

SPECIAL RAPPORTEUR IN THE FIELD OF CULTURE

Questionnaire on the implementation of cultural rights and sustained or emerging issues Commentary on the right to freedom of artistic expression and creation (thematic report A/HRC/23/34).

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As a member of the independent expert bank of the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions and author of Chapter 10 of Re/Shaping Cultural Policies in the 2005 Convention Global Report 2018, 'Promoting the freedom to imagine and create', I bring to the Special Rapporteur's attention the findings of this report as having relevance to her request for comment on the implementation of cultural rights.

UNESCO 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions

UNESCO describes its 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions as *"a milestone in international cultural policy. Through this historic agreement, the global community formally recognised the dual nature, both cultural and economic, of contemporary cultural expressions produced by artists and cultural professionals. Shaping the design and implementation of policies and measures that support the creation, production, distribution of and access to cultural goods and services, the 2005 Convention is at the heart of the creative economy."* The Convention supports governments and civil society towards finding policy solutions towards this aim. Based on human rights and fundamental freedoms, it provides *"a new framework for informed, transparent and participatory systems of governance for culture."* It's four goals are:

1. National policies and measures promote creation, production, distribution and access with regard to diverse cultural goods and services and contribute to informed, transparent and participatory systems of governance for culture.
2. Preferential treatment measures facilitate a balanced flow of cultural goods and services and promote the mobility of artists and cultural professionals around the world.
3. Sustainable development policies and international assistance programmes integrate culture as a strategic dimension.
4. International and national legislation related to human rights and fundamental freedoms promote both artistic freedom and the social and economic rights of artists.

For further details of the Convention, visit the UNESCO 2005 Convention website: <https://en.unesco.org/creativity/convention>

Promoting the right to freedom to imagine and create

For the purpose of this document, the focus is on the Convention in relation to the right to freedom of artistic expression, specifically as defined in Chapter 10 of the 2005 Convention Global Report 2018, 'Promoting the freedom to imagine and create'. The full report can be accessed here: <http://unesdoc.unesco.org/images/0026/002605/260592e.pdf>¹

This chapter reviews progress in the development of freedom of artistic expression over the previous two years since the publication of the first 2005 Convention report in 2015² and includes commentary that is closely linked to and refers to the work of the UN Special Rapporteur in the field of culture. Specifically, the authors of the 2015 and 2018 chapters on artistic freedom, refer to the 2013 report on freedom of artistic expression presented by Ms Farida Shaheed as being a seminal document on the issue, and the first to raise this important right within the United Nations framework.

Key findings

In summary, the key findings on the promotion and protection of freedom of artistic expression as given in the 2018 Global Report are:

- Reported attacks on artistic freedom in 2016 perpetrated by both state and non-state actors, mostly against musicians, show a significant rise compared with 2014 and 2015.

While the numbers cited in the report – over 400 recorded attacks in 2016, a figure that rises to well over 1,000 with the inclusion of blacklists – these numbers are also reflective of both the growing capacity of arts freedom monitors to operate and the increasing understanding of the multiple challenges faced by artists in the practice of their right to freedom of expression.³

- Monitoring and advocacy for arts freedom has grown, as has the number of organisations who are engaged in them, particularly in the past two years.

The report documents a number of new NGOs set up to monitor and advocate on artistic freedom, as well as existing NGOs expanding their mandate to include attacks on artists. Also, organisations representing artists and cultural workers are increasingly inviting rights experts to take part in panels and workshops on artistic freedom at their annual gatherings, creating greater visibility and awareness of the issues surrounding artistic freedom. Linked to this is the growth in the numbers of cities world wide that provide safe havens for endangered writers and artists at risk, numbered at over 80. Add to this that projects that provide refuges for human rights defenders now consider artists to fall within their remit and eligible for consideration for placements.⁴

The creation of the role of and work carried out by the Special Rapporteur has informed these positive developments, and relationships between the Rapporteur and relevant NGOs, arts and civil society organisations engaged in artistic freedom should continue. The report notes, however, that data collection and analysis on arts freedom in general, although

¹ Also available in French and Spanish

² The 2005 Convention Global Report 2015 is available here: <https://en.unesco.org/creativity/global-report-2015>

³ For up to date and historical data visit www.freemuse.org

⁴ Further information can be found on www.icorn.org

improved since 2014, remains inconsistent, making it difficult to have a complete picture of the state of play. It also notes that media rights organisations and those working for human rights defenders have a wealth of expertise that could be shared with those seeking to promote artistic rights. In its conclusion, the report recommends that support should be provided to all engaged in the arts and cultural sectors to develop expertise in documenting, monitoring and advocating freedom of artistic expression, including drawing on the expertise of media rights and other organisations working in the defence of human rights. The Special Rapporteur is in a prime position to encourage and identify where such collaboration could be facilitated. It should be noted that she is already collaborating with her colleagues, specifically the Special Rapporteur on Freedom of Expression, and this should be continued and developed.

