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Towards a Right to Cultural Identity? Yes, Indeed!

Yvonne Donders*

1. Introduction

In 2002 I presented my PhD research in the book *Towards a Right to Cultural Identity?*. The aim of my dissertation was to examine to what extent a right to cultural identity should be further developed as a separate right within the framework of international human rights law, and what the nature, scope and content of this right could be. The title of the book was well thought-out. First of all, it referred to a right to cultural identity and not to the right to cultural identity. This was not merely because no such right was yet secured, but also to emphasize that there was perhaps not one fixed right to cultural identity. Secondly, the title ended with a question mark. This was because it was truly an open question at the beginning of the research. Perhaps rather uncommon for a human rights project, the conclusion was that a right to cultural identity should actually not be developed. In my words back then:

«although it is true that cultural rights have generally been neglected and that the protection of cultural identity as an important value and element of human dignity would fit into the human rights sphere, translating cultural identity into a separate right is *neither desirable nor necessary*. It is not desirable because translating the vague and general concept of cultural identity into a right would risk abuse or suppression of individual rights and freedoms within a cultural context. It is not necessary because existing cultural rights in the broad sense already offer possibilities for the protection of cultural identity».  

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2 Ibid., p. 337 (emphasis added).
Instead I proposed that cultural identity should serve as some sort of principle in the interpretation and implementation of existing human rights provisions, especially cultural rights: «[h]uman rights provisions should be considered from a more cultural perspective, whereby the cultural dimension of all human rights is developed, using a broad concept of cultural identity and its collective dimension.»

More than 15 years later, much has happened in relation to my question and conclusion. First of all, cultural rights are no longer neglected or ignored. In the last decade much academic output on cultural rights has been published. Furthermore, the mandate of the UN Special Rapporteur on Cultural Rights was established and the mandate holders have issued several reports on different aspects of cultural rights, including cultural heritage, intellectual property, violent extremism, artistic freedom, cultural rights of women and universality. Also important was the adoption in 2007 of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly and the adoption in 2009 of General Comment 21 on the right to take part in cultural life by the Committee on Economic, Social and Cultural Rights. These instruments, documents and developments show that academics, experts and States have indeed further elaborated cultural rights and developed the cultural dimension of human rights.

Secondly, there is new caselaw by international and regional bodies involving a right to cultural identity. In these cases, cultural identity is indeed used to «colour existing human rights provisions». However, it seems that cultural identity is increasingly seen also as a more self-standing or substantive right to be enjoyed by individuals and by communities. Indeed, the collective subject of the right to cultural identity is increasingly recognized. In my book I encouraged monitoring bodies to take the collective dimension of cultural identity into account, for instance by referring to the community behind the individual. I was however more

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3 Ibid., p. 341.
5 In 2006, the mandate of the independent expert in the field of cultural rights was established, see Human Rights Council, Resolution 10/23, Independent expert in the field of cultural rights, UN Doc. A/HRC/RES/10/23 of 26 March 2009. The mandate was extended and changed into Special Rapporteur in the field of cultural rights. The most recent extension was adopted in Human Rights Council, Resolution 37/12. Mandate of the Special Rapporteur in the field of cultural rights, UN Doc. A/HRC/RES/37/12 of 5 April 2018 (the reports are available at www.ohchr.org) Several reports have been bundled and commented upon in L. Belders and H. Porsdams (eds), op. cit.
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reserved about a collective right to cultural identity.\(^8\) I found several issues hard to overcome, for instance the definition of the subject, including the level and connotation of the community (national, regional, religious or linguistic), the risk of suppression or unjustified limitation of individual rights and freedoms by the collective protection of cultural identity, and the representation of individuals in the decision-making on what the cultural identity of the community would be.\(^9\) The latter two arguments also related to the broader issue that a right to cultural identity could be misused to justify questionable cultural practices. Here also interesting new developments in several standards and in the work of supervisory bodies have taken place.

Below several crucial normative and interpretative developments related to a right to cultural identity are discussed, testing some of my conclusions of more than 15 years ago. A selection was made of instruments and caselaw adopted after 2002 in which a right to cultural identity was explicitly or noticeably discussed. This compilation shows that I may have found that translating cultural identity into a separate right was neither desirable nor necessary, but that it is, at least to some extent, actually happening.

2. Developing a Right to Cultural Identity Is Not Desirable, or Is It?

There is no doubt that cultural identity is important for human beings, individually and collectively. Bearing in mind the crucial value of cultural identity as part of human dignity, a right to cultural identity fits well in the idea of human rights. The reason a right to cultural identity has however not only been embraced but also criticized is that the protection of cultural identity, in particular as a collective notion, may have negative consequences in the form of supporting or sustaining harmful cultural practices and/or limiting individual rights and freedoms.

In the book I found the concept of cultural identity to be too broad and vague for it to be translated into a separate human right: «[t]he comprehensive nature of cultural identity cannot be reduced to a concrete right. Both the object and the State obligations of such a right would be equally broad and, therefore, vague [...]». I linked that also to justiciability: «[a] right, especially if it were to have a justiciable character, should be sufficiently clear to be used before a judicial body, and the State obligations to the right should be concrete. Both are problematical in relation to a right to cultural identity, because cultural identity is a broad and dynamic concept». I realized that many other human rights are vague and dynamic, but found that cultural identity involved so many different

\(^8\)I use the term ‘collective right’ here to cover a right for communities as such (group rights) as well as a right to be enjoyed by persons collectively. For a more extensive analysis and elaborated distinction between forms of collective cultural rights see Y. DONDERS, “Foundations of Collective Cultural Rights in International Human Rights Law”, in Cultural Rights as Collective Rights: An International Law Perspective, A. JAKUBOWSKI (ed.), Leiden-Boston, 2016, p. 89 ff.

fields and aspects that it would be difficult to determine the object of the right – what is that one is actually entitled to –, as well as the obligations of States. Decisive for my conclusion that a separate right to cultural identity was not desirable was, however, the risk of the abuse of this vague and broad right, for example in the form of suppression or limitation of individual rights and freedoms or justification of intolerable practices. I did however state that «these matters should, in principle, be dealt with on a case-to-case basis, depending on the community and situation involved».  

