

## Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21

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### **Summary**

*Indigenous peoples in Africa currently experience a range of human rights abuses. Recently, the United Nations Committee on Economic, Social and Cultural Rights released General Comment 21 on the right to take part in cultural life (ICESCR article 15(1)(a)). This contribution examines the relevance of General Comment 21 and its interpretation of article 15(1)(a) for African indigenous groups.*

### **1 Introduction**

The United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) recently released General Comment 21: Right of

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everyone to take part in cultural life (art 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)).<sup>1</sup> The article discusses the General Comment and highlights its potential significance for indigenous peoples in Africa.

Indigenous peoples in Africa currently experience a wide range of human rights violations.<sup>2</sup> Many of these violations may be classified as forms of discrimination based on their cultural identities.<sup>3</sup> Other violations concern their survival as culturally-distinct communities.<sup>4</sup> In General Comment 21, the ESCR Committee identifies clear obligations to respect, protect and promote the right to culture, binding on all ICESCR state parties. The Comment is directly relevant to the problems facing indigenous groups in Africa because of the essential and foundational role that 'culture' plays within their communities.

The clarification of the ICESCR right to take part in cultural life – and the identification of specific state obligations in this regard – could be important to indigenous groups in several ways. First, 45 African states are state parties to ICESCR<sup>5</sup> and are bound by their obligations under that treaty. States that fail to respect and protect rights of indigenous peoples violate binding treaty obligations.<sup>6</sup> Emphasising states' ICESCR obligations could be particularly important in the case of African countries which have not signed the Declaration on the Rights of Indigenous Peoples.<sup>7</sup> These states include Nigeria, Kenya, Burundi, Ethiopia, Morocco, Rwanda and Uganda<sup>8</sup> – states in which indigenous peoples have experienced difficulties.<sup>9</sup>

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1 E/C.12/GC21 (21 December 2009); ICESCR UN Doc A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967).

2 See discussion below. Problems faced by indigenous peoples are not unique to Africa. Indigenous cultures are also seriously threatened in the Americas, in Asia and the Middle East, in Australasia and in parts of Europe. See United Nations report *The state of the world's indigenous peoples* (2009).

3 See discussion below.

4 See discussion below.

5 Forty-eight of 53 African Union member states have signed ICESCR and 44 of these have ratified it; <http://treaties.un.org/> (accessed 31 March 2011). (Morocco is a state party to ICESCR but not a member of the AU.)

6 See A Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23; and *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 691.

7 A/61/L.67/Annex.

8 One hundred and forty-three states voted in favour of the Declaration, including 34 African states. Burundi, Kenya and Nigeria abstained from voting. Several African states were absent from the Assembly on the day of adoption. These included Ethiopia, Morocco, Rwanda and Uganda; <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (accessed 20 February 2011).

9 African Commissions's Working Group of Experts on Indigenous Populations/Communities *Report of the African Commissions's Working Group of Experts on Indigenous Populations/Communities* (2005).

Second, the ESCR Committee's General Comment can be used to clarify or amplify rights found in other documents. This could be especially important for the interpretation of the African Charter on Human and Peoples' Rights (African Charter),<sup>10</sup> which expressly provides that interpretation of the Charter should 'draw inspiration from international law on human and peoples' rights', particularly as emanating from the United Nations (UN) and its specialised agencies.<sup>11</sup> Here again, emphasising states' ICESCR obligations could be especially useful if states object to interpretations of the African Charter that are based on the Declaration of the Rights of Indigenous Peoples.<sup>12</sup>

Third, states may be more willing to recognise the ESCR Committee's interpretation of the right to culture than they have been to recognise the full spectrum of indigenous peoples' rights as set out in the Declaration of the Rights of Indigenous Peoples. Many African states have been wary of recognising collective rights for indigenous peoples in their territories, fearing that this might lead to ethnic division and strife<sup>13</sup> – or even to demands for secession.<sup>14</sup> General Comment 21 avoids some of the topics that historically have proved most controversial, such as the questions of self-determination and state obligations to provide or return land to indigenous communities.<sup>15</sup> Instead, the General Comment adopts a comparatively minimalist approach, and projects a tone of harmony and inclusiveness: Respect for indigenous rights is founded on the most fundamental of all human rights – respect for human

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10 OAU Doc CAB/LEG/67/3 rev 5; 1520 UNTS 217; 21 *ILM* 58 (1982).

11 Art 60.

12 The African Commission referred to the Declaration on Indigenous Rights when interpreting the African Charter and concluding that Kenya has violated its Charter obligations. See *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case). See also African Commission Working Group Report (n 9 above) where the African Commission compares the rights set out in the Declaration to those in the African Charter. For commentary on these processes, see KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382; and AK Sing'Oei & J Shepherd '"In land we trust": The *Endorois*' communication and the quest for indigenous peoples' rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 57.

13 See eg comments made by Rwanda during debates on the Draft Declaration on 26 November 2006 (United Nations. 61st General Assembly. Third Committee. 53rd Meeting UN Doc GA/SCH/3878) <http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm> (accessed 20 February 2011).

14 See Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (2007) [http://www.achpr.org/english/Special%20Mechanisms/Indigenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indigenous/Advisory%20opinion_eng.pdf) (accessed 20 February 2011) para 16, reporting such fears on behalf of the African group of states.

15 For a discussion on these controversies, see W van Genugten 'Protection of indigenous peoples on the African continent: Position seeking, and the interaction of legal systems' (2010) 104 *American Journal of International Law* 29; Bojosi & Wachira (n 12 above) and Sing'Oei & Shepherd (n 12 above).

dignity – and the protection and promotion of indigenous rights are aimed at preventing conflict rather than creating it.<sup>16</sup>

## 2 Defining 'indigenous peoples'

The term 'indigenous peoples' is notoriously difficult to define.<sup>17</sup> The UN has paid attention to the position of the world's indigenous peoples for more than 40 years,<sup>18</sup> but has never adopted a formal definition of 'indigenous peoples', not even in the 2007 United Nations Declaration on the Rights of Indigenous Peoples. Erica-Irene Daes, Rapporteur of the United Nations Working Group on Indigenous Populations, has suggested that 'the concept of "indigenous" is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world'.<sup>19</sup> The African Commission's Working Group of Experts on Indigenous Populations has decided that a 'strict definition of indigenous peoples is neither necessary nor desirable'.<sup>20</sup> Indigenous peoples themselves have rejected the adoption of a strict definition because of the danger that it might exclude some groups which ought to qualify as indigenous.<sup>21</sup>

Despite the dangers of an overly-precise definition, it is important to have some guidelines on the kinds of communities that qualify for the protections sought by indigenous peoples. The African Commission's Working Group tried to achieve this (while avoiding the problems of a prescriptive 'definition') by outlining the most important 'characteristics' of indigenous peoples as an aid to identification of indigenous communities.<sup>22</sup> This is the approach followed by most contemporary commentators and intergovernmental groups.<sup>23</sup>

16 See comments in African Commission Working Group Report (n 9 above) 88.

17 The definitional problems have been discussed by numerous scholarly commentators and experts working within international and regional organisations. See discussion below, and SJ Anaya *Indigenous peoples in international law* (2002) 3; B Kingsbury 'Indigenous peoples in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414 419.

18 The UN began its first study on discrimination against indigenous peoples in 1971. R Barsh 'Indigenous peoples in the 1990s: From object to subject of international law?' (1994) 7 *Harvard Human Rights Law Journal* 33.

19 E Daes *Working Paper on the Concepts of Indigenous People* UN Doc E/CN.4/Sub.2/AC.4/1996/2 para 9 [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2b6e0fb1e9d7db0fc1256b3a003eb999/\\$FILE/G9612980.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2b6e0fb1e9d7db0fc1256b3a003eb999/$FILE/G9612980.pdf) (accessed 31 March 2011).

