



# **Economic and Social Council**

Distr.  
GENERAL

E/C.12/40/7  
9 May 2008

ENGLISH ONLY

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COMMITTEE ON ECONOMIC, SOCIAL  
AND CULTURAL RIGHTS  
Fortieth session  
Geneva, 28 April – 16 May 2008

## **DAY OF GENERAL DISCUSSION**

### **Right to take part in cultural life (article 15 (1) (a) of the Covenant)**

Friday, 9 May 2008

Submission of the International Commission of Jurists for the Day of Discussion on the right to  
participate in cultural rights convened by the Committee on Economic, Social and Cultural  
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Background paper submitted by the International Commission of Jurists\*\*

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Submission of the International Commission of Jurists for the Day of Discussion on the right to participate in cultural rights convened by the Committee on Economic, Social and Cultural Rights, May 8, 2008.

1. The International Commission of Jurists (ICJ) warmly welcomes the initiative of the Committee on Economic, Social and Cultural Rights regarding the discussion and eventual adoption of a General Comment on the right to participate in cultural life (art. 15 (1)(a) of the International Covenant on Economic, Social and Cultural Rights). If it is true that, for a long period, the whole category of economic, social and cultural rights has been generally neglected in comparison to civil and political rights, the same can be said about cultural rights within the category of economic, social and cultural rights. The adoption of a General Comment, as well as the increasing attention being paid to cultural rights in the context of the Human Rights Council, will help to clarify the content and the legal implications of the right to participate in cultural life.

2. The right to participate in cultural life is closely connected with many other human rights. Some other human rights are particularly significant for the right to participate in cultural life: for example, freedom of consciousness, freedom of expression, freedom of press and freedom of religion, the right to education, political rights and the right to equality and to be free from discrimination. However, the exercise of many other human rights also entails cultural components, relevant to assess the enjoyment of the right to take part in cultural life. The Committee on Economic, Social and Cultural Rights has adequately captured this concept in several of its General Comments referred to specific economic and social rights, through the notion of “acceptability”, “cultural adequacy” or “cultural appropriateness”. The Committee has employed this notion to define the normative requirements of other rights set forth by the International Covenant on Economic, Social and Cultural Rights (ICESCR)– such as the right to adequate housing, the right to adequate food, the right to the highest attainable standard of health and the right to water.<sup>1</sup> This, in turn, implies that food, housing, health and water can be, *inter alia*, significant components of cultural life.

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<sup>1</sup> See Committee on Economic, Social and Cultural Rights, General Comment N°4, The right to adequate housing (Art.11 (1)) : 13/12/1991. E/1992/23, para. 8 (g); General Comment N°12, The right to adequate food (art. 11) : 12/05/1999. E/C.12/1999/5, para. 11; General Comment N°13, The right to education (article 13 of the Covenant) : 8/12/1999. E/C.12/1999/10, para. 6 (c); General Comment N°14, The right to the highest attainable standard of health : 11/08/2000. E/C.12/2000, para. 12 (c); General Comment N°15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) : 20/01/2003. E/C.12/2002/11, para. 12(c)(i).

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3. A particularly important issue regarding cultural rights is the acknowledgment of the rights of minority groups, or other groups that – regardless of being a minority – maintain a diverse cultural identity, such as indigenous or tribal peoples or communities. Among other binding international human rights instruments, this issue is well captured by article 27 of the International Covenant on Civil and Political Rights<sup>2</sup> and, generally, by the International Labour Organization Convention N° 169, concerning Indigenous and Tribal Peoples in Independent Countries. Both legal references offer important guidance when it comes to give meaning to article 15 (1)(a) of the ICESCR.

Relevant provisions from other international human rights instruments also include article 27(1) of the Universal Declaration of Human Rights, articles 31 of the Convention on the Rights of the Child,<sup>3</sup> article 43(1)(g) of the International Convention on the Protection of the Rights of All Migrant Workers and Member of their Families, and article 2(2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

4. A standard criticism of economic, social and cultural rights has been their “vagueness”, or lack of definition of their normative content. The right to participate in cultural life is usually considered an example of a right whose content lacks clarity. Thus, the adoption of a General Comment provides the opportunity to employ – as it was the case with other General Comments devoted to specific rights, previously issued by the Committee – a rigorous conceptual framework, in order to clarify the normative content of this right and the legal obligations that stem from it, including the minimum core obligations, and to offer examples of violations of the right. The Committee should particularly bear in mind efforts by civil society and academic groups to define cultural rights – as, for example, the so-called Fribourg Declaration, sponsored by the Inter-disciplinary Institute for Ethics and Human Rights of the University of Fribourg, Switzerland and endorsed by a significant number of NGOs, inter-governmental organizations and individuals.