There has always been great awareness in international human rights law of the potential risk of cultural rights and a right to cultural identity. Culture can be used as a justification for harmful practices that are in conflict with or limit the enjoyment of human rights. In recent years, several international instruments have been adopted that explicitly state that respect for cultural diversity and cultural identities cannot be an argument to systematically or grossly deny international human rights law. In the Universal Declaration on Cultural Diversity (adopted in 2001) and in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted in 2005) it is clearly laid down that no one may invoke cultural diversity in order to infringe upon human rights as guaranteed by the UDHR and by international law, or to limit the scope thereof. In other words, in order for cultural institutions, activities or practices to be accepted, they should not be in conflict with the values underlying international human rights law, such as human dignity, integrity and equality. This is also reflected in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted in 2003). Art. 1 of this treaty states that «if, for the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development». The UN Declaration on the Rights of Indigenous Peoples (adopted in 2007) maintains in Art. 34 that «[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards». 

Several UN treaties contain specific provisions concerning the (in)acceptability of cultural practices and on the obligation of the State to eradi-

10 Ibid., pp. 337-338. 
11 Ibid. 
cate them or to promote modification. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), for example, states in Art. 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».

The Convention on the Rights of the Child (CRC) contains in Art. 24(3) that «States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children».

Several UN treaty bodies have given their assessment and opinion on specific practices that they consider harmful and therefore against the respective treaty. These general comments and general recommendations are not legally binding upon states, but they show how treaty bodies have elaborated on the compatibility of certain cultural practices with human rights.

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) adopted in 1990 a general recommendation on female circumcision, urging States to eradicate this practice harmful to the health of women. In its general recommendation on violence against women, adopted in 1992, the CEDAW Committee stated that «[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, dowry deaths, acid attacks and female circumcision [...].» It found these practices to be depriving women of their rights as protected by the treaty.

In its general comment on the equal enjoyment of rights, adopted in 2000, the Human Rights Committee has stated that «States Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Cove-

15 A similar provision can be found in Art. 2(2) of the Protocol to the 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 [...].»

16 Although ‘traditional practices’ are not defined, it becomes clear from the drafting documents that this provision was targeted against FGM. See S. HARRIS-SHORT, “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural relativism and the UN Convention on the Rights of the Child” in Human Rights Quarterly 2003, p. 130 ff., pp. 136-137.


nant rights». It has also listed a number of harmful cultural practices as violations of human rights. It maintains that female infanticide, widow burning and dowry killings are violations of the right to life, that forced abortion, forced sterilisation and forced genital mutilation are violations of the right not to be subjected to inhumane and degrading treatment, and that forced male guardianship is a violation of the freedom of movement.

In 2014 the CEDAW and CRC Committees adopted a joint general comment/recommendation on harmful practices. The purpose of the document was «[…] to clarify the obligations of States parties to the Conventions by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the Conventions to eliminate harmful practices». The Committees provided for extensive criteria to identify harmful practices and they specifically listed and elaborated on female genital mutilation, child and/or forced marriage, polygamy and crimes committed in the name of so-called honour as examples of harmful practices.

Apart from the specific prohibition of harmful cultural practices, there are general rules in international human rights law on the possibility to limit the enjoyment of human rights, including cultural rights. Limitation clauses, such as in Art. 29 of the Universal Declaration of Human Rights (UDHR) or in human rights treaties, provide that rights can be restricted by States under certain specific circumstances and if the measures fulfil certain criteria. Similarly, if a right to cultural identity would exist, it could be limited in case of conflict with other human rights or with the general interest of society.

International and regional monitoring bodies have frequently dealt with cases concerning limitations of human rights in relation to the cultural identity of a person or community, some of which are dealt with below. In relation to harmful practices, the African Court has in 2018 submitted an interesting decision in a case against Mali. Mali changed its family code setting the minimum age for marriage at eighteen for boys and sixteen for girls and allowing exemption for marriage as from fifteen years, with the father’s or mother’s consent for the boy, and only the father’s consent, for the girl. The claimants stated that this law violated provisions in the Protocol to the African Charter on the Rights of Women in Af-

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19 Human Rights Committee, General Comment No. 28: Equality of Rights Between Men and Women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add. 10, 29 March 2000, para. 5.
20 Ibid., paras. 10 and 16.
21 Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women, General Comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014.
22 Ibid., para. 2.
23 Ibid., paras. 15 and 16.
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Africa (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child (ACRWC), which set the minimum age for marriage at 18 without exception. Mali argued that it had first proposed a law that did comply with its international commitments, but that this had led to mass protest of such scale that the State feared «[...] social disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion». It therefore chose to submit the text for a second reading, involving Islamic organisations, leading to the current law. It found it «[...] unjustified to accuse the State of violating rights whereas the State was only revising the initial text in order to garner consensus and avoid unnecessary disruptions». Mali further argued that the rules on the minimum age of marriage «[...] must not eclipse social, cultural and religious realities» and that «[...] the distinction contained in Art. 2g1 of the Family Code should not be seen as a lowering of the marriage age or a discrimination against girls, but should rather be regarded as a provision that is more in line with the realities in Mali». Mali also argued that «law should be in harmony with socio-cultural realities» in order to be able to be implemented. The African Court, however, noted that «[...] the way in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards [...]]». The Court concluded that the family code and its minimum age of marriage, as well as matters of inheritance and discriminatory customary practices, violated several provisions of African instruments (Art 2(2) and 6(b) of the Maputo Protocol, and Art. 1(3), 2 and 21 of the African Charter on the Rights and Welfare of the Child), as well as international instruments (Art. 5 CEDAW).

