The European Journal of International Law Vol. 24 no. 2

The International Law of Recognition

Emmanuelle Tourme-Jouannet*

Abstract

International society in the aftermath of World War II was faced with demands about culture and identity that placed renewed strain on the principles of legal equality and cultural difference. The less-favoured states – those which felt stigmatized – together with indigenous peoples, ethnic groups, minorities, and women all aspired to secure recognition of their equal dignity and of their specific identities and rights, with some even seeking reparation for the violation of their identities and the confiscation of their land or property. To cater for these new demands, the subjects of international society have developed a new branch of law, which is referred to here as the 'international law of recognition'. The aim of this article is to highlight these developments, to identify the legal practices arising from this new law of recognition, and to submit them to critical scrutiny.

A new branch of international law has been emerging since the end of the Cold War. This 'international law of recognition' reflects the new social and cultural paradigm of the recognition of identities in municipal and international law since the 1990s. Section 1 of this article outlines the historical and doctrinal background to this new branch of law, section 2 surveys some of its most interesting current legal manifestations, and section 3 touches on the difficulties and questions it raises.

1 The Historical and Doctrinal Emergence of the International Law of Recognition

The recognition of others, of their dignity and identities is rooted in what has always been a diverse and multicultural world, but a world that has only recently come to

* Université Paris I, Ecole de droit de la Sorbonne. This article includes passages from E. Jouannet, *Qu'est-ce qu'une société internationale juste? Le droit international entre développement et reconnaissance* (2011) and from an article to be published in *RGDIP* in January 2013. My sincere thanks to Editions Pedone and to Carlo Santulli, Editor of the *RGDIP* for authorizing this new publication. The argument is made again and extended in *What is a Fair International Society? International Law between Development and Recognition* (forthcoming). Email: emmanuellejouannet@hotmail.com.

terms with this fact. Recognition encompasses all manner of claims about gender, nation, language, history, culture, or religion. It is a global phenomenon, extending from East to West and North to South. But even so, it is not self-evident that there should be so specific a thing as an international law relating to recognition. In point of fact, it is the outcome of a gradual evolution, which explains why this branch of law, like the recognition it is based on, has more than one meaning. The evolutionary pathway has been a complex one, in part because of the uneasy legacy of colonization. Before the Cold War, expectations as to recognition were reflected internationally by calls for equal status and equal rights. In post-Cold War times, those calls have been for the right to be different. This dissociation between expectations and the series of legal responses in international law should come as no surprise. It merely reflects the different possible modes of recognition. Recognition is by no means a uniform process. It varies with the prevailing state of international society, the expectations of those involved at any given time, and the denials of recognition that are encountered.

A *From the International Law of Civilized Nations to Postcolonial International Law*

Until 'the end of the colonies', international law was a stigmatizing law. It reflected the imbalance of power among states, the feeling of superiority of an entire political caste, and the latent racism of the age. Based as it was on the fundamental discrimination between civilized and uncivilized nations, international law was an instrument of domination embodying the denial of recognition. Classical international law laid down a 'civilized standard' against which to measure any people looking to become a subject of international law. And that standard was none other than Euro-American civilization.[1] Interestingly enough, the basis at the time for counting countries among the subjects of the Euro-American law of nations was the legal technique of *recognition*. This recognition was the unilateral, individual, or collective instrument by which the civilized nations attested that a political entity was sufficiently civilized, and therefore sufficiently mature, to join the 'community of civilized nations'. And so the civilized nations bound themselves by recognizing the new status of the political entity as a wholly civilized, wholly sovereign state that was wholly a subject of international law.[2] This instrument of recognition therefore put an end to the exclusion of a political entity that had previously been disqualified from membership for not being civilized enough.[3] Recognition was therefore of the essence to classical international law. It secured a place at the table of the civilized nations, which were subjects of international law. But recognition was restrictive and discriminatory. Recognition at the time was nothing to do with recognizing the difference that made others what they were, that constituted their identity. Quite the contrary. It was the recognition that a state

[1] See, e.g., Lorimer, 'La doctrine de la reconnaissance, fondement du droit international', 16 *Revue de droit international et de législation comparée* (1884) 335.

[2] See *Annuaire de l'Institut de droit international* (New abridged edn, 1928), Session de La Haye, 1875, i, at 70 ff.

[3] See especially the three kinds of recognition in J. Lorimer, *The Institutes of the Law of Nations* (1883–1884), at 91 ff.

or a people once held to be ethnoculturally different had embraced civilized values and attained a certain standard of civilization. Inclusion within the 'community of civilized nations' and the attribution of equal status and equal rights were achieved by dint of forced assimilation and standardization. The newly recognized state had to have at least papered over its cultural and civilizational differences with Euro-American nations and had to display an acceptable level of 'civilized awareness'.[4]

After decolonization, then, the recognition of equal standing was to be the preeminent sign of acknowledgement of the identity of new states. Independence movements pretty much secured the inclusion of all formerly dominated and colonized peoples within the circle of subjects of international law based now on the right of peoples to self-determination[5] and no longer on the criterion of degree of civilization and the old legal technique of recognition. Decolonized peoples were automatically invested with legal rights and obligations. They enjoyed legal standing as new states and shared equal legal status with their former colonizers. The stigmatizing features of classical international law, with its semi-civilized nations or uncivilized and non-autonomous peoples, vanished at last along with the resulting difference in status. The very fact that formerly colonized peoples were held to be subjects of international law equal to others, and especially to their former colonial powers, with the same rights and obligations, and the fact that they were considered and treated with equal dignity, was a fundamental form of recognition of their identity.[6] This recognition of their status that ended the discrimination of colonial times did not reside in the affirmation of a right to their difference but in the affirmation of a right to equality, which ignores differences; indeed it is indifferent to differences.

However, the cultural and economic domination of the industrialized world has remained a bone of contention. The tragic ambivalence of decolonized states, still subjected to Western economic hegemony, torn between their desire to modernize and their desire to rediscover their identities, has been a constant feature of post-colonial times. It is one reason why their call for recognition has evolved into what is now a demand for a right to legal protection of their cultures and, for some, a claim for reparation of historical wrongs inflicted by colonization that bruised and spurned their identities. New claims form part of a far more global movement in post-Cold War international society which this time involves the call for a right to be different.

B *A New Post-Cold War Paradigm*

The ending of the Cold War has seen the rise of a new phenomenon that has been much studied in the social sciences. The awakening of identities and the many contemporary aspirations to recognition have come to such a pitch that after 1989 we can speak of the emergence of a recognition paradigm. This is a new system

[4] See, e.g., P. Fauchille, *Traité de droit international public* (1922), at 30–31.

[5] GA Res. 1514 (XV), 14 Dec. 1960. Declaration on the granting of independence to colonial countries and peoples.

