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Minority groups and litigation: A review of developments in international and regional jurisprudence

By Mauro Barelli, Gulara Guliyeva, Stefania Errico and Gaetano Pentassuglia





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Minority Rights Group International

Minority Rights Group International (MRG) is a nongovernmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations, which represent minority and indigenous peoples.

MRG works with over 150 organizations in nearly 50 countries. Our governing Council, which meets twice a year, has members from 10 different countries. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC), and observer status with the African Commission on Human and Peoples' Rights (ACHPR). MRG is registered as a charity and a company limited by guarantee under English law. Registered charity no. 282305, limited company no. 1544957.

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights	ECmHR	European Commission on Human Rights
ACHR	American Convention on Human Rights	ECtHR	European Court of Human Rights
AfrCH	African Charter on Human and Peoples' Rights	EU	European Union
AWGIPC	Working Group on Indigenous Populations/Communities in Africa	FCNM	Framework Convention for the Protection of National Minorities
CDE	UNESCO Convention against Discrimination in Education	HRC	Human Rights Committee
CEACR	Committee of Experts on the Application of Conventions and Recommendations	IACHR	Inter-American Commission of Human Rights
CEDAW	Committee on the Elimination of Discrimination Against Women	IACtHR	Inter-American Court of Human Rights
CERD	Committee on the Elimination of Racial Discrimination	ICCPR	International Covenant on Civil and Political Rights
CESCR	Committee on Economic, Social and Cultural Rights	ICESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child	ILO	International Labour Organization
EC	European Community	OAS	Organization of American States
ECHR	European Convention for the Protection of Human Rights	P1-2	Article 2 of Protocol 1 ECHR
ECJ	European Court of Justice	TFEU	Treaty on the Functioning of the EU
		UNDM	UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
		UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Foreword

Minority rights are an integral part of human rights law, yet their recognition and acceptance by governments, and indeed in international law, has been slow. The main minority specific instrument, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, is not legally binding; while Europe is the only region which has developed a general treaty dedicated to their protection. In spite of this seeming reluctance to shape and determine minority rights standards, strategic litigation before international and regional human rights bodies has produced an emerging jurisprudence which, drawing upon existing universal standards, has started to establish important norms for the

promotion and protection of the rights of minorities and indigenous peoples.

Written by the International Human Rights & Group Diversity Programme at Liverpool Law School in cooperation with Minority Rights Group International (MRG) legal cases programme, this publication focuses on key areas of MRG's work, including non-discrimination, political participation, land rights and women's rights. As such, it contains a welcome and thorough compilation of the major developments in minority rights litigation.

*Lucy Claridge
Head of Law, MRG
November 2010*

Preface

The present guide provides an overview of areas of international and regional human rights jurisprudence which have, or may have an impact on the protection of ethno-cultural minority groups, including indigenous peoples. It aims primarily to assess the law as it is shaped through the recent practice of judicial and quasi-judicial bodies, and to relate that practice to the relevant human rights mechanisms. The guide is the result of a pro-bono collaboration between the International Human Rights & Group Diversity Programme at Liverpool University and the Legal Cases Programme of Minority Rights Group International.

As is clear from the above, the following review is not intended to generate a comprehensive analysis of the body of international standards and cases in the field. Academic monographs, textbooks and articles offer a more appropriate context for such an undertaking. Rather, it serves the more limited, practical purpose of identifying specific areas or themes which have been increasingly the subject of litigation in recent years, or which may well be considered for litigation in future, based on a range of legal and/or institutional

developments at the global and regional levels. They include: (1) non-discrimination; (2) education; (3) political participation; (4) land rights; and (5) women's rights. Occasionally accounting for domestic jurisprudence and exploring cases principally within the United Nations, European, Inter-American and African systems, the present assessment discusses critical dimensions of protection, ranging from intersectional discrimination to positive action, to elements essential to minority identity promotion. The guide ends with a summary of the findings derived from the analysis of the case law and uses them to submit a set of recommendations on how best to employ judicial or quasi-judicial proceedings. It is to be hoped that the overview and commentary will be of interest and benefit to legal practitioners involved with minority issues, international and national institutions, as well as academics working in the area of minority protection.

As much as possible, the case law is updated as of 30 March 2010. The authors are grateful to those MRG and external reviewers who usefully commented on an earlier draft of this text.

Non-discrimination

This part of the guide focuses on the guarantee of non-discrimination as one of the most essential aspects of minority protection. First, relevant provisions of international human rights treaties and minority rights instruments are reviewed. Then, a selection of relevant jurisprudence of international courts and quasi-judicial bodies is analysed, with the focus on direct and indirect discrimination. This analysis is followed by a discussion of case law on non-discrimination on the grounds of religion; religion and gender; and race and ethnic origin. The section is concluded by an examination of European Union (EU) rules on non-discrimination, with an emphasis on race and religion.

Guarantees on non-discrimination in international and regional treaties

The principle of non-discrimination, as one of the facets of minority protection, is firmly enshrined in general human rights treaties, as well as more specific minority rights instruments. A general prohibition to discriminate on grounds such as race, religion, language and gender is well-established in international treaties on the protection of human rights. At the universal level, the International Covenant on Civil and Political Rights (ICCPR)¹ precludes discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in two provisions: Article 2 outlaws discrimination in the enjoyment of the Covenant's rights and Article 26 comprises an autonomous right.² Based on the same grounds, the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibits discrimination in the exercise of economic, social and cultural rights in Article 2(2).³

At the European level, the European Convention for the Protection of Human Rights (ECHR)⁴ precludes discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status in Article 14. Similar to Article 2 ICCPR, this provision applies in conjunction with the substantive rights in the ECHR, that is, it is not an independent provision. Since 1 April 2005 Protocol No. 12 to the ECHR introduced the equivalent of Article 26 ICCPR – a general prohibition of discrimination.⁵ The

difference between Article 14 ECHR and Protocol No. 12 is that whereas Article 14 prohibits discrimination in the enjoyment of the rights and freedoms set forth in the ECHR, Article 1 of Protocol 12 extends the scope of protection to any right set forth by law and therefore is absolute and stand-alone.⁶ Despite the latter's breadth of application, there is a low number of ratifications of Protocol 12, particularly by western European countries, while all contracting parties to the ECHR are bound by Article 14.

Furthermore, the African Charter on Human and Peoples' Rights (AfrCH)⁷ forbids discrimination in Article 2; although the list of grounds of non-discrimination is open-ended, similar to Article 2 ICCPR and Article 14 ECHR, the reach of Article 2 AfrCH is limited to the enjoyment of the Charter rights. The American Convention on Human Rights (ACHR)⁸ has a slightly different formulation in Article 24 on the right to equal protection: it merges the equal treatment before the law with equality of treatment.⁹ Moreover, unlike the above-mentioned provisions, Article 24 ACHR does not enumerate the grounds of discrimination.

In addition to general human rights guarantees, Article 4 of the Framework Convention for the Protection of National Minorities (FCNM)¹⁰ contains the guarantee of non-discrimination specifically tailored to the needs of national minorities.¹¹ Although Article 27 ICCPR does not refer to the principle of non-discrimination, in its General Comment No. 23, the Human Rights Committee (HRC), a quasi-judicial body under the ICCPR entrusted to monitor compliance with the instrument and to offer interpretations of its provisions, established that persons belonging to minorities can benefit from the guarantees in Articles 2 and 26 ICCPR.¹²

Jurisprudence of international and regional courts and quasi-judicial bodies

Direct discrimination

In assessing a claim of discrimination, it is essential to differentiate between direct and indirect discrimination. Direct discrimination concerns treating people in similar situations differently based on prohibited grounds without an objective justification. The jurisprudence of international and regional courts and quasi-judicial bodies

on the prohibition of direct discrimination is rather straightforward and assessed below through the examination of examples from their jurisprudence.

In General Comment No. 18 on non-discrimination, the UN HRC maintained that the term 'discrimination' under Article 26 ICCPR implies:

*'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'*¹³

The HRC further noted that: 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.¹⁴ Furthermore, in its General Comment No. 23 on the rights of minorities, the HRC affirmed that the prohibition of discrimination in Articles 2 and 26 ICCPR applies to minorities as well.¹⁵ Regrettably, there are very few communications before the HRC where these provisions have been used in relation to minorities.¹⁶

Similarly, the European Court of Human Rights (ECtHR)¹⁷ famously ruled in the *Belgian Linguistics* case that 'the principle of equality of treatment is violated if the distinction has no objective and reasonable justification'.¹⁸ Importantly, such differential treatment must pursue a legitimate aim; moreover, the means employed to achieve this aim must be proportionate.¹⁹

In its earlier jurisprudence the ECtHR was reluctant to use Article 14 on a number of occasions. For example, in *Podkolzina v Latvia*, concerning additional linguistic requirements imposed on candidates for elections in Latvia, the ECtHR refused to consider the applicant's claims of differential treatment as a member of Russian-speaking minority under Article 14 ECHR.²⁰ Likewise, in *Jewish Liturgical Association Cha'are Shalom Ve Tzedek v France*,²¹ an Orthodox Jewish liturgical association did not succeed in persuading the ECtHR that the refusal of authorities to allow them ritual slaughter in line with their convictions violated Article 9 together with Article 14 ECHR.

However, recent jurisprudence of the ECtHR has marked significant developments and saw more confident application of aspects of Article 14 in a range of cases discussed below, including, for example, *Thlimmenos v Greece*,²² *Aziz v Cyprus*,²³ *Nachova v Bulgaria*,²⁴ *Timishev v Russia*,²⁵ *D.H. and Others v The Czech Republic*,²⁶ and *Sejdić and Finci v Bosnia and Herzegovina*.²⁷ This is the case even when the decision does not favour the group.

For instance, in *Nachova v Bulgaria*, despite the Grand Chamber's reversal of the 2004 Chamber decision finding a violation of Article 14 read together with Article 2 ECHR in its substantive aspect, the Grand Chamber found a violation of these provisions in their procedural aspect, accepting in principle that in certain cases the burden of proof can be shifted onto the authorities. The Grand Chamber subsequently picked up on this reasoning in *D.H. and Others v The Czech Republic* (discussed below).

This is not to suggest that the ECtHR now easily agrees to consider Article 14 issues. A degree of reluctance is likely to remain. However, compared to the earlier jurisprudence of the ECtHR, Article 14 case law is currently more progressive. It is hoped that this approach will be further strengthened with the wider application of Protocol 12 ECHR.

There are fewer cases which came before the quasi-judicial bodies in the Inter-American and African contexts. Overall, the Inter-American Court's (IACtHR) method of finding direct discrimination is similar to that of the ECtHR. For example, in its advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*,²⁸ the IACtHR stated that differential treatment would not constitute discrimination when 'the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review'.²⁹ Furthermore, the aims must not be 'unjust or unreasonable'.³⁰

Conversely, the African Commission on Human and Peoples' Rights (ACHPR) assessment of discrimination is somewhat sketchy: it identifies those who have been subjected to differential treatment based on ethnic origin and finds a violation of Article 2 without elaborating on the matters of principle, such as in *Amnesty International v Zambia*³¹ and the *Organisation Mondiale Contre la Torture and Others v Rwanda*,³² which are discussed in more detail in the sub-section on 'Race and ethnicity' (p. 11).

Indirect discrimination

Indirect discrimination occurs where rules which are neutral on the face of it, have disproportionate effects on members of a certain group without any objective and reasonable justification. Indirect discrimination did not feature strongly in the initial approach of international courts and quasi-judicial bodies, except for the European Court of Justice (ECJ), which, as early as 1974, established that 'the rules regarding equality of treatment ... forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result ...'³³

In contrast, the UN HRC, a quasi-judicial body established under the ICCPR, was hesitant to make such finding in its early jurisprudence. Thus, in *Ballantyne, Davidson, McIntyre v Canada*³⁴ the applicants argued that permitting advertising in French only in Quebec constituted discrimination against English-speakers. The HRC noted that domestic law requiring the use of French only in commercial advertising outdoors affected equally French- and English-speakers. Therefore, there was no discrimination on the ground of language under Article 26 ICCPR.³⁵

The HRC's more recent jurisprudence reveals a notable change in approach towards indirect discrimination. In *Diergaardt v Namibia*³⁶ the authors, members of the Rehoboth Basters community, claimed that by denying them the use of their own language in administration, justice, education and public life, Namibia violated their rights under Articles 26 and 27 ICCPR. In particular, the state instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language; public authorities had to follow this instruction even when they were perfectly capable of speaking the tribal language, because under Article 3 of the Constitution English was the only official language in Namibia.³⁷ Taking into account the effects of this practice on Afrikaans speakers and in the absence of any response from the state, the HRC found a violation of Article 26 ICCPR without elaborating on the concept of indirect discrimination.³⁸

The HRC explicitly acknowledged indirect discrimination in its later communications, such as *Althammer v Austria*³⁹ and *Derksen v the Netherlands*,⁴⁰ by noting that 'a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate'.⁴¹ Furthermore, the HRC emphasized that such indirect discrimination should be based on the grounds listed in Article 26 ICCPR; also, a measure will not be indirectly discriminatory if it can be objectively and reasonably justified. Effectively, the HRC used the same test to find indirect discrimination as in the assessment of direct discrimination.

A similar trend can be discerned from the jurisprudence of the ECtHR. Only in 2001 the ECtHR explicitly recognized the principle of indirect discrimination. For example, in *Kelly v the United Kingdom*⁴² concerning an allegation of discriminatory treatment: the applicants claimed that 'between 1969 and March 1994, 357 people had been killed by members of the security forces, the overwhelming majority of whom were young men from the Catholic or nationalist community'.⁴³ In its assessment the ECtHR noted that '[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as

discriminatory notwithstanding that it is not specifically aimed or directed at that group'.⁴⁴ The ECtHR, however, promptly added that statistics in themselves are not sufficient to determine a violation of Article 14 in this case.⁴⁵

Case study: *D.H. et al. v Czech Republic*

The ECtHR's initial reluctance to give full effect to the concept of indirect discrimination is also evident from the Chamber's decision in *D.H. et al. v Czech Republic*⁴⁶ where the applicants – members of the Roma minority – complained that in 1996–9 they had been discriminated against by being placed in special schools. Because a significantly higher number of Roma children was affected, the applicants claimed indirect discrimination in access to ordinary schools in the Czech Republic.

The second Chamber of the ECtHR considered the compatibility of placing Roma children in special schools with Article 14 ECHR in conjunction with Article 2 of Protocol 1 (P1-2) ECHR. In the Chamber's view the government successfully established that special schools were not created to cater for Roma children; neither did placement rules refer to a pupil's ethnic origin.⁴⁷ Therefore, special schools pursued the 'legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children'.⁴⁸ As a result, the Chamber found no violation of Article 14 in conjunction with P1-2 ECHR.

However, this finding ignored the concept of indirect discrimination. Indirect discrimination occurs where a neutral rule has a disproportionately adverse impact on members of a certain group. Intention to discriminate is irrelevant for finding indirect discrimination: it is the actual effect of a measure which matters. Although the applicants maintained that the effects of placing Roma children in special schools were discriminatory and statistical evidence could support this claim, the Chamber did not find indirect discrimination.⁴⁹

On appeal, the Grand Chamber of the ECtHR rightly found a violation of Article 14 in conjunction with P1-2.⁵⁰ In assessing the claim of indirect discrimination, the ECtHR first clarified that the case did not concern the Czech Republic's failure to ensure positive action to protect Roma minority in educational matters; rather, all that had to be established in the applicants' submission was that, 'without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination'.⁵¹ In the Grand Chamber's view 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms,

discriminates against a group'.⁵² One way of determining indirectly discriminatory effects of neutral rules is through assessment of relevant statistics. In this respect, the Grand Chamber followed the practice of the ECJ, which consistently relied on statistics in finding indirect discrimination in long-standing case law on gender⁵³ and nationality⁵⁴ discrimination. Consequently, the Grand Chamber found that because the relevant legislation had a disproportionately prejudicial effect on the Roma community, 'the applicants as members of that community necessarily suffered the same discriminatory treatment'.⁵⁵ Therefore, by 13 votes to 4 the Grand Chamber found a violation of the Convention rights.

The ECtHR's interpretation of the self-standing provision on non-discrimination in Protocol 12 is likely to strengthen these guarantees further. The case of *Sejdić and Finci v Bosnia and Herzegovina*⁵⁶ concerning the exclusion of persons belonging to minorities in Bosnia and Herzegovina from standing for elections (discussed below) supplies some clarification on the application of the principle of non-discrimination under Protocol 12 ECHR, though not in the context of indirect discrimination. The ECtHR is yet to explore the breadth of Protocol 12's applications.

Grounds of discrimination: race and religion

Having established general trends in the assessment of claims of discrimination we will now turn to the cases where specific grounds of discrimination comprised religion; religion and gender; and race or ethnic origin.

Religion

The HRC's leading communication on discrimination based on religion remains *Waldman v Canada*.⁵⁷ The author of the communication, a member of the Jewish faith, complained that in the province of Ontario, Canada provided full and direct public funding to Roman Catholic schools only. In the HRC's view, the authorities' decision not to fund other religious schools violated Article 26 ICCPR, because if a state decides to provide public funding to religious schools, 'it should make this funding available without discrimination'.⁵⁸ Canada failed to justify differential treatment of religious schools in the light of its historic protection of the Protestant minority in the province of Ontario. Even the fact that such guarantee had been enshrined in the Canadian Constitution since 1867 did not persuade the HRC that there was a need to maintain such differential treatment between religious minorities:

*'[t]he material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools.'*⁵⁹

Accordingly, such differential treatment was not justified, and, hence, Article 26 ICCPR was breached.

Although the ECtHR's case law on prohibition of discrimination against persons belonging to a minority based on religion⁶⁰ is not particularly strong (mainly because of selective assessment of Article 14 ECHR claims), the Court can be commended for expanding the scope of the principle of non-discrimination in the case of *Thlimmenos v Greece*.⁶¹ The applicant, a Jehovah's Witness, was convicted for insubordination as a result of his refusal to wear the military uniform during a general mobilization. Subsequently, he was refused a post as a chartered accountant because the national law excluded convicted persons from such appointments. The applicant relied on Article 14 ECHR in conjunction with Article 9 ECHR and complained that in the 'application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences'.⁶²

The ECtHR noted that its past case law focused on differential treatment of persons in analogous situations without any objective and reasonable justification. However, the Court considered that:

*'this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'*⁶³

Therefore, the failure of Greece to ensure such differentiated treatment amounted to a violation of Article 14 ECHR in conjunction with Article 9 ECHR.

Intersectionality: religion and gender

The notion of 'intersectionality' refers to a situation of double or multiple discrimination, such as discrimination on grounds of religion and gender.⁶⁴ To date, one of the most prominent cases where the applicant claimed that she was discriminated against based on her religion and gender remains *Şahin v Turkey*.⁶⁵ The case concerns a Turkish university student excluded from attending classes and taking exams for wearing a headscarf. In deciding this

case, first the Chamber (unanimously) and then the Grand Chamber of the ECtHR (16 votes to 1) found that the applicant's right to manifest her religion was violated under Article 9(1) ECHR; however, the interference with her right was justified under Article 9(2), because it was in accordance with law, 'pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order',⁶⁶ and necessary in a democratic society where several religions coexist within one society; hence, restrictions may be placed on 'freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.⁶⁷ The rationale behind this conclusion was that in the secular Muslim-majority Turkey, a mere wearing of the headscarf was capable of a proselytizing effect. The Court accepted Turkey's justifications based on the principles of secularism and gender equality, and found that the interference with the applicant's freedom to manifest religious symbols in public space was justified.

Only Judge Tulkens dissented from the majority decision in the Grand Chamber. She argued that the interference could not be justified under Article 9(2) ECHR, because it was not necessary in a democratic society. Where gender equality is concerned, she was unable to see 'how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted'. Moreover, the ECtHR granted too wide a margin of appreciation to Turkey, because similar disputes, contesting the right to manifest a religion, came before the courts in several European states; so this was no longer a local matter and there was a need for European supervision.

In their reasoning in *Şahin*, the majority of judges heavily relied on *Karaduman v Turkey*⁶⁸ and *Dahlab v Switzerland*.⁶⁹ In *Karaduman v Turkey*, the European Commission on Human Rights (ECmHR) found that there was no interference with Article 9(1) ECHR. The case concerned a Muslim student who could not receive her degree certificate for two years because she refused to supply an identity photograph showing her bare-headed, which she claimed was contrary to her religious beliefs. The applicant further complained that the authorities discriminated between females of foreign and Turkish nationality, because the restriction did not affect female foreign nationals who had total freedom as to how to dress in Turkish universities. The ECmHR ruled that because the purpose of the photograph was to identify the person concerned, it could not be used by an individual to manifest one's religious beliefs; hence, Article 9(1) ECHR did not apply to this situation. Furthermore, the ECmHR refused to deal with the applicant's claim under Article 14 ECHR, because she had not exhausted domestic remedies;

according to the ECmHR, this argument was not raised before a national court.

Dahlab v Switzerland concerned a school teacher's complaint that, by dismissing her from her job for wearing a headscarf, the state interfered with her freedom of religion. Furthermore, she alleged that the prohibition imposed by the Swiss authorities amounted to discrimination on the ground of sex under Article 14 read in conjunction with Article 9 ECHR, 'in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition'.

The ECtHR found the application inadmissible because this interference was necessary in a democratic society and justified under Article 9(2) on the grounds of protecting the rights and freedoms of others, public order and public safety, because Ms Dahlab taught very young children who could be easily influenced by such a manifestation. However, even assuming that the restrictions on the rights of Ms Dahlab were legitimate,⁷⁰ despite the fact that there were no complaints from children or their parents, this case should be distinguished from *Karaduman* and *Şahin* because, as a teacher, Ms Dahlab represented the state and was in a position of authority in relation to the very young children, aged 4 to 8, she taught.

This conclusion stems from the ECtHR's case law concerning proselytism, where the ECtHR established the significance of the superior position of a proselytizer. Thus, in *Kokkinakis v Greece*,⁷¹ the applicant's conviction for proselytizing others was found to infringe his rights under Article 9 ECHR. In contrast, in the case of *Lariss v Greece*,⁷² the applicant was convicted of proselytism. The ECtHR found that since Mr Lariss was an officer and therefore a superior in the Greek army, his conviction for seeking to proselytize his subordinates should be upheld. Hence, there was no violation of Article 9. Similarly, in *Delgado Paez*,⁷³ the UN HRC found that the dismissal of a teacher of religion and ethics for advocating his own views on religion among pupils did not violate Article 18 ICCPR, because he used his superior position to influence children's religious views.

Accordingly, even if the ECtHR could find an element of superior position in *Dahlab* (if not indoctrination) and, hence, accept Switzerland's justifications under Article 9(2), this was not a case in *Karaduman* and *Şahin* concerning university students: clearly, the applicants were not in a position of authority towards their peers and did not represent the state. Moreover, the arguments drawing on the distinction between the state's secularity as a political principle of government policy and an individual's wearing of symbols to take part in a religious practice which does not infringe upon the state's secularity,⁷⁴ was not accepted in the ECHR institutions.

Nor did the ECtHR consider the applicant's claims of discrimination based on the ground of sex under Article 14 read in conjunction with Article 9 ECHR. In *Dahlab*, the ECtHR merely noted that the measure by which the applicant was prohibited:

*'purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.'*⁷⁵

Thus, the ECtHR's leading case law, where the applicants claimed the right to non-discrimination on the grounds of religion and sex, does not take into account multiple grounds of discrimination. Moreover, the Court applied the same line of reasoning as in *Şahin* in its recent case law. In 2006, the ECtHR declared inadmissible three 'headscarf' cases against Turkey. The case of *Emine Araç v Turkey*⁷⁶ concerned the rejection of an application for university because the applicant was in her headscarf in the accompanying photo. In *Şefika Köse and 93 others v Turkey*,⁷⁷ the ECtHR found that the headscarf ban 'in a second level school providing theological training'⁷⁸ did not violate Article 9 ECHR. Nor did the ECtHR accept the arguments of a university lecturer in *Kurtulmuş v Turkey*,⁷⁹ who lost her job after refusing to remove her headscarf.

Moreover, the ECtHR has recently affirmed the principles established in *Şahin* in the context of secular France in its identical judgments in *Dogru v France*⁸⁰ and *Kervanci v France*.⁸¹ In *Dogru*, the applicant, a Muslim girl aged 11 in 1998, enrolled in a state secondary school in Flers. From January 1999 she wore the headscarf to school. Despite repeated requests by her teacher to remove the headscarf, she failed to comply with the instructions. On 11 February 1999, the school's pupil disciplinary committee expelled the applicant from the school for not complying with the duty of assiduity.⁸²

The applicant's parents appealed against the school's decision; however, French national courts repeatedly rejected their application and explained that, by not complying with instructions, Ms Dogru 'overstepped the limits of the right to express and manifest her religious beliefs on the school premises'.⁸³ The applicant claimed violation of her rights under Article 9 ECHR before the ECtHR.

In its assessment, the ECtHR established that the ban on wearing the headscarf during sports classes and the expulsion of Ms Dogru from the school for her refusal to remove it constituted interference with her freedom of religion under Article 9(1). It then proceeded to determine

whether such interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society to achieve the aims concerned. The ECtHR found that the criterion of 'prescribed by law' was satisfied. Because the facts of the case took place in 1999, the Court considered that case law of the *Conseil d'État* comprised the relevant legal framework. The Court further noted that the interference pursued the legitimate aim of protecting the rights and freedoms of others and public order.

Where the criterion of necessity in a democratic society is concerned, the ECtHR recapitulated its case law⁸⁴ to reiterate that to protect the rights of others states may impose limitations on the exercise of freedom of religion. Furthermore, the ECtHR repeatedly emphasized the role of the national decision-making bodies and states' wide margin of appreciation in regulating the wearing of religious symbols in educational establishments.⁸⁵ The ECtHR also observed that, as in Turkey and Switzerland, secularism is a constitutional principle in France and an 'attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention'.⁸⁶ Accordingly, taking into consideration states' wide margin of discretion on the matter, the ECtHR ruled that the interference with the applicant's right was justified under Article 9(2). Nor did the ECtHR consider it necessary to rule on violation of the applicant's right to education under Article 2 of Protocol 1 ECHR.

The ECtHR has recently examined the 2004 French law banning wearing of conspicuous religious symbols in public schools. On 17 July 2009, the ECtHR declared inadmissible several cases against France, which concerned the expulsion of pupils from school for wearing a religious dress. Thus, in *Aktas v France*,⁸⁷ *Bayrak v France*,⁸⁸ *Gamaleddyn v France*⁸⁹ and *Ghazal v France*,⁹⁰ on the first day of school, the girls, who were Muslims and wore headscarves, were banned from public schools for wearing conspicuous religious dress.⁹¹

The ECtHR found that there was no violation of Article 9 ECHR, because the restriction was provided by the law of 15 March 2004 and restated in Article L.141-5-1 of the Education Code, which pursued the legitimate aim of protecting the rights and freedoms of others and public order. The ECtHR emphasized the importance of the state's role as the neutral and impartial organizer of the exercising of various religions; furthermore, the ban on all conspicuous religious symbols was based on the constitutional principle of secularism, which was, in the ECtHR's view, consistent with the values protected under the ECHR and its case law. Since the interference by the authorities with the pupils' freedom to manifest their religion was justified and proportionate, the applications were rejected as manifestly ill-founded.⁹² The ECtHR also

rejected the claims of discrimination under Article 14 in conjunction with Article 9 ECHR as manifestly ill-founded, because French law applied to all conspicuous religious symbols.