5. As for the alleged lack of clarity of the right, it should be underscored that the formulation of the right in the ICESCR is very similar to the wording adopted by the International Covenant on Civil and Political Rights regarding the right to participate in public affairs (ICCPR, article 25(1)).<sup>4</sup> The same can be said about the already quoted rights set forth by articles 27 of the

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<sup>2</sup> ICCPR, article 27:

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

<sup>3</sup> Regarding the application of article 31 of the Convention on the Rights of the Child, see Committee on the Rights of the Child, General Comment N° 7, Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, 20 September 2006, para. 34; Concluding observations: Mongolia, CRC/C/15/Add.264, 21 September 2005, paras. 54 and 55; Concluding observations: Bosnia and Herzegovina, CRC/C/15/Add.260, 21 September 2005, para. 59; Concluding observations: Ireland, CRC/C/IRL/CO/2, 29 September 2006, paras. 62 and 63; Concluding observations: Maldives, CRC/C/MDV/CO/3, 13 July 2007, para. 84; Concluding observations: Timor-Leste, CRC/C/TLS/CO/1, 14 February 2008, paras. 69 and 70.

<sup>4</sup> Compare both texts:

ICESCR

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life.

ICCPR

Article 25

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ICCPR, which in fact make explicit reference, *inter alia*, to the right “to enjoy (...) culture”. No problem was ever posed regarding the legal value or clarity of the right to take part in public affairs and to the rights provided by article 27 of the ICCPR,<sup>5</sup> so there is no reason to do so with the possibility of defining the content of the right to participate in cultural life.

6. Regarding the normative content of the right, a key issue concerns the definition of “culture” and “cultural life”, as employed in article 15(1)(a). Traditionally, the notion of “culture” has been the subject of two kinds of definitions. On the one hand, narrow definitions, which restrict “culture” to manifestations of what is sometimes referred to as “high culture”, and comprising, for example artistic and scientific expressions. On the other hand, a broad definition of “culture”, which refers to a wider array of elements which enable the establishment of collective bonds. This broader definition also includes arts and sciences, but also encompasses language, traditions, folklore, institutions, practices and shared views of the world which determine the way in which communities define their identity.<sup>6</sup> The ICJ strongly encourages the Committee to adopt a broad view of “culture” and “cultural life”. This approach is more appropriate for a right which is predicated of “everyone” –and not only of authors of scientific, literary or artistic production, as stated, by contrast, in article 15(1)(c). It is also consistent with the case law of different domestic, regional and international courts and quasi-judicial bodies which has been sensitive to the cultural significance of diverse components of other human rights. The fact that some of this jurisprudence only captures cultural dimensions indirectly and in a scattered manner offers a solid justification to the need to define the right to participate in cultural life as a self-standing right.

7. A second important issue that the Committee should consider is related to the collective components of the right to participate in cultural life. At least three considerations should be made in this respect – the list does not intend to be exhaustive.

8. Firstly, while the right to participate in cultural life can be perfectly conceived as an individual right, it necessarily requires a collective component, “cultural life”. “Culture” and “cultural life”

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Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

1. To take part in the conduct of public affairs, directly or through freely chosen representatives.

<sup>5</sup> For case law of the Human Rights Committee on the application of article 27 in context of the communications system, see *infra*, para. 19.

<sup>6</sup> See, for example, Human Rights Committee, General Comment N°23: The rights of minorities (Art. 27) : 08/04/94. CCPR/C/21/Rev.1/Add.5, para. 7: “With regard to the exercise of the cultural rights protected under article 27, *the Committee observes 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.” (emphasis added).