[6] On this basic process of legal recognition of the other as one's equals see A. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts* (1995) and C. Taylor, *Multiculturalism and the Politics of Recognition* (1992).

of representation influencing and determining how those involved in internal and international law act and react. It is not surprising that it should have attained these proportions. Regardless of its manifestations, it reflects the fundamental need for recognition which is now thought to be vital for individuals and groups, and which has come to prominence with the end of the Cold War and the advent of the new episode of globalization.[7] The need for recognition was examined in the 1990s by several contemporary writers with respect to the situation in democratic societies. They viewed it in terms of policy-making that respected cultural differences within what have become multicultural societies and in terms of denials of recognition that are found within many present-day democratic societies. On the first of these points, Charles Taylor has shown that the question of identities and cultural differences was at the heart of struggles for recognition in ever more ethnoculturally diverse societies, that it fuelled most political and social conflicts, and made necessary a general policy of recognition that could accommodate difference.[8] On the second point, Axel Honneth has worked on contempt and lack of respect.[9] In a re-reading of Hegel, Honneth shows that everyone wants to escape contempt and secure true recognition for what they are in three separate spheres: in the private and family sphere, where we seek the love of our nearest and dearest; in the cooperative or work sphere, where we aspire to the social esteem due to us for our productivity; and in the public sphere of law and politics, where we hope for legal respect, that is, for equal legal recognition of our status and our rights.[10]

Other commentators have reintroduced or gone deeper into the idea of identity or brought in the demand for justice. The need for recognition seems to be based on the idea that individuals or groups are looking for recognition of their individual and collective identities[11] and that these identities are determined in part by their relationships with others. The concept of identity relates to a system of mental representation of oneself and of others which is part of the make-up of each individual and each group. Individually, it implies that people are defined not just in the abstract by a common identity, with equal dignity to others, but also by a specific identity determined by their belonging to specific cultures and having specific values. People's identity is tightly bound up, then, with the cultural systems in which individuals and groups live, with the changes they undergo, and with the way they are handed down from generation to generation.[12] And the need for this identity to be recognized is examined sociologically as a fundamental human requirement, which cannot be defined by

7 See T. Todorov, *La peur des barbares. Au-delà du choc des civilisations* (2008), at 129 ff. On the sociological causes and manifestations see A. Caille (ed.), *La quête de la reconnaissance. Nouveau phénomène social total* (2007).

8 Taylor, *supra* note 6. See also P. Savidan, *Le multiculturalisme* (2009).

9 Honneth, *supra* note 6.

10 *Ibid.*, at 92 ff. See also P. Ricœur, *Parcours de la reconnaissance* (2004), at 293–340. Based on these pioneering works, the field has been extended to moral, political, and social philosophy, sociology, anthropology, and psychoanalysis.

11 B. Ollier, *Les identités collectives à l'heure de la mondialisation* (2009), at 8 ff.

12 S. Hall, *Identités et cultures. Politique des Cultural Studies* (2008), a collection of some of Hall's essays in French.

self-interest alone and cannot be reduced to the utilitarians' *homo œconomicus*. People aspire as much, if not more, to being recognized and esteemed by others for what they are.[13]

Hence, for some observers, there are specific cultural rather than socio-economic injustices.[14] They arise from what we might broadly term 'denials of recognition', born of contempt for a common or specific identity, for the value of a culture, a way of life, for the dignity of individuals, and for their physical integrity.[15] Such denials of recognition may be attempts to marginalize, stigmatize, or culturally dominate others. This means that individuals, peoples, minorities, groups, or even certain states not only fail to feel they are full members of a society, whether internal or international, but they come to feel they are no longer respected in terms of their identity, for what they *are*, and they cannot live and act in accordance with their cultural preferences. These denials prompt feelings of indignation, lack of self-esteem, humiliation, and ultimately of injustice. This fosters unbearable suffering that may become radicalized, leading to extremely violent conflicts. To avoid this and meet the fundamental need for recognition of their identity that everyone feels, there must be a guarantee that their identity will be respected by others and by all of society, which, given that these are cultural wrongs, means changing the society's cultural or symbolic representations. A whole series of measures arises from this that may be adopted politically and legally. Those measures range from granting equal status to re-evaluating spurned identities, by way of changing the means of communication and representation in a way that is beneficial to identities, and protecting or promoting cultural products of groups or individuals who are victims of discrimination.

And so it can be understood that internationally several legal instruments relating to identities and cultures have been adopted in response to different types of denials of recognition, with the more or less clearly expressed intent to tackle these issues. This is evidence of a quite remarkable development in international law.

C *A New Body of Law*

In this way an increasingly complex and ever less stable post-Cold War international society is assailed by multiple claims for recognition of identities and cultures. From this a new branch of international law has emerged, that of recognition. It is not formulated as such internationally but it is no less present, both in the many claims as to identity and culture formulated in legal language and in the various legal solutions proposed by international law, all of which converge in this direction. International recognition law should be seen for what it is, and should be spoken of in describing a set of legal institutions, discourses, practices, and principles which until then had not been adequately theorized and collated, although they address the same subject

[13] A. Caille, *Théorie anti-utilitariste de l'action. Fragments d'une sociologie générale* (2009), at 5.

[14] N. Fraser, *Qu'est-ce que la justice sociale? Reconnaissance et distribution* (2005), at 13 ff.

[15] Recognition is so commonly used nowadays that it pertains to a whole range of experience, injustice, and suffering that may seem to be different in kind. Many such experiences are deliberately lumped together here although they are sometimes viewed differently by scholars and not necessarily as injustices. For contrasting views see, e.g., Honneth, *supra* note 6, at 130 ff and Fraser, *supra* note 14, at 83 ff.

matter which sets them apart from others in that it relates to the need for recognition. Consequently, this international law of recognition appears to be the counterpart of international development law and to form another essential component of a fair international society, that is, a society that is not just equitable but that is also decent and based on respect for others.

Just what is involved in this need for recognition towards which today's international law is tending? It is different from the first process of recognition of others which led to decolonization and was based on a policy of 'equal dignity' founded on states having equal status and equal rights. Nowadays, as Alain Touraine puts it, peoples as well as states, groups, and minorities want to be recognized by international law as being 'equal but different'.[16] They are not just claiming legal equality that grants the same legal status to all despite their differences, as the decolonized countries did. They are claiming the legal recognition of certain differences that maintain their difference. They are no longer content with just being recognized as equals by international law. They want to be respected as being different, as belonging to cultures or groups which are themselves recognized as being specific and that form the basis of their identity, and which may imply different rights.[17] Unlike with international development law, where the measures are provisional and designed to level the playing field, which if successful would mean the end of those measures, in international recognition law the measures are designed to consecrate existing differences permanently. In the light of these distinctions, it can be seen that this new form of recognition entails a completely different representation of identity. It is no longer a shared identity through equal status that is claimed but a specific identity, meaning that states, people, groups, or individuals consider themselves to be truly unique.[18] Where post-colonial international law of the Cold War era was based exclusively on abstract liberal principles like formal equality and equal rights, post-Cold War international law is less abstract and is progressively ratifying an international policy of recognition based on the right to be different and the right to preserve one's cultural identity.

2 The Scope of the International Law of Recognition

A thorough study of existing legal practice is required to show how and why law has been used internationally in some instances to address the issues of identity and culture and the aspirations to recognition. Here we can only glance at three areas that are part of this international recognition law and that relate to the preservation of identities and cultures. The first area is the recognition of cultural diversity. The aim here is to combat cultural domination associated with globalization. The second is the granting of specific rights by which to preserve the identity of groups or individuals. The third is the recognition of past wrongs and reparation for historical crimes. This

[16] A. Touraine, *Pourrons-nous vivre ensemble? Egaux et différents* (1997).

[17] On this distinction see Taylor, *supra* note 6.

[18] This is prompted by the enlightening developments in S. Mesure and A. Renaut, *Alter ego. Les paradoxes de l'identité démocratique* (1999), at 9 ff.

relates to the construction of identities in time rather than in space. It illustrates how nations, peoples, or individuals endeavour to reconstruct their 'narrative identity'. It is plain to see that a legal status of difference has emerged alongside the legal status of equality in international law, and that this development is a response to a deep-felt need of the times we live in.

