MASTER'S THESIS IN PUBLIC INTERNATIONAL LAW

Johanna Ekebom

No Winners Without Losers?

Indigenous and Non-Indigenous Communities on the Hunt for Cultural Rights in a Time of Limited Wildlife Resources

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Supervisor: Elina
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Abstract:
Hunting is an important cultural practice for many, including for indigenous as well as non-indigenous individuals. However, when resources are limited, the enjoyment of such a cultural practice may suffer. In order to follow the obligations arising from human rights law as well as obligations related to wildlife protection, states are often walking a tight-rope in order to ensure everyone's right to culture.

Hunting falls within the scope of what several human rights instruments consider to be culture, including the two international Covenants, the International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural Rights. In addition to human rights, culture and cultural rights are taken into account in several areas of international law. For example, hunting and fishing traditions are safeguarded in the context of the work of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and several agreements aiming to protect wildlife.

States which are parties to the two International Covenants, should, first and foremost, avoid interfering with and hindering the individual's right to cultural life. State Parties should also ensure a satisfactory standard of participation in cultural life for all. Nevertheless, temporarily restricting hunting due to lack of resources may be justified, provided that the state ensures a satisfactory standard of participation in cultural life for all. A satisfactory standard includes, inter alia, the right of everyone to an acceptable minimum standard of living.

Considering hunting as a part of indigenous way of life, the right to livelihood of indigenous peoples should not be denied when taking measures to protect wildlife. Furthermore, with regards to indigenous peoples, the principle of free, prior, and informed consent should be respected.

On a regional European level, the thesis analyses the European Convention on Human Rights (ECHR) and how its provisions correspond with the right to culture. In order to achieve this, the right to culture is examined through a dynamic interpretation of the ECHR. The ECHR and the reasoning made by the European Court of Human Rights also lends itself as a tool in order to analyse differential treatment, in which individuals from one group of the population are allowed to hunt before the other.

Depending on the status and group belonging of the rights holder, the right to culture may differ. Indigenous peoples' cultural rights are often collective, whereas the cultural rights of non-indigenous peoples are individual rights whose realisation may depend on the collective. However, as is concluded in the thesis, it is not the collective nature of indigenous peoples' cultural rights that sometimes leads to prioritising their rights of indigenous peoples over those who are non-indigenous. In order to achieve true equality, there may be a need for differential treatment. Indigenous culture is often at a disadvantage compared to the majority culture. Indigenous peoples' traditions are also often linked to their identity and, ultimately, survival. Therefore, special treatment may be justified in order to ensure the survival of indigenous peoples and to achieve true equality.

In protecting biodiversity, states should take cultural rights into account. In particular, the rights of indigenous peoples, who often have a deep connection to practices regarding nature and the use of natural resources, shall be respected.

As long as resources are scarce, states will struggle to prioritise the rights of one group over another, which can lead to one group feeling like the loser. What is certain, however, is that if biodiversity is not protected and species disappear altogether, *everyone* loses.

Keywords:
Right to culture, cultural rights, cultural heritage, indigenous peoples' rights, wildlife protection, conservation, hunting and fishing.

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Abbreviations and Acronyms

ACHM	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples Rights
ACtHPR	African Court on Human and Peoples' Rights
Bern Convention	Convention on the Conservation of European Wildlife and Natural Habitats
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Faro Convention	2005 Framework Convention on the Value of Cultural Heritage for Society, otherwise known as the Faro Convention
FCNM	Framework Convention for the Protection of National Minorities
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International human rights law
ILO 169	International Labour Organization's Indigenous and Tribal Peoples Convention from 189
UDCD	Universal Declaration on Cultural Diversity

UDHR	United Nations Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	Word Intellectual Property Organization
2003 UNESCO Convention	2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

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1. Introduction

1.1. Culture and Wildlife Conservation

"I have fished salmon as long as I can remember with my father and I have learned more from it than I can explain about subsistence, nature, language, culture."[1]

These are the words of Álsat Holmberg, the vice-president of the Sámi Council. In 2017, Holmberg posted a video on his Facebook where he aimed criticism at the Governments of Finland and Norway. Just days after the video was posted, Finland and Norway entered an agreement regarding fishing in the Tana River. The Tana River is a body of water bordering the northern parts of Norway and Finland and is traditionally inhabited by the indigenous peoples, the Sámi. Besides the Sámi, the local non-indigenous population and tourists are frequent visitors to the river; all of them fishing for its wild salmon.

In an effort to slow down the rapid decline of the salmon population in the Tana River, the two Governments entered an agreement, limiting the fishing of salmon in the area by establishing catch quotas as well as creating regulations on who can obtain a fishing licence, and by restricting specific fishing methods. Perhaps not surprisingly, the agreement brought criticism from both the indigenous and the non-indigenous communities. The indigenous community claims that the agreement infringes on their rights, including their right to culture and self-determination. The local, non-indigenous community, were also negatively affected and disappointed by the limitations the agreement created, having to face restrictions to a beloved leisure activity.

In the case of the Tana River, there is no doubt that the salmon population is under threat and that actions are needed in order to restore the population to more sustainable levels. In the summer of 2021, the salmon population was under such existential pressure that Finland and Norway agreed on a temporary ban on fishing salmon in the river. The Ministry of Agriculture and Forestry in Finland concluded in its reasoning that the temporary ban was in accordance

[1] Fanny Malinen and Steve Rushton, "The EU's Last Indigenous Peoples Fight for Self-Determination" (*Equal Times*, 15 November 2017) <https://www.equaltimes.org/the-eu-s-last-indigenous-peoples?lang=en#.YjN42hDMJpT> accessed 25 April 2022.

with the Sámi peoples' right to culture. Due to the importance fishing has to the culture of the indigenous population, the Ministry noted that it is vital to consider if a temporary ban is more damaging than worse fishing opportunities in the future.[2]

The potential interference that environmental and wildlife conservation efforts may have on indigenous culture is becoming a more prevalent issue. Much of wildlife is declining due to habitat destruction, pollution, climate change, invasive species, and overexploitation through hunting and fishing. The loss of biodiversity subsequently pushes states to take more pervasive actions.[3] Conservation efforts are not intended as tools meant to limit indigenous peoples' rights. However, its unintended consequences may be detrimental to the realisation of indigenous peoples' human rights. This begs the question: When faced with limited resources, in this case, wildlife, is it possible to protect biodiversity while respecting both indigenous peoples' and non-indigenous, local individuals' rights?

In order to fulfil national or international biodiversity conservation goals and targets, states are often tasked with making difficult decisions: Creating rules and regulations while weighing several interests against each other. Who should have the right to hunt and fish, and who should not? Under what premises should hunting and fishing be allowed? What methods can be used, and should exceptions be made? In the end, there are several different outcomes and most, if not all of them, will leave somebody or something hurting. The inclusion of someone may mean the exclusion of another. Unlimited access to wildlife hurts wildlife. Limited access to wildlife hurts cultural rights. Paying no regard to indigenous peoples' status and rights hurts indigenous peoples. Excluding non-indigenous individuals from accessing wildlife hurts non-indigenous individuals. In order to have winners, do you have to have losers?

1.2. Research Question, Delimitations, and Structure

[2] "Förbud mot laxfisket i Tana älvs vattendrag föreslås för fiskesäsongen 2021 – Möjligheten att fiska andra fiskar utökas" (*The Finnish Government*, 7 April 2021) <https://valtioneuvosto.fi/sv/-//1410837/forbud-mot-laxfiske-i-tana-alvs-vattendrag-foreslas-for-fiskesasongen-2021-mojligheterna-att-fiska-andra-fiskar-utokas> accessed 25 April 2022.
[3] "The Five Main Drivers of Wildlife Decline" (*The National Caucus of Environmental Legislators*, 21 May 2021) <https://www.ncelenviro.org/resources/the-five-main-drivers-of-wildlife-decline-infographic/> accessed 25 April 2022.

For states to protect wildlife, limitations and sometimes even bans may be put in place. Nevertheless, limitations and bans will affect parts of the State's population. In this regard, this thesis aims to analyse how national wildlife preservation efforts interact with the right to culture and cultural life under international law, focusing primarily on its realisation through human rights law. In this thesis, hunting and fishing as a part of what constitutes as "culture" under public international law will be examined, as well as the different legal protection such a cultural practice has for indigenous versus non-indigenous individuals and communities. To this end, this thesis aims to answer the following questions:

1. Juxtaposing wildlife conservation efforts with cultural rights, how do the two interact with each other? According to current international law, what priority are cultural rights given when dealing with interest of conserving and protecting wildlife?

2. In what way does the right to cultural life of the non-indigenous individual interact with the collective cultural right of indigenous peoples when resources essential for the cultural practice are limited?

The thesis is divided into six chapters. In the second chapter of the thesis, hunting and fishing as a part of what constitutes as "culture" under international law will be discussed. In order to gain a better understanding of the concept of culture and, therefore, cultural right, "culture" as a complex and multifaceted concept within international law, will be examined. So will also tradition and heritage, which, in this case, is closely related to the cultural practice of hunting and fishing. Furthermore, as cultural rights are not only contained to human rights instruments, but have also been included in agreements which relates to the use of natural resources and the environment, the ways in which environmental law has been "culturalized" will also be analysed.

The third chapter introduces the analysis of a fictional case and its potential outcomes, which will be further introduced in the upcoming chapter on method and material. In the third chapter, everyone's right to cultural life, regardless of the status of the rights-holder will be analysed. Moreover, looking at the right to cultural life being subject to limitations due to wildlife protection.

The fourth chapter delves into indigenous peoples right to culture. Similarly to chapter three, chapter four will be examining indigenous peoples right to culture and it being subject to limitations due to wildlife protection. In this chapter, special attention will be given to the indigenous peoples claim of self-determination, how it correlates with cultural rights, and the ways in which wildlife protection relates to these rights.

Lastly, before coming to the conclusions, chapter five will analyse how individuals' right to cultural life interact with the collective right to culture of indigenous peoples when contrasted against each other.

While the thesis will touch upon international law which addresses “culture”, including those instruments produced by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the main focus will be on the human rights law aspect of culture and how questions of wildlife protection and cultural rights are addressed within different human rights instruments. In addition to this, while culture and cultural rights relate to several provisions under human rights law, due to limitations, culture will mainly be analysed through its realisation under the two international Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) as well as through the European Convention on Human Rights (ECHR).[4]

As will be presented in the chapter on method and material, a in order to answer the research questions posed, a fictional case will be analysed. The fictional case centres on the State of Finland. Therefore, the instruments analysed will also, mainly, centre those of which Finland have signed on in agreement with and are a State Party to. With this in mind, it must be noted that Finland is also a part of the European Union, which may influence how hunting and fishing, as cultural practices, are approached when considering limited resources and protecting wildlife. While particular attention should be given to the developments under the European Union regarding protecting cultural rights through its legal system and cultural policies, such analysis will be left out of this thesis due to limitations. Nevertheless, it should be noted that

[4] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), and European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR).

the ECHR, which will be analysed in this thesis, and the European Union's Charter of Fundamental Rights hold many similarities, as the provisions under the European Convention on Human Rights have been used as a basis for the EU Charter. As translated into the EU Charter, the norms under the ECHR are therefore given binding legal status under the Lisbon Treaty.[5] The author of the thesis recognises the importance of the European Union with regard to protecting and promoting culture and cultural rights and believes that further analysis of the questions posed in this thesis, from an EU perspective, would act as a great continuation and supplement to this thesis.

Due to the limitations, this thesis shall not be considered an exhaustive or conclusive analysis of how hunting and fishing, as a part of culture, are regarded and approached under international law. Culture and practices such as hunting and fishing can be addressed and protected through several legal pathways, including human rights law, heritage law, intellectual property law, and environmental law. All of these pathways may approach the question posed in this thesis differently, leading to different conclusions.

1.3. Method and Material

Analysing the right to culture, cultural life, in a time of limited resources, a legal dogmatic research method will be applied, in which current legal norms are being systematically analysed and interpreted. In this thesis, primary and secondary sources of international law will be examined, interpreted, and analysed.[6]

This thesis' analysis mainly centres current human rights standards. In regards to analysing the right to culture, as it is protected within international human rights law, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights will be some of the most important primary law used in this thesis' analysis.[7] Furthermore, in principle regarded as international law,[8] the European Convention on Human Rights will also play the most important part in analysing the right to culture in Europe.[9]

[5] Ana Vrdoljka (ed), *The Cultural Dimensions of Human Rights* (Oxford Scholarship Online 2014) 161.
[6] See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.
[7] ICCPR and ICESCR.
[8] Jan Wouters and Michal Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press, 2021) 212-213.
[9] ECHR.

In addition to the human rights treaties mentioned, other instrument that touch upon the human right to culture will be referenced and included in the analysis, including those instruments relating to the protection on cultural heritage. Furthermore, primary sources regulating wildlife will also be included, examining the relationship between human rights and wildlife protection.