Cfr. UNESCO Declaration on Cultural Diversity (2001), Preamble: “culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs”. See also UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), article 4; Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), article 2(a).

are by definition collective settings, the product and the space of common or collective action. Thus, participation in cultural life entails interaction with other individuals and groups of individuals who share common practices and assets.<sup>7</sup> This is sometimes called the “necessary collective exercise” of these rights. The fact that this right requires, in order to be enjoyed, interaction with other individuals or groups of individuals is not particularly different from many other human rights: rights such as freedom of association and freedom to form and join trade unions, or the right to strike also require the concurrence of other individuals for their exercise to be possible. The same could be said, in a broader sense, of practically all human rights, in the sense that their exercise or outcome is only significant when it transcends the individual and interacts with others. In the particular case of the right to participate in cultural life, the concerned group is a broader collectivity, a “cultural community” – that is, a group which shares a common cultural identity.<sup>8</sup>

9. The common enjoyment of cultural life also entails the recognition of the special value of some specific collective goods, which serve as a token or as a medium for communal cultural practices.<sup>9</sup> The value of specific collective goods lies on their shared symbolic meaning, which may represent for a community a link with the sacred or with its history, or an attribute of its identity. Language, historical sites, sacred buildings, communal land and environments, rituals and ceremonies constitute examples of these collective goods. The collective character of these goods derives in the impossibility of their individual appropriation without losing its collective meaning. The preservation of these collective goods is of capital importance for the collective practices that inform cultural life and, therefore, their disregard often results in a shared sense of cultural offense.

10. Both of these aspects have led to the frequent use of the notion that cultural rights are “collective rights”. While in some cases this could be a metaphorical expression, it has also some strict legal manifestations. Thus, for example, as cultural life is collectively enjoyed, the same legal infringement – for example, the ban of the use of a language, or the prohibition of a specific ceremony – may harm the whole community that shares the practice, institution, believe or value at stake. This could, of course, be described as an infringement of the aggregation of the individual rights of all the members of a group. But it is not unsound to present it, alternatively, as a violation of a collective right. Indeed, this second description may have some advantage: it may capture the fact that the violation does not only affect individuals in isolation, but as participants of a collective practice. On the same line of ideas, because collective goods are not divisible, no individual is in the position to claim that harm to any of these goods constitutes an individual violation. Thus, it is not inadequate to state that harm to collective goods constitutes a violation to the collective rights of the community.

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<sup>7</sup> See, for example, Human Rights Committee, General Comment N°23: The rights of minorities (Art. 27) : 08/04/94. CCPR/C/21/Rev.1/Add.5, para. 6.2: “Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.”

<sup>8</sup> See, for example, Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), article 2(b). See also UNESCO Declaration on Cultural Diversity (2001), articles 1 and 2; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), articles 1 and 2.

<sup>9</sup> See, for example, UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (1972), articles 1, 4 and 6; UNESCO Declaration on Cultural Diversity (2001), articles 7 and 8; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), article 1(g) ; Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), articles 1 and 2(a).

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11. If effective legal remedies should be made available in these cases, some kind of collective representation is needed in order to bring a claim to obtain legal relief or redress to the violation: someone should be legally entitled to bring the claim on behalf of the community, and not only on his or her personal behalf. Different legal systems offer diverse legal answers to this requirement: in some cases, any member of a group can collectively represent the group; in other cases, it is the formal representative of a legally recognized collective; in other cases, it could be a qualified legal entity – such as a public interest organization.

12. Another contemporary legal development, which has been considered key regarding the rights of minorities and indigenous groups, is particularly relevant in the context of cultural rights. Different human rights instruments – and the interpretation of different human right bodies – recognize the right of communities to be consulted before the adoption of legislative, administrative or other policy measures susceptible to have an impact on their cultural identity.<sup>10</sup> The right to be consulted is a preventive procedural safeguard, to ensure that the voice of groups whose cultural identity may be affected is heard when public decision-making takes place, and can also be seen as a component of the right to participate in public affairs<sup>11</sup> and to ensure the exercise of freedom of expression for groups that often suffer of political under-representation.

13. Along with the recognition of both individual and collective aspects of cultural rights comes the acknowledgment of possible conflicts between individuals and communities. As an individual right, the right to participate in cultural life has also a negative aspect: freedom to abstain from participating, and the right not to be forced to participate in cultural life if an individual does not wish to do so. Furthermore, the value of collective cultural practices is not absolute: in order to be legally protected and upheld, cultural practices should not be incompatible with human rights and fundamental freedoms.<sup>12</sup>

14. The use of the tripartite typology of obligations – respect, protect and fulfill has proved useful in other general comments to clarify the content of different rights recognized by the ICESCR. The ICJ encourages its employment in regarding the right to participate in cultural life too. As cultural rights encompass individual and collective elements, the three levels of obligations should apply to both elements.