20 African Commission Working Group Report (n 9 above) 87.

21 *Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations System* (Commission on Human Rights, 55th session 25 March 1999, E/CN.4/1999/83 [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1999.83.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1999.83.En?OpenDocument) (accessed 20 February 2011) para 56.

22 See African Commission Working Group Report (n 9 above) 86.

23 African Commission Working Group Report (n 9 above) 87.

Most attempts to define or otherwise identify characteristics agree on the following criteria: Indigenous groups are non-dominant or marginalised communities who are culturally distinct from the majority population. Daes suggested four core criteria that may be used to identify indigenous peoples.<sup>24</sup>

- 1 occupation and use of a specific territory;
- 2 voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
- 3 self-identification, as well as recognition by other groups, as a distinct collectivity;
- 4 an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

The African Commission's Working Group has identified similar criteria, emphasising the importance of self-identification 'as indigenous peoples or communities' and noting that<sup>25</sup>

their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, both politically and socially.

The ESCR Committee does not define the term 'indigenous peoples' in General Comment 21. For the purposes of this paper, we will not define 'indigenous peoples', but will nevertheless use the term to refer to groups of people who display the criteria suggested by Daes and the African Commission's Working Group.

### 3 Defining 'culture'

Like 'indigenous peoples', 'culture' is a difficult term to define. Essentially, the word 'culture' can be used to indicate 'a way of life of a people'.<sup>26</sup> Anthropologist Robert Murphy suggests that culture is<sup>27</sup>

the total body of tradition borne by a society and transmitted from generation to generation. Thus it refers to the norms, values and standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible.

<sup>24</sup> As quoted in African Commission Working Group Report (n 9 above) 93.

<sup>25</sup> African Commission Working Group Report (n 9 above) 89.

<sup>26</sup> R Williams *Keywords: A vocabulary of culture and society* (1983) 90.

<sup>27</sup> R Murphy *Culture and social anthropology: An overture* (1986) 14.

In terms of the Fribourg Declaration on Cultural Rights, the term culture 'covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development'.<sup>28</sup>

Hadjionnou describes indigenous culture as 'the core body of beliefs, knowledge, traditions and way of life that is passed on from generation to generation in indigenous communities'.<sup>29</sup> This body of beliefs, knowledge, traditions and ways of life form an integral part of the lives of indigenous peoples and are manifested in the form of ancestor worship, religious or spiritual ceremonies, oral tradition and rituals which have been passed down through the generations.<sup>30</sup>

For indigenous peoples, culture is the outcome of their relationship with other human beings, plants, animals, and the land on which they dwell.<sup>31</sup> This relationship between the culture of indigenous peoples and their immediate environment distinguishes them from members of mainstream society.<sup>32</sup> These indigenous customs and traditions are central to the lives of indigenous peoples and constitute their existence as separate entities.<sup>33</sup>

The importance of culture to indigenous peoples cannot be overstated, because the cultural distinctiveness of indigenous peoples is regarded as 'central to the concept of "indigenous" in international law'.<sup>34</sup> This cultural distinctiveness qualifies these communities for recognition as indigenous peoples. For indigenous communities, protection of their culture is essentially the same thing as protecting their very existence as groups that are special and different from mainstream society. Without this cultural distinction, indigenous communities risk assimilation into the dominant society, thereby leading to their extinction as indigenous peoples. At present, this distinctiveness is threatened in many parts of Africa.

#### 4 Threats to indigenous communities in Africa

The report prepared under the auspices of the African Commission's Working Group<sup>35</sup> identifies a number of threats to the continued

28 Art 2(a) (definitions).

29 M Hadjionnou 'The international human right to culture: Reclamation of the cultural identities of indigenous peoples under international law' (2001) 8 *Chapman Law Review* 201 204.

30 Hadjionnou (n 29 above) 204.

31 A Xanthaki *Indigenous rights and the United Nations standards: Self-determination, culture and land* (2007) 204.

32 See Daes (n 19 above) para 69.

33 See generally Daes (n 19 above).

34 Daes (n 19 above) para 43.

35 African Commission Working Group Report (n 9 above).

existence of indigenous communities in Africa. It is useful to look at some of the reported problems in order to understand the relevance and significance of the ESCR Committee's General Comment 21 on the Right to Culture.

#### 4.1 Loss of traditional lands and resources

The distinct cultures and ways of life of indigenous peoples are usually premised on the availability of land and traditional resources. In Africa, many indigenous groups have traditionally used a hunter-gatherer economy, and the continuation of this way of life is dependent on continued access to appropriate land and resources. Access to these resources is seriously threatened. In several Central and West African countries, for example, forest peoples, such as the Batwa,<sup>36</sup> have been evicted from forests to create conservation areas, particularly sanctuaries for gorillas.<sup>37</sup> Indigenous forest dwellers have also lost traditional resources when areas of forest have been sold to logging companies and effectively destroyed.<sup>38</sup> In Southern Africa, San hunter-gatherers have lost land to conservation areas.<sup>39</sup>

In East Africa, the traditional economies of pastoralist indigenous groups, such as the Maasai of Kenya and Tanzania, are threatened by the shrinking availability of suitable grasslands.<sup>40</sup> Land taken from the Maasai during the colonial period was not returned to them after independence, but allocated to more dominant groups in those countries.<sup>41</sup> The Maasai continue to lose their lands to conservation areas<sup>42</sup> or large-scale commercial agricultural operations.<sup>43</sup>

Loss of traditional lands and resources is caused both by direct government activity and by activities of commercial companies, including foreign multinationals. For example, the activities of oil company Shell have seriously harmed the resource base and traditional way of life of the Ogoni people in Nigeria.<sup>44</sup> Mining, logging and large-scale commercial farming operations have had devastating impacts on indigenous groups elsewhere on the continent.<sup>45</sup>

Loss of traditional land does not only affect communities' ability to subsist, but may also have implications for traditional cultural, spiritual and religious ceremonies. The Maasai, for example, have lost the sacred

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36 This group is known by different names in different parts of Africa. See African Commission Working Group Report (n 9 above) 16.

37 African Commission Working Group Report 22-23.

38 African Commission Working Group Report (n 9 above) 27.

39 African Commission Working Group Report (n 9 above) 23.

40 African Commission Working Group Report (n 9 above) 24.

41 As above.

42 African Commission Working Group Report (n 9 above) 25.

43 African Commission Working Group Report (n 9 above) 33.

44 African Commission Working Group Report (n 9 above) 28.

45 See footnotes to previous paragraph.

site Endoinyio Oolmorauk, which was used for an important spiritual rite by every generation of Maasai from both Tanzania and Kenya.<sup>46</sup>

## 4.2 Assimilation policies

In many parts of Africa, indigenous communities have been threatened by deliberate assimilationist policies pursued by the national government. For example, the governments of Algeria and Morocco have pursued a policy of 'Arabisation', which has had a negative impact on the distinct cultural and linguistic identity of Berber-speaking communities who live in those countries.<sup>47</sup>

Many governments view the traditional economic practices of indigenous communities as 'backward' or old-fashioned.<sup>48</sup> They favour agriculture over hunter-gatherer or pastoralist economies, and some national governments perceive 'development' as synonymous with fixed settlement and initiation of agricultural projects.<sup>49</sup> Thus, traditional ways of life may be deliberately destroyed in the name of progress, motivated by an underlying philosophy favouring adoption of 'modern' mainstream economic practices by hunter-gatherer and pastoral communities.

## 4.3 Discrimination

The African Commission's Working Group reports that there is 'rampant discrimination' against indigenous communities in many parts of Africa.<sup>50</sup> For example, the Batwa of Central Africa experience extreme discrimination and ostracisation in many countries, and are considered 'undeveloped, intellectually backward, hideous, unsavoury characters, or sub-human'.<sup>51</sup> In parts of the Congo, outsiders have nicknamed the

<sup>46</sup> African Commission Working Group Report (n 9 above) 41. The Report does not discuss problems experienced by the pastoralist Endorois community in Kenya. However, in its complaint to the African Commission, the group complained of loss of grazing land and other resources as well as loss of key ceremonial and religious sites when their lands were proclaimed conservation areas. *Endorois* case (n 12 above).