Lastly, with regards to the material used, this thesis will also make use of secondary sources of international law, referencing judicial decisions and the teachings of the most highly qualified publicists of the various nations.[10] Sources such as declarations and resolutions, general comments made by treaty monitoring bodies, guidelines, reports, and various documents concluded by established and qualified institutions will also be included in the analysis.

In order to support the research method chosen, a fictional scenario is created and analysed. While the fictional case takes some of its inspiration from issues that have been brought up before regarding cultural rights and wildlife preservation, the case is entirely fictional. Indeed, it should be noted that the fictional case speaks of an indigenous population. In Finland, the only recognised indigenous peoples are that of the Sámi. However, in this case, the indigenous peoples are not the Sámi, but rather a fictional group.

The fictional case presents three potential outcomes when the state of Finland is trying to protect wildlife while also ensuring the cultural rights of those within its territory. The fictional case goes as follows:

Both an indigenous and non-indigenous community inhabits a geographical area within the State of Finland. In this area, the hunt of a particular migratory bird has been limited due to the number of birds being rapidly declining. Hunting the bird is a common practice among both indigenous peoples and non-indigenous individuals and is considered an important part of the local culture. While the hunting and the use of the bird is considered a part of local heritage, the hunt is argued to be of specific importance to the indigenous peoples who have a long tradition of hunting the bird. The indigenous peoples in the area claim that they have, for

[10] See Vienna Convention on the Law of Treaties, art 31(d).

generations, been relying on said species and that the hunt and the use of the bird forms an important part of their right to subsistence.

Furthermore, the indigenous people claim to have a deep connection to their traditional lands and resources, including the species discussed. Therefore, they claim that any limitation of hunting the bird is infringing on their rights, specifically their cultural rights and right to self-determination. On the other hand, the local, non-indigenous persons also claim that the hunting of the bird forms a part of their culture and that limitations to the hunt may infringe on their right to partake in their own cultural life.

Those persons who are not part of the indigenous community also argue that the hunt and use of the species constitutes an important part of their cultural heritage. While not claiming that the hunt is a part of their right to subsistence, the local non-indigenous community claims that the hunt holds cultural importance for the community. The act of hunting is not only a common practice among those living in the area, but it also serves a part of what they claim is local identity connected to local history and tradition.

Today, the bird is hunted by both indigenous and non-indigenous individuals using both traditional and more modern techniques.

In this case, the State of Finland considers three different options while protecting the bird population:

a) *Due to the current status of the species, the State concludes that there is a need for banning bird-hunting for all. The ban will only be lifted after reassessing the bird population's status.*
b) *The State decides that some parts of the hunt may be permissible, adding strict hunting restrictions for how many birds may be caught in the area and which methods may be used. The limitation applies to all persons living in the area.*
c) *The hunt is restricted/banned for those a part of the local, non-indigenous population, while the indigenous are given exceptions to the restriction/ban. The State argues that such an exception is based on the hunt constituting a part of indigenous peoples' identity and right to culture.*

Examining and discussing the three potential options taken by the State, the limitations of natural resources and how such limitations interact with norms related to the human right to culture will be an analysed. Furthermore, through considering the three different options posed in the fictional case, current human rights standards, as it relates to both indigenous and non-indigenous individuals right to culture, will be examined.

By creating and analysing a fictional scenario, the author aims to create a tool which aims to scale the research and the research questions down to their very core. Taking inspiration from real-life issues and cases but not analysing a specific case, the method of approaching the analysis through a fictional case allows the author to pose and answer the research questions without having to take into consideration the often very complex details of real-life cases. Indeed, while the author has chosen to uses a method of analysing a fictional case, with the intention of this serving as a useful tool analysing and interpreting sources of law, she, nevertheless, realises the complex issues surrounding, especially, indigenous peoples' rights and that there are several cases in which one could analyse the right to culture.

The three options presented in the fictional case will be discussed throughout the thesis, corresponding to different chapters within the thesis. An analysis of option A and B will be introduced in chapter three, where everyone's right to cultural life is examined. The same options will also be included in chapter four, which analyses hunting as a part of culture and way of life for indigenous peoples. Option C, the option in which indigenous peoples are given an exception to the hunting ban/restriction, will be analysed in chapter five, addressing differential treatment and the prioritisation of one person/group's right before another.

2. Hunting and Fishing as a Part of "Culture" and "Cultural Identity"

2.1. What is "Culture" According to Public International Law?

Like many other broad ideas and concepts, understanding the term "culture" depends heavily on its context. As discussed within international law, culture is not offered an official definition. This lack of definition may be explained due in part by the need to keep the scope of what is culture as wide as possible. By giving culture an official definition, one may, even so unintentionally, limit its range. While no official definition exists, there is, needless to say, a need to know the ambit and scope of the ideas discussed. Therefore, a general understanding of what one refers to when discussing culture is needed.

Culture may encompass a multitude of aspects and elements. Just as culture is diverse and expressed in several ways by different people and within different mediums, its use and interpretation within international law may differ depending on where it is discussed and what and how culture is intended to be regulated. Considering culture, two main interpretations are identified. The first is the "traditional" interpretation of culture. The traditional interpretation considers culture as "the arts", "high", or popular culture. This includes, for example, the visual and performing arts, music, and literature.[11] While this interpretation of culture is not necessarily a wrong interpretation, it is very limited. This leads to the second interpretation identified, the anthropological interpretation. The anthropological interpretation of culture does not only include what is "the arts" or the products and artefacts related to the manifestation of creative and expressive drives, but it also includes the very fabric of society's thought and "way of life", which forms the foundation for all social manifestations.[12] Thus, the anthropological interpretation also includes the lifestyles, traditions, and values of individuals and communities.[13]

[11] Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff Publishers 2012) 33.
[12] Roger O'Keefe, "The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR" (1998) 47 International and Comparative Law Quaterly 904, 905.
[13] Silvia Borelli and Federico Lenzerini (eds) (n 11) 33–34.

The latter interpretation, the anthropological one, seems to have gained the most traction within current public international law.[14] Indeed, considering the work done within UNESCO, culture is often discussed in terms following the anthropological reasoning. In the Preamble of the 2001 Universal Declaration on Cultural Diversity (UDCD), "culture" is defined as:

> [t]he 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.[15]

In addition, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression, a treaty adopted during the UNESCO General Conference, defines "cultural diversity" as the "manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies."[16]

2.2. Culture or Tradition? Intangible Versus Tangible Aspects of Heritage

As noted, culture can be described as the core of views and beliefs manifested through different mediums and expressions. In this case, the practice of hunting and fishing falls within the ambit of what is culture and what is *tradition* or *heritage*.

Culture and heritage are often used interchangeably. This is not without reason. As previously noted, following the anthropological interpretation of culture, heritage or traditions are a part of what is culture. Heritage can, therefore, be described as a subsection of culture. While culture can be contemporary, "heritage is the cultural legacy which we receive from the past, which we live in the present and which will pass on to future generations."[17]

Cultural heritage has gained its own standard-setting instruments within public international law. Indeed, cultural traditions, or heritage, are not only protected through human rights law,

[14] Silvia Borelli and Federico Lenzerini (eds) (n 11) 33–34.
[15] UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001) UNESCO Gen. Conf. 31st Session, UNESCO Doc. CLT.2002/WS/9 (UDCD), preamble.
[16] Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 December 2005, entered into force 18 March 2007) 2440 UNTS 311, art 4, para 1.
[17] "Cultural Heritage" (*UNESCO*) <https://en.unesco.org/fieldoffice/santiago/cultura/patrimonio> accessed 24 April 2022.

but also through international cultural heritage law. In this field of international law, UNESCO has had much influence.

International cultural heritage law often makes a distinction between *tangible* and *intangible* cultural heritage. As will be discussed, traditional fishing and hunting practices can, in this regard, be considered to fall within the ambit of *intangible cultural heritage*. Intangible cultural heritage can be explained in relation to its counterpart, tangible cultural heritage. Tangible cultural heritage is heritage is which consist of physical objects and artefacts. Intangible cultural heritage can therefore be explained as the opposite: it is that part of heritage which cannot be subject to physical touch, but are memories, knowledge, and expressions transmitted from generation to generation.[18]

While intangible cultural heritage has long been a topic of discussion within UNESCO, it is only around the turn of the millennium that the UN specialised agency achieved the creation of a legally binding regime for the safeguarding of intangible aspects of cultural heritage.[19] Before that, much of UNESCO's standard-setting attention was aimed at protecting tangible cultural heritage, including cultural and natural property as well as landscapes.[20] After the creation of the 1972 World Heritage Convention, it would become more evident that there was a need for protecting intangible aspects of cultural heritage. Both UNESCO and the Word Intellectual Property Organization (WIPO) agreed to examine different pathways in order to protect of intangible cultural heritage: WIPO focusing on issues concerning intellectual property while UNESCO considered intangible cultural heritage from a multidisciplinary and holistic perspective, a dichotomy that persists today.[21]

While creating several initiatives aimed at the protection of intangible cultural heritage throughout the decades ever since 1972, it is safe to say that, the 2003 UNESCO Convention

[18] Convention on the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (2003 UNESCO Convention), art 2.
[19] Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013) 29.
[20] Consider the timeline with regards to UNESCO's Culture conventions: The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Convention on the Protection of the Underwater Cultural Heritage (2001), the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).
[21] Lucas Lixinski (n 19) 30–31.

for the Safeguarding of the Intangible Cultural Heritage (hereinafter, the 2003 UNESCO Convention) can be seen as one of the most important legally binding instruments created by UNESCO with regards to regulating the protecting and promoting intangible cultural heritage. As according to the 2003 UNESCO Convention, intangible cultural heritage is defined as:

> the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.[22]

Intangible cultural heritage manifests itself, according to the 2003 UNCESCO Convention, through different domains, including oral traditions and expressions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe, as well as traditional craftmanship.[23] In this regard, hunting and fishing practices can arguably fall with the ambit of what the Convention considers intangible cultural heritage.[24] Nevertheless, it is important to note that the Convention text *only* aims to safeguard intangible cultural heritage which is deemed compatible with sustainable development.[25] If a hunting practice of an endangered species can be safeguarded under the 2003 UNESCO Convention is subject for interpretation.

From a regional, European standpoint, the founding document of the Council of Europe speaks of the protection of a common heritage of the European nations. From the perspective of the work of the Council of Europe, the protection of cultural heritage is a concern for the organisation, as it protects a common European identity, which fosters the Council's idea of integration and regional cooperation.[26] The Council of Europe, unlike that of UNESCO, does not make a distinction between that of tangible and intangible cultural heritage, rather cultural heritage is addressed from a holistic point of view. In light of this, the Council of Europe has launched several projects with the aim of fostering a common European identity through

[22] 2003 UNESCO Convention, art 2(1).
[23] 2003 UNESCO Convention, art 2 (2).
[24] See, for example, "Falconry, a living human Heritage" (*UNESCO*) <https://ich.unesco.org/en/RL/falconry-a-living-human-heritage-01708> accessed 28 April 2022, "Charfia fishing in the Kerkennah Islands" (*UNESCO*) <https://ich.unesco.org/en/RL/charfia-fishing-in-the-kerkennah-islands-01566> accessed 28 April 2022, and "Culture of Jeju Haenyeo (women divers)" (*UNESCO*) <https://ich.unesco.org/en/RL/culture-of-jeju-haenyeo-women-divers-01068> accessed 28 April 2022.
[25] 2003 UNESCO Convention, art 2(2).
[26] Lucas Lixinski (n 19) 76–77.

cultural heritage protection, often, similar to the 2003 UNESCO Convention, seeking involvement from civil society, local communities, or larger national communities.[27]

While the Council of Europe does not make any distinction between that of tangible and intangible cultural heritage, most of its instrument's deal with the protection of tangible cultural heritage. Nevertheless, of the most important instruments dealing with intangible aspects of cultural heritage is the 2005 Framework Convention on the Value of Cultural Heritage for Society, otherwise known as the Faro Convention.[28] The Faro Convention goes further than the 2003 Convention by UNESCO by speaking of every person's right to engage in cultural heritage. However, this is purely a declaratory right, meaning that while the Convention recognises the rights of every person to engage with cultural heritage the Convention does not, in itself, create any subjective or enforceable rights.[29]

The Faro Convention considers cultural heritage from the perspective that culture is every evolving and living.[30] As according to the Convention, the Council of Europe considers cultural heritage to be:

> a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time[.][31]

Furthermore, the Faro Convention explains its "common heritage of Europe" as:

> all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and […] the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law.[32]

Compared the Faro Convention to the 2003 UNESCO Convention, the Faro Convention places much more emphasis on a common, European value.[33] Furthermore, compared to the 2003 UNESCO Convention's in which safeguard intangible cultural heritage is a goal in itself, the

[27] Lucas Lixinski (n 19) 77–78.
[28] Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) ETS No. 199 (Faro Convention).
[29] Lucas Lixinski (n 19) 78–79.
[30] Lucas Lixinski (n 19) 79.
[31] Faro Convention, art 2(a).
[32] Faro Convention, art 3.
[33] Lucas Lixinski (n 19) 80.