Interestingly, the European Court had some years before also argued that not all aspects of culture and marriage are protected under the European Convention on Human Rights (ECHR). First the Court noted that marriage has «[...] deep rooted cultural connotations» and the Court accepted that a payment to the father of the bride «[...] can reasonably be accepted as representing a gift from one family to another, a tradition common to many different cultures in today's society». Then, the Court stated in a later case that Art. 8 ECHR on the right to respect for private life and Art. 12 ECHR on the right to marry «[...] cannot be in-

27 African Court on Human and Peoples’ Rights, APDF and IHRDA v. Mali, cit., para. 64.
28 Ibid., para. 65.
29 Ibid., para. 66.
30 Ibid.
31 Ibid., para. 94.
32 Ibid., paras. 114-115 and 124-125.
interpreted as imposing on any State party to the Convention an obligation to rec­
ognise a marriage, religious or otherwise, contracted by a 14 year old child».

The instruments and documents described above show that concerns as re­
gards the risk a right to cultural identity may pose are recognized. States have
found ways to lay down general rules on State obligations in relation to the pos­
sible harmful effects of a right to cultural identity. Monitoring bodies have filled
in these rules with more specific guidelines concerning the elimination of certain
practices that they consider to be harmful and against the provisions of the trea­
ties. The risk of a right to cultural identity being abused to justify harmful cultur­
al practices or implying the suppression of individual rights and freedoms within
a cultural context, is thereby, at least in theory, diminished. It should however be
noted that prohibition of harmful cultural practices in treaties and laws does not
always prevent these from being practised. Law cannot by itself change cultural
practices. Changes in cultural practices are most successful if they arise within the
cultural community itself instead of merely being imposed from outside, by law
or by the State. The African case does show however that States are obligated to
comply with international and regional human rights standards to which they are
a party, even if that means that certain groups in society disagree. In this regard, a
right to cultural identity seems to be less problematic if its limits and the existing
obligations of States are taken seriously.

3. Developing a Right to Cultural Identity Is Not Necessary, or Is It?

The other reason to reject a separate right to cultural identity was that existing
human rights provisions at the international and regional level already offer pos­
sibilities in relation to the protection of (aspects of) cultural identity; for example,
the rights to freedom of expression, freedom of religion, freedom of association,
and the right to education. Land rights for indigenous peoples as important part
of their cultural identity are protected by various provisions, such as the rights to
life, health, family life and home. Protecting and promoting these provisions indi­
directly also protects and promotes cultural identity. In other words, developing a
separate right to cultural identity would not be necessary. I did however note that
«the possibilities offered by existing human rights provisions for the protection
of cultural identity should be further developed through the clarification and im­
plementation of these provisions in the light of the protection of cultural identi­
ty».

This has indeed happened by several monitoring bodies at international and regional level.

34 European Court of Human Rights, Z.H. and R.H. v. Switzerland, Application no. 60119/12,
Judgment of 8 December 2015, para. 44.
3.1. UN Level: Rights to Culture and Cultural Life

A right to cultural identity is as such (still) not incorporated in international human rights instruments. There are however human rights provisions in international legal instruments that explicitly refer to culture or cultural life. The most well-known provisions are the right of everyone to participate in cultural life, as laid down in Art. 27 UDHR, Art. 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and several other treaties, the right of members of minorities to enjoy their own culture, practise their own religion and speak their own language, as laid down in Art. 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 30 of the Convention on the Rights of the Child (CRC), and the right to freely pursue cultural development as part of the right to self-determination (Art. 1 ICCPR and ICESCR). Another example is included in the CRC, namely the obligation of States to promote and facilitate the right to education for children directed to the development of «[...]» respect for his or her own cultural identity, language and values. «[...]»

Several instruments on rights of specific communities include provisions explicitly mentioning protection of their cultural identity. Most of these provisions are, however, formulated as State obligations, not as individual or collective rights. The Convention on the Rights of Migrant Workers and their Families contains in Art. 31 that «[...]» States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin». Interestingly, according to Art. 34, migrant workers also have a duty to «[...]» respect the cultural identity of the inhabitants of such States. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities includes in Art. 1 the duty of States to protect and promote the cultural (and religious, ethnic, and linguistic) identity of minorities. Following from this general provision, members of minorities have specific rights, for example, to enjoy their culture, to use their language and practice their religion. The Declaration has a strong collective dimension, but does not include rights for communities as such. The Declaration includes that the rights in the Declaration can be enjoyed collectively (Art. 3), similar to Art. 27 ICCPR, but where the Declaration refers to minorities as such, in relation to the protection of their identity and existence, it is formulated as duties on the part of States.

The UN Declaration on the Rights of Indigenous Peoples does include rights related to their cultural identity as group or community rights. Art. 2 includes
that «[i]ndigenous peoples and individuals [...] have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity». Art. 33 stipulates that «[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions». Several other provisions give cultural rights to indigenous peoples as such. Apart from the right to self-determination, the Declaration includes for instance in Art. 5 that «[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State». Art. 8(1) stipulates that «[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture».

The Declarations are not legally binding. They have however served as inspiration for monitoring bodies in their assessment of the implementation of and compliance with their treaties. These monitoring bodies, at international as well as regional level, have elaborated several rights provisions, showing increasing recognition of cultural identity as an individual and a collective right.

3.1.1. The Right to Take Part in Cultural Life

The Committee on Economic, Social and Cultural Rights (CESCR) clarified the normative content of the right to take part in cultural life in its General Comment 21. In this General Comment, the Committee recognized, under the heading of State obligations, several rights related to cultural identity as part of the right to take part in cultural life. It stated for instance that the obligation to respect «[...] includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group: (a) To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected; This includes the right not to be subjected to any form of discrimination based on cultural identity, exclusion or forced assimilation, and the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life. States parties should consequently ensure that their legislation does not impair the enjoyment of these rights through direct or indirect discriminations».

In other words, a right to cultural identity here includes the rights to choose and express cultural identity and to non-discrimination based on cultural identity.

38 Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right to Take Part in Cultural Life (Art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21 of 21 December 2009. The Optional Protocol to the ICESCR has entered into force in 2013 and therefore only a very limited amount of cases has been dealt with by the Committee, none of which concerned the right to take part in cultural life.