<sup>47</sup> African Commission Working Group Report (n 9 above) 42-44. See also comments by Rwanda during debates on the Draft Declaration 26 November 2006 (n 9 above) declaring that the state favoured 'integrating indigenous peoples' into mainstream society.

<sup>48</sup> African Commission Working Group Report (n 9 above) 37. For a discussion of Botswana's view of the San's hunter-gatherer lifestyle as 'backward', see K Lehmann 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 86 94.

<sup>49</sup> African Commission Working Group Report (n 9 above) 33, discussing Ethiopian development policies. See also 36 discussing attitudes to hunter gatherers in the CAR.

<sup>50</sup> African Commission Working Group Report (n 9 above) 34.

<sup>51</sup> African Commission Working Group Report (n 9 above) 35, referring specifically to Rwanda and Burundi.

Batwa *la viande qui parle* (the animal that speaks).<sup>52</sup> Societal attitudes are reinforced by government attitudes and policies which tend to perceive the Batwa's hunter-gathering lifestyle as 'primitive and shameful for national heritage'.<sup>53</sup>

The discrimination and social ostracisation experienced by the Batwa have a negative impact on their ability to find employment or to benefit from state social services such as health and education. Personnel at government clinics and hospitals are reluctant to treat Batwa patients.<sup>54</sup> Teachers and fellow students ridicule Batwa school children, often leading to the Batwa children's departure from the educational system.<sup>55</sup>

The Batwa also experience discrimination in the enforcement of law and order. Authorities are unlikely to act effectively when the Batwa have been victims of crime (including violent crime and murder),<sup>56</sup> and the Batwa have been victims of arbitrary arrest and erroneous court judgments.<sup>57</sup>

#### **4.4 Marginalisation and exclusion from political, judicial and development processes**

All over Africa, indigenous communities are among the most marginalised and impoverished population groups. Indigenous groups face impoverishment through the loss of their traditional resources, and they experience widespread social exclusion and difficulty when trying to make use of social services such as health and education. A lack of education and social prejudice makes it difficult for indigenous people to find alternative means of subsistence.<sup>58</sup>

Development projects are sometimes biased against the traditional practices of indigenous peoples. Very often they take the form of large agricultural projects, which might displace indigenous hunter-gatherer and pastoralist communities.<sup>59</sup> Even when communities are permitted to retain their lands, governments might exclude indigenous groups from development projects unless they are willing to change to pre-

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<sup>52</sup> African Commission Working Group Report (n 9 above) 53. In the Congo, the Batwa are known as the Babendjelle.

<sup>53</sup> African Commission Working Group Report (n 9 above) 37, referring specifically to the Congo.

<sup>54</sup> African Commission Working Group Report (n 9 above) 52-54.

<sup>55</sup> African Commission Working Group Report (n 9 above) 56.

<sup>56</sup> African Commission Working Group Report (n 9 above) 38-39, referring specifically to Uganda.

<sup>57</sup> African Commission Working Group Report (n 9 above) 35, referring specifically to Rwanda and Burundi. See also 38 for examples from Uganda and 39 for examples from the DRC.

<sup>58</sup> African Commission Working Group Report (n 9 above) 55.

<sup>59</sup> African Commission Working Group Report (n 9 above) 30.

ferred methods of subsistence.<sup>60</sup> Indigenous communities often live in remote areas and do not receive infrastructural development, including the supply of clean water.<sup>61</sup>

Indigenous communities are often excluded from political participation – even when the decisions concern them and their access to resources.<sup>62</sup> They have also found it difficult to access legal and political channels through which to prevent the loss of land, to claim the return of their traditional lands, or to claim compensation for land which has been irretrievably lost.<sup>63</sup>

## 5 Committee on Economic, Social and Cultural Rights' General Comments

The ESCR Committee has played a pivotal role in interpreting ICESCR and clarifying the Covenant's entitlements and obligations. The UN Economic and Social Council (ECOSOC) is responsible for administering ICESCR<sup>64</sup> but, in 1987, ECOSOC established the ESCR Committee, comprising human rights experts, to assist in these supervisory duties. In practice, the ESCR Committee is the supervisory body for the Covenant.<sup>65</sup>

The ESCR Committee has attempted to spell out states' ICESCR obligations by developing a framework for thinking about rights in terms of obligations to respect, protect and promote the rights; core minimum obligations; and specified violations.<sup>66</sup> From time to time, the Committee issues General Comments aimed at 'clarify[ing] the normative issues [of ICESCR] for the States Parties'.<sup>67</sup> Although the General Comments are not formally binding,<sup>68</sup> the ESCR Committee regards

60 African Commission Working Group Report (n 9 above) 33.

61 African Commission Working Group Report (n 9 above) 50-51.

62 African Commission Working Group Report (n 9 above) 44-47.

63 African Commission Working Group Report (n 9 above) 25 (Tanzania) 23 (DRC); 28 (Cameroon).

64 P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) 19.

65 M Sepúlveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 29 32 89-90; P Alston 'Out of the abyss: The challenges confronting the new UN Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332.

66 Hunt (n 64 above) 13-14.

67 Comment made by the Committee in Summary Record of the 28th meeting, 15 November 1999 (UN Doc E/C.12/1999/SR.28) para 41, as quoted by Sepúlveda (n 65 above) 41. Authority to issue General Comments was given by ECOSOC in Resolution E/RES/1987/5.

68 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 104; J Harrison *The human rights impact of the World Trade Organisation* (2007) 133; H Haugen 'General Comment No 17 on "authors' rights"' (2007) 10 *Journal of World Intellectual Property* 53 55.

its General Comments as 'authoritative interpretations' of ICESCR,<sup>69</sup> intended as firm guidelines for the practical implementation of the binding ICESCR rights.<sup>70</sup> The Committee is 'the most authoritative bod[y] ... for determining the scope of the obligations imposed by the [ICESCR]'<sup>71</sup> and state parties that fail to act upon the Committee's recommendations 'show bad faith in implementing their Covenant-based obligations'.<sup>72</sup>

General Comments carry 'considerable legal weight'<sup>73</sup> and provide valuable 'jurisprudential insights' into the issues discussed by the ESCR Committee.<sup>74</sup> The Committee has developed its practice of issuing General Comments into a 'quasi-legislative mechanism' and the resulting 'quasi-legal status' of the Comments 'is to an extent supported by the tacit acceptance by States Parties to ICESCR, both to the ongoing formation of General Comments, and their utilisation as a mechanism by which to assess state reports under the Covenant'.<sup>75</sup> The General Comments have also been used when interpreting human rights in national and regional courts, further evidence of the Comments' high standing and quasi-legal status.<sup>76</sup> Over time, the General Comment has become 'a distinct juridical instrument ... that bears some resemblance to the advisory opinion practice of international tribunals'.<sup>77</sup>

The ESCR Committee has examined many of the ICESCR rights in detail.<sup>78</sup> It has established clear benchmarks and has identified specific

69 See E/C.12/1999/11 para 441 and E/C.12/1999/11 para 52.

70 Sepúlveda (n 65 above) 88. See also Haugen (n 68 above) 55, describing General Comments as the 'most authoritative clarification' of ICESCR.

71 Sepúlveda (n 65 above) 88.

72 As above; UN Fact Sheet 16 para 6. This would contravene art 26 of the Vienna Convention on the Law of Treaties. Sepúlveda's argument is that states have binding obligations to meet their ICESCR commitments. The ESCR Committee's General Comments clarify more precisely what the ICESCR commitments entail. The General Comments provide states with lists of specific steps which should be implemented. States that fail to implement the steps identified by the ESCR Committee thus fail to abide by their treaty commitments.