Faro Convention's "ultimate purpose […] is the development of a more democratic human society and the improvement of quality of life for everyone."[34]

While both the 2003 UNESCO Convention as well as the Faro Convention establishes ways of implementation, creating, for example, monitoring systems and, as in the case of the 2003 UNESCO Convention, representative lists of intangible cultural heritage, there is a distinct connection between realising the safeguarding efforts of intangible cultural heritage through and human rights. Both the 2003 UNESCO Convention as well as the Faro Convention references the connection between safeguarding intangible cultural heritage has with protecting human rights with its articles.[35] The Faro Convention even goes as far as to claim that the Convention's declaratory right to participate in one's cultural heritage is protected through the right freely to participate in cultural life as according to the United Nations Universal Declaration of Human Rights (UDHR) as well as the International Covenant on Economic, Social and Cultural Rights.[36] Indeed, the protection of intangible cultural heritage is associated with, for example, the right to culture and way of life.[37] By utilizing the human rights framework, one may address the protection of intangible cultural heritage: in this case, hunting and fishing among non-indigenous and indigenous individuals.[38]

2.3. Culture as a Human Right

2.3.1 What are Cultural Rights?

Protecting and promoting culture is a human rights imperative and the right to cultural life well-established, integral part of human rights.[39] Nonetheless, cultural rights have for a long time been considered as an area of human rights which is "underdeveloped".[40] This sentiment may exist due to the fact that cultural rights have long been given less attention compared to other human rights, leading to cultural rights sometimes being viewed as human rights of lesser

[34] Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (27 October 2005) ETS No. 199, Section I, art 1.
[35] Faro Convention, arts 1, 3, 6 and 2003 UNESCO Convention, preamble and art 2(1).
[36] 2003 UNESCO Convention, art 2(2) and Faro Convention, preamble.
[37] Lucas Lixinski (n 19) 145.
[38] Lucas Lixinski (n 19) 152–154.
[39] "Right to participate in cultural life" (*UNESCO*) <https://en.unesco.org/human-rights/cultural-life> accessed 28 April 2022.
[40] Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 165–182.

priority.[41] Regardless, cultural rights are considered as "an integral part of human rights, which are universal, interrelated and interdependent."[42] As according to the UN independent expert in the field of cultural rights, "cultural rights are pivotal to the recognition and respect of human dignity, as they protect the development and expression of various world visions, individual and collective, and encompass important freedoms relating to matters of identity."[43] Safeguarding everyone's right to culture and cultural life is therefore not only a matter of protecting culture as a means in and of itself, ensuring cultural diversity and plurality, but it is vital in order to ensure everyone's right to "develop and express their humanity, their world view and the meanings they give to their existence and their development."[44] Furthermore, like many other human rights, cultural rights also depend on its relationship with other human rights, included but not limited to the right to education, language, freedom of thought, conscience and religion, freedom of expression and association.[45]

Considered a universal right, meaning that the right shall apply to all by virtue of being human and that the rights are inherent to all, everyone has the right to participate in cultural life regardless of "age, sex, religion, national or social origin, or any other particular characteristics."[46] Article 27 of the UDHR from 1948,[47] states that:

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.[48]

Since the creation of article 27 of the UDHR, cultural rights have been included in several hard and soft-law human rights instruments, the main sources of cultural rights in international human rights law (IHRL) being found in the International Covenant of Economic, Social and

[41] UN Human Rights Council "Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council" (22 March 2010) UN Doc A/HRC/14/36, para 3.
[42] UN Human Rights Council, Resolution Adopted by the Human Rights Council on 23 March 2017: Promotion of the enjoyment of the cultural rights of everyone
and respect for cultural diversity (6 April 2017) UN Doc. A/HRC/RES/34/2, para 1.
[43] UN Human Rights Council "Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council" (n 41), para 3.
[44] id., para 9.
[45] Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (BRILL 2016) 24.
[46] "UNESCO and the Universal Declaration on Human Rights" (*UNESCO*, 23 November 2018) <https://en.unesco.org/udhr> accessed 28 April 2022.
[47] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) UN Doc A/810 (UDHR), art 1.
[48] UDHR, art 27.

Cultural rights (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR).[49]

Every person's right to cultural life as stipulated in Article 15(1)(a) of the ICESCR holds similarities to the right to participate in cultural life under Article 27 of the UDHR. Article 15(1)(a) of the ICESCR establishes the legal obligation of the State Parties to the Covenant to "recognize the right of everyone […] [t]o take part in cultural life." [50] Like the UDHR, the ICESCR emphasise the universality of the rights of the Covenant, recognising the right to cultural life is derived "from the inherent dignity of the human person".[51] Therefore, ensuring everyone's right to cultural life is also closely linked with ensuring the dignity and identity of every person. [52]

In its General Comment No. 21, the Committee on Economic, Social and Cultural Rights (CESCR) notes that culture is a broad concept which includes a multitude of manifestations of human existence.[53] Furthermore, the CESCR notes that what is considered as "cultural life", as according to the ICESCR, is as "a living process, historical, dynamic and evolving, with a past, a present and a future."[54] For the purpose of the right to cultural life under Article 15(1)(a) of the CESCR, the ICESCR considers cultural life to encompass:

> inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of 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. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.[55]

Cultural life in itself is not only protected under Article 15(1)(a) of the ICESCR, but so is the right to *take part* in cultural life. According to the ICESCR, to "take part in cultural life"

[49] Note, however, that this is not the *only* sources of cultural rights within international human rights law.
[50] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 15(1)(a).
[51] ICESCR, Preamble.
[52] UN Committee on Economic, Social and Cultural Rights (CESCR), "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (5 September 2008) UN Doc E/C.12/40/3 5.
[53] UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (21 December 2009) UN Doc E/C.12/GC/21, para 11.
[54] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 11.
[55] id., para 13.

includes the right to participation, to have access to, know, and understand owns culture, as well as the right of everyone to contribute to cultural life.[56]

The right to cultural life, as laid out in the ICESCR, requires the State Parties of the Covenant to both abstention as well as positive actions, aimed at the full realisation of the right.[57] While not imposing positive obligations like that under Article 15(1)(a), State Parties to the ICCPR may, besides to protect from denial and violation, take positive measures of protection in order to ensure the right to culture under Article 27 of the ICCPR.[58] Article 27 of the ICCPR reads as follows:

> [i]n 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.[59]

Compared to the right to cultural life under Article 27 of the UDHR and Article 15(1)(a) of the ICESCR, the right to culture under Article 27 of the ICCPR is not a universal right but rather a rights of individuals part of a *minority*.[60]

This brings us to, before delving into the substance of the rights under Article 27, the important question of who can be considered a minority under Article 27 of the ICCPR and the distinction between a "minority" and "peoples".

Article 27 of the ICCPR does not contain a definition of what a minority is. However, following the definition given by the, at the time, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and protection of Minorities may service as a working definition. That is:

> A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[61]

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[56] id., para 15 (a), (b), and (c).
[57] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 6.
[58] UN Human Rights Committee (HRC) "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 6.1.
[59] ICCPR, art 27.
[60] Claudia Tavani, *Collective Rights and the Cultural Identity of the Roma: A Case Study of Italy* (Martinus Nijhoff Publishers 2012) 171.
[61] Francesco Capotori, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities" (1979) UN Doc. E/CN.4/Sub.2/384/Rev. 1, para 568.

While this thesis discusses the rights of indigenous peoples and refers to indigenous peoples and minority rights, often in tandem, it must be noted that "minority" and "indigenous peoples" are not the same, the difference laying, first and foremost, in the right to self-determination, which will be discussed later on. Without delving too deep into the definition, it should be noted that a general understanding is that minorities are not peoples. That is, minorities do not have the right to self-determination.[62] Indigenous peoples, on the other hand, do, arguably, have at least an international right to self-determination based on their status as peoples, more of which will be discussed in the upcoming sub-chapter.[63] Furthermore, while minorities and indigenous peoples may exhibit the same characteristics, it is important to mention that indigenous peoples, compared to minorities, often have a district connection to their ancestral land, of which they rely upon for their way of living.[64] Keeping this distinction in mind, the Human Rights Committee has, nevertheless, accepted that individuals a part of an indigenous community can constitute a minority, and that, therefore, indigenous peoples can make individual communications, claiming an interference with the right to culture under Article 27 of the ICCPR.[65]

Considering the right to participate in cultural life under the ICESCR, Article 27 of the ICCPR establishes *both* the right to participate in cultural life in general terms as well as the right to enjoy a specific culture.[66]As the Human Rights Committee (HRC), the monitoring body for the implementation of the ICCPR, notes in its General Comment No. 23, protecting minorities' right to culture "is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole."[67] However, as opposed to the ICESCR, the HRC does not go into any further detail of what may constitute as "culture" under the Article, stating that "culture

[62] Ulrike Barten, "Article 27 ICCPR: A First Point of Reference" in Ugo Caruso and Rainer Hoffmann (eds.), *The United Nations Declaration on Minorities: An Academic Account on the Occasion of Its 20th Anniversary (1992–2012)* (Brill Nijhoff 2015) 50.
[63] See chapter 2.3.2 of this thesis.
[64] Ulrike Barten (n 62) 50.
[65] Ulrike Barten (n 62) 50–51, see also *Lovelace v Canada* (1981) UN Human Rights Committee, Communication No. 24/1977 and *Ivan Kitok v Sweden* (1988) UN Human Rights Committee, Communication No. 197/1985.
[66] Claudia Tavani (n 60) 171.
[67] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 9.

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."[68]

Besides the minority rights under the ICCPR, there are several other international instruments worth mentioning that are aiming to protect the cultural rights of individuals part of groups often subject to disadvantaged treatment. These include, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child,[69] the International Covenant of the Rights of Migrant Workers and their Families, and the Convention of the Rights of Persons with Disabilities.[70] Furthermore, international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization's Indigenous and Tribal Peoples Convention from 189 (ILO 169), also aim to protect the cultural rights of indigenous peoples.[71]

While international human rights law has addressed culture directly through, for example, Article 15 and 27 of the two international covenants, cultural rights relate to many other human rights. Moving outside of the articles mentioned so far two, explicitly establishing the right to culture and cultural life, there are also rights which are directly linked to culture, including the right to self-determination, the right to freedom of religion, freedom of expression, freedom of assembly and association, and the right to education. Furthermore, numerous other human rights may include cultural dimensions and thus be reliant upon cultural rights. For example, the right to health or the right to food, which should be culturally appropriate and acceptable.[72]

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[68] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 7.
[69] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. Similarly to Article 27 of the ICCPR, the Convention of the Child includes a provision stating (Article 30): "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."
[70] CESCR, "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (n 52) 3–4.
[71] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) (UNDRIP) and International Labour Organisation Indigenous and Tribal Peoples Convention (adopted 27 June 1989, entered into force 5 September 1991) C169 (ILO 169). Note that the UNDRIP is *not* a legally binding instrument but that it can be argued to hold a significant normative value.
[72] Yvonne Donders, "Foundations of Collective Cultural Rights in International Human Rights Law" (2015) Amsterdam Law School Legal Studies Research Paper No. 2015-23 Amsterdam Center for International Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622424> accessed 28 April 2022 3–4.