A *The Law as it Relates to Cultural Diversity*

Ethnocultural pluralism is an age-old feature of human history. Human societies have always been vehicles for thousands of different cultures through the mixing and movement of populations, and through trade and conflict. It is this diversity, which is intrinsic to human life, that has at last been taken into account by post-Cold War international law because of a consensus that has suddenly formed around the new conviction that it is necessary to protect 'human heritage' in its entirety. This broad consensus has been achieved through the power of attraction of the recognition paradigm and the absolute need to protect cultures, and through them identities, some of which seemed to be in danger of extinction. This is attested to by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Make no mistake about it. The Convention does not just reflect the concern to safeguard economic interests in the domain of culture, even if such interests do, of course, have their place there. It also reflects the need to adapt to a world which, since the end of the Cold War, has been sliding away from politics and towards culture, a world which is witnessing the entanglement of questions of identity, culture, and economics and which is making respect for cultural identities a new requirement.

UNESCO has always considered the plurality of cultures to be an inescapable fact on which its action is based. But it is particularly interesting to see how it has progressively transformed this *fact* of plurality into a *legal principle* of diversity. The 1972 United Nations Conference on the Human Environment in Stockholm associated the topic of biodiversity in nature with that of cultural diversity, considering that both were under threat from the Western model of growth. In that same year UNESCO adopted its Convention Concerning the Protection of the World Cultural and Natural Heritage, inaugurating a very active policy by the organization to protect cultural property and peoples. Twenty years later, at the Earth Summit in Rio, the odd but highly suggestive concept of preservation of the equilibrium of 'cultural ecosystems' was introduced. The Convention on Biological Diversity was adopted at Rio and the 2005 Convention on the Diversity of Cultural Expressions was an echo to it of sorts. In 1995, UNESCO came up with the concept of 'creative diversity'. This was aimed at 'the flourishing of human existence in its several forms and as a whole'.[19] But above all it clarified and consolidated the concept of 'cultural diversity' which, because of fears about the surge of globalization in the 2000s, was solemnly declared 'the common heritage of humanity' (Article 1) by the Universal Declaration on Cultural Diversity adopted unanimously by the 2001 UNESCO Conference. This was a landmark text

[19] Report of the World Commission on Culture and Development. Our Creative Diversity (Paris, UNESCO, 1996), available at: http://unesdoc.unesco.org/images/0010/001055/105586e.pdf.

in the field.[20] The analogy with nature and the living world is made again, since the Declaration holds cultural diversity to be just as vital 'for humankind as biodiversity is for nature'. Even if it is dubious in terms of principles,[21] the comparison between the diversity of cultures and the diversity of living organisms serves a strategic purpose: to make us aware that while we are concerned by the threat to some animals and plants, we are wholly unconcerned by threats to minority arts and languages affecting the cultural heritage of humankind. Again in 2001, the UN declared 21 May as The World Day for Cultural Diversity for Dialogue and Development. In 2004, the UNDP devoted its annual report to 'Cultural Liberty in Today's Diverse World' and made cultural diversity 'one of the central challenges of our time'.[22] All of these developments culminated in UNESCO adopting on 20 October 2005 the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (which came into force on 18 March 2007).

The Convention is far from negligible in its scope. The diversity of cultural expressions becomes a norm to be complied with. Ethnocultural plurality had been an accepted state of affairs. Now it has become a norm, a legal principle about 'diversity' aimed at preserving and promoting 'plurality'. This entails new rights and obligations extending far beyond the simple 'cultural exception'. The principle of the 'diversity of cultural expressions'[23] relativizes the principle of 'cultural exception', even if the latter still has effects within the context of the WTO. While there is continuity between the two principles, they are not on the same plane and one is far more restrictive than the other. The principle of cultural diversity or of diversity of cultural expressions is above all to safeguard cultures and cultural policies of each country against the possible domination of a single cultural model because of the ever greater economic liberalization of trade. Like the principle of cultural exception, it too fits in with the rationale of the need for states to combat the out-and-out importing of dominant cultural products, because the hegemony of the industrialized or emerging nations in the markets of poor countries is every bit as much a threat to the diversity of their cultural expressions. The principle is likewise based on the idea that cultural products and property are not goods like others, and so they must not be governed by the ordinary rules of trade.

Even so, the principle of cultural diversity is still very different from the principle of cultural exception in many respects and especially in its nature and scope. The issues related to it should therefore be looked at differently. Probably the most significant point in this respect, to take up the outlook in the 2001 Universal Declaration

[20] Available at: http://portal.unesco.org/culture/fr/ev.php-URL_ID=34321&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[21] J. Habermas, *L'intégration républicaine* (1996), at 226 ff. It is especially problematic as it suggests that cultures evolve much as biological species do; C. Lévi-Strauss, *Anthropologie structurale deux* (1996), at 385 ff.

[22] UNDP Report, *Cultural Liberty in Today's Diverse World* (2004), available at: http://hdr.undp.org/en/media/hdr04_complete.pdf.

[23] In this general study I shall not delve into the distinction between 'cultural diversity' and 'diversity of cultural expressions', both of which are defined in the 2005 Convention although the latter alone is directly its subject matter. The terms are used interchangeably here for convenience.

(Article 1), is that the Preamble to the 2005 Convention roots the principle of the diversity of cultural expressions in a conception of culture that very plainly leads culture in the broad sense to be related to the identities of individuals and groups.[24] And so it unequivocally indicates that any domination of one culture by another seriously jeopardizes the unique character and precious singularity of individuals and groups. The concept of 'cultural property', defined shortly afterwards, confirms the fundamental connection between culture and identity. Cultural property is defined as property that symbolically conveys 'identity, values and meaning' (Preamble and Article 1(g)). Similarly cultural content is defined in regard of identities (Article 4(2)). The vast scope of application of the principle (Article 3) reveals its near infinite perspectives, when it is considered that culture is found in everything. Far from being confined to audiovisual works and the cinema, it encompasses all 'cultural expressions', which is a particularly hold-all term referring to an inevitably subjective and potentially very broad interpretation of the object of the Convention. As far as concerns the legal regime specified by the Convention, unlike the cultural *exception*, the principle of diversity of cultural expressions is not an exception within a system of trade liberalization, but does indeed have the status of a general rule. Whereas the cultural exception is a fight for targeted protectionism, cultural diversity is generally applicable. There are three highly significant points in this general legal regime.

First is the fundamental principle round which rights and obligations under the Convention hinge, that of equal dignity and so equal respect for each culture (Article 2(3)). Next, as the Convention title states, two objectives are pursued: not just to preserve the diversity of cultural expressions but also to promote that diversity. The preservation of different cultural expressions makes it lawful for states to take national measures to protect their cultural creations, property, and products. This flies in the face of the liberalization of trade. But the objective of promoting diversity goes further still. It means that diversity is intrinsically beneficial and forces states to encourage ever more variety in terms of culture. Thirdly, states are bound to apply within their own territory the principle of diversity they wish to see applied in terms of international relations (Article 5(2)).[25] Externally, the principle of diversity means equal treatment for each state's cultures and the right for each of them to be respected in what makes it specific. States also have the right, which is what they want above all, freely to establish and preserve their own cultural policies. That is, a state legally has the ability, within the limits of respect for fundamental human rights, to limit its citizens' access to foreign cultures in order to protect their own culture. But internally states also have legal obligations to protect and to promote diversity within their territory, and so to respect substate or indigenous cultures and promote individual freedom of creation and expression. Significantly, the 2005 Convention is presented as ensuring that 'artists, cultural professionals, practitioners and citizens worldwide can create, produce, disseminate and enjoy a broad range of cultural goods, services and activities,

[24] Available at: http://unesdoc.unesco.org/images/0014/001429/142919f.pdf.