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<sup>10</sup> See ILO Convention N°169, article 6; see also Human Rights Committee, General Comment N°23: The rights of minorities (Art. 27) : 08/04/94. CCPR/C/21/Rev.1/Add.5, para. 7: “With regard to the exercise of the cultural rights protected under article 27, the Committee observes 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. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. *The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.*” (emphasis added)

<sup>11</sup> See, for example, Human Rights Committee, General Comment N°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. 6: “Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.”

<sup>12</sup> See, for example, ILO Convention N°169, article 8.2: “[Indigenous] 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 recognized human rights.* Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.” (emphasis added). See also UNESCO Declaration on Cultural Diversity (2001), articles 4 and 5. See also UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), article 2(1); Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), articles 4(b) and (c), and 6(a).

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15. State parties have an obligation to respect the right to participate in cultural life.<sup>13</sup> Regarding its individual component, States should refrain from interfering in the individual exercise of the right to participate in cultural life. Regarding the collective component, States should refrain from interfering on those practices, institutions or collective goods that make it possible for groups to engage and develop cultural life.

16. State parties have an obligation to protect the right to participate in cultural life.<sup>14</sup> Regarding its individual components, States should prevent that third parties interfere in the exercise of cultural rights by individuals, or impose sanctions where illegal interference occurs. Regarding the collective component, State should protect cultural community from interference by third parties on their cultural practices and collective goods. In both cases, the regulation of the conduct of third parties and a specific legal regime for collective goods may be necessary.

17. State parties have an obligation to fulfill the right to participate in cultural life. While in the case of other rights enshrined in the ICESCR the obligation to provide may have a prominent role, it seems that the role of the obligations to facilitate and promote the right to participate in cultural life have a more important role here.<sup>15</sup> State parties should facilitate and promote the participation of individuals in cultural life through different means, when for reasons beyond their control they confront obstacles to the full enjoyment of this right. State should also facilitate and promote the cultural life of communities and groups, by removing the legal and factual obstacles which may hinder or impede the exercise of cultural rights. Positive measures may be necessary to ensure that minority or disadvantaged communities can fully exercise their cultural rights.<sup>16</sup> Regarding the obligations to provide, it is important to underscore the key role of education in relation to cultural rights. Provision of free primary education, and fair opportunities to pursue education through other stages, constitute a fundamental means to develop individual capacities to engage in cultural life. On the other hand, in order to ensure cultural diversity and similar opportunities of minorities or disadvantaged groups to maintain their culture, States should assist them, when necessary, to teach their own language or traditions. Obligations to provide may also play an important role when, for reasons of scale or cost, individuals or groups have difficulties to undertake culturally significant practices, to maintain traditions or to preserve collective goods. The restoration and preservation of the collective historical patrimony offers a good example of this.

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<sup>13</sup> See UNESCO Declaration on Cultural Diversity (2001), articles 4 and 5; Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), articles 4(a) and (c).

<sup>14</sup> See UNESCO Declaration on Cultural Diversity (2001), articles 5 and 6; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), article 1(a), 1(e), 2(1), 2(3), 2(6), 4(7), 5, 6 and 8, *inter alia*; Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), articles 4(b), 7(b) and 9 (a).

<sup>15</sup> See UNESCO Declaration on Cultural Diversity (2001), articles 2 and 4-9; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), article 1(a)-(e), 2 (1), 2(7), 6-10 and 13; Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), articles 1(c), 1(d), 3, 5 and 9-14.

<sup>16</sup> See Human Rights Committee, General Comment N°23: The rights of minorities (Art. 27) : 08/04/94. CCPR/C/21/Rev.1/Add.5, "Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group." (para. 6.2); "The enjoyment of [the cultural rights protected by article 27] may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them." (para. 7).

18. As any other human right, the recognition of the right to participate in cultural life requires a remedy for victims in case of violation. Many of the aspects of the right to participate in cultural life described in this submission are captured by decisions made by international courts and quasi-judicial bodies<sup>17</sup>

19. The jurisprudence of the Human Rights Committee offers good examples of the adjudication of cultural rights, and illustrates a number of the issues that were discussed before.

