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**DOI**

[10.1111/j.1468-2451.2010.01746.x](https://doi.org/10.1111/j.1468-2451.2010.01746.x)

**Publication date**

2010

**Document Version**

Final published version

**Published in**

International Social Science Journal

[Link to publication](#)

**Citation for published version (APA):**

Donders, Y. (2010). Do cultural diversity and human rights make a good match? *International Social Science Journal*, 61(199), 15-35. <https://doi.org/10.1111/j.1468-2451.2010.01746.x>

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# Do cultural diversity and human rights make a good match?

Yvonne Donders

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## The international human rights framework

In 1948 the Universal Declaration of Human Rights (UDHR) was announced as a so-called “common standard of achievement”. In 1966 the norms of this Declaration were turned into legally binding provisions by two Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The division between the different categories of human rights – civil, political, economic, social and cultural – does not imply that one category of human rights is more important than the other. In the preambles of both 1966 Covenants it is stated that all human rights are interrelated, indivisible, interdependent and equally important. States have reaffirmed this principle on various occasions, for instance in the Declaration of the World Conference on Human Rights in Vienna in 1993 (para. 5). Nonetheless, the different categories of human rights have not developed at an equal pace. Cultural rights have received less attention and, consequently are conceptually and legally less well developed than civil, political, economic and social rights (see Donders 2002; Symonides 2000; United Nations [UN] 1992).

This can first of all be explained by the fact that “culture” is a vague term. It can refer to many things, from cultural products, such as arts and literature, to cultural process or to

culture as a way of life. Culture is something that can develop and change in the course of time. It is not static, but dynamic; it is not a product, but a process, be it one without well-defined boundaries. Culture has both an objective and a subjective dimension. The objective dimension is reflected in visible characteristics such as language, religion, or customs, while the subjective dimension is reflected in shared attitudes and ways of thinking, feeling and acting.

Culture has both an individual and a collective dimension: cultures are developed and shaped by communities, which individuals identify with, building their personal cultural identity. Culture is mostly considered to be important to human beings:

culture shapes all our thinking, imagining and behaviour ... a

dynamic source for change, creativity, freedom, and the awakening of innovative opportunities. For groups and societies, culture is energy, inspiration and empowerment. (UNESCO 1995)

In other words, culture may give individuals and communities a sense of belonging. As such, culture concerns their human dignity, which is where human rights come into play.

Culture is, however, not an abstract or neutral concept: it is shaped by when it is instrumentalised, a process in which power structures play an important role. Culture is not necessarily intrinsically of positive value. Culture may also harm people or constraint their development. There exist

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cultural practices, for example, that are questionable from a human rights perspective. The breadth, complexity and sensitivity of the concept of culture have been crucial challenges in its transformation into legal human rights norms.

### **Universalism and cultural relativism**

Another matter impeding the development of cultural rights is the debate between the theories of universalism and cultural relativism. Universalism asserts that every human being has certain human rights by virtue of being human. According to this theory, human rights are inalienable and meant to protect human dignity and all persons should equally enjoy them. The fact that human rights should be universally enjoyed – by all persons on the basis of equality – is not very controversial. However, universalism is also linked to the universal character of the norms themselves. This universal character, or universal content, of the legal norms, is debated more frequently, especially by supporters of cultural relativism. The relativist position reflects the empirical fact that there is an immense cultural diversity in the world, including diverse views about right and wrong. Cultural relativism, accordingly, claims that there are no universal human values and that the variety of cultures implies that human rights can, and may, be interpreted differently. In between, moderate forms of both theories exist (on universalism and cultural relativism, see Donnelly 1989, pp.107–160; Steiner and Alston 2008, pp.517–618).

International human rights instruments express universalism in terms of the subjects of the rights. In addition to its title, the UDHR states in Article 1, “all human beings are born free and equal in dignity and rights”. The UDHR as well as the Covenants speak of “everyone”, “all persons” or “no one”, reaffirming that all human beings have certain rights and freedoms, no matter where they were born or to which community they belong. However, that does not say anything about the content of the norms.

The question arises as to whether the promotion of cultural rights, which emphasise the value of different cultures and endorse specificities, implies some form of cultural relativism. To what extent can the promotion and

protection of cultural rights be consistent with the notion of the universalism of human rights? The answer is that cultural rights and universalism do not have to be mutually exclusive. The fact that cultural rights draw special attention to the cultures of individuals and communities does not stand in the way of the norms as such having universal value. It is generally accepted that the universal value of human rights does not necessarily involve the universal implementation of these rights. While human rights norms have a universal character and apply to everyone on the basis of their human dignity, the implementation of these rights does not have to be uniform. As a result, cultural rights should be universally applicable to all communities and individuals, regardless of their geographical place or specific background, on the ground that culture is an important element of human dignity. At the same time, states have a certain margin of freedom when implementing human rights, whereby they can take specific situations and context into account. As a result, the specific level and scope of implementation of human rights may vary, depending upon specific circumstances.

### **Equality and non-discrimination**

It has further been argued that the promotion and protection of cultural rights would clash with fundamental principles of human rights, namely equality and non-discrimination. Instead of focusing on equality, cultural rights seem to be based on the fact that individuals and communities want to be different and want to be treated differently. It has been asserted that cultural rights have a specifying and differentiating effect instead of aiming at equality, as human rights are intended to do.

Contrastingly, equality and non-discrimination as key principles of human rights also entail the recognition of diversity and the right to be different. Having equal rights is not the same as being treated equally. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal situations should be treated unequally. Legal doctrine distinguishes between differentiation, distinction and discrimination. Differentiation is difference in treatment that is lawful; distinction is a neutral term that is used

when it has not yet been determined whether difference in treatment is lawful or not; and discrimination is difference in treatment that is arbitrary and unlawful. Consequently, only treatment that results in discrimination is prohibited (UN 2002, p. 20).

At the international level, it has been confirmed that “the enjoyment of rights and freedoms on an equal footing . . . does not mean identical treatment in every instance” (Human Rights Committee [HRC] 1989, paras 8 and 13). Not all difference in treatment constitutes discrimination, as long as the criteria for such differentiation are reasonable and objective and serve a legitimate aim. The principle of equality is violated if, without an objective and reasonable justification, individuals in similar situations are treated differently, or individuals in different situations are not treated differently (the European Court of Human Rights (ECHR) has reaffirmed this in many cases, including the Belgian linguistics case of 23 June 1968. See also *Thlimmenos v. Greece*, 6 April 2000, para. 44 and *D.H. and others v. the Czech Republic*, 7 February 2006, para. 44).

In short, the fact that the promotion and protection of cultural rights may specify and differentiate is not necessarily in contradiction with the principles of equality and non-discrimination. In each particular case it has to be determined whether the actual implementation of cultural rights constitutes discrimination or not. Although cultural rights seem to differentiate, they are based on equality in so far as they can be invoked by communities and individuals alike. With regard to the implementation of cultural rights, there may be differences in scope and the level of protection and of necessary means, without this being in contradiction with the principle of equality.