39 CESCR, General Comment No. 21, cit., para 49(a) (emphasis added); see also paras. 49(d) and 50(d).
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The Committee further endorsed the collective dimensions of the right to take part in cultural life in terms of the content and the enjoyment of this right. It considers culture as a broad and dynamic notion encompassing

«(...) inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities».

Although the right to take part in cultural life is formulated as an individual right, without an explicit reference in the treaty to shared enjoyment, the Committee confirmed that it is usually enjoyed together with other members of a cultural community. The Committee stated that the term 'everyone', as the subject of the right to take part in cultural life, refers to the individual or the collectivity: «cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such».

3.1.2. The Right to Enjoy Culture for Members of Minorities

Art. 27 ICCPR is formulated in individual terms, but explicitly recognizes its collective enjoyment by members of minorities 'in community with others'. This collective dimension is also reflected in cases where individuals present a collective claim on behalf of their community to the Human Rights Committee (HRC).

The HRC in its General Comment on Art. 27 recognized the collective dimension of the object and the subject of the right to enjoy culture. The HRC states that

«although the rights protected under Art. 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture...in community with the other members of the group [...].»

It also maintained that the rights in Art. 27 are «[...] directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole».

40 Ibid., para 13 (emphasis added).
41 Ibid., para. 9.
42 Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5 of 1994, paras. 6.2 and 9 (emphasis added).
the practice of the HRC it becomes clear that indigenous peoples fall within the scope of Art. 27, especially with regard to their culture.43

The HRC has established a broad conception of culture, including all kinds of cultural, social and economic activities. For instance, it has recognized education in a minority language as «fundamental part of minority culture», to be protected under Art. 27 by negative as well as positive measures by the State.44 The HRC further maintains that culture includes for example a particular way of life associated with the use of land resources, especially in relation to indigenous peoples.45 The HRC has established a set of criteria to determine whether specific State interference with Art. 27 constitutes a violation of this provision. In general, State measures which interfere with the enjoyment of culture must be provided by law, have a reasonable and objective justification and be compatible with the other provisions in the ICCPR. Furthermore, the State has the positive obligation to consult the community involved, including seeking to obtain their prior and informed consent, and to ensure that the measures may not have such an impact as to fully deny the rights under Art. 27.46

In most cases, the impact was found to be insufficient or insufficiently clear to constitute a breach of Art. 27. This led to critical remarks about the impact assessment by the HRC. The main critique was that the HRC did a quantitative comparison between the area allocated to the disputed projects and the total area used by an indigenous community for their traditional activities such as fishing or reindeer herding. It was argued that insufficient attention was paid to qualitative aspects of a certain area and the potential impact of the measures on the future livelihood of the community.47

The first case in which the HRC concluded that the limitation of Art. 27 indeed constituted a breach of that provision was the case of Poma Poma v. Peru. This case concerned the withdrawal of water from indigenous land authorised by

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44 Human Rights Committee, Mr. Rakhim Mavloniov and Mr Shansiy Sa'adi v. Uzbekistan, Comm. No. 1334/2004 of 29 April 2009, paras. 8.6 and 8.7.

45 Human Rights Committee, General Comment No. 23, cit., para. 7.


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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. 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 a violation of Art. 27 ICCPR.

It is further interesting to note that in several cases the HRC confirmed its dynamic approach to the concept of culture. In the Länsman cases, the HRC had argued that Art. 27 not only protects the traditional economic activities of a community. The fact that, for example, technological innovations are used in these economic activities, such as reindeer herding, does not imply that Art. 27 is no longer applicable. In Apirana Mahuika the HRC again asserted that Art. 27 not only protects traditional means of livelihood of minorities, but also allows for adaptation of those means to the modern way of life and technology. These decisions indicate that the HRC employs a dynamic concept of culture, which is not frozen but «[...] may be invoked as support for an indigenous way of life that has a historical link to the traditional life style but has, nevertheless, undergone transformations [... ]».

Art. 15 and Art. 27 do not explicitly include a right to cultural identity, but the above confirms that cultural identity is an important value underlying these provisions. The broad interpretation of 'cultural life' and 'enjoyment of culture' and their individual and collective dimension, make both provisions very relevant for the protection and development of the cultural identity of individuals and communities. At regional level, a more explicit recognition of a right to cultural identity can be seen.

3.2. Regional Level: Rights to Private Life, Housing, Property and Development

At regional level, also, there is no human rights treaty that includes a specific provision containing a right to cultural identity. However, several human rights provisions have been interpreted as including respect for and protection of cultural identity of individuals and of communities. Below the most relevant examples of cases are dealt with, namely those in which the concept of cultural identity was used explicitly or noticeably by the monitoring body. All cases concern rights of certain cultural communities, be it religious or ethnic minorities or indigenous peoples.

48 Human Rights Committee, Angela Poma Poma v. Peru, cit.
49 Ibid., para. 7.6.
50 Human Rights Committee, Ilmari Länsman et al. v. Finland, cit., para. 9.3.
51 Human Rights Committee, Apirana Mahuika et al. v. New Zealand, cit.
3.2.1. The European Convention on Human Rights and Pluralism

The ECHR does not include provisions explicitly referring to culture, cultural identity or cultural life.\textsuperscript{52} The European Court of Human Rights has however in several cases explicitly referred to obligations related to cultural identity when assessing State compliance with rights to, for example, freedom of religion, freedom of expression, freedom of association and the right to education.\textsuperscript{53} Here only a selection of cases is discussed, based on where the most explicit link with (a right to) cultural identity was made.

