

# Protecting the right to culture for minorities and indigenous peoples: an overview of international case law

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## Introduction

Cultural rights are often called the ‘Cinderella’ of human rights because of the limited attention that has been paid to them. However, recent years have witnessed more attention being paid to this area, particularly in terms of the cultural rights of minorities and indigenous peoples. Human rights legal instruments refer to ‘cultural rights’ or ‘the right to culture’ or the ‘right to take part in the culture’. However, even these interchangeable terms do not reflect the plethora of aspects that the right to culture contains for minority and indigenous peoples. Litigation has therefore played a major role in determining and defining the exact legal parameters of these concepts.

This chapter will outline the various key international human rights legal standards that may come into play when considering minority and indigenous peoples’ cultural rights, and draw on jurisprudence of international and regional courts and quasi-judicial mechanisms, illustrating how litigation, including Minority Rights Group International’s (MRG) own legal cases programme, has assisted in their development. As will be shown, using litigation to develop the right to culture has usually involved the right being claimed in conjunction with other rights, such as the right to language or the right to land, rather than litigating the right to culture directly.

## Defining the right to culture

The understanding of what is meant by ‘culture’ is essential in defining the scope of the right to culture. As explained in the keynote chapter, ‘Cultural rights and their implications for minority and indigenous communities’, a greater understanding of culture in international law has developed over time that has assisted the protection of minorities and indigenous peoples’ right to culture. The United Nations (UN) Human Rights Committee (HRC) has observed that ‘culture manifests itself in many forms’<sup>2</sup> and the UN Committee for the Elimination of All Forms of Racial Discrimination (CERD) has given a broad scope of the concept that includes ‘distinct culture, history, language and way of life as an enrichment of the State’s cultural identity’.<sup>3</sup> The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) made

an important contribution to this debate in acknowledging a detailed and broad number of cultural rights not previously explicitly recognized as human rights, such as ‘archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature’ (Article 11) and ‘human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts’ (Article 31).<sup>4</sup> In 2009, the UN Committee on Economic, Social and Cultural Rights (CESCR) issued a General Comment on the Right to Take Part in Cultural Life, which expanded this understanding beyond indigenous peoples.

Lately, the debate on the right of minorities and indigenous peoples to their culture has been closely linked to the concept of ‘cultural heritage’, a term found in several international instruments, including the World Heritage Convention, the Framework Convention on National Minorities (FCNM), the Faro Framework Convention on the Value of Cultural Heritage for Society and UNDRIP.

Similar approaches have been adopted at the regional level. For example, in the African context, ‘culture’ has a number of meanings, all of which have been recognized by the African Commission on Human and Peoples’ Rights (ACHPR). The first understanding of culture is ‘culture as capital’: the accumulated material heritage of mankind or particular groups, exemplified by monuments and artefacts. The second is ‘culture as creativity’: the process (and products) of artistic and scientific creation.<sup>5</sup> Article 17(2) and (3) of the African Charter on Human and Peoples’ Rights (the African Charter) therefore provides:

*‘(2) Every individual may freely take part in the cultural life of his community.*

*(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.’<sup>6</sup>*

Culture, in this sense, therefore equates to the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other communities.

## Applying the right to culture to minorities and indigenous peoples

The right to culture – and the right to take part in culture – was, at first, purely an individual right, as provided by Article 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR). However, the right to take part in culture has been expanded through a wider interpretation of Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which affirms the right to culture for members of minorities and indigenous peoples. Article 27 specifically stipulates that persons belonging to ethnic, religious or linguistic minorities ‘shall not be denied the right, in community with other members of their group, to enjoy their own culture’. Although the language is quite generic, it is now accepted that positive protection is required to realize the provisions of Article 27.<sup>7</sup> In a slightly different formulation, the indigenous right to culture under UNDRIP incorporates a collective element: states are under an obligation to protect indigenous peoples’ full enjoyment of their human rights either as individuals or as a collective.

The rights of persons belonging to minorities and indigenous peoples to enjoy their own culture are permanent. Importantly, their realization may need special measures. Such special measures are well recognized in international law as not being discriminatory,<sup>8</sup> and are mandatory, rather than discretionary as some states have indicated.<sup>9</sup> Therefore, state policies that simply provide for non-interference in the right to culture of minorities and indigenous peoples do not fulfil the current obligations of states under the prevailing interpretation of contemporary international law.