### **Limits to the enjoyment of human rights**

It has often been argued that cultural rights should not be promoted nor protected because they could justify questionable cultural activities such as the discriminatory treatment of women; examples of which are forced marriages, bride price, female genital mutilation, widow cleansing and fewer rights compared with men with regard to land ownership or inheritance. The

legal issues playing a role here are conflicting human rights and limitations of human rights, which are difficult to address in general terms. Cultural rights should not be categorically rejected, solely on the grounds that they could conflict with other human rights. In fact, many human rights are inherently capable of clashing in certain situations. A famous example is the Danish cartoon affair of 2006, which demonstrated tension between freedom of religion and freedom of expression. These situations cannot be solved in practice by rejecting either one of these rights. One can also not privilege a priori one right over the other. Independent evaluation, for example, by judges or independent supervisory bodies, is needed to determine which right prevails over another in a particular situation.

At the same time, cultural rights, like other human rights, cannot be enjoyed without limit. The general framework of such limitations is outlined in Article 29(2) of the UDHR, in which it is stated:

in the exercise of his rights and freedoms, everyone shall be subject to only such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Such limitation clauses can be found in most human rights instruments, sometimes in general terms, sometimes attached to a particular provision. Article 4 of ICESCR, for example, gives states the possibility to limit the enjoyment of the rights in the Covenant, but only on the condition that these limitations are

determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

This limitation clause is not meant to provide states with a simple excuse not to implement the provisions of the ICESCR. Limitations may not be in contradiction with the nature of the rights in the Covenant, otherwise the provisions would no longer have any value and substance (UN 1987, pp. 122–135).

Whether or not a limitation of cultural rights by law is justified depends on the actual circumstances. On the one hand,

the phrase “for the general welfare” is vague, possibly allowing states to abuse it to justify certain cutbacks. On the other hand, the unlimited exercise of cultural rights should not seriously endanger the rights of others or of society as a whole. For example, freedom of expression can be limited in that creative expressions should not harm the cultural life of society as a whole or that of specific groups, such as children. The right to take part in cultural life can be limited in cases where cultural activities use racist or discriminatory expressions.

The question remains how to deal with cultural activities or practices – not to be confused with cultural rights – which are in conflict with or limit the enjoyment of human rights. Such practices, it is argued, should not be protected by cultural rights. Cultural practices are very diverse, which makes it impossible to make general statements about their acceptability in relation to human rights. The scope of their possible conflict with human rights depends on the particular context of the case. However, cultural practices that are clearly in conflict with international human rights norms cannot be justified by merely stating that they are protected as a result of being classified as cultural rights. As Article 29(3) UDHR also notes, “rights and freedoms may in no case be exercised contrary to the purpose and principles of the UN”. An appropriate criterion could therefore be that cultural practices should not be in conflict with the value of human dignity and the internationally accepted norms of human rights. This has certain implications. Cultural communities may have a certain amount of freedom to arrange their internal structure and institutions but they should always guarantee and respect the rights and freedoms of their individual members including, among other things, the right to take part in the decision-making processes that determine and develop the community’s cultural life, as well as the right and freedom to leave the community. They should also respect the rights of their members to participate in society at large, for example, through education, election processes and labour.

It is clear that changes in cultural practices are most successful if they arise within the cultural community itself and are not imposed from outside. This does not relieve states from the responsibility to find ways to promote such

changes. In this regard, it is interesting to note that, for example, the the UN Convention on the Elimination of All Forms of Discrimination of Women (1979) states in Article 5 that

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

A similar provision can be found in Article 2(2) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005):

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.

## Cultural rights

Which human rights can be considered cultural rights? There is no definition of cultural rights in any international human rights instrument and as a result different lists have been drawn up of legal provisions in international instruments that could be labelled cultural rights. Which rights are included in a list of cultural rights depends on how culture is defined. As outlined above, the concept of culture is ambiguous in that it can vary from intellectual and artistic achievements, such as arts and literature, to culture in the anthropological sense, being the way of life of individuals and communities, as reflected in shared beliefs, language, traditions and customs. Between these two concepts lie the cultural institutions established to pass on culture such as museums, educational institutions and the media.

Different concepts of culture lead to different approaches towards cultural rights. If culture is considered from a narrow perspective as corresponding to cultural products such as arts, literature and tangible and intangible cultural heritage, then cultural rights could include the protection of such cultural heritage, as well as the right to take part in cultural life

and to have access to such products and heritage in museums, theatres and libraries. If, however, culture is considered from the perspective of the process of artistic and scientific creation, cultural rights would include the rights to freedom of expression, artistic and intellectual freedom, as well as rights related to the protection of producers of cultural products, including copyright. And finally, if culture is regarded as a way of life, the sum of material and spiritual activities and products of a community, then cultural rights comprise the right of self-determination, including cultural development, the rights to freedom of thought, religion and association, the right to education, and also the rights to maintain and develop culture (Hansen 2002, p.281; Marks 2003, p.295–296; Stavenhagen 1998, pp.89–92).

### **Cultural rights in international human rights instruments**

Drawing from universal human rights instruments, different lists have been compiled of legal provisions that could be labelled cultural rights. A general distinction can be made between cultural rights in the narrow sense and cultural rights in the broad sense. The group of narrow cultural rights contains rights that explicitly refer to culture such as the right to participate in cultural life as laid down in Article 27 UDHR and Article 15(1)(a) of ICESCR, or the right to enjoy culture for members of minorities, as laid down in Article 27 of ICCPR. The group of broad cultural rights includes the above-mentioned rights but also other civil, economic, political or social rights that have a link with culture. It might be claimed that almost every human right has a link with culture, but the rights specifically meant here are the rights to freedom of religion, freedom of expression and freedom of association and the right to education (Leuprecht 1993, p.76; Marks 2003, pp. 299–300; Meyer-Bisch 1993, p.25). Several monitoring bodies, such as the ECHR and the Inter-American Commission on Human Rights (IACHR), have also referred to other provision to protect culture, such as the right to life, the right to health and the right to family life and home (see Donders 2002, pp.231–241, 269–300).

The right of self-determination could also be considered a cultural right. This right has a

special link with the protection of cultural diversity, because it is the only collective right in the International Bill of Human Rights. The right of self-determination, as laid down in Article 1 of ICCPR and Article 1 of ICESCR, includes the statement:

[A]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This right has two components: external and internal self-determination. External self-determination means a people's capacity to free itself from, for example, colonial or racist rule. This can imply secession and the establishment of a new sovereign and independent state, the free association or integration with another independent state or any other political status freely determined by the people involved. Internal self-determination implies the presence of a representative government committed to respecting human rights and freedoms, with a special focus on the rights of peoples and communities. Internal self-determination includes the ability to participate in government and in the work of decision-making bodies without discrimination. It may also refer to some form of self-government or autonomy in the economic, social or cultural field. The internal aspects of the right of self-determination are directly linked with cultural diversity, for example in the form of determining cultural development or granting cultural autonomy. It should, however, be noted that this right, mainly because of its external component, is very much disputed. An in-depth analysis of the right of self-determination falls outside the scope of this article (regarding this right, see Aikio and Scheinin 2000; Hannum 1996; Henrard 2000).