73 Craven (n 68 above) 104.

74 Hunt (n 64 above) 20.

75 Harrison (n 68 above) 133.

76 D Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to medicine' (2003) 19 *South African Journal on Human Rights* 541 546; D Cassel 'The globalisation of human rights: Consciousness, law and reality' (2004) 2 *North Western University Journal of International Human Rights* 6 77.

77 T Buergenthal 'The Human Rights Committee' as quoted by Sepúlveda (n 65 above) 41.

78 General Comments on specific ICESCR rights include General Comments on the Right of Everyone to Take Part in Cultural Life (General Comment 21); Right to Work (General Comment 6); Right to Food (General Comment 12); Right to Education (General Comment 13); Right to Water (General Comment 15); and Right to Housing (General Comments 4 and 7). It has also issued comments on more general obligations such as General Comment 3 on the nature of states' obligations, General Comment 8 on economic sanctions and General Comment 9 on the domestic

conduct that will be regarded as violating ICESCR obligations. This jurisprudential development has enormous advantages for those wishing to rely on the binding human rights set out in ICESCR.

### 5.1 ‘Tripartite typology’

One of the jurisprudential tools used by the ESCR Committee is the ‘tripartite typology’ which shows that all human rights give rise to duties to ‘respect’, ‘protect’ and ‘fulfil’ the rights. The duty of respect requires states to refrain from any action which would interfere with a particular right: ‘The broad idea is not to worsen an individual’s situation by depriving that person of the enjoyment of a declared right.’<sup>79</sup> The obligation to protect requires states to ‘prevent violations of such rights by third parties’.<sup>80</sup> The obligation to fulfil requires states ‘to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realisation of such rights’.<sup>81</sup>

### 5.2 Minimum core

Another useful tool developed by the ESCR Committee is the identification of the ‘minimum core’ of the ICESCR rights. General Comment 3 sets out the concept of the ‘minimum core obligation’ as follows:<sup>82</sup>

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential food-stuffs, of essential primary health care, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.

These minimum core obligations are in principle non-derogable: If they are not fulfilled, states will be regarded *prima facie* as having violated the rights concerned.<sup>83</sup> The Committee has recognised, however, that ‘any assessment of whether a state has discharged its minimum core

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application of the Covenant. All ESCR Committee General Comments are available from <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

79 H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 182.

80 Maastricht Guidelines (n 6 above) para 6.

81 As above.

82 ESCR Committee General Comment 3: The nature of states parties’ obligations (UN Doc E/1991/23) para 10.

83 Maastricht Guidelines (n 6 above) para 9. A Chapman ‘Core obligations related to the right to health and their relevance for South Africa’ in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 35 37; S Russell ‘Minimum state obligations: international dimensions’ in Brand and Russell (above) 11 16; S Leckie ‘Another step toward indivisibility: Identifying the key features of violations of economic, social and cultural rights’ (1998) 20 *Human Rights Quarterly* 81 98.

obligations must also take account of resource constraints applying within the country concerned'.<sup>84</sup> Leckie points out:<sup>85</sup>

At the most fundamental level, any failure by a state to comply with an international legal obligation must first be examined in terms of whether the state concerned is unable to implement an obligation or if the state is decidedly unwilling to do so.

The Committee stresses, however, that<sup>86</sup>

in order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

The approach thus shifts the burden of proof to the state concerned if it claims that it was unable to meet its minimum core obligations because of resource constraints.<sup>87</sup> The Committee goes on to stipulate that<sup>88</sup>

even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.

Some of the ESCR Committee's General Comments have been emphatic about the non-derogable nature of the minimum-core rights. For example, in General Comment 14 on the right to health, the Committee stated that 'a state party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations ... which are non-derogable'.<sup>89</sup> States must take immediate steps towards the implementation of the minimum-core rights.<sup>90</sup> The minimum core concept is extremely useful for policy setting and benchmarking, and could be a powerful tool in international negotiation.<sup>91</sup>

<sup>84</sup> ESCR Committee General Comment 3 para 10.

<sup>85</sup> Leckie (n 83 above) 98.

<sup>86</sup> ESCR Committee General Comment 3 para 10.

<sup>87</sup> Russell (n 83 above) 16; W Felice 'The viability of the United Nations approach to economic and social human rights in a globalised economy' (1999) 75 *International Affairs* 563 573.

<sup>88</sup> ESCR Committee General Comment 3 para 11.

<sup>89</sup> ESCR Committee General Comment 14 para 47.

<sup>90</sup> ESCR Committee General Comment 3: The nature of states parties' obligations (UN Doc E/1991/23) para 1; Leckie (n 83 above) 81 93.

<sup>91</sup> For criticism of the use of the minimum core in other ways, see K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163; Russell (n 82 above) 16.

### 5.3 Meaning of 'progressive realisation'

ICESCR is subject to 'progressive realisation'. Article 2(1) of the Covenant provides that '[e]ach state party ... undertakes to take steps ... to the maximum of its available resources with a view to achieving progressively the full realisations of the rights in the present Covenant. The ESCR Committee has explained that progressive realisation<sup>92</sup>

should not be interpreted as removing all meaningful content from states parties' obligations. Rather, it means that states parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of [the rights].

States have *immediate* obligations to 'take steps' towards the full realisation of the ICESCR rights.<sup>93</sup> Examples of such steps might include legislation aimed at achieving a right,<sup>94</sup> or the development and implementation of 'targeted, legally consistent, and sufficiently progressive policies' aimed at the full realisation of economic and social rights.<sup>95</sup>

### 5.4 Violations approach

The 'violations approach', developed by academics, is intended to complement and improve the ESCR Committee's work in monitoring compliance with ICESCR rights by identifying specific violations.<sup>96</sup>

Chapman<sup>97</sup> identifies three types of violations: those that result from government policies and actions; those related to discrimination; and those resulting from the state's failure to fulfil minimum core obligations as identified by the ESCR Committee.<sup>98</sup> The Maastricht Guidelines<sup>99</sup> further develop the violations approach. Following the tripartite typology, they confirm that states have obligations to respect, protect and fulfil social and economic rights, and actively *violate rights* when they fail to respect, protect or take appropriate measures toward their fulfilment.<sup>100</sup> States also violate the Covenant when they fail to satisfy minimum core obligations identified by the Committee.<sup>101</sup> Violations may occur through acts of commission by states themselves, or by third parties that states fail to regulate properly.<sup>102</sup> Violations can also occur through acts of omission. Listed examples include 'failure

<sup>92</sup> ESCR Committee General Comment 14 para 31.

<sup>93</sup> ESCR Committee General Comment 3 para 1. Similar language is used in ESCR Committee General Comment 14 para 30.

<sup>94</sup> ESCR Committee General comment 3 para 3.

<sup>95</sup> Leckie (n 83 above) 93.

<sup>96</sup> Chapman (n 6 above) 23.

<sup>97</sup> Chapman was the first to set out the approach systematically.

<sup>98</sup> Chapman (n 6 above) 24.

<sup>99</sup> Maastricht Guidelines (n 6 above).

<sup>100</sup> Maastricht Guidelines (n 6 above) para 6.

<sup>101</sup> Maastricht Guidelines (n 6 above) para 9.

<sup>102</sup> Maastricht Guidelines (n 6 above) para 14(c).

to regulate the activities of individuals or groups so as to prevent them from violating economic, social and cultural rights'.<sup>103</sup> The Maastricht Guidelines stress that states' obligations to protect require them to control activities of private parties, including transnational corporations, and that states are responsible for violations of rights resulting from their failure to exercise control diligently.<sup>104</sup>

## 6 ESCR Committee's General Comment 21 on ICESCR article 15(1)(a) – the right of everyone to take part in cultural life

General Comment 21 examines article 15(1)(a) of ICESCR,<sup>105</sup> which provides: 'The state parties to the present Covenant recognise the right of everyone: (a) to take part in cultural life.'