### The right to participate in cultural life: what does this mean in practice?

As explained in the keynote chapter, the right of members belonging to minorities to practise their culture, recognized in Article 27 of the ICCPR, must be read in conjunction with the right of everyone ‘to take part in cultural life’, recognized in Article 15 of the ICESCR.<sup>10</sup> ‘The culture’ in which everyone has the right to participate is not only the national culture, but

Right: Saami indigenous people in Finland herd reindeer. *Michiel van Nimwegen.*

also one’s own culture. The right to ‘participation in cultural life’ also includes ‘the right to benefit from cultural values created by the individual or the community’.<sup>11</sup> The negative dimension of the right to participate in the culture includes non-interference by the state in ‘the exercise of cultural practices and access to cultural goods and services’, while the positive obligation ensures ‘preconditions for participation, facilitation and promotion of cultural life, and access and preservation of cultural goods’.<sup>12</sup> In *Khurshid Mustafa and Tarzibachi vs. Sweden*, for example, the European Court of Human Rights (ECtHR) held that the eviction of tenants on account of their refusal to remove a satellite dish that enabled them access to television programmes in Arabic and Farsi of their country of origin was contrary to the right of members of minorities ‘who may wish to maintain contact with the culture and language of their country of origin’.<sup>13</sup>

In interpreting Article 27, the HRC has confirmed a high threshold for a violation to be established, with consultation of minority groups being a key criterion. In *Länsman vs. Finland*, a case concerning the Saami indigenous people, the applicants complained about the decision of the state authority to allow stone quarrying to take place on their land, disrupting their reindeer-herding activities. With regard to the measure interfering with the applicants’ rights under Article 27, the HRC indicated the impact of such a measure must be substantial ‘that it does effectively deny to the authors the right to enjoy their cultural rights in the region’.<sup>14</sup> Nevertheless, the situation complained of did not constitute a denial of the applicants’ rights. Considering the quarrying in the affected area that had already taken place, the HRC concluded that reindeer-herding ‘does not appear to have been adversely affected by such quarrying’.<sup>15</sup> The fact that the affected community was consulted and its interests were considered in the process leading to contracting the private company was also taken into account.

In a later case, *Apirana Mabuika and others vs. New Zealand*, the HRC linked the limitations of indigenous cultural rights to the indigenous



people’s own right to participation and control over such matters. The HRC was tasked with assessing the extent to which the negotiations between the government and the Māori population in relation to fishing rights complied with Article 27 of the ICCPR. While particular attention was paid to the cultural and religious importance of fishing for the Māori throughout the consultation process, the HRC acknowledged ‘Article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology’.<sup>16</sup> ‘By engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Māori fishing activities’, the HRC concluded that the state party had taken the necessary steps to ensure that the legislation regulating possibilities for the Māori to engage in commercial and non-commercial fishing was compatible with Article 27.<sup>17</sup> Nevertheless, the state party is bound to pay attention to the requirements

of Article 27 in the implementation of the legislation.<sup>18</sup>

UNDRIP affirms indigenous peoples as the primary guardians and interpreters of their cultures and the true collective owners of their works, arts and ideas. On the basis of indigenous self-determination, former UN Special Rapporteur on the rights of indigenous peoples, Erica-Irene Daes, has argued that no alienation of these elements of their culture should be allowed by international or national law, unless made in conformity with indigenous peoples’ own traditional laws, and with the approval of their own local institutions.<sup>19</sup> However, indigenous rights to tradition are not absolute. Articles 1 and 46 of UNDRIP place the text of the Declaration within the general standards of international law, including its well-known principles of solving conflicts between human rights.<sup>20</sup> It is necessary to ensure that indigenous communities are informed and give their free, prior and informed consent before any interference with their cultural practices. Further, of great importance is the

principle of non-discrimination in participation in, and access and contribution to the culture, both in the national and the minority culture.<sup>21</sup> Recognition of indigenous communities as the main interpreters of their traditions must also be ensured. At the same time, the Declaration does not stand on its own, but forms part of the wider human rights system and therefore is susceptible to the checks, guarantees and limits this system sets, as set out later in this chapter.

### Justifying restrictions on minority and indigenous rights to culture: a difficult balancing act

Conflicts between the right of members of minorities and indigenous peoples to culture and other human rights have been used as an excuse for states not to recognize minority and indigenous customs and practices. Recent voices that present human rights values as only part of the western 'way of life' are erroneous, undermine the respect for minority and indigenous cultures and lead to unhelpful stereotypes. The 2005 United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions recommends 'the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples' (Article 2). The rhetoric of 'integration' is unfortunately often used in Europe to unnecessarily restrict minority cultural rights.<sup>22</sup> Hate speech against individuals on the basis of their culture has been repeatedly criticized by international monitoring bodies.