From a regional human rights perspective, the right to take part in cultural life is recognised in the African Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.[73] As for the European human rights system, the European Convention on Human Rights (ECHR) does not explicitly mention any right to cultural life. Nevertheless, the European Court of Human Rights (ECtHR) has, through a dynamic interpretation of the articles within the ECHR, "gradually recognised substantive rights which may fall under the notion of 'cultural rights' in a broad sense."[74] In relation to cultural rights, often invoked provisions are the right to respect for private and family life under Article 8 of the ECHR, freedom of thought, conscience and religion under Article 9 of the ECHR, freedom of expression under Article 10 of the ECHR, as well as the right to education under Article 2, Protocol No. 1.[75] Part of the reason why issues concerning cultural rights has become more assurgent in the caselaw from the ECtHR is due to the number of complaints brought by applicants belonging to national minorities, including cultural, linguistic, or ethnic minorities.[76] These complaints are then often related to "the right to maintain a minority identity and to lead one's private and family life in accordance with the traditions and culture of that identity."[77]

Considering other instruments from the Council of Europe, the European Charter for Regional or Minority Languages, which mainly focuses on recommendations on co-operation in preserving European culture, the European Charter for Regional or Minority languages, which aims at protecting cultural and cultural identity through linguistic rights.[78] As for further protection aimed at minority culture, the Framework Convention for the Protection of National Minorities (FCNM),[79] which creates principles that shall be implemented by the State Parties. The principles included in the FCNM are formulated in terms of recommendations and policy

[73] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (African Charter), art 17(2) and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992) (Protocol of San Salvador), art 14(1)(a).
[74] European Court of Human Rights Research Division Cultural, "Rights in the case-law of the European Court of Human Rights" (January 2011, updated 17 January 2017) <https://www.refworld.org/docid/4e3265de2.html> accessed 28 April 2022, para 1.
[75] ibid.
[76] ibid.
[77] ibid.
[78] Yvonne Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002) 248–250.
[79] Framework Convention for the Protection of National Minorities and Explanatory Report (adopted 1 February 1995, entered into force 1 February 1998) ETS No. 157 (FCNM).

objectives that the State Party should peruse. Therefore, the FCNM does not create any detailed list of rights of persons belonging to a minority,[80] besides Article 3 which contains the right of every person belonging to a national minority to choose whether they want to be treated as a member of a national minority or not.[81] As for respecting minority people's cultural right, the FCNM lays down in Article 5 of the Convention that:

> The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.
>
> Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.[82]

Like all derogable rights, cultural rights may be subject to limitations or restrictions. As for the rights under the ECHR and its Protocols mentioned, which can be interpreted to involve issues of cultural rights, limitations, restrictions, and interreferences with the rights are allowed under the ECHR, given that they are, for example, in accordance or prescribed by law or is necessary in a democratic society.[83] As for the international human rights instruments previously mentioned, the ICESCR and the ICCPR, the CESCR notes in General Comment No. 21 that:

> Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant.[84]

Furthermore, if the State Party creates any limitations to the right to partake in cultural life, the limitations must be "proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed."[85] Moreover, as for the right of minorities

[80] United Nations, "Pamphlet No 8 of the UN Guide for Minorities" <https://www.ohchr.org/en/minorities/united-nations-guide-minorities> accessed 28 April 2022.
[81] Yvonne Donders (n 78) 252.
[82] FCNM, art 5(1) and (2).
[83] ECHR, arts 8, 9, and 10.
[84] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 19.
[85] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 19.

to enjoy their own culture, restrictions and limitations may be put in place if the exercise of the right infringes or in any other way is inconsistent with the other provisions of the ICCPR.[86]

2.3.2 An Individual or Collective Right?

With regards to cultural rights, as they are protected and promoted under IHRL, there is a tension between individual and collective rights. While the concept of individual rights may have a fairly straight forward definition, that is, the right is held by an individual, the definition of "collective rights" rights may be considered as inconsistent. When talking about "collective rights" one can three different notions: *Community rights*, *communal rights*, and *individual rights that hold collective dimensions*. Community rights are those human rights provisions of which the rights-holder constitutes a collective entity. Such rights would for example be the right to self-determination as stipulated in Article 1 of both the ICCPR and the ICESCR, as well as several provisions under UNDRIP. The rights-holder of communal rights, on the other hand, is that of the individual, who is recognised as a part of a collective entity. Examples of this would the right of persons belonging to minorities to enjoy their own culture in community with the members from their group, as stipulated in Article 27 of the ICCPR. Lastly, human right provisions where the rights-holder is that of the individual but which realisation is clearly reliant upon collective dimensions is sometimes also included when discussing collective rights, for example the right of everyone to take part in cultural life, as included in Article 15(1)(a) of the ICESCR.[87]

While the collective rights are a highly contested and debated topic within human rights law, there is, nevertheless, a distinct connection between the right to culture and cultural life and the collective. [88] As previously mention, the right to cultural life, as stipulated in Article 27 of the UDHR and Article 15(1)(a) of the ICESCR, holds elements related to the collective, since many cultural practices can only be expressed and enjoyed in community with others. As the CESCR notes in its General Comment on Article 15(1)(a), the right to cultural life may be exercised by a person as an individual, in association with others or within a community or group.[89] This collectivist dimension of cultural life does not mean, however, that the right is a community

[86] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 8.
[87] Yvonne Donders (n 72) 2–3.
[88] Lucas Lixinski (n 19) 148 and Yvonne Donders (n 72) 5.
[89] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 9.

right i.e., that a cultural group would be the rights bearer under the article. Rather, the right to cultural life is an individual right which, due to the collective nature of cultural practices, hold collective dimension and may therefore impose obligations on the State Parties to take measures supporting cultural groups. This obligation may then establish "an objective legal dimension in favour of collective entities stemming from the right to take part in cultural life."[90]

As for minorities right to cultural life as included in Article 27 of the ICCPR, Yvonne Donders argues that the rights under the article can be considered as a "communal right".[91] That is, the right of the individual to enjoy their right to culture in communion with others. While minorities may create a group, the cultural rights under Article 27 of the ICCPR are construed as that of the individual. Indeed, rather than cultural rights being the rights of the minority, Article 27 refers to the right belonging to "*persons* belonging to minorities".[92] Similar to that of the right to cultural life, there is an undeniable collective dimension to the right to culture under Article 27. Namely, the right of the individual, as a part of minority, is reliant upon the rights of the community.[93]

One well-established community right adopted within human rights law is the right to self-determination, included in Article 1 of both the ICCPR and the ICESCR. The right to self-determination establishes that all peoples have the right to determine their own destiny and the right holds an important cultural component, especially when discussing internal self-determination. Here, a distinction is often made between *internal* and *external self-determination*. Internal self-determination can be described as the right of peoples to govern matters which relates to them.[94] *External* self-determination, on the other hand, is the right of peoples to determine their own political status and, therefore, also free themselves from domination by others, in other words, the right to secession.[95] The right to internal self-determination has an important cultural component. Internal self-determination includes peoples' right to preserve their cultural, ethnic, historical, and territorial identity. In order to

[90] CESCR, "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (n 52) 9.
[91] Yvonne Donders (n 72) 13.
[92] ICCPR, art 27. Emphasis added.
[93] Yvonne Donders (n 72) 12–13.
[94] Kalana Senarante, "Internal Self-Determination in International Law: A Critical Third-World Perspective" (2013) 3 Asian Journal of International Law 305, 306.
[95] Salvatore Sense, "External and Internal Self-Determination" (1989) 16(1) Social Justice 19, 19.

implement the right to internal self-determination, the peoples who hold the right may be entitled to some form of self-government or autonomy over their economic, social and cultural affairs.

As concerns indigenous peoples, the right to internal self-determination and, therefore, the right to control and determine their own culture, is often called upon. [96] While a heavily debated topic, the current consensus seems to be that indigenous peoples' have, at the very least, a right to internal self-determination.[97] The right to self-determination and, if a group can claim the right to self-determination, may also affect ways in which, in this case, culture can be interfered with. Further analysis of indigenous peoples, self-determination and ways in which it relates to their right to culture will be made in chapter four, analysing option A and B of the fictional case.

2.3.3. Hunting and Fishing as a Part of "Cultural Life" under the International Covenant on Economic, Social and Cultural Rights? Connecting Culture with Nature

Culture, as has been noted so far, can encompass a multitude of elements and be expressed in several different ways. However, when discussing the connection between practices related to nature and its resources, the focus often falls on indigenous peoples. This is perhaps not so surprising, as many indigenous communities today are trying to defend their right to their ancestral lands, which hold a close connection to their culture, way of life, and identity. Nevertheless, while indigenous peoples' culture and its connection to nature are, and have been, centre of much attention within IHRL, the cultural connections to using natural resources are not necessarily only restricted to members of a specific group.[98]

Culture, as defined by the UDCD and following the anthropological interpretation, may encompass elements which relates to nature and natural resources. Especially, as is discussed in this thesis, cultural and traditional practices such as fishing and hunting are closely linked with nature.[99] Indeed, following the work done by UNESCO, while the organisation tends to divided cultural heritage into the tangible, intangible and natural, there is undoubtedly a strong connection between intangible (and tangible) cultural heritage and nature. For example, the

[96] Yvonne Donders (n 72) 13–14.
[97] Kalana Senarante (n 94) 306.
[98] Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford 2018) 125–126.
[99] Jérémie Gilbert (n 98) 118.

2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage establishes that intangible cultural heritage can be manifested through practices concerning nature and the universe.[100] Therefore, "[p]rotecting the natural environment is often closely linked to safeguarding a community's cosmology, as well as other examples of its intangible cultural heritage."[101]

The connection between culture and nature is also acknowledged within IHRL and, as noted, not only when discussing minority or indigenous peoples' rights. Indeed, in its General Comment on the right to take part in cultural life, the ICESCR notes that, in order for the State Parties to meet the necessary conditions for the full realisation of the right, everyone needs to have the right to access cultural goods and services. These cultural goods and services may include "the shared open spaces essential to cultural interaction, such as […] nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there".[102] In order to ensure the full realisation of the right to culture, the State Party then need to guarantee that everyone has an equal right to partake in cultural life, which may include ensuring the availability of those natural good and resources associated with the right.[103]

Furthermore, while it may serve several purposes for those who participate in the practice, hunting and fishing, especially in the case considered, may serve as a means of sustenance for the individuals practicing the fishing or hunting. Indeed, in its General Comment on the right to cultural life, the ICESCR considers cultural life to encompass food.[104] Indeed, as noted in the description of the case, not only may the hunting or fishing activity hold cultural importance, but so may the food source in itself.

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[100] 2003 UNESCO Convention, art 2(2).
[101] "Knowledge and Practices Concerning Nature and the Universe" (*UNESCO*) <https://ich.unesco.org/en/knowledge-concerning-nature-00056> accessed 3 May 2022.
[102] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 16(a).
[103] David Suzuki Foundation, "Environmental Protection of Economic, Social and Cultural Rights on the Pacific Coast of Canada: Parallel Report Submitted by the David Suzuki Foundation to the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of its Consideration of Canada's 6th Periodic Report at its 57th Session (22 Feb 2016–05 Mar 2016)" (2016) <https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CAN/INT_CESCR_CSS_CAN_22890_E.pdf> accessed 3 May 2022, paras 66–67.
[104] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 13.

Pursuant to Article 11, dealing with the right to adequate food, and Article 2 of the CESCR on progressive realisation, State Parties shall recognise the right of everyone to adequate food and undertake steps, to the maximum of its available resources, for the full realisation of the right.[105] The right to adequate food, as according to the CESCR, does not only mean the right to nutritious foods, but the right to food which is culturally acceptable for the community in question. Therefore, when realising the right, cultural appropriateness must be taken into consideration.[106] Restricting the access to nature or, as in this case, limiting or banning a hunting or fishing practice, which may be an important aspect of cultural life but also as a source of food, may then, in some case, potentially lead to an interfere with the right to culturally adequate food.[107]

2.3.3. Hunting and Fishing Practices as a part of "Culture" and "Way of Life" for Indigenous Peoples: A Well-established Link?

For indigenous peoples, the right to use and access nature and natural resources are often closely linked with indigenous culture, way of life, and identity. Indeed, the connection between that of indigenous culture and nature, the use of natural resources, including wildlife, has been addressed several times within IHRL.

For example, the connection between indigenous culture and way of life and nature and natural resources is recognised within both of the two international Covenants. In its General Comment on the right of persons part of a minority to enjoy their own culture as stipulated in Article 27 of the ICCPR, the HRC notes that, while the rights under the article "does not prejudice the sovereignty and territorial integrity of a State party", the right to enjoy one's own culture "may consist in a way of life which is closely associated with territory and use of its resources" and that this "may particularly be true of members of indigenous communities constituting a minority."[108] Following this, the HRC even makes an explicit reference to hunting and fishing practices, stating that:

> 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.[109]

[105] ICESCR, arts 2 and 11.
[106] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 11.
[107] Jérémie Gilbert (n 98) 126.
[108] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 3.2.
[109] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 7.

Consulting the case-law made by the HCR, the connection between indigenous peoples right to culture and way of life seems to be made even clearer. In the decisions made by the HRC with regards to individual complaints made to the Committee, including the cases of *Ominayak v Canada*, *Lansman et al. v Finland*, and *Lovelace v Canada*, the HRC draws upon the connection between indigenous peoples right to culture under Article 27 of the ICCPR and nature and natural resources. [110]

As for the ICESCR, while protecting everyone's right to take part in cultural life, the CESCR recognises a need for special attention as to protect indigenous peoples' culture within its General Comments. In the General Comments on the right to take part in cultural life, the CESCR recognises that:

> The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and 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 protected, 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.[111]

Indeed, not only does the CESCR agree on the connection between indigenous peoples' culture and nature, which may limit the ways in which State parties may take actions that negatively affect the cultural rights of indigenous peoples, but the CESCR even goes as far as claiming that:

> States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.[112]

Moving to IHRL instruments specifically dealing with indigenous peoples' rights, the notion of nature and indigenous culture being interlinked is reflected in, for example, the UNDRIP. The UNDRIP recognises a connection between cultural rights and indigenous peoples' right to land and territory, thus also including resources found within the land, including wildlife.[113] In

[110] *Ominayak Lubicon Lake Band v Canada* (1990) UN Human Rights Committee, Communication No. 167/1984, *Lansman et al. v Finland* (1992) UN Human Rights Committee, Communication No. 511/1992, and *Lovelace v Canada* (1981) UN Human Rights Committee, Communication No. 24/1977.
[111] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 36.
[112] ibid.
[113] Frederico Lenzerini, *The Culturalization of Human Rights Law* (Oxford 2014) 141.

its Preamble, it is stated that there exists an "urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources[.]"[114] Indeed, contrary to the perception of land and resources being a question related to that of property rights, the UNDRIP assert that, for indigenous peoples, having access to land and resources is grounded in the *cultural significance* it bears to the indigenous community, their way of life and identity.[115] This is further explored in the articles of the Declaration, Article 25 stating that "[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship" and therefore also cultural relationship "with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[116]

Besides voicing the rights of indigenous people to their traditional lands, the UNDRIP states that "[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use",[117] again asserting connection between the right to access and use resources, including wildlife, and the cultural rights of indigenous peoples. Furthermore, with regards to indigenous cultural heritage, in Article 31, Paragraph 1, indigenous peoples right "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora" is laid out.[118]

Article 13 of ILO 169 recognises that "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories."[119] Indeed, the Convention even goes as far as to explicitly mention the connection between the hunting and fishing and culture, stating that:

[114] UNDRIP, preamble.
[115] Ferico Lenzerini (n 113) 141.
[116] UNDRIP, art 25.
[117] UNDRIP, art 26.
[118] UNDRIP, art 31.
[119] ILO 169, art 13.

> Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted.[120]

Article 14, Paragraph 1 of the ILO 169 also demands that the State Parties to the Convention to recognise indigenous peoples' ownership and possession "over the land which they traditionally occupy" and that the State Party shall take measures, in appropriate cases, "to safeguard the right of the peoples concerned to use land not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[121]

Using the ILO 169 as a touchstone, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also extend to the rights of indigenous peoples; including the connection between indigenous culture, nature, and natural resources. Indeed, in its General Recommendation No. 23, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) calls upon its State parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and […] to take steps to return those lands and territories."[122] Furthermore, during periodic reporting conducted by the CERD, much emphasis has been put on indigenous peoples' right to land and its resources, including CERD criticising exploitation of natural resources on indigenous lands, which may negatively impact the cultural identity of indigenous peoples, thus noticing the link between indigenous cultural identity and the right to land and its natural resources, including wildlife.[123]

Hunting and fishing may not only serve an essential part of indigenous peoples' cultural identity, but as an important means of subsistence for indigenous peoples. Indeed, according to both of the two international Covenants, "[i]n no case may a people be deprived of its own

[120] ILO 169, art 23(1).
[121] ILO 169, art 4(1).
[122] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) and Committee on the Elimination of Racial Discrimination (CERD) "General recommendation XXIII on the rights of indigenous peoples" (Fifty-first session, 1997) U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003), para 5.
[123] Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016) 102-108.

means of subsistence."[124] As with regards to indigenous peoples, the UNDRIP establishes in Article 20 that:

> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.[125]

Furthermore, besides recognising subsistence economies and traditional activities under Article 23(1), Article 14 of the ILO 169 lays down, in relation to recognising indigenous peoples right to ownership and possession of their traditional lands, that "measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[126]

As for the right to culture under Article 27 of the ICCPR, the HRC has continuously held that subsistence activities, such as reindeer herding for the Sámi, fisheries for the Maori, and llama and alpaca grazing for the Aymara, fall within the scope of "culture" under Article 27.[127] For example, in the case of *Poma Poma v. Peru*, while the HRC did not consider the authors claim of violation to Article 1(2) due to procedural grounds,[128] it noted that raising of llamas formed an essential part of the authors culture and that the activity formed a part of the authors subsistence. In this case, the State Party had, besides not consulting the community in which the author belongs, through its water division, lead to detrimental effects on the author's way of life and traditional economy and, therefore, subsistence.[129] In a similar case brought before the HRC almost 20 years before *Poma Poma*, the HRC recognised that subsistence/economic activities part of the culture of the community, in this case the hunting and fishing activities of the *Lubicon Lake Band*, are protected under Article 27 of the ICCPR and that interference with

[124] ICCPR, art 1(1) and ICESCR, art 1(1).
[125] UNDRIP, art 20.
[126] ILO 169, art 14.
[127] Athanasios Yupsanis, "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee" Yearbook of International Law (2013) 26 Brill Nijhoff 359, 371.
[128] As noted, the HRC *only* considers applications which deal with individual rights. The right to under Article 1 of the ICCPR are collective in nature and can, therefore, not be considered by the HRC.
[129] *Ángela Poma Poma v Peru* (2009) UN Human Rights Committee, Communication No. 1457/2006, paras 7.3–7.5.

such activities may be detrimental to the cultural integrity and survival of the community.[130] Nevertheless, while the HRC have been able to address the right to and protection of indigenous peoples subsistence through Article 27 of the ICCPR, the question of State Parties interference and to what extent State Parties may interfere with indigenous peoples traditional economic/subsistence activities before it amounts to a violation of Article 27 is still up for consideration and will be analysed further in chapter four.

Besides not depriving indigenous peoples of their subsistence, as previously mentioned, hunting and fishing as a part of indigenous culture also related to other rights, rights such as the right to adequate food holds cultural aspects to it. Indeed, as previously noted, the right adequate food includes cultural appropriateness.[131] This holds especially true for indigenous peoples, who often rely upon and have a strong cultural connection to their traditional foods. Indigenous hunting and fishing practices, which may form a part of the realisation of the right to culturally appropriate foods, are therefore reliant upon access to nature and natural resources. In order to fulfil indigenous peoples right to adequate food as under Article 11 of the ICESCR, indigenous peoples must therefore have access to natural resources, which may include wildlife.[132]

Lastly, while not considered in the case discussed in the thesis, it may also be noted that there may also exist a connection between indigenous peoples' use of resources and the right to freedom or religion. Indeed, for many indigenous communities, the use of natural resources may constitute an important part of their belief system.[133] Both the UNDRIP and ILO 169 recognise the spiritual importance that natural resources may have for indigenous peoples.[134] Furthermore, the HRC has held that the right to freedom of religion, as stipulated under Article 18 of the ICCPR, includes a wide understanding of what constitutes as "belief" or "religion".[135]

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[130] *Lubicon Lake Band v Canada* (1990) UN Human Rights Committee, Communication No. 167/1984, paras 3.2, 29.1, 32.2, and 32.3.
[131] UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 12: The Right to Adequate Food (Art. 11)" (12 May 1999) UN Doc E/C.12/1995/5, para 11.
[132] Food and Agriculture Organization of the United Nations (FAO), "Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security" (adopted by the 127th Session of the FAO Council November 2004) <https://www.fao.org/3/y7937e/y7937e00.htm> (accessed 4 May 2022), para 8.1.
[133] Jérémie Gilbert (n 98) 138.
[134] UNDRIP, art 25 and ILO 169, art 13.
[135] UN Human Rights Committee (HRC) "CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)" (30 July 1993) UN Doc. CCPR/C/21/Rev.1/Add.4 and HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 2.

While not mentioning belief systems which are reliant upon the use of natural resources,[136] the HRC notes that "[t]he freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts,"[137] hence including a wide interpretation of what can constitute as religion.[138]

2.3.4. Hunting and Fishing Practices as a Part of Private Life, Religion or Association? A Tricky Translation of "Culture" and "Cultural Life" Within the European Convention on Human Rights

The ECHR does not, as previously mentioned, include any provisions that explicitly refer the right to culture or cultural life. Similarly, the ECHR does not include provisions directly related to the protection on indigenous peoples right. However, through a dynamic interpretation of the ECHR, the ECtHR has been able to address both issues related to culture and indigenous peoples.

Cultural rights can be considered based on a dynamic interpretation of several of the articles within the ECHR. As for considering hunting and fishing as a part of what may be considered as a cultural activity, forming a part of the individual's cultural identity, Article 8, 9, and 11 are of particular interest. While Article 10 of the ECHR, that deals with the freedom of expression, may also include artistic expressions, the ECtHR has yet addressed such artistic expressions from an anthropologic viewpoint. Instead, the ECtHR considers different artistic expressions, such as visual arts, literary creations, or satire as falling within the ambit of what can be considered as "artistic expressions".[139] If hunting, as a part of an individual's cultural practice, may be considered to fall within the ambit of "expression" is, therefore, up for interpretation.

Article 9, stipulating everyone's right to thought, conscience and religion, is one of the articles often evoked when dealing with issues related to culture. As already mentioned in the previous sub-chapter, while in the case examined in this thesis does not mention anyone claiming the hunting practice to constitute a part of their religious practice, it may be noted that hunting and fishing activities may hold spiritual or religious elements, especially with regards to indigenous

[136] Jérémie Gilbert (n 98) 139.
[137] UN Human Rights Committee (HRC) "CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)" (30 July 1993) UN Doc. CCPR/C/21/Rev.1/Add.4 and HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 4.
[138] Jérémie Gilbert (n 98) 139.
[139] See, for example, *Müller and Others v Switzerland* App No. 10737/84 (ECtHR, 24 May 1988), para 27.

peoples hunting and fishing activities.[140] In a similar vein to the reasoning by the HRC in its General Comment No. 22, the ECtHR does not only consider recognised or organised religion to fall within the ambit of Article 9. Rather, the ECtHR has held that a restrictive interpretation of religion would have a direct impact on the exercise of right to freedom of religion.[141] While the ECtHR is yet to deal with practices, such as hunting and fishing, forming a part of what is considered as religion under the Convention, other practices which related to religious diets and the use of animals have been brought before the Court. For example, in the case of *Cha'are Shalom Ve Tsedek v. France*, the ECtHR held that ritual slaughter of animals, as according to the Jewish tradition, falls within the ambit of what is considered as "religion" or "belief".[142] As the case of *Cha'ater Shalom Ve Tsedek* relates to a religious practice that was not contested by the State Party nor the Court and which is, also, well-documented through religious texts, it would be interesting to hear the reasoning of the ECtHR if, for example, an indigenous group would claim that a traditional hunting and fishing practice forms a part of their religious beliefs.

The issue of the right to assembly has also been brought up before the ECtHR when dealing with aspects cultural rights. For example, when dealing with persons belonging to minorities forming associations for the purpose of promoting their culture, the ECtHR has held that such associations may, like political assemblies, are "important to the proper functioning of democracy."[143] Indeed, in the case of *Gorzelik and Others v. Poland*, the ECtHR highlighted the particular importance of letting those a part of a minority gather in order to promote and protect their culture and cultural heritage, emphasising that:

> pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large

[140] See, for example, Frederico Lenzerini, "Cultural Identity, Human Rights, and Repatriation of Cultural Heritage of Indigenous Peoples" (2016) 23 The Brown Journal of World Affairs 127, 127: "These peoples, although scattered throughout all areas of the world and representing a myriad of different specific communities, share the same conception of life and spiritual affairs, characterized by holisticism, a deep interconnection with nature […] Consequently, for virtually all indigenous communities in the world, all beings—either animate or inanimate—are deeply interconnected with each other and share the same soul and spirit, which are grounded in the land where those peoples live, composing a whole that is given life by the spirits who created the world. Each piece of indigenous peoples' cultural heritage is therefore not a simple object, but instead a part of that whole which, like any other component, is essential for the good order of life and—inasmuch as it is connected with deities and other mystical beings—is infused with a profound connotation of spirituality."
[141] *Izzettin Dogan and Others v Turkey* App No. 62649/10 (ECtHR, 26 April 2016), para 114.
[142] *Cha'are Shalom Ve Tsedek v France* App No. 27417/95 (ECtHR, 27 June 2000), para 73.
[143] *Gorzelik and Others v Poland* App. No. 44158/98 (ECtHR, 17 February 2004), para 92.

> extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.[144]

As for hunting and fishing as a part of what constitutes as culture, said practices often include a collective element and, specifically hunting activities, are often practiced in association with others, which may then give rise to the question of freedom of association. The right to freedom of association and assembly, as included in Article 11 of the ECHR, includes the right of everyone to peaceful assembly.[145] In considering the admissibility of *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom*, the question of association as it relates to certain hunting activities was brought up. In the case, the applicants claimed that the ban on fox hunting interfered with their right to freedom of assembly, as the ban interfered with the purpose and interest of the group. In its assessment, the Court was willing to accept that the right to association under Article 11 of the ECHR also extends to assemblies of a social character, of which the Court was of the opinion that the hunters were. Nevertheless, in this case, the ECtHR noted that while the right to association protects the right of individuals to gather, restricting a particular way of hunting did not interfere with applicants' right to assembly *per se*, noting that:

> [t]he hunting bans only prevent a hunt from gathering for the particular purpose of killing a wild mammal with hounds; as such, the hunting bans restrict not the right of assembly but a particular activity for which huntsmen assemble. The hunt remains free to engage in any one of a number of alternatives to hunting such as drag or trail hunting […] It is also of some relevance that the wider public or social dimensions to a traditional hunt have also been preserved in drag or trail hunting. In the Court's view the mere fact that, prior to the bans, hunting culminated in the killing of a wild mammal by hounds is not sufficient for it to find that the bans struck at the very essence of the right of assembly.[146]

Dealing specifically with hunting and fishing as a part of what constitutes a cultural practice and a part of one's cultural identity, Article 8 of the ECHR is of particular interest. While not explicitly dealing with hunting and fishing, the ECtHR has drawn connections between the right to private life under Article 8 of the Convention and access to and protection of land, nature, and its resources, especially in regards to minorities right to their way of life. For example, in the case of *Chapman v the United Kingdom*, a woman part of the Roma community, claimed that her right to private life under Article 8 of the ECHR had been violated. The applicant had been refused planning permission to station caravans on her land and therefore claimed that the

[144] id., para 92.
[145] ECHR, art 11.
[146] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App No. 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 50.