Cultural rights provisions were also incorporated in the regional human rights instruments in Europe, Africa and the Americas. The European Convention on Human Rights and Fundamental Freedoms (1951) contains civil and political rights, while the European Social Charter (ESC, 1966, revised in 1996) complements the European Convention in the economic and social field. These instruments do not contain cultural rights in the narrow sense, but they do incorporate cultural rights in the broad sense that are important in relation to cultural diversity, such as non-discrimination, freedom

of religion and association and the right to private life. The issue of cultural diversity was given impetus by the democratic changes in Central and Eastern Europe in the 1980s. As new member states from these parts of Europe acceded to the Council of Europe, attention was drawn to new human rights themes such as the protection of minorities, including the promotion of cultural rights. This led to the adoption of the Charter on Regional and Minority Languages (1992) and the Framework Convention for the Protection of National Minorities (1995). These instruments contain various cultural rights and reaffirm the value of cultural diversity, in particular for minorities.

The American Declaration on Human Rights (1948) contains cultural rights both in the broad and in the narrow sense, including the right to take part in the cultural life of the community (Article VIII). The American Convention on Human Rights (1969) contains civil and political rights, including the rights to life, personal liberty and security, family life, equal protection, property and freedom of religion, movement and residence. Economic, social and cultural rights were incorporated in the San Salvador Protocol on Economic, Social and Cultural Rights (1988). The Protocol contains provisions similar to the ICESCR, including the right to education and the right to take part in the cultural life of the community (Article 14).

The African Charter on Human and Peoples' Rights (1981) is unique in that it incorporates all human rights – civil, cultural, economic, political and social – in one instrument and in that it includes individual as well as collective rights. It includes cultural rights in the broad sense, such as freedom of religion and association and the right to education, as well as cultural rights in the narrow sense, such as the right to take part in the cultural life of the community (Article 17) and the right of peoples to their cultural development (Article 22).

### **The cultural dimension of human rights**

Cultural diversity can also be reflected in the cultural dimension of human rights. Although some human rights, at first glance, may not be

directly linked with cultural diversity, most of them have important cultural implications. The Committee on Economic, Social and Cultural Rights, the independent UN body supervising the implementation of the ICESCR, has acknowledged the cultural elements of, for instance, the rights to food, health and housing. Among other things, it has determined that the right to adequate housing implies that the construction of houses, the building materials and the supporting policies “must appropriately enable the expression of cultural identity and diversity of housing” (Committee on Economic, Social and Cultural Rights 1991, para.8g). With regard to the right to health, the Committee has determined that “all health facilities, goods and services must be . . . culturally appropriate, that is, respectful of the culture of individuals, minorities, peoples and communities” (Committee on Economic, Social and Cultural Rights 2000, para. 12c). With regard to the right to adequate food, the Committee has stated that the guarantees provided should be culturally appropriate and acceptable (Committee on Economic, Social and Cultural Rights 1999, paras 7, 8 and 11). Other supervisory bodies, including the ECHR and the IACHR, have addressed the cultural dimension of human rights provisions. Several of these cases are dealt with below.

### **Cultural rights as individual and/or collective rights**

Cultural rights clearly have an individual and a collective dimension. How is that collective dimension reflected in legal norms? In legal doctrine a distinction is made between (a) individual rights; (b) group rights (rights of individuals as part of a community); and (c) collective rights (rights of communities as such).

Cultural rights provisions in international human rights instruments are mostly defined as individual rights. However, although, legally speaking, only individuals can claim these rights, it is evident that their enjoyment is firmly associated with other individuals and with communities. For example, the individual right to participate in cultural life can be enjoyed by individuals only as members of a cultural community. Other cultural rights, such as the

rights to freedom of religion, expression and association, also have a collective dimension but they are defined as individual rights. In other words, the collective dimension of these rights does not mean that they are, legally speaking, collective rights that a community as such can claim. Only a few collective human rights have been included in international legal instruments. The right of self-determination, as included in the ICESCR and the ICCPR (both Article 1), is a right of “all peoples”. The African Charter on Human and Peoples’ Rights does include several collective rights of peoples. The right to enjoy culture for members of minorities, as laid down in Article 27 of ICCPR, could be considered a group right, because the provision explicitly indicates that the right can be enjoyed “in community with others”. Communities, however, increasingly claim rights as a collectivity, such as the collective right to the protection of cultural identity and the right not to have an alien culture imposed, or the right of peoples to their own cultural institutions and heritage (Prot 1988, pp.95–97). These claims have not yet generally transformed into international legal norms, although some have been incorporated in non-binding instruments, which are discussed below.

The state approach towards cultural rights, reflected in the international instruments, has been mainly individual. States have been reluctant to empower communities as a whole with cultural rights for fear of such a collective approach endangering the stability of the society. Despite this anxiety, collective cultural rights have formed an important part of the elaboration of instruments containing rights of minorities and indigenous peoples. The UN Declaration on the Protection of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) contains specific individual cultural rights for members of minorities, such as rights to enjoy their culture, to use their language and to practice their religion (Article 2), as well as linguistic rights and educational rights (Article 4). The Declaration also recognises the collective dimension of these rights, referring, for example, in Article 3 to the possibility of the collective enjoyment of the rights in the Declaration. Moreover, Article 1 provides that states have the obligation to protect the cultural, religious, ethnic and linguistic identity

of minorities as a whole, thereby recognising minorities as collectivities. However, the provisions referring to minorities as a whole are formulated as duties on the part of states and not as rights for the communities involved. This means that the latter are not the subjects that can claim such rights, but the beneficiaries of these provisions. Moreover, the Declaration is not legally binding, as it is not a treaty.

The UN Declaration on the Protection of Rights of Indigenous Peoples (2007) goes much further in its collective approach. The Declaration contains several collective rights for indigenous peoples as a collectivity, including rights related to non-discrimination, non-assimilation and not being forcibly removed from territory. It also contains several cultural rights, such as the right not to have culture destroyed and to be protected against the deprivation of cultural values (Article 8); the right to practice and revitalise cultural traditions and customs, including manifestations of culture (Article 11 and 12); and land rights (Article 25 and 26). However, this Declaration is not a legally binding instrument.

## **Human rights cases related to cultural diversity**

Most international human rights treaties have a monitoring mechanism carried out by an independent body, such as a committee or court. Such monitoring is important as not only should it improve the implementation of the rights, but it also determines the scope of the provisions and limitations. Some universal human rights treaties provide for an individual complaints procedure that has to be specifically recognised by the state party. For example, the HRC handles individual complaints under the ICCPR if a state has specifically recognised its competence to do so by ratifying the Optional Protocol to the ICCPR. Although the views of the HRC are not legally binding they have a strong moral and political weight encouraging states to comply with them. The ICESCR, containing one of the most prominent cultural rights, namely the right to take part in cultural life, does not (yet) provide for an individual complaints procedure. The Optional Protocol to the ICESCR

was adopted by the UN General Assembly in December 2008 and has been open for ratification since September 2009. The Protocol needs 10 ratifications to enter into force.