At the same time, international monitoring bodies have rightly identified and criticized cultural practices that have a negative effect on individuals.<sup>23</sup> The Siracusa Principles on Limitations and Derogations<sup>24</sup> together with the case law of monitoring bodies<sup>25</sup> provide an important guide as to how to deal with such cases. Any restriction of the right to culture of a member of a minority group will have to be based on grounds justifying limitations recognized by a relevant provision of international law, will have to respond to a pressing public or social need, to pursue a legitimate aim and to be proportionate to that aim. No limitations are

permitted outside the ones enumerated in the specific provisions and the core of the right has to be maintained.

The evolution of the application of this approach is clearly demonstrated in the case law of the UN HRC. In *Kitok vs. Sweden*,<sup>26</sup> the HRC was faced with a question of restricting the rights of an individual member of the Saami indigenous people as opposed to the rights of the community as a whole. To reduce the number of reindeer breeders, a new provision had been introduced into law limiting the right to reindeer husbandry of those members of the Saami indigenous people who had engaged in other professions for three years. As a result, the applicant was denied the respective right, in spite of the fact that his family had been active in reindeer breeding for more than 100 years. According to the HRC, the restriction imposed upon an individual 'must be shown to have a reasonable and an objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.<sup>27</sup> In this respect, the HRC acknowledged that the applicant was permitted to graze and farm his reindeer, as well as hunt and fish, and held there had been no violation of Article 27 as a result.

The proportionality of the measures interfering with the rights under Article 27 was also scrutinized by the HRC in the case of *Lovelace vs. Canada*.<sup>28</sup> The applicant, an indigenous woman, lost her legal status and rights with regard to the Canadian Indian Act, after she had married a non-indigenous man. As a result she could not claim a right to reside on her First Nations' reserve. The HRC indicated that the state's action in this respect must have an objective and reasonable justification and be consistent with other ICCPR provisions.<sup>29</sup> Given that the marriage of the applicant had broken up, the HRC did not consider denying the right of residence to the applicant reasonable or necessary for preserving the identity of the Indian tribe. The HRC concluded, therefore, that the denial, to the applicant, of the legal status as an Indian amounted to a violation of Article 27.<sup>30</sup>

### Rights to minority and indigenous customs, practices and traditions

A central part of minority and indigenous cultural rights is their right to protect, maintain

and develop their cultural customs, practices and traditions. These are at the core of indigenous identities, and respect for such elements has a salutary impact on the general well-being of individuals and the communities. Studies have shown that the lack of respect for identity is closely related to endemic problems of alcoholism and poor physical and mental health in indigenous communities. States are encouraged to take specific measures that enable the development of minority cultures, traditions and customs, with assimilation clearly prohibited.<sup>31</sup> In practice, this right has been litigated in international courts in conjunction with a variety of other rights, including the right to privacy and family life, and the right to freedom of association.

Evaluating a claim under Article 8 of the European Convention on Human Rights (ECHR), which protects the right to privacy and family life, the ECtHR has noted:

*'an emerging international consensus ... recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle ... not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community'*.<sup>32</sup>

Particularly with respect to Roma, the Court has recognized the positive obligations of states to facilitate the Roma way of life, including consideration of their needs and their different lifestyle. So, in *Chapman vs. The United Kingdom*,<sup>33</sup> a case concerning a Roma who was prevented by the authorities from occupying a caravan on the land she had purchased, the ECtHR concluded that the right to follow a traditional way of life fell also within the ambit of Article 8. According to the Court's assessment, such a way of life was 'an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle'.<sup>34</sup>

Similarly, in *Ciubotaru vs. Moldova*,<sup>35</sup> a case that involved the refusal of the state authorities to record the applicant's ethnic identity on his identity card, the Court considered an individual's ethnic minority as an essential aspect of his or her right to private life.<sup>36</sup> In addition to

that, the Court held that there is a right to freely choose one's own cultural or ethnic identity and to have the choice respected, provided that the choice is based on objective grounds, within the ambit of Article 8.<sup>37</sup>