Participation in a unique and distinct culture is a core characteristic of indigenous communities, and the General Comment on the ICESCR right to take part in cultural life is thus extremely pertinent to the problems facing indigenous communities in Africa and elsewhere.

The ESCR Committee interprets the term 'culture' as a 'broad, inclusive concept encompassing all manifestations of human existence'.<sup>106</sup> In the context of implementing article 15(1)(a), the Committee notes that culture includes such things as ways of life, languages, religion or belief systems, rites and ceremonies, methods of production or technology, natural and man-made environments, food, clothing and shelter, customs and traditions through which individuals and communities 'express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives'.<sup>107</sup> Thus, the Committee recognises that 'culture shapes and mirrors the values of well-being and the economic, social and political life of individuals ... and communities'.<sup>108</sup> The Committee also recognises the social aspect of culture and cultural participation and notes that cultural rights may be exercised by individuals or 'within a community or group'. By interpreting 'culture' in this broad and inclusive manner, the Committee's Comment acquires direct relevance for the cultural practices of indigenous communities, including their economic practices.

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<sup>103</sup> Maastricht Guidelines (n 6 above) para 15(d).

<sup>104</sup> Maastricht Guidelines (n 6 above) para 18.

<sup>105</sup> The ESCR Committee examined another part of art 15 (art 15(1)(c)) on authors' rights in its General Comment 17.

<sup>106</sup> General Comment 21 para 10.

<sup>107</sup> General Comment 21 para 13.

<sup>108</sup> As above.

The General Comment does not focus specifically on rights of indigenous peoples; the Comment focuses primarily on culture in mainstream society. However, in keeping with the contemporary practice of acknowledging and protecting human rights of indigenous populations,<sup>109</sup> the Comment has paragraphs directed particularly to problems experienced by indigenous communities.<sup>110</sup>

It appears that many of the problems currently experienced by indigenous communities could be addressed or alleviated by proper implementation of ICESCR right 15(1)(a) as interpreted in General Comment 21. In the discussion below, we focus on those parts of the Comment that appear to be most helpful in this regard.

## 6.1 Importance of cultural diversity

As discussed above, the very existence of many indigenous communities is threatened. Preservation of their cultural institutions and ways of life is essential to prevent the cultural extinction of these groups. As a guiding principle, General Comment 21 makes it clear that all ICESCR state parties have ethical and legal responsibilities to prevent this cultural extinction and to maintain cultural diversity.<sup>111</sup>

The ESCR Committee highlights the inherent importance of cultural diversity and notes that<sup>112</sup>

the protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms and requires the full implementation of cultural rights, including the right to take part in cultural life.

The link between culture, identity and human dignity has been extensively explored by political philosophers.<sup>113</sup> The denial or suppression of non-hegemonic cultural identities, or insistence that every community or individual conforms to a hegemonic national culture, is an infringement of human dignity that impacts on the very notion of 'self'.<sup>114</sup> The ESCR Committee has now highlighted the fundamental human rights violation inherent in such practices and has confirmed that ICESCR protects the right to cultural diversity.

With respect to minority groups, particularly, the Committee notes that states have a duty to 'recognise, respect and protect minority

<sup>109</sup> See United Nations (n 2 above) 194-195.

<sup>110</sup> General Comment 21 paras 36 and 37 are directed specifically to needs of indigenous peoples. Indigenous peoples are also explicitly referred to in other paragraphs (eg paras 49(d) and 50(c)).

<sup>111</sup> General Comment 21 para 40.

<sup>112</sup> As above.

<sup>113</sup> See eg C Taylor *Multiculturalism: Examining the politics of recognition* (1994).

<sup>114</sup> Taylor (n 113 above) 34 63 68; KA Appiah 'Identity, authenticity, survival: Multicultural societies and social reproduction' in *Multiculturalism: examining the politics of recognition* (1994) 155.

cultures as *an essential component of the states themselves*'.<sup>115</sup> Thus, instead of attempting to change indigenous cultural practices to conform to those of mainstream society, states must recognise the inherent value of indigenous cultures and 're-imagine' their national identities in ways that embrace the variety of distinct cultural forms found within national boundaries.<sup>116</sup>

In the past, some African governments have effectively denied the existence of 'indigenous peoples' requiring special attention and treatment – they have claimed that 'all Africans are indigenous',<sup>117</sup> thus denying that some groups require particular recognition as 'indigenous peoples'.<sup>118</sup> The General Comment reminds ICESCR member states that they have legal obligations to acknowledge and recognise the diversity of cultures within national boundaries and to respect, protect and promote minority and indigenous cultures. States must ensure that their legislation and policies respect the rights of everyone to their cultural identity and practices, particularly minorities and indigenous peoples.<sup>119</sup>

The General Comment also highlights the importance of community. The practice of culture is an inherently social activity.<sup>120</sup> With regard to indigenous peoples, the ESCR Committee calls on states to take measures to 'guarantee' that exercise of the right to take part in cultural life 'takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples'.<sup>121</sup> The Committee notes that the strong communal dimension of indigenous peoples' cultural life is 'indispensable to their existence and well-being'.<sup>122</sup> States therefore have an obligation to recognise indigenous peoples as *groups* that require protection and which have the right to practice their culture communally.<sup>123</sup> However, the Committee does not link this to politi-

<sup>115</sup> General Comment 21 para 32 (our emphasis).

<sup>116</sup> See Taylor (n 113 above) for a discussion of national identity and multiculturalism.

<sup>117</sup> African Commission Working Group Report (n 9 above) 88.

<sup>118</sup> Recently, African governments have been more accepting of the concept 'indigenous peoples'. Adoption of the African Commission Working Group Report by the African Commission was an important milestone in this regard. In 2010, Kenya changed its Constitution to recognise the existence of 'indigenous peoples' (Report by the International Work Group for Indigenous Affairs <http://www.iwgia.org/sw42636.asp> (accessed 20 February 2011)). This was in part a response to the African Commission's findings in the *Endorois* case (n 12 above).

<sup>119</sup> General Comment 21 para 49(d).

<sup>120</sup> See Taylor (n 113 above) 32, arguing that we establish our identities, and particularly our social and cultural identities through social interaction; B Kingsbury 'Claims by non-state groups in international law' (1992) 25 *Cornell International Law Journal* 481 490, discussing rights of cultural groups to 'cohesiveness'.

<sup>121</sup> General Comment 21 para 36.

<sup>122</sup> As above.

<sup>123</sup> Kingsbury (n 120 above) 490.

cal secession from the nation state. Instead, it advocates recognition, accommodation and protection within existing political borders.<sup>124</sup>

## 6.2 Negative or positive rights: Assimilation and the land issue

The ESCR Committee notes that, as formulated in ICESCR, the right to take part in cultural life 'can be characterised as a freedom'<sup>125</sup> to participate in the culture of an individual's or community's choosing.<sup>126</sup> In part, the right requires that states do not deliberately interfere with cultural practices.<sup>127</sup> ICESCR state parties violate this right if they deliberately interfere with cultural practices or attempt to destroy the culture altogether through the assimilation policies discussed above. The General Comment notes that states have legal obligations to respect the rights of indigenous peoples to their cultural identity and practices,<sup>128</sup> and explicitly mentions assimilation policies as a violation of this duty.<sup>129</sup> Indigenous communities at risk from state policies of these kinds can now point to a binding right in a widely-ratified treaty when arguing for the continuation of their cultural distinctiveness., African states that continue to adopt assimilation policies and deny the existence of indigenous peoples within their territory will be in violation of this legal obligation

However, threats to the existence of indigenous communities are created not only by deliberate assimilation policies. The most serious threats to the survival of traditional cultures are posed by loss of the lands and resources upon which these cultures depend.<sup>130</sup> The ability to exercise the 'freedom' to take part in cultural life is inextricably linked to availability of appropriate land and resources.