- Progress has been made in understanding the importance of protecting and promoting artistic expressions; some States have made commitments and put in place legislative changes to respect this fundamental freedom.

Some evidence of this cited in the report is the Nordic Council Ministers of Culture statement of May 2016: ‘Culture constitutes one process of, and space for, democratic debate. The freedom of artistic expression forms its backbone. There is compelling evidence that participation in culture also promotes democratic participation as well as empowerment and well-being of our citizens’.⁵

The report also notes an increased number of references to artistic freedom in international fora, such as the United Nations Human Rights Council. It cites the September 2015 joint statement by 57 Member States entitled ‘Reaffirming the Right to Freedom of Expression Including Creative and Artistic Expression’ to the Human Rights Council that stated “We stand firm in our commitment to protect and promote the right to freedom of expression, including artistic and creative expression. In addition to being an integral part of the protected human right to freedom of expression, artistic and creative expression is critical to the human spirit, the development of vibrant cultures, and the functioning of democratic societies. Artistic expression connects us all, transcending borders and barriers”.⁶

However, the report points out that since the signatories represent only 30% of the 193 UN Member States, a great deal of work needs to be done to encourage more to sign onto future initiatives. The Special Rapporteur is in a unique position to encourage greater understanding of the importance of the right to artistic freedom among UN member states, and to extend the numbers of those committing to defending this right.

- Some states have made commitments and put in place legislative changes or improved their administrative practices to respect artistic freedom

The report cites some examples of recent good practice such as:

⁵ Declaration by the Nordic Council of Ministers of Culture on promoting diversity of cultural expressions and artistic freedom in a digital age. <http://www.norden.org/en/nordic-council-of-ministers/council-of-ministers/the-nordic-council-of-ministers-for-culture-mr-k/declarations-and-statements/declaration-by-the-nordic-ministers-of-culture-on-promoting-diversity-of-cultural-expressions-and-artist>

⁶ United States Mission, Geneva, *HRC Statement Reaffirms Right to Freedom of Expression Including Creative and Artistic Expression*. <https://geneva.usmission.gov/2015/09/18/hrc-statement-reaffirms-right-to-freedom-of-expression-including-creative-and-artistic-expression/>

- **France:** In July 2016, amendments to extend protection for artistic freedom, architecture and heritage were adopted and became French law. Uniquely, this new law also specifies that ‘dissemination of artistic creation is free’, meaning that not only are artists free to create work, but are also assured that their work is disseminated and available to the wider public, and cannot be censored or withdrawn from exhibits.
- **Tunisia:** Article 42 of Tunisia’s new Constitution adopted in January 2014 that states: ‘The right to culture is guaranteed. The freedom of creative expression is guaranteed. The state encourages cultural creativity and supports the strengthening of national culture, its diversity and renewal, in promoting the values of tolerance, rejection of violence, openness to different cultures and dialogue between civilizations’.
- **South Korea:** Following the artists’ blacklist scandal in early 2017, President Moon Jae-in announced a ‘Support not Intervene’ policy that will ensure transparent management and greater involvement of artists themselves in the appointment of high-level posts in the sector, giving reassurance that previous interference in arts freedom would not be repeated⁷

Yet the report notes that that there are gaps between rhetoric and practice. Among the 22 States⁸ that cite artistic freedom as a right in their legislations, there are several that nevertheless curtail this very right, with rights monitors reporting censorship, threats and even arrests. Conversely, countries with strong protections of artistic freedoms do not necessarily have this right explicit in their legislations. The Special Rapporteur could use her role to encourage states, including those where there is good protection of freedom of expression to make it unambiguously clear that art enjoys the same legal protection as other forms of expression.

- Laws dealing with terrorism and state security, criminal defamation, religion and ‘traditional values’ have been used to curb artistic and other forms of free expression. Governments faced with cultural expressions that challenge their authority frequently bring artists before the courts and at times into prison, most often under laws dealing with terrorism and state security, criminal defamation and ‘insult’, as well as legislation protecting religion and traditional values. These laws are not designed to target artists specifically but are applied against anyone whose commentary and ideas bring them into confrontation with those in power. The report notes that artists face similar judicial measures that curtail their rights to freedom of expression as those faced by journalists, human rights defenders and others whose work challenges the authority. This is an added incentive to encourage these sectors to work together to share knowledge and experience.