[25] See also Arts 6, 7, 8, 10, and 11. Art. 5(2) requires 'consistency' and not 'conformity' with the Convention.

including their own'.[26] International law leans very clearly, then, towards the rights of the individual, and more generally towards a conception of human beings as free, that is, they must be given the possibility of making 'choices' (Article 2(1)).

The principle of cultural diversity (and of the diversity of cultural expressions) is held to be a fundamental principle of international law and reflects the new recognition paradigm. In the face of the exponential character of standardizing globalization, the principle enshrines diversity and singularity and shuns the identical repetition of a given cultural model. It is plain that the principle of diversity is also at the heart of states' defence of their own economic interests and their cultural industries. But this in no way diminishes it. Indeed, its effects can be measured in the light of the colonial and post-colonial history of international law. The enshrinement of the principle of cultural diversity tends to end centuries of denial of recognition for the customs, cultures, and traditions of certain peoples who were for so long dominated or marginalized. The 2005 Convention, then, is a decisive legal instrument which, if properly applied, can significantly change the forms of self-representation and of cultural and symbolic evaluation that still prevail worldwide. There is no longer any question of passively accepting the domination of any one cultural model, nor of moving towards a universal culture. On the contrary, the very principle of diversity enshrines the plurality of all existing cultures. In the same way, any individual's or people's affirmation of their identity within their culture becomes meaningful. Imagining that under specific rights conferred on minorities or under specific cultural rights anyone might be able to affirm their cultural identity, what would that be worth if it had to be done in a context that was itself culturally dominated? It is a tipping point involving all of the law of recognition as a remedy for a particular type of injustice. It is an assertion that earlier, liberal, pluralistic, and formal classical international law is unable to meet the need for satisfactorily respecting the cultures of all. The would-be neutralism of classical international law in cultural matters, based on the equal sovereign freedom of states in matters of culture and economics, does not work and means that one or more dominant cultures (and so one or more dominant cultural identities) are imposed *de facto*. The upshot is that by this reversal of perspectives it is legal recognition of cultural diversity that consolidates the sovereign equality of states in cultural matters, which was given such a raw deal by the formalism of classical, liberal international law. The legal enshrinement of the principle of cultural diversity becomes the instrument of greater equality among states.

B *Recognition Based on Rights*

In post-colonial and post-Cold War international society, international recognition law is not limited to the legal enshrinement of the objective principle of cultural diversity. It also takes the form of individual or collective rights that must be ensured within states, and that can preserve and promote the identity of individuals or groups and end

[26] See http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/what-is-the-convention/.

stigmatization and marginalization.[27] These rights are the essential complement to the law of cultural diversity, just as cultural diversity is essential for them to be effectively exercised.[28] The legal guarantee of the diversity of cultures is not enough in itself to ensure the recognition of individuals and groups in terms of their dignity and of their specificity, if this is to be protected, too. That guarantee must be coupled with the granting of individual rights that endow people with rights that are binding on their state but that also confer on the more vulnerable groups (minorities, native peoples) the legal means to preserve their identity in the face of the majority groups within states.[29]

The whole dynamic of individual rights is operative here and opens up new prospects as well as new difficulties. More specifically, there are several categories of rights which, when differentiated, cast different light on a number of unsuspected issues. First, the rights conferred on specific groups or on individuals as members of those groups can be brought together. These are the rights of minorities and of native peoples. Next, we can identify the rights bestowed on individuals regardless of whether or not they belong to any group but according to very varied hypotheses, be they cultural rights, human rights, or women's rights. All of these categories of rights provide a vivid picture of the diversity of practices concerning recognition and of the way legal instruments respond to aspirations by alternating constantly between concern for respecting differences between individuals and groups and concern for preserving their equal dignity. These categories cannot all be examined here, so I shall focus on minority rights as an example of rights of individuals belonging to a cultural group.[30]

Since the end of the Cold War there has been an increase in the number of legal instruments guaranteeing the rights of minorities. After 1945 only human rights had been recognized in international conventions as guaranteeing the specificity of minorities, in particular through the principle of non-discrimination. But from 1990 onwards, it was realized that minorities had remained particularly vulnerable and stigmatized groups. Majorities within states pretty much everywhere had imposed their cultural models, marginalizing minorities and fomenting in return their identity-based claims. So it is hardly surprising that, in line with the new values granted to recognition, a reaction came about in Europe after 1989 and worldwide, too. Several international legal instruments have been adopted enshrining specific and separate rights for members of minorities and therefore based on the explicit recognition of

[27] Recognition of rights is examined by both Honneth and Ricœur, but with the emphasis on rights common to everyone (e.g., civil, political, economic, and social) and not specific rights: see Honneth, *supra* note 6, at 92 ff and Ricœur, *supra* note 10, at 311 ff.

[28] Conditional upon the earlier interpretation of cultural diversity, which cannot be invoked in violating people's fundamental freedoms and rights. This would again entail the downward spiral of cultural entrapment: see A. Sen, *Identity and Violence* (2006), at 103 ff.

[29] The underlying aim is to confer greater autonomy on them in the pursuit of their individual or group ends: see A. Honneth, *La société du mépris. Vers une nouvelle théorie critique* (2006), at 254 and Caille, *supra* note 13, at 167–168. This shows that, internationally, the issue of the rights to difference does not necessarily run counter to human rights but may supplement their objective of autonomy for individuals and therefore human 'capabilities'.

[30] See Jouannet, *Qu'est ce qu'une société internationale juste*, *supra* note *, at 208 ff for an examination of other rights.

their cultural identity. Those instruments vary in scope and, for the time being at least, most are European conventions. They include the OSCE's 1990 Copenhagen Document, the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1992 European Charter for Regional or Minority Languages, the Copenhagen Criteria laid down by the EU in 1993 as membership conditions for new candidates from Eastern Europe and requiring the protection of minorities, or again the Framework Convention for the Protection of National Minorities of 2 February 1995.

The 1992 UN Declaration was adopted thanks to the new Eastern European states joining the UN. Those states were particularly keen to manage this problem after the Cold War, and that Declaration remains the only text of general scope on this topic.[31] From the outset, the document situates the question of minorities in terms of respect for their identities (Article 1), with states being under an obligation to respect and promote those identities. The text lays down specific rights to be granted to members of minorities so as to preserve their identities. These include, from the inter-war years, rights to use their language, to practise their religion, and to enjoy their own culture (Article 2). Hard on the heels of the Declaration, the General Assembly tasked the Office of the High Commissioner for Human Rights in 1993 with promoting and protecting minority rights enshrined in the Declaration and with beginning a dialogue with states on that subject. The Sub-Commission on the Fight against Discriminatory Measures and Protection of Minorities set up a working group that became a particularly active forum on the issue. In addition, the Human Rights Committee developed an interpretation of Article 27 of the International Covenant on Civil and Political Rights, which is also evolving in this direction and accompanying the progressive worldwide deployment.

Even so, most of the legal instruments were adopted at European level.[32] In line with the experiments of the inter-war years, European states in the space of a decade developed a whole array of legal instruments defining the specific rights of members of their minorities. Summarizing the gist of the new paradigm about the recognition of identities, the Preamble to the 1995 Framework Convention for the Protection of National Minorities states:

> [A] pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity ….[33]

[31] GA Res. 47/135, 18 Dec. 1992, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, available at: http://www2.ohchr.org/english/law/minorities.htm. It was drafted in two weeks thanks to the new Eastern European countries, whereas the UN had tried in vain for more than 14 years to come up with a common text. However, it is very general and the frequent use of conditional forms underscores its non-mandatory character.

