

Creators Conference 2015 Composing the future #2050

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Ladies, gentlemen...and everyone else

I am honoured to be here with you again today, my second time at the Creators Conference, and I congratulate the organisers. I am also honoured to be on such a distinguished panel.

When I last participated in 2013, I shared key points of my annual thematic report on the right to freedom of artistic expression and creativity which I had just presented to the Human Rights Council. The report describes the multi-faceted ways in which the right to the freedom indispensable for artistic expression and creativity may be curtailed and, as always, it presents a series of recommendations, largely addressed to States, on how to make these a living reality.

When I took up the issue of the artistic freedom it was a subject which had received little to no attention in Human Rights forums despite being explicitly covered in the two main covenants and the UDHR.¹ In the United Nations – and most other human rights forums, the decisions and actions concerning artistic freedom were rare, and the handful we found related to specific individual cases.

At the same time, **few** -- if indeed any - **artists** were engaging with the UN human rights system for their rights as artists. Bringing artists to the UN to share their concerns and engage with State representatives was, in itself, an innovation.

I wish I could say that since then, the whole world has changed, but of course, that's not the case, and less than 2 years is a very short time indeed. However, whenever I run Human Rights trainings, I always say that the first step to enjoying any specific right is to break the silence so that a problem can be recognised as a violation of rights. And while there are few concrete measures yet adopted, I believe my report has helped to break the silence on artistic freedoms and to draw attention to the issues at hand.

I am pleased to say that it has also made many realise (1) the crucial role artists and artistic creativity play in our societies, and (2) that artistic voices and creativity are being silenced by various means in different ways. I keep saying "artistic expression is not a luxury; it is a necessity, a defining element of our humanity".

The new interest in the UN is reflected in several events last year promoting artists' voices and making visible their role as civil society actors and human rights defenders. I

¹ Art 15 (c) of the ICESCR committing States "to respect the freedom indispensable for...[amongst other things] creative activity" and Article 19 (2) of ICCPR which states that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds "in the form of art" since the 1960s and everyone's 'right to enjoy the arts' under the UDHR

am happy to say that during the up-coming March HRC session, at least two specific side events focus on artistic freedom, and also that the SR on the right to freedom of opinion and expression is extremely interested in addressing the issue of artistic expression.

I find it encouraging that some resolutions of the Human Rights Council have started to refer to artistic expression. For example, in September 2014, the Council emphasized in its resolution 27/31 the important role of artistic expression and creativity in the development of society and, accordingly, the importance of a safe and enabling environment in that regard, in line with article 19 of the ICCPR). This is a really important step.

But of course, on the ground, I confess to sometimes feeling pessimistic when I read, almost every day, reports of artistic freedoms being violated, on each continent. I am increasingly approached by artists and their supporters concerning violations of artistic freedoms. In several cases, I have written to concerned Governments requesting them to clarify allegations received and to stop violations (for example, Russia, China, Morocco, Thailand, Iran, Viet Nam, Syria). I am unsure whether to celebrate or mourn this development, for it is difficult to know whether more people are approaching me – which is positive – or violations are increasing, which is not, of course.

Much more needs to be done, and I therefore call upon artists to organize themselves and, in cooperation with HR CSOs, to submit relevant information to us, UN Special Rapporteurs, asking us to step in when violations occur or if rights are threatened. We need relevant information to act - from the concerned artists, their families or lawyers; we cannot take up issues merely on the basis of media reports. From Europe, I do not receive such communications, although I know and I see that problems do arise.

Although Russia is not in the EU, it is still Europe and the Pussy Riot case is well-known and one I took up both during my visit and subsequently. I recently heard the harrowing tale of the arrest without access to counsel, and threatened rape of **Natalia Kaliada**, a Founding Co-Artistic Director of the Belarus Free Theatre. The Theatre, is one of the most outspoken critics of Belarus's repressive regime and continues to stage performances under near impossible conditions as an underground entity. In 2010, Natalia and her husband had to be smuggled out of Belarus and now live in exile in London. Ironically enough even in London some years ago, the play of a British playwright, Gurpreet Kaur Bhatti, (**BEHZTI (DISHONOUR)**) **could not be performed**, in 2004, due to public protests by the Sikh community, as the authorities would not provide security.

An alert system it seems is needed to address the violations of artistic freedoms by private individuals, non-state actors as well as by States across the world, including in Europe, so timely action can be taken – preferably BEFORE the violation.

Since my first report, I now systematically address the issue for artistic freedom during country visits (Viet Nam in particular), and I have included different aspects of artistic

freedoms in various subsequent reports. My report on the impact of commercial advertising and marketing practices takes up the uneven access to public spaces by artists as compared to commercial advertising and the criminalization of graffiti art in some places; the report on Memorialisation recommends cultural interventions in post-conflict as well as divided societies, and the role artists can play.