The report does however, note some positive developments in recent years. Since 2015, States including the Dominican Republic, Gabon, Kyrgyzstan, Lithuania, Italy and Norway have repealed their insult laws fully or in part and this will have a positive effect of freedom of expression for artists as well as the wider community. There is a tendency to see

⁷ Yonhap News Agency *President Moon likely to pursue hands-off policy on culture.*
<http://english.yonhapnews.co.kr/news/2017/05/10/0200000000AEN20170510010500315.html>

⁸ Data gathered by the French senate prior to the amendment of legislation on artistic freedom see - Sénat Française, Direction de l’Initiative Parlementaire et des Délégations (2016) LC261 *Législation Comparée – La liberté de création artistique*

freedom of expression as solely about media freedom, so it is particularly welcome that when Croatia amended its insult laws in 2015, it specifically mentioned art among works disseminated in the public interest as being free from prosecution.

There can be reluctance to antagonise religious conservatives by removing blasphemy laws, but several countries have done so. For example, in 2015, Iceland repealed its law that had made '[r]idiculing or insulting the dogmas or worship of a lawfully existing religious community in Iceland' a criminal offence, and in 2016 Malta too removed its law on blasphemy. Most recently, in June 2017, Denmark also scrapped its blasphemy law.⁹

Terrorist attacks in recent decades, notably at festivals and live performances, have left thousands of performers, cultural workers and audience members worldwide dead and injured, creating a pall of fear. States have responded by creating and tightening security laws and their enforcement ostensibly in an attempt to protect their citizens and to deter further attacks. But all too often these measures have, intentionally or not, become tools to suppress the views of, among others, government critics and minority activists.

Report conclusions

To summarise, the report makes the following recommendations to UNESCO member states, recommendations that are also relevant to and raised by the UN Special Rapporteur:

- The promotion and protection of artistic freedom, including initiatives for the recognition of the status of the artists, should be central to all aspects of cultural policy.
- Support should be extended to all engaged in the arts and cultural sector to develop expertise in documenting, monitoring and advocating freedom of artistic expression, including drawing upon the expertise of media rights and other organisations working in defence of human rights.
- Governments should publicly condemn, and prosecute perpetrators of violence and threats against artists, audiences and cultural workers, so as to ensure that violators do not enjoy impunity.
- National legislation should be reviewed so as to ensure that laws are framed in such a way that only clear calls for incitement to hatred or violence can be prosecuted. Blasphemy laws should be repealed, enabling free exploration of religion without fear of retribution.
- States should consider including the right to freedom of artistic expression as a specific right within law, and to establish systems to monitor and enforce this right.
- Initiatives that engage UN mechanisms and member States with the promotion and protection of freedom of artistic expression should be strengthened, including through a UN Plan of action for the safety of artists.

⁹ This commentary is based on an OSCE 2017 report, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*. <http://www.osce.org/fom/303181>

New and emerging issues

The Special Rapporteur has requested recommendations for new and emerging issues for her consideration in her future work.

- **Social and Economic Rights of Artists:** UNESCO's 1980 Recommendation on the Status of the Artist that covers a wide range of issues and provides recommendations to address the professional, social and economic status of artists. In too many countries, the precarious nature of artist employment, difficulties in getting properly remunerated for their work, reduced access to social security, training and denial of representation through trade unions or other professional bodies can be a significant deterrent to taking up artistic or cultural practice or can lead to a decision to withdraw from the sector entirely. This is an area of study where study by the Special Rapporteur could raise, linking to Article 23 of the UN Declaration on Human Rights, protecting the right to work, just remuneration and fair working conditions.¹⁰
- **Freedom of movement:** A second significant issue touched upon both within the UNESCO 2005 Convention and the 1980 Recommendation is the right to freedom of movement, an issue that has become an increasing problem for artists, especially those from conflict regions. As the 2018 Global Report gives as an example, the new digital economy makes it increasingly difficult to earn an income from record sales, so touring has become a main source of income. For those whose work is censored or who are threatened, performing abroad brings the added benefit of creative freedom, of exposing their work to new audiences, which would be impossible at home. Yet, obtaining visas to work abroad, even for short tours or one-off events, has become increasingly difficult. Sanctions and bans are typically stronger on travel from conflict areas or from where there are large numbers of migrants and refugees, and more often than not, these are also the countries where artistic rights are under strain.

¹⁰ Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.