One of the important earlier cases relating to cultural identity was the case of \textit{Chapman v. the UK}, which concerned the right for gypsies to live in a caravan. The Court connected this way of living and their traditional lifestyle to the identity of the gypsies and argued that these form part of the right to respect for private life, family life and home as guaranteed by Art. 8 ECHR. The Court cited international instruments on minorities, especially the Council of Europe Framework Convention on National Minorities,\textsuperscript{54} and observed that:

«there 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».\textsuperscript{55}

The Court hereby also recognized not merely the individual but also the collective dimension of the protection of cultural identity. In the end, however, the Court found that there was no concrete consensus among States on \textit{which} action would be desirable in a given situation and therefore the Court did not recognize specific positive State obligations. It concluded that Art. 8 and 14 on non-discrimination were not violated.\textsuperscript{56}

\textsuperscript{52} The \textit{European Social Charter} also does not include such a provision. The Council of Europe Framework Convention on the Protection of National Minorities includes an explicit reference to cultural identity in art. 5, however, not as a right, but as an obligation of States Parties to «[...] promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage».

\textsuperscript{53} Many of these cases are dealt with in Y. DONDERS, \textit{Towards a Right to Cultural Identity?}, cit., pp. 269-300


\textsuperscript{56} \textit{Ibid.}, paras. 94 and 116. Different other aspects of culture and cultural identity have been linked by the Court to the right to private life and family life. For instance, access to burial grounds was considered to be part of private life and family life because of the cultural and religious attachment with the graves of relatives. The case concerned the denial of access to the graves of relatives in a disputed area between Armenia and Azerbaijan, which was found by the Court to be a
In several cases relating to the right to freedom of religion the Court also recognized the link with cultural identity. The Court has often emphasized the importance of religious pluralism for democratic societies, emphasizing that in case of tensions between religious groups, «the role of the authorities [...] is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other».\(^7\) One of the more recent cases in this regard is the case of S.A.S. v. France concerning the prohibition of wearing facial coverage in public places.\(^8\) In this case, the Court recognized that wearing full face coverage may be an important part of someone’s social and cultural identity.\(^9\) It also argued that this expression of cultural identity contributes to pluralism, which is inherent in democracy.\(^10\)

In the SAS case, the Court maintained that «[...] democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities [...].»\(^11\) At the same time the Court argued that «[...] it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected».\(^12\) In this case the Court left the final decision on how to respect and protect pluralism to the State party by giving it a wide margin of appreciation. It found the ban on facial coverage justified to reach the aim of ensuring the observance of the minimum requirements of life in society, or ‘living together’, as part of the protection of the rights and freedoms of others.\(^13\) As regards the proportionality of the ban, the Court noted that women «[...] may perceive the ban as a threat to their identity».\(^14\) The Court however found that the ban was «[...] not expressly based on the religious connotation of the clothing in question but solely on the fact that it

\(^{7}\) Cases include European Court of Human Rights, Sargsyan v. Azerbaijan, Application no. 40167/06, Judgment of 15 June 2015, para. 257. Different other aspects of culture and cultural identity have been linked by the Court to the right to private life and family life. For instance, access to burial grounds was considered to be part of private life and family life because of the cultural and religious attachment with the graves of relatives. The case concerned the denial of access to the graves of relatives in a disputed area between Armenia and Azerbaijan, which was found by the Court to be a violation of art. 8 among others. European Court of Human Rights, Sargsyan v. Azerbaijan, Application no. 40167/06, Judgment of 15 June 2015, para. 257. Different other aspects of culture and cultural identity have been linked by the Court to the right to private life and family life. For instance, access to burial grounds was considered to be part of private life and family life because of the cultural and religious attachment with the graves of relatives. The case concerned the denial of access to the graves of relatives in a disputed area between Armenia and Azerbaijan, which was found by the Court to be a violation of art. 8 among others.


\(^{9}\) Ibid., paras. 79, 124 and 139.

\(^{10}\) Ibid., para. 120.

\(^{11}\) Ibid., para. 128.

\(^{12}\) Ibid., para. 126.

\(^{13}\) Ibid., para. 142.

\(^{14}\) Ibid., para. 146 (emphasis added).
conceals the face». The Court accepted that France had «[...] to a certain extent restricted the reach of pluralism», but it found that France had not overstepped its wide margin of appreciation in this respect. It concluded that there was no violation of the European Convention. Interestingly two judges in their (partly) dissenting opinion referred explicitly to a right to cultural identity. In their opinion, the blanket ban constitutes a far-reaching prohibition, «touching upon the right to one's own cultural and religious identity».

In another recent case against Bosnia and Herzegovina, the Court found a violation of Art. 9 when a person was prohibited from wearing a skullcap in the courtroom. The Court cited the principles on religious clothing and symbols as developed in SAS and other cases, including the wide margin of appreciation for States. In this case, however, it found a violation since «the applicant had no choice but to appear before the domestic court», which made this case different from «[...] cases concerning the wearing of religious symbols and clothing in the workplace, notably by public officials who may be under a duty of discretion, neutrality and impartiality». The applicant further had no «[...] hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance» and he had shown a respectful attitude. The Court therefore found a violation of Art. 9 of the Convention.

The European Court clearly values respect for cultural identities and pluralism as part of a democratic society. The European Court has not explicitly recognized a right to cultural identity, but it has on several occasions recognized the importance of cultural identity, linking it to, for instance, private life, home and religion and it has requested that States respect and protected different cultural identities and properly balance the majority and minority interests. Focusing on individual rights, the Court also referred to the collectivity behind the individual claimant, for instance gypsies or religious communities, however without recognizing collective rights. Two other regional courts, in the Americas and in Africa, are more outspoken in this regard, in particular in relation to indigenous peoples. This also has to do with the fact that the standards monitored by these Courts provide more direct entry points for a right to cultural identity. Moreover, the specific situations of indigenous peoples in these regions has given rise to more explicit recognition of a right to cultural identity.

3.2.2. The American Convention on Human Rights and the Right to Property

The Inter-American Commission and Court of Human Rights have often dealt with cases concerning indigenous peoples and their cultural identity, reflected in

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65 Ibid., para. 151.
66 Ibid., para. 153.
67 Joint partly dissenting opinion of judges Nussbeger and Jäderblom, para. 2 (emphasis added).
69 Ibid., paras. 41 and 42.
the ownership and use of their lands. In these cases, the Court has established collective rights, in particular related to property, including a collective right to culture and cultural identity.