[32] Plainly this does not mean that other countries around the world do not try to protect their minorities or to grant them specific rights: see, e.g., R. Manchanda, *The No Nonsense Guide to Minority Rights in South Asia* (2009) and A. Axelrod, *Minority Rights in America* (2002).

[33] Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm. However, the Framework Convention reduces the field of protection to national minorities whereas the 1992 Declaration covers ethnic, religious, and linguistic minorities.

The Copenhagen Document was one of the first post-Cold War texts to set out the content of the special rights of minorities. The main rights that it specified have often been taken up in binding conventions.[34] Its Part IV states that the principle of non-discrimination is a human right that is to be applied to members of minorities. It supplements this by a series of specific rights for members of minorities which states have to abide by. These include the right 'to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects' (point 32), the right to use their mother tongue (points 32.1 and 3), the right to establish and maintain their own 'educational, cultural and religious' institutions for which they may receive public assistance (point 32.2), and the right to 'profess and practise their religion' (point 32.3). The state is bound to implement and ensure all of these rights, which means covering their economic and social aspects.

The scope of such rights and the scale of the legal shift they reflect should not be underestimated. First of all, the new international law of minorities meshes in with European law of the inter-war period on minorities and with the new recognition paradigm. While minority rights were conceded after 1918, it was primarily because of the new territorial carve-up at the time rather than to preserve any right to be different. Then came the changes of 1945 (UN Charter) and 1948 (Universal Declaration of Human Rights). Contrary to what was attempted after 1945 and which often stemmed from an implicit intention to assimilate others, the aim now is no longer to preserve minorities by granting the same rights to one and all, indiscriminately, but to preserve them by conferring specific rights on the members of minorities precisely because they are members of minorities. These new rights guarantee the specificity of a minority, and so more fundamentally still the right for its members to be different and to live differently in accordance with their own culture. In other words, they officially enshrine the right to be equal but different. In 1945 and 1948 it was thought that the exercise of individual rights of freedom of speech, of opinion, of religion, and assembly for all without discrimination would be sufficient for minorities to live the way they wanted to. But after 1989 there was a change of legal strategy. It was opted to adopt rights that, beyond the formal freedoms that everyone was recognized as enjoying, directly guaranteed what it is that constitutes their cultural *difference* and therefore defines their identity. For example, even if the right of free speech can be applied without discrimination, experience shows that it does not answer the concern of linguistic minorities to preserve their minority languages.[35] However, the existence of a special right to teach and to express oneself in the language will preserve it lastingly, because it creates the circumstances for its effective use over time. In this respect the Preamble to the 1992 European Charter for Regional or Minority Languages even asserts that the use of a regional or minority language in public and private life is an

[34] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, available at: www.osce.org/odihr/elections/14304.

[35] This is what the PCIJ had concluded in the inter-war years, when specific rights of people belonging to minorities were at last recognized: see Advisory Opinion, *Case of Minority Schools in Albania* [1935] PCIJ Series A/B, at 17 ff.

'inalienable right'.[36] These changes have meant that the principle of non-discrimination is the subject of new interpretations converging in this direction. These interpretations take much more account than before of the diversity of the actual cultural circumstances of individuals, with the result that attempts are now made not to treat different people equally but to treat people differently because they belong to a minority.[37] There remains the difficult matter of how satisfactorily to combine the principle of non-discrimination (which is always asserted first) and the specific rights of minorities. This is never clearly defined and may raise serious problems of interpretation and application. But what makes recognition a difficult and subtle matter is the need to be able to navigate between the two, on a case by case basis, without shutting up minorities in their cultural difference but recognizing them as being 'equal and different'. This ultimately means reinforcing their equal standing with 'majorities' by countering the formalism of earlier law, which, far from being neutral and non-discriminatory, constantly favoured majority groups.

C *Reparation of Historical Wrongs*

Recent years have seen a surge in another type of contemporary claim based on recognition, in the shape of calls for reparation for historical crimes committed for reasons of racism, colonialism, and imperialism. Does not the recognition of others in post-colonial society involve the acceptance of a shared history which casts light on centuries of denial of the other and need for reparations for historical wrongs?

Claims of the sort were made by the Third World at the time those countries secured their independence, including as part of the New International Economic Order. But they have incontrovertibly become far more prominent since the end of the Cold War. Evidence of this, were any needed, is the way these claims for recognition have multiplied but also become more diverse, in line with the different historical wrongs invoked: they range from new claims for reparation for victims of Nazi Germany in Eastern Europe and of Japanese imperialism in Asia to claims from native peoples like New Zealand Maoris or Australian Aborigines, by way of claims from Africans on the grounds of slavery and the slave trade and colonization. While history seemed to have ratified the *fait accompli* of destruction and enslavement, the victims have organized and now want states to admit responsibility for the historical crimes and to make reparations.

But how far can one accommodate such claims for reparation for crimes of the past, with their countless victims and their descendants looking for recognition? Can history be repaired, asked Antoine Garapon?[38] Is there nowadays an international law of reparation of historical wrongs, or even a right to reparation? These questions are decisive, in that they pose the problem of the actual possibility of reparation of

[36] Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm.

[37] See Human Rights Committee, General Comment 23 (1994) on Art. 27 (Rights of minorities), at para. 6.2: 'positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group'.

[38] A. Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage, Shoah* (2008).

history and of wounded identities. The 2001 Durban Conference (revisited in 2009 in Geneva) tried to provide political and legal answers with which to understand the essential issues behind such claims in terms of recognition and the aporias and limits in any recourse to international law.

Several principles in the Final Declaration of 2001 are noteworthy, three of which were stated after much compromise and attest to some movement in this area: (1) the principle that 'slavery and the slave trade are a crime against humanity and should always have been so' (Point 13); (2) the official recognition that 'these historical injustices have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries' (Point 158); and (3) the principle that 'States concerned' should 'honour the memory of the victims of past tragedies' (Point 99). In this respect, the Declaration notes that 'some States have taken the initiative to apologize and have paid reparation, where appropriate, for grave and massive violations committed' (Point 100) and it invites other countries 'who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so' (Point 101).[39]

The principles adopted at Durban and Geneva have no binding force and the 2001 Declaration expressly says that the states concerned have a moral and not a legal obligation to take appropriate measures to end the harmful consequences of past practices of colonialism and slavery. The principles can be used to identify the direction given by most states to these questions and the possible legal pathways that are open. Most claims made at the time invoked the breach of rules of international law, and so reference should be made to existing international law in the domain when assessing the guidelines set out at Durban in the context of the settlement of future disputes.