State Party, the United Kingdom, was interfering with her right to participate in her culture; living in her caravan. In the case, the ECtHR noted that living in caravans could be considered a way of life and constitute an integral part of the applicant's identity.[147] Furthermore, the ECtHR noted that, for the Roma community, special needs may be aimed at the security, identity, and lifestyles of minorities.[148] In order to be able to practice and partake in her culture, that is caravanning, the applicant was reliant upon access to the environment in which her way of life took place. Nevertheless, in this case, the ECtHR ruled in favour of the State, who held that there had been no violation of Article 8 of the ECHR, as the refusal of the applicant's planning permission had been due to environmental preservation. The Court noting that "although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented."[149]

Besides *Chapman* and other cases such as *Lee v The United Kingdom* or *Buckley v the United Kingdom*,[150] dealing with the right to private life for Roma people and access to the environment in which they lead their traditional lifestyles, the ECtHR has also drawn a connection between Sami peoples' right to private life and its relationship to nature and natural resources. The case-law dealing with indigenous peoples' cultural rights is much less dense with regards to the ECtHR compared to other regional human rights bodies or the case-law found with regards to the right to culture under Article 27 of the ICCPR. Nevertheless, the European Commission on Human Rights, in the first case brought by an indigenous community before the European Commission on Human Rights, *G. & E. v Norway*, the Commission noted that the construction of a hydroelectric powerplant effected the applicants' ability to practice reindeer herding and fishing in the area, thus also interfering with the applicants right to private life.[151] While the Commission made the assessment that the interference did not amount to a violation of Article 8 of the ECHR, stating that the size of the area affected was not so large as to amounting to a violation of the applicants right to private life,[152] the case shows similarities to that of the

[147] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 73.
[148] id., para 93.
[149] id., para 96.
[150] *Lee v the United Kingdom* App No. 25289/94 (ECtHR, 18 January 2001) and *Buckley v the United Kingdom* App No. 20348/92 (ECtHR, 29 September 1996).
[151] *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30, 35–36.
[152] id., 36.

reasoning made by the ICCPR with regards to indigenous peoples cultural rights and access to nature and its resources, that is, that they are interconnected and dependent. Indeed, while the Commission did not find any violation of Article 8, the Commission recognised that the applicants, as a part of a minority, had, for centuries, been practicing reindeer herding, fishing, and hunting and that unprecedented loss of access to the land in which they practiced their traditions would mean a loss of their identity.[153]

Following the reason in *G and E*, there is reason to believe that ECtHR, especially in the case of indigenous peoples, that hunting and fishing, when forming a way of life for a minority, may fall within the ambit of what constitutes as private life.[154] However, outside of protecting minority culture and way of life through Article 8 of the ECHR, the connection between hunting and fishing as falling within the right to private life seems less obvious.

Drawing from *Friends and Others v the United Kingdom*, in which a group of foxhunters from the United Kingdom claimed to have had been discriminated against and hade their right to private life violated, due to national legislation that prohibit the hunting of wild mammals using hounds,[155] the Court agreed that:

> the hunting of wild mammals with hounds had a long history in the United Kingdom; that hunting had developed its own traditions, rituals and culture; and, consequently, that it had become part of the fabric and heritage of those rural communities where it was practised. Similarly, for the individual applicants in the present cases, the Court accepts, as the High Court did, that hunting formed a core part of their lives. It accepts therefore that, for various reasons, hunting came to assume a particular importance in the lives of these applicants.[156]

Nevertheless, while the ECtHR agreed that the hunt constituted an important part of rural life and even a part of what could be considered as a tradition or heritage, the Court held that the activity is a public one, rather than a private one. The Court held that while a practice taken place in the public does not necessarily mean that the activity is not a part of the individual's private life, the ECHR noted that:

> [H]unting is, by its very nature, a public activity. It is carried out in the open air, across wide areas of land. It attracts a range of participants, from mounted riders to followers of the hounds on foot, and very often spectators. Despite the obvious sense of enjoyment and personal fulfilment the applicants derived from hunting and the interpersonal relations they have developed through it, the Court finds hunting to be too far removed from the personal autonomy of the applicants, and the

[153] Yvonne Donders (n 78) 288.
[154] *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30, 36.
[155] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009).
[156] id., para 40.

> interpersonal relations they rely on to be too broad and indeterminate in scope, for the hunting bans to amount to an interference with their rights under Article 8.[157]

Furthermore, the applicants in the case of *Friends and Others* relied upon hunting forming a part of their lifestyle, claiming that the activity would amount to them forming a minority. The ECtHR made it clear in its assessment that hunting activities, by itself, does not make a minority. Indeed, contrary to cases such as *G and E* or *Buckley*, where "where the applicants belonged to distinctive groups, each with a traditional culture and lifestyle at issue that was so fundamental as to form part of its identity",[158] a common practiced activity, like hunting, cannot be considered enough to create a minority group.[159] The ECtHR was of the opinion that "hunting amounts to a particular lifestyle which is so inextricably linked to the identity of those who practise it that to impose a ban on hunting would be to jeopardise the very essence of their identity"[160] Indeed, considering the reasoning made by the ECtHR hunting activities, by themselves, cannot be considered as a "particular lifestyle considered to be indispensable for personal or cultural identity", unless linked to a community, such as indigenous peoples, reliant upon the practice for subsistence.[161]

2.4. The Inclusion of Culture and Cultural Rights in Public International Environmental Law: A Growing Field of Interest?

While human rights law bears into mind the limited resources of nature, as far as it may serve as a means for limiting certain rights, same consideration of culture can be found within several environmental agreements. Indeed, it can be argued that there is a trend in including elements and provisions related to culture and cultural rights in international legal instruments, also including those instruments aiming to regulate wildlife and wildlife protection.[162]

For example, the Convention on Biological Diversity (CBD) does not only aim at protecting biodiversity, it also includes within its provisions that its State Parties shall:

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[157] id., para 43.
[158] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 25.
[159] id., para 44.
[160] ibid.
[161] Angus Nurse, "Criminalising the right to hunt: European law perspectives on anti-hunting legislation" (2017) 67 Crime Law Soc Change 383, 383–384.
[162] Frederico Lenzerini (n 113) 131.

> [s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices.[163]

The inclusion of Article 8(j) in the CBD has arrived out of the need of ensuring effective participation with those cultures closely related to the use of natural resources. Indeed, following the creation of the CBD, in order to ensure the proper implementation of Article 8(j),[164] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted,[165] further establishing the need for inclusion on human rights, and in this case indigenous rights, into instruments concerning the use of natural resources. In the Nagoya Protocol, the duty of the State Party to seek prior informed consent when dealing with indigenous and local communities traditional knowledge concerning the use of biodiversity is further established.[166]

As for wildlife preservation, the 1957 Interim Convention on Conservation of North Pacific Fur Seals and the International Agreement on the Conservation of Polar Bears may also be mentioned, as they both include articles relating to culture.[167] For example, the Interim Convention on Conservation of North Pacific Fur Seals, Article VII establishes that exceptions to the hunting prohibition are made for those indigenous populations within the State Parties, given that they use traditional methods.[168] A similar provision is included in the International Agreement on the Conservation of Polar Bears, in which exceptions to the general prohibition is made if the hunt is performed "by local peoples using traditional methods in the exercise of their traditional rights."[169]

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[163] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1790 UNTS 79 (CBD) art 8(j).
[164] Frederico Lenzerini (n 113),136.
[165] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) UNEP/CBD/COP/DEC/X/1 (Nagoya Protocol).
[166] Nagoya Protocol, art 7.
[167] Interim Convention (with schedule) on Conservation of North Pacific Fur Seals (adopted 9 February 1957, entered into force 14 October 1957) 314 UNTS 105 and Agreement on the Conservation on Polar Bears (adopted 15 November 1973, entered into force 26 May 1976) 2898 UNTS 243.
[168] Interim Convention (with schedule) on Conservation of North Pacific Fur Seals (adopted 9 February 1957, entered into force 14 October 1957) 314 UNTS 105, art 7.
[169] Agreement on the Conservation on Polar Bears (adopted 15 November 1973, entered into force 26 May 1976) 2898 UNTS 243 art III(d).

While not diving too deep into different instruments on the protection of migratory species it may be noted, as the fictional case being analysed concerns the protection of migratory birds within the European continent, that Finland has an obligation to protect and conserve the migratory bird species and that these obligations may arise both from international agreements aimed at protecting migratory species as well as EU wildlife protection laws.

As for international instruments protecting migratory birds, in which cultural rights have been given attention within the text, the Convention on the Conservation of Migratory Species of Wild Animals is worth mentioning.[170] Indeed, similarly to the other international instruments mentioned, the Convention on the Conservation of Migratory Species of Wild Animals stipulates that exceptions may be made for those species listed in Appendix I, given that the taking of the bird "is to accommodate the needs of traditional subsistence users of such species."[171]

Furthermore, while not only dedicated to the protection of migratory birds, the Convention on the Conservation of European Wildlife and Natural Habitats, also known as the Bern Convention, is also worth mentioning. The Bern Convention aims to coordinate the efforts of protecting European wildlife, including special provisions on the protection of migratory species.[172] While not dedicating extensive attention as to exceptions due to culture, the Bern Convention recognises that fauna "constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations,"[173] adding that State Parties shall take "measures to maintain the population of wild flora and fauna at […] a level which corresponds in particular to ecological, scientific and cultural requirements."[174]

[170] Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 art III.
[171] ibid.
[172] Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1982, entered into force 1 June 1982) ETS 104, art 10.
[173] id., preamble.
[174] id., art 2.

Considering the inclusion of cultural rights from an EU law perspective, migratory birds that are under threat of extinction are protected by, for example, the EU Birds Directive.[175] Almost identical to the previously cited article of the Bern Convention, according to the EU Birds Directive, the EU Member States shall:

> take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and *cultural requirements*, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.[176]

Namely, the Directive takes into account the principle of cultural diversity while ensuring the sustainable use and taking of migratory bird species. However, as for claiming culture and tradition in order to derogate from the Directive it may however be noted that, as in the case of the *European Commission v the Republic of Malta*, such claims may not go against Article 9(1) of the Declaration. As according to Article 9(1) of the Birds Directive, the Member State may derogate from the provisions of Articles 5 to 8, given that it is:

> (a) — in the interests of public health and safety,
> — in the interests of air safety,
> — to prevent serious damage to crops, livestock, forests, fisheries and water,
> — for the protection of flora and fauna;
>
> (b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;
>
> (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.[177]

In order to allow derogation from the protection under the Directive, Member States must prove that there is no other satisfactory solution and that the derogation is used judiciously, with small numbers and strict supervision.[178] In the case of the *European Commission v the Republic of Malta*, Malta claimed that its derogation regime aimed at enabling "persons who practice the live-capturing of finches to lawfully pursue their activity of capturing and keeping those birds, in accordance with national tradition."[179] Nevertheless, as was noted by the Commission and the Court, claiming derogations on the basis of tradition *only*, not taking into consideration

[175] European Parliament and Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7.
[176] European Parliament and Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7 art 2. Emphasis added.
[177] id., art 9(1).
[178] ibid.
[179] Case C-557/15 *European Commission v Republic of Malta* [2018] ECLI:EU:C:2018:477, para 39.

keeping the use of birds to "small numbers" and ensuring a satisfactory level of the species, renders the test under Article 9(1) meaningless.[180]

3. Everyone's Right to Have a Culture and Participate in Cultural Life and Wildlife Conservation

3.1. State Obligation to Respect, Protect, and Fulfil the Right to Cultural Life Under Human Rights Law

Bringing back to mind the potential options taken by the state presented in the first chapter, options A and B are considered in this chapter. Option A is the full ban on hunting while the second option, option B, is the adding of strict restrictions to catch and methods used when hunting. As explained in the first chapter, both options are equally applied for all individuals living in the area.

As argued by the indigenous population of the area, the practice of hunting the bird is closely connected to their culture and their right with regards to having access to and controlling their culture will be discussed in the upcoming chapter. Nevertheless, the non-indigenous part of the population in the area also argue that the hunt forms a part of their cultural life. Therefore, this chapter will, first and foremost, analyse the question of how the right to cultural life as a right held by everyone, regardless of group belonging, interacts with conservation efforts and when resources are restricted.

Considering everyone's right to participate in one's cultural life within IHRL, the right is, as previously mentioned, laid down in the ICESCR, Article 15(1)(a), to which Finland is a State Party. As also discussed previously, following the broad interpretation of "cultural life" made in the ICESCR's General Comment, there are reasons to believe that hunting, as a leisure activity or as closely related to and individual or a groups' identity, may fall within what the ICESCR considers as "cultural life".[181]

[180] id., paras 39, 63, and 66.
[181] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 15(b).