The above overview of the ECtHR's case law reveals that individuals practising minority religions may suffer adverse treatment in education because they may be excluded from educational activities for dressing in accordance with their religious beliefs. Furthermore, the ECtHR's approach in the headscarf cases seems to disregard the notion of indirect discrimination, as the Court fails to assess the disproportionate effect of neutral rules on religious minorities, particularly women. Overall, the ECtHR's headscarf case law is disappointing, because the Court deals with these cases under Article 9 ECHR only and has refused to consider the applicants' claims under Article 14 ECHR on non-discrimination based on sex together with the ground of religion under Article 9 ECHR, or dealt with these claims inadequately. As a result, the notion of 'intersectionality' has yet to find its way into the ECtHR's case law.

Although the ECHR does not contain special minority rights, the ECtHR has consistently taken into consideration the needs of minorities in other contexts.⁹³ It is essential that the Court adopts a similar approach to the right of minorities to manifest their religious symbols. This can be done through granting states a very narrow margin of discretion in such cases.

The ECtHR decisions contrast starkly with the UN HRC decision in *Hudoyberganova v Uzbekistan*.⁹⁴ The applicant, a university student, was precluded from wearing a headscarf to public university. She was excluded from the university on 25 March 1998. On 15 May 1998, Uzbekistan adopted a Law on the Liberty of Conscience and Religious Organizations. Article 14 of this law explicitly banned wearing of religious dress in public places. Pursuant to this law the applicant was expelled from the university because of her refusal to remove her headscarf. She brought a claim before the HRC and alleged that Uzbekistan violated her freedom of religion under Article 18 ICCPR.

In its assessment the HRC first emphasized that the freedom to manifest a religion encompasses wearing of religious dress in public. Furthermore, it considered that to 'prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion'.⁹⁵ The HRC has already affirmed this approach in its General Comment No. 22 on freedom of religion: policies or practices aimed to coerce individuals based on their beliefs, such as restricting access to education, are inconsistent with Article 18(2).⁹⁶

The HRC found that, by imposing such limitation, Uzbekistan violated Article 18(2) ICCPR on freedom of religion, because the state failed to justify this ban on the permitted grounds under Article 18(3). The HRC emphasized that this finding is without either prejudging the right of a state party to limit expressions of religion and belief in the context of Article 18 of the Covenant, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning.⁹⁷ The case demonstrates that one aspect of Article 18 ICCPR is particularly significant: paragraph 2 of the provision precludes coercion based on religion, for example, through denial of access to education.

Race and ethnicity

Where discrimination based on race and ethnic origin is concerned, recent jurisprudence of the ECtHR marks a significant development in this area. Thus, in *Nachova v Bulgaria*,⁹⁸ the applicants claimed that their close relatives Mr Kuncho Angelov and Mr Kiril Petkov had been shot and killed by military police in violation of Article 2 ECHR. In addition, the applicants alleged that the impugned events were the result of prejudice and a hostile attitude towards persons of Roma origin, and that these discriminatory attitudes breached Article 14 taken in conjunction with Article 2 ECHR.

Both the Chamber and the Grand Chamber of the ECtHR established that Article 2 ECHR precludes the use of firearms to arrest persons 'who, like Mr Angelov and Mr Petkov, were suspected of having committed non-violent offences, were not armed and did not pose any threat to the arresting officers or others'.⁹⁹ Due to the use of 'grossly excessive force'¹⁰⁰ and a lack of an effective investigation of the deprivation of life, there had been a violation of Article 2.

The applicants also alleged a violation of Article 14 ECHR in that discriminatory attitudes towards persons of Roma origin led up to the deaths of Mr Angelov and Mr Petkov; moreover, the authorities had failed in their duty to investigate possible racist motives in their killing. In their assessment, the Chamber and the Grand Chamber arrived at different conclusions: the Chamber decided that there was a violation of Article 14 read in conjunction with Article 2 ECHR in its substantive aspect, while the Grand Chamber found that there was a violation of these provisions in their procedural aspect.

Thus, the Chamber maintained that Articles 2 and 14 ECHR together impose a duty on state authorities to conduct an effective investigation irrespective of the victim's racial or ethnic origin; moreover, where there is 'suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality...'¹⁰¹ Having established that, on

the facts of the case, the authorities failed to conduct a meaningful investigation into racist statements made by law enforcement officers,¹⁰² the Chamber shifted the burden of proof onto the respondent state; that is, it was up to Bulgaria to provide a plausible explanation regarding a lack of investigation.¹⁰³ Because the state did not offer any further explanation, and taking into consideration other cases where Bulgarian ‘law enforcement officers had subjected Roma to violence resulting in death’,¹⁰⁴ the Chamber found a violation of Article 14 taken together with Article 2 ECHR in its substantive aspect.

Unlike the Chamber, the Grand Chamber considered that the alleged failure of the authorities to carry out an effective investigation into the supposedly racist motive for the killing should not shift the burden of proof to the government with regard to the breach of Article 14 taken together with the substantive aspect of Article 2 ECHR. The Grand Chamber reiterated that, in certain circumstances, where events leading to a death of a person were within the exclusive knowledge of the authorities, the burden of proof may rest on the authorities; neither did it exclude the possibility that, in certain circumstances, a government may be required to disprove an alleged discrimination. However, in the present case, ‘such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned’.¹⁰⁵ In explaining its approach, the Grand Chamber drew the distinction between violent and non-violent acts. While the burden of proof may shift onto the government in cases alleging discrimination in non-violent acts, for example, employment, ‘that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated’.¹⁰⁶ Considering all the circumstances of the case, the Grand Chamber departed from the Chamber’s approach and ruled that racist attitudes did not play a role in Mr Angelov’s and Mr Petkov’s deaths.¹⁰⁷ Nevertheless, where the procedural aspect of Article 14 in conjunction with Article 2 ECHR is concerned, the Grand Chamber considered that:

*‘any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place ...’*¹⁰⁸

and renders necessary a careful examination. Failure of the authorities to take all possible steps to investigate whether or not discrimination may have played a role in the events breached Article 14 ECHR taken in conjunction with Article 2 in its procedural aspect.

The Grand Chamber’s finding of a procedural as opposed to a substantive violation demonstrates that the ECtHR was cautious in its approach in *Nachova*. Nevertheless, even though the Grand Chamber’s ruling was less forceful than the Chamber’s decision, it strongly affirmed the duty of authorities to investigate the cases of discrimination against Roma. Furthermore, the Grand Chamber accepted that, in certain situations, the burden of proof may, in principle, shift to the authorities. In addition, the case laid the foundation for the ECtHR’s case law where the Court found that Roma were subjected to discriminatory treatment in other contexts.

Thus, in the case of *Moldovan and others v Romania*,¹⁰⁹ the applicants claimed that they had been discriminated against based on their ethnicity as Roma by state officials and judicial bodies contrary to Article 14 ECHR in conjunction with Articles 6 and 8 ECHR. Based on the facts of the case, the ECtHR established that the applicants’ Roma ethnicity appeared to have been ‘decisive for the length and the result of the domestic proceedings...’.¹¹⁰ Moreover, the applicants were repeatedly subjected to discriminatory remarks made by the authorities while their claims were being considered by domestic authorities. Accordingly, there was a violation of Article 14 together with Articles 6 and 8 ECHR.

Equally, in *D.H. and Others v The Czech Republic*,¹¹¹ the Grand Chamber took into account that the applicants, who were placed in special schools, were subjected to differential treatment based on their Roma ethnic origin. The placement in special schools was based on parental consent. However, because it appeared that parents of Roma children were not fully informed and often signed a pre-completed form, the Grand Chamber was not persuaded that ‘members of a disadvantaged community and often poorly educated, [Roma parents] were capable of weighting up all the aspects of the situation and the consequences of giving their consent’.¹¹² The Grand Chamber concluded that even assuming that Roma parents gave their ‘informed consent’ for their children to be placed in special schools, ‘no waiver of the right not to be subjected to racial discrimination can be accepted’.¹¹³

The ECtHR placed similarly strong emphasis on the prohibition of discrimination based on racial and ethnic origin in *Timishev v Russia*.¹¹⁴ The applicant claimed that his right to liberty of movement was restricted based on his Chechen ethnic origin. The authorities who did not allow him to pass through the checkpoint on the administrative border between Ingushetia and Kabardino-Balkaria, referred to an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin. He claimed that he was discriminated against contrary to Article 14 read together with Article 2 of Protocol 4 ECHR.

In its assessment, the ECtHR emphasized that ‘[d]iscrimination on account of one’s actual or perceived ethnicity is a form of racial discrimination’¹¹⁵ and it is the duty of the authorities to investigate such cases with special vigilance. Noting that the respondent state failed to present plausible explanation of differential treatment based on ethnic origin, the ECtHR stated that:

*‘[i]n any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.’*¹¹⁶

In this passage the ECtHR effectively indicates that in a democratic society justification of a difference in treatment on the basis of race may not be acceptable. Such an approach indicates that the ECtHR is likely to adopt a high level of scrutiny in cases involving racial discrimination. This is not to say that special measures¹¹⁷ based on race and ethnicity, specifically designed to ensure substantive equality of a racial or ethnic group could not lead to differential treatment.¹¹⁸ The ECtHR has long established that not every differential treatment results in discrimination;¹¹⁹ in addition, there may be a state duty to differentiate in order to protect minorities.¹²⁰

Accordingly, the ECtHR adopts a high level of scrutiny in its case law on racial and ethnic discrimination. The cases of *Sejdić and Finci v Bosnia and Herzegovina*,¹²¹ decided by the Grand Chamber on 22 December 2009, confirmed this trend. It is noteworthy that Minority Rights Group International (MRG) advised and represented Mr Finci throughout the proceedings. The cases concern discrimination against persons belonging to minorities, who are excluded from effective participation in the political life of Bosnia and Herzegovina based on their ethnic origin. The ECtHR found a violation of Article 14 ECHR read together with Article 3 of Protocol 1 ECHR and Article 1 of Protocol 12 ECHR. Significantly, the ECtHR established that, notwithstanding the difference in scope between Article 1 of Protocol 12 ECHR and Article 14 ECHR, the meaning of non-discrimination in these articles was intended to be identical, as clarified in paragraph 18 of the Explanatory Report to Protocol 12.¹²² Because in assessing non-discrimination under Protocol 12 the ECtHR relied on its reasoning under Article 14 ECHR, it may be useful to overview the Court’s analysis in more detail.

In assessing the state’s compliance with Article 14 in conjunction with Article 3 of Protocol 1, the ECtHR reiterated that discrimination means treating differently, without an objective and reasonable justification, persons

in similar situations. ‘No objective and reasonable justification’, in the ECtHR’s view, ‘means that the distinction in question does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”’.¹²³ Furthermore, depending on the circumstances, the subject matter and the background, states may have varying degrees of margin of discretion.

Where the ground of discrimination based on ethnicity and race is concerned, the ECtHR reaffirmed that discrimination based on a person’s ethnic origin is a form of racial discrimination; as a particularly egregious kind of discrimination, racial discrimination requires from the authorities special vigilance and a vigorous reaction.¹²⁴ In view of its perilous consequences, in cases involving a difference in treatment based on race or ethnicity, ‘objective and reasonable justification’ must be construed as strictly as possible.¹²⁵ Moreover, no difference in treatment exclusively or primarily based on a person’s ethnic origin can be objectively justified in a contemporary democratic society based on the principles of pluralism and cultural diversity. That being said, Article 14 does not preclude states from treating groups differently to correct ‘factual inequalities’ between them; moreover, in some situations a failure to attempt to correct inequality may violate this provision, unless there is an objective and reasonable justification.¹²⁶

Accordingly, the ECtHR has not deviated from its previous jurisprudence on Article 14 and has reaffirmed the principles established in its case law. In applying these principles to the present case, the ECtHR found a violation of Article 14 ECHR read in conjunction with Article 3 of Protocol 1. So far, we have overviewed the general principles in the ECtHR’s assessment of non-discrimination. The ECtHR’s reasoning on non-discrimination in political participation in the context of the present case is discussed in more detail on pages 27–28 of this guide.

We now turn to the ECtHR’s construal of non-discrimination under Protocol 12. The applicants in *Sejdić and Finci* complained that under the constitutional provisions they were ineligible to stand for election to the Presidency of Bosnia and Herzegovina. Because this was a right set forth by law, irrespective of whether elections to the Presidency fell within the ambit of Article 3 of Protocol 1, Article 1 of Protocol 12 applied to the case. In its assessment, the Court referred to its reasoning under Article 14 ECHR, considered that there was no pertinent distinction between the House of Peoples and the Presidency of Bosnia and Herzegovina, and concluded that there was also a violation of Article 1 of Protocol 12.

In his partly concurring and partly dissenting opinion Judge Mijovic expressed disappointment with the ECtHR’s brief reasoning in assessing alleged

discrimination under Protocol 12, considering the expectation that the Court would ‘use this case, as the very first of its kind, to lay down specific first principles, standards or tests that might be considered universal and applicable to future cases concerning general discrimination’.¹²⁷ Nonetheless, by finding a violation of Protocol 12 in the first case where the ECtHR has issued a judgment regarding Protocol 12, the Court confirmed that this instrument may further enhance the protection of minorities under the ECHR. Furthermore, as this case demonstrates, the added value of Protocol 12 is in its application to any ‘right set forth by law’.

Some developments in the area of non-discrimination based on racial or ethnic origin took place in the African and Inter-American contexts as well. Thus, the ACHPR found a violation of Article 2 on non-discrimination of the African Charter based on the ground of ethnic origin in the cases such as *Amnesty International v Zambia*¹²⁸ and the *Organisation Mondiale Contre la Torture and Others v Rwanda*.¹²⁹

Thus, in *Amnesty International v Zambia*,¹³⁰ Zambia deported two prominent political figures, which in the view of the applicants constituted discrimination and violated *inter alia* Article 2 of the African Charter. The ACHPR noted that Article 2 imposes an obligation on Zambia to guarantee the rights protected under this instrument to all persons within its jurisdiction irrespective of their political or any other opinion.¹³¹ Without any elaboration on the application of the principle of non-discrimination, the ACHPR concluded that the arbitrary removal of one’s citizenship cannot be justified and hence there was a violation of Article 2.

Similarly, in *Organisation Mondiale Contre la Torture and Others v Rwanda*,¹³² the African Commission did not specify any particular test in applying the principle of non-discrimination. The case concerned the expulsion from Rwanda of Burundi nationals (who had been refugees in Rwanda for many years), and arbitrary arrests and detentions made on the basis of ethnic origin, including the Tutsi ethnic group, in various parts of the country by the Rwandan security forces. The African Commission simply held that

‘[t]here is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.’¹³³

Such a brief reasoning may be explained by the fact that, despite the numerous notifications of the communications

sent by the ACHPR, the government of Rwanda did not supply any substantive response. Thus, because the applicants’ claims remained uncontested by the government, the ACHPR had to decide based on the facts provided.¹³⁴ Nevertheless, a lack of dialogue between the ACHPR and the government did not prevent the ACHPR from clarifying a review mechanism in the application of the principle of non-discrimination.

The ACHPR has slightly expanded on its interpretation of the principle of non-discrimination in *Malawi African Association and Others v Mauritania*,¹³⁵ concerning discriminatory treatment of many Black Mauritians, who, because of the colour of their skin, were forced to flee, or were detained, tortured or killed. The African Commission interpreted Article 2 AfrCH as essential to the spirit of the instrument, which *inter alia* pursues the goal of the elimination of all forms of discrimination and aims to ensure equality among all human beings. The ACHPR then relied on Article 1(1) of the UN Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities (UNDM) and maintained that international human rights law and the international community accord significance to the eradication of discrimination in all its forms. Therefore, a state’s discriminatory treatment of its own indigenes based on the colour of their skin is an unacceptable discriminatory attitude in violation of Article 2.¹³⁶

As in the above-discussed cases, the ACHPR accorded a heightened scrutiny to the case of discrimination based on ethnic origin or race. In all three cases, discriminatory treatment of minority groups was blatantly obvious. Nevertheless, in future, it is desirable for the ACHPR to specify a review mechanism, as in the jurisprudence of the ECtHR and HRC, to clearly indicate which state acts may contravene Article 2.

Case study: *The Yean and Bosico Children v Dominican Republic*

In this regard, the IACTHR decision in *The Yean and Bosico Children v Dominican Republic* case,¹³⁷ in which MRG intervened, is highly commendable for its thorough assessment of a discriminatory denial of birth certificates to children of Haitian origin. The Yean and Bosico children of Haitian origin were born in the Dominican Republic. Article 11 of the Constitution of the Dominican Republic stipulated that all those born on its territory are Dominicans (*ius soli*),¹³⁸ except for the children of foreign diplomats resident in the country or *the children of those in transit*.

Around 500,000 undocumented Haitian workers live in the Dominican Republic; many of them have been born

on Dominican territory and lived there for up to 40 years.¹³⁹ Most of them ‘face a situation of permanent illegality, which they transmit to their children, who cannot obtain Dominican nationality because, according to the restrictive interpretation that Dominican Authorities give to article 11 of the Constitution, they are children of “foreigners in transit.”’¹⁴⁰

Hence, there are significant obstacles for these children to receive a birth certificate, which entitles them to attend a public school, and have access to healthcare and social assistance services. Furthermore, because of precarious economic conditions and fear of deportation, many families of Haitian origin use the late declaration of birth procedure to declare their children born in the Dominican Republic.¹⁴¹ To make the late declaration of birth procedure for children under 13, parents should produce three pieces of evidence; for the registration of children over 13 years, there is a list of 11 requirements.¹⁴²

When the Yean and Bosico children’s parents made the late declaration of birth, both children were under the age of 13. However, the registrar refused their registration, because the documents presented were insufficient for late registration, based on a list of 11 requirements. The IACtHR observed in this regard that the state ‘adopted different positions regarding the requirements the children had to fulfil’ and that ‘there are no standard criteria for demanding and applying the requirements for late birth registration of children under 13 years of age in the Dominican Republic’.¹⁴³

The IACtHR further noted that, although the determination of who has a right to be a national falls within a state’s domestic jurisdiction, this discretionary authority may be restricted in order to protect individuals against arbitrary acts of states.¹⁴⁴ Thus, there are two state obligations in this respect: to provide individuals with the equal and effective protection of the law and to reduce statelessness.¹⁴⁵ In particular:

*‘the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.’*¹⁴⁶

Moreover, the obligation to respect and ensure the principle of the right to equal protection and non-discrimination applies irrespective of a person’s migratory status in a state. Accordingly, states have the ‘obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence,

nationality, race, gender or any other cause’.¹⁴⁷ Therefore, the Dominican Republic was obliged to adopt all necessary positive measures for the Yean and Bosico children to access the late registration procedure in conditions of equality and non-discrimination, and fully exercise and enjoy their right to Dominican nationality.¹⁴⁸

The implications of this ruling are very powerful: the IACtHR strongly condemned racial discrimination in access to nationality and upheld equality of treatment to all individuals on the state’s territory.

Lessons from EU law

The principle of non-discrimination based on nationality¹⁴⁹ and sex¹⁵⁰ featured strongly from the inception of the European Communities, that is, the predecessor of the EU. Recent years have marked the further development of the principle of non-discrimination in EU law. Thus, the 1997 Treaty of Amsterdam introduced Article 13 TEC (now Article 19 of the Treaty on the Functioning of the European Union [TFEU]) to provide that the Council may adopt secondary legislation against discrimination on several grounds, such as sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. This list of grounds does not, however, include national minority status, nationality or language.¹⁵¹ This section overviews the provisions of secondary legislation adopted under Article 19 TFEU (ex Article 13 TEC) which minority groups could indirectly benefit from, and discusses relevant case law.

Within one year of Article 13 TEC’s (now Article 19 TFEU) entering into force, the Council adopted Directives on the ‘Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’ (Race Directive)¹⁵² and on ‘Establishing a General Framework for Equal Treatment in Employment and Occupation’ (Employment Directive).¹⁵³ In addition, in 2004, the Council adopted a Directive on Equal Treatment in Access to and Supply of Goods and Services¹⁵⁴ (Goods and Services Directive) to combat gender discrimination in provision of goods and services.

The Directives require member states to protect individuals against direct and indirect discrimination, harassment and victimization on the grounds of racial and ethnic origin (Race Directive), sex (Goods and Services Directive), and religion or belief, disability, age and sexual orientation (Employment Directive). The scope of the Race Directive is significantly wider, because it applies to employment and occupation, the provision of goods and services, including education in both public and private spheres. Conversely, the Employment Directive has a

somewhat more limited scope, because it applies to employment and occupation in the public sector only. Furthermore, although the Goods and Services Directive applies to both public and private sector, it is limited to access to and supply of goods and services; for example, it explicitly excludes the content of media and advertising, as well as education from its scope.¹⁵⁵

Under all three Directives, direct discrimination takes place where one person is treated 'less favourably than another is, has been or would be treated in a comparable situation'¹⁵⁶ on grounds specifically prohibited by the respective Directives. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin, sex, religion or belief, disability, age and sexual orientation at a particular disadvantage compared with other persons.¹⁵⁷ Under the Race and Employment Directives, indirect discrimination may, however, be justified if a measure had a legitimate aim, to be achieved by appropriate and necessary means. For example, differences in treatment in connection with age may be justified on the basis of legitimate employment policy, labour market and vocational training objectives.¹⁵⁸ The Goods and Services Directive introduces the similar concept of objective justification without limiting it to cases of indirect discrimination.¹⁵⁹ The preamble of the Goods and Services Directive refers, for example, to single-sex shelters aimed to protect victims of sex-related violence.¹⁶⁰

In addition, the Directives prohibit harassment – unwanted conduct related to one of the prohibited grounds of discrimination with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The Directives permit member states to define the concept of harassment, taking into consideration the context supplied by Article 2(3). Furthermore, any instruction to discriminate on the grounds listed in the Directives is deemed to be discrimination.

The Directives, however, contain several exceptions. For example, Article 4 of the Race Directive and Article 4(1) of the Employment Directive stipulate that differential treatment based on a characteristic related to racial or ethnic origin, age, disability, religion or belief or sexual orientation would not be considered discriminatory if by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.¹⁶¹

As to the Goods and Services Directive, prior to 21 December 2007, the Directive allowed member states to 'permit proportionate differences in individuals' premiums

and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data'.¹⁶² However, the use of sex as a factor in the calculation of premiums for the purposes of insurance and related financial services is precluded in all contracts concluded after 21 December 2007.¹⁶³ Thus, there are a number of hedges in all three Directives capable of limiting the scope of their application.

On the positive side, all three Directives specify that, to ensure full equality in practice, member states would not be precluded from maintaining or adopting positive action to prevent or compensate for disadvantages entailed by non-discrimination.¹⁶⁴ In addition, the Directives clarify that the provisions of these instruments are minimum standards and member states are free to maintain higher standards of protection;¹⁶⁵ moreover, the implementation of the Directives may not reduce the level of protection that was already afforded under national laws.¹⁶⁶

It is hoped that the exceptions in Articles 4 in each of the Equality Directives will not detract from their protective scope, but this will largely depend on the ECJ's reading of the instruments. The following section reviews the ECJ's jurisprudence based on these Directives.

Race Directive: ethnic and racial discrimination

Case study: *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV (Feryn)*

The ECJ has interpreted the scope of the Race Directive only once. In *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV (Feryn)*,¹⁶⁷ the ECJ dealt with the concept of direct discrimination. The case concerned public statements by one of the directors of Feryn who claimed that his firm, which specialized in the sale and installation of doors, would not recruit persons of Moroccan origin, because some customers do not want them in their private homes. The Belgian Centre for Equal Opportunities and Opposition to Racism brought proceedings against Feryn before national courts. The national court stayed the proceedings and asked the ECJ to provide guidance on whether public statements by an employer declaring that it would not recruit employees of a certain ethnic origin constitute direct discrimination under the Race Directive.

One of the distinct features of the case is a lack of an identifiable victim in the case. The UK and Ireland argued, therefore, that no claim can be made under the Race Directive.¹⁶⁸ The ECJ, however, disagreed and held that the existence of direct discrimination was not dependent

on an identifiable complainant who claims to be a victim:¹⁶⁹ the scope of the Race Directive would be limited if it only applied to ‘those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer’.¹⁷⁰ The ECJ ruled that an employer’s public statements in the context of a recruitment drive, stating that applications from persons of a certain ethnic origin would be turned down, amounted to direct discrimination under the Race Directive, because they were likely to hinder access to the labour market by dissuading certain candidates from applying for advertised positions.

The ECJ’s ruling in the case suggests that the Court accords high scrutiny to cases involving discrimination based on racial or ethnic origin. This view may be also supported by the fact that in *Feryn*, neither the ECJ nor the Advocate General discussed a possibility that, in some exceptional cases, genuine and determining occupational requirements¹⁷¹ may require an employer to differentiate between the applicants. Although such discussion might have been unnecessary in the context of *Feryn*, this approach may also be indicative of the ECJ’s intention to interpret exceptions under the Race Directive very narrowly.

Employment Directive: religion or belief

To date, the ECJ has not considered a case concerning religious discrimination based on the Employment Directive.¹⁷² Arguably, in addition to the Employment Directive, the Race Directive may indirectly protect those minorities who share both an ethnic origin and a religion.

Three aspects of the Equality Directives which may affect future case law in this field should be mentioned. First, the Race Directive is more rigorous than the Employment Directive and requires member states to protect racial and ethnic groups in employment, vocational training, education and provision of goods and services in both public and private spheres, whereas the Employment Directive applies only to employment relations. Thus, there is a notable hierarchy of the grounds under the Equality Directives, with race or ethnic origin accorded the highest level of protection, followed by gender, while religion is at the bottom of the hierarchy. This hierarchy stems from the different scopes of protection accorded under the Race, the Employment and the Goods and Services Directives, as discussed above. Recently, the Commission proposed to expand the scope of the Employment Directive to match the Race Directive.¹⁷³ If this proposal is accepted, the Employment Directive would apply not only to employment and occupation, but also to the provision of goods and services, including education in both public and private spheres.

