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.

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’ 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’. 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). 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. Article 17(2) and (3) of the African Charter on Human and Peoples’ Rights (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.*’

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.

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

Lucy Claridge and Alexandra Xanthaki

State of the World’s Minorities and Indigenous Peoples 2016
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 27.7

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,8 and are mandatory, rather than discretionary as some states have indicated.1 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.9 The culture in which everyone has the right to participate is not only the national culture, but 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’.10 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’.11 In Khursheed Mustafa and Tærzbächli 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’.12

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 Länsmann 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’.13 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’.14 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 Mahuta 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.15 ‘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 27.16 Nevertheless, the state party is bound to pay attention to the requirements of Article 27 in the implementation of the legislation.17

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.18 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.19 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.\textsuperscript{21} 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 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.\textsuperscript{22} Hate speech against individuals on the basis of their membership of a group is 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 Kink vs. Sweden,\textsuperscript{23} 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’.\textsuperscript{24} 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.\textsuperscript{25} 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.\textsuperscript{26} Given that the applicant lacked a non-indigenous husband, 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.\textsuperscript{27}

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.\textsuperscript{28}

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.\textsuperscript{29} Evaluating a case 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’.\textsuperscript{30} 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,\textsuperscript{31} 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’.\textsuperscript{32} Similarly, in Ciubotaru vs. Moldova,\textsuperscript{33} 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.\textsuperscript{34} 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.\textsuperscript{35}

The ECtHR has also recognized a significant link between linguistic rights and the maintaining of the cultural identity of minorities. In Podkolezina vs. Latvia\textsuperscript{36} 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 secondary school level was considered to pursue a legitimate aim of the proper functioning of the institutional system,\textsuperscript{37} 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.\textsuperscript{38}

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,\textsuperscript{39} 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’\textsuperscript{40} 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’,\textsuperscript{41} the Court held, as a result, that the interference in the right indicated was not disproportionate.\textsuperscript{42}

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’\(^5^0\) 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.\(^5^2\) The Inter-American Court of Human Rights (IACtHR) has developed considerable jurisprudence in this respect. Violations of the customary marriage practices of indigenous peoples,\(^5^3\) 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 Ačhi culture, and the loss of faith in their traditions following militarization and repression\(^5^4\) have all been criticized by the Court. The Court has clarified that funeral ceremonies are part of indigenous cultures,\(^5^5\) 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,\(^5^6\) 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,\(^5^7\) which constitute violations of their cultural rights. These rights have similarly been recognized in the African human rights system.\(^5^8\) 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’.\(^5^9\) Most of the endangered languages around the world are languages of minorities and indigenous peoples. Rights of minorities and indigenous 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.\(^5^4\)

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.\(^5^9\) 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’.\(^6^0\)

The UN HRC has touched upon the issue of provision of education in a minority language in Movlouve and Sáidu vs. Uzbekistan.\(^6^0\) 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’\(^6^0\) 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,\(^6^1\) 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,\(^6^2\) and ruled that the right to education per se was not violated.\(^6^3\) 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.\(^6^2\)

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.\(^6^4\) In the breakaway region of Transdniestria, 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 Transdniestria region.\(^6^4\)

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.\(^6^5\) 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’.\(^6^6\) It is the IACtHR who 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) Awati Tigui 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.72

In the Ogiek community case in Kenya, members of the community were deprived of their traditional livelihood and were effectively prevented from enjoying their right to property, further aggravated the detrimental effects of the interference on the applicants.73 The Court found a violation of Protocol No. 1, Article 1, in respect of Bulgaria.74

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.75 They can contribute considerably to environmentally sound practices and sustainable development. International law has recognized 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 peoples.

Right: Members of the Ogiek community attend a public meeting with journalists in Kenya, MRG.
Indigenous cultures also include ‘traditional lifestyles relevant for the conservation and sustainable use of biological diversity’, protected by the Convention on Biological Diversity, which states that respects to state, preserve and maintain such knowledge and practices, and promote their wider application with the approval and involvement of the holders. In particular, state obligations to indigenous traditional activities or their practical traditions of cultivation, agriculture and animal herding and fishing also constitute 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 culture 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.

1 The authors are also grateful to Gabriela Majerovská for her extensive research on relevant case law.
2 UN HRC, General Comment No. 25, Art. 27 (Rights of Minorities), UN doc. CCPR/C/21/Rev.3/ Add-1 (2004), para. 7.
6 See also Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya (2009), Communication No. 70/2008.
7 UN HRC, General Comment No. 25, supra note 2, para. 38.
8 Council of Europe FCNM, Advisory Committee (1995), Art. 3.1.
9 CERD, General Recommendation No. 32 on the protection of special measures in the field of immigration on the elimination of All Forms Racial Discrimination, UN doc. CERD/C/GC/32 (2009), para. 3.
13 ECCHR, Aloreal Músique and Tshembu a. Sweden, Application no. 2386/06 (2008), para. 44.
15 Ibid. para. 241.
17 Ibid., para. 9.8.
18 Ibid., para. 9.9.
24 Ibid. para. 73.
25 ECCHR, Cislaru a., Communication no. 511/3055/1 (1993), para. 57.
27 Ibid., supra note 8.
29 Ibid., supra note 46.
30 Ibid., para. 47.
31 UN CESCR, General Recommendation on the Rights of All Migrant Workers and Members of Their Family, Art. 43.1(g), Convention on the Protection of Migrants and Their Rights, Convention on the Rights of All Migrant Workers and Members of Their Family, Art. 43.1(g), Convention on the Protection of Migrants and Their Rights, Application no. 70/2000 (2007), para. 54.
32 UN CESCR, General Recommendation on the Rights of All Migrant Workers and Members of Their Family, Art. 43.1(g), Convention on the Protection of Migrants and Their Rights, Application no. 70/2000 (2007), para. 54.
34 Ibid., para. 19.
35 FCNM, Art. 5, supra note 8.
36 ECCHR, Chapman v. The United Kingdom, Application no. 2728/95 (2001) at para. 93.
37 Ibid. para. 73.
38 ECCHR, Cislaru a., Communication no. 511/3055/1 (1993), para. 57.
39 Ibid., supra note 8.
40 UN CESCR, General Recommendation on the Rights of All Migrant Workers and Members of Their Family, Art. 43.1(g), Convention on the Protection of Migrants and Their Rights, Application no. 70/2000 (2007), para. 54.
41 Ibid., supra note 8.7.
43 UN CESCR, General Recommendation on the Rights of All Migrant Workers and Members of Their Family, Art. 43.1(g), Convention on the Protection of Migrants and Their Rights, Application no. 70/2000 (2007), para. 54.
44 Ibid., para. 73.
45 Ibid., para. 73.
46 Ibid., para. 73.
47 UN CESCR, General Recommendation on the Rights of All Migrant Workers and Members of Their Family, Art. 43.1(g), Convention on the Protection of Migrants and Their Rights, Application no. 70/2000 (2007), para. 54.
48 ACHR, Aloreal Músique and Tshembu a. Sweden, Application no. 2386/06 (2008), para. 44.
49 Ibid., para. 73.
50 Ibid., para. 73.
51 Ibid., para. 73.
52 Ibid., para. 73.
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68 Ibid., para. 73.
69 Ibid., para. 73.
70 Ibid., para. 73.
71 Ibid., para. 73.
72 Ibid., para. 73.