The case of *Awas Tingni v. Nicaragua* is one of the most famous cases recognizing collective rights related to land, property and cultural identity. In this case the Inter-American Court concluded that Nicaragua had violated the right to property of the Awas Tingni as laid down in Art. 21 of the American Convention on Human Rights. The Court explained the connection between land rights and the culture of an indigenous community as follows:

«the close relationship that the communities have with the land must be recognized 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».

Although the Court did not explicitly recognize a right to cultural identity in this case, the collective right to property is noticeably seen in this light. Also, the reparations Nicaragua was ordered to provide, namely demarcation and recognition of the ownership title over the land of the Awas Tingni, had to be done in accordance with the community’s values and customs, emphasizing the cultural dimensions of such measures.

This line of reasoning was reaffirmed by the Inter-American Court in other cases. The *Toledo Maya case against Belize*, for example, also concerned property and land rights of an indigenous community. Because Belize was not a party to the American Convention, the Court applied several provisions of the American Declaration on Human Rights, most notably Art. 23 on the right to property.

In its final decision, the Inter-American 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

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70 Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua*, Judgment of 31 August 2001.

71 Ibid., para. 149.


effective realization of their human rights [...]».

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 organization [...]».

The Inter-American Court 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, however without explicitly referring to a right to cultural identity.

Cultural identity was explicitly mentioned in the cases of the Yakye Axa, the Sawboyamaza and Xakmok Kasek against Paraguay. In these cases the Inter-American Court found that Paraguay had violated the right to property by failing to ensure the effective use and enjoyment of ancestral land by the respective indigenous communities. It ordered Paraguay to return 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. The Court 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».  

It stated that «[...] disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members». In the Xakmok Kasek case, the Court reiterated the Inter-American Commission by stating that «[...] they have the right to recover

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75 Ibid., para. 114.
76 Ibid., para. 120.
81 Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, cit., para. 147 (emphasis added).
Towards a Right to Cultural Identity? Yes, Indeed!

these lands, or to obtain others of the same size and quality in order to guarantee their right to preserve and develop their cultural identity».

The Inter-American Court has consistently reaffirmed the strong connection between the ownership and use of land and cultural identity, linking rights to property and other human rights to a right to cultural identity. In the case of the Saramaka People v. Suriname, the Court stated that «[...] land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people». The Court further argued that special measure were required «[...] to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States».

In the case of the Kichwa Indigenous People of Sarayaku v. Ecuador, the Court more extensively explored a right to cultural identity, as part of the right to property, but also as a self-standing right. The Court referred to other international and regional instruments and bodies to establish the right to cultural identity. The Court then stated that «[t]he Court considers that the right to cultural identity is a fundamental right – and one of a collective nature – of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society». It concluded violations of the rights to consultation, cultural identity and property.

The idea of the right to cultural identity as a separate right, apart from being an element of the right to property, was reaffirmed in the case of the Garifuna Triunfo de la Cruz Community and its Members v. Honduras, which also concerned ownership and use of land by an indigenous people. The Court repeated its jurisprudence concerning the link between land and cultural identity as well as the obligations of States parties to respect and protect the cultural identity of the community under the right to property. The Court concluded that Ecuador had violated Art. 21 on the right to property, as well as Art. 1(1) on respect for the

82 Inter-American Court of Human Rights, Xákmok Kásek Indigenous Community v. Paraguay, cit., para. 51 (emphasis added).
83 Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of 28 November 2007.
84 Ibid., para. 82 (emphasis added).
85 Ibid., para. 121 (emphasis added).
86 Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of 27 June 2012, section B.6 (“The rights to consultation and to communal property in relation to the right to cultural identity”).
87 Ibid., paras. 215-216.
88 Ibid., para. 217 (emphasis added).
89 Ibid., paras. 227 and 232.
90 Inter-American Court of Human Rights, Case of Garifuna Triunfo de la Cruz Community and its Members v. Honduras, Judgment of 8 October 2013.
91 Ibid., paras. 166 and 167.
rights without any discrimination and Art. 2 on domestic implementation «in relation to their right to cultural identity».\(^92\)

These cases show that although the American Convention on Human Rights does not include a right to cultural identity, its monitoring bodies, the Inter-American Commission and Court, have recognized the existence of such a right and they have identified corresponding negative as well as positive State obligations. It first constructed the right to cultural identity as being part of existing provisions in the American Convention and Declaration on Human Rights, but more recently the right to cultural identity is considered as a self-standing right as well. Moreover, according to the Commission and Court, this right is not merely an individual right, but also a collective right, at least in relation to indigenous peoples.

3.2.3. The African Charter and the Right to Property and Cultural Development

The African Charter on Human and Peoples’ Rights includes several provisions that more directly link to the promotion and protection of cultural identity of individuals and of peoples. It contains concrete collective/peoples’ rights, including the right of peoples to «[...] their economic, social and cultural development with due regard to their freedom and identity [...]» (Art. 22), the right to development (Art. 20) and the right to freely dispose of their wealth and resources (Art. 21). These provisions, together with the individual right to take part in the cultural life of the community and the duty of the State to promote and protect traditional values recognized by the community (Art. 17(2) and (3)), have given the African Commission and African Court on Human and Peoples’ Rights concrete tools to establish an individual and a collective right to cultural identity.

Just as in the Inter-American system, the relevant cases concerned indigenous peoples and the ownership and use of their land. After the famous Ogoni case, in which the Commission found a violation of violations of the rights to health (Art. 16), property (Art. 14) and family rights (Art. 18) of the African Charter,\(^93\) the more recent cases of the Endorois and Ogiek peoples show more explicit references to rights to culture and cultural identity.