One question is whether slavery in past centuries can be characterized as a crime, or even as a crime against humanity, when it was entirely consistent with international law and national laws of the time. Can states be held liable on this ground? The same goes for the colonial system, which, for centuries, Euro-American international law held to be lawful. This is a question of the applicability of law in time. The classical answer in international law is that new law cannot be applied retroactively. Accordingly, there is no retroactive liability. A state's behaviour is wrongful and entails international responsibility only if it failed to comply with an international obligation that existed at the time it occurred. Hence the wording adopted in the 2001 Declaration by way of compromise that 'slavery and the slave trade are a crime against humanity and *should always have been so*' (Point 13). Article 13 of the Final Report on State Responsibility (2001) confirms this legal position and the fact that there is a breach of an international obligation only if the state is bound by that obligation at the time of the facts at issue. In its commentary on Article 13, the ILC states that, even when a new norm of peremptory law arises (to which the prohibition of slavery and perhaps of colonialism can be likened), there cannot be any retroactive

[39] Available at: www.un.org/WCAR/durban.pdf.

responsibility.[40] Similarly, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide makes no provision for retroactive responsibility. In truth, while the argument is incontrovertible in itself formally as a general rule, it should not be overlooked that the principle of non-retroactivity, which is clearly established in international law, has met with memorable exceptions in the Nuremberg and Tokyo Tribunals and some of today's international criminal tribunals.[41]

The only possibility admitted today is that the state voluntarily consents to accept its responsibility retroactively for acts which, at the time they occurred, were not in breach of an international obligation.[42] International legal instruments may establish voluntary recognition of past crimes and grant reparations, for example in a bilateral treaty between a former colonized country and its colonial power. This was the case of the Treaty of Friendship of 30 August 2008 between Italy and Libya, which is one of a kind at the moment between states. It is also the case of the settlement of the historical dispute between the Sioux and the US government and of 70 agreements between the provincial governments of Canada, the federal government, and the representatives of native peoples over the recognition of past despoliation and the affirmation of a new status for those populations.

Another question is how to set about claiming for liability of the kind? For what type of harm or loss? The acts involved as presented at Durban are of many kinds: death, slavery, forced labour, plunder of natural resources, confiscation of land, destruction of cultures and ways of life, and contemporary underdevelopment. But the legal characterization is not settled even so. From more general trends and the Final Declaration two forms of wrong can be identified: a moral harm resulting from centuries of humiliation and the denial of recognition to which so many communities were subject. This is compounded by a material loss for the plunder of resources, the slave system, and then the colonial system of exploitation and despoliation of land that allegedly accounts for the current state of underdevelopment of former colonized countries and of native peoples. The Declaration states that colonization engendered not just past wrongs but also 'lasting social and economic inequalities in many parts of the world today' (Point 14). The present-day loss or damage is supposedly then intrinsically related to the past loss or damage. However, several difficulties arise here. How can one evaluate the extent to which the present loss or damage is related to past loss or damage? And how can it be proved? For example, underdevelopment in some countries is presented as a consequence of past colonization. But does it not also result from factors involving the responsibility of post-colonial states? And the difficulties are even greater when the loss or damage of the past is to be defined. How can one prove, for slavery and colonization especially, the occurrence of specific acts directly attributable to the state, when these were generalized and large-scale systems of exploitation

[40] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Art. 13, para 5, at 135, available at: http://untreaty.un.org/ilc/reports/english/a_56_10.pdf.

[41] D. Zolo, *La justice des vainqueurs. De Nuremberg à Bagdad* (2009), at 188 ff. Some atrocities committed in the past are comparable to genocides or crimes against humanity with the advent of the modern world: see R. Gellately and B. Kiernan (eds), *The Specter of Genocide. Mass Murder in Historical Perspective* (2003).

[42] ILC, *supra* note 40, Art. 13, para. 6, at 136.

with many causes and involving many actors? True, these questions relate to strictly formalist arguments, but they are relevant even so and plainly complicate any implementation of responsibility for historical crimes.

The form of reparation raises associated problems. What type of reparation can be granted? And how can those entitled to reparation be identified generations after the event? The problem was simplified at Durban because what was at issue was the responsibility of one state towards another, so the beneficiary is simply the former colonized state and the responsibility lies with the former colonial power. In the case of native peoples, it is also usually the people who are considered as the beneficiary of reparations and the state as owing the reparations. The position is far more awkward where the author of the loss or damage is a private company, say, and the complainants are individuals claiming to be the descendants of generations who were despoiled and discriminated against. In terms of means of reparation, international law of responsibility provides a range of possibilities: restoration in kind, financial compensation, and satisfaction. All of them have been invoked, whether in the context of the Durban Declaration or in specific cases. Restoration in kind evokes especially actions for the restoration of stolen cultural property, and sometimes of mummified human remains that have occurred in certain instances.[43] Under special legislation of 6 March 2002, France returned to the Khosian people of South Africa the remains of Saartje Baartman, known as the Hottentot Venus, which were buried in 2002 in accordance with the traditional rites of her people. The proliferation of this type of claim for human remains housed in Western museums is a further indication of the spectacular surge in claims for recognition of identities wounded by history, based on equal respect due to any human being and on the acceptance of their difference.

However, it is the other two forms of reparation that are usually invoked. Compensation is the commoner. It must correspond to the economic loss arising from the wrongdoing but also, where possible, to the moral harm done to people. But how can adequate financial compensation be evaluated when the loss results from several centuries of economic exploitation and denial of people's identities? How can it be evaluated when it is considered to continue because of underdevelopment? The difficulties are enormous and the most realistic idea is probably to reach a negotiated agreement on enhanced development aid. This is what was done via the 2008 Treaty between Italy and Libya. Italy apologized for the 30 years of Italian colonization and undertook to pay $5 billion in compensation in the form of investment over the coming 25 years. In this instance, the financial measures are considered to be reparations for historical loss or damage, which is totally different symbolically and legally from aid granted by former colonial powers through unilateral agreements or through treaties. Accepting to situate financial aid in a perspective of recognition of responsibility

[43] Such reparation in the form of restitution is expressly set out in Art. 11(2) of the UN Declaration on the Rights of Indigenous Peoples, available at: www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. Discussion long bore essentially on the return of cultural property, with the creation of an intergovernmental committee within UNESCO for the purpose.

for historical wrongs makes it a symbolic form of reparation for bruised identities which can thus be worked back into the weave of history.[44]

But financial compensation may be felt insufficient or wholly inappropriate in view of the type of historical loss or damage invoked, and some states or victims reject any suggestion of financial compensation. Some African states have dismissed as demeaning any idea of paying money by way of reparation for the slave trade and colonialism. That is also why the Lakotas Indians declined the compensation proposed in 1980 by the US government for illegal occupation of the Black Hills. To accept compensation would be to accept the theft of their sacred land. If it is sought, financial compensation may help to close and repair the historical injury to identities, provided that the words that go with it make it meaningful by relating it to a 'discourse of justice'[45] and the recognition of the denial of persons on a massive scale. Satisfaction may prove a more appropriate form of reparation for immaterial damage as it is aimed directly at the symbolic reparation of the damage. It may take extremely varied forms including, say, the recognition of responsibility, the expression of regret, a formal apology, or asking for forgiveness. Memorably, the State of Virginia was the first of the American states to apologize publicly in February 2007 for the slavery of blacks and the exploitation of native peoples and for the violation of their most fundamental rights. Similarly, Germany officially apologized at Durban for its colonial policy. As ordered by the Inter-American Court in several matters concerning the native peoples of Latin America, less mundane but probably more effective measures can be adopted, such as the organization of cultural events, the creation of foundations, memorial stones, remembrance days, museums, or associations to help native communities.[46]

What illuminates the reasons for these claims and can perhaps pinpoint the most appropriate response to them is the fact that they are part of the contemporary recognition paradigm. This explains why all the history-related claims have become so prominent today, whereas before they were usually settled by silence and the passage of time. In what has become a famous speech made in 1992, the Australian Prime Minister expressed this new attitude towards the Aborigines:

> It begins, I think with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. … We committed the murders.[47]

[44] This is why the first compensation process established by the King of Morocco, Mohammed VI, in 1999, for the victims of torture and 'disappearance' did not really work. It provided for 'straight' compensation for the crimes of the regime but without recognizing them as crimes. A second more satisfactory process had to be established: see Garapon, *supra* note 38, at 214–217.