The ECtHR has also recognized a significant link between linguistic rights and the maintaining of the cultural identity of minorities. In *Podkolzina vs. Latvia*<sup>38</sup> the Court found a violation of the right to free elections under Protocol No. 1, Article 3, where the applicant, a member of the Russian-speaking minority in Latvia, was struck out as a candidate in the elections to the Latvian parliament, due to insufficient knowledge of the state official language. Although the requirement of a command of Latvian at the upper level was considered to pursue a legitimate aim of the proper functioning of the institutional system,<sup>39</sup> the Court held that the decision to eliminate the applicant from the list of candidates could not be regarded as proportionate to any such legitimate aim.<sup>40</sup>

A further important aspect of the right to culture is the right of minorities to form associations aimed at promoting their culture. The ECtHR has considered this right in the context of Article 11 of the ECHR, which protects the right to freedom of assembly and association. In *Sidiropoulos and Others vs. Greece*,<sup>41</sup> the ECtHR found that a refusal of state authorities to register a not-for-profit association of persons with Macedonian ethnic origin, on the grounds of the protection of Greece's territorial integrity, was in violation of the applicants' right to freedom of association. Considering the aims of the association 'to preserve and develop the traditions and folk culture of the Florina region'<sup>42</sup> to be legitimate, since 'the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons',<sup>43</sup> the Court held, as a result, that the interference in the right indicated was not proportionate.<sup>44</sup>

### Culture and religion

Religious expressions are also included in the concept of intangible culture. At times, the difference between culture and religion is blurred.

Prohibition of or disrespect towards 'religion or belief systems, rites and ceremonies'<sup>45</sup> violates both the right to culture and the freedom of religion. One has to bear in mind that religious/cultural expressions of members of minorities and indigenous peoples require additional protection to such expressions of the majority, as the former are inherently vulnerable because of their non-dominance in the society. Today, it is recognized that the right to indigenous spiritual and religious beliefs is a collective right.<sup>46</sup> The Inter-American Court of Human Rights (IACtHR) has developed considerable jurisprudence in this respect. Violations of the customary marriage practices of indigenous peoples,<sup>47</sup> the interruption of the passage of cultural knowledge to future generations by the deaths of women and elderly acting as the oral transmitters of the Maya Achí culture, and the loss of faith in their traditions following militarization and repression<sup>48</sup> have all been criticized by the Court. The Court has clarified that funeral ceremonies are part of indigenous cultures,<sup>49</sup> while prohibition of access to indigenous burial sites, often a result of relocation and development projects on the lands of the burial sites, or prohibition against practising traditional burial ceremonies,<sup>50</sup> are obstacles to the community's ways of honouring the dead, fostering lack of knowledge on the whereabouts of the remains of the indigenous ancestors,<sup>51</sup> which constitute violations of their cultural rights. These rights have similarly been recognized in the African human rights system.<sup>52</sup> States are now under the obligation to act in positive and precise ways in order to recover the remains of deceased members of indigenous communities.

### Languages

The loss of minority and indigenous languages contributes to the erosion of their identity and traditional knowledge. Language is an essential part of minority and indigenous cultures as it differentiates them from the rest of the population and guarantees 'the expression, diffusion, and transmission of their culture'.<sup>53</sup> Most of the endangered languages around the world are languages of minorities and indigenous peoples. Rights of minorities and indigenous

**Right:** Maya in Belize perform a traditional dance with incense. *Chelsea Purvis/MRG.*

peoples to language are twofold: on the one hand, they have the right to learn the national language on the same basis as the rest of the population, without any discrimination. As set out further below, states have to take positive measures to ensure equal access to the teaching of the language. On the other hand, minority and indigenous communities also have the right to learn their own languages.<sup>54</sup>

The ACHPR commented on the role of language and linguistic rights in the life of a community in *Malawi African Association and Others vs. Mauritania*.<sup>55</sup> Although it was not able to determine there had been a violation of Article 17 of the African Charter on the basis of the evidence available, it recognized language as a means of participation in community life and also indicated that 'to deprive a man of such participation amounts to depriving him of his identity'.<sup>56</sup>

The UN HRC has touched upon the issue of provision of education in a minority language in *Mavlovov and Sa'di vs. Uzbekistan*.<sup>57</sup> In this case, public media authorities refused to register a newspaper written in the Tajik language, containing materials for Tajik students to supplement existing textbooks. The HRC acknowledged the use of minority language press as 'an essential element of the Tajik minority's culture'<sup>58</sup> and held there had been a violation of Article 27 in respect of Uzbekistan.