Furthermore, under the Race Directive some groups which share both a common race and common religion may receive more extensive (indirect) protection, while others who share only a religion may be excluded. Arguably, it is often difficult to delimit race and religion, which may prove problematic in the application of the Race and the Employment Directives, particularly where ‘a religion can be linked to ethnicity, either because a religious group is considered to have an ethnic character, or because members of a religion belong predominantly to particular ethnic groups’.¹⁷⁴ In this respect, the UK’s experience is highly relevant, because the Race Directive was modelled on the Race Relations Act (1976); hence, similar to the British experience, some groups which have both a common ethnic origin and a common religion, such as Sikhs, Gypsies and Jews,¹⁷⁵ may benefit from the Race Directive, while others, who share only religion, such as Muslims, Rastafarians and Jehovah’s Witnesses,¹⁷⁶ may be excluded. Accordingly, indirect protection of some religious minorities which also share a common ethnic origin under the Race Directive might generate an imbalance in the protection of religious minorities.

In addition, based on Article 4(2), which permits a specific exception to the principle of equal treatment in the case of churches and other organizations with an ethos based on religion or belief, employers may choose a ‘person of the same religion or belief for a job where being of that religion or belief is a genuine, legitimate and justified occupational requirement’. This provision may permit, for example, a church to advertise for a ‘committed Christian’ to take a position as the Minister of the Church. However, when transposing the Directive into their national laws, some member states have provided ‘exceptions that may go beyond the strict terms of the Directive or which remain ambiguous’.¹⁷⁷

Moreover, the Employment Directive establishes in Article 2(5) that the instrument is without prejudice to measures laid down by national law which ‘in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others’. This limitation, which replicates Article 9(2) ECHR, may further curtail the scope of rights of religious minorities under the Directive.

Another problem in the application of the Employment Directive may stem from a lack of a definition of the terms ‘religion’ or ‘belief’ in the majority of member states. Arguably, it is often difficult to delimit race and religion, which may prove problematic in the application of the Race and the Employment Directives, particularly where ‘a religion can be linked to ethnicity, either because a religious group is considered to have an

ethnic character, or because members of a religion belong predominantly to particular ethnic groups'.¹⁷⁸

The application of these limitations is clear from the recent case of Mrs Azmi in the UK,¹⁷⁹ a Muslim teaching assistant at the Headfield Church of England (Controlled) Junior School,¹⁸⁰ dismissed for refusing an instruction not to wear her veil covering her face while in class with pupils assisting a male teacher. Mrs Azmi brought a case before the Employment Tribunal (ET) at Leeds and claimed direct and indirect discrimination, harassment and victimization on the ground of religion under the Employment Equality (Religion or Belief) Regulations 2003 – the piece of legislation which incorporates EC Employment Directive in the UK legal system.

In the decision of 19 October 2006 the ET dismissed her claims of direct discrimination and harassment; the claim of victimization succeeded and she was awarded a monetary compensation. Where direct discrimination is concerned, the ET ruled that Azmi's comparator was a person who was issued instructions and following a failure to follow the instructions was suspended. As she failed to follow the instructions, her suspension could not be regarded as direct discrimination. The ET did not accept Mrs Azmi's argument that her comparator should have been another Muslim woman who covers her head but not her face.¹⁸¹ As to indirect discrimination, the ET found that although the treatment in question could amount to indirect discrimination against the applicant on the ground of religion, such treatment was justified because it pursued a legitimate aim of ensuring that the children received the best possible instruction in the English language. Furthermore, the treatment was justified because it was proportionate: the requirement to remove the veil was not imposed by the school immediately; up to 16 November 2006, Mrs Azmi was permitted to wear the veil, when she considered it appropriate.

The Employment Appeal Tribunal (EAT) upheld this decision. In its assessment it relied on Articles 1 (the purpose of the Employment Directive), 2 (Concept of Discrimination) and 4 (Occupational Requirements).¹⁸² Where direct discrimination is concerned, the EAT followed the restrictive approach of the ET by confirming its choice of a comparator. The case signals the significance of choosing an appropriate comparator. A choice of such a broad comparator in this case is unfortunate and is unlikely to help a claim of any Muslim woman, dismissed for a failure to follow the instructions which she deemed to contradict her religious belief. Arguably, in a case of discrimination on the ground of religion, at the very least, a comparator should have been a person who refused to follow instructions due to one's religion or belief.

Furthermore, both Tribunals found that persons who shared the applicant's belief were likely to be

disadvantaged by the school's practice as compared to others. The Tribunals, however, were influenced by the school's statements indicating that the observation of Mrs Azmi's teaching demonstrated that it was unsatisfactory when she taught in a veil covering her face as compared to her teaching without it. Accordingly, her dismissal was a proportionate measure necessary to achieve the legitimate aim of ensuring a proper learning of pupils who should be able to interpret facial expression of a teacher. Thus, this case demonstrates that although the Employment Directive made it possible for individuals to bring claims of discrimination on the ground of religion, it may be too weak to remedy the situation of religious minorities.¹⁸³ It is regrettable that the EAT refused to refer a preliminary ruling question to the ECJ and we will need to wait and see what the latter's approach would be.

Conclusions

The principle of non-discrimination of minorities and indigenous peoples is not developed to its full potential. This is partially due to the limited number of cases where claims of discrimination against minorities were considered. Nevertheless, recent advancements in the jurisprudence of the ECtHR, ACHPR and Inter-American Commission of Human Rights (IACHR), coupled with legislative developments such as Protocol 12 ECHR and EU Equality Directives, may serve as a major impetus for strengthening anti-discrimination law. Furthermore, the ECtHR is yet to explore the full potential of Protocol 12; in this respect, a wider ratification of the instrument, particularly by western European countries, is desirable.

Findings of indirect discrimination against minorities by the HRC and ECtHR can be evaluated as positive developments in anti-discrimination law, because they may open the way for greater protection of minority groups. However, the application of this concept needs further development, particularly in the Inter-American and African contexts. In the European context, the ECJ's finding of indirect discrimination in cases concerning sex and nationality discrimination, and the elaborate rules of the Equality Directives may guide the jurisprudence of other courts and quasi-judicial bodies. Furthermore, major moves can be observed in the ECtHR's jurisprudence, which accepted statistical evidence and agreed that, in certain situations, the burden of proof may be shifted on to the authorities.

Where the grounds of discrimination are concerned, international and regional courts and quasi-judicial bodies seem to accord a high level of scrutiny in cases concerning discrimination on the grounds of race or ethnicity. For example, *The Yean and Bosico Children v Dominican*

Republic, Amnesty International v Zambia, Timishev v Russia and *Feryn* constitute a welcome development in anti-discrimination law. In contrast, the case law on religious discrimination is limited and requires a higher level of scrutiny of state measures. This is particularly important in the cases concerning intersectional discrimination based, for example, on the grounds of religion and gender. The jurisprudence of the ECtHR is particularly disappointing in this respect, as it seems to be outdated: the Court continues to be unwilling to consider the applicants' claims of multiple discrimination.

Although it is commendable that racial discrimination is strongly condemned, the differentiation between the grounds of non-discrimination may lead to an undesirable hierarchy. Such hierarchy of grounds is particularly visible in the context of EC Equality Directives, with race and ethnicity in the first place, sex second, and other grounds, such as religion or belief, accorded the least protection. However, the Directives could be used as a fertile ground for developing the concept of 'intersectional' discrimination in practice, particularly where a group may share a common ethnic origin and a common religion.

Right to education

The right to education is a right essential to everyone; for minorities and indigenous people, however, 'it is also instrumental as a precondition for the full enjoyment of many other rights, such as the right to participation, expression, association, etc.'¹⁸⁴ In its General Comment on the right to education, the Committee on Economic, Social and Cultural Rights (CESCR) introduced essential features of education: availability, accessibility, acceptability and adaptability (the so-called 4As).¹⁸⁵ The CESCR explained that *availability* requires functioning educational institutions and programmes; *accessibility* entails open access to education without discrimination: thus, education should be accessible within physical or technological reach, economically affordable and equal without any discrimination; *acceptability* concerns the form and substance of education; finally, *adaptability* requires flexible education which can be adjusted according to changing social needs.

This part of the guide reviews international guarantees and the jurisprudence of international and regional courts on the right to education, with the main focus on access to education, including education in a minority language.

The right to education in international and regional instruments

The right to education is guaranteed by a number of international instruments. Thus, the Universal Declaration of Human Rights affirms that everyone has the right to education.¹⁸⁶ Furthermore, the ICESCR recognizes everyone's right to education in a very detailed Article 13.¹⁸⁷ Similarly, the Convention on the Rights of the Child (CRC) upholds this right in respect to children.¹⁸⁸ The International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries guarantees the right to education of indigenous people specifically.¹⁸⁹ Furthermore, the UNESCO Convention against Discrimination in Education (CDE) reinforces this guarantee by forbidding any distinction, exclusion, limitation or preference based on *inter alia* language.¹⁹⁰ The CDE defines the concept of 'education' broadly to include all types and levels of education, and governs access to education, standard and

quality of education, as well as the conditions under which it is offered.¹⁹¹

At the regional level, Article 2 of Protocol 1 (P1-2) to the European Convention on Human Rights (ECHR) also establishes that '[n]o person shall be denied the right to education'. Recently, the Charter of Fundamental Rights of the European Union introduced the right to education in Article 14. This guarantee is largely modelled on P1-2 ECHR and Article 13(2) ICESCR. It provides for free compulsory education for all¹⁹² and the freedom to establish private schools.¹⁹³ Furthermore, the AfrCH includes the right to education as a matter of principle in Article 17(1).¹⁹⁴ In the Inter-American context, the Inter-American Declaration of the Rights and Duties of Man addresses the right to education in Article XII, as well as Article 13 of Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights.¹⁹⁵

Regarding specifically minorities, Article 27 of the ICCPR is a universal minimum standard. Although Article 27 ICCPR does not specifically refer to education, educational needs of minorities are central to the protection of their identity and equal treatment. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDRIP) is more explicit in this regard and refers to education in Article 4(4). Furthermore, the FCNM¹⁹⁶ requires states to guarantee access to education in Article 12, to recognize the right of national minorities to set up and to manage their own private educational and training establishments in Article 13, and to provide education in and of minority languages in Article 14. Another important instrument which has an extensive provision on education is the European Charter for Minority Languages (Languages Charter): Article 8 offers a long list of possibilities for education in regional or minority languages: the higher the number of members of a linguistic minority, the higher protection they may claim from a state. However, states can pick and choose from the Charter's provisions, taking into consideration their national circumstances: it is sufficient to accede to 35 out of 68 Articles of the instrument. Moreover, the Languages Charter aims to protect neither human rights nor minority rights. The main purpose of the instrument is to promote linguistic diversity. In addition, the (non-legally binding) OSCE Hague Recommendations regarding the Education Rights of National Minorities clarify the content of

minority education rights and interpret applicable standards to ensure coherence in their application.

The following section overviews the jurisprudence of international and regional courts to highlight the application of some of these standards.

Access to education

Equality in access to education can be denied directly or indirectly through imposition of additional conditions, which may disadvantage members of a particular group. Therefore, equal access to education requires it to be non-discriminatory; in addition, education should be physically and economically accessible. These aspects of the right to access education have featured in the jurisprudence of international courts.

Case study: *Belgian Linguistics*

The ECtHR's first decision on access to education in *Belgian Linguistics*¹⁹⁷ has been one of the most influential judgments in this area. The case was brought by a large number of French-speaking parents living in Dutch-speaking districts of Belgium. The applicants complained that French-speaking children whose parents' place of residence was in the Dutch-speaking region were denied access to schools in bilingual communes on the outskirts of Brussels which enjoyed 'special status'. Access to these bilingual schools was limited to four categories of children: children who had attended classes in 1962–3; children and family members of university employees, students and teaching staff; children of foreign nationality; and children of French-speaking Belgians living *outside* the Dutch-speaking region.¹⁹⁸ Thus, children of French-speaking parents who lived in the unilingual Flemish region were denied access to schools in these communes. In contrast, in the same communes Dutch classes were open to all children irrespective of their language or place of residence of their parents.¹⁹⁹

In its analysis, the ECtHR first established that P1-2 did not impose any linguistic requirements; therefore, the right to education under this provision was not violated in Belgium because, irrespective of their language children had access to public or subsidized education in Dutch-language schools. Moreover, the Convention did not guarantee the right to be educated in the language of parents by the public authorities or their financial support.²⁰⁰

Nevertheless, the ECtHR indirectly recognized general group-oriented language/education policies and the need to secure protection of certain individuals or groups against discrimination as part of this process. Thus, the

Court ruled that denial of access to existing schools was discriminatory because it stemmed solely from considerations relating to residence; accordingly a breach of P1-2 in conjunction with Article 14 ECHR was found. This finding is very cautious: the ECtHR did not require Belgium to guarantee the access of French-speaking children to minority schools. Instead, the Court found that the requirement of residence was disproportional to the aims pursued.

As to the requirement of non-discriminatory access to education, the case of *D.H. and Others v The Czech Republic*,²⁰¹ where the Grand Chamber established that indirect discrimination in access to education based on racial or ethnic origin is prohibited, provides strong guarantees. Furthermore, the case informed the ECtHR's subsequent jurisprudence. Thus, in *Affaire Sampanis et Autres c. Grèce*,²⁰² the ECtHR found that the placement of Roma children in separate classes in a mainstream primary school in a Greek municipality constituted indirect discrimination. Furthermore, in the *Case of Oršuš and Others v Croatia*²⁰³ Roma children were placed in Roma-only classes within certain local primary schools. Croatia maintained that the measure was adopted based on the fact that Roma children did not have adequate command of the Croatian language. The First Section of the ECtHR accepted the government's justification of differential treatment and found no violation of Article 14 ECHR. However, the applicants' request to refer the case to the Grand Chamber succeeded: relying on *D.H. and Others* and *Sampanis*, the applicants claimed indirect discrimination, and even direct discrimination based on race and ethnicity. On 16 March 2010, the Grand Chamber reversed the Chamber's decision and found a violation of Article 14 ECHR taken together with P1-2. The Grand Chamber held that a difference in treatment of Roma children constituted indirect discrimination.

The Advisory Committee, the body monitoring the implementation of the FCNM, took a similar stance in its Opinions based on Article 12(3) FCNM, which protects access to education and obliges states to promote 'equal opportunities for access to education at all levels for persons belonging to national minorities'. A clear wording of the provision allowed the Advisory Committee to set a higher threshold for the implementation of Article 12. Thus, in its Opinion on Bosnia and Herzegovina,²⁰⁴ Italy,²⁰⁵ Slovakia,²⁰⁶ etc., the Advisory Committee expressed its concern about high level of absenteeism of Roma children; moreover, the Committee criticized the practice of placing Roma children in special schools.²⁰⁷ In the view of the Committee, '[s]egregated education, often of lower

standard than that offered to other students, is one of the most extreme examples of the precarious position of Roma parents and pupils'.²⁰⁸

Indeed, although the UNESCO Convention against Discrimination in Education permits establishment and maintenance of separate educational systems for linguistic reasons, such permission is conditional on optional attendance and high-quality education, which conforms to state standards.²⁰⁹ Otherwise, segregation of minorities would constitute discrimination.

In the Inter-American context,²¹⁰ the IACtHR considered a discriminatory denial of access to education in *The Yean and Bosico Children v Dominican Republic*.²¹¹ In the Dominican Republic, children who did not possess a birth certificate could not access day schools; this limitation adversely affected children of Haitian origin, who often struggled in acquiring an identity document. Violeta Bosico, a child of Haitian origin, was denied her birth certificate and hence her access to education in day schools was barred. She was initially admitted to day school without a birth certificate and studied up until third grade.²¹² However, when she tried to enrol for the fourth grade in day school, she was denied access because she did not have a birth certificate.²¹³ Therefore, she enrolled in evening school for adults over 18 years of age where she attended fourth and fifth grades. The purpose of evening school was to teach adults to read and write only, with pupils doing two grades in one year. The compressed type of education adopted in this school made fewer demands than day school.²¹⁴

The IACHR strongly condemned this denial of access to education in the Dominican Republic. In 2001, as a part of a friendly settlement, the Dominican Republic granted Violeta Bosico her birth certificate and she returned to day school. Moreover, the IACHR awarded non-pecuniary damages to the applicant and her parents for a violation of her right to education by the Dominican Republic.

Accordingly, access to education should be non-discriminatory; in addition, requirements such as residence and birth certificates may unduly limit minorities' access to education.

Furthermore, access to education should be physically accessible as exemplified in the ECtHR's judgment in *Cyprus v Turkey*.²¹⁵ Significantly, the ECtHR's interpretation of access to education also has a linguistic component in this case. The case concerned the compatibility of a total ban on the availability of Greek-language secondary schools with the terms of P1-2 in Northern Cyprus, occupied by Turkey. While secondary education in Greek was formerly available to children of Greek Cypriots, it had been subsequently abolished by the Turkish-Cypriot authorities. Primary education in Greek was still available to children in Northern Cyprus;

however, if parents of these children wished them to continue their education in Greek they had to send them to schools in Southern Cyprus. Alternatively, children could attend English or Turkish schools available in the north.

The vast majority of families chose the first option and many schoolchildren received their secondary education in the south.²¹⁶ However, significant restrictions existed on their return to the north upon completion of their studies: until 1998 male students who attained the age of 16 and female students who attained the age of 18 were not allowed to return to the north permanently.²¹⁷ This restriction resulted in the separation of many families upon children's completion of their studies.

In its assessment, the ECtHR first applied the principles established in *Belgian Linguistics*: P1-2 does not guarantee the choice of the language of instruction.²¹⁸ The ECtHR ruled that in the strict sense there was no denial of the right to education because children had access to a Turkish- or English-language school in the north. However, taking into consideration that the authorities assumed responsibility for providing primary education in Greek, their failure to 'make continuing provision for it at the secondary-level must be considered in effect to be a denial of the substance of the right at issue'.²¹⁹ Children's attendance of Greek schools in the south could not be considered as a viable alternative having regard to its impact on family life in the light of limitations imposed on their return to Northern Cyprus. In addition, the Court emphasized that '[t]he authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek Language'.²²⁰ Therefore, by 16 votes to 1 the ECtHR found that there was a breach of P1-2.

Overall, *Cyprus v Turkey* is a significant development in the ECtHR's jurisprudence regarding minority education. It affirms that access to education should not negatively impact family life of minorities. Moreover, the ECtHR established that where the state offers primary education in a minority language, it may also be responsible for the provisions of secondary education in a minority language.

Can the ECtHR depart from the principles in *Belgian Linguistic* and move from the exceptions to be found on a case-by-case basis, such as in *Cyprus v Turkey*, to a general principle of education in a minority language? Such a development is possible, and probably desirable. However, this does raise difficulties. First, the wording of P1-2 does not *prima facie* allow the ECtHR to find a general obligation to secure education in a minority language. Second, the ECHR does not contain an equivalent of Article 27 ICCPR. Third, general human rights provisions can and should be read in a minority-friendly fashion,²²¹ but they do not necessarily generate generally applicable

principles. The Court's approach in *Cyprus v Turkey* appears realistic at this stage.

Where economic accessibility is concerned, states are free to adopt educational policy they see fit: there is no state obligation to fund private minority schools.²²² However, even though states are not obliged to financially support private schools, the question of public funding may arise if a state chooses to subsidize education of some minority groups and refuses funding to others. Such treatment may be challenged as discriminatory, although it will not necessarily render a positive state action. Thus, the decision of the UN Human Rights Committee in *Waldman v Canada*²²³ suggests that, although there is no requirement on states to fund private minority schools, if they choose to assist private schools, minority schools would have to be treated in an equal manner. Furthermore, as Martin Scheinin, a member of the HRC, argued in his individual (concurring) opinion in *Waldman v Canada*,²²⁴ Article 27 ICCPR imposes positive state obligations to promote religious instruction in minority religions; to this end, an optional arrangement within the public education system is one permissible arrangement. To avoid discrimination in funding religious (or linguistic) education, in some cases states may legitimately make decisions regarding public funding based on whether there is a constant demand from minorities for such education; another legitimate criterion in making such decisions is whether there is a sufficient number of children to attend such a school, to ensure the viability of providing religious (or linguistic) education.²²⁵

Conclusions

Access to education is essential to guaranteeing the right of minorities to education, as well as ensuring that they have equal opportunities with the majorities to enjoy other fundamental rights, such as the right to effective participation in the political, economic, social and cultural life of a country, and freedom of speech and assembly. States should ensure that access of minorities to education is non-discriminatory, physically accessible and economically affordable.

As far as non-discriminatory treatment in access to education is concerned, recent jurisprudence of international courts and quasi-judicial bodies shows remarkable developments, such as in *D.H. and others v Czech Republic* and *Oršuš and Others v Croatia* before the Grand Chamber of the ECtHR and *The Yean and Bosico Children v Dominican Republic* decided by the IACtHR.

Litigation in this area is essential for strengthening these principles further and eliminating discrimination against minorities in this context.

Cyprus v Turkey is a significant development in ensuring access of minorities to education in a minority language. It imposed an obligation on states to provide secondary education in a minority language where it assumed the responsibility for primary education. The precedential value of *Cyprus v Turkey* may be limited, as the context of this case should be taken into consideration. Yet it provides a clear indication that, although the ECtHR is unlikely to recognize a free-standing right to education in a minority language, there exist situations where the Court can hardly ignore the group dimension of minority protection.

In addition, in *Cyprus v Turkey* education was not physically accessible; thus, the case sets a clear standard on the physical accessibility of education to minorities and may serve as a benchmark in future cases to substantiate demands for education in a minority language where, for example, attendance of existing schools in a minority language may not be physically accessible, with a negative impact on family life.

One objection to minorities' demand for public schooling in a minority language may be the freedom of minorities to establish their own schools. This freedom, however, is intimately linked with the requirement of economic affordability of education. Provisions in domestic legislation on freedom of minorities to establish their educational establishments are redundant if a minority group does not have adequate resources to organize such education. So far, in the context of non-discriminatory treatment of various minority schools, Canada was required to provide public funding to religious minority schools in a non-discriminatory manner. However, Article 27 ICCPR may be used to impose positive duties on a state to promote religious education. Furthermore, in making decisions regarding public funding, states should take into account whether (1) there is a sufficient demand from minorities for religious education or education in a minority language and (2) whether there is a sufficient number of children to attend such schools. While judicial or quasi-judicial findings of a general minority right to education in a minority language might be difficult to obtain, particularly under P1-2 ECHR, justifying *ex post* minority-friendly policies on the basis of equality and minority clauses, as well as finding of exceptions to the lack of a general entitlement on a case-by-case basis, appear to be realistic developments.

Right to political participation

It is generally recognized that minorities' and indigenous peoples' rights are better protected when these groups enjoy an effective right to political participation. This right may take different forms, including, in particular, the right to direct representation at the institutional level and the right to participate in those decision-making processes that may affect them.

In international human rights law, three types of instruments are of relevance in this context: those setting forth general human rights; those applicable only to minorities, including indigenous peoples to the extent that they constitute minorities;²²⁶ and finally those that are specifically designed to address the interests and needs of indigenous peoples as such.

While providing a short overview of general and special participatory standards concerning minorities and indigenous peoples, including the evolving right to effective participation in decisions affecting them, the following focuses on recent jurisprudential developments relating to general political rights, mainly the rights to vote and to stand for elections. Complex issues of consultation and consent will be addressed in the next section, in connection with an assessment of the indigenous land rights case law.

General and special participatory rights for minorities and indigenous peoples: a brief summary of standards

The right to political participation is recognized under the main international and regional human rights instruments. Examples include Article 25 of the ICCPR, Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 3 of Protocol 1 to the ECHR, Article 23 of the ACHR and Article 13 of the AfrCH. These general provisions apply to everyone, including members of minorities and indigenous peoples.

In addition, a number of provisions are specifically addressed to persons belonging to minorities. Among these, one should highlight Article 27 of the ICCPR and

Article 15 of the FCNM.²²⁷ While Article 15 of the FCNM explicitly requires states to create the conditions necessary for effective participation of persons belonging to national minorities in all aspects of a country's life, including in public affairs, in particular those affecting them, Article 27 ICCPR does not include such references.

Nevertheless, the HRC in interpreting the cultural rights of minorities under Article 27 ICCPR observed that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. Crucially, the HRC held that the enjoyment of these cultural rights may require positive measures to ensure the effective participation of members of minority communities in decisions which affect them.²²⁸ Indeed, the HRC's jurisprudence affirms the right of minorities to participation in matters affecting their interests, such as in *Ilmari Länsman et al. v Finland*,²²⁹ *Jouni Länsman et al. v Finland*²³⁰ and *Apirana Mabuika et al. v New Zealand*.²³¹ In these cases, the authors complained that the states' commercial exploitation of natural resources had a disruptive effect on their traditional way of life. In assessing whether Finland and New Zealand had violated their obligations under Article 27 ICCPR, the HRC focused on evaluating state measures taken to ensure the effective participation of members of the minority communities concerned in decisions which affected them. For example, in *Apirana Mabuika et al. v New Zealand*, the HRC emphasized that two criteria are essential in evaluating the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority: 'whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy'.²³² In all three communications, the HRC found that because the states consulted the groups concerned before they adopted relevant domestic legislation and took into specific consideration the sustainability of the minority groups' traditional activities,²³³ there was no violation of Article 27 ICCPR.²³⁴ Accordingly, Article 27 ICCPR also includes the right to effective participation of minorities in matters affecting their interests.

It is also worth mentioning the provisions included in the (non-legally binding) UNDM, inspired by Article 27

ICCPR. Article 2(2) of the UNDM affirms the right of minorities to effective participation in cultural, religious, social, economic and public life. Furthermore, Article 2(3) notes that persons belonging to minorities have the right to effective participation in decisions affecting their interests on the national and, where relevant, the regional level, in a manner compatible with domestic laws.²³⁵

Finally, ILO Conventions No. 107²³⁶ and No. 169²³⁷ – two legally binding instruments – and the UNDRIP, which, by contrast, does not produce legal obligations, specifically recognize the right of indigenous peoples to participate in decisions which may affect them. The UNDRIP not only recognizes this right but also introduces the concept of ‘free, prior and informed consent’. Article 19 establishes that states shall consult and cooperate in good faith with indigenous peoples ‘in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them’. Article 32 specifically recognizes this right in the context of indigenous peoples’ land rights. As we shall see below (in the section on Land rights, p. 30), the content of this provision was recently upheld by the IACtHR. However, whether such a right can be interpreted as including a right to veto remains to be seen.

Participation in government, with special reference to the right to vote

In its General Comment on Article 25 ICCPR, the HRC emphasized that a democratic government, based on the consent of the people and in conformity with the principles of the ICCPR, comprises the core of Article 25.²³⁸ States must report to the HRC on the conditions for access to public service positions, including dismissal or removal from office, so that the HRC could detect any irregularities in a timely way.²³⁹ Where voting rights are concerned, states must respect and implement the results of genuine elections.²⁴⁰

Article 3 of Protocol 1 ECHR stipulates that states must ensure ‘the free expression of the opinion of the people in the choice of the legislature’. This provision may prove useful to minorities in the exercise of their political rights, particularly where the choice of their representatives and the legislature are concerned, as highlighted in the above section.