The right to continued access to land and other resources has been recognised as an enforceable aspect of the right to culture within the international legal system.<sup>131</sup> The ESCR Committee similarly recognises that continued access to appropriate land and resources is a crucial

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<sup>124</sup> The collective nature of indigenous peoples' rights as group rights has historically been controversial because of fears that this might lead to demands for secession. See Van Genugten (n 15 above) 44-45.

<sup>125</sup> General Comment 21 para 6.

<sup>126</sup> General Comment 21 paras 7 & 15(a).

<sup>127</sup> General Comment 21 para 6.

<sup>128</sup> General Comment 21 para 49(d).

<sup>129</sup> General Comment 21 para 49(a).

<sup>130</sup> See discussion above.

<sup>131</sup> See eg *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* Human Rights Committee Communication 167/1984 UN Doc Supp No 40 (A/45/40) 1, where the Human Rights Committee found that Canada had violated art 27 of ICCPR (the right to enjoy minority culture) by subjecting the lake to 'modern usage'. The link between the right to culture and traditional economic activities was also recognised in Communication 197/1985 *Kitok v Sweden* UNHR Committee 1987/88, where the UN Human Rights Committee held that art 27 of ICCPR was infringed where a Sami man was prohibited from practising reindeer husbandry – part of his traditional

component of the right to take part in cultural life, particularly for indigenous communities.

The Committee makes it clear that everyone has the right to 'follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions'.<sup>132</sup> Paragraph 36 of the General Comment looks particularly at indigenous peoples and emphasises that the right and freedom of indigenous peoples to practise their cultures<sup>133</sup>

includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with *respect and protection*, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to *recognise and protect* the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ...

This obligation to recognise and respect the right of indigenous peoples to their traditional lands and resources is confirmed in several other places in the General Comment. Paragraph 49(d), for example, provides that state parties must<sup>134</sup>

respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.

States must adopt 'specific measures' (such as appropriate legislation) aimed at achieving this obligation of respect.<sup>135</sup> Thus, it is clear from General Comment 21 that the right to participate in cultural life is infringed where states confiscate land occupied by indigenous groups (for example when creating nature reserves) or fundamentally change its character so that it is unsuitable for traditional cultural practices (for example, by changing grasslands into agricultural land). States must change their policies and practices if they violate this duty of respect.<sup>136</sup>

It is not only states themselves that interfere with traditional uses of indigenous peoples' lands. As noted above, the activities of commercial

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culture. See also Kingsbury (n 120 above) 490 and M Scheinin 'The right to enjoy a distinct culture: indigenous groups and competing uses of land' in TS Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 165. Indigenous peoples' rights to traditional lands are also recognised in ILO Convention 169, arts 5 and 31 and in the United Nations Declaration on the Rights of Indigenous Peoples, arts 11-13.

<sup>132</sup> General Comment 21 para 15(b).

<sup>133</sup> General Comment 21 para 36 (our emphasis and citations omitted).

<sup>134</sup> General Comment 21 para 49(d).

<sup>135</sup> General Comment 21 para 49.

<sup>136</sup> This emerges primarily from General Comment 21 para 49.

companies (some of them foreign) have had an extremely detrimental impact on access to traditional lands and resources.<sup>137</sup> The General Comment makes it clear that member states also have an obligation to *protect* the right to culture against infringement by third parties,<sup>138</sup> including ‘private or transnational enterprises and corporations’.<sup>139</sup> The obligation to protect from third party interference applies to the activities listed in paragraph 49.<sup>140</sup>

In addition, paragraph 50(c) specifically notes that states have a duty to protect indigenous peoples ‘from illegal or unjust exploitation of their lands, territories and resources by state entities *or* private or transnational enterprises and corporations’.<sup>141</sup> Thus, state parties have a positive obligation to *protect* indigenous peoples’ lands and resources from the activities of third parties, such as logging, mining, and large-scale commercial agriculture.

Some human rights scholars have suggested that, where the continuation of a particular culture is dependent on the availability of traditional land and resources, there might be a *positive* obligation on states to *provide* the necessary resources. This applies particularly to land traditionally owned by indigenous groups which has been lost to outsiders or appropriated by the state.<sup>142</sup>

The ESCR Committee recognises that the ‘right to take part in cultural life’ cannot be understood solely in negative terms. The right also has a very important positive component, giving rise to state obligations to ensure the ‘preconditions for participation’ and to ensure the ‘promotion of cultural life, and access to and preservation of cultural goods’.<sup>143</sup>

In General Comment 21, the Committee identifies many positive steps that are required to ensure *respect and protection* of the right to culture. Many of these positive steps take the form of adopting appropriate policies to safeguard and protect resources already in possession of indigenous and other groups.<sup>144</sup> In some parts of the Comment, the Committee goes further and suggests that states also have positive duties to *provide resources*. For example, paragraph 52(c) clearly

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<sup>137</sup> See examples discussed above.

<sup>138</sup> General Comment 21 para 50.

<sup>139</sup> General Comment 21 para 50(c).

<sup>140</sup> General Comment 21 para 50.

<sup>141</sup> General Comment 51 para 50(c).

<sup>142</sup> For discussions on the possibility of positive duties to provide land and other resources in this context, see Lehmann (n 48 above) 116. See also *Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC), where Sachs J considers the possibility of positive duties where a community’s ‘survival as a distinct cultural group can be said to be in peril’ but declines to reach a definite conclusion (para 69).

<sup>143</sup> General Comment 21 para 6.

<sup>144</sup> These policy-related steps are discussed below.

identifies state obligations to provide financial assistance to artists and others engaged in similar cultural activities.<sup>145</sup>

However, the General Comment does not have a similarly strongly-worded and unambiguous paragraph requiring states *to provide* (or *return*) *land* and other resources that indigenous peoples require to participate in their traditional ways of life. Paragraph 54 reads:<sup>146</sup>

States parties must *provide all that is necessary* for the fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons beyond their control, to realise this right for themselves with the means at their disposal ...

Despite the wide and inclusive wording of paragraph 54, this paragraph can probably not be interpreted to imply that states have positive obligations to provide the land that might be necessary for indigenous communities to practice their traditional culture. The ESCR Committee lists four examples of positive state activity in sub-paragraphs 54(a) to 54(d), but does not refer to the provision of land. Instead, paragraph 54(a) requires 'enactment of appropriate legislation and the establishment of effective mechanisms' to ensure that peoples can participate in decision making, protect their right to take part in cultural life and claim and receive compensation if their rights have been violated.<sup>147</sup> Paragraph 54(b) concerns the preservation of cultural heritage; paragraph 54(c) concerns cultural education and paragraph 54(d) concerns access to existing libraries, museums and cinemas. Thus, in the context of paragraph 54, 'state provision' takes the form of adopting appropriate policies and establishing appropriate machinery rather than providing the resources themselves.

The General Comment focuses specifically on the traditional lands of indigenous groups in paragraph 36 and states that where indigenous groups have lost their traditional lands and resources without their voluntary and informed consent, states should 'take steps to return these lands and resources'.<sup>148</sup> It is not clear what 'take steps' means in this context, and the Committee does not discuss the return of lost lands elsewhere in the General Comment. As worded in paragraph 36, 'take steps' could imply that the state itself must return lands lost through direct state appropriation. However, 'take steps' could also be interpreted to mean that states should promulgate appropriate legislation or establish appropriate machinery to investigate land loss and facilitate its return. This interpretation would be consistent with the apparent meaning of paragraph 54.

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<sup>145</sup> General Comment 21 para 52(c).

<sup>146</sup> General Comment 21 para 54 (our emphasis).

<sup>147</sup> General Comment 21 para 54(a).

<sup>148</sup> General Comment 21 para 36.

Usually, the ESCR Committee's General Comments are strongly worded, and positive state duties are set out clearly and unambiguously.<sup>149</sup> General Comment 21 uses clear and unambiguous language in many places, but seems to stop short of identifying positive obligations for states to return or provide land and resources which indigenous people require for the continuation of their traditional ways of life.