The right to mother tongue education as an important cultural right of minorities has also been scrutinized by the ECtHR. In its landmark judgment in the *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' vs. Belgium*,<sup>59</sup> the Court assessed the position of French-speaking applicants residing on the outskirts of Brussels, where the Flemish language was predominant and where the law restricted the access of the applicants to French-language schools. The Court held that the right to receive education in one's own language was not included within the right to education under Protocol No. 1, Article 2,<sup>60</sup> and ruled that the right to education *per se* was not violated.<sup>61</sup> However, since the restriction in access to the



preferred education was based solely on the criterion of the parents' residence, the Court held that the law in question was discriminatory and in violation of Article 14 in conjunction with Protocol 1, Article 2.<sup>62</sup>

The ECtHR Grand Chamber was faced with the question of access to education in a minority language in the more recent case of *Catan and Others vs. Moldova and Russia*.<sup>63</sup> In the breakaway region of Transnistria, restrictions on the use of the Moldavian language written in the Latin script were introduced and use of the Cyrillic script was enforced, further isolating the Moldavian community in the region. Parents who continued to send their children to schools using the Latin script were both intimidated and harassed, while the schools were closed. The Court held there had been a violation of the right to education protected under Protocol No. 1, Article 2, in respect of Russia, which had jurisdiction over the Transnistria region.<sup>64</sup>

### Land rights and indigenous rights to culture

Many indigenous practices and traditions relate to land. Indeed, the protection of the lands,

territories and resources of indigenous peoples cannot be separated from the preservation and enjoyment of their cultural heritage. Nature often provides the material basis for distinct indigenous cultural practices, spirituality and identity. Development projects often lead to the displacement of indigenous communities and have disastrous effects for their cultures, including their separation from their sacred sites, the loss of their traditional livelihoods, and the loss of food systems and spiritual and cultural practices.<sup>65</sup> Such processes affect indigenous peoples by disrupting traditional activities important for the survival and well-being of these communities. The World Bank has acknowledged that the 'distinct circumstances' of indigenous peoples expose them 'to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease'.<sup>66</sup>

The IACtHR has engaged with indigenous cultural rights on several occasions. Repeatedly, it has addressed the link between the cultural identity of indigenous communities and their traditional lands. Cases of indigenous peoples evicted from or denied access to their ancestral

lands have been approached by the Court through reading indigenous land rights into the right to property. The failure of the state to provide basic necessities for the communities deprived of their traditional livelihood has also been found to amount to a violation of the right to a dignified life.

In the landmark judgment *Mayagna (Sumo) Awas Tigni Community vs. Nicaragua*, the Court recognized the land rights of indigenous peoples in Latin America for the first time. Significantly, the Court drew on a collective meaning ascribed to property in the context of indigenous communities while the relationship of the communities to their ancestral lands includes a spiritual element, in addition to the material element.<sup>67</sup>

In two other cases involving a violation of the communal right to property as well as the right to life, the Court indicated that dispossessing the indigenous communities of their traditional lands leads to a risk of 'irreparable ethnic and cultural loss'.<sup>68</sup> In accordance with its previous jurisprudence, the Court affirmed the concept of culture as being determined by the relationship of the indigenous community to its traditional land (*Yakye Axa Indigenous Community vs. Paraguay*),<sup>69</sup> and of the indigenous right to property as being linked to the preservation of the right to life in a broader sense, including the preservation of cultural identity (*Sawhoyamasa Indigenous Community vs. Paraguay*).<sup>70</sup> In both cases, the Court ordered restitution of the traditional lands along with the duty of the state to adopt provisional measures and provide basic necessities for the affected communities. In another significant case against the government of Paraguay, *Indigenous Community Xakmok Kasek vs. Paraguay*, the Court affirmed the right of the indigenous community to return to their ancestral land as a precondition for the preservation of their cultural identity.<sup>71</sup> As far as procedural rights of indigenous communities are concerned, the Court referred in *Saramaka People vs. Suriname* to the communities' right to consultation and the duty to obtain their free, prior and informed consent.<sup>72</sup> The Court reiterated its jurisprudence and developed the standard of prior consultation and consent in *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*,<sup>73</sup>

**Right:** Members of the Ogiek community attend a public meeting with journalists in Kenya. MRG.

especially with regard to the cultural sensitivity of the consultation. In addition to developing firm jurisprudence in respect of the indigenous right to property, the Court has succeeded in applying the concept to children, specifically. In *Chitay Nech and Others vs. Guatemala*, the Court pronounced a duty of the state to guarantee the right to cultural life of indigenous children.<sup>74</sup> Furthermore, it indicated that the child's development requires that the children live 'within their natural and cultural environment, particularly because they possess a distinctive identity that roots them with their land, culture, religion, and language'.<sup>75</sup>

In the same vein, the Inter-American Commission on Human Rights (IACHR) has acknowledged the distinct nature of the right to property when applied to indigenous peoples. In a case in which MRG has been advising the Maya, *Maya Indigenous Communities of the Toledo District vs. Belize*, the Commission held that the continued enjoyment of indigenous culture depends on the free exercise of the right to property by indigenous communities.<sup>76</sup> To give effect to the indigenous right to property, the state has the duty to consult the community, accordingly.