These lines of argument can be followed in the jurisprudence of regional courts and quasi-judicial bodies. Thus, in *Walter Humberto Vasques Vejarano v Peru*²⁴¹ the IACtHR established that by removing the applicant from the post of justice of Peru’s Supreme Court of Justice, the President of the Republic of Peru, violated, *inter alia*, his right to participate in government under Article 23 of the ACHR. Although the right to political participation does

not prescribe a form of government or separation of powers within government, ‘a democratic structure is an essential element for the establishment of a political society where human rights can be fully realized’.²⁴² The IACtHR emphasized that the right to govern rests with the people, ‘who alone are empowered to decide their own and immediate destiny and to designate their legitimate representatives’.²⁴³

Likewise, in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*,²⁴⁴ the ACHPR emphasized the relevance of democracy and respect for the voters’ choice in the exercise of political rights. The ACHPR ruled that Nigeria violated Article 13 of the AfrCH by annulling the results of elections from several districts during the 1993 presidential elections. The ACHPR emphasized that under international human rights law certain standards must be applied uniformly across national borders. Governments must be liable to these standards. Taking the context of the case into account, the ACHPR ruled that it is the duty of international observers to ascertain whether elections were free and fair; otherwise it would be contrary to ‘the logic of international law if a national government with a vested interest in the outcome of an election, were the final arbiter of whether the election took place in accordance with international standards’.²⁴⁵ Furthermore, the right to participate freely in government entails voting for a representative of one’s choice; accordingly, government must respect the results of free expression of the will of the voters.²⁴⁶

Moreover, states are obliged to adopt legislative and other measures²⁴⁷ to ensure that minorities enjoy political rights and are not excluded from the electoral process. Thus, in *Aziz v Cyprus*²⁴⁸ the ECtHR established that Cyprus violated Article 3 of Protocol 1 to the ECHR: by failing to introduce any legislative changes to its Constitution ensuing from the occupation of Northern Cyprus by Turkey, Cyprus did not ensure the right of Turkish Cypriots to political participation.²⁴⁹ This failure to introduce necessary legislative provisions completely deprived the applicant of any opportunity to express his opinion in the choice of the legislature of the country of his nationality and permanent residence,²⁵⁰ thus impairing the very essence of the applicant’s right to vote.

However, not every differential treatment in the electoral system of a state may amount to discrimination. Indeed, states may choose to introduce a regime which through differential treatment would ensure respect for minorities’ rights. Thus, in *Lindsay and Others v the United Kingdom*,²⁵¹ the ECmHR decided that the application of a proportional representation system in the Northern Ireland as opposed to a ‘first past the post’ system in the rest of the United Kingdom was compatible with Article 3

of Protocol 1: the reason for applying different systems was the protection of the rights of a minority, and was, hence, justified. The ECmHR developed this approach further in *Moureaux v Belgium*²⁵² by emphasizing that states may be obliged to take account of the special position of minorities when electors choose candidates based on their belonging to an ethnic or linguistic group.

Another way to protect minority groups may be the introduction of a residence requirement aimed to limit political participation of persons who do not have sufficiently strong links with the territory or a minority group. Thus, in *Marie-Hélène Gillot v France*²⁵³ and *Py v France*,²⁵⁴ both the HRC and the ECtHR found that the 10-year period of residence requirement to qualify for voting in New Caledonia was compatible with the right to vote under the ICCPR and the ECHR. Given that the residence requirement was introduced in the context of self-determination of New Caledonia's population, it was not unreasonable to limit participation in local referenda and elections to individuals who have sufficiently strong ties with the territory and are directly concerned by the future of New Caledonia.²⁵⁵

Similarly, in *Nicoletta Polacco and Alessandro Garofalo v Italy*²⁵⁶ the ECmHR found that a four-year residence requirement to vote in elections in Trento was legitimate, because Italy introduced this condition to protect the rights of the German and Ladin minorities in the region of Trentino Alto-Adige. The requirement aimed to ensure that individuals taking part in elections are reasonably aware of the social, political and economic context of the region. This, in the ECmHR's view, was necessary in order 'for the elector to have a thorough understanding of the regional context, so that his vote in the local elections can reflect the concern for the protection of the linguistic minorities';²⁵⁷ hence, the measure was proportionate.

Right to stand for elections

International instruments do not impose on states any particular electoral system. However, they require states to guarantee the free expression of the electorate. In particular, the drawing of electoral boundaries and allocation of votes 'should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely'.²⁵⁸ Moreover, states should avoid disadvantaging national minorities by introducing changes to the administrative structures of a country.²⁵⁹

Thus, in *Istvan Matyus v Slovakia*,²⁶⁰ the applicant complained that the number of residents per representative in five voting districts in the town of RoňÁava was not proportional. Thus, there was 'one representative per 1,000 residents in district number one; one per 800 residents in district number two; one per 1,400 residents in district

number three; one per 200 residents in district number four; and one per 200 residents in district number five'.²⁶¹ Consequently, the last two districts were better represented in the elections. As a candidate in voting district number three, the applicant claimed that his right to political participation was violated because he was not given an equal opportunity to exercise his right to be elected to posts in the town council. In its decision on this case, the Constitutional Court of Slovakia established that, by drawing election districts for the same municipal council with substantial differences between the number of inhabitants per elected representative, Slovakia acted contrary to the election law specifically requiring proportional representation of inhabitants in voting districts and the Constitutional provision on equality of voting rights. However, the Constitutional Court dismissed the complaint of Mr Matyus because he complained after the election: declaring the election invalid could have interfered with the rights of elected representatives who acquired their positions in good faith.²⁶² In assessing this claim under Article 25 ICCPR, the HRC, taking note of the Constitutional Court's pronouncement and the fact that Slovakia failed to explain the differences in the number of representatives per districts, found a violation of Article 25 (a) and (c) ICCPR.

Generally, when minorities' access to standing for elections was barred without sufficient procedural guarantees, the international courts did not hesitate to find a violation. For example, in *Antonina Ignatane v Latvia*²⁶³ and *Podkolzina v Latvia*²⁶⁴ both the HRC and the ECtHR found that Latvia breached the applicants' right to stand for elections. In both cases, although the applicants successfully passed language aptitude tests, they were subjected to additional verification of language skills without sufficient procedural safeguards. Thus, the full responsibility in the assessment of the applicants' language proficiency was 'left to a single civil servant, who had exorbitant power in the matter'.²⁶⁵ This procedural aspect of the case was decisive in finding a violation.

In addition to procedural guarantees, the state must ensure judicial review of acts which may limit the right to stand for elections. In *Susana Higuchi Miyagawa v Peru*, the IACtHR found that Peru violated Article 23 of the ACHR. The applicant was prevented from standing for elections, because the National Electoral Board invalidated the applicant's registration due to typographical errors detected in the list.²⁶⁶ Significantly, the decisions of the National Electoral Board were not subject to review. The IACtHR found that Peru was obliged to guarantee effective remedies to review its acts which may violate political rights as protected under Article 23 ACHR.²⁶⁷

Moreover, states should not unreasonably limit the right of persons to stand for election by requiring

candidates to be members of parties or of specific parties.²⁶⁸ The IACtHR has recently admitted a case of *Nasry Javier Ictech Guifarrao v Honduras*²⁶⁹ challenging the refusal of Honduras to register the applicant's independent candidacy in the local elections. In its submission, Honduras indicated that the applicant failed to submit all necessary documents required by the Electoral and Political Organizations Law; besides the law did not permit the registration of independent candidates. Whether the IACtHR would consider a state's refusal to register independent candidates in local elections as a violation of the right to political participation remains to be determined, as there has not yet been a ruling from the IACtHR.

Despite international courts' strong stance on procedural guarantees, where access of minorities to standing in elections was barred due to linguistic restrictions, their interpretation has been less generous. By way of example, in the inadmissibility decision in *Fryske Nasjonale Partij and Others v the Netherlands*,²⁷⁰ the ECmHR established that the applicants whose names had been struck off a list of candidates for appearing in a minority language, could not claim a violation of Article 3 of Protocol 1. In the ECmHR's view the applicants were not as such prevented from standing as candidates; it was rather problems related to the language in which the registration took place. The candidates could simply submit a translation of their names to the authorities.

The ECtHR took a similar approach in *Mathieu-Mohin and Clerfayt v Belgium*,²⁷¹ by declaring that Belgium did not violate the political rights of the members of the French-speaking minority who became ineligible for membership in the Flemish Community Council because they took their parliamentary oaths in French. The ECtHR ruled that the principle of territoriality was essential to preserve a balance between different regions in Belgium, and therefore there was no discrimination against the applicants: the essence of their right to stand for elections and to be elected was not violated.²⁷²

Another argument which states used to justify excluding minorities from standing for elections is a lack of loyalty to the state. For example, in *Ždanoka v Latvia*,²⁷³ the applicant was permanently disqualified from standing for elections because of her work for the Communist Party of Latvia (CPL) during Latvia's transition to independence between January and September 1991. On 17 June 2004, the First Section of the ECtHR reviewed the proportionality of the applicant's permanent disqualification from standing for elections and found that it impaired the essence of the applicant's rights under the Protocol. However, in 2007, the Grand Chamber of the ECtHR found no violation of Article 3 of Protocol 1 ECHR.²⁷⁴ The Grand Chamber ruled that states may

impose stricter requirements on eligibility to stand for election to parliament than on the exercise of voting rights. Therefore, the ECtHR's review was limited to checking the absence of arbitrariness in domestic procedures to disqualify possible candidates.²⁷⁵ In the view of most judges, the applicant's active participation in the CPL rendered her exclusion from standing for a seat in the national parliament logical and proportionate.²⁷⁶

Significantly, the ECtHR's recent jurisprudence on political participation of minorities has been strengthened through more confident application of the principle of non-discrimination. This trend started in *Aziz v Cyprus*. In *Aziz*, the applicant complained that, in the exercise of his voting rights, he had been discriminated against on account of his national origin and association with a national minority, in breach of Article 14 ECHR read together with Article 3 of Protocol 1.²⁷⁷ Since 1964, the Cypriot government had adopted laws which benefited the Greek Cypriots only, without safeguarding the rights of the Turkish Cypriots. As a result, the applicant and thousands of other Turkish Cypriots were deprived of their right to vote or stand for elections.²⁷⁸ The government rejected these claims by submitting that the applicant was not in a comparable situation to voters who belonged to the Greek-Cypriot community.²⁷⁹ The ECtHR concluded that there was no reasonable and objective justification for the differential treatment of Turkish Cypriots and found a separate breach of Article 14 in conjunction with Article 3 of Protocol 1.

Case study: *Sejdić and Finci v Bosnia and Herzegovina*

Even more far-reaching conclusions regarding political participation of minorities stem from the recent cases of *Sejdić and Finci v Bosnia and Herzegovina*,²⁸⁰ which allowed the Court to crystallize its case law on non-discrimination under Article 14 ECHR read in conjunction with Article 3 of Protocol 1. The cases concern the compatibility of the domestic legislation of Bosnia-Herzegovina, which prevents persons not belonging to one of the three constituent peoples (Bosniaks, Serbs and Croats) from standing for election to the Presidency and the House of Peoples of the Parliamentary Assembly, with the ECHR rights.

In its assessment, the ECtHR observed that eligibility for standing in elections for the House of Peoples of Bosnia and Herzegovina is based on affiliation with one of the 'constituent peoples'. As a result, the applicants, who are of Roma and Jewish origin respectively, are excluded. This exclusion is a result of the 1995 Dayton Peace Agreement – the culmination of some 44 months of intermittent negotiations under the auspices of the

International Conference on the former Yugoslavia.²⁸¹ The ECtHR noted that the exclusion of the applicants from standing for elections pursued a legitimate aim of restoring peace which was broadly compatible with the general objectives of the ECHR as reflected in its Preamble.²⁸² This was so because at the time of enacting the impugned constitutional provisions, a very fragile ceasefire had been achieved on the ground. The provisions aimed to end a brutal conflict which led to 'ethnic cleansing'. To ensure peace, it was necessary to acquire the approval of 'constituent peoples'. This explained, though it did not justify, the exclusion of other communities from standing for elections. However, in light of recent developments, the maintenance of the system did not satisfy the requirement of proportionality, based on the reasons discussed below.

First, the situation in Bosnia and Herzegovina has significantly developed since the Dayton Peace Agreement. The state joined NATO's Partnership for Peace in 2006, signed and ratified a Stabilization and Association Agreement with the European Union in 2008, successfully amended its Constitution in 2009 and recently has been elected as a member of the UN Security Council for a two-year term. Furthermore, preparations are under way for the closure of an international administration as an enforcement measure under Chapter VII of the UN Charter. Therefore, the aim of restoring peace is not as pressing as when the Dayton Agreement was concluded.

Second, even though the ECHR does not prescribe a particular electoral system, there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of persons belonging to the 23 legally recognized national minorities or a person who does not want to identify him or herself as exclusively Bosniak, Croat or Serb or who refuses to identify him or herself for whatever reason, as the Opinions of the European Commission for Democracy through Law (Venice Commission) illustrate.²⁸³ Accordingly, there is the possibility of achieving the same end by using alternative means.²⁸⁴ For example, the Venice Commission commented on several proposals²⁸⁵ which could address the exclusion of minorities from standing for elections, including indirect elections for the collective presidency with the view of moving towards a single president in a manner which ensured trust beyond the ethnic group to which he or she belongs.²⁸⁶

Finally, as a member of the Council of Europe and a candidate for EU membership, Bosnia and Herzegovina has voluntarily assumed certain obligations. Thus, by ratifying the ECHR and its Protocols, the state agreed to meet the relevant standards. Moreover, Bosnia and Herzegovina committed itself, within one year of its

accession, to review (with the assistance of the Venice Commission) its electoral legislation and revise it where necessary to comply with the Council of Europe standards which *inter alia* include respect for minority rights. This commitment is reaffirmed in the 2008 Stabilization and Association Agreement with the EU.²⁸⁷

Based on these considerations, the ECtHR concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked an objective and reasonable justification and constituted a breach of Article 14 taken together with Article 3 of Protocol 1. In addition, the ECtHR found that an identical constitutional precondition concerning eligibility to stand for elections to the Presidency violated Article 1 of Protocol 12.

The case advances the right of minorities to political participation in several respects. First, as discussed in the section on non-discrimination, Article 1 of Protocol 12 widens the application of the principle of non-discrimination; in this case it condemned discrimination against minorities in political participation not only in the elected legislature, that is, the right protected under Article 3 of Protocol 1, but also in other bodies, such as the presidency.²⁸⁸

Moreover, the ECtHR granted the state only a narrow margin of discretion, despite the government's suggestion that the ECtHR follow *Ždanoka v Latvia* in order to reaffirm the states' considerable latitude in establishing electoral systems within their constitutional order and to distinguish the case from *Aziz v Cyprus*, because minorities in Bosnia and Herzegovina have not been prevented from standing for elections in all bodies. Furthermore, despite Judge Bonello's strong criticism,²⁸⁹ the ECtHR was not influenced by historic and political circumstances leading to the establishment of the current electoral system in Bosnia and Herzegovina; instead, it focused on the state's firm commitments to review its electoral legislation and guarantee political participation of minorities in line with Council of Europe standards.

Accordingly, the potential of the principle of non-discrimination to ensure effective participation of minorities in the political life of states is becoming increasingly significant. These developments may bring the ECtHR's case law in line with the jurisprudence of other international and regional quasi-judicial bodies.

Thus, the HRC has been more generous than the ECtHR in its interpretation of the right to stand for elections by requiring states to avoid excluding persons who are otherwise eligible to stand for election by unreasonable or discriminatory requirements such as descent, or by reason of political affiliation.²⁹⁰ Likewise, in *Legal Resources Foundation v Zambia*²⁹¹ the ACHPR was less forgiving of

Zambia's exclusion of 35 per cent of the population from standing for the office of the president by imposing the requirement of Zambian descent. The ACHPR found a violation of Article 13 of the AfrCH, because not only did the government violate the right of individuals to stand for elections, it also breached the right of citizens to freely choose their political representatives.²⁹²

With regard to indigenous peoples, special mention should be made of the *Yatama v Nicaragua* case decided in 2005 by the Inter-American Court of Human Rights (IACtHR).²⁹³ The case dealt with the alleged violation by the government of Nicaragua of Article 23 of the IACHR.²⁹⁴ More precisely, it focused on a claim of the indigenous organization Yatama that a new electoral law passed by Nicaragua in 2000 unduly restricted its right to take part in the conduct of public affairs. This law obliged indigenous political organizations willing to participate in the upcoming elections to take the form of a mainstream political party, and had the negative effect of forcing them to present candidates even in areas of the country where no indigenous people lived.

In its decision, the IACtHR importantly elaborated on the right to political participation in the context of indigenous rights. As a premise, the IACtHR aptly emphasized the general rule whereby states 'should generate the optimum conditions and mechanisms to ensure that ... political rights can be exercised effectively, respecting the principles of equality and non-discrimination'.²⁹⁵ It went on to specify how this general provision should be interpreted with regard to indigenous peoples. Hence, the IACtHR stressed that states' obligation to guarantee the effective enjoyment of political rights 'is not fulfilled merely by issuing laws and regulations that formally recognize these rights' but, instead, 'requires the State to adopt the necessary measures to guarantee their full exercise'. At this point, the IACtHR further noted that, in considering such 'necessary measures', states should pay special attention 'to the weakness or helplessness of the members of certain social groups or sectors',²⁹⁶ such as, in this case, indigenous peoples. In other words, the IACtHR confirmed that special measures should be taken with a view to guaranteeing the equal, and effective, participation of indigenous peoples to public life.

Moreover, the IACtHR stressed that measures that have the effect of impairing – without any objective justification or purpose – citizens' right to political participation, inevitably violate Article 23 of the IACHR. The IACtHR underlined two elements in relation to this specific point. First, electoral boundaries should take into account the special situation of political organizations

representing minority groups. Second, states should take into account the different culture as well as traditional forms of organization and institutions that characterize indigenous peoples. Accordingly, to impose a specific form of organization such as, for example, that of a political party, may amount to a violation of their right to full and equal access to public life.²⁹⁷

Conclusions

The right to vote is essential for political participation of minorities. Strategic litigation to guarantee this right may target legislative lacunae depriving minorities of opportunities (or not sufficiently allowing them) to express their opinion in the choice of a legislature or to have an effective say in matters of particular concern to the group.

The jurisprudence of international courts and quasi-judicial bodies suggests that cases challenging procedural irregularities, such as the number of representatives per district or additional verification of language skills without sufficient procedural safeguards, proved to be successful in protecting minority groups in standing for elections. Bringing claims in cases involving procedural obstacles – including the number of representatives per district, registration for elections, etc. – to the enjoyment of political participation by such groups may further enhance their protection. As established by the IACtHR, electoral boundaries should take into account the special situation of political organizations representing minority groups. In addition, imposing a specific form of organization, such as, for example, that of a political party, may amount to a violation of indigenous peoples' right to full and equal access to public life.

The principle of non-discrimination in political participation should be used more effectively, particularly in the European context, where Protocol 12 ECHR may prove a useful tool in ensuring equal treatment of minorities in the exercise of political rights. In this respect, the low level of ratification of Protocol 12 to the ECHR by western European countries is regrettable. Wider ratification would be a welcome step towards improving the application of non-discrimination in Europe.

Article 27 ICCPR requires states to secure effective participation of minorities in decisions that affect them. With regard to indigenous peoples, recent normative developments suggest that the right to consultation should be seen as instrumental in obtaining indigenous peoples' free, prior and informed consent. A question arises as to whether free, prior and informed consent entails an actual right to veto.

Land rights

One of the key features of ‘indigenous peoples’ as a distinct sub-state group in international law is their cultural and spiritual attachment to ancestral lands. This special attachment is at the basis of the recognition of indigenous peoples’ right to collectively own their traditional lands under international law. As non-indigenous minorities lack such a cultural characteristic, the recognition of a collective right to own ancestral lands has so far remained confined to the indigenous rights regime. Accordingly, this section will focus specifically on indigenous peoples’ land rights. As the following sub-sections will show, the IACtHR and IACHR, the ILO and various UN human rights treaty bodies have regularly dealt with indigenous land rights in recent years. The ACHPR, instead, has only recently rendered its very first decision on the issue, while the ECtHR has yet to do so.

The inter-American system of human rights

The Inter-American system of human rights has been at the forefront in the protection and promotion of the rights of indigenous peoples. The pronouncements of the IACtHR and IACHR have significantly contributed, in particular, to the development and identification of standards concerning indigenous peoples’ rights to their traditional lands. The IACtHR can decide cases which are sent to it by states or by the IACHR. Its scope of action is limited to those states that are party to the Inter-American Convention²⁹⁸ and have accepted its compulsory jurisdiction. By contrast, the IACHR supervises the implementation of both the IACHR and the American Declaration on the Rights and Duties of Man (American Declaration). It can receive petitions from individuals, groups of individuals and NGOs complaining of violations of either instrument. In this regard, it is worth noting that the American Declaration applies to all member states of the Organization of American States (OAS). As we shall see, the IACtHR and IACHR have thus far produced a clear and innovative jurisprudence on the issue of indigenous peoples’ land rights, providing a solid legal background for further litigation in the area.

The right to collective ownership of ancestral lands and its applicability

The fundamental principle established by the IACtHR is that Article 21 of the ACHR on the right to property also protects the right of the members of indigenous communities to collective ownership of their ancestral lands.²⁹⁹ This groundbreaking interpretation, introduced for the first time in the 2001 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*³⁰⁰ case and later confirmed in a number of equally significant cases,³⁰¹ essentially stems from the preliminary recognition of the special relationship existing between indigenous peoples and their land.³⁰² On this basis, the IACtHR held that members of those groups who are characterized by, *inter alia*, a traditional collective form of organization, a spiritual relationship with their ancestral lands and a communal system of ownership of the said lands, are entitled to the protection provided by Article 21.

Crucially, the IACtHR also found that, in order to claim the right to ownership, indigenous peoples do not need to show evidence of a formal title to property obtained by the relevant state.³⁰³ Instead, by virtue of the interplay between indigenous customary law and national law, the right may be legitimately claimed by simply possessing the land.³⁰⁴ Importantly, the IACHR has taken the same approach with regard to Article XXIII of the American Declaration,³⁰⁵ holding that the international human right of property encompasses the collective property of indigenous peoples as defined by their own customs and traditions.³⁰⁶ In the IACHR’s view, any determination of indigenous peoples’ rights should be done in consultation with indigenous peoples. In particular, the IACHR has emphasized the state’s duty to identify and demarcate indigenous peoples’ lands in consultation with indigenous peoples and with due regard for their customary land tenure system.³⁰⁷

Furthermore, both the IACtHR and the IACHR extended the applicability of these provisions to certain Afro-descendant communities, on the basis of a number of considerations including their special attachment to a specific territory and their cultural distinctiveness.³⁰⁸

The following sub-sections will further investigate the content of the indigenous land rights regime developed by these two bodies. Before doing so, however, it is important

to consider the applicability of the said regime, as this certainly represents a crucial issue in the context of potential litigation.

As noted above, the IACtHR can only decide on alleged violations of Article 21 with regard to those member states of the OAS which have ratified the ACHR and accepted the compulsory jurisdiction of the IACtHR. Under these circumstances, when a state is brought before it for the alleged violation of Article 21, the IACtHR will first consider the national and international obligations of the concerned state with regard to indigenous peoples' land rights. This is so because Article 29 of the ACHR requires that no provision thereof may be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party'. Accordingly, those states which have passed national legislation recognizing indigenous land rights, or have ratified international treaties that specifically protect such rights,³⁰⁹ will certainly be bound by a progressive interpretation of Article 21. This said, the IACtHR has taken a rather dynamic approach to the issue with a view to extending the potential applicability of the indigenous land rights regime. Thus, a state which has not passed national legislation recognizing indigenous land rights, and has not ratified international treaties that specifically protect such rights, might still be bound by a progressive interpretation of Article 21, provided that one or more international human rights treaties to which it is a party can be interpreted as protecting indigenous land rights. For example, a state party to the ICCPR will be required by the IACtHR to respect the land rights of its indigenous communities in the light of the practice of the HRC, which, through its Concluding Observations, General Comments and Individual Communications, has constantly upheld the recognition of these rights.

The right to restitution in combination with the right to property

The fact that indigenous land rights are protected by Article 21 of the ACHR must be read in combination with the right to restitution contextually established by the IACtHR. In particular, the IACtHR observed that 'the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith'.³¹⁰ Under the latter circumstance, however, indigenous peoples are not left without protection altogether. Indeed the IACtHR established that, despite lacking property rights, indigenous peoples have a right to restitution with regard to those lands.

Furthermore, if the claimed lands cannot be returned, indigenous peoples will enjoy the right to obtain other lands of equal extension and quality.³¹¹ The next subsection will further analyse these issues. For now, instead, it is important to stress that the IACtHR introduced a time-restriction on the exercise of the right. More specifically, it found that the right is enforceable as long as the special relationship between an indigenous community and its land continues to exist.³¹² According to the IACtHR:

*'[this] relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.'*³¹³

Thus, if any of these circumstances can be proved, the IACtHR will decide in favour of the right to restitution.

Land rights and competing claims

As noted above, when indigenous ancestral lands have been lawfully transferred to third parties in good faith, the problem of restitution, and competing claims, arise. Importantly, the IACtHR did not shy away from the difficult task of providing guidelines on how to resolve such crucial problems. As a necessary premise, the IACtHR aptly noted that Article 21 of the ACHR protects communal properties of indigenous communities as much as private properties of individuals.³¹⁴ It follows that competing claims of indigenous peoples and individuals need to be balanced and assessed on an *ad hoc* basis. This said, the IACtHR has made it clear that the most preferable solution should be, inasmuch as possible, the recognition of indigenous rights.

The general rule upheld by the IACtHR is that restrictions to the right to property, whether they affect indigenous peoples or individuals, must meet a number of specific requirements: first, they must be established by law; second, they must be necessary and proportional; and third, they must be aimed to attain a legitimate goal in a democratic society.³¹⁵ Hence, not every restriction to the enjoyment and exercise of the right to property is permissible.³¹⁶ This said, in case of clashes between private property and claims for ancestral property, the IACtHR emphasized that:

'states must take into account that indigenous territorial rights encompass a broader and different

*concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations.*³¹⁷

It follows, the IACtHR continued, 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’.³¹⁸ On the other hand, the IACtHR observed that:

*‘restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention.’*³¹⁹

These guidelines seem to have been crystallized in the IACtHR’s jurisprudence. Indeed, in the two cases of this kind thus far decided, the IACtHR always found in favour of indigenous peoples. This remains true even though it cautiously observed that deciding in favour of indigenous peoples in one particular case does not imply ‘that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former’.³²⁰

Land rights and natural resources

The most significant issue the IACtHR has yet to adequately address concerns the rights over natural resources that are found on indigenous land. The IACtHR dealt with these issues in one case only, that is, the 2007 *Saramaka People v Suriname* case. In its judgment, the IACtHR established a number of clear and definitive principles, yet left a number of important questions unanswered. The same, as we shall see, can be said with regard to the IACHR.