In *Sandra Lovelace v. Canada*,<sup>18</sup> the author of the communication, a member of the Maaliset community, had lost her rights and status as indigenous for marrying a non-indigenous and was therefore denied the right to reside in the indigenous reserve where she was born and brought up. The complainant alleged that the statute that deprived her of her cultural identity breached articles 27 of the ICCPR. She claimed that “the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity”.<sup>19</sup> The Committee made the following considerations and findings:

“13.2 Although a number of provisions of the Covenant have been invoked by Sandra Lovelace, the Committee considers that the one which is most directly applicable to this complaint is article 27, which reads as follows:

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

It has to be considered whether Sandra Lovelace, because she is denied the legal right to reside on the Tobique Reserve, has by that fact been denied the right guaranteed by article 27 to persons belonging to minorities, to enjoy their own culture and to use their own language in community with other members of their group.

14. The rights under article 27 of the Covenant have to be secured to "persons belonging" to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as

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<sup>17</sup> And, of course, by domestic courts. Some Latin American and Caribbean domestic courts offer an extensive consideration of the right to cultural identity and its components and implications. See, for example, Supreme Court of Belize, *Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and others v. the Attorney General of Belize and others* (claims 171 and 172 of 2007) (18 October 2007); Constitutional Court of Colombia, decisions SU-039/97 (3 February 1997), T-652/98 (10 November 1998), C-418/02 (20 May 2002), SU-383/03 (13 May 2003), T-382/06 (22 May 2006) and C-030/08 (23 January 2008); Supreme Court of Costa Rica (Constitutional Chamber), decision 2000-08019 (8 Septiembre 2000); Constitutional Tribunal of Ecuador, case No. 170-2002-RA, *Claudio Mueckay Arcos v. Dirección Regional de Minería de Pichincha: Director Regional* (13 August 2002).

<sup>18</sup> See Human Rights Committee, *Sandra Lovelace v. Canada*, Communication No. 24/1977, views adopted on 30-07-1981.

<sup>19</sup> See Human Rights Committee, *Sandra Lovelace*, para 13.1.

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belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as "belonging" to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. The right to live on a reserve is not as such guaranteed by article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12 (1) of the Covenant set out in article 12 (3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

16. In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be. It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case.

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to."

In *Kitok v. Sweden*,<sup>20</sup> the Committee examined a communication where a member of the Sami minority alleged that, due to the restrictive legislation regarding reindeer breeding, he was illegally deprived of this ancestral right, and thus his right to enjoy his own culture was

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<sup>20</sup> See Human Rights Committee, *Ivan Kitok v. Sweden*, Communication No. 197/1985, views adopted on 27-07-1987.

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violated. While it considered that no breach of article 27 occurred because the author of the communication was still allowed to breed reindeer, the Committee held, among other considerations, that

“[t]he regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant”.<sup>21</sup>

In *Lubicon Lake Band v. Canada*,<sup>22</sup> an indigenous community, represented by its chief, alleged that several activities authorized by the State party, including the expropriation of land for oil and gas exploration and the promotion of the industrial development of the area, caused the destruction of the environmental and economic base on which the community lived, and this deprived the community of its means of subsistence and of the enjoyment of the aboriginal way of life. The Committee considered that

“[a]lthough initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”.<sup>23</sup>

and found that

“[h]istorical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue”.<sup>24</sup>

In *Ilmari Länsman et al. v. Finland*<sup>25</sup>, a group of reindeer breeders of Sami origin challenged a contract passed by State authorities with a private company, to allow the quarrying of stone in the territory where they carry on the reindeer breeding. The authors alleged that the quarrying of stone and its transportation through their reindeer herding territory would violate their rights under article 27 of the Covenant, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry. The Committee considered that the scale of the exploitation and the fact that the community was consulted did not reveal a violation of article 27 of the ICCPR. Notwithstanding, the Committee held that

“[w]ith regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their

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<sup>21</sup> See Human Rights Committee, *Kitok*, para. 92.

<sup>22</sup> See Human Rights Committee, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, views adopted on 26-03-1990.

<sup>23</sup> See Human Rights Committee, *Lubicon Lake Band*, para. 32.2.

<sup>24</sup> See Human Rights Committee, *Lubicon Lake Band*, para. 33.