As far as the indigenous right to culture in the African context is concerned, the ACHPR has pronounced on individual elements that the cultural identity of a community is defined in a number of cases. In the landmark case which MRG supported concerning the Endorois community, the ACHPR addressed culture as a:

*'complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.'*<sup>77</sup>

Accordingly, the ACHPR has linked culture to such characteristics of a community as religion



or language. While it acknowledged the creation of a game reserve on the ancestral lands of the Endorois community as a legitimate aim, the denial of access to the lands was not found to be proportionate to such an aim. By such a measure, the Endorois community was denied access to 'an integrated system of beliefs, values, norms, mores, traditions and artefacts', meaning 'the very essence of the Endorois' right to culture' was denied.<sup>78</sup>

Importantly, the ECtHR has used the right to property to engage with the issue of the protection of cultural and natural heritage. In *Debelianovi vs. Bulgaria*,<sup>79</sup> the Court held that the preservation of cultural and architectural heritage was a legitimate aim when considering an interference with the right to property.<sup>80</sup> The applicants claimed a violation of Protocol No. 1, Article 1, of the ECHR, which protects the right to property, in relation to the return of a house that had been expropriated by the Government of Bulgaria from their father and then turned into a museum as a historic monument. The National Assembly subsequently introduced a moratorium on the restitution laws, by virtue of which the restitution of applicants' property

was postponed, and which remained in effect for a period of more than 12 years. In spite of the legitimate aim, the duration of the interference together with the uncertainty experienced by the applicants, who were effectively prevented from enjoying their right to property, further aggravated the detrimental effects of the interference on the applicants.<sup>81</sup> The Court found a violation of Protocol No. 1, Article 1, in respect of Bulgaria.<sup>82</sup>

### **The right to the conservation and protection of the environment**

Finally, indigenous peoples have important contributions to make in environmental management and development because of their rich traditional knowledge.<sup>83</sup> They can contribute considerably to environmentally sound practices and sustainable development. International law has recognized to a degree the importance of traditional knowledge in this respect. Measures must be established to recognize that traditional and direct dependence on renewable resources and eco-systems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous

people and their communities.<sup>84</sup>

Indigenous cultures also include 'traditional lifestyles relevant for the conservation and sustainable use of biological diversity', protected by the Convention on Biological Diversity, which requests states to respect, preserve and maintain such knowledge and practices, and promote their wider application with the approval and involvement of the holders. In particular, state obstacles to indigenous traditional activities or their traditional practices of cultivation, agriculture and animal herding and fishing also constitute obstacles to indigenous cultures, with dire effects on indigenous livelihoods, socio-economic rights and health. Distinct indigenous beliefs about food, its preparation and its consumption, form part of their ceremonies and rituals and, ultimately, their identity.

Recently, the IACtHR explored the link between the rights of indigenous peoples, their procedural rights and environmental conservation, in *Kaliña and Lokono Peoples vs. Suriname*, where restrictions were placed on the natural reserve of indigenous communities. According to the Court, the indigenous communities need to participate effectively and their agreement with conservation agencies needs to be sought,<sup>85</sup> while the traditional practices contributing 'to the sustainable care and protection of the environment should be maintained, protected and promoted'.<sup>86</sup> The matter has also recently been argued in one of MRG's legal cases before the African Court of Human and Peoples' Rights, concerning the Ogiek community of Kenya.<sup>87</sup> The case remains pending but it is hoped that judgment will be delivered in 2016.

## Conclusion

While they constitute a vital part of human diversity, most minority and indigenous cultures are facing serious challenges. Therefore, progress with regard to the protection of the minority and indigenous right to culture is urgently needed. International understanding of the full scope of the right to culture is deepening, however, greatly assisted by advocacy and cases brought before international tribunals by minority and indigenous communities themselves. Developments in international law

and jurisprudence have clearly contributed significantly to the further crystallization and elaboration of their rights. The interpretation of older legal instruments in the light of these recent understandings and standards is therefore vital to the protection of minorities' and indigenous peoples' right to culture.