[45] *Ibid.*, at 229.

[46] This is also recommended by res. 2002/5 of the Sub-Commission for the Protection and Promotion of Human Rights (pt 6): recognition of responsibility for massive and flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism and wars of conquest, available at: www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2002.5.En?Opendocument.

[47] Declaration for reconciliation, draft text adopted in 1999 by the Council for Aboriginal Reconciliation, quoted in M. Piquet, *Australie plurielle. Gestion de la diversité éthnique en Australie de 1788 à nos jours* (2004), at 215–216, available at: www.antar.org.au/issues_and_campaigns/self-determination/paul_keating_redfern_speech.

One part of the nation apologizes and expresses its sincere regrets for past injustice so that the other part can accept the apology and forgive.

The demand that historical crimes be recognized is not completely new. There are examples of the kind in the past. There are obviously other points to the explanation for the spread of this type of action, in particular the extension of talk about human rights and the intention to punish crimes that 'fall into the category of the unjustifiable', for which there is no time bar.[48] But the demand for recognition of historical crimes is considerably reinforced here by the new perception of the identities of peoples, communities, and individuals and by the new way in which they see themselves through history and the passage of time. They define themselves not just in terms of their present-day status and their cultures, but through the history and memory of their group, their state, or their community.[49] Paul Ricœur describes individual identities forged collectively in a temporal dimension that includes 'what may be centuries old discrimination against these groups'.[50] The time dimension of the identity of people and groups means that not only *are* they their own history, but in addition that history is not reduced to the narrative account of their existence. It is also woven from histories inherited from the past and from the common memory handed down the generations. And so individuals, groups, and peoples experience the present effects of mass crimes of the past, based on the denial of individuals, interiorizing an image of themselves that is deprecatory or vilifying, and so suffering from a profound denial of recognition that is passed down the generations and that is not repaired in any way.[51] Awareness of this denial that still weighs on the victims or their descendants is nowadays transformed into a call for justice, that is, into a call for the state's responsibility and a claim for reparation for the crimes committed that then function as a process of recognition of others. The recognition of responsibility and reparation should end the general feeling of devaluation and stigmatization that has lasted over time by designating the guilty party, revealing the scale of the crimes, honouring the memory of the victims, and rehabilitating people in terms of their equal dignity and of respect for their ethnic and cultural difference.

There is no going back on these issues. Because our age has entered the recognition paradigm, the question of historical loss or damage relating to mass crimes of the past based on the denial of identities and producing effects in the present can no longer be ignored. Some commentators misunderstand what is behind recognition and deride repentance, while some states and governments sometimes fail to realize that this demand for historical recognition has become inescapable because of the new paradigmatic values of our times and the circumstance of post-Cold War justice. And it is true that there is no easy solution. Durban is an example of that. Fixing over-ambitious objectives as to recognition for a single international conference was probably a mistake, and it is probably better to opt for other national, bilateral, and

[48] P. Ricœur, *La mémoire, l'histoire et l'oubli* (2000), at 609.

[49] The connection between identity and memory is an idea that is now investigated as much by philosophers as by sociologists or anthropologists: see J. Candau, *La mémoire, l'histoire, l'oubli* (2000), at 9 ff.

[50] Ricœur, *supra* note 10, at 331.

[51] *Ibid.*, at 332.

regional arrangements. It all depends on the context and amplitude of the prejudice caused and on the way the infringement of identity and the reparation of the immaterial damage have been dealt with. The limits of what international law can do can also be seen, in that recognition is not only a question of justice and of law but also of love, self-esteem, education, and morality. This is an essential aspect to be noted from this examination of a few areas where the right of recognition has been illustrated. The concept of recognition aims at an expectation that law and justice can never completely meet, because it means accepting others for what they are and so cannot be computed or measured by law alone.[52] Plus, for the major historical crimes in question here, they have a political, moral, and historical importance so that law can never be the only appropriate response to calls for recognition. The solution for historical crimes is not just legal but social, political, educational, and cultural. Aside from justice in a specific case for a specific historical crime or aside from what law can bring through the formalism of a general recognition of responsibility, both of which are inevitably limited, only education or the creation of new institutions can allow the next generation of the ex-colonized and ex-colonizers to draw the lessons from the errors and crimes of the past by helping to deconstruct the political and moral structures and the underlying cultural representations that made those crimes possible and by getting rid of stigmatizing rules, practices, and institutions. A distinction must be drawn between the discourse of international law containing official recognition relating to a legal decision or an act of repentance or responsibility and the historical, educational, and cultural work of deconstruction and rehabilitation that cannot take the form of a legal text or judicial decision.[53]

3 Difficulties and Questions with the New International Law of Recognition

This leads me to underscore the many difficulties and questions that the new international law of recognition inevitably raises. The law concerning recognition is new. It reflects the need in international law to recognize not just everyone's equal dignity but also the importance of culture, diversity, and identities so as to respect what it is that makes the lives and histories of individuals, women, communities, and peoples meaningful and to end the countless denials of recognition that befell them. The law of recognition caters for the demands in symbolic and cultural terms and no longer in terms of rationally defined material interests, as for most of development law. This suggests that a significant redistribution of the requirements of justice has occurred

[52] Both Honneth and Ricœur show, through a threefold arrangement of orders of intersubjective recognition, that there are structures of recognition that anticipate or go beyond legal matters: see, e.g., Ricœur, *supra* note 10, at 295.

[53] Conditional upon the limits related to revisionism of these mass crimes, although those reservations are also contested: see J. Michel, *Gouverner les mémoires. Les politiques mémorielles en France* (2010), at 135 ff. See the parallel with the international criminal tribunals in M. Koskenniemi, *The Politics of International Law* (2011).

internationally and internally in the last 20 years.[54] But this shift is particularly complex in some aspects; it raises many questions that have not necessarily been resolved and it has several dark sides. How can the contemporary need for recognition be satisfied in legal terms at international level? How can the identities to be recognized and protected be pinpointed? Whose identities? Because everyone wishes to be recognized, should all cultures and identities be legally enshrined? How is the legal preservation of certain cultures and identities compatible with other branches of law, including human rights and international economic law? The 'thirst for recognition' characteristic of our times has ambivalent effects. It reflects aspirations to recognition that are legitimate, coming from communities, peoples, states, or individuals that have long been stigmatized, and finds a potential solution in international law. But it sometimes also expresses the need for social certainty at any price in a globalized world that deprives individuals, groups, or peoples of their bearings, even in the most community-based societies. This could lead them to manipulate certain rules of the law of recognition so as to reassure themselves in proclaiming radical and fundamentalist identities that directly infringe the fundamental rights of individuals.[55]

Let us take the example of the principle of the equal dignity of cultures, which underpins the principle of diversity set out in the 2005 Convention and in other international texts and which still raises a general problem. The principle lays down a strict equivalence between cultures in international terms. This is problematic insofar as it is far from established that all cultural practices can be considered equivalent and of equal dignity. To take familiar examples that are particularly enlightening here: can it be considered that a cultural practice like the excision of young girls is equally as dignified as others? As Charles Taylor points out, to answer yes is to fall again into strict culturalism, which is overstating things and challengeable.[56] There is therefore a limit to safeguarding the integrity of each cultural practice and which is to be found in the observance of fundamental human rights, that is, in respect not for equal dignity of cultures but the equal dignity of human beings, which is ultimately the foundation of the entire edifice. This is what is reflected, among other things and particularly forcefully with regard to the example we have chosen, by the 2003 Additional Protocol to the African Charter on Human and Peoples' Rights with respect to women's rights in Africa. The protocol prohibits traditional 'harmful' practices, especially genital mutilation, as being contrary to human rights and women's rights (Article 5(b)).[57] In other words, what can be called 'strong' culturalist arguments – that is strictly differentialist arguments – are plainly disavowed here by the very existence of such a regional instrument. And this is precisely what is indicated in the 2001 Universal Declaration (Article 4) and the 2005 Convention (Article 4) since they very clearly set out that no argument can be made on the grounds of cultural diversity to infringe human rights.