Focusing, first, on the well-established principles, the IACtHR held, unambiguously, that the indigenous peoples’ right ‘to use and enjoy their territory would be meaningless ... if said right were not connected to the natural resources that lie on and within the land’.³²¹ Consequently, the IACtHR found that Article 21 protects also those natural resources found on and within traditionally owned territory. However, the IACtHR also added that the resources to be protected are actually

those ‘necessary for the very survival, development and continuation of [indigenous peoples’] way of life’.³²² At this point, therefore, two crucial questions need to be addressed. First, whether Article 21 also protects those natural resources that are *not* necessary for the survival of indigenous peoples and, second, whether it is possible to introduce restrictions to the recognized right of indigenous peoples to enjoy their natural resources. With regard to the former point, the IACtHR made it clear that the answer should be in the positive. This is so because activities related to resources that are *not* necessary for the survival of indigenous peoples may nevertheless have important repercussions on those resources which, by contrast, are necessary for their survival.³²³ In this respect, therefore, the focus must switch to the consequences of the said activities.

In regard to the latter point, instead, the IACtHR noted that ‘Article 21 should not be interpreted in a way that prevents the state from granting any type of concession for the exploration and extraction of natural resources’ within a territory owned by an indigenous community.³²⁴ It follows that restrictions to the right of indigenous peoples to enjoy their natural resources may be possible. This said, following the same principles elaborated in the context of land rights proper, the IACtHR found that restrictions are possible only if they are established by law, are necessary and proportional, and have the aim of achieving a legitimate objective in a democratic society.³²⁵ However, since the survival of the indigenous community is at stake, further safeguards need to be put in place, for restrictions should never amount to ‘a denial of [indigenous] traditions and customs in a way that it endangers the very survival of the group and its members’.³²⁶

More precisely, in order to safeguard the special relationship between indigenous peoples and their territories, and, thus, their very existence, the IACtHR held that states have four fundamental obligations: first, to ensure the effective participation of the members of the community in any development, or investment, plan; second, to ensure that the concerned people have a reasonable share of the benefits; third, to perform or supervise prior environmental and social impact assessments; and, fourth, to implement adequate safeguards and mechanisms so as to avoid the activities concerned significantly affecting the condition of the traditional lands and natural resources at stake.³²⁷

At this point, a number of complications emerge in the light of the IACtHR’s identification of two parallel regimes with regard to states’ first obligation, namely to ensure the effective participation of indigenous peoples. More precisely, the IACtHR observed that in case of small-scale developments states must simply consult the

affected community,³²⁸ whereas in case of large-scale developments indigenous peoples have a right to free, prior and informed consent.³²⁹ Two points should be made here.³³⁰ First, the IACtHR described large-scale developments only in terms of their potential impact, noting that they would normally have significant negative effects on the environment and life of the indigenous groups concerned. This raises the question, though, whether several small(er)-scale projects may have equally serious effects.³³¹ Second, the IACtHR's reasoning suggests that the right to free, prior and informed consent actually entails a right to veto. If this were not the case, the promotion of two different regimes with respect to small- and large-scale developments would be of little use, as in both cases indigenous peoples would lack the legal basis to obtain the suspension or termination of the relevant project. This approach breaks new ground, since no indigenous consent is upheld by ILO Convention No. 169, and the UNDRIP is at best ambiguous over the matter.³³² The Committee on the Elimination of Racial Discrimination (CERD) within the framework of the ICERD did embrace such consent in its General Recommendation No. 23 of 1997. The CERD stressed that states are requested to: 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.³³³ In the light of the above, a judgment on a case concerning large-scale developments would certainly shed further light on such issues.

In a similar vein, the IACHR has embraced the basic principle that states have the obligation to consult indigenous peoples and provide all necessary information prior to making any decisions which may affect indigenous peoples' traditional lands.³³⁴ The IACHR has also stressed the need for indigenous peoples' informed consent in connection with the implementation of projects for the exploitation of natural resources,³³⁵ and required the involvement of indigenous peoples' representative institutions in the consultation procedures.³³⁶ Finally, it has referred to indigenous peoples' participation in the benefits flowing from the realization of these activities.³³⁷

However, further developments should be sought with regard to the consultation procedures, especially as regards the role of indigenous peoples' representative authorities and traditional decision-making frameworks. Crucially, the implications of the requirement for indigenous peoples' informed consent do not seem to have been fully explored by the IACHR.

The International Labour Organization

ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169)

ILO Convention No. 169 is currently the only binding instrument still open to ratification setting out indigenous peoples' rights.³³⁸ Adopted on 27 June 1989 and having entered into force on 5 September 1991, the Convention has so far been ratified by 20 states.³³⁹ Like any other ILO Convention, it is subject to the ILO supervisory system, relying on a regular monitoring procedure and some special procedures.³⁴⁰ In particular, it is worth briefly recalling the procedures regulated by Articles 22 and 24 ff.

Article 22 of the ILO Constitution requires that states submit reports on the implementation of ratified conventions at regular intervals. These intervals are every one to five years depending on the Convention concerned and on whether problems have arisen in its implementation. Under Article 23 of the Constitution, workers' and employers' organizations can provide their observations on the implementation of ratified Conventions. The reports submitted by states and the observations of the social partners are then examined by a committee composed of independent experts, that is, the Committee of Experts on the Application of Conventions and Recommendations (hereinafter CEACR), which will comment on states' compliance with its obligations under a Convention by means of 'observations' and 'direct requests'.

As to Article 24 of the ILO Constitution, this article enables any workers' and employers' organization, whether international or national, to make a representation to the ILO alleging the failure of a member state to abide by certain provisions contained in a ratified Convention.

NGOs cannot have access to ILO procedures. Therefore, unless special mechanisms are set up at national level (see, for example, the involvement of the Sami parliament in the regular monitoring procedure through the submission of comments on the reports of Norway), indigenous peoples' and minorities' concerns can only be voiced through the ILO constituents, notably workers' and employers' organizations. These latter can, for instance, incorporate the information submitted to them by indigenous peoples in their observations on the implementation of the Convention submitted under Article 23 of the ILO Constitution.

Indigenous peoples' land rights under ILO Convention No. 169

After acknowledging in Article 13 the special importance that indigenous peoples' relationship to land has for their

culture, ILO Convention No. 169 recognizes indigenous peoples' rights of ownership and possession over the lands that they 'traditionally occupy' (Art. 14). Two aspects deserve to be underscored with regard to this provision.

First, the Convention refers to 'rights' in the plural as it acknowledges that while there can be cases where a full right to property shall be conferred on indigenous peoples, there can also be cases where only a right of possession and use can be recognized. Therefore, the specific situation of the various indigenous peoples needs to be examined on a case-by-case basis. In particular, Article 14 sets out that measures shall be taken to safeguard the right of indigenous peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Second, the Convention uses the expression 'traditionally occupy' suggesting that, although the 'occupation' of a land is a prerequisite for the recognition of rights over it, the provision also covers those cases where indigenous peoples have lost the possession of their lands. *The Guide to the ILO Convention No. 169* stresses that:

*'[i]t was suggested, at various times during the discussion of the adoption of the Convention that this provision should read "have traditionally occupied" which would have indicated that the occupation would have to continue into the present to give rise to any rights. The wording, as it was adopted [i.e. lands which they traditionally occupy], does indicate that there should be some connection with the present – a relatively recent expulsion from these lands, for example, or a recent loss of title. It should also be read in connection with paragraph 3 of article 14 which requires that a procedure for land claims be established ...'*³⁴¹

Despite the fact that no mention is made of the collective or individual nature of the rights of ownership and possession to be conferred on indigenous peoples, the ILO seems to give preference to the former as it is aware of the implications that this choice has. Indicative in this respect are, for example, the comments made by the Governing Body's tripartite committee when dealing with a representation concerning Peru, in which the Committee noted 'from its experience acquired in the application of the Convention and its predecessor, that the loss of communal land often damages the cohesion and viability of the people concerned'.³⁴²

Pursuant to Article 14, paragraph 2, states are called upon to take the necessary steps to identify indigenous peoples' traditional lands. This article should be read in conjunction with Article 6 regulating the procedure of consultation with indigenous peoples with regard to the

adoption of administrative and legislative measures which may affect them directly. Therefore, the demarcation of indigenous peoples' lands is to be carried out following consultation with the peoples affected, through their representative institutions and according to appropriate procedures accommodating indigenous decision-making procedures. Also, the practice of ILO supervisory bodies has emphasized that, pending demarcation, transitional measures should be taken to safeguard indigenous peoples' interests in the lands.³⁴³

Moreover, under Article 14, paragraph 3, states are obliged to set up adequate procedures to resolve land claims by the peoples concerned. Such mechanisms are intended, in particular, to allow indigenous peoples to recover the possession over lands that they have lost or to obtain compensation for this loss.³⁴⁴

Lastly, it is worth recalling that Article 18 requires that states establish penalties for unauthorized intrusion upon, or use of, the lands of the peoples concerned and take measures to prevent these offences.

Indigenous peoples and the exploitation of natural resources located in their lands

While conferring on indigenous peoples the right to the natural resources pertaining to their lands, Article 15, paragraph 2, of the Convention acknowledges that, in many cases, states retain the ownership of mineral and subsurface resources. In these cases, the Convention lays down that the state shall establish or maintain procedures through which they shall consult indigenous peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The Convention also stipulates that indigenous peoples shall, wherever possible, participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Once again, it should be noted that this provision has to be read in conjunction with Article 6 of the Convention establishing the procedure of consultation. In this regard, it should be emphasized that, according to paragraph 2 of Article 6, consultations with indigenous peoples shall be undertaken with 'the objective of achieving agreement or consent to the proposed measures'. Even though this provision does not confer on indigenous peoples any right to veto, it is worth stressing that the Convention does require that the parties concerned engage in a genuine dialogue in order to reach appropriate solutions that can accommodate indigenous peoples' concerns.³⁴⁵

Equally relevant is Article 7, demanding that states should ensure that studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact of planned development activities on them. It then goes on to say that the results of these studies 'shall be considered as fundamental criteria for the implementation of these activities'. Furthermore, it is worth stressing that pursuant to Article 7, paragraph 1, indigenous peoples have the right to decide their own priorities for the process of development and they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. The implications of this provision vis-à-vis Article 15 have been pointed out by the CEACR in its general observation on the Convention of 2008. In that regard, the following passage is worth quoting:

'The Committee cannot over-emphasize the importance of ensuring the right of indigenous and tribal peoples to decide their development priorities through meaningful and effective consultation and participation of these peoples at all stages of the development process, and particularly when development models and priorities are discussed and decided. Disregard for such consultation and participation has serious repercussions for the implementation and success of specific development programmes and projects, as they are unlikely to reflect the aspirations and needs of indigenous and tribal peoples. Even where there is some degree of general participation at the national level, and ad hoc consultation on certain measures, this may not be sufficient to meet the Convention's requirements concerning participation in the formulation and implementation of development processes, for example, where the peoples concerned consider agriculture to be the priority, but are only consulted regarding mining exploitation after a development model for the region, giving priority to mining, has been developed.' (emphasis added)³⁴⁶

Finally, it should be noted that Article 15 applies also when a legal title to the lands has not yet been granted to indigenous peoples.³⁴⁷ Also, the CEACR has specified that:

'[T]he Convention covers not only areas occupied by indigenous peoples but also "the process of development as it affects their lives ... and the lands they occupy or otherwise use" (Article 7, paragraph 1). Accordingly, a project for exploration or exploitation in the immediate vicinity of lands occupied or otherwise used by indigenous peoples, or which

*directly affects the interests of such peoples, would fall within the scope of the Convention.'*³⁴⁸

The protection of indigenous peoples' right to traditional lands and ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) deals with the broader issue of equality in employment and occupation. Unlike Convention No. 169, it has been widely ratified,³⁴⁹ which potentially enables it to reach out to indigenous peoples worldwide.³⁵⁰

The main entry point is represented by the principle of equality of opportunity and treatment in respect of access to occupation (Art. 1, para. 3). Indeed, in the case of indigenous peoples, access to traditional occupations is conditional upon their access to lands. The recognition of their rights of ownership and possession over the lands that they traditionally occupy thus appears to be a measure necessary to enable indigenous peoples to carry out their traditional activities.

The UN treaty bodies

The Human Rights Committee

The HRC is mandated to monitor the implementation of the ICCPR. Besides receiving periodical reports from the States parties and formulating 'Concluding Observations' on them, the HRC is also enabled to receive inter-state complaints under Article 41 of the ICCPR and to examine individual complaints alleging the violation of some provisions of the ICCPR by states that are parties to the First Optional Protocol to the ICCPR.

The issue of indigenous peoples' right to land has been addressed by the HRC mainly in the context of the right to cultural integrity enshrined in Article 27 of the ICCPR. In the view of the HRC, the right to cultural integrity also covers the right to engage in economic activities which shape the way of life and the culture of certain communities.³⁵¹ Accordingly, in many of its Concluding Observations, the HRC has called upon states to recognize indigenous peoples' right to their traditional lands as instrumental in ensuring indigenous peoples' enjoyment of their culture.³⁵² In particular, the HRC has stressed the importance of carrying out the demarcation of indigenous peoples' traditional lands in order for their right to lands and cultural integrity to be effectively secured without however mentioning the need to consult with indigenous

peoples.³⁵³ Neither is reference made to the need to respect indigenous peoples' customary laws and practices regarding land tenure systems when deciding on indigenous peoples' claims to their traditional lands.

The HRC and the exploitation of natural resources located in indigenous peoples' lands

With regard to the exploitation of natural resources located in indigenous peoples' traditional lands, the HRC assesses the conformity of these activities with indigenous peoples' right to cultural integrity in light of a twofold criterion, that is the 'sustainability' of the activity in relation to the culture of indigenous peoples which would be affected by these initiatives and the 'participation' of the indigenous communities concerned in the decision-making about the projects to be carried out in their lands.³⁵⁴ In this latter respect, it is worth noting that in its 2008 Concluding Observations on Panama the HRC expressed its concern about the 'absence of a process of consultation to seek the *prior, free and informed consent* of communities to the exploitation of natural resources in their territories' (emphasis added).³⁵⁵

The recent case *Poma Poma v Peru* summarizes very well the HRC's approach to the issue, including the role of free, prior and informed consent. In its considerations of the merits, the HRC recognizes that:

*'a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.'*³⁵⁶

The HRC then goes on to highlight that:

'the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which

*requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.'*³⁵⁷

The Committee on the Elimination of Racial Discrimination

The CERD is charged with monitoring the implementation of the ICERD. To this purpose, states are required to submit to the CERD periodical reports which will be the subject of the CERD's 'Concluding Observations', containing some specific recommendations to states. In addition to that, the CERD can examine inter-state complaints, individual complaints and establish early-warning procedures.

The issue of indigenous peoples' rights to traditional lands is dealt with by the CERD under Article 5 (d) (v) of the ICERD prohibiting racial discrimination with respect to the enjoyment of property rights. In its General Recommendation No. 23 on indigenous peoples³⁵⁸ the CERD has spelt out that the ICERD requires states to:

'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.'

This interpretation is regularly reflected in the CERD's Concluding Observations.

In its Concluding Observations, the CERD has further called upon states to identify and demarcate indigenous peoples' lands³⁵⁹ and, in particular, to discharge this duty 'in co-operation with the indigenous and tribal peoples concerned'.³⁶⁰ Additionally, it has recommended that states 'establish adequate procedures, and ... define clear and just criteria to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant *indigenous customary laws*' (emphasis added).³⁶¹ Pending this procedure – the same holds true for the procedures of identification and demarcation of indigenous peoples' lands – the CERD tends to require that the state adopt 'freezing measures', that is, refrain from and suspend the

execution of all those activities that may affect indigenous peoples' right to lands.³⁶²

The CERD and the exploitation of natural resources located in indigenous peoples' lands

Turning to the issue of the exploitation of natural resources impacting indigenous lands, the CERD has constantly requested that the free, prior and informed consent of indigenous peoples be sought before undertaking any activities on their lands.³⁶³ It has explicitly clarified that 'merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the CERD's general recommendation [No. 23 on indigenous peoples]',³⁶⁴ which indeed states that 'no decisions directly relating to their rights and interests are taken without their informed consent'.³⁶⁵ Moreover, the CERD has called upon states to ensure that indigenous peoples receive an 'equitable sharing of benefits' deriving from the exploitation of natural resources.³⁶⁶ In some instances, the CERD has extended its consideration also to Afro-descendant communities.³⁶⁷

Lastly, it should be noted that in the most recent Concluding Observations, the Committee has expressly referred to the standards set in the UNDRIP. Thus, with regard to the report submitted by the United States, the CERD recommended that:

'the State party recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.' (emphasis added)³⁶⁸

The Committee on Economic, Social and Cultural Rights

The CESCR monitors the implementation of the ICESCR by the States parties. It thus examines the regular reports received from the States parties and then addresses to them 'Concluding Observations' pointing out the main subjects of concern and the consequent recommendations. In addition, it should be noted that on 10 December 2008, the UN General Assembly adopted an Optional Protocol to the Covenant which confers on the CESCR the authority to receive communications by individuals or

groups of individuals claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the ICESCR by a state that is party to such Optional Protocol.³⁶⁹

So far, the CESCR has dealt with the issue of indigenous peoples' land rights mainly under Article 1 of the ICESCR (right to self-determination) either requiring that the discrimination suffered by indigenous peoples in the recognition of their right to traditional lands be addressed³⁷⁰ or emphasizing that the recognition of indigenous peoples' land rights is a crucial means to protect their right to maintain and develop their traditional culture and way of life.³⁷¹ Nonetheless, it does not seem that the CESCR has further elaborated on indigenous peoples' land rights.

The CESCR and the exploitation of natural resources located in indigenous peoples' lands

As regards the implementation of projects for exploitation of natural resources situated in indigenous peoples' traditional lands, the CESCR has requested that the state 'consult and seek consent of the indigenous people concerned prior to the implementation of natural resources-extracting projects ... affecting them',³⁷² or, in a more specific way, 'prior to the implementation of timber, soil or subsoil mining projects ... affecting them'.³⁷³

The Committee on the Elimination of Discrimination Against Women

Pursuant to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination Against Women (CEDAW) can receive communications from individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the Convention by a state which is party to the Optional Protocol.

For the purpose of this section, it is worth recalling that Article 14 of the Convention provides, among other things, that states shall take all appropriate measures to ensure that women are not discriminated against with regard to access to agricultural credit and loans, marketing facilities, appropriate technology, and have equal treatment in land and agrarian reform as well as in land resettlement schemes. As will be illustrated in the subsection on 'Multiple discrimination and international practice' (p. 41), the CEDAW examines the situation of indigenous women through the broader categories of rural or vulnerable women. In this context, it has raised the issue of women's access to land, especially in connection with the examination of discriminatory laws and practices concerning ownership and inheritance rights.³⁷⁴ For more details on the CEDAW's general approach to indigenous

questions, see below, the section on ‘Gender, minority groups and culture’ (p. 41).

Indigenous peoples’ rights in Africa

Historic and socio-political circumstances have traditionally played against the establishment of minority/indigenous rights regimes in Africa. However, it should be noted that the ACHPR has recently begun to seriously address the issue of indigenous peoples’ rights in the region. The ACHPR established in 2000 the Working Group on Indigenous Populations/Communities in Africa (AWGIPC) with the task of conducting a preliminary investigation on the issue of indigenous peoples’ rights in this context.³⁷⁵ The Report produced by the AWGIPC, and adopted by the ACHPR in 2003,³⁷⁶ concluded, among others, that indigenous communities do exist in Africa and are characterized by a special attachment to and use of traditional land, as well as experiences of subjugation, marginalization and dispossession.³⁷⁷ At its 45th session in May 2009, the ACHPR also adopted another groundbreaking report on the situation of indigenous peoples in Africa resulting from a three-year research focusing on 24 African countries carried out by the ILO and the ACHPR in collaboration with the Centre for Human Rights of the University of Pretoria.³⁷⁸ The conclusions of this report highlight that ‘it is an undeniable reality that indigenous peoples exist in many African States. These groups cover a diversity of ethnicities, life-styles, cultures and languages.’ Although ‘the overriding picture is one of government neglect and negation of the plight of these peoples’, the report underscores that ‘significant opportunities do exist for the protection of these peoples within existing legal frameworks in a number of African countries’.

In fact, the African regional framework offers important entry points for future litigation on indigenous peoples. The recent ruling of the ACHPR on the *Endorois* case stands as a milestone in this regard.³⁷⁹

Unique among regional human rights treaties, the AfrCH includes a number of Articles (19–24) which expressly recognize rights to peoples. As highlighted by the AWGIPC, these Articles provide crucial protection for the rights to land and natural resources of indigenous communities.³⁸⁰ More precisely, the AWGIPC stressed the importance of Article 20 on the right to existence and self-determination, Article 21 on the right to natural resources and property, and Article 22 on the right to economic, social and cultural development. Early case law had already evidenced the potential of the AfrCH to protect minority groups in general. *Katangese Peoples’ Congress v Zaire*,³⁸¹ referred to Article 20 AfrCH and consisted in a

request by the President of the Katangese Peoples’ Congress to recognize the Katangese Peoples’ Congress as a liberation movement entitled to support in the achievement of independence for Katanga, and to further recognize the legitimate independence of Katanga from Zaire. Although the claim was not successful, the ACHPR held that the right to self-determination established by Article 20 does not apply exclusively to the population of a state as a whole, but also to minorities residing within the territory of a state. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (so-called *Ogoni* case),³⁸² it was alleged, among others, that the government of Nigeria had caused environmental degradation and health problems in Ogoniland due to its involvement in oil production through a state oil company in the area. The ACHPR crucially found that the Nigerian government violated, *inter alia*, the right of the Ogoni people to freely dispose of their wealth and natural resources (Article 21) and their right to a general satisfactory environment favourable to their development (Article 24).³⁸³

Also, it should be recalled that in its recent Advisory Opinion on the UNDRIP,³⁸⁴ the ACHPR dismissed, in particular, the claim advanced by many African states that the recognition of land rights to indigenous communities would be impracticable because ‘the control of land and natural resources is the obligation of the State’.³⁸⁵ Instead, the ACHPR referred to Article 21 AfrCH to emphasize not only that such rights exist and are compatible with the constitutional framework of each country but also that they are expressly recognized by the AfrCH.³⁸⁶

Case study: Centre for Minority Rights Development (Kenya) and MRG on behalf of the *Endorois Welfare Council v Kenya*

In the above-mentioned *Endorois* case, the ACHPR indeed applied the provisions of the AfrCH to respond to indigenous peoples’ claims regarding their traditional lands. It found that Kenya had violated Articles 1, 8 (religion), 14 (property), 17 (culture), 21 (natural resources) and 22 (development) of the AfrCH to the detriment of the Endorois community, who had been evicted from their ancestral lands in connection with the creation of a game reserve around Lake Bogoria. Drawing heavily on international and regional instruments and case law to examine the allegations and decide the claims of the Endorois community, the ACHPR has established some fundamental principles regarding the protection of indigenous peoples’ rights under the AfrCH, in particular vis-à-vis their traditional lands, while touching upon further issues, such as consultation and free, prior and informed

consent, whose contours may have to be further elaborated upon by the ACHPR in future litigation. It has also wisely taken the opportunity offered by the case to return to the crucial issue of the identification of indigenous peoples in the African context.³⁸⁷

In particular, the ACHPR has affirmed that the rights, interests and benefits of indigenous communities in their traditional lands constitute 'property' under Article 14 AfrCH and that special measures may have to be taken to secure such 'property rights'.³⁸⁸ The state therefore has the duty 'to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law'.³⁸⁹ In this regard, the ACHPR has found that the 'trust system' – still dominant in many African countries – is inadequate to protect indigenous peoples' rights and states must recognize indigenous peoples' ownership rights over their traditional lands.³⁹⁰ From its reasoning, the ACHPR draws the following conclusions that are of paramount importance for the protection of indigenous peoples' rights throughout the African continent:

*'(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.'*³⁹¹

The ACHPR has also emphasized that while 'encroachment' according to Article 14 of the AfrCH can take place when it responds to a public need/general interest and is carried out in accordance with the law, the 'public interest' test must meet a much higher threshold in the case of encroachment on indigenous peoples' lands since rights over these lands are closely related with their right to exist as a people, the right to life of their members and the right to self-determination, among others. Limitations on land rights should also respect the

principle of proportionality. As regards the criterion of 'accordance with the law', the ACHPR has pointed out that this would cover, in particular, the requirements of effective participation of the indigenous peoples concerned and the payment of compensation.

On the whole, the ACHPR has addressed the issue of participation in respect of activities affecting indigenous peoples' traditional lands under different Articles (14, 21 and 22) of the AfrCH, thereby making various observations which would benefit from further systematization and clarification. In particular, under Article 14 AfrCH, the ACHPR has found that '[i]n terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that *consent* be accorded', but it has then referred to the obligation to 'seek consent' when it has affirmed that '[f]ailure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property'.³⁹² With respect to the right to natural resources enshrined in Article 21 AfrCH, the ACHPR has reaffirmed that the right to natural resources contained within indigenous peoples' traditional lands are vested in indigenous peoples and has reached the conclusion that, pursuant to such provision, 'indigenous peoples have the right to freely dispose of their wealth and natural resources in consultation with the State'.³⁹³

The issue of effective participation is further raised in the context of the right to development provided for in Article 22 AfrCH. According to the ACHPR's interpretation of this provision, indigenous peoples must be given the opportunity to shape the development process in a manner that empowers them and improves their capabilities and choices. In this regard, the ACHPR has also underscored that the state has a duty not only to consult with indigenous communities, but also to obtain their free, prior, and informed consent, according to their customs and traditions in relation to any development or investment projects that would have a major impact 'within their territory'.³⁹⁴

Furthermore, the ACHPR has stressed the crucial role of land in sustaining the community's livelihood and way of life, recognizing that forced eviction from their ancestral lands violated the Endorois community's right to culture and religious freedom.