Further, as a result of these legal advances, the realization of the right to culture now includes a plethora of aspects that include the protection of both intangible and tangible heritage. In protecting these rights, the meaningful participation of minorities and the free, prior and informed consent of indigenous peoples are important. In addition, and as a necessary precondition to a series of other rights, the rights to participate in cultural life, to education and the environment all play a part. International law and jurisprudence will continue to occupy a key and determinant role in further elucidating these rights. ■

### Endnotes

- 1 The authors are also grateful to Gabriela Majercikova for her extensive research on relevant case law.
- 2 UN HRC, General Comment No. 23, Art. 27 (Rights of Minorities), UN doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 7.
- 3 CERD, General Recommendation XXIII on the Rights of Indigenous People, UN doc. A/52/18 (1997).
- 4 UN doc. A/Res/61/295 (2007).
- 5 See ACHPR, 'Guidelines for National Periodic Reports', in *Second Annual Activity Report of the African Commission on Human and Peoples' Rights (1988–1989)*, ACHPR/ RPT/2nd, Annex XII.
- 6 See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2009), Communication No. 276/03, para. 241.
- 7 UN HRC, General Comment No. 23, *supra* note 2, para. 38.
- 8 Council of Europe FCNM (1995), Art. 5.1.
- 9 CERD, General Recommendation No. 32 on 'The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination', UN doc. CERD/C/GC/32 (2009), para. 30.
- 10 See Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), Art. 1(a).
- 11 CESCR, General Discussion on the Right to Take Part in Cultural Life as Recognized in Article 15 of the Covenant, UN doc. E/C.12/1992/SR.17 (1992), para. 32.
- 12 *Ibid.*, para. 6.
- 13 ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, Application no. 23883/06 (2008), para. 44.
- 14 UN HRC, *Länsman and Others v. Finland*, Communication No. 511/1992, UN doc. CCPR/C/52/D/511/1992 (1994), para. 9.5.
- 15 *Ibid.*, para. 9.6.
- 16 UN HRC, *Apirana Mabuika et al. v. New Zealand*, Communication No. 547/1993, UN doc. CCPR/C/70/D/547/1993 (2000),

- 17 *Ibid.*, para. 9.8.
- 18 *Ibid.*, para. 9.9.
- 19 See: Principles and Guidelines for the Protection of the Heritage of Indigenous People, Elaborated by the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, UN doc. E/CN.4/Sub.2/1995/26 Annex (1995); see also: Principles and Guidelines for the protection of the Heritage of Indigenous peoples, Report of the Technical Meeting on the Protection of the Heritage of Indigenous People, UN doc. E/CN.4/Sub.2/1997/15 (1997), Annex, at para. 3.
- 20 See Xanthaki, A., 'Multiculturalism and international law: discussing universal standards', *Human Rights Quarterly*, vol. 32, no. 1 (2010).
- 21 See International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(e)(vi); Convention on the Elimination of All Forms of Discrimination against Women, Art. 13 (c); Convention on the Rights of the Child, Art. 31.2; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 43.1(g); Convention on the Rights of Persons with Disabilities, Art. 30.1.
- 22 Xanthaki, A., 'On weakening minority protection', *International Journal of Human Rights* (forthcoming).
- 23 See e.g. CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women, Mexico', UN doc. CEDAW/C/MEX/CO/7-8 (2012), paras. 34–35; CEDAW, 'Concluding observations of the Committee on the Elimination of Discrimination against

Women, Mexico', UN doc. CEDAW/C/PRY/CO/6 (2012), para. 32.