### 6.3 Non-discrimination

As noted above, many indigenous communities face discrimination in their nation states, specifically because of their cultural difference. Frequently, indigenous cultures have been labelled inferior, primitive or even barbaric by mainstream society.

The ESCR Committee makes it clear that ICESCR forbids discrimination on a wide range of grounds,<sup>150</sup> and stresses that 'no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or groups, or to practice or not to practise a particular cultural activity',<sup>151</sup> and no one shall be excluded from cultural goods and practices.<sup>152</sup> States may not discriminate against anyone on the basis of their cultural group or identity.<sup>153</sup>

Throughout its existence, the ESCR Committee has shown particular preoccupation with discrimination. This was the direct focus of General Comment 20,<sup>154</sup> and most other General Comments have paragraphs focused particularly on discrimination. The duty of states to avoid and prevent unfair discrimination is a non-derogable core obligation in terms of all ICESCR rights.

The General Comments identify non-discrimination as a non-derogable minimum core right in terms of the right to take part in cultural life.<sup>155</sup> It points out that this can be achieved fairly easily by adopting appropriate legislation (if necessary) and through publicity.<sup>156</sup> As in all General Comments, the ESCR Committee emphasises the rights and needs of 'the most disadvantaged and marginalised individuals and groups' and suggests that even where states face severe resource constraints, these sectors can be protected by adopting appropriate and

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<sup>149</sup> Eg General Comment 14: The right to the highest attainable standard of health (art 12) (UN Doc E/C.12/2000/4), where the Committee unambiguously lists actual provision of essential medicines as a 'minimum core' obligation from which no derogation is permitted (para 43(d)).

<sup>150</sup> Arts 2(3) & 3 ICESCR. See General Comment 21 para 21.

<sup>151</sup> General Comment 21 para 22.

<sup>152</sup> General Comment 21 para 22.

<sup>153</sup> General Comment 21 para 49(a).

<sup>154</sup> General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (UN Doc E/C.12/GC20).

<sup>155</sup> General Comment 21 para 55.

<sup>156</sup> General Comment 21 para 23.

relative low-cost programmes. In particular, the Committee emphasises that<sup>157</sup>

a first and important step towards the elimination of discrimination, whether direct or indirect, is for states to *recognise the existence of diverse cultural identities* for individuals and communities on their territories.

It is well-established in political and juridical thinking that apparently 'neutral' laws and policies might have differing impacts for different groups of people and that 'equality' and 'non-discrimination' are sometimes best achieved by treating people differently rather than treating everyone in exactly the same way.<sup>158</sup> The Committee's comments are consistent with the understanding that 'non-discrimination' might sometimes require that members of cultural minority groups might require different and special treatment. For example, in its discussion on 'appropriateness',<sup>159</sup> the Committee notes that provision of state services such as health, water, housing and education may impact on cultural diversity and urges states to respect the diversity of cultural practices when providing such services so that they are culturally appropriate for the intended recipients.<sup>160</sup>

#### 6.4 Political marginalisation

Marginalisation is a core characteristic for the identification of indigenous communities. General Comment 21 identifies positive state duties aimed at reducing the marginalisation experienced by indigenous communities, who are often excluded from decision making that affects their rights to take part in and maintain their culture. States must enact appropriate legislation and establish the required machinery to ensure that communities can participate effectively in decision making, 'claim protection of their right to take part in cultural life, and claim and receive compensation if their rights have been violated'.<sup>161</sup>

<sup>157</sup> As above (our emphasis).

<sup>158</sup> Frequently-cited pioneering works arguing for special and different treatment that accommodates distinct cultures and ways of life include Taylor (n 113 above); and W Kymlicka *Multicultural citizenship: A liberal theory of minority rights* (1995). For useful recent examinations of substantive versus formal equality, see contributions to (2007) 23 *South African Journal on Human Rights*.

<sup>159</sup> General Comment 21 para 16(e).

<sup>160</sup> Examples of culturally-inappropriate services are boarding schools provided to San children in Botswana. Parents complained that after attending these schools, children become 'children of the government' (African Commission Working Group Report (n 9 above) 55).

<sup>161</sup> General Comment 21 para 54(a).

## 6.5 State action required

### 6.5.1 Meaning of progressive realisation

The ESCR Committee is always mindful of the ‘progressive realisation clause’<sup>162</sup> and its potential as an ‘opt-out’ provision for states wishing to avoid their treaty commitments. In this regard, General Comment 21 reminds states that the progressive realisation clause does indeed impose specific duties upon states, and that they have an immediate obligation to ‘take deliberate and concrete measures aimed at the full implementation of the right’.<sup>163</sup>

In particular, states must ensure that the right is exercised without discrimination.<sup>164</sup> States must not deliberately interfere with cultural groups or obstruct them from engaging in cultural practices of their choice.<sup>165</sup> Regressive measures are not permitted, and any state taking such measures will have to justify its actions by showing that they had been carefully considered and were justified in the circumstances.<sup>166</sup>

### 6.5.2 State obligations to respect, protect and fulfil the right

The General Comment then looks at the specific duties within the tripartite typology: state duties to respect, protect and fulfil the right to culture.

The *duty of respect* is primarily negative: States have an obligation not to interfere with the enjoyment of the right to take part in cultural life either directly or indirectly.<sup>167</sup> Where necessary,<sup>168</sup> states must take positive steps to ensure that legislation and policies do not violate the obligations of respect discussed above,<sup>169</sup> for example by discriminating against people based on their cultural group,<sup>170</sup> by forced assimilation,<sup>171</sup> by interference with their use or possession of traditional lands,<sup>172</sup> or by economic development and environmental programmes which impact negatively on the cultural heritage of indigenous groups.<sup>173</sup>

As noted above, states also have positive obligations to *protect* indigenous communities from harmful activities of private third parties.

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<sup>162</sup> Art 2(1).

<sup>163</sup> General Comment 21 para 45.

<sup>164</sup> General Comment 21 para 44.

<sup>165</sup> As above.

<sup>166</sup> General Comment 21 para 46.

<sup>167</sup> General Comment 21 para 48.

<sup>168</sup> Eg, if current legislation or policy violates the obligation of respect.

<sup>169</sup> General Comment 21 para 49.

<sup>170</sup> General Comment 21 para 49(a).

<sup>171</sup> As above.

<sup>172</sup> General Comment 21 para 49(d).

<sup>173</sup> General Comment 21 para 50(b).

Thus, states must take ‘positive measures’<sup>174</sup> (including legislation) to protect indigenous communities from commercial companies, and must particularly take steps to protect indigenous communities’ lands and resources.<sup>175</sup>

Another aspect of the duty to protect is the protection of people practising particular cultures or religions from ‘national, racial or religious hatred’ or discrimination of other kinds.<sup>176</sup> States have positive obligations to promulgate and enforce legislation prohibiting such activities.<sup>177</sup>

The duty to fulfil involves direct state action to ‘facilitate, promote and provide’.<sup>178</sup> This includes state obligations to take appropriate financial measures directed at the realisation of the right.<sup>179</sup> Positive action required by states includes the adoption of appropriate policies for the protection and promotion of cultural diversity,<sup>180</sup> and the adoption of policies specifically geared towards enabling peoples from all cultural communities to ‘engage freely and without discrimination in their own cultural practices ... and choose freely their own way of life’.<sup>181</sup> In this regard, states must take appropriate measures to create conditions that are ‘conducive to a constructive intercultural relationship’ between various cultural communities ‘based on mutual respect, understanding and tolerance’.<sup>182</sup> This should include publicity campaigns aimed at elimination of ‘any form of prejudice against individuals or communities, based on their cultural identity’.<sup>183</sup>

States should actively promote the exercise of the right of association for cultural and linguistic minorities.<sup>184</sup> States must take ‘appropriate measures’ to support minority and other communities in efforts to preserve their culture<sup>185</sup> and states themselves have a responsibility to initiate programmes ‘aimed at preserving and restoring cultural heritage’.<sup>186</sup> States also have an obligation to ‘provide all that is necessary’ for the fulfilment of the right to take part in cultural life where communities do not have the necessary means to realise this right.<sup>187</sup>

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<sup>174</sup> General Comment 21 para 50.