The ECtHR and minorities' property rights

In recent years the ECtHR has decided a number of cases concerning breaches of the right to the peaceful enjoyment of one's possessions, as established by Article 1 of Protocol No. 1, in conjunction with the right to respect

for one's home as provided by Article 8 of the ECHR. In addressing and evaluating such issues, the ECtHR has taken a different approach from that embraced by the IACtHR, falling short of recognizing a special cultural and spiritual relationship between the individuals concerned and their properties.³⁹⁵ It follows that as of today the recognition of a collective right to own ancestral lands on the basis of the said special relationship remains specific to the indigenous rights regime. That said, in *Dogan and Others v Turkey*³⁹⁶ the ECtHR significantly narrowed the gap between traditional interpretations of minority and indigenous property rights. In establishing whether the applicants, who belonged to the Kurdish minority, legally possessed the homes and lands they were forced to leave following the intervention of Turkey's security forces, the ECtHR supported a broad conception of the term 'possessions' as enshrined in Article 1 of Protocol No. 1. Turkey argued that the lack of proof of ownership in accordance with Turkey's law meant that the applicants did not have a legal title to the properties concerned. By contrast, the ECtHR found that 'although they did not have registered property, [the applicants] had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the lands belonging to the latter'.³⁹⁷ The ECtHR also noted that 'the applicants had unchallenged rights over the common lands in the village, such as pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling'. Accordingly, the ECtHR found that all these economic resources, as well as the resulting revenue, could qualify as 'possessions' for the purposes of Article 1 of Protocol No. 1. It follows that certain minorities, particularly those who live in rural areas and maintain a traditional land tenure system, may successfully claim property rights with regard to their homes and lands even in the absence of legal title to their properties. Recent jurisprudence also indicates the possibility for the ECtHR to consider elements of the indigenous land rights regime which have already been recognized in the Inter-American and African contexts.³⁹⁸

Conclusions

The jurisprudence of the IACtHR and IACHR has become a central feature of the indigenous land rights regime in international law. The two bodies should further illuminate certain aspects of this regime. In particular, they could usefully elaborate on the

implications of the right to free, prior and informed consent of indigenous peoples, especially in the context of cumulative effects that may be expected to result from development activities. Considering the ambiguity surrounding the role of indigenous consent in specialized instruments, further case law on the matter can only add strength and clarity to the legal debate.

Attention should be paid to the link between Articles 6, 7 and 15 of ILO Convention No. 169 with a view to further clarifying the scope of the consultations with indigenous peoples and, consequently, of the objective of reaching agreement or consent with them laid down in article 6(2). In this regard, it would be extremely interesting to see the implications of the results of the impact studies vis-à-vis states' obligation to safeguard the cultural, social and economic integrity of these peoples pursuant to the Convention. Furthermore, it is important to bear in mind the potential impact of Convention No. 111 with regard to the promotion of indigenous peoples' rights, given the wide number of states that have ratified this instrument.

The practice of the UN treaty bodies is not homogeneous given the different angles from which these bodies examine the issue of indigenous peoples' land rights. Whenever possible, efforts should thus be made to encourage the harmonization of treaty bodies' practice. In particular, the HRC should be encouraged to stress the need to consult with indigenous peoples when carrying out the demarcation of indigenous peoples' traditional lands as well as to respect indigenous peoples' customary laws and practices regarding land tenure systems when deciding on indigenous peoples' claims to their traditional lands.

In the light of, respectively, recent decisions and normative developments, land rights could become increasingly relevant in the jurisprudence of both the ACHPR and ECtHR. In the African context, the landmark decision handed down by the ACHPR in the Endorois case paves the way for further consideration of indigenous peoples' rights under the AfrCH. Fundamental principles regarding the protection of indigenous peoples' rights have been established, in particular vis-à-vis their traditional lands. Major issues, such as consultation and free, prior and informed consent are likely to be taken up by the ACHPR in future cases. In the European context, interesting developments concerning the recognition of land rights could follow from the broad interpretation of the notion of 'possessions' embraced by the ECtHR.

Gender, minority groups and culture

Women belonging to minority and indigenous groups often find themselves in a particularly vulnerable situation as a result of the multiple forms of discrimination to which they can be exposed.³⁹⁹ Minority and indigenous women are simultaneously victims of discrimination because of their gender and the ethnic or religious group to which they pertain. These different grounds of discrimination ‘intersect and reinforce each other with cumulative adverse consequences for the enjoyment of human rights’.⁴⁰⁰ As a result, they face ‘double’ unequal treatment, significantly reduced opportunities and severe social exclusion. As Banda and Chinkin point out in their report:

‘[L]ooking at the effects of gender and race combined requires identifying when minority or indigenous women suffer discrimination in different circumstances, of a different kind, or to a different degree to minority and indigenous men, and when minority or indigenous women suffer sex discrimination in different circumstances, of a different kind, or to a different degree than majority women.’⁴⁰¹

Multiple discrimination and international practice

The *UN Development Group Guidelines on Indigenous Peoples’ Issues*, for instance, indicate that where data exists, it points to disparities between the indigenous population and society as a whole and confirms that indigenous peoples and, in particular, indigenous women, have less access to health services, adequate housing and education, dispose of lower incomes and have fewer employment and vocational training opportunities.⁴⁰² In particular, the guidelines highlight that ‘indigenous women [are] worse off than indigenous men and non-indigenous women in terms of poverty levels, access to education, health and economic resources, political participation and access to land, among other issues’.⁴⁰³

More recently, on the occasion of the 50th anniversary of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), building on the years of experience in monitoring the implementation of the Convention, the CEACR of the ILO emphasized the phenomenon of multiple discrimination.⁴⁰⁴ Women often

face obstacles in access to and retention of employment and stereotyped assumptions on their aspirations and capabilities as well as their suitability for certain jobs, which lead to their segregation in education and training and consequently in the labour market. For women belonging to indigenous and minority groups these difficulties are coupled with, complemented and reinforced by discrimination patterns along ethnic and religious lines. The CEACR noted that women belonging to indigenous and tribal peoples and ethnic minorities as well as female migrant workers are often disproportionately vulnerable to discrimination.⁴⁰⁵

In its comments on the application of ILO Convention No. 111,⁴⁰⁶ the CEACR captured this situation on a number of occasions.⁴⁰⁷ While the CEACR has observed the phenomenon of multiple discrimination against minority and indigenous women from the viewpoint of employment, occupation, professional training and education, the CEDAW has emphasized the broader dimension of it. In its Concluding Observations on Ecuador of 2008, it pointed out that:

‘indigenous women continue to experience double discrimination, based on their sex and ethnic origin, and violence, which constitute an obstacle to their de facto enjoyment of their human rights and full participation in all spheres of life. [...] indigenous women and women of African descent are disproportionately affected by poverty, have lower level of access to higher education, higher school drop-out rates, higher rates of maternal mortality and early pregnancies, higher rates of unemployment and underemployment, lower wages and a lower level of participation in public life than the rest of the population of Ecuador.’⁴⁰⁸

The vulnerability of minority and indigenous women thus manifests itself in a wide range of areas, including scant participation in decision-making and exposure to violence. However, it should be noted that the Convention on the Elimination of All Forms of Discrimination against Women does not refer to the issue of multiple discrimination and only focuses on ‘any distinction, exclusion or restriction made on the basis of sex’.⁴⁰⁹ A similar approach is found in the ICERD which

only embraces ‘any distinction, exclusion, restriction or preference based on *race, colour, descent, or national or ethnic origin*’.⁴¹⁰ As a result, the inter-linkages between different grounds of discrimination as they affect women belonging to indigenous or minority groups do not always appear to be systematically addressed by these bodies.

As far as the CEDAW is concerned, in most cases the emphasis is placed upon rural or vulnerable women rather than minority and indigenous women, thus not really capturing directly intersectionalities between gender and other grounds of discrimination, including race, colour and ethnic origin. Nevertheless, the categories of vulnerable and rural women are sometimes used also to encompass women belonging to minority groups and indigenous communities. In a few cases, minority women are made explicitly the subject of detailed consideration.⁴¹¹ In its 2004 special session on indigenous women, the UN Permanent Forum on Indigenous Issues recommended that the CEDAW pay special attention to issues related to the gender dimension of racial discrimination against indigenous peoples.⁴¹²

Regarding the CERD, following the adoption of the General Recommendation No. 25 on ‘Gender related dimensions of racial discrimination’,⁴¹³ it has been drawing increasing attention to the specific situation of minority women, including in respect of participation in public life,⁴¹⁴ literacy and education,⁴¹⁵ access to health care⁴¹⁶ and exposure to violence.⁴¹⁷

In the General Recommendation No. 25 the CERD acknowledged that racial discrimination does not always affect women and men in the same way. The CERD observed that:

‘[c]ertain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. Racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies women victims of such rape may also be ostracized. Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.’

In its Concluding Observations on Namibia of 2008, for example, the CERD declared itself ‘concerned about the high incidence of rape of San women by members of other

communities, which seems to be caused by negative stereotypes’.⁴¹⁸ The case of San women is not isolated. In the Great Lakes region, Batwa women’s vulnerability to rape is exacerbated by widespread superstitions.⁴¹⁹

The CERD consequently developed a methodology for fully taking into account the gender-related dimensions of racial discrimination, by giving particular consideration to: (a) the form and manifestation of racial discrimination; (b) the circumstances in which racial discrimination occurs; (c) the consequences of racial discrimination; and (d) the availability and accessibility of remedies and complaint mechanisms for racial discrimination.⁴²⁰

In its General Recommendation No. 32 of 2009 concerning ‘the meaning and scope of special measures’,⁴²¹ the CERD confirmed that:

‘[t]he “grounds” of discrimination are extended in practice by the notion of “intersectionality” whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion - when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention.’

A recent study by UNICEF/MRG entitled *State of the World’s Minorities and Indigenous Peoples 2009* examined, in particular, the gender dimension of minority and indigenous education, shedding some light on the situation of indigenous and minority girls, and on the number of factors, both internal and external to the community, that can hinder their educational opportunities and future job prospects. It highlighted that although the prioritization of boys’ education over girls’ is common also in majority communities, the higher poverty rate of many minority and indigenous communities means that they are more likely to be forced to make this choice. It also identified hunger, the remoteness of the areas where minority and indigenous communities live, and the connected risk of physical violence against minority and indigenous girls, as elements that have a great impact on girls’ education.⁴²²

Some apparently neutral regulations adopted by states at the national level can further disproportionately affect women and girls belonging to minority and indigenous groups. This has been the case with restrictions on the wearing of headscarves or other visible religious symbols in schools and universities.

While the position taken by the ECtHR in the cases brought up before it has been that, although such restrictions constituted an interference with the applicant’s right to manifest her religion, they were necessary in a democratic society to protect the rights and freedoms of

others, concerns about the effects of these restrictions on women's education have been expressed by other international bodies.

Case study: *Leyla Sahin v Turkey*

In *Leyla Sahin v Turkey*,⁴²³ the ECtHR, for example, examined the case of a Turkish university student who was denied access to lectures and exams for wearing a headscarf. The Grand Chamber of the Court found that the applicant's right to manifest her religion (Art. 9.1) was violated. However, it considered that the restriction on wearing a headscarf was justified under Article 9.2 of the ECHR because it was prescribed by law, pursued the legitimate aim of protecting the rights of others and public order, and was necessary in a democratic society where several religions coexist.

On the other hand, the CEACR considered that restrictions imposed on university students wearing Islamic headscarves in Turkey could have the 'effect of nullifying or impairing the access to university education of women who feel obliged to or wish to wear a headscarf out of religious obligation or conviction'.⁴²⁴ It therefore required the government of Turkey to assess the impact of these restrictions on the participation of women in higher education. Similarly, with regard to the ban adopted in France, the CEACR expressed its concern that such provision could result in some children, particularly girls, being kept away from public schools for reasons associated with their religious convictions, thereby reducing their possibility to find employment, contrary to ILO Convention No. 111.⁴²⁵ A similar view was expressed by the CEDAW in its Concluding Observations on Turkey and France.⁴²⁶ An analogous situation (a student being precluded from attending university for wearing a headscarf) has also been examined by the HRC in *Hudoyberganova v Uzbekistan*⁴²⁷ under Article 18 of the ICCPR (freedom of religion). On 15 May 1998 Uzbekistan had adopted a Law on the Liberty of Conscience and Religious Organizations, Article 14 of which stipulated that Uzbek nationals cannot wear religious dress in public places. The HRC considered that to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. At the same time, it recalled that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others (Article 18, paragraph 3 of the ICCPR).⁴²⁸ In the case at

hand, the HRC found that the applicant's freedom of religion was violated as the state failed to justify the restriction in accordance with Article 18 (3). However, it highlighted that its decision in this case is:

*'without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning.'*⁴²⁹

Minority and indigenous women and culture

Minority and indigenous women, however, do not only face constraints originating from outside their communities. They may also face discriminatory stereotypes, traditions and customs deeply rooted in the communities to which they belong that can hinder the full enjoyment of their rights or even be deemed contrary to their basic human rights and dignity. While this is by no means an issue pertaining exclusively to minority and indigenous realities, and some of the practices referred to in this section can also be found among majority groups and in the dominant society, such issue can be of particularly sensitive nature in the case of indigenous and minority women, as will be seen below.

Opinions as to what amounts to 'practices which are based on the idea of inferiority or the superiority of either of the sexes' may differ not only between indigenous and non-indigenous people, but also within indigenous communities.⁴³⁰ It has been pointed out that:

*'the objective is to bring religious and customary laws into conformity with international human rights law, not to extinguish religious or customary laws themselves or transform their jurisprudential character. In any case, whether, and to what extent, and how indigenous perceptions about religious and customary laws should and can be challenged, changed, or modified should be left to the process of internal discourse ...'*⁴³¹

In the Baguio Declaration of the 2nd Asian Indigenous Women's Conference (2004), indigenous women noted with concern that changes in their traditional social, cultural and political institutions and practices had resulted in a loss of values and codes of behaviour which uphold gender-sensitive structures and roles. At the same time, they committed themselves to engage with

traditional institutions and leaders to change customary laws and practices which oppress indigenous women in the name of custom and tradition. As will be illustrated below, the approach adopted by the HRC, the CEDAW and the UN Committee on the Rights of the Child in addressing the issue of discriminatory practices or customs is to call for the full participation and involvement of all concerned actors, particularly women and women's organizations as well as traditional and religious leaders, in examining and reviewing such practices and customs.

The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people noted that, in Nepal, indigenous women face particularly high levels of vulnerability and exclusion from representation in decision-making processes, not only at the national level but also at the local level and within indigenous peoples' own traditional systems of leadership and justice.⁴³² After his visit to Kenya, the Special Rapporteur referred to the fact that female genital mutilation (FGM), although outlawed in the country in 2001, is still widely practised in many communities, including indigenous communities such as the Maasai. The Special Rapporteur also referred to the denial of property rights to women as a result of discriminatory statutory and customary law.⁴³³ The MRG/UNICEF report referred to above also highlights some cultural practices detrimental to women, including early or forced marriage and bride abduction.⁴³⁴

As members of the communities that impose further constraints on them, indigenous and minority women are in a particularly difficult situation. Especially when the cultural and physical survival of their own communities is under threat, they can feel the pressure of loyalty to their communities as well as the need to defend their fundamental rights. During his mission to Nepal, the Special Rapporteur found that '[i]ndigenous women share in expressing a desire to maintain the integrity of the distinctive cultures of Adivasi Janajati, while emphasizing the need to purge those cultures of ... particular practices and attributes'.⁴³⁵ The situation is made even more difficult by the fact that indigenous women also feel that their role in the communities is weakening as a result of the pressures on their communities and the denial of their collective rights. Indigenous women in Asia have declared, for example, that:

'(i) The loss of lands, waters and forests is deepening the poverty of indigenous women while increasing their domestic loads and subsistence responsibilities. We now have to work harder and longer to feed and nurture our families. Many women have become increasingly dependent on their husbands as the primary wage-earners, who have more employment

opportunities and higher salaries in the market system. Thus indigenous women's status and power decline, weakening their influence and participation in decision-making.

(ii) The incorporation of indigenous peoples in the cash economy has eroded self-reliant subsistence activities and women's role in production, economy and community life.

*(iii) Changes in the traditional social, cultural and political institutions and practices have led to a loss of practices, rules and codes of behaviour which have long been instruments in ensuring gender-sensitive structures. The introduction of western education and religion, and the imposition of alien leadership structures have undermined the role of our indigenous women spiritual leaders and healers, who have provided moral and spiritual guidance through generations, and who were often part of decision-making structures in our communities.'*⁴³⁶

The basic principle of gender equality is enshrined in the main instruments specifically concerning indigenous peoples and minorities. Thus, Article 3 of ILO Convention No. 169 provides that '[t]he provisions of the Convention shall be applied without discrimination to male and female members of these peoples'. Similarly, the UNDRIP stipulates, in Article 44, that '[a]ll the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals'. The UNDM does not contain a similar provision. However, its preamble refers to 'equal rights of men and women'.

The issue therefore becomes one of balancing the protection of cultural identity of indigenous/minority groups and the safeguarding of cultural diversity with the protection of women's rights and putting a limit on the protection of traditional customs, laws and practices. Governments have the obligation to address harmful and discriminatory practices. However, this obligation shall not result in an indiscriminate attack on minority and indigenous cultures. 'It is clear that the State is not free to adopt whatever prohibitions against minorities' cultural practices that it wants.'⁴³⁷ Prohibitions shall be based on reasonable and objective grounds.

Cultural diversity and the human rights of women

The protection of cultural diversity goes hand in hand with respect for human rights generally. The UNESCO Universal Declaration on Cultural Diversity of 2001 spells out that '[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor

to limit their scope'. This statement has been reinforced by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, Article 2 of which stipulates that 'no one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law'. Such a basic principle clearly emerges from the Vienna Declaration of 1993 as well, which affirms that:

*'[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'*⁴³⁸

In the specific context of the recognition of minority and indigenous peoples' rights, it is interesting to note that the UNDM calls upon states to take the necessary measures to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, 'except where specific practices are in violation of national law and contrary to international standards'.⁴³⁹ As has been indicated above, this does not mean, however, that states are free to adopt whatever prohibitions against minorities' cultural practices that they want. In this regard, the Commentary on the Declaration by the Working Group on Minorities spells out that:

*'If that were the case, the Declaration, and article 4.2 in particular, would be nearly empty of content. What is intended, however, is to respect the margin of appreciation which any State must have regarding which practices it wants to prohibit, taking into account the particular conditions prevailing in that country. As long as the prohibitions are based on reasonable and objective grounds, they must be respected.'*⁴⁴⁰

Similarly, with regard to Article 5 of the FCNM – providing that states have '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' – the Explanatory Report clarifies that '[t]he reference to

"traditions" is not an endorsement or acceptance of practices which are contrary to national law or international standards'.⁴⁴¹

In the same vein, the UNDRIP makes the recognition of indigenous peoples' 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' conditional upon the fact that these customs, traditions and practices are 'in accordance with international human rights standards'.⁴⁴² Likewise, ILO Convention No. 169 lays down that '[t]hese peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights'.⁴⁴³

The issue of the respect of women's fundamental rights is basically addressed in line with the approach just described. The UN Special Rapporteur on violence against women, Radhika Coomaraswamy, has emphasized that many traditional practices challenge the very concept of universal human rights⁴⁴⁴ as '[m]any of them involve "severe pain and suffering" and may be considered "torture like" in their manifestation. Others such as property and marital rights are inherently unequal and blatantly challenge the international imperatives towards equality'.⁴⁴⁵

The GA Declaration on the Elimination of Violence against Women of 1993 has thus stated, for instance, that states should 'condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligation with respect to its elimination'.⁴⁴⁶ An identical recommendation was included in the Beijing Platform for Action of 1995.⁴⁴⁷ It is also worth mentioning the prohibition of 'harmful practices' enshrined in the Protocol to the AfrCH on the Rights of Women in Africa which considers as harmful practices 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.⁴⁴⁸

The UN Treaty bodies and the protection of minority and indigenous women's rights

In its General Comment No. 28, the HRC has explicitly dealt with the question of the respect of women's rights vis-à-vis the protection for cultural integrity when exploring the relationship existing between, on the one hand, the principle of equality of rights between men and women incorporated in Article 3 of the ICCPR and, on the other hand, the right of persons belonging to minorities to enjoy their culture provided in Article 27.

At the very outset, the HRC observed that '[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes', and has therefore called upon states to 'ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights'.⁴⁴⁹ Thus, in its Concluding Observations, the HRC has recommended that states should ensure compliance of customary laws and practices with the rights provided in the ICCPR, in particular by means of women's full participation in the ongoing review of customary laws and practices.⁴⁵⁰

With regard to Article 27, the HRC has invited states to report on the measures taken 'to discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women'.⁴⁵¹ It has further spelt out that the right to cultural integrity covered by this article 'do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law'.⁴⁵² This can be the case, for instance, of discriminatory provisions regulating the membership in minority/indigenous communities as, for example, the provisions included in the Canadian Indian Act, discussed in the well known *Lovelace v Canada* case, according to which an Indian woman marrying a non-Indian man would lose her status as an Indian, while the same consequence was not contemplated in the event of an Indian man marrying a non-Indian woman. This is a clear example of conflict between the collective interests of the tribe to cultural integrity and the individual interest of a member to continue to enjoy his/her membership and, thus, his/her culture. As the HRC affirmed in its Concluding Observations on Canada of 2006, analysing the issue in light of both Article 3 and Article 27 of the ICCPR, 'balancing collective and individual interests on reserves to the sole detriment of women is incompatible with the Covenant'.⁴⁵³

For its part, the CERD has dealt, in particular, with the customary laws on marriage and inheritance of certain ethnic groups which discriminate against women under Articles 2 and 5 (d) (iv) and (vi) of the Convention on the Elimination of all Forms of Racial Discrimination. In its Concluding Observations of 2008 on Namibia, for example, it has called upon states to ensure that 'discriminatory aspects of customary laws are not applied'.⁴⁵⁴ Also, recalling its General Recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the CERD has recommended in particular, that the state party urgently ensure that its laws, especially on marriage and inheritance, do not discriminate against women and girls of certain ethnic groups.⁴⁵⁵

Regarding the CDESCR, it is worth recalling General Comment No. 16 (2005) on Article 3 of the ICESCR which provides for the equal right of men and women to the enjoyment of all the economic, social and cultural rights set forth in the ICESCR. In this document, the CDESCR has acknowledged that '[w]omen are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom'.⁴⁵⁶ It has also underscored that women often face multiple forms of discrimination grounded, among others, on race, colour and ethnicity, in addition to gender. It should be noted that Article 3 is 'a cross-cutting obligation and applies to all the rights contained in ... the Covenant'.⁴⁵⁷ Therefore, this provision may arguably have some implications vis-à-vis Article 15, recognizing, in particular, the right of everyone to take part in cultural life, which has not yet been explored. In fact, Article 15 has been applied by the CDESCR to protect the cultural heritage⁴⁵⁸ and the cultural identity⁴⁵⁹ of ethnic groups.

In this respect, it is worth noting that in its General Comment No. 21 on the right of everyone to take part in cultural life⁴⁶⁰ the CDESCR emphasized that:

*'[i]mplementing article 3 of the Covenant, in relation to article 15, paragraph 1 (a), requires, inter alia, the elimination of institutional and legal obstacles, as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from fully participating in cultural life, science education and scientific research.'*⁴⁶¹

The CDESCR also pointed out that 'no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope'. It went on to add that:

*'[a]pplying limitations on the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed.'*⁴⁶²

It further highlighted that the right to take part in cultural life is violated when a state party fails to take steps to combat practices harmful to the well-being of a person or

group of persons. These harmful practices, including those attributed to customs and traditions, such as FGM and allegations of the practice of witchcraft, are considered as barriers to the full exercise by the affected persons, of the right enshrined in Article 15, paragraph 1 (a) of the ICESCR.⁴⁶³

Interestingly, the CEDAW has paid particular attention to 'negative cultural practices'. Pursuant to Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, states shall take appropriate measures:

'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'.

Relying on this provision, the CEDAW has required that states adopt measures to eliminate traditional and cultural practices that discriminate against women in cooperation with traditional and religious leaders and women's organizations.⁴⁶⁴

In relation to the recognition of indigenous peoples' rights, while congratulating the states for the recognition of cultural diversity, the CEDAW has stressed its concern that the 'emphasis placed on such specificities [i.e. those informing indigenous culture] might detract from compliance with the provisions of the Convention relating to non-discrimination and formal and substantive equality between men and women'. The CEDAW has thus urged states to ensure that indigenous practices are in conformity with the legal framework of the Convention and to create the conditions for an intercultural dialogue 'that would respect diversity while guaranteeing full compliance with the principles, values and international norms for the protection of human rights, including women's rights'.⁴⁶⁵

As regards the UN Committee on the Rights of the Child, it has focused its attention particularly on 'harmful traditional practices' (FGM, early and forced marriages, forced initiation and child betrothal), calling for their prohibition and states' engagement with traditional and religious leaders as well as children's extended families in this regard.⁴⁶⁶

Conclusions

Full awareness of the interplay between different grounds of discrimination, in particular gender, race, colour, ethnic origin and religion, is crucial to address the specific situation of minority and indigenous women. While increasing attention is being paid to multiple forms of

discrimination faced by these women, a more systematic approach in this sense should be encouraged, especially by the CEDAW which places emphasis mostly upon rural or vulnerable women rather than minority and indigenous women, thus not really capturing directly intersectionalities between gender and other grounds of discrimination.

It is equally important to bear in mind that minority and indigenous women are faced not only with multiple discrimination from the dominant sectors of society but may also be confronted with discriminatory practices, traditions and customs originating within their own communities. In this regard, the protection of the right to cultural integrity of indigenous/minority groups does not allow specific practices which are incompatible with the principle of equality, as well as respect for the dignity or the physical and psychological integrity of women. The UN treaty bodies have called upon states to take all appropriate measures to prohibit and eradicate these practices. As has been highlighted above, governments' obligation to address harmful and discriminatory practices must not result in an indiscriminate attack on minority and indigenous cultures, and prohibitions must be based on reasonable and objective grounds and be proportionate to the aims pursued.

However, culture is a highly sensitive issue and minority and indigenous women can find themselves in an extremely delicate situation, split between calls for loyalty to their communities and the defence of their rights. The UN treaty bodies have generally recommended that states should engage in an intercultural dialogue with all the parties concerned, notably traditional and religious leaders and women themselves, with a view to fostering reconsideration of aspects of the community's identity. The participation of women in the process of rethinking customary laws is crucial as their own right to cultural identity is at stake.

The process of rethinking customary law could benefit from further guidance from the treaty bodies⁴⁶⁷ as to the identification of those 'fundamental human rights' that must stand as a limit on the protection of cultural diversity as well as on the criteria that should inform the balance between individual rights and the collective right to/interest in cultural integrity. Cases where traditional practices breach the principle of equality, including family law and marital rights, and cases where other human rights of women and girls, such as their right to life, health, dignity, education and physical integrity, are violated as a result of specific traditional practices and customs should be considered on a regular basis by the treaty bodies.

In particular, further decisions by the HRC on the question of the respect of women's rights vis-à-vis the

protection of cultural integrity in light of Articles 3 and 27 of the ICCPR would prove extremely helpful.

In the same vein, the implications of Article 3 of the ICESCR vis-à-vis Article 15 are worth exploring.

In light of the approach taken by the CEDAW, interesting developments in this area could also come

from the application of Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The fact that a large number of states have ratified the Optional Protocol to the Convention provides an additional basis for examining the potential of this provision.

General conclusions and recommendations

Non-discrimination

The principle of non-discrimination has expanded over the past few years under international and European human rights law in ways that increase the number of spheres where unreasonable distinctions can be found (e.g. race or ethnicity, religion, education, or voting rights), elaborate on the type of discrimination involved (direct and indirect), and reach out to significant procedural aspects, including the shift of the burden of proof and the use of statistical evidence.