<sup>25</sup> See Human Rights Committee, *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992, views adopted on 26-10-1994.

own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.”<sup>26</sup>

In *Jouni E. Länsman et al. v. Finland*,<sup>27</sup> a group of reindeer breeders of Sami ethnic origin challenged the plans of the Finnish Central Forestry Board to approve logging and the construction of roads in an area covering about 3,000 hectares, alleging that it would adversely affect their traditional breeding activities, thus violating article 27 of the ICCPR. The Committee held that, due to the scale of the approved logging, and the consultation with the community, no violation of article 27 took place. However, the Committee pointed out that

“if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.”<sup>28</sup>

In *Apirana Mahuika et al. v. New Zealand*,<sup>29</sup> the Human Rights Committee considered a communication where the complainants, members of the Maori people, claimed that fishing regulations issued by the State affected their traditional fisheries and thus breached the State party obligations set forth in article 27 of the ICCPR. The Human Rights Committee decided that the right to culture of an indigenous population under Article 27 of the ICCPR could be restricted where the community itself participated in the decision to restrict such right. The Committee found that “the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on 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”.<sup>30</sup> In the case, it considered that a proper consultation had taken place, and that “[i]n the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, inter alia to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities”.<sup>31</sup> Thus, no violation to art. 27 was found. However, the Committee underscored that

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<sup>26</sup> See Human Rights Committee, *Ilmari Länsman et al.*, para 9.

<sup>27</sup> See Human Rights Committee, *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, views adopted on 30-10-1996.

<sup>28</sup> See Human Rights Committee, *Jouni E. Länsman et al.*, para. 10.7.

<sup>29</sup> See Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, views adopted on 27-10-2000.

<sup>30</sup> See Human Rights Committee, *Apirana Mahuika et al.*, para. 9.5.

<sup>31</sup> See Human Rights Committee, *Apirana Mahuika et al.*, para 9.8.

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“the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act. With reference to its earlier case law (19), the Committee emphasises that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group.”<sup>32</sup>

20. The Inter-American Court of Human Rights has decided a considerable number of cases where it considered the particular cultural meaning of ancestral land and territories, and of its natural resources, for indigenous peoples. In the leading case, *Awes Tingni v. Nicaragua*,<sup>33</sup> and in subsequent cases,<sup>34</sup> the Court has interpreted the right to property (Article 21 of the American Convention on Human Rights), in terms of its enjoyment by indigenous people, as a collective right. This interpretation accords with the arguments presented by many indigenous groups and is supported by ILO Convention N°169. The Court has constantly held that

“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, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy [...] to preserve their cultural legacy and transmit it to future generations”<sup>35</sup>

and also that

“the cultural and economic survival of indigenous and tribal peoples, and their members, depend on their access and use of the natural resources in their territory “that are related to their culture and are found therein”.”<sup>36</sup>

The Inter-American Court has also developed the scope of the right of indigenous communities to be consulted before decisions that could affect their culture and way of life are taken. In the *Saramaka People v. Suriname*, the Court decided that

“First, the Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions (...). This duty requires the State to both accept and disseminate information, and entails

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<sup>32</sup> See Human Rights Committee, *Apirana Mahuika et al.*, para 9.9.

<sup>33</sup> Inter-American Court of Human Rights, *Mayagna (Sumo) Community Awes Tingni v. Nicaragua*, August 31, 2001.

<sup>34</sup> In the same sense, see Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, paras. 123-156, especially paras. 131, 135, 137, 146, 147 and 154; *Sawhoyamaya Indigenous Community v. Paraguay*, March 29, 2006, paras. 117-143, *Saramaka People v. Suriname*, November 28, 2007, paras. 88-96.

<sup>35</sup> Inter-American Court of Human Rights, *Mayagna (Sumo) Awes Tingni Community*, para. 149; *Plan de Sánchez Massacre v. Guatemala*, (Reparations) November 19, 2004, para. 85; *Sawhoyamaya Indigenous Community*, para. 118; *Yakye Axa Indigenous Community*, para. 131, and *Saramaka People*, November 28, 2007, para. 90.