My report to the HRC this March focuses on another topic extremely important for artists and the creative sector: copyright policies and the enjoyment of the right to science and culture. There is considerable debate on this topic. My report advocates a rebalancing to ensure the rights of creators as distinct from those of intellectual rights-holders as well as the public's access to artistic creations (and scientific writings).

There has been a tendency to strengthen copyright protection with little consideration to human rights, and for trade negotiations being conducted amid great secrecy, with substantial corporate participation but without an equivalent participation of elected officials and other public interest voices.

Cultural participation and the protection of authorship are both human rights principles designed to work in tandem, and striking an appropriate balance between the two goals is a key challenge. I am convinced however, that approaching the unresolved tensions between intellectual property laws and human rights, especially cultural rights, through the lens of the right to science and culture offers a promising space for reconciliation.

Naturally as the UN SR in the field of cultural rights, I advocate a human-rights based approach to copyright issues which not be treated primarily in terms of trade. There is a need to design copyright rules to genuinely benefit human authors, support broad diffusion and cultural freedom, preserve spaces for not-for-profit cultural production and innovation, and take into account special considerations of copyright impact on marginalised or vulnerable groups.

Let me highlight some key points of my reports.

- 1) **First**, the human right to protection of authorship requires that copyright policy be carefully designed to ensure that **authors (and not only copyright holders) benefit materially**. An appropriate balance is crucial, recognizing that creators are both supported and constrained by copyright rules
- 2) **Two: Copyright regimes may under-protect the moral interests of authors** because producers/publishers/distributors and other “subsequent right-holders” typically exercise more influence over law-making than individual creators, and may have opposing interests when it comes to those rights. Even when an author sells her copyright interest to a corporate publisher or distributor, the right to protection of authorship

remains with the human author(s) whose creative vision gave expression to the work. Therefore

- 3) **Three:** it is important to look beyond moral rights already recognized in copyright regimes to discern additional or **stronger moral interests from a human rights standpoint**, such as, in particular, the interest of artists and researchers in creative, artistic and academic freedom, freedom of expression, and personal autonomy.
- 4) **Four: intellectual property rights are not human rights.** This equation is false and misleading. Copyright policies in some ways fall short of adequately protecting authorship; in other ways they often go too far, unnecessarily limiting cultural freedom and participation. A recalibration is necessary.
- 5) **Five: protection of authorship as a human right requires in some ways more and in other ways less than what is currently found in the copyright laws of most countries.**
- 6) **Six:** Measures other than copyright law can and should be used to promote the protection of authorship and artistic livelihoods. **Copyright law is but one element of protection of authorship and should be understood as part of a larger set of policies to promote the cultural sector and the right to science and culture.**

Therefore, key recommendations are that

- States must ensure that copyright regulations are designed to promote creators' ability to earn a livelihood and to protect their scientific and creative freedom, the integrity of their work and their right to attribution.
- Given the inequality of legal expertise and bargaining power between artists and their publishers and distributors, States should protect artists from exploitation in the context of copyright licensing and royalty collection. In many contexts, legal protections that may not be waived by contract will be most appropriate. Enforceable rights of attribution and integrity, *droit de suite*, statutory licensing and reversion rights are recommended examples.
- States should further develop and promote mechanisms for protecting the moral and material interests of creators without unnecessarily limiting public access to creative works, through exceptions and limitations and subsidy of openly licensed works.
- States are encouraged to consider policies on labour practices, social benefits, funding for education and the arts, and cultural tourism, etc., to support artistic livelihoods.

One main challenge I see is that International copyright treaties generally treat copyright protections as mandatory, while treating exceptions and limitations as optional, with very few exceptions. The standard for judging whether a particular exception or limitation is permissible under international copyright law is not articulated with precision. This is why one of my recommendations is **to explore the possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognized by most States, and/or an international fair use provision.** to ensure the conditions for everyone to enjoy their right to take part in cultural life, by permitting legitimate educational opportunities, expanding space for non-commercial culture and making works accessible for persons with disabilities or speakers of non-dominant languages.

Creativity, I must stress, is not a privilege of an elite segment of society or professional artists, but a universal right. Copyright law and policy must be designed with sensitivity to populations that have special needs or may be overlooked by the marketplace.

Digital piracy is an area that requires more focused research from a human rights perspective and debate on possible steps to address this.

Finally, I am pleased to see that Julia Reda, the initiator of a Draft Report for the European Parliament on the harmonization of certain aspects of copyright and related rights in the information society, refers to my report in several instances. And I hope that people in the Creators Conference and others connected to you and the creative industries will engage with this new initiative.

Thank you for your attention

The January events in Paris against Charlie Hebdo are of course on our minds today. And these events are a signal, an additional proof that the right of every person to freedom of expression, including in the form of art, needs to be forcefully protected.