Jurisprudence should be further enhanced by:

- (a) exposing the connection between equality (e.g. Article 14 ECHR), substantive rights (e.g. under Articles 2, 3, 8, 9 ECHR, and Article 2 Protocol 1 ECHR) and minority protection;
- (b) exploring the full potential of Protocol 12 ECHR; wider ratification of the instrument, including by western European countries, would strengthen non-discrimination in Europe;
- (c) encouraging an expansive use of the notion of indirect discrimination under the European and Inter-American and African human rights regimes. In the European context, the ECJ's finding of indirect discrimination in cases concerning sex and nationality discrimination, and the elaborate rules of the Equality Directives may guide the jurisprudence of other courts and quasi-judicial bodies, including on issues of evidence and burden of proof;
- (d) paying particular attention to, not only discrimination on account of race and ethnic origin, but also discrimination based on religion, including multiple discrimination on the grounds of religion and gender.

Education, participation

*Cases such as *Cyprus before the ECtHR* (elaborating on education in a minority language under certain conditions) and *Yatama before the IACtHR* (elaborating on the link between political participation and indigenous identity) suggest that more specific aspects of protection may be read into general human rights norms, beyond the specifics of equality law. The potential ramifications of this jurisprudence*

for minority protection remain to be seen and further case law in these areas is thus highly desirable.

Jurisprudence should be further enhanced by

- (a) initiating cases concerning access to education in general, and minority education in particular, based on the nuanced approach reflected in *Cyprus* in relation to secondary education provision and its physical accessibility;
- (b) extending the requirement of economic affordability to include provision of education in a minority language, where there is a substantial number of minority members in the relevant area and there is sufficient demand. Cases under Article 27 ICCPR may better entrench positive duties on a state to guarantee public funding to support minority education. While judicial or quasi-judicial findings of a general minority right to minority-language education might be difficult to obtain at this stage, particularly under Article 2 of Protocol 1 ECHR, justifying ex post minority-friendly policies on a case-by-case basis appears realistic and entirely desirable jurisprudence;
- (c) consolidating jurisprudential developments in electoral matters arising out of legislative lacunae in domestic laws, procedural irregularities or other measures affecting minority groups' right to political participation;
- (d) encouraging wider use of the principle of non-discrimination in political participation, particularly under the Inter-American system and the ECHR; here again, wider ratification of Protocol 12 ECHR is of considerable importance;
- (e) initiating further cases under Article 27 ICCPR on effective participation of minorities in decisions that affect them, especially (though by no means exclusively) in relation to indigenous peoples.

Land rights

*The Inter-American jurisprudence has proved instrumental in advancing indigenous land rights under the ACHR and the American Declaration. The groundbreaking criteria developed by the IACtHR in *Saramaka* in relation to*

restrictions on land rights should be further considered in future cases before the Inter-American bodies, particularly as they involve the relationship between indigenous consultation and consent, as well as the role of indigenous representatives in the relevant decision-making process. Cases before the IACHR and IACtHR should promote synergy and consistency within the system, taking also into account ILO and HRC practice, as well as the particularly progressive approach to land rights adopted by CERD.

Jurisprudence should be further enhanced by

- (a) expanding on certain aspects of this regime, including the implications of the right to free, prior and informed consent of indigenous peoples, most notably in the context of cumulative effects that may be expected to result from development activities;
- (b) exploring the link between Articles 6, 7 and 15 of ILO Convention No. 169 with a view to further clarifying the scope of consultations with indigenous peoples, and consequently the objective of reaching an agreement with them as laid down in Article 6(2);
- (c) encouraging the HRC to emphasize the duty on states to consult with indigenous peoples when carrying out the demarcation of their traditional lands, as well as to respect indigenous peoples' customary laws and practices regarding land tenure systems when deciding on indigenous claims to traditional lands;
- (d) promoting dialogue between judicial and quasi-judicial bodies over relevant aspects of indigenous land rights and their potential diffusion within the African and European systems.

Women's rights

There is a need for jurisprudential elaboration on the impact of cultural diversity, including minority rights, on the rights of women. Generally speaking, full awareness of the interplay between different grounds of discrimination, particularly gender, race, colour, ethnic origin and religion, is crucial to address the specific situation of indigenous and minority women. In this sense, CEDAW should be encouraged to

embrace a more systematic approach to multiple forms of discrimination, involving not only rural or vulnerable women but also minority and indigenous women. The protection of the cultural integrity of indigenous/minority groups does not encompass practices that run counter to the protection of their members, including women. Governments' obligation to address harmful and discriminatory practices must not result in an indiscriminate attack on minority and indigenous cultures as such, and prohibitions must be based on reasonable and objective grounds and be proportionate to the aims pursued. The UN treaty bodies have generally recommended that states should engage in an intercultural dialogue with all the parties concerned, notably traditional and religious leaders and women themselves, with a view to fostering reconsideration of aspects of the community's identity. The participation of women in rethinking customary laws is central to this process.

Jurisprudence should be further enhanced by

- (a) supporting cases where particular practices infringe on the principle of equality, including family law and marital rights, and cases where other rights of women and girls, such as their right to life, health, dignity, education and physical integrity appear to have been equally threatened;
- (b) encouraging further decisions by the HRC on the complex interplay of women's rights and minority rights in light of Articles 3 and 27 of the ICCPR;
- (c) encouraging developments in this area under Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The fact that a large number of states have ratified the Optional Protocol to the Convention may create opportunities to examine the potential of this provision in a quasi-judicial setting;
- (d) considering the implications of Article 3 of the ICESCR vis-à-vis Article 15; the recently adopted Optional Protocol to the ICESCR establishing a complaints procedure may offer further avenues for litigation, although it is not possible at this stage to foresee if and when the protocol will enter into force.

Notes

- 1 ICCPR (adopted and opened for signature, ratification and accession 16 December 1966, entered into force 23 March 1976), General Assembly resolution 2200A (XXI).
- 2 HRC, General Comment No. 18: Non-discrimination, 10 November 1989, para. 12. In addition, Article 3 ICCPR prohibits sex discrimination.
- 3 CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, 10 June 2009.
- 3 ECHR, CETS No. 005 (opened for signature 4 November 1950, entered into force 4 November 1953).
- 5 Protocol No. 12 to the ECHR, CETS No. 177 (adopted 4 November 2000, entered into force 1 April 2005), Article 1(1).
- 6 The ECtHR has recently confirmed this in the cases *Sejdić and Finci v Bosnia and Herzegovina* (Applications 27996/06 and 34836/06), 22 December 2009, para. 53.
- 7 AfrCH (concluded on 26 June 1981, entered into force on 21 October 1986), OAU Doc.CAB/LEG/67/3 Rev.5.
- 8 ACHR, OAS Treaty Series No. 36, 1144 UNTS 123 (signed on 22 November 1969, entered into force 18 July 1978).
- 9 Article 24 of the ACHR reads as follows: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'
- 10 FCNM, CETS No. 157.
- 11 Article 4 FCNM reads as follows:

'1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.'
- 12 HRC, General Comment 23, Article 27 (50th session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 38 (1994), para. 4. See also, CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, 10 June 2009, particularly comment on Article 2(2) ICESCR.
- 13 HRC, General Comment 18, Non-discrimination, para. 7.
- 14 *Ibid.*, para. 13.
- 15 HRC, General Comment 23, Article 27, para. 4.
- 16 *Simunek et al. v the Czech Republic*, Communication No. 516/1992, Views of 19 July 1995. CCPR/C/54/D/516/1992; *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia*, Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000); HRC, *Waldman v Canada*, Communication No. 694/1996, UN Doc. A/55/40, CCPR/C67/D/694/1996.
- 17 The ECtHR is a judicial body under the ECHR; unlike the HRC's decisions, the ECtHR's judgments are legally binding.
- 18 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics)*, (Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), (1968) 1 Yearbook of the European Convention on Human Rights 832, para. 10.
- 19 *Ibid.*
- 20 *Podkolzina v Latvia*, (Application no. 46726/99), ECtHR, Judgment 9 April 2002. The ECtHR, however, found a violation of Article 3 of Protocol 1 ECHR, as discussed in the section on 'The right to stand for elections' (p. 24).
- 21 *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*, 27 June 2000.
- 22 *Thlimmenos v Greece* (Application No. 34369/97) [2001] 31 EHRR 15.
- 23 *Aziz v Cyprus* (Application No. 69949/01) Judgment of 22 June 2004.
- 24 *Nachova v Bulgaria* (Application Nos 43577/98, 43579/98) [2006] Grand Chamber, 42 EHRR 43.
- 25 *Timishev v Russia* (Application Nos 55762/00, 55974/00) [2007] 44 EHRR 37.
- 26 *D.H. and Others v The Czech Republic* (Application No. 57325/00) [2008] ELR 17.
- 27 *Sejdić and Finci v Bosnia and Herzegovina*, supra 6.
- 28 Advisory Opinion OC-4/84, January 19, 1984, IACtHR (Ser. A) No. 4 (1984).
- 29 *Ibid.*, para. 57.
- 30 *Ibid.*
- 31 *Amnesty International v Zambia, African Commission on Human and Peoples' Rights*, Comm. No. 212/98 (1999).
- 32 *Organisation Mondiale Contre La Torture v Rwanda*, ACHPR, Comm. Nos 27/89, 46/91, 49/91, 99/93 (1996).
- 33 *Giovanni Maria Sotgiu v Deutsche Bundespost*, Case 152/73, 12 February 1986, para. 31.
- 34 *Ballantyne, Davidson, McIntyre v Canada*, Communications Nos 359/1989 and 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).
- 35 *Ibid.*, para. 11.5.
- 36 *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia*, supra 16.
- 37 *Ibid.*, para. 10.10.
- 38 Interestingly, the HRC did not deal with this claim under Article 27 ICCPR. The case suggests that the state could legitimately insist on all communications between the authorities and minorities to take place in the official language, and that an exclusive official language does not automatically discriminate against minority languages. It should be pointed out that, the authors did not allege that their language rights were denied under Article 27 ICCPR and limited their submission under this provision entirely to land use; therefore, in the absence of a complaint from the authors, the HRC was not in a position to construct a case under Article 27. However, the joint dissent led by P.N. Bhagwati seems to suggest that were the authors to insist on the violation of language rights under Article 27 rights, the HRC could consider their claim under this provision. The individual opinion by R. Lallah took a contrary view, though.
- 39 *Mr. Rupert Althammer et al. v Austria*, Communication No. 998/2001, UN Doc. CCPR/C/78/D/998/2001 (2003).
- 40 *Cecilia Derksen v Netherlands*, Communication No. 976/2001, UN Doc. CCPR/C/80/D/976/2001 (2004).

- 41 *Mr. Rupert Althammer et al. v Austria*, supra 39, para. 10.2.
- 42 *Kelly v the United Kingdom* (Application No. 30054/96) [2001] ECtHR, 4 May 2001.
- 43 *Ibid.*, para. 146.
- 44 *Ibid.*, para. 148.
- 45 *Ibid.*
- 46 *D.H. and Others v The Czech Republic* (Application No. 57325/00) [2006] 43 EHRR 41, para. 48.
- 47 *Ibid.*, para. 49.
- 48 *Ibid.*
- 49 Compare this finding with the House of Lords decision in *Mandla v Dowell Lee* [1983] AC 548.
- 50 *D.H. and Others v The Czech Republic* (Application No. 57325/00) [2008] 47 EHRR 3.
- 51 *Ibid.*, para. 183.
- 52 *Ibid.*, para. 184.
- 53 See for example, Case 170/84, *Bilka-Kaufhaus* [1986] IRLR 317; Case 43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455; Joined Cases C-231/06, 232/06 and 233/06, *Office national des pensions v Emilienne Jonkman, Hélène Vercheval and Noëlle Permesaen v Office national des pensions* [2007] ECR I-5149.
- 54 Case C 152/73, *Sotgiu*, [1974] ECR 153; Case 39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 3161; Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-209/03 *R (on the application of Danny Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119.
- 55 *D.H. and Others v The Czech Republic*, supra 50, para. 209.
- 56 *Sejdić and Finci v Bosnia and Herzegovina*, supra 6.
- 57 HRC, *Waldman v Canada*, supra 16.
- 58 *Ibid.*, para. 10(6).
- 59 *Ibid.*, para. 10.4.
- 60 In contrast, the ECtHR's jurisprudence on freedom of association of religious organizations is more supportive of a minority group's claims: *Serif v Greece* (Application No. 38178/97) [1999] 31 EHRR 561; *Hassan and Chaush v Bulgaria* (Application No. 30985/96) [2000] 24 EHRR 55; *Case of Metropolitan Church of Bessarabia and others v Moldova*, (Application No. 45701/99), Judgment of 13 December 2001; *Case of Supreme Holy Council of the Muslim Community v Bulgaria* (Application No. 39023/97), Judgment of 16 December 2004; *Case of the Moscow Branch of the Salvation Army v Russia* (Application No. 72881/01), Judgment of 5 October 2006.
- 61 *Thlimmenos v Greece*, supra 22.
- 62 *Ibid.*, para. 42.
- 63 *Ibid.*, para. 44.
- 64 CERD, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, 75th session, August 2009, para. 7.
- 65 *Şahin v Turkey* (Application No. 44774/98) Grand Chamber (2007) 44 EHRR 5; *Şahin v Turkey* (Application No. 44774/98) (2005) 41 EHRR 8.
- 66 *Şahin v Turkey* (Application No. 44774/98) (2005) 41 EHRR 8, para. 99.
- 67 *Ibid.*, para. 106.
- 68 *Karaduman v Turkey* (Application No. 16278/90) (1993) 74 DR 93.
- 69 *Dahlab v Switzerland* (Application No. 42393/98) Inadmissibility Decision of 15 February 2001.
- 70 Compare to the German headscarf case in *Bundesverfassungsgericht (BverfGE)*, 2 BverfGE 1436/02, Judgment of 24 Sept. 2003.
- 71 *Kokkinakis v Greece* (A/260-A) [1994] 17 EHRR 397.
- 72 *Lariss v Greece* [1998] EHRR 329.
- 73 *Delgado Paez v Colombia* (Communication No. 195, 1985) [1990] HRC, 12 July 1990.
- 74 *Karaduman v Turkey* (1993) 74 DR 93, supra 68.
- 75 *Dahlab v Switzerland*, supra 69.
- 76 *Emine Araç v Turkey*, No. 9907/02, decision of 19 September 2006.
- 77 *Şefika Köse and 93 others v Turkey*, No. 26625/02, decision of 24 January 2006.
- 78 Parliamentary Assembly of the Council of Europe, State of human rights and democracy in Europe, Doc. 11217, 30 March 2007, para. 62.
- 79 *Kurtulmuş v Turkey* (Application No. 65500/01), decision of 24 January 2006.
- 80 *Dogru v France* (Application No. 27058/05), ECHR, 4 December 2008.
- 81 *Kervanci v France* (Application No. 31645/04), ECHR, 4 December 2008.
- 82 *Dogru v France*, supra 80, para. 8.
- 83 *Ibid.*, para. 14.
- 84 *Şahin v Turkey* (Application No. 44774/98) Grand Chamber (2007) 44 EHRR 5; *Refah Partisi (the Welfare Party) and Others v Turkey* (Application Nos 41340/98, 41342/98, 41343/98 and 41344/98), Judgment of 13 February 2003; *X v the United Kingdom* (Application No. 7992/77), (1978) 14 DR 234; *Phull v France* (dec.) (Application No. 35753/03), Judgment of 11 January 2005; *El Morsli v France* (Application No. 15585/06), inadmissibility decision of 4 March 2008; *Karaduman v Turkey*, supra 68; *Dahlab v Switzerland*, supra 69; *Şefika Köse and 93 others v Turkey*, (Application No. 26625/02), inadmissibility decision of 24 January 2006.
- 85 *Dogru v France*, supra 80, paras 63, 71, 72, 75 and 77.
- 86 *Ibid.*, para. 72.
- 87 *Aktas v France* (Application No. 43563/08).
- 88 *Bayrak v France* (Application No. 14308/08).
- 89 *Gamaleddyn v France* (Application No. 18527/08).
- 90 *Ghazal v France* (Application No. 29134/08).
- 91 See also inadmissibility decisions in *J. Singh v France*, No. 25463/08 and *R. Singh v France*, No. 27561/08, where boys were banned from a school for wearing a 'keski', an under-turban worn by Sikhs.
- 92 *Aktas v France*, supra 87, para. 4.
- 93 *Chapman v. UK* (Application No. 27238/95) ECHR, 18 January 2001 (the right to one's own way of life); *ECmHR, Lindsay and Others v the United Kingdom* (Application 8364/78), Decision of 8 March 1979 (legitimacy of having different election systems within one state to protect the participation right of minorities); *Sidiropoulos and Others v Greece* (Application No. 26695/95), Judgment of 10 July 1998 (the freedom of association to protect separate identity of a minority group); *Cyprus v Turkey* (2002), 35 EHRR 30 (educational rights of minorities).
- 94 *Hudoyberganova v Uzbekistan* (931/2000) UN HRC 19 BHRC 581, 18 January 2005.
- 95 *Ibid.*, para. 6.2.
- 96 HRC, General Comment No. 22, para. 5.
- 97 *Hudoyberganova v Uzbekistan*, para. 6.2.
- 98 *Nachova v Bulgaria* (Application Nos 43577/98 and 43579/98) [2004] 39 EHRR 37.
- 99 *Nachova v Bulgaria* (Application Nos 43577/98 and 43579/98) [2006] Grand Chamber, 42 EHRR 43, para. 89, see also Chamber's decision in *ibid.*, *Nachova v Bulgaria*, para. 105, supra 98.
- 100 *Nachova v Bulgaria*, supra 98, paras 108 and 109.
- 101 *Ibid.*, para. 157.
- 102 *Ibid.*, para. 170.
- 103 *Ibid.*, para. 171.
- 104 *Ibid.*, paras 172–3.
- 105 *Nachova v Bulgaria*, supra 99, para. 157.
- 106 *Ibid.* However, in *Stoica v Romania* (Application No 42722/02) Judgment of 4 March 2008, the ECtHR appeared to concede the shift of the burden of proof to the state, even though the facts of the case are related to racially-motivated violence.

- 107 *Ibid.*, para. 158.
- 108 *Ibid.*, para. 164.
- 109 *Moldovan and others v Romania* (Application Nos 41138/98 and 64320/01) [2007] 44 EHRR, 16.
- 110 *Ibid.*, para. 139.
- 111 *D.H. and Others v The Czech Republic*, supra 50.
- 112 *Ibid.*, para. 203.
- 113 *Ibid.*, para. 204.
- 114 *Timishev v Russia* [2007] 44 EHRR 37, supra 25.
- 115 *Ibid.*, para. 56.
- 116 *Ibid.*, para. 58.
- 117 The CERD, a quasi-judicial body under the ICERD, has recently clarified the meaning and scope of special measures in its General Recommendation No. 32. The CERD suggested that special measures should be 'appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary'. CERD, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, 75th session, August 2009, para. 16.
- 118 Such measures should be designed and implemented on the basis of need and a minority group's current situation: *ibid.*
- 119 *Belgian Linguistics*, supra 18.
- 120 *Ibid.*, para. 44.
- 121 *Sejdić and Finci v Bosnia and Herzegovina* supra 6.
- 122 *Ibid.*, para. 55.
- 123 *Sejdić and Finci v Bosnia and Herzegovina*, supra 6, para. 42.
- 124 *Ibid.*, para. 43; see also *Nachova v Bulgaria*, supra 99, para. 145; *Timishev v Russia*, supra 114, para. 56.
- 125 *Sejdić and Finci v Bosnia and Herzegovina*, supra 6, para. 44.
- 126 *Ibid.*, para. 45; see also, *Belgian Linguistics*, supra 18, para. 10; *Thlimmenos v Greece*, supra 22, para. 44.
- 127 Partly concurring and partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev.
- 128 *Amnesty International v Zambia*, ACHPR, Comm. No. 212/98 (1999).
- 129 *Organisation Mondiale Contre La Torture v Rwanda*, ACHPR, Comm. Nos. 27/89, 46/91, 49/91, 99/93 (1996).
- 130 *Amnesty International v Zambia*, supra 128.
- 131 This obligation not to discriminate against persons within its jurisdiction was reaffirmed by the ACHPR against Zambia in another case concerning deportations of West Africans in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*, ACHPR, Comm. No. 71/92 (1996).
- 132 *Organisation Mondiale Contre La Torture v Rwanda*, supra 129.
- 133 *Ibid.*, para. 22.
- 134 *Ibid.*, para. 20.
- 135 *Malawi African Association and Others v Mauritania*, ACHPR, Comm. Nos 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).
- 136 *Ibid.*, para. 131.
- 137 *The Yean and Bosico Children v Dominican Republic*, Judgment of September 8, 2005, IACtHR (Ser. C), No. 130 (2005).
- 138 *Ibid.*, para. 109(12).
- 139 *Ibid.*, para. 153.
- 140 *Ibid.*
- 141 *Ibid.*, para. 109(10).
- 142 *Ibid.*, para. 109(14), 109(17), 109(18) and 109(20).
- 143 *Ibid.*, para. 109(16).
- 144 *Ibid.*, para. 140.
- 145 *Ibid.*
- 146 *Ibid.*, para. 141.
- 147 *Ibid.*, para. 155.
- 148 *Ibid.*, para. 177.
- 149 Case 170/84, *Bilka-Kaufhaus* [1986] IRLR 317.
- 150 Case C 152/73, *Sotgiu* [1974] ECR 153.
- 151 Furthermore, the procedure used under Article 13 TEC (now Article 19 TFEU) requires the unanimous consensus of all 27 member states, so in practice, it may be difficult to amend it to incorporate explicit reference to minority rights.
- 152 Directive 2000/43/EC, Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L180/22 (Race Directive).
- 153 Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303/16 (Employment Directive).
- 154 Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L373/37 (Goods and Services Directive).
- 155 *Ibid.*, Article 3(3).
- 156 Race Directive, Article 2(2)(a).
- 157 *Ibid.*, Article 2(2)(b).
- 158 Employment Directive, Preamble, Recital 25.
- 159 Goods and Services Directive, Article 4(5).
- 160 *Ibid.*, Preamble, Recital 16.
- 161 Race Directive, Article 4.
- 162 Goods and Services Directive, Article 5(2).
- 163 *Ibid.*, Article 5(1).
- 164 Race Directive, Article 5; Employment Directive, Article 7; Goods and Services Directive, Article 6.
- 165 Race Directive, Article 6(1); Employment Directive, Article 8(1); Goods and Services Directive, Article 7 (1).
- 166 Race Directive, Article 6(2); Employment Directive, Article 8(2); Goods and Services Directive, Article 7(2).
- 167 Case C 54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, 10 July 2008.
- 168 *Ibid.*, para. 10.
- 169 *Ibid.*, para. 25.
- 170 *Ibid.*, para. 24.
- 171 Race Directive, Article 4.
- 172 Case C-144/04, *Mangold v Helm* [2006] 1 CMLR 43 and Case C-411/05, *Felix Palacios de la Villa v Cortefiel Servicios Sa*, 16.10.2007 on age discrimination; Case C-303/06, *S. Coleman v Attridge Law and Steve Law*, 17.07.2008 and Case C-13/05, *Chacon Navas v Euresit Collectividades SA* [2006] 3 CMLR 40 on disability discrimination; and Case C-276/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 01.04.2008 on discrimination based on sexual orientation.
- 173 Commission (EC) Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Non-discrimination and equal opportunities: a renewed commitment', COM(2008) 420 final, 2.
- 174 *Ibid.*
- 175 *Mandla v Dowell Lee* [1983] AC 548, *Commission for Racial Equality v Dutton* [1989] IRLR 8; *Seide v Gillette Industries Ltd* [1980] IRLR 427.
- 176 *Tariq v Young*, Case 247738/88, EOR Discrimination Case Law Digest No. 2, *Crown Suppliers (Property Services Agency) v Dawkins* [1993] ICR 517] and *Lovell-Badge v Norwich City College of Further and Higher Education*, Case 1502237/97 (1999) 39 EOR Discrimination Case Law Digest 4.
- 177 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation', COM(2008) 225 final/2, 9 July 2008, 4.
- 178 *Ibid.*
- 179 *Azmi v Kirklees Metropolitan Borough Council*, Employment Appeal Tribunal, Appeal No. UKEAT/0009/07/MAA, 8 March 2007.