At the regional level, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights (IACourtHR) and the European Court on Human Rights submit recommendations (Commission) and binding judgments (Courts) on individual cases related to provisions in the respective treaties. The African system will not be dealt with here, because the African Commission on Human and Peoples' Rights has not (yet) dealt with cases in which a clear link with cultural diversity has been established. In the one case where Article 17(2) of the African Charter concerning the right to participate in cultural life was invoked, *Prince v. South Africa* (Comm. No. 255/2002, 2004), the Commission found no violations of cultural rights. Furthermore, the case of *Kantangese Peoples' Congress v. Zaire* (Comm. No. 75/92, 1995) under Article 20(1) of the African Charter on the right to self-determination was not approached from a cultural perspective, but from the perspective of territorial integrity. In another famous case concerning economic, social and cultural rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Comm. No. 155/96 2001), the Commission found violations of several provisions of the African Charter, including Article 21 concerning the right of peoples to freely dispose of resources, but no direct link was established with their cultural development or autonomy. The African Court on Human Rights was established in 2006 but it has not dealt with individual complaints yet. This section analyses several cases dealt with by these supervisory bodies. A selection was made of cases in which human rights provisions were applied to protect (elements of) cultural diversity and the supervisory body directly referred to culture or cultural diversity. The cases concern conflicts over the way a state should respect or protect cultural diversity. There are many more cases on issues relating to culture, for example concerning freedom of religion or freedom of expression, but these fall outside the scope of this contribution. The list of cases is therefore not exhaustive, but is merely meant to provide an illustration of the potential of human rights norms

in the promotion and protection of cultural diversity.

### **The HRC: culture and minorities**

The ICCPR contains a cultural right in the narrow sense (Article 27), as well as cultural rights in the broad sense. Article 27 of ICCPR reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The HRC has ruled on a series of cases under this provision, all representing interesting issues in relation to cultural diversity. The HRC has, for example, determined that members of indigenous peoples fall within the scope of Article 27, whereas minorities in a province do not. Indigenous peoples have been involved in various Sami cases, such as *Kitok v. Sweden* (Comm. No. 197/1985) and *Länsman v. Finland* (Comm. No. 511/1992 and 671/1995). The issue relating to a minority in a province was determined in the case of *Ballantyne, Davidson, McIntyre v. Canada* (Comm. Nos. 359/1989 and 385/1989).

It has also ruled that a person's legal status is not decisive when it comes to determining whether that person is a member of a minority. As a consequence, persons who have officially lost their status as a member of a minority could still fall within the scope of Article 27 if they have the ethnic background of a minority (*Lovelace v. Canada*, Comm. No. 24/1977, para. 14). The HRC has further endorsed a broad interpretation of "culture", to include, for example, economic activities such as fishing and hunting. Since these economic activities often concern land, the issue of land rights has gained importance under Article 27 of ICCPR even though it is not explicitly referred to in this provision.

### **The enjoyment of culture and economic activities**

The HRC has dealt with several cases under Article 27 concerning the enjoyment of culture in relation to the traditional use of land.

A landmark case in relation to the link between land and a community's culture is the case of *Lubicon Lake Band v. Canada* (Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Comm. No. 167/1984, 26 March 1990). On behalf of the native Indian community, the Chief claimed a violation of the right of self-determination under Article 1 of ICCPR. He argued that although the Canadian government had recognised the right of the Lubicon Lake Band to continue its traditional way of life, the government had allowed the expropriation of land for the benefit of private corporate interests such as gas and oil exploration, thereby destroying its environmental and economic base (*Lubicon Lake Band v. Canada*, Comm. No. 167/1984, paras 29.1, 29.5 and 29.9).

The HRC found that it could not deal with collective rights under Article 1, since the ICCPR's Optional Protocol (Article 1) stipulates that only individuals who are victims of violations of rights under the ICCPR can submit claims. The HRC argued that an individual could not be a victim of a collective right of self-determination. Since communities as such do not have *locus standi* before the HRC, all cases under Article 1 are inadmissible. Consequently, the HRC does not deal with cases concerning self-determination, which is a right with an important cultural component in relation to cultural diversity.

However, the HRC did find that many of the claims presented by the applicants raised issues under Article 27 and the enjoyment of culture. It concluded in a brief reasoning that historical inequities and recent developments threatened the way of life and the culture of the Lubicon Lake Band and therefore constituted a violation of Article 27 (*Lubicon Lake Band v. Canada*, Comm. No. 167/1984, paras 32.1, 32.2 and 33).

The HRC has continued its broad interpretation of "enjoyment of culture" to include a certain traditional use of land. There have been several cases brought by individuals of Sami origin, which concerned the use of land to breed and herd reindeer in relation to government permission for companies to use the land for logging, mining or forestry. The case of *Ivan Kitok v. Sweden* (Comm. No. 197/1985, 27 July 1988 concerned a Swedish citizen of Sami ethnic origin who complained that he had been denied his right to enjoy his culture in community with

others because he no longer had the right to breed reindeer. According to the Swedish Reindeer Husbandry Act of 1971, Sami members having engaged in a profession other than reindeer breeding for a period of 3 years or more lose their right to breed reindeer unless they are formally re-recognised as a member by a Sami community. The Act was passed in order to limit the number of reindeer breeders and to protect the environment and indigenous Sami culture. However, although Kitok had officially been denied membership of the Sami community, which normally implied he could no longer practice reindeer husbandry, he was, in fact, allowed to exercise a limited form of reindeer husbandry because he owned reindeer and had the right to protect his interests in this respect, see paras 2.1, 2.1 and 4.2). The HRC confirmed that the economic activity of reindeer husbandry is an essential component of the Sami culture and as such falls under Article 27. The HRC established a set of criteria to determine whether specific state interference with Article 27 constitutes a violation of this provision. In general, state measures that interfere with the enjoyment of culture must have a reasonable and objective justification and be compatible with the other provisions in the ICCPR. Furthermore, the state has the obligation to consult the community involved and to limit the impact of the measures taken. In the Kitok case the decisive factor became the impact of the measures taken on the enjoyment of culture. The HRC concluded that the impact of the rule on Kitok was limited, since he was allowed, although not as a right, to herd reindeer. It found the rule objectively justified in view of the welfare of the minority as a whole and consequently concluded that no violation of Article 27 had occurred (para. 4.3, 9.2, 9.7, 9.8).

In two other important Sami cases, the Länsmän cases against Finland, the HRC adopted a similar approach (*Ilmari Länsmän et al. v. Finland*, Comm. No. 511/1992, 26 October 1994 and *Jouni E. Länsmän et al. v. Finland*, Comm. No. 671/1995, 30 October 1996). Both cases concerned reindeer breeders of Sami ethnic origin who claimed a violation of their right to enjoy their culture as laid down in Article 27, because government authorities respectively allowed stone quarrying, and logging and road construction on the land used for reindeer herding. In both cases, the HRC argued with regard to the impact of the

measures on reindeer herding activities that reindeer breeding did not seem to be much affected by the quarrying and logging activities. The HRC concluded that the impact of the measures taken by the authorities on the enjoyment of culture was limited to such an extent that it did not constitute a violation of Article 27 of ICCPR (*Ilmari Länsman et al. v. Finland*, paras 2.1–2.3, 3.1 and 9.1–9.8; *Jouni E. Länsman et al. v. Finland*, paras 2.1–2.9, 10.1–10.6.). The HRC did, however, express its general concern about the permits issued by the authorities to private companies. The HRC warned Finland that future activities might constitute a breach of Article 27 if they had a significant negative impact on reindeer breeding and the enjoyment of the Sami culture (*Jouni E. Länsman et al. v. Finland*, Comm. No. 671/1995, para. 10.7.).