<sup>36</sup> Inter-American Court of Human Rights, *Yakye Axa Indigenous Community*, para. 137; *Sawhoyamaya Indigenous Community*, para. 118, *Saramaka People*, para. 120.

constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.”<sup>37</sup>

21. Both the European Court of Human Rights and the European Committee of Social Rights have considered complaints regarding States parties' failure to respect and facilitate the housing rights of Roma communities, therefore adversely affecting their itinerant way of life. Interestingly, while the issue remained basically the same – failure to accommodate housing policy to the culture and way of life of a particular group – because different instruments and rights applied, violations or potential violations were based on different rights.

In *Connors v. the United Kingdom*, for example, the European Court of Human Rights held that

“[t]he vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (Buckley judgment cited above, pp. 1292-95, §§ 76, 80 and 84). To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life (see Chapman, cited above, § 96 and the authorities cited, *mutatis mutandis*, therein)”<sup>38</sup>.

In turn, the European Committee of Social Rights has considered the same question in three different cases. Due to the fact that, under the European Social Charter and its revised version, States can choose the right to which they wish to be bound (that is, the so-called “*à la carte*” system), the Committee has found Greece in breach of the right of the family to social, legal and economic protection, in conjunction with the prohibition of discrimination (article 16 and Preamble of the European Social Charter), Italy in breach of the right to housing in conjunction with the prohibition of discrimination (articles 31 and E of the revised European Social Charter) and Bulgaria in breach of the right of the family to social, legal and economic protection, in conjunction with the prohibition of discrimination (articles 16 and E of the Revised European Social Charter).

In *European Roma Rights Centre v. Greece*, the Committee held that

“[t]he implementation of Article 16 as regards nomadic groups including itinerant Roma, implies that adequate stopping places be provided, in this respect Article 16 contains similar obligations to Article 8 of the European Convention of Human Rights.”<sup>39</sup>

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<sup>37</sup> Inter-American Court of Human Rights, *Saramaka People*, para. 133.

<sup>38</sup> See European Court of Human Rights, *Connors v. the United Kingdom*, 27 May 2004, para. 84. Article 8 of the European Convention on Human Rights recognizes the right to personal and family life.

<sup>39</sup> See European Committee of Social Rights, *European Roma Rights Centre v. Greece*, Complaint No. 15/2003, 8 December 2004, para. 25

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In *European Roma Rights Centre v. Italy*, the Committee held that

“Article 31§1 E enshrines the prohibition of discrimination and establishes an obligation to ensure that, in absence of objective and reasonable justifications (see paragraph 1 of the Appendix), any group with particular characteristics, including Roma, benefit in practice from the rights in the Charter. On the contrary, by persisting with the practice of placing Roma in camps the Government has failed to take due and positive account of all relevant differences, or adequate steps to ensure their access to rights and collective benefits that must be open to all.”<sup>40</sup>

In *European Roma Rights Centre v. Bulgaria*, the Committee held that

“that Article E enshrines the prohibition of discrimination and establishes an obligation to ensure that, in the absence of objective and reasonable justifications (see paragraph E, Part V of the Appendix), any individual or groups with particular characteristics benefit in practice from the rights in the Charter. In the present case this reasoning applies to Roma families.”<sup>41</sup>

22. The Human Rights Chamber for Bosnia and Herzegovina also provides a good example of the consideration of collective goods which have a particular cultural significance for a community. In the case of the *Islamic Community in Bosnia and Herzegovina*<sup>42</sup>, the Chamber found that the State authorities, in destroying and removing the remains of mosques and desecrated graveyards, and denying the Muslim community the ability to rebuild the destroyed mosques, breached the community’s religious and property rights.

23. As it is apparent from this account, the right to participate in cultural right is perfectly fit for adjudication, and States should provide effective remedies in case of violation, not unlikely any other human right.

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<sup>40</sup> See European Committee of Social Rights, *European Roma Rights Centre v. Italy*, Complaint No. 27/2004, 7 December 2005, para. 36.

<sup>41</sup> See European Committee of Social Rights, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, 18 October 2006, para 40.

<sup>42</sup> See Human Rights Chamber for Bosnia and Herzegovina, CH/96/29, *The Islamic Community in Bosnia and Herzegovina v. the Republika Srpska*, June 11, 1999.

The Human Rights Chamber for Bosnia and Herzegovina is a judicial body established under the General Framework Agreement for Peace in Bosnia and Herzegovina (known as the Dayton Peace Agreement). The Chamber has the mandate to consider violations of human rights as provided in the ECHR and its Protocols, and discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15 other international instruments, including the ICESCR.

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