[54] A. Caille, *La quête de la reconnaissance. Nouveau phénomène social total* (2007), at 5.

[55] See 3 landmark books: A. Maalouf, *Les identités meurtrières* (1992); Sen, *supra* note 28; A Appadurai, *Fear of Small Numbers. An Essay on the Geography of Anger* (2006).

[56] Taylor, *supra* note 6.

[57] It came into force in 2005. See www.achpr.org/francais/_info/women_fr.html.

The question may still arise because of the cultural interpretation of human rights themselves in accordance with 'weak' culturalist arguments. This ultimately refers us to the need to understand the exact role of human rights internationally and the extent to which they in turn are a form of cultural imperialism. Without being able to go far into this here, it should be noted that the question of the equal dignity of cultures should be distinguished from the more specific question of the equal dignity of cultural practices and expressions. A culture cannot be reduced to one or two cultural practices developed within it, and it would be particularly reductive and contrary to the spirit of new international texts to disqualify any culture by simply denouncing one of its practices or cultural expressions. This is a point that is seldom made, although it seems capital for safeguarding the strange new strength of the legal principle of equal dignity of cultures in our post-Cold War and post-colonial world based on recognition, without jeopardizing the equal dignity of persons but without abandoning either the idea that a culture can no longer, in law, decree itself superior to others and move back to a hegemonic policy against which the principle of diversity has been raised. A few cultural practices or expressions, in the North as in the South, are strategically denounced by some commentators to discredit the cultures as a whole and to call into question the principle of the equal dignity of cultures, as well as the quite legitimate need to adapt human rights to those cultures.[58]

Something must be said about the *de facto* (and not *de jure*) subordination of the international law of recognition to international economic law because of the indifference of the legal regimes one to the other. For the time being the interplay of rules continues to confirm the economic and cultural domination of the most powerful of the day, and especially of the major private economic operators to the detriment of the rules of recognition. What can the rules of the 2005 Convention be worth if they do not provide for their primacy, or at least their compatibility with the WTO rules? What becomes of the principle of the diversity of cultural expressions adopted in 2005 at UNESCO if at the WTO the only legal regime applicable is the much more restricted one of the cultural exception? And if the US as the world's leading economic power uses the technique of bilateral agreements systematically to circumvent the rules for the benefit of free trade? Since the 2005 Convention was adopted, the US has hijacked the principle of diversity through a series of bilateral agreements with Third World states by which it makes the granting of economic advantages conditional upon the abandoning of internal measures for the protection and promotion of national cultures provided by the Convention. The cynicism of the policy destroys everything that was symbolically so decisive in terms of cultural recognition and of respect for identities in the 2005 Convention. As another example, what are the rights of minorities and native peoples worth, the preservation of their heritage, their traditional arts, their forests, and their ancestral lands if the national and transnational interplay of private economic actors, oil, mining, and logging companies can be imposed quite lawfully on them, especially through investment contracts that are stacked in favour

[58] See Nyamu, 'How Should Human Rights and Development Respond to Cultural Hierarchy in Developing Countries?', 41 *Harvard Int'l LJ* (2000)381.

of the investor?[59] In Latin America, for example, several firms have seen new markets open up to them through globalization and the neoliberal system that promotes deregulation of investment, but to the obvious detriment of the rights of native peoples.[60] Several of them have been taken to court for this reason, as in *Glamis Gold* and *Montana* in Guatemala, *Repsol* in Bolivia and Peru, and *Texaco* in Ecuador. However, there has been little opportunity to give precedence to social rights, the rights of native peoples, or human rights to counter activities that are made lawful by international investment law.

The issue of the relations between these separate regimes was discussed when negotiating the 2005 Convention on the Diversity of Cultural Expressions. The negotiators were fully aware that the principle of diversity of cultural expressions would be a dead letter because of the imbalance of economic power between North and South, and now between South and South if competition law prevailed over the law of cultural diversity.[61] Accordingly they tried to make allowances for the different standards of development of states, but also to fit the rules of the Convention to international economic law. There is a string of articles on development. They introduce the principles of cooperation, preferential treatment, and the creation of a support fund for developing countries (Article 2(4) and Articles 13–18). But the fund is currently only modestly endowed and, as Hélène Ruiz-Fabri[62] states, if the provisions on cooperation are used by rich countries conditionally to influence the cultural orientation of developing countries, they may provide a way for reinstating a new cultural imperialism via the back door. The new law may therefore have ambivalent effects and be used as a new constraint on poor countries. The Convention provides for relations with the other treaty instruments of the states parties (Articles 20 and 21) including their economic and financial commitments. Article 20 stipulates that these relations shall be of three kinds: 'mutual supportiveness, complementarity and non-subordination'. States cannot then subordinate the 2005 Convention to other treaties, but neither can they use the Convention as an argument for altering their other treaty-based commitments. This is a classical application of the law of treaties. That leaves 'mutual supportiveness' and 'complementarity' and the hypothesis of a possible solution of compatibility between the treaty provisions. Although the compatibility of rules – and of the actions of the institutions concerned – may produce a common economic solution to make the legal principle of diversity effective, it must be realized that there is no telling at this stage how the relationship between the rules preserving and promoting cultural diversity and the rules of international economic law will be settled in actual fact. All the signs are, for the time being, that the WTO's international economic law will prevail as it has already done in other domains.

[59] See, e.g., F. Deroche and J. Burger, *Les peuples autochtones et leur relation à la terre: un questionnement pour l'ordre mondial* (2008).

[60] See, e.g., Warden-Fernandez, 'Indigenous Communities' Rights and Mineral Development', 23 *J Energy and Natural Resources L* (2005) 395, at 417 ff.

[61] See Comby, 'Quel type de coopération peut être engagé entre pays du Nord et pays du Sud?' in H. Ruiz-Fabri (ed.), *La convention de l'UNESCO* (2010), at 255–266.

[62] Ruiz-Fabri, 'Conclusion à deux voix', in *ibid.*, at 276.

The international law of recognition may well prove ineffective in some of its branches and largely fail to reform the infringement of cultures and identities unless it can end a situation of economic and cultural domination that detracts from the diversity of cultures and impedes the flourishing of identities. This would be a particularly worrying dark side, and a highly rhetorical aspect that might even nurture scepticism about these legal developments since recognition law as a whole could be seen as further subjecting individuals, states, groups, and marginalized individuals to the dominant neoliberal world order, with no care for their identities and their cultures. They would have nothing more than an impression of being better respected.[63] There might be a wholesale shift in the presupposed original purpose of these legal instruments and they might paradoxically be diverted from their purpose with promises about recognition actually promoting 'forms of voluntary submission' to the existing order, the very order these instruments were supposed to redirect and reform.[64]

[63] In line with a self-image consistent with what society expects and that acts as an incentive to voluntary submission. This is an 'ideological' form of recognition that must be distinguished from these 'justified forms': see Honneth, *supra* note 29, at 245 ff.

[64] For recognition see the approach of and cautions by Honneth, in *ibid.*, at 245 and at 286 ff.