The way the HRC used its impact criterion has been criticised. The main critique is that the HRC did a quantitative comparison between the area allocated to the disputed projects and the total area used by the Sami for reindeer herding. Insufficient attention was paid to the argument of the minority claimants who emphasised a qualitative aspect, namely the specific importance of a certain area and its potential impact on their future livelihood (Scheinin 2000, pp.170, 175 and 212). In the case of *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, more attention was paid to the quality of the land. In this case, the applicants argued that the land concerned was the best winter grazing available, and consequently of strategic importance. The HRC argued that it did not have sufficient information from both parties in order to “draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under Article 27” (*Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, Comm. No. 779/1997, 24 October 2001, para. 7.6). The HRC subsequently argued that it could not conclude that the logging constituted a violation of Article 27 (The HRC did however decide that the case constituted a violation of Art. 14(1) in conjunction with Art. 2, because the applicants had to pay a large amount of money to the winning party, which had a deterrent effect on the ability of individuals to seek a legal remedy (para. 7.2), and because the applicants did not have the opportunity to comment on a brief by the forest authority

(para. 7.4). This case illustrates the difficulty of determining the importance of a certain piece of land. Consequently, it remains unclear when state measures are of such impact that they do constitute a violation of Article 27, in other words, when the line between permissible limitations and impermissible limitations is crossed.

It was crossed, according to the HRC, in the case of *Poma Poma v. Peru* which concerned the withdrawal of water from indigenous land authorised by the state, thereby preventing the indigenous people from raising llamas (*Angela Poma Poma v. Peru*, Comm. No. 1457/2006, 24 April 2009). As regards the consultation of the indigenous people, the HRC added the specific criterion that indigenous participation in the decision-making process has to be effective “which requires not mere consultation, but the free, prior and informed consent of the member of the community”. As regards the impact of the measures taken, the HRC specified that these must respect the principle of proportionality so as not to endanger the very survival of the community and its members (*Angela Poma Poma v. Peru*, Comm. No. 1457/2006, 24 April 2009, para. 7.6). In this case, the HRC found that the community was not sufficiently consulted, that no studies were undertaken to assess the impact of the measures and that these measures substantively compromised the way of life and culture of the claimant. Consequently, it concluded that a violation of Article 27 of ICCPR had occurred.

In the case of *Apirana Mahuika et al. v. New Zealand*, the petitioners were New Zealand Maoris claiming that their rights under Article 27 of ICCPR had been violated in a dispute over fishing rights. The petitioners claimed that they were denied their right to freely pursue their economic, social and cultural development under Article 1 of ICCPR. Furthermore, they claimed that the government’s actions threatened their way of life and culture in violation of Article 27 (*Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993 paras 6.1, 6.2, 7.1 and 7.4). The HRC repeated that it could not express its views on Article 1 on self-determination. However, it argued that “the provisions of Article 1 may be relevant for the interpretation of other rights protected by the Covenant, in particular Article 27” (*Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, para. 9.2). It thereby established the link between the

enjoyment of culture and elements of self-determination. The HRC further confirmed that the use or control of fisheries constitutes part of the Maori culture. It based its final decision on the assessment of the impact on the traditional forms of life of the community and on the question whether this community was given sufficient opportunity to participate in the decision-making process. The HRC concluded that New Zealand had engaged in a process of broad consultation with the Maori and had taken the necessary steps to ensure that the fisheries settlement was compatible with Article 27 of ICCPR. Accordingly, no breach of Article 27 was found (*Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, paras 9.3–9.8, 10).

In these cases, the HRC has employed a dynamic approach to the concept of culture, including economic activities that are linked to the culture of a community. Moreover, it has argued that Article 27 of ICCPR does not only protect the traditional economic activities or means of livelihood of a community. The fact that, for example, technological innovations are used in these economic activities, such as reindeer herding, or that economic means are adapted to the modern way of life and technology does not imply that Article 27 is no longer applicable. However, the cases show that states are given a certain margin to implement the right to enjoy culture for members of minorities. Only when the community was not consulted at all and the measures taken had a clear negative impact on the culture of the community did it conclude that it was a violation of this provision.

In order for land claims to fall under the enjoyment of culture of Article 27, a close relationship must be demonstrated between the two. In the case of *J.G.A. Diergaardt* (the late Captain of the Rehoboth Baster Community) *et al. v. Namibia*, this relationship was not sufficiently demonstrated. In this case, the HRC concluded that

although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture.

The HRC therefore found no violation of Article 27 of ICCPR (*J.G.A. Diergaardt* (the late Captain of the Rehoboth Baster Community) *et al. v. Namibia*, Comm. No. 760/1997, para. 10.6).

In the case of *Diergaardt v. Namibia*, the claimants also complained about the prohibition on the use of their own language (Afrikaans, in this case), in violation of Article 26 on non-discrimination and Article 27 of ICCPR. The Namibian Constitution ruled that English is the sole official language. Parliament was empowered to adopt legislation that would allow the use of other languages in administration, justice, education and public life. However, no such legislation had been passed, which, according to the claimants, constituted discrimination against non-English speakers. The HRC indeed found a violation of Article 26 of ICCPR (*J.G.A. Diergaardt* (the late Captain of the Rehoboth Baster Community) *et al. v. Namibia*, Comm. No. 760/1997, paras 3.4 and 10.10). Several committee members, however, expressed an individual opinion reflecting issues relating to cultural diversity.

One committee member dissented on the finding of a violation of Article 26 because the use of minority languages had been limited only at the official level. He also stated that giving the many tribal languages an official status would be an obstacle to nation-building. Other committee members disagreed, because English was treated differently from all other languages, which were in turn all treated the same. In other words, Afrikaans was not discriminated against compared to other languages (except English), which constituted an objective and reasonable distinction permitted under Article 26. One committee member underlined the relation between language and Article 27 in arguing that this provision would be stretched too far if public authorities were obliged to guarantee the use of a non-official language in official affairs. This case confirmed the importance of non-discrimination in relation to cultural – in this case linguistic – diversity. The individual opinions show, however, that there was no agreement in the committee on the difficult issues surrounding language and cultural diversity.

Language was also the central element in the case of *Mavlonov and Sa'di v. Uzbekistan* (*Rakhim Mavlonov and Shansiy Sa'di v. Uzbekistan*, Comm.No. 1334/2004). The authors were the editor and a reader of a newspaper in the Tajik minority language to which a licence had been refused, because it was alleged to have incited inter-ethnic hostility and questioned the territorial integrity of the country. The HRC concluded that education and information in a

minority language are fundamental parts of minority culture. It found a violation of Article 27, read together with Article 2 of ICCPR on the effective enjoyment of the rights. No dissenting opinions were attached to this view.

### **The French declaration in relation to Article 27 of ICCPR**

The HRC considered several cases under Article 27 against France, which were all declared inadmissible. France submitted a declaration that since the French Constitution prohibits all distinctions between citizens on grounds of origin, race or religion, no minorities exist in France. Consequently, Article 27 would not be applicable with regard to France. In 1989 the HRC concluded that this declaration should be considered a binding reservation. As a result, the HRC did not find itself competent to examine complaints directed against France concerning alleged violations of Article 27 (*T.K. v. France* Comm. No. 220/1987, para. 8.6). Committee member Higgins dissented and argued that the HRC on several occasions had rejected the idea that the existence of minorities would be dependent on a form of discrimination. The existence of a minority was a factual matter and minorities could also exist within states that apply the principles of equality and non-discrimination. In her opinion, the French declaration was incompatible with the HRC's interpretation of Article 27 and could not be interpreted as a reservation (*T.K. v. France* Comm. No. 220/1987, Appendix I).