<sup>175</sup> General Comment 21 para 50(c).

<sup>176</sup> General Comment 21 para 50(d).

<sup>177</sup> As above.

<sup>178</sup> General Comment 21 para 51.

<sup>179</sup> General Comment 21 para 52.

<sup>180</sup> General Comment 21 para 52(a).

<sup>181</sup> General Comment 21 para 52(b).

<sup>182</sup> General Comment 21 para 52(h).

<sup>183</sup> General Comment 21 para 52(i).

<sup>184</sup> General Comment 21 para 52(c).

<sup>185</sup> General Comment 21 para 52(f).

<sup>186</sup> General Comment 21 para 54(b).

<sup>187</sup> General Comment 21 para 54 (noting that the lack of means must be beyond the control of the community concerned).

### 6.5.3 Minimum core obligations

The Committee identifies five non-derogable minimum core obligations on states aimed at creating and promoting an environment within which communities can participate in the culture of their choice.<sup>188</sup> These minimum core obligations are linked to the more general obligations outlined in the Comment as a whole. They include passing legislation and taking any other necessary steps to guarantee non-discrimination in enjoyment of the right to take part in cultural life,<sup>189</sup> respecting the right of everyone to identify with the community of their choice (and change this choice),<sup>190</sup> respecting and promoting the right of everyone to engage in their own cultural practices,<sup>191</sup> and eliminating 'any barriers or obstacles that inhibit or restrict' a person's access to his or her own culture without discrimination. The final minimum core obligation is specifically focused on indigenous communities and other minority groups, and is directed at ameliorating their political marginalisation: States must permit and encourage minority and indigenous groups to participate in the 'design and implementation of laws and policies that affect them'.<sup>192</sup> Very importantly, states must obtain free and informed prior consent from these communities 'when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk'.<sup>193</sup>

Using its typically uncompromising terminology, the General Comment has a section identifying violations of the right. States will violate their treaty commitments if they do not take the appropriate measures to 'ensure respect for cultural freedoms' or if they fail to take necessary steps 'towards the full realisation of the right within their maximum available resources'.<sup>194</sup> In particular, states must show that they have guaranteed non-discrimination in the exercise of the right.<sup>195</sup>

## 7 Conclusion

Some ESCR Committee General Comments have been worded very strongly and have clearly spelt out minimum obligations with which state parties must immediately comply if they wish to avoid violating their treaty commitments.<sup>196</sup> General Comment 21 seems to stop

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<sup>188</sup> General Comment 21 para 55.

<sup>189</sup> General Comment 21 para 55(a).

<sup>190</sup> General Comment 21 para 55(b).

<sup>191</sup> General Comment 21 para 55(c).

<sup>192</sup> General Comment 21 para 55(e).

<sup>193</sup> As above.

<sup>194</sup> General Comment 21 para 60.

<sup>195</sup> As above.

<sup>196</sup> Eg, General Comment 14 on the right to essential medicines, which identifies immediate, non-derogable obligations to provide essential medicines.

short of requiring states to provide what indigenous communities require most in order to practise their culture: It does not explicitly state that states have a positive duty to *provide land and resources* for this purpose. However, General Comment 21 clarifies other aspects of article 15(1)(a) that create binding rights that are directly useful to indigenous groups in Africa.<sup>197</sup>

States have binding obligations to recognise the existence of indigenous communities and to respect these communities and their cultural practices. States may not practise deliberate assimilation policies. Neither may they do this indirectly by requiring indigenous communities to adopt mainstream economic practices or participate in the mainstream education system. States must take positive steps to prevent discrimination against indigenous communities, whether by state agencies or by other private parties. States must respect the undisturbed possession and use of lands presently occupied by indigenous communities and essential for the practice of their culture. States must also protect this undisturbed possession and use from third party interference, especially by commercial companies. Where indigenous communities have already lost their lands, states must create appropriate machinery and formulate appropriate policies (including legislation if necessary) through which indigenous communities can apply for the return of their lands or for compensation. States must take steps to ameliorate the marginalisation of indigenous communities and, where necessary, must ensure that state services and infrastructure (including education and health services) are accessible to indigenous communities and provided in culturally-appropriate forms. States must also establish policies and machinery to ensure meaningful participation by indigenous communities in political processes that affect them. However, the General Comment stops short of advocating secession or a right to self-determination.

Having highlighted states' obligations, and the rights that accrue to indigenous peoples under article 15(1)(a) of ICESCR, what remains to be seen is the practical impact that General Comment 21 will have on the policies and practices of African states. Could it serve as an important tool for indigenous communities in Africa who wish to hold states to the obligations identified by the ESCR Committee? ICESCR has no formal complaints mechanisms for individuals or groups whose rights have been violated, and the supervision of state compliance with ICE-SCR obligations relies on ESCR Committee reports.<sup>198</sup>

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<sup>197</sup> However, the General Comment stops short of advocating secession or a right to self-determination.

<sup>198</sup> Sepúlveda (n 65 above) 88.

Under such circumstances, the practical political significance of human rights obligations sometimes seems doubtful.<sup>199</sup> Human rights documents are not necessarily a panacea that immediately solves the problems of those whose rights have been violated. However, the clear identification and specification of human rights obligations are useful for consciousness raising and mobilisation;<sup>200</sup> it assists with the 'internalisation' of human rights norms both by states and by members of society;<sup>201</sup> it gives affected groups a legal 'vocabulary' with which to articulate specific claims;<sup>202</sup> and provides states with the basis for positive agendas when formulating policy.<sup>203</sup> Empirically, most democratic states try to abide by their human rights obligations.<sup>204</sup>

Seen in this light, General Comment 21 provides a useful blueprint for the respect and protection of indigenous rights and the adoption of policies appropriate to the needs of indigenous peoples. In addition, General Comment 21 could provide useful clarification of indigenous rights when interpreting other human rights documents, such as the African Charter. The African Charter expressly permits the use of UN human rights documents in its interpretation,<sup>205</sup> and the African Commission on Human and Peoples' Rights has already referred to the Declaration on Indigenous Rights when adjudicating land claims by indigenous groups.<sup>206</sup> The clear and practical steps required by states as set out in General Comment 21 might be useful for groups who claim violations of their rights to culture and for the African Commission when deciding such disputes.

<sup>199</sup> Goldsmith & Posner, eg, argue that human rights treaties have had virtually no impact on state behaviour. JL Goldsmith & EA Posner *The limits of international law* (2005) 111-112.

<sup>200</sup> D Cassel 'Does international human rights law make a difference?' (2001) 2 *Chicago Journal of International Law* 121 124; I Cotler 'Human rights as the modern tool of revolution' in KE Mahoney & P Mahoney (eds) *Human rights in the twenty-first century: A global perspective* (1993) 15; Hunt (n 64 above) 146-147; V Gauri 'Social rights and economics: Claims to health care and education in developing countries' in P Alston & M Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 83.

<sup>201</sup> See H Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599 2655, discussing how norms acquire their 'stickiness'; and M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organisation* 887 917, discussing norm internalisation.

<sup>202</sup> N Stammers 'Social movements and the social construction of human rights' (1999) 21 *Human Rights Quarterly* 980 986-987; N Gordon & N Berkovitch 'Human rights discourse in domestic settings: How does it emerge?' (2007) 55 *Political Studies* 243 244.

<sup>203</sup> M Robinson 'What rights can add to good development practice' in Alston & Robinson (n 200 above) 33.

<sup>204</sup> See generally Cassel (n 200 above); Koh (n 201 above); A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organisation* 175.

<sup>205</sup> Art 60.

<sup>206</sup> *Endorois* case (n 12 above).