- 180 Ninety-two per cent of pupils and 35 per cent of staff of the school were Muslims. *Azmi v Kirklees Metropolitan Borough Council*, para. 3.
- 181 *Ibid.*, para. 55.
- 182 The EAT specifically emphasized that Article 2(5) of the Directive replicates Article 9(2) ECHR by providing limitations on freedom to manifest religion (para. 42); however, it was noted that the UK implementing legislation did not have an equivalent provision. *Azmi v Kirklees Metropolitan Borough Council*, para. 47.
- 183 In the recent report on the implementation of the Employment Directive by member states, the European Commission has specifically indicated several issues concerning the prohibition of discrimination on grounds of religion or belief. In particular, the Commission pointed out that:
- '[n]ational case law arising since the adoption of the Directive has highlighted conflicts between employee dress codes and manifestations of religious belief. Some of these cases have been treated as human rights matters (raising issues of freedom of religious expression) rather than discrimination cases, but they indicate that this area is likely to be a sensitive issue in implementing the Directive.'*
- Communication from the Commission, 'The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation', supra 177.
- 184 Advisory Committee on the FCNM, Commentary on education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, 2 March 2006, 7.
- 185 CESCR, General Comment on the right to education (Art.13): 8 December 1999 E/C12/1999/10.
- 186 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res. 217 A(III)) (UDHR), Article 26.
- 187 ICESCR (adopted and opened for signature, ratification and accession 16 December 1966, entered into force 3 January 1976, UNGA Res. 2200A (XXI)) (ICESC), Article 13.
- 188 CRC (adopted and opened for signature, ratification and accession 20 November 1989, entered into force 2 September 1990, UNGA Res. 44/25) (CRC), Article 28.
- 189 Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries guarantees the right to education of indigenous people specifically (adopted on 27 June 1989 by the General Conference of the ILO, entered into force on 5 September 1991), Articles 26–31.
- 190 Convention against Discrimination in Education (adopted 14 December 1960, the General Conference of UNESCO) (CDE), Article 1(1).
- 191 *Ibid.*, Article 1(2).
- 192 Charter of Fundamental Rights of the European Union, *Official Journal C* 364, 18.12.2000, 1–22, Article 14(2).
- 193 *Ibid.*, Article 14(3).
- 194 AfrCH (concluded on 26 June 1981, entered into force on 21 October 1986), OAU Doc.CAB/LEG/67/3 Rev. 5.
- 195 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 14 November 1988, entered into force on 16 November 1999), OAS Treaty Series 69.
- 196 FCNM CETS No. 157.
- 197 *Belgian Linguistics*, supra 18.
- 198 *Ibid.*, para. 27.
- 199 *Ibid.*, para. 32.
- 200 *Ibid.*, para. 7.
- 201 *D.H. and Others v The Czech Republic*, supra 50.
- 202 *Affaire Sampanis et Autres c. Grèce* (Application No. 32526/05), Judgment of 5 June 2008 (final on 5 September 2008), para. 96 (in French).
- 203 *Oršuš and Others v Croatia*, Application No. 15766/03, Judgment of 17 July 2008.
- 204 Opinion on Bosnia and Herzegovina, ACFC/INF/OP/I(2005)003, 27 May 2004, paras 88, 89.
- 205 Opinion on Italy, ACFC/INF/OP/I(2002)007, 14 September 2001, para. 55; Second Opinion on Italy, ACFC/INF/OP/II(2005)003, 24 February 2005, para.114.
- 206 Second Opinion on the Slovak Republic, ACFC/OP/II(2005)004, 26 May 2005, para. 98.
- 207 Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, paras 61–3; Second Opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, paras 145–9; Opinion on Bulgaria, ACFC/OP/I(2006)001, 27 May 2004, para. 97, etc.
- 208 Advisory Committee on the FCNM, Commentary on education under the Framework Convention for the Protection of National Minorities, supra 184, 21.
- 209 Convention against Discrimination in Education, supra 190, Article 2(b).
- 210 Generally, there are fewer cases on the right to education in the inter-American and African contexts, because this right is perceived more as a matter of principle, with the countries striving to guarantee to individuals more pressing rights, such as the right to food, health, water, safe environment, etc. *Social and Economic Rights Action Centre and the Centre for Economic (SERAC) and Social Rights (CESR) v Nigeria*, ACHPR Communication 155/96; *Zimbabwe Lawyers for Human Rights, Human Rights Trust of Southern Africa v The Government of Zimbabwe Forced Evictions Hopley-Porta Farm and Hatcliffe Communities*, ACHPR Case Communication No. 314/05.
- 211 *The Yean and Bosico Children v Dominican Republic*, supra 137.
- 212 *Ibid.*, para. 109(34).
- 213 *Ibid.*, para. 109(35).
- 214 *Ibid.*, 109(36).
- 215 *Cyprus v Turkey* (2002) 35 EHRR 30.
- 216 *Ibid.*, para. 44.
- 217 *Ibid.*, para. 43.
- 218 *Ibid.*, para. 277.
- 219 *Ibid.*, para. 278.
- 220 *Ibid.*
- 221 For example, in *Hopu and Bessert v France*, the HRC dealt with the applicants' claims that by constructing a hotel complex at a fishing lagoon and on a burial ground, France violated the minority rights of an indigenous Polynesian community in Tahiti, through the medium of Article 17 ICCPR (the right to privacy) and Article 23 ICCPR (the right to family life). The HRC resorted to general human rights provisions, because of France's reservation to Article 27 ICCPR: *Hopu and Bessert v France*, 29 July 1997, HRC, No. 549/1993. Equally, the ECtHR itself has not hesitated to read the ECHR provisions broadly to accommodate minorities in other contexts. See supra 84.
- 222 Although minorities have the right to establish their own schools, for example, under Article 13 FCNM, as the Advisory Committee noted, this provision does not give rise to any observations of state compliance, simply because minorities do not have the financial resources to establish their own educational institutions. Advisory Committee on the FCNM, Commentary on Education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, 22.
- 223 *Waldman v Canada*, supra 16.
- 224 *Ibid.*, Individual opinion by member Martin Scheinin (concurring), para. 5.
- 225 *Ibid.*
- 226 For example, the Advisory Committee under the FCNM has confirmed that indigenous groups, such as the Sami in Norway, can benefit from the protection under the FCNM.

- ACFC, First Opinion on Norway, ACFC/INF/OP/I(2003)003, 12 September 2002, para. 19.
- 227 For more elaborate rules on political participation of minorities see the (non-legally binding) Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note (1999), retrieved 12 September 2010, http://www.osce.org/documents/hcnm/1999/09/2929_en.pdf.
- 228 HRC, General Comment 23, Article 27, para. 7.
- 229 *Ilmari Länsman et al v Finland*, Communication No. 511/1992, CCPR/C/52/D/511/1992 (1994).
- 230 *Jouni E. Länsman et al. v Finland*, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996).
- 231 *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000).
- 232 *Ibid.*, para. 9.5.
- 233 For example, in *Apirana Mahuika et al. v New Zealand*, the HRC concluded that 'by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities', New Zealand took the necessary steps to comply with Article 27 ICCPR (para. 9.8).
- 234 Potential implications and recent developments of minorities' right to participate in decisions which affect them, including the role of their free prior and informed consent, were explored by the HRC in *Poma Poma v Peru*, UN Doc. CCPR/C/95/D/1457/2006, 24 April 2009, discussed in the section of this guide 'The HRC and the exploitation of natural resources located in indigenous peoples' lands' (p. 34).
- 235 Another non-legally binding document pertinent to political participation of minorities is the Lund Recommendations on the Effective Participation of National Minorities in Public Life; these recommendations specifically recognize the right of minorities to effective participation in all aspects of public, economic, social and cultural life of a country. The Lund Recommendations is a set of political principles, which states are encouraged to take into account. The Recommendations reflect state commitments under the 1990 Copenhagen Document of the Conference on the Human Dimension (Part IV), as well as United Nations and Council of Europe instruments on human rights.
- 236 The list of States party to this Convention is available at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>.
- 237 The list of States party to this Convention is available at [http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?\(C169\)](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169)) (retrieved 14 August 2009).
- 238 HRC, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12.07.96, CCPR/C/21/Rev.1/Add.7, para. 1.
- 239 *Ibid.*, para. 24.
- 240 *Ibid.*, para. 19.
- 241 IACHR, Case No. 11.166, *Walter Humberto Vasques Vejarano v Peru*, Report No. 48/00.
- 242 *Ibid.*, para. 93.
- 243 *Ibid.*
- 244 ACHPR, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Comm. No. 102/93 (1998).
- 245 *Ibid.*, para. 47.
- 246 *Ibid.*, para. 50.
- 247 HRC, General Comment to the ICCPR No. 25, supra 238, para. 1.
- 248 *Aziz v Cyprus*, supra 23.
- 249 *Ibid.*, para. 30.
- 250 *Ibid.*, para. 29.
- 251 *Lindsay and Others v the United Kingdom* (Application 8364/78), ECmHR, Decision of 8 March 1979.
- 252 *Moureaux v Belgim*, DR 33, 114, ECmHR, Decision of 12 July 1983.
- 253 HRC, *Marie-Hélène Gillot v France*, Communication No. 932/2000, Views of 15 July 2002, UN Doc. A/57/40, 270.
- 254 *Py v France* (Application 66289/01), ECtHR, Judgment of 6 June 2005.
- 255 *Marie-Hélène Gillot v France*, para. 13.16; *Py v France*, *ibid.*, paras 61, 62 and 64.
- 256 *Nicoletta Polacco and Alessandro Garofalo v Italy* (Application No. 23450/94), ECmHR, Inadmissibility decision of 15 September 1997.
- 257 *Ibid.*
- 258 HRC, General Comment No. 25, supra 238, para. 21.
- 259 In addition, states must refrain from measures which may alter the proportions of the population in areas inhabited by national minorities, aimed at restricting their rights and freedom under the FCNM: see FCNM, Article 16.
- 260 HRC, *Mátyus v Slovakia*, Communication No. 923/2000, 22 July 2002, CCPR/C/75/D/923/2000.
- 261 *Ibid.*, para. 2.2.
- 262 *Ibid.*, para. 4.5.
- 263 HRC, *Antonina Ignatane v Latvia*, Communication No. 884/1999, 25 July 2001.
- 264 *Podkolzina v Latvia* (Application No. 46726/99), ECtHR, Judgment 9 April 2002.
- 265 *Ibid.*, para. 36.
- 266 *Susana Higuchi Miyagawa v Peru*, Case 11.428, Report No. 119/99, OEA/Ser.LV/II.106 Doc. 3 rev. at 1262 (1999), para. 37.
- 267 *Ibid.*, para. 56.
- 268 HRC, General Comment No. 25, supra 238, para. 17.
- 269 IACHR, *Nasry Javier Ictech Guifarro v Honduras*, Case 2570-02, Report No. 30/06, IACHR, OEA/Ser.LV/II.127 Doc. 4 rev. 1 (2007).
- 270 *Fryske Nasjonale Partij and Others v the Netherlands*, ECmHR, Admissibility Decision of 12.12.1985, DR45, 240.
- 271 *Mathieu-Mohin and Clerfayt v Belgium* (Application no. 9267/81) [1988] 10 EHRR 1.
- 272 It is noteworthy that the Advisory Committee for the FCNM called on states to adopt a narrow approach to language proficiency requirements. See, for example, Advisory Committee, Opinion on Estonia, ACFC/INF/OP/I(2002)005, 14 September 2001, paras 55–60; Second Opinion on Estonia, ACFC/INF/OP/II(2005)001, 24 February 2005, paras 163–6.
- 273 *Ždanoka v Latvia* (Application No. 58278/00) [2005] 41 EHRR 31.
- 274 *Ždanoka v Latvia* (Application No. 58278/00) [2007] 45 EHRR 17.
- 275 *Ibid.*, para. 115 (e).
- 276 *Ibid.*, para. 132.
- 277 *Aziz v Cyprus*, supra 23, para. 31.
- 278 *Ibid.*, para. 32.
- 279 *Ibid.*, para. 33.
- 280 *Sejdić and Finci v Bosnia and Herzegovina*, supra 6.
- 281 *Ibid.*, para. 10.
- 282 *Ibid.*, para. 45.
- 283 *Ibid.*, para. 22.
- 284 *Glor v Switzerland* (Application No. 13444/04) ECtHR, 30 April 2009, para. 94: see in *Sejdić and Finci v Bosnia and Herzegovina*, supra 6, para. 48.
- 285 Venice Commission, Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina, CDL-AD(2006)004, 20 March 2006.
- 286 *Sejdić and Finci v Bosnia and Herzegovina*, supra 6 para. 22.
- 287 *Ibid.*, para. 49.
- 288 Judge Mijovic has even questioned the application of Article 3 of Protocol 1 to the elections to the House of Peoples, because, in his view, members of this House are not elected, but designated/selected by the entity parliaments: *Sejdić and Finci v Bosnia and Herzegovina*, supra 6: Partly concurring and partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev.

- 289 *Sejdić and Finci v Bosnia and Herzegovina*, Dissenting opinion of Judge Bonello.
- 290 HRC, General Comment No. 25, supra 238, para. 15.
- 291 *Legal Resources Foundation v Zambia*, ACHPR, Comm. No. 211/98 (2001).
- 292 *Ibid.*, para. 72.
- 293 IACtHR, Series C No. 127 (23 June 2005).
- 294 Article 23 establishes that every citizen shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected in genuine periodic elections, and to have access, under general conditions of equality, to the public service of his or her country
- 295 *Ibid.*, para. 195.
- 296 *Ibid.*, para. 201.
- 297 The IACtHR noted that ‘participation in public affairs of organizations other than parties ... [may be] essential to guarantee legitimate political expression and necessary in the case of groups of citizens who, otherwise, would be excluded from this participation.’ *Ibid.*, para. 217.
- 298 The following countries are parties to the ACHR: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Among those, Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela are also subject to the compulsory jurisdiction of the IACtHR.
- 299 Article 21 of the Convention reads as follow: (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law; (3) Usury and any other form of exploitation of man by man shall be prohibited by law.
- 300 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR, Series C 79 (2001).
- 301 *Comunidad Indígena Yakye Axa v Paraguay*, IACtHR, Series C 125 (2005), paras 124, 137; *Sawhoyamaya Indigenous Community v Paraguay*, IACtHR, Series C 146 (2006), paras 118–21; *Saramaka People v Suriname*, IACtHR, Series C 172 (2007), paras 87–96.
- 302 In the words of the IACtHR in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, para. 149, supra 300:
- among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*
- 303 *Ibid.*
- 304 *Ibid.*
- 305 *Mary and Carrie Dann v United States*, Case 11.140, IACHR, Report no. 75/02 (merits decision of 27 December 2002), para.130; *Maya Indigenous Communities of the Toledo District – Belize*, Case 12.053, IACHR, Report no. 40/04 (merits decision of 12 October 2004).
- 306 See, for example, *Maya Indigenous Communities of the Toledo District – Belize*, *ibid.*, para. 117.
- 307 *Ibid.*, para. 132.
- 308 See *Garifuna Community of Cayos Cochinos and its members v Honduras*, IACHR, Report no. 39/07 on admissibility, 24 July 2007. See also *Saramaka People v Suriname*, IACtHR, Series C 172 (2007) paras 84, 96; *Moiwana Community v Suriname*, IACtHR, Series C No. 124 (2005), paras 86(6), 131–4.
- 309 Namely ILO Conventions No. 107 and 169. ILO Convention No. 107 is now closed to ratification.
- 310 *Sawhoyamaya Indigenous Community v Paraguay*, IACtHR, Series C 146 (2006), para. 128.
- 311 *Ibid.*
- 312 *Ibid.*, para. 131.
- 313 *Ibid.*
- 314 *Comunidad Indígena Yakye Axa v Paraguay*, IACtHR, Series C 125 (2005), para. 143.
- 315 *Ibid.*, para. 144
- 316 Accordingly, the IACtHR held: ‘the necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest’. Therefore, it would be insufficient ‘to prove, for example, that the law fulfils a useful or timely purpose’. Furthermore, the IACtHR explained that the criterion of proportionality is ‘based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right’. Finally, the IACtHR stated that: ‘for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right’. This is in line with the general prescription of Article 21(1) according to which the law may subordinate the use and enjoyment of property to the interest of society.
- Ibid.*, para. 145.
- 317 *Ibid.*, para. 146.
- 318 *Ibid.*, para. 147.
- 319 *Ibid.*, para. 148.
- 320 *Ibid.*, para. 149.
- 321 *Saramaka People v Suriname*, IACtHR, Series C 172 (2007), para. 122.
- 322 *Ibid.*, para. 122.
- 323 *Ibid.*, paras 125–8.
- 324 *Ibid.*, para. 126.
- 325 *Ibid.*, para. 127.
- 326 *Ibid.*, para. 128.
- 327 *Ibid.*, para. 158.
- 328 In the *Saramaka v Suriname* case, the question arose with regard to logging and mining activities. These were not considered large-scale developments, and therefore the IACtHR simply established that Suriname had failed to consult the Saramaka community.
- 329 *Ibid.*, para. 137.
- 330 It should be noted that the Saramaka case involved small-scale development. Thus, the IACtHR did not have the chance to further elaborate on the issues discussed here.
- 331 *Ibid.*, paras 134–7. In a later judgment on the case, the IACtHR referred to the obligation upon the state to supervise prior environmental and social impact assessments in order to determine whether any individual or cumulative effects may be expected to derive from existing and future activities (*Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs*, Judgment of 12 August 2008, Series C No. 185, para. 41).
- 332 With regard to the ILO Convention No. 169, see Articles 6(2) and 16(2). Article 20 of the then UN Draft Declaration on the Rights of Indigenous Peoples established that states shall obtain the free and informed consent of the indigenous peoples concerned before adopting and implementing

- legislative or administrative measures that may affect them. States opposed the strong language of the Article which eventually was watered down by replacing the phrase 'shall obtain' with 'shall consult and cooperate ... in order to obtain their consent' (final Article 19). See also original Article 30 and final Article 32. With regard to the HRC, see, for example, *Ilmari Länsman et al. v Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994), and *Jouni E. Länsman et al. v Finland*, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996). But see also *Poma Poma v Peru*, UN Doc. CCPR/C/95/D/1457/2006, 24 April 2009, discussed in the section of this guide 'The HRC and the exploitation of natural resources located in indigenous peoples' lands' (p. 34).
- 333 CERD, General Comment No. 23, The rights of indigenous peoples, para. 4(d).
- 334 See, for example, *Maya Indigenous Communities of the Toledo District – Belize*, supra 305, para. 142.
- 335 *Ibid.*, paras 153, 194.
- 336 See *Informe sobre la situación de los derechos humanos en Ecuador*, Capítulo IX, Asuntos de derechos humanos de especial relevancia para los habitantes indígenas del país, OEA/Ser. L/V/II.96 Doc. 10 rev. 1, 24 April 1999, recomendaciones.
- 337 See *Segundo Informe sobre la situación de los derechos humanos en el Perú*, Capítulo X, Los Derechos de las Comunidades Indígenas, OEA/Ser.LV/II.106 Doc. 59 rev., 2 June 2000, para. 39.5.
- 338 It is worth recalling that the ILO Convention equally applies to indigenous and tribal peoples. The reference made to indigenous peoples throughout these sections should therefore not be intended as limiting the regime described only to indigenous peoples.
- 339 Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and the Bolivarian Republic of Venezuela.
- 340 They are: (a) procedure for representations on the application of ratified conventions; (b) procedure for complaints over the application of ratified conventions; and (c) special procedure for complaints regarding freedom of association.
- 341 Tomei, M. and Swepson, L., *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, Geneva, International Labour Office, 1996, pp. 18–19.
- 342 Governing Body, 273rd Session, November 1998, Representation under Article 24 of the ILO Constitution, Peru, GB.273/14/4, para. 30.
- 343 See, for instance, Governing Body, 299th Session, June 2007, Representation under Article 24 of the ILO Constitution, Guatemala, GB.299/6/1, para. 45.
- 344 See Tomei and Swepson, supra 341, p. 19.
- 345 See ILO Governing Body, 282nd Session, November 2001, representation under Article 24 of the ILO Constitution, GB.282/14/2, para. 36.
- 346 CEACR, General Observation on Convention No. 169, 79th Session, 2008, published 2009.
- 347 CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Bolivia, published 2006, para. 11.
- 348 CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala (ratification: 1996), published 2007, para. 5.
- 349 At present, 168 states have ratified it.
- 350 See ILO, *Eliminating Discrimination against Indigenous and Tribal Peoples in Employment and Occupation: A Guide to ILO Convention No. 111*, Geneva, ILO, 2007.
- 351 See *Lake Lubicon Band v Canada*, UN Doc. CCPR/C/38/D/167/1984 (1990), para. 32.2; *Kitok v Sweden*, UN Doc. CCPR/C/33/D/197/1985 (1988), para. 9.2; General Comment No. 23: The rights of minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 7.
- 352 See, for instance, the Concluding Observations on: Chile, UN Doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 19; Brazil, UN Doc. CCPR/C/BRA/CO/2, 1 December 2005; Thailand UN Doc. CCPR/CO/84/THA, 8 July 2005; Honduras, UN Doc. CCRP/C/HND/CO/1, 25 October 2006; Philippines, UN Doc. CCPR/CO/79/PHL, 1 December 2003; Guatemala, UN Doc. CCPR/CO/72/GTM, 27 August 2001; Guyana, UN Doc. CCPR/C/79/Add.121, 25 April 2000; Norway, UN Doc. CCPR/C/79/Add.112, 1 November 1999.
- 353 See Concluding Observations on: Brazil, UN Doc. CCPR/C/BRA/CO/2, 1 December 2005, para. 6; and on Guyana, UN Doc. CCPR/C/79Add. 121, 25 April 2000, para. 21.
- 354 See, in particular, *Ilmari Lansman et al. v Finland*, UN Doc. CCPR/C/52/D/511/1992, 26 October 1994, para. 9.4ff; *Lansman et al. v Finland*, CCPR/C/58/D/671/1995, 22 November 1996, para. 10.3ff; *Apirana Mahuika et al. v New Zealand*, CCPR/C/70/D/547/1993, 15 November 2000, para. 9.5.
- 355 HRC, Concluding Observations on Panama, UN Doc. CCPR/C/PAN/CO/3, 17 April 2008, para. 21.
- 356 UN Doc. CCPR/C/95/D/1457/2006, 24 April 2009, para. 7.4.
- 357 *Ibid.*, para. 7.6
- 358 CERD, General Recommendation No. 23 on Indigenous Peoples, UN Doc. A/52/18, Annex 8, 18 August 1997.
- 359 See, for example, Concluding Observations on: Guyana, UN Doc. CERD/C/GUY/CO/14, 4 April 2006, para.16; and Brazil, UN Doc. CERD/C/64/CO/2, para. 15.
- 360 Concluding Observations on Suriname, UN Doc. CERD/C/64/CO/9, 2 March 2004, para. 12.
- 361 Concluding Observations on Guyana, UN Doc. CERD/C/GUY/CO/14, 4 April 2006, para. 16.
- 362 USA, Decision 1 (68), UN Doc. CERD/C/USA/DEC/1, 11 April 2006 (Early Warning and Urgent Action Procedure), para. 10.
- 363 See, for example, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2, 21 March 2003, para. 16.
- 364 *Ibid.*
- 365 General Recommendation No. 23, supra 358, para. 4 (d).
- 366 CERD, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2, 21 March 2003, para. 16. See also the Concluding Observations on the United States, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 29.
- 367 Concluding Observations on Colombia, UN Doc. CERD/C/304/Add.76, 20 August 1998, para. 16.
- 368 CERD, Concluding Observations on the United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 2.
- 369 See UN Doc. A/63/435, 28 November 2008.
- 370 See, for instance, Concluding Observations on Guatemala, UN Doc. E/C.12/1/Add.93, 12 December 2003, paras 11, 29.
- 371 See, for instance, Concluding Observations on Finland, UN Doc. E/C.12/CO/FIN/5, 18 May 2007, para. 11.
- 372 CDESCR, Concluding Observations on Ecuador, UN Doc. E/C.12/1/Add.100, 7 June 2004, para. 35.
- 373 CDESCR, Concluding Observations on Brazil, UN Doc. E/C.12/1/Add.87, 23 May 2003, para. 58.
- 374 See, for example, Concluding Observations on Nigeria, UN Doc. CEDAW/C/NGA/CO/6, 18 July 2008, para. 35.
- 375 ACHPR/Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Populations/Communities in Africa (2000). Available at http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution56_en.html
- 376 ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/Communities, http://www.achpr.org/english/resolutions/resolution70_en.html
- 377 ACHPR/Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Populations/Communities in Africa (2000), p. 92.
- 378 ILO/ACHPR, *Overview Report of the Research Project by the ILO and the ACHPR on the Constitutional and Legislative*

Protection of the Rights of Indigenous Peoples in 24 African Countries, Pretoria, 2009.

- 379 ACHPR, Communication No. 276/2003, Centre for Minority Rights Development (Kenya) and MRG on behalf of the *Endorois Welfare Council v Kenya*, The decision was adopted by the ACHPR in May 2009 and approved by the African Union at its January 2010 meeting in Addis Ababa. Notably, MRG was a co-litigant and advised and represented the Endorois in this case.
- 380 ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/Communities, p. 21.
- 381 *Katangese Peoples' Congress v Zaire*, ACHPR, Comm. No. 75/92 (1995).
- 382 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR, Comm. No. 155/96 (2001).
- 383 *Ibid.*, para. 55.
- 384 ACHPR/Res. 121 (XXXII) 07 Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 28 November 2007.
- 385 *Ibid.*, paras 32–4.
- 386 *Ibid.*
- 387 ACHPR, Communication No. 276/2003, Centre for Minority Rights Development (Kenya) and MRG on behalf of the *Endorois Welfare Council v Kenya*, supra 379, para. 147ff.
- 388 *Ibid.*, para. 187.
- 389 *Ibid.*, para. 196.
- 390 *Ibid.*, para. 199ff.
- 391 *Ibid.*, para. 209.
- 392 *Ibid.*, para. 226.
- 393 *Ibid.*, para. 268.
- 394 *Ibid.*, para. 286.
- 395 See, for example, *Akdivar and Others v Turkey* (Application No. 21893/93, Judgment of 16 September 1996) and *Blečić v Croatia* (Application No. 59532/00, Judgment of 8 March 2006).
- 396 Applications Nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004.
- 397 *Ibid.*, paras 137–9.
- 398 See also *Handölsdalen Sami Village and Others v Sweden*, Application no. 39013/04.
- 399 For an interesting analysis of the subject, see Banda, F. and Chinkin, C., *Gender, Minorities and Indigenous Peoples*, London, MRG, 2004.
- 400 *Ibid.*, p. 11.
- 401 *Ibid.*, p. 12.
- 402 *UNDG Guidelines on Indigenous Peoples' Issues*, 2008, p. 11, retrieved 2 December 2010, <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>.
- 403 *Ibid.*, p. 22.
- 404 See Report III(A) – Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, p.31 ff.
- 405 *Ibid.*, p. 33.
- 406 For an overview of the supervisory system of the ILO and the role of the CEACR, see the section of this guide on 'The International Labour Organization' (p. 33).
- 407 By way of illustration, see CEACR: Individual Observation concerning Discrimination (Employment and Occupation Convention), 1958 (No. 111) Chile (Ratification: 1971), 2007, para. 4. In this case, the CEACR noted that: 'in terms of income distribution and average income there was a marked segregation of indigenous people from the non-indigenous population'. At the same time, it also noted that '67.9 per cent of indigenous women were not active, while the figure for men was 24.2 per cent'.
- 408 CEDAW, Concluding Observations on Ecuador, UN Doc. CEDAW/C/EQU/CO/7, 7 November 2008, para. 24.
- 409 CEDAW, Article 1.
- 410 ICERD, Article 1, emphasis added.
- 411 See, for example, Concluding Observations on Japan, UN Doc. CEDAW/C/JPN/CO/6, 7 August 2009, para. 50ff.
- 412 UN Doc. E/2004/43, 21 May 2004, para. 6 (a).
- 413 UN Doc. A/55/18/Annex 5, 20 March 2008.
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- 461 *Ibid.*, para. 25.
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- 466 Concluding Observations on: Eritrea, UN Doc. CRC/C/ERI/CO/3, 23 June 2008, para. 61; Kenya, UN Doc. CRC/C/KEN/CO/2, 19 June 2007, para. 53; Sierra Leone, UN Doc. CRC/C/SLE/CO/2, 20 June 2008, paras 57, 58; UN Doc. CRC/C/MLI/CO/2, 3 May 2007, para. 52.
- 467 For an overview of the procedures available before the HRC, the CESCR, the CERD and the CEDAW, please see the section of this guide on 'Land rights' (pp. 30–33). As regards the Committee on the Rights of the Child, please note that this body cannot consider individual complaints.

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working to secure the rights of minorities and indigenous peoples

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Minority groups and litigation: A review of developments in international and regional jurisprudence

This guide provides an overview of developments in international and regional human rights jurisprudence relevant to the protection of ethno-cultural minority groups, including indigenous peoples.

The guide is the result of a pro-bono collaboration between the International Human Rights & Group Diversity Programme at Liverpool University and the Legal Cases Programme of Minority Rights Group International.

The authors have identified five themes which have increasingly become the subject of litigation in recent years: (1) non-discrimination; (2) education; (3) political

participation; (4) land rights; and (5) women's rights. Cases discussed are principally within the United Nations, European, Inter-American and African systems, as well as some domestic systems. The authors examine the critical dimensions of minority protection raised, ranging from intersectional discrimination to positive action, and suggest methods to further enhance this jurisprudence.

It is hoped that the overview and commentary provided in this guide will be of interest and benefit to legal practitioners involved with minority issues, international and national institutions, as well as academics working in the area of minority protection.