The case of the Endorois v. Kenya\(^94\) before the African Commission concerned the forceful removal of this community from their ancestral lands in the Lake Bogoria area, because the government planned to turn the land into a game

\(^92\) Ibid., para. 224 (emphasis added), original text in Spanish: «[L]a Corte concluye que el Estado es responsable por la violación del derecho a la propiedad comunal reconocido en el artículo 21 de la Convención, así como de los artículos 1.1 y 2 del mismo instrumento en relación con el derecho a la identidad cultural, en perjuicio de la Comunidad de Punta Piedra y sus miembros».


reserve. The Endorois community argued that the fertile land was used for raising their cattle, as well as for cultural and religious ceremonies. The Endorois complained further that the compensation promised by the Kenyan government was not only not provided, but that compensation would not restore their cultural link to the land.

The African Commission used the concept of cultural identity in relation to its determination of the community as being an indigenous people and in relation to the rights to property and development. It recognised the Endorois as an indigenous people, because it had «[...] a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection [...]».

The Commission gave a broad meaning to culture and cultural identity by stating that

«[...] it thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristic».

The Commission also referred to the work of the HRC on Art. 27 ICCPR reaffirming that economic activities could fall within the concept of culture. The Commission explicitly maintained that cultural identity implies negative and positive obligations for States parties:

«Protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Art. 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community».

Cultural identity was again referred to when the Commission stated that States parties have duties to tolerate diversity and to adopt measures to protect the identity of groups different from those of the majority. States should therefore take measures «[...] aimed at the conservation, development and diffusion

95 Ibid., paras. 2, 3, 6, 7, 12 and 14.
96 Ibid., para. 151.
97 Ibid., para 241 (emphasis added).
98 Ibid., para. 243.
99 Ibid., para. 241 (emphasis added).
of culture», including promoting «[...] cultural identity as a factor of mutual ap­preciation among individuals, groups, nations and regions [...]».100

As regards the possibility to limit the right to take part in cultural life, the Commission argued that

«[...]the absence of a claw-back clause is an indication that the drafters of the Charter en­visaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture [...] even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights».101

The Commission was finally of the view that the limitations were not justified, because they denied «[...] the very essence of the Endorois' right to culture [...]».102 The African Commission also concluded that the Endorois were not suf­ficiently consulted and did not effectively participate in the process in accordance with their customs and traditions.103 The Commission concluded that the rights to freedom of religion, property, culture and development were violated.104

The case of Ogiek v. Kenya was taken by the African Commission to the Af­rican Court of Human and Peoples' Rights.105 The Ogiek hunter-gatherer com­munity was forcibly removed from ancestral lands in the Mau forest. The Court made some interesting remarks concerning a 'right to culture' under the rights to property and the right to development.

As regards the right to property (Art. 14), the Court stated that although this right is included in the part of the African Charter containing individual rights, the right to property also applies to groups.106 The Court referred to and followed the approach of the Inter-American Court and also interpreted the right to property in light of Art. 26 UNDRIP with the effect that greater emphasis was placed on col­lective rights of possession, occupation and use of land, instead of more individual ownership in the classical sense.107 The Court decided that the Ogiek community had a right to occupy, use and enjoy their ancestral lands and that the eviction without prior consultation was a violation of the collective right to property.108

The assessment of Art. 21 containing the peoples' right to freely dispose of wealth and natural resources contained interesting remarks concerning collective rights. The Court stated that the African Charter did not define the notion of

100 Ibid., para. 246 (emphasis added).
101 Ibid., para. 249 (emphasis added).
102 Ibid., para. 251 (emphasis added).
103 Ibid., para. 291.
104 Ibid., recommendations, p. 80.
106 Ibid., para. 123.
107 Ibid., paras. 124-127.
108 Ibid., paras. 128-131.
peoples, giving it flexibility. The enjoyment of collective rights in the African Charter was intended to be not just for the populations of States as a whole, but also for sub-state ethnic groups, provided they do not call into question the sovereignty or territorial integrity of the State. It followed from the finding of a violation of the collective right to property that there was also a violation of the Ogieks' right to enjoy and freely dispose of their natural resources.

The African Commission and African Court explicitly translated Art. 17(2) and (3) into 'the right to culture.' The Court further held that this right to culture has both an individual and collective nature. Following the formulation of Art. 17, this provision protects individuals' participation in cultural life and obliges the State to promote and protect traditional values of the community. The Court argued, similar to the Commission in the Endorois case, that «[t]he protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity». The Court, again similar to the Commission in the Endorois case, described culture in a very broad manner:

«In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality».

The Court considered protection of the right to culture especially fundamental for indigenous populations due to the vulnerability of their continued existence as a distinct group. It explicitly referred to UNDRIP Art. 8 and CESC General Comment No. 21 in further assessing the right to culture of the Ogiek.

The Court recognized that the Ogieks had their own distinct culture distinguishing them from other communities, including their own traditional clothes, language, way of entombing the dead, rituals, medical practices, spiritual/traditional values, wedding ceremonies, folklore, songs and clan boundaries. Restrictions on their access to the Mau Forest and their evictions affected their ability to preserve these traditions and, therefore, interfered with their right to culture. This inter-

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109 Ibid., para. 196.
110 Ibid., para. 199.
111 Ibid., para. 201.
112 Ibid., para. 177.
113 Ibid., para. 177.
114 Ibid., para. 179.
115 Ibid., para. 179.
116 Ibid., paras. 180-181.
117 Ibid., paras. 182-183.
ference could not be justified hence the Court concluded that there was a violation of the right to culture.118

Interestingly, comparable to remarks made by the HRC in its caselaw, the Court in this case also discussed the dynamic development of cultures. Kenya argued the Ogieks had evolved and their ways of life changed to the extent they lost their distinctive cultural identity. The Court held there was insufficient evidence to support the contention that the Ogiek completely lost their cultural distinctiveness. Moreover, the Court held that «stagnation or the existence of a static way of life is not a determining element of culture or cultural distinctiveness».119 The Court stressed that it found it natural that aspects of the culture of indigenous peoples could change over time, while leaving invisible traditional values unchanged.120

The cases show that the African Commission and Court recognize an individual as well as a collective right to culture, which is close to a right to cultural identity and they have identified negative and positive obligations of States in relation to this right. These monitoring bodies have made use of the existing entry points in the African Charter, complemented with references to other international and regional developments, to construct a right to cultural identity, not only as part of other rights, but with an increasing self-standing position.