As a State Party to the ICESCR, Finland is legally bound to its provisions and shall, with regards to fulfilling the rights under the Covenant, the *respect*, *protect*, as well as *fulfil* the right of everyone to take part in culture. As according to General Comment No. 21, *respecting* the right of everyone to take part in cultural life, includes the duty of the State Party of not interfering with the right, both directly or indirectly.[182] As according to Christian Groni's background paper on the right to take part in cultural life, the State Party should refrain from "interfering in the cultural self-realisation of a person's creative and artistic activities as well as an individual's access to culture."[183] Furthermore, State Parties should, in order to respect everyone's right to culture, be mindful of the cultural identities of individuals, especially those apart of a minority or indigenous community and the State Party shall also respect cultural diversity as well as "the autonomy of culture, understood as a domain largely independent of the State."[184] As for the duty to *protect*, the State Party is obliged to prevent the interference of third parties on the right to take part in cultural life. This includes, for example, the duty of the State Party to protect indigenous peoples' culture from being harmed by a third-party. For example, the State Party may have to protect from different economic activities taken place on traditional indigenous land from interfering with the cultural rights of indigenous peoples.[185]

Besides respecting and protecting everyone's right to cultural life, State Parties to the ICESCR also have the obligation to *fulfil* the right under the Covenant.[186] This includes the State Party taking positive measures facilitating individuals and groups to enjoy their right to cultural life through, for example, promoting information about the right of everyone to take part in cultural life as well as providing means in those cases when individuals are unable to take part in cultural life, assisting through, for example, subsidies.[187]

[182] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 48.
[183] CESCR, "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (n 52) 20–21.
[184] ibid.
[185] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 50 and CESCR, "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (n 52) 21.
[186] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 51.
[187] CESCR, "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (n 52) 21.

As a State Party to the ICESCR, Finland must adhere to the obligations arising under the ICESCR. Pursuant to the provisions in Article 2 of the ICESCR, the State Party should "take steps […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant[.]"[188] Finland has therefore not only a duty of non-interference but also an obligation to ensure the satisfaction of minimum essential levels of the right of everyone to take part in cultural life as well as advancing progressively towards a full realisation of the right.[189]

Minimum core obligations refer to the minimum level in which the State Party must fulfil in order to ensure the satisfaction of minimum essential levels of each right under the ICESCR.[190] As according to the General Comments made by the CESCR on the right to cultural life, the minimum core obligation under Article 15(1)(a) of the Covenant includes "the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice[.]"[191] The CESCR notes that the core obligations under the Article, therefore, may include taking "legislative and any other necessary steps to guarantee non-discrimination and gender equality", respecting "the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice", respecting and protecting "the right of everyone to engage in their own cultural practices, while respecting human rights", "eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind", as well as allowing and encouraging "the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them."[192]

[188] ICESCR, art 2.
[189] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 67 and UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant)" (14 December 1990) UN Doc E/1991/23.
[190] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 55.
[191] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 55.
[192] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 55(a), (b), (c), (d), and (e).

Moreover, in order to fulfil the right to cultural life under Article 15(1)(a) of the ICESCR, Finland must consider all its available resources and take steps in order to progressively achieve the right to cultural life. While "to take steps" and "resources" are closely related, "to take steps" refers to the actions taken by the State Party, while "resources" is what the right is dependent on in order to be satisfactory. For example, as for the right to food, law prescribing every school child the right to a free meal every day is the step while kitchen staff and foodstuff are the recourses.[193]

Indeed, while resources often may be related to money, it is not the only type of resource that may be considered. As Robert E. Robertson writes about "resources" under the ICESCR:

> To the rural dweller, access to natural resources is of equal or greater significance than access to money. Giving a farmer land, water, seeds, and animals so he can fulfill his own right to food, is preferable to purely financial assistance, as it is more likely to alleviate state dependency.[194]

In this case, one may argue that the resource requested by those who hunt is the migratory bird species in question. Given access to the resources may then be essential in order to fulfil the State Party's duty to progressive realisation of the rights under Article 15(1)(a) of the Covenant. Nevertheless, while having to satisfy the minimum core obligations arising from the right, Finland may take actions and measures based on its resources available. Given that the species is in rapid decline, the State of Finland has made the assessment that resources are limited, leading to a temporary ban/limitation of the hunt. Such a limitation/ban may then be justified under the ICESCR, given that all available resources have been considered. Nevertheless, as according to the both the principle of minimum core obligations and the Limburg Principles, Finland must ensure the respect for minimum subsistence levels for all.[195] As noted in the case study, the indigenous community, especially, are reliant upon the hunt as a means of their subsistence. A ban on hunting may, therefore, infringe with their right to subsistence, giving rise to its compatibility with indigenous peoples' rights, which will be discussed further in chapter 4.

[193] Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights" (1994) 16 Human Rights Quarterly 693, 695–696.
[194] Robert E. Robertson (n 193) 696.
[195] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (8 January 1987) UN Doc E/CN.4/1987/17 para 25.

As for the ECHR, as noted, translating the right to cultural life into the provisions within the ECHR is not an easy task, as several Articles within the Convention holds cultural aspects to them.[196] The duty of the State Parties to respect the cultural life of individuals may therefore be scattered over several provisions, including those articles mentioned in chapter 2: Article 8, 9, and 11 of the ECHR.

If considering the practice hunting of a specific bird species from the perspective of it forming a central part of an individual's cultural life and cultural identity, the current view of the ECtHR seems to be that, hunting forms a public, rather than private practice. Following the reasoning made in both *Herrmann v Germany*, in which the ECtHR underlined the public nature of hunting activities,[197] and *Friends and Others*, it would be difficult to argue that the hunt of the of the migratory bird, at least for those individuals who are not a part of the indigenous community, would be considered as forming a part of private life.

For the sake of argument, however, given that in this case hunting was to fall within the ambit of what is private life, the State obligations arising from Article 8 of the ECHR is mainly formulated as to impose a negative one. That is, similarly to the obligations arising under the ICESCR, Finland shall, first and foremost, deter from interfering with everyone's right to private life.[198]

While Finland has a duty not to interfere with the rights under the articles of the ECHR, the ECtHR has increasingly recognised that the State Parties also have a positive obligation under the Convention. As for Article 8, on the right to private life, after considering a potential interference of the right, the State Party's positive obligation to protect the right shall be examined. In a similar vein as to when considering if the State Party has followed its negative obligations under the Article, that is, considering if a fair balance has been struck between competing interests of individuals and the community as a whole and if any interference is consistent with the requirements under the second paragraph of the Article, in order to assess the positive obligations under the Article, the Court must consider the importance of the

[196] European Court of Human Rights Research Division Cultural, "Rights in the case-law of the European Court of Human Rights" (January 2011, updated 17 January 2017) <https://www.refworld.org/docid/4e3265de2.html> accessed 28 April 2022, para 1.
[197] *Herrmann v Germany* App No. 9300/07 (ECtHR, 26 June 2012), para 21.
[198] *Libert v France* App No. 588/13 (ECtHR, 22 February 2018), paras 40–42.

interests at stake.[199] Positive obligations may, for example, arise if the interests at stake are of fundamental values or form an essential aspect of private life. Likewise, the State Party may be obliged to positive obligations when there is "discordance between the social reality and the law [and/or] the coherence of the administration and legal practices within the domestic system."[200]

While the hunting practices would, in this case, not fall within the scope of freedom of religion for those who practice it, as there seem to be no reason for the practice to be considered as a religious practice (at least not for those who are not a part of the indigenous community) the hunting community could, given that the hunt among the non-indigenous persons is exercised though, for example, a hunting association, give rise to issues within the right to freedom of association. Like the right to private life, the right to freedom of assembly and association includes the duty of the State Party to "refrain from applying unreasonable indirect restrictions on the right to assemble peacefully but also safeguard that right."[201]

As for positive obligations arising from the right of freedom of assembly and association the State Party may, particularly, be obliged to ensure that, in those cases in which the right is exercised by persons who may have unpopular views or by persons belonging to minorities, the individuals in question are able to fully enjoy their right.[202]

3.2. Interfering With or Limiting the Right to Cultural Life due to Wildlife Protection: Can Wildlife Protection Serve as a Legitimate Reason to Limiting the Right to Cultural Life?

As previously noted, in order to fulfil the right of everyone to take part in cultural life under Article 15 of the ICESCR, all available resources must be taken into consideration. In this case, the State of Finland has, after considering the decline of the bird species, made the assessment that the resources are limited and must be distributed accordingly; through a full ban, as in option A, or, as in option B, through limitations to the hunt. While not addressing lack of natural

[199] *Hämäläinen v Finland* App No. 37359/09 (ECtHR, 16 July 2014), paras 65–66.
[200] id., para 66.
[201] *Kudrevičius and Others v Lithuania* App No. 37553/05 (ECtHR, 15 October 2015), para 158.
[202] *Bączkowski and Others v Poland* App No 1543/06 (ECtHR, 24 September 2007), para 64.

resources, but rather State Parties going through economic hardships, in a letter by the Chairperson of the ICESCR highlights that:

> Economic and financial crises and a lack of growth impede the progressive realization of economic, social and cultural rights and can lead to regression in the enjoyment of those rights. The Committee realizes that some adjustments in the implementation of some Covenant rights are at times inevitable. States parties, however, should not act in breach of their obligations under the Covenant.[203]

Furthermore, in the letter, the Committee notes that, when forced to take actions which may be regressive, the State Party must still follow the following requirements:

> First, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures […] and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights[.][204]

Indeed, while an obligation of non-interference arises from the right to take part in cultural life under the ICESCR, this does not equate to a State Party not being able to make decisions which may affect the right. As according to Article 4 of the ICESCR, the State Party may restrict the rights of the Covenants, given that the limitations "are determined by law only in so far as this may be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society."[205] Finland, as a State Party to the Covenant, may then limit the right of everyone to take part in cultural life, given that the limitation is proportionate. That is, the limitation serves a legitimate aim, is the least restrictive, and that its effects are in proportion with its intent.[206]

In this case it may be argued that the Finland, by imposing a ban/limitation on the hunting, is interfering with the right to cultural life of those who enjoy hunting. Nonetheless, such interferences may be necessary, especially if arising out of obligations concerning wildlife preservation. Protecting biodiversity and, in this case, species from going extinct may arguably

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[203] Office of the High Commissioner for Human Rights, "Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights" (16 May 2012) CESCR/48th/SP/MAB/SW <https://www2.ohchr.org/english/bodies/cescr/docs/Lettercescrtosp16.05.12.pdf> 1.
[204] Office of the High Commissioner for Human Rights, "Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights" (16 May 2012) CESCR/48th/SP/MAB/SW <https://www2.ohchr.org/english/bodies/cescr/docs/Lettercescrtosp16.05.12.pdf> 1–2.
[205] ICESCR, art 4.
[206] CESCR, "The Right to Take Part in Cultural Life: Background Paper Submitted by Mr. Chrisitian Groni" (n 52) 18.

serve as a legitimate aim and necessary for the promotion of general welfare in a democratic society.[207] Indeed, a temporary ban/limitation on the right to hunt the bird may even serve as a means in order to protect the right of everyone to take part in cultural life in the future. By restoring the bird population, individuals living in in the area will be able to continue their hunt. If Finland, however, ceases to protect the bird population, the future of the right to cultural life may be at risk as the extinction of the bird would lead to it being impossible to continue the hunt and thus, an element of cultural life.

What may be considered as central when imposing limitations on the right to cultural life when resources, in this case wildlife, are limited is that there exists a *legitimate aim* of the interference of the right. Indeed, without legitimate aim, bans and limitations of cultural practices, such as hunting, may go against the principles of the Covenant, even amounting to forced assimilation, going against the very core of the right of everyone to take part in cultural life. This may especially be true in cases where the hunt amounts to a way of life, such as in the case of indigenous peoples.[208]

Indeed, while placing restrictions on the right to cultural life through a hunting ban/limitation, careful consideration must be given to the measures in place and the *least restrictive measure* should be the one put in place.[209] That is, if less restrictive measures are available and possible, they should be taken. Finland should then, in order for the limitation to be the least restrictive and proportionate, continue to consider its available resources. If or when the bird population regains huntable status again, a ban or restriction on hunting would perhaps not serving a legitimate aim anymore and could therefore also, potentially, amount to Finland disproportionally interfering with everyone's right to cultural life.

Following the reasoning made by the ECtHR in previous cases concerning hunting practices conducted by persons not a part of a minority, it would seem unlikely that hunting in this case would give rise to an interference of Article 8 of the Convention. Regardless, one may consider the reasons by which Finland, as a State Party to the ECHR, may interfere with the right to

[207] Silvia Borelli and Federico Lenzerini (eds) (n 11) 90.
[208] Silvia Borelli and Federico Lenzerini (eds) (n 11) 90.
[209] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 19.

private life, given that a limitation/ban of hunting would amount to an interference for non-indigenous hunters.