The HRC created an interesting way of circumventing Article 27 of ICCPR in the case of *Hopu and Bessert v. France* (*Francis Hopu and Tepoaitu Bessert v. France*, Comm. No. 549/1993). In this case, the petitioners were indigenous Polynesians claiming ownership of a piece of land in Tahiti where the French-Polynesian authorities had started to build a hotel. The piece of land contained a traditional indigenous burial ground and a fishing lagoon (*Francis Hopu and Tepoaitu Bessert v. France*, paras 1 and 2). According to the logic of the HRC's case law, this case would fall under Article 27. It could, however, not be dealt with under this provision as a result of the French declaration described above. (Five members of the HRC dissented and argued that the declaration was not of

relevance to overseas territories under French sovereignty. See also Scheinin, 2000, pp. 217–218). The HRC solved this problem by addressing the claim under Article 17 concerning privacy, family and home and Article 23 on the rights of the family (*Francis Hopu and Tepoaitu Bessert v. France*, paras 4.3 and 4.4). It argued that the relationship of the claimants with their ancestors was an important element of their identity and played a defining role in their family life. As a result, the claimants were not under any legal obligation to prove a direct kinship link with the remains in the burial grounds. (Several committee members dissented on this point, arguing that the term “family” does not include all members of one's ethnic community. Accordingly, in order to fall under Articles 17 and 23, the burial grounds should be connected to the direct family, which could not be established by the authors). The HRC concluded that the construction of a hotel on the traditional burial grounds of the Polynesians constituted an interference with the right to privacy and family life, which was neither reasonable nor justified (*Francis Hopu and Tepoaitu Bessert v. France*, para. 10.3).

Several committee members maintained that the issues of this case did not fall under the provisions on privacy and family life. They argued that the HRC emphasised the history and culture of the claimants, which referred to cultural values – protected under Article 27 – and not to family rights or privacy (*Francis Hopu and Tepoaitu Bessert v. France*; individual opinion by Thomas Buergenthal, David Kretzmer, Nisuke Ando and Lord Colville).

The cases described above illustrate how the right to enjoy culture and other human rights of the ICCPR may raise diverse issues concerning the protection and promotion of cultural diversity and the role of states in these issues. Article 27 of ICCPR, being one of the cultural rights in the narrow sense, plays a key role in relation to cultural diversity, but other rights in the ICCPR, such as the right to family life, freedom of religion, expression or association have also been invoked to protect and promote cultural diversity. All this shows the breadth of the concept of cultural diversity and the complex issues it may raise in human rights terms. It confirms the importance of the indivisibility, interrelation and

interdependence of all human rights, especially in relation to the protection and promotion of cultural diversity.

Apart from the cases at the international level, there are also several cases before regional monitoring bodies which can serve as examples.

### **The ECHR and the cultural dimension of rights**

As mentioned above, neither the ECHR nor the ESC contains cultural rights in the narrow sense. However, individuals and communities have invoked cultural rights in the broad sense or the cultural dimension of rights before the ECHR to protect interests in relation to cultural diversity. In the cases below, which mainly concern minority groups, the European Court recognised the link between human rights and cultural diversity.

### **The right to education, freedom of religion and association**

The first of such cases was the *Belgian Linguistics* (Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. *Belgium* (merits, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), decision 23 July 1968), in which the applicants, francophone residents in Flanders, claimed that the Belgian authorities had violated their right to education (Article 2 First Protocol), because they had refused to provide primary school education in French. The Court held that Article 2 of the First Protocol did not impose positive state action to establish or finance a particular type of education in a certain language. Notwithstanding, this provision might impose positive obligations to ensure the equal enjoyment of the right to education. Accordingly, the Court held that there had been a violation of Article 2 of the First Protocol in conjunction with Article 14 ECHR on non-discrimination, in so far as certain children were prevented, only on the basis of the residence of their parents, from having access to the French language schools in the six ‘special status communes’ on the Brussels periphery. This case is famous for the determination of linguistic rights, in

terms of non-discrimination, for minorities in education.

In several other cases the Court determined that cultural organisations set up to preserve and develop a minority culture and traditions are, in principle, protected under Article 11 of ECHR on the right to freedom of association (*Sidiropoulos and others v. Greece*, Application No. 26695/95, decision of 10 July 1998; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95, decision of 2 October 2001; *Gorzelik and others v. Poland*, Application No. 44158/98, decision of 20 December 2001). In one of the cases the Court established a clear link between cultural diversity and the role of the state by arguing that

the existence of minorities and different cultures in a country is a historical fact that a democratic society has to tolerate and even protect and support according to the principles of international law. (*Sidiropoulos and others v. Greece*, 10 July 1998, paras 41 and 44)

Under Article 9 of ECHR concerning freedom of conscience and religion, the Court has dealt with interesting issues relating to the role of the state in religious matters. In the *Manoussakis* case (*Manoussakis and others v. Greece*, 26 September 1996, para. 36–42) the Court emphasised that states have a limited margin of appreciation with regard to the delicate relation between the state and religions. In the *Serif* case (*Serif v. Greece*, Application No. 38178/97, decision of 14 December 1999, paras 39, 45 and 50), the Court stressed that the role of the state is not to remove tension by eliminating pluralism but to take all necessary measures to ensure that different religious communities tolerate each other.

Another interesting case is *Chaáre Shalom ve Tsedek v. France* (*Chaáre Shalom ve Tsedek v. France*, Application No. 27417/95, decision of 27 June 2000). The applicant’s association was refused a permit for a special form of ritual slaughtering, subject to strict religious rules, in order to prepare special kosher meat (*glatt*) (*Chaáre Shalom ve Tsedek v. France*, paras 27–34). The Court argued that ritual slaughtering constituted a rite and, as such, was covered by Article 9 of ECHR. According to the Court, Article 9 of ECHR would only be interfered with if it would be impossible for ultra-orthodox Jews

to obtain meat from animals slaughtered in accordance with their religious prescriptions. In fact, Jews could obtain such meat from various butchers in Belgium. The Court concluded that the refusal of the permit did not constitute an interference with Article 9 of ECHR (*Chaïre Shalom ve Tsedek v. France*, paras 72–84). The Court further concluded that there had not been a violation of Article 9 taken together with Article 14 on non-discrimination, because the difference in treatment between the applicant's organisation and a similar organisation (ACIP) that had received a permit was limited in scope and pursued the legitimate aim of avoiding the proliferation of associations that carried out the exceptional activity of ritual slaughtering (*Chaïre Shalom ve Tsedek v. France*, paras 86–88).

Seven judges jointly submitted a dissenting opinion, arguing that by denying the applicant's organisation the status of a religious body and rejecting the permit for ritual slaughtering, the state had unjustifiably restricted the right to freedom of religion. With regard to Article 14, the dissenters noted that the applicant's organisation was in an analogous situation to ACIP and that the right to non-discrimination implied that states should not treat individuals or communities in analogous situations differently without an objective and reasonable justification. They asserted that the refusal of a permit "amounted to a failure to secure religious pluralism".

This case shows the steady but sometimes difficult relationship between human rights and cultural – in this case religious – diversity. There have been many other cases concerning religious issues, including on the wearing of headscarves. In all these cases, the Court tries to assess whether a certain restriction of freedom of religion is lawful, pursues a legitimate aim and is necessary and proportionate, while generally reaffirming the importance of pluralism and diversity for a democratic society.