4. Concluding Remarks

In 2002, I concluded that accepting a right to cultural identity as a substantive right was «neither desirable nor necessary». I found the incorporation of a separate right to cultural identity in international human rights law to be undesirable because of the risk of abuse that a broad and vague right to cultural identity could bring for other individual rights and freedoms. I also found it unnecessary to develop a separate right to cultural identity, because existing cultural rights in the broad sense already offered possibilities for the protection of cultural identity. I did encourage States and monitoring bodies to develop the cultural dimension of human rights, applying a broad concept of cultural identity and its individual and collective dimension. And so they did.

The above shows that the ‘risks’ of a right to cultural identity have been addressed in international human rights law. The possible tension between the collective right to cultural identity and individual freedoms, as well as the problem of harmful cultural practices, have been dealt with in standard-setting as well as in monitoring processes. Several international legal instruments have specified that cultural diversity or cultural rights cannot be used to infringe upon other human rights. Moreover, limitation clauses to human rights, including cultural rights, have been included and used to protect the rights of others or broader so-

118 Ibid., paras. 187-190.
119 Ibid., para. 185.
120 Ibid., para. 186.
societal interests. The balancing of these different interests, individual, collective and societal, is an important task of States in the implementation of cultural rights and it is an important aspect of the monitoring work of international and regional bodies.

Monitoring bodies at international and regional level have endorsed a broad conception of culture. They have also confirmed that cultures are dynamic and that protection of cultural identity does not require that these identities are fixed and static. It seems that a right to cultural identity is meant to protect the cultural identity that individuals and communities involved find it to be. This is confirmed by the fact that consultation with and free, prior and informed consent by the communities involved are part of the obligations of States.

It seems that international human rights law is indeed moving towards recognition of a right to cultural identity, or the right to cultural identity, without this right being explicitly incorporated into an international legal instrument. Such incorporation has not been necessary in order for this right to be recognized, at least by claimants and monitoring bodies, as a substantive right for individuals and communities implying concrete negative and positive obligations for States. Claimants have invoked and monitoring bodies have interpreted various human rights, such as the right to take part in cultural life, the right to enjoy culture, the right to freedom of religion, the right to respect for private life, and the right to property, to effectively promote and protect (part of) cultural identity.

The above shows that the right to cultural identity has been recognized most explicitly in relation to indigenous peoples and their land rights. In relation to minorities or other cultural communities, cultural identity is mostly approached from the side of State obligations, thereby only implicitly recognizing a right to cultural identity. The right to cultural identity has further been recognized as an individual right, as a collective right for minorities and as a group right for indigenous peoples.

International and regional monitoring bodies have also elaborated further on the content of the right to cultural identity. In my book I doubted that a right to cultural identity could be justiciable, because the object and State obligations of this right would not be sufficiently clear to be invoked before a monitoring body. Interestingly, the process seems to take the opposite route: international and regional monitoring bodies have actually developed and applied a right to cultural identity, including the identification of the subject and of State obligations. While the right to cultural identity still seems very broad and thereby endless in its possible elements to be respected and protected by States, monitoring bodies have shown to be able to work with it on a case-to-case basis.

The increased and more explicit recognition of the right to cultural identity is certainly part of the broader increased attention for and promotion of cultural rights. Since 2002 these rights have become more prominent in international human rights law, including in new instruments such as the UNDRIP and several UNESCO instruments. Also, the cultural dimension of provisions in existing human rights instruments has indeed been further elaborated by international
and regional monitoring bodies. Logically, the more connection the existing treaty provisions offer, for instance by explicitly referring to culture or by containing collective rights, the easier it is to discern a right to cultural identity from these provisions. Monitoring bodies interpret their treaties not merely on the basis of the text, but, in line with the interpretation rules in the Vienna Convention on the Law of Treaties, also on the basis of their object and purpose and in light of other international and regional instruments. They refer to newly adopted instruments and to the work of other monitoring bodies at international and regional level to find support for the recognition of the right to cultural identity.

Can it be concluded that the right to cultural identity indeed exists? The answer should be no if ‘exist’ means that it is a rule incorporated in positive law. So far States have not incorporated cultural identity as a substantive right in an international treaty or other legal instrument. The lack of common State practice and opinio juris, reflected in the limited amount of and specialized caselaw, makes that the right to cultural identity can in my view not be considered a rule of international customary law. The answer should however be yes if one looks beyond a strict rule and sees the right to cultural identity as an important emerging norm. This norm can be part of other existing human rights, but the above shows that it is increasingly a self-standing norm developed by caselaw and other interpretative documents. In this regard international human rights law is indeed moving towards a or now the right to cultural identity. Actually, it is already there.

**ABSTRACT. Towards a Right to Cultural Identity? Yes, Indeed!**

The aim of this contribution is to ascertain whether a right to cultural identity can be considered as existing in the context of international human rights law. In the past two decades the recognition of such a right in relevant practice has in fact progressively grown, to the point that it has attained huge consideration among human rights experts and practitioners. Is the said practice sufficient to support the position that a right to cultural identity actually exists as a ‘self-standing’ right? The answer should be no if ‘exist’ means that it is a rule incorporated in positive law. So far States have not incorporated cultural identity as a substantive right in an international treaty or other legal instrument. The lack of common State practice and opinio juris, reflected in the limited amount of and specialized caselaw, makes that the right to cultural identity can probably not be considered a rule of international customary law. However, the answer is instead yes if one looks beyond a strict rule and sees the right to cultural identity as an important emerging norm. This norm can be part of other existing human rights, but it is increasingly becoming a self-standing norm developed by caselaw and other interpretative documents.

*Keywords:* cultural identity; cultural life; cultural rights; collective rights; human rights; indigenous peoples; land rights; minorities.

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