- 24 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN doc. E/CN.4/1985/4 (1984), para. 27.
- 25 UN HRC, *Sandra Lovelace v. Canada*, Communication No. R.6/24, UN doc. Supp. No. 40 (A/36/40) (1981).
- 26 UN HRC, *Ivan Kitok v. Sweden*, Communication No. 197/1985, UN doc. CCPR/C/33/D/197/1985 (1988).
- 27 *Ibid.*, para. 9.8.
- 28 *Sandra Lovelace v. Canada*, *supra* note 25.
- 29 *Ibid.*, para. 16.
- 30 *Ibid.*, para. 19.
- 31 FCNM, Art. 5, *supra* note 8.
- 32 ECtHR, *Chapman v. The United Kingdom*, Application no. 27238/95 (2001) at para. 93.
- 33 *Ibid.*
- 34 *Ibid.*, para. 73.
- 35 ECtHR, *Ciubotaru v. Moldova*, Application no. 27138/04 (2010).
- 36 *Ibid.*, para. 53.
- 37 *Ibid.*, para. 57.
- 38 ECtHR, *Podkolzina v. Latvia*, Application no. 46726/99 (2002).
- 39 *Ibid.*, para. 34.
- 40 *Ibid.*, para. 38.
- 41 ECtHR, *Sidiropoulos and Others v. Greece*, Application no. 571997/841/1047 (1998) at para. 43.
- 42 *Ibid.*, para. 44.
- 43 *Ibid.*
- 44 *Ibid.*, para. 47.
- 45 UN CESCR, General Comment No. 21, *supra* note 12 at para. 13.
- 46 UNDRIP, Art. 12, *supra* note 4.
- 47 IACtHR, *Aloboetoe et al. v. Suriname*, Series C No. 15 (1993).
- 48 IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Series C No. 116 (2004).
- 49 IACtHR, *Bánaca-Velásquez v. Guatemala*, Series C No. 91 (2002), para. 82.
- 50 IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Series C No. 105 (2004), para. 43.
- 51 IACtHR, *Moiwana Community v. Suriname*, Series C No. 124 (2005),

- para. 208.
- 52 See further *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, (2009) *supra* note 6, at para. 239 and 251.
- 53 IACtHR, López Álvarez v. Honduras, Series C No. 141 (2006), paras. 169–171.
- 54 See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), Article 32; Recommendation 1201 of the Parliamentary Assembly of the Council of Europe (1993), Articles 7–8; and the European Charter for Regional or Minority Languages (1998).
- 55 ACHPR, *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme (Mauritania)*, Communications 54/91-61/91-96/93-98/93-164/97-196/97-210/98 (2000).
- 56 *Ibid.*, para. 137.
- 57 UN HRC, *Rakhim Mavlonov and Mr. Shansiy Sadi v. Uzbekistan*, Communication No. 1334/2004, UN doc. CCPR/C/95/D/1334/2004 (2009) at para. 2.
- 58 *Ibid.*, para. 8.7.
- 59 ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (No. 2), Application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (1968).
- 60 *Ibid.*, p. 27, para. 3.
- 61 *Ibid.*, p. 84.
- 62 *Ibid.*, p. 83.
- 63 ECtHR, *Catan and Others v. Moldova and Russia*, Application nos 43370/04, 8252/05, 18454/06 (2012).
- 64 *Ibid.*, paras. 123, 150.
- 65 See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya* (2009), *supra* note 6, at para. 173.
- 66 World Bank, Operational Directive 4.10, July 2005 (revised April 2013).
- 67 IACtHR, *Mayagna (Sumo) Awus Tingni Community vs. Nicaragua*, Series No. 79 (2001), para. 149.
- 68 IACtHR, *Yakye Axa Indigenous Community vs. Paraguay*, Case 12.313 (2005), para. 216.
- 69 *Ibid.*, para. 135.
- 70 IACtHR, *Saoboyamaxa Indigenous Community vs. Paraguay*, Case 0322/2001 (2006), para. 150.
- 71 IACtHR, *The Xakmok Kasek Indigenous Community vs. Paraguay*, Case 12.420 (2010), para. 51.
- 72 IACtHR, *Saramaka People vs. Suriname*, Case 12.338 (2007), paras. 129–140.
- 73 IACtHR, *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*, Series C No. 245 (2012).
- 74 IACtHR, *Chitay Nech et al. vs. Guatemala*, Series C No. 212 (2010), para. 168.
- 75 *Ibid.*, para. 169.
- 76 IACHR, *Maya indigenous community of the Toledo District v. Belize*, Case 12.053 (2004), para. 155.
- 77 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya* (2009), *supra* note 6, at para. 241.
- 78 *Ibid.*, paras. 250, 251.
- 79 ECtHR, *Debelianovi vs. Bulgaria*, Application no. 61951/00 (2007).
- 80 *Ibid.*, para. 54.
- 81 *Ibid.*, para. 59.
- 82 *Ibid.*, para. 60.
- 83 Rio Declaration on Environment and Development, Principle 22, UN doc. A/CONF.151/26 (vol. I) (1992).
- 84 UN Agenda 21 (1992), Article 26.3.
- 85 IACtHR, *The Kaliña and Lokono Peoples vs. Suriname*, Case 12.639 (2015), para. 230.
- 86 *Ibid.*, para. 181, footnote 231.
- 87 African Court of Human and Peoples' Rights, *ACHPR vs. Kenya*, Application 006/2012.