### **Traditional lifestyle and respect for private life**

Under Article 8 of ECHR on the right to respect for private life, family life and home, the European Court has dealt with several cases concerning Roma families in the UK who were refused planning permission to place their

caravans on a certain piece of land. The Court did not find a violation of Article 8 in these cases, mainly because this provision would not entail such far-reaching positive obligations as to imply the right to be provided with a specific home of choice (*Buckley v. the United Kingdom*, Application No. 20348/92, decision of 25 September 1996, Reports of Judgments and Decisions 1996-IV, no. 16; *Chapman v. the United Kingdom*, Application No. 27238/95, decision of 18 January 2001). The Chapman case was one of the five concerning the refusal of the government to provide gypsy families with planning permissions. Although the circumstances of the cases differed slightly, the Court in all cases reached the same conclusion. The other four cases are *Beard v. the United Kingdom*, Application No. 24882/94, decision of 18 January 2001; *Coster v. the United Kingdom*, Application No. 24876/94, decision of 18 January 2001; *Lee v. the United Kingdom*, Application No. 25289/94, decision of 18 January 2001; and *Jane Smith v. the United Kingdom*, Application No. 25154/94, decision of 18 January 2001. The Commission, by 18 votes to 9, decided that the UK had not violated Article 8 or Article 14 of ECHR (see *Chapman v. the United Kingdom*, 18 January 2001, paras 3–4 and paras 10–18). The cases are interesting from the point of view of cultural diversity, because the Court established a remarkable link between the traditional way of life of the gypsies and respect for their home and private life.

By citing international and European instruments on minorities, the Court observed that

[t]here may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe that recognises the special needs of minorities and the obligation to protect their security, identity and lifestyle not only for the purpose of safeguarding the interests of the minorities themselves, but to preserve a cultural diversity of value to the whole community. (*Chapman v. the United Kingdom*, 18 January 2001, paras 90–93, (quote in para. 93).

However, the Court continued by stating that there was no definite consensus among states on which state action would be desirable in a given situation. The Court noted that

the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting

requirements, renders the Court's role a strictly supervisory one. (*Chapman v. the United Kingdom*, para. 94)

This statement reflects the judicial constraint of the Court, acting with self-restraint to avoid overstepping its mandate. In such cases, the Court is not likely to be inclined to impose positive obligations on states. The Court finally held, by 10 votes to 7, that Article 8 had not been violated.

As regards Article 14 of ECHR concerning non-discrimination, the Court stated that the vulnerable position of gypsies as a minority required a special consideration of their needs and lifestyle in regulatory planning. However, in this case, the Court found that gypsies were not treated worse than non-gypsies who wished to live in a caravan. The Court unanimously concluded that there had been no violation of Article 14 (*Chapman v. the United Kingdom*, paras 95–97, 117–130).

Seven judges submitted a joint dissenting opinion in which they concluded that the UK had violated Article 8 (joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strá Nická, Lorenzen, Fischbach and Casadevall). The dissenters did not agree with the view that special protection under Article 8 would conflict with Article 14 on non-discrimination. The dissenters argued that discrimination might also arise if states fail to treat different situations differently. The judges concluded that there had been a violation of Article 8 and that this article did impose

a positive obligation on the authorities to ensure that gypsies have a practical and effective opportunity to enjoy their rights to home, private and family life, in accordance with their traditional lifestyle. (*Chapman v. the United Kingdom*, paras 8–10)

In this case, the rights to private and family life were given a cultural dimension, particularly the protection of a traditional lifestyle (under the ESC, the European Committee on Social Rights has issued several non-binding views on cases concerning discrimination of Roma in housing, in violation of Article 31 of the ESC. See, for example, Communication No. 15/2003 against Greece, Communication No. 27/2004 against Italy and Communication No. 31/2005 against Bulgaria. As these cases mainly concern racial discrimination and racial segregation and no

specific reference was made to culture or cultural diversity, they are not dealt with in detail). The applicants lost their cases because the Court, although concluding that there was general consensus on the special needs of minorities and the obligation of states to protect their culture, did not deem these obligations to be sufficiently concrete to conclude on a breach of Article 8. With regard to the special treatment of gypsies in relation to non-discrimination, the Court adopted a rather curious view. On the one hand, the Court emphasised the special position minorities may have in policy-making. On the other hand, the Court argued that, if gypsies had been treated differently from other citizens, this would be in conflict with non-discrimination. As stated above and confirmed by the European Court itself, non-discrimination not only implies that equal cases should be treated equally but also that different situations should be treated differently. In some cases, cultural communities may need special measures to protect their (cultural) interests.

### **The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights: indigenous peoples and land**

The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights (IACourtHR) have also dealt with cases in which, in the absence of provisions in the American Declaration and the American Convention directly referring to culture, the cultural dimension of several human rights was clearly acknowledged. These cases concern indigenous communities that were discriminated against through forced assimilation and land seizure, as a result of which their cultural identity and lifestyle were jeopardised.

In the case of *Yanomami v. Brazil* (Organization of American States [OAS] 1985), for example, the complainants argued that the Brazilian government had failed to protect the Yanomami by permitting the construction of highways and mining activities on ancestral lands of the tribe. The IACHR concluded that the Brazilian government had violated several rights in the American Declaration, such as the right to life, personal security, residence and health (OAS 1985, para. 1,

p. 33). The Commission also invoked Article 27 of ICCPR, arguing that

international law in its present state recognises the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity. (OAS 1985, para. 7, p.31)

The citation of Article 27 of ICCPR is all the more interesting since Brazil was not a party to the ICCPR at that time (Brazil ratified the ICCPR on 24 January 1992).

In the case of *Awat Tingni v. Nicaragua* (the case of the *Mayagna (Sumo) Indigenous Community of Awat Tingni versus the Republic of Nicaragua*, judgement of 31 August 2001, see, also the arguments of the IACHR in a report entitled “The human rights situation of the Indigenous People in the Americas” (OEA/Ser.L/V/II.108 doc. 62, 20 October 2000) the Commission’s reports are confidential, but limited information can be found in a report entitled “The human rights situation of the Indigenous People in the Americas” (OEA/Ser.L/V/II.108 doc. 62, 20 October 2000), the IACourtHR concluded that Nicaragua had violated the right to property (Article 21 of the Convention) by not delimiting and demarcating the communal property of the Awat Tingni and by authorising third parties to exploit land and resources with respect to that property. The IACourtHR ordered Nicaragua to demarcate and recognise the ownership title over the land of the Awat Tingni in accordance with the community’s values and customs (*Case of the Mayagna (Sumo) Indigenous Community of Awat Tingni versus the Republic of Nicaragua*, judgment of 31 August 2001, paras 151, 153, 155). The IACourtHR explained the connection between land rights and the culture of an indigenous community as follows:

[T]he close relationship that the communities have with the land must be recognised and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations. (*Case of the Mayagna (Sumo) Indigenous Community of Awat Tingni versus the Republic of Nicaragua*, judgment of 31 August 2001, para. 149).

The decision of the IACourtHR in the Awat Tingni case has been reaffirmed in other cases. The *Toledo Maya* case against Belize (IACHR 2004 Report No. 40-04, case No. 12.053 *Maya Indigenous Communities of the Toledo District Belize*, 12 October 2004), (for example, also concerned an indigenous community which claimed that its rights had been violated by state permissions for logging and oil development. It was somewhat different from the Awat Tingni case in the sense that Belize was not a party to the American Convention. The IACHR therefore applied the American Declaration, particularly Article 1 on the right to life, Article 3 on religious freedom, Article 6 on family life, Article 11 on the preservation of health and well-being and especially Article 23 on the right to property (IACHR 2004).

In its final decision the IACHR reaffirmed that it is generally recognised that special measures might be taken to secure indigenous human rights (IACHR 2004, para.97). The Court reasoned that the right to property has a distinctive meaning as far as indigenous peoples are concerned, because

the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realisation of their human rights. (IACHR 2004, para. 114)

It reaffirmed the cultural dimension of the right to property by expressing the “longstanding view that the protection of the culture of indigenous peoples encompasses the preservation of the aspects linked to productive organisation” (IACHR 2004, para. 120). The IACHR found that Belize had violated the right to property and the right to equality before the law, the cultural dimension of these rights being decisive.

This line of reasoning was embraced in more recent cases. In the *Yakye Axa* case and the *Sawhoyamaxa* case the IACHR found that Paraguay had violated the right to property as laid down in Article 21 of the Convention by failing to ensure the effective use and enjoyment of ancestral land by the respective indigenous communities (*Case of Yakye Axa Indigenous Community v. Paraguay*, judgment of 17 June 2005 in which the proceeding of the IACHR was cited in para. 7; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, judgment of

29 March 2006, in which the decision of the IACHR was cited in para. 8). It ordered Paraguay to restitute the ancestral land or to provide an alternative piece of land and to pay monetary compensation, all in accordance with the cultural practices of the communities (*Case of Yakye Axa Indigenous Community v. Paraguay*, para 7-1; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para.8-5). The IACourtHR reaffirmed the strong link between ancestral land and a community's cultural identity. In both cases it argued that

the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity. (*Case of Yakye Axa Indigenous Community v. Paraguay*, para 135; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 118)

In both cases separate opinions were submitted by judges on the cultural dimension of the cases. In the *Yakye Axa* case, Judge Burelli emphasised the importance of the right to cultural identity, especially for ethnic and cultural groups. This right could be constructed from the sum of other human rights, including the right to health, property, assembly, association, freedom of religion and expression. He concluded that

it is possible to establish that cultural identity is expressed in various ways that fall under the protection, as well as the limitations, set forth in the American Convention on Human Rights. (*Case of Yakye Axa Indigenous Community v. Paraguay*, partially dissenting opinion by Judge A. Abreu Burelli, para. 36).

In the *Sawhoyamaya* case, Judge Trindade also elaborated upon the importance of the right to cultural identity as part of or an addition to the fundamental right to life (*Case of the Sawhoyamaya Indigenous Community v. Paraguay*, separate opinion by Judge A.A. Cansado Trindade, paras 4 and 28). These cases confirm the importance and potential of human rights provisions for the promotion and protection of cultural diversity by recognising the cultural dimension of these rights.

## Concluding remarks

The Universal Declaration on Cultural Diversity (2001) notes that cultural diversity is an important source of exchange, innovation and creativity, which should be preserved for present and future generations. Cultural diversity is “a living, and thus renewable treasure that must not be perceived as being unchanging heritage but as a process guaranteeing the survival of humanity” (Article 1 and message of the Director-General attached to the Declaration, (UN Documents n.d.)). The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions recognises cultural diversity as a defining characteristic of humanity that nurtures human capacities and values and is essential to the full realisation of human rights. If cultural diversity is an important value to be promoted and protected, the human rights framework provides a logic and suitable framework to do so. Linking cultural diversity and human rights affirms that culture is an important aspect of the identity, existence and dignity of individuals and communities.

Human rights provide a moral and legal framework for promoting and preserving not only the diversity between cultures, but also the diversity within cultures. Apart from reaffirming the importance of culture for human dignity, human rights also provide a frame for cultural diversity to shield it from negative side effects. As shown above, cultural rights cannot be enjoyed without limit. They cannot be invoked or interpreted in such a way as to justify the denial or violation of other human rights and fundamental freedoms. Any attempt to justify such violations on the basis of culture has no validity under international law. This is supported by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in Article 2(1)

no one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the UDHR or guaranteed by international law or to limit the scope thereof.

The framework of human rights, with its system of limitations based on the principles of equality,

non-discrimination, as well as the rights of others, could safeguard cultural diversity from being misused for the protection of cultural practices that infringe upon human rights.

Within the general human rights framework, cultural rights have special importance for the promotion and preservation of cultural diversity. Above, an overview has been given of the rights that could qualify as cultural rights and that have a direct or indirect link with cultural diversity. The broad concept of culture, including not only cultural products, but also process-oriented aspects such as association, language, religion and education, implies that the category of cultural rights includes many different human rights. Cultural rights are the rights to create and enjoy cultural products and the rights to have access to and participate in culture, as well as the rights to freedom of association, expression, religion and the right to education. Cultural rights may also refer to the cultural dimension of human rights, such as the rights to private life, family life, housing and health. In other words, the category of cultural rights covers many different human rights. Cultural rights are more than merely those rights that explicitly refer to culture but include all human rights that protect or promote components of the cultural identity of individuals and communities as part of their human dignity. Cultural rights reflect the individual as well as the collective dimension of human rights and they have a multidimensional character. As such, they embody the indivisibility, interdependence and interrelation of all human rights.

States have adopted several international human rights instruments that include cultural rights provisions, as well as several instruments that recognise the link between cultural diversity and human rights, such as the UNESCO instruments on cultural diversity. This implies that states generally recognise the importance of both human rights and cultural diversity, including the link between the two. However, the implementation of human rights in relation to cultural diversity raises difficult issues. International bodies supervising the human rights treaties have dealt

with individual cases in which cultural diversity issues played an important role. The various cases described above confirm that many human rights provisions have a cultural dimension that is taken into account by the supervisory bodies, especially in relation to minorities and indigenous peoples. Apart from the rights directly referring to culture, rights related to life, private life, health, property and association have also been invoked to protect cultural interests. The cases show that the supervisory bodies underscore the value of cultural diversity and the role of human rights in its promotion and protection.

While generally acknowledging the importance of cultural diversity and human rights, including cultural rights, states do not always agree whether cultural rights are substantive human rights or more policy-oriented rights that do not impose direct, definite obligations. The discussion in this article indicates that cultural rights are true human rights that protect an essential part of human dignity. As such, they have the same value as other human rights of a civil, economic, political or social nature. Cultural rights should not be seen as an extra after other human rights have been implemented. Cultural rights, including the cultural dimensions of human rights, are to be enjoyed by individuals and communities, and states have legal obligations in this regard. At the same time, these rights cannot be enjoyed without limit and can be restricted to protect legitimate aims, in particular the rights of others. In order to encourage states to improve the implementation of cultural rights and to take the cultural dimension of human rights better into account, the normative content and scope of these rights and the role they play in the promotion and protection of cultural diversity should be further elucidated by supervisory bodies, scholars and non-governmental organisations. Much can also be expected in this regard of the recently appointed UN Independent Expert on Cultural Rights. Cultural diversity and human rights may be a good match, but any relationship needs energy, work and dedication in order to sustain itself and to advance.

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