Indeed, as for the right to private life under Article 8 of the ECHR, interference with the right may be justified if it is "in accordance with the law and *is necessary in a democratic society* in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or *for the protection of the rights and freedoms of others*."[210]

When dealing with its obligations under the Article, including also the potential interference with the right to private life, the State Party may be awarded some margin of appreciation. Said margin of appreciation will differ based on the issues at stake. For example, when dealing with issues surrounding an individual's existence or identity, the margin may be restricted,[211] while if there is no consensus among the Member States of the Council of Europe as to the importance of the interests at stake, the margin may be wider.[212]

As for what may be "necessary in a democratic society", the ECtHR has held that an interference may be legitimate if it manages to answer a "pressing social need" and is proportionate to the legitimate aim perused.[213] For example, in the case of *Chapman*, the Court held that is, primarily, the national authorities who may make the initial assessment on the necessity of the situation, while the final evaluation may be done by the Court.[214] Furthermore, the ECtHR held, in the same case, that a margin of appreciation as to the what may be "necessary in a democratic society" may be awarded to the State Party and its national authorities, "who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions."[215]

Indeed, in the case of *Chapman*, while the Court agreed that the right to private life includes the right of minorities to maintain their identity and live their lives as according to their

[210] ECHR, art 8 para 2, emphasis added.
[211] *X and Y v the Netherlands* App No 8978/80 (ECtHR, 26 March 1985), paras 24 and 27.
[212] *X, Y and Z v the United Kingdom* App No. 21830/93 (ECtHR, 22 April 1997), para 44.
[213] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 90.
[214] ibid.
[215] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 91.

traditions, in this case living in caravans, the State Party was awarded a wider margin of discretion, as the land inhabited by the applicant was subject to environmental protection.[216] Similarities to the reasoning made in the *Chapman* case and *Buckley*, which was also heavily referenced in *Chapman*. In the case of *Buckley*, like in the case of *Chapman*, the Court also found that the State Party was given a wide margin of appreciation when evaluating local needs and concerns.[217]

Furthermore, as with regards to "protection of the rights and freedoms of other", as established in in *Chapman*, environmental protection may also serve as a legitimate aim in order to protect the "rights of the others". That is, the right of the others in the local community to environmental protection.[218] Considering the ban/limitation in hunting activities for all, it could, similarly, be argued that the ban/limitation of the hunting practice server and protect the "rights of the others", that is, those locals who do not participate in the hunt to enjoying the plurality of wildlife and nature.

Moreover, in the light of the reasoning made in *G and E v. Norway* from 1983, the Commission made the assessment that, while the construction of a hydroelectric plant constituted an interference with the applicants right to private life under Article 8, the interference was of proportion, as it did not amount to a large enough area as to constitute a denial of the applicants right to private life. The Committee, while not going into further detail as to its reasoning, the Committee held that "the interference could reasonably be considered as justified under Article 8, para. 2, as being in accordance with law, and necessary in a democratic society in the interests of the economic well-being of the country."[219] Pointing, yet again, at the margin of appreciation that is rewarded to the State Party when it comes to interferences, that have a legitimate aim such as a pressing social need or economic activity, to the right to private life and, in this case, culture. Such wide margin of appreciation may even be rewarded in cases dealing with members part of a minority.

As for the right to assembly and association, which was also included in the case of *Friends and Others*, there are restrictions as to how the State Party may interfere with certain groups

[216] id., para 92.
[217] *Buckley v the United Kingdom* App No 20348/92 (ECtHR, 29 September 1996) para 75.
[218] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), paras 80–82 and 104.
[219] *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30, 36.

right to gather. As according to the second paragraph of the Article, restrictions may only be placed unless they are:

> prescribed by law and are *necessary in a democratic society in the interests* of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or *for the protection of the rights and freedoms of other*.[220]

Similarly to Article 8, and the reasoning made as to what is "necessary in a democratic society" or "for the protection of the rights and freedoms of other", the State Party may be given a certain degree of margin of appreciation. Nevertheless, the restrictions taken by the State Party should answer a "pressing social need" and be proportionate to its legitimate aim.[221]

While, as in the case of *Friend and Others* and *the Countryside Alliance and Others v the United Kingdom*, the United Kingdom did not directly prohibit the hunters from gathering, the ban on fox hunting "prohibited the Hunt's *raison d'etre* and therefore the very reason for assembly."[222] Indeed, as according to the reasoning made by the ECtHR in, for example, the case of *Anderson and nine others v. The United Kingdom*, the right to associate also includes the right to do so for particular purposes, such as hunting.[223] The ECtHR noted in *Friend and Others* and *the Countryside Alliance and Others* that, while the right to assembly had primarily been used in order to protect the right to assembly of, for example, trade unions and political movements, the Article may also extend to those assemblies who held an essentially social character."[224] Nevertheless, as was concluded by the Court in the same case:

> [T]he hunting bans in Scotland, England and Wales as they apply to the first applicant do not prevent or restrict his right to assemble with other huntsmen and thus do not interfere with his right of assembly *per se*. The hunting bans only prevent a hunt from gathering for the particular purpose of killing a wild mammal with hounds; as such, the hunting bans restrict not the right of assembly but a particular activity for which huntsmen assemble. The hunt remains free to engage in any one of a number of alternatives to hunting such as drag or trail hunting.[225]

Considering option B in the case analysed, in which catch and method used are limited and restricted, it could then be argued, following the reasoning made by the ECtHR in *Friend and Others*, that the restriction does not, necessarily, interfere with the right to assembly, as the hunters are still able to participate in their hunting activity, but under more regulated

[220] ECHR, art 11, para 2. Emphasis added.
[221] *Kudrevičius and Others v Lithuania* App No. 37553/05 (ECtHR, 15 October 2015), paras 142–146.
[222] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 48.
[223] *Anderson and nine others v. The United Kingdom* App No 33689/96 (ECtHR, 27 October 1997), para 1.
[224] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 50.
[225] ibid.

circumstances. Furthermore, considering even a full ban of hunting the bird species in question, as under option A, it could also be argued that it does not prevent hunters from gathering, but for a particular purpose. However, the hunters would be able, like in the case of *Friend and Other*, to engage in other alternatives of hunting, such as hunting for animals that are currently not in decline or facing extinction.

4. Indigenous Peoples' Right to Culture

4.1. State Obligation to Protect and Promote Indigenous Peoples' Cultural Rights Under International Human Rights Law: Minority Protection Arising from Article 27 of the International Covenant on Civil and Political Rights

While this thesis does not consider any specific indigenous group in particular, but rather an entirely fictional indigenous group in Finland, it may be noted that the Constitution of Finland from 1999 includes the right of the country's indigenous population, the Sámi, to maintain and develop their own language and culture.[226] Indeed, while the Constitution of Finland protects the Sámi peoples' rights and no other indigenous peoples, it will be presumed, for the sake of coherency within the fictional case, that the indigenous peoples in the fictional case considered also enjoy a similar protection under the Constitution. The rights of the Sámi, as is included in the Constitution of Finland, reflects the obligations of Finland as a State Party to several instruments aimed at protecting and promoting the rights of indigenous peoples. As already noted in the second chapter, there are several provisions within human rights law that aim at protecting the culture of indigenous peoples, many of which Finland is bound by.[227]

Protecting minorities right to culture, including indigenous peoples' culture, Finland is bound by obligations arising from several different instruments. Considering some of the soft-law instruments, which are not legally binding *per se* but which nevertheless may hold a significant normative value, the UNDRIP, of which Finland is a signatory, recognises the cultural rights of indigenous peoples to practice and revitalise their culture as well as not become subject to forced assimilation or destruction of their own culture.[228] Similarly, Finland has also signed on

[226] The Constitution of Finland, 11 June 1999, 731/1999, amendments up to 817/2018 included, Chapter 1, Section 17.
[227] See chapter 2.3.3. in this thesis.
[228] UNDRIP, arts 8 and 11.

in agreement with the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities from 1992, which recognises the rights of minorities to enjoy and develop their own culture.[229]

As for provisions creating legally binding obligations for Finland, Article 30 of the Convention on the Rights of the Child, similarly to Article 27 of the ICCPR, establishes that:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[230]

Furthermore, while not an instrument specifically aimed at protecting the rights of minorities and indigenous peoples, Finland is also, as noted in the previous chapter, bound to follow the duties arising from the ICESCR, including everyone's right to cultural life under Article 15(1)(a), which, according to the CESCR, includes the State Party's duty to guarantee indigenous peoples rights to take part in their culture as a community.[231]

Similarly to the ICESCR, that is not directly aimed at being an minorities and indigenous peoples specific instrument, the ICERD also plays a role in protecting the cultural rights of minorities and indigenous peoples. While the Convention does not refer to concepts such as minorities or indigenous peoples, but rather to the prohibition of racial discrimination, its application has been interpreted by the CERD in a manner that it touches upon the rights of minorities and indigenous peoples.[232] The ICERD aims to protect from actions which result in both direct and indirect discrimination on the basis of race, colour, decent, national, or ethnic origin,[233] and the CERD notes in its General Recommendation No. 23 that indigenous peoples fall within the scope of the Convention.[234] As for protecting indigenous peoples culture, the

[229] United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992), arts 2 and 4.
[230] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), art 30.
[231] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 36.
[232] Kristin Henrard and Robert Dunbar (eds.), *Synergies in Minority Protection: European and International Law Perspectives* (Cambridge University Press 2008) 250.
[233] ICERD, art 1 and Kristin Henrard and Robert Dunbar (eds.) (n 232) 250.
[234] Committee on the Elimination of Racial Discrimination (CERD) "General recommendation XXIII on the rights of indigenous peoples" (Fifty-first session, 1997) U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003), para 1.

CRED has also stressed the importance of recognising, respecting, and promoting indigenous peoples culture and identity.[235]

As for legally binding, international human rights law instruments and provisions specifically dedicated to the rights of indigenous peoples, particular attention may be given to the ILO 169 and the ICCPR Article 27. The ILO 169, as has been discussed in chapter 2 of this thesis, recognises within its provisions the cultural rights of indigenous peoples, in particular when considering the land rights of the peoples concerned.[236] The ILO 169 sets out provisions dealing specifically with the cultural rights of indigenous peoples and creates legally binding obligations for State Parties to ensure the rights of indigenous peoples. However, as the cultural rights of indigenous peoples are analysed from the perspective of Finland and, as in the time of writing, Finland is yet to ratify the Convention there is no further need to analyse the obligations arising from the Convention, as Finland is not a State Party and, therefore, not legally bound by its provisions.

Nevertheless, as for other legally binding human rights instruments in which Finland is a party to, the ICCPR and its article on protection of minority is perhaps the most notable one when discussing the cultural rights of minorities and as in this case, indigenous peoples. The Optional Protocol to the ICCPR enables individual communications, leading to the HRC dealing with indigenous peoples' claims of State Party interference to their right to culture. Indeed, today, Article 27 of the ICCPR can be considered as one of the key human rights provisions protecting the rights of indigenous peoples and a cornerstone of international minority rights law.[237]

As to the State Party obligations arising under Article 27 of the ICCPR, the HRC notes in its General Comment No. 23 that, in order to ensure the right under Article 27, the "State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation."[238] Thus, Article 27 of the ICCPR creates, an obligation for the State Party as to refrain from interfering with the right. While the Article, in itself, is formulated in negative terms, the HRC notes that the State Party may also be under an obligation to take positive measures in order to ensure the right. That is, besides refraining from

[235] id., para 4.
[236] ILO 169, art 13.
[237] Ulrike Barten (n 62) 46.
[238] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 6.1.

interfering with the right to culture under the article, there is also a need for the State Party to take measures of protection, including the State Party taking measures through its legislative, judicial, or administrative authorities in order to protect the right from denial or violation.[239]

The positive obligation under the article may also mean that the State Party must take measures which ensures equality between minorities and between the minority and the majority. This may include differential treatment for certain minorities, in order to achieve *de facto* equality.[240] Indeed, the HRC states in its General Comments on the right to culture under Article 27 that "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."[241] In order to ensure the right to culture for minorities, the State shall weigh the measures needed in order to implement the right under Article 27 "against the measures it considers to benefit the minority as a whole as well as the larger society."[242]

4.2. State Obligation to Protect and Promote Indigenous Peoples' Cultural Rights Under Regional Human Rights Law: The European Convention on Human Rights

On a regional European level, the right of minorities is protected through several different instruments. Minorities are, for example, protected through the work done by the Organisation for Security and Cooperation in Europe, in which the High Commissioner of National Minorities is tasked at monitoring and examining the legal and political situation of national minorities in Europe.[243]

Looking at the Council of Europe and the protection of culture, in this case hunting, one must again mention the Framework Convention for the Protection of National Minorities, which obliges State Parties to ensure national minorities right to culture. As previously mentioned, the

[239] ibid.
[240] Ulrike Barten (n 62) 56.
[241] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 6.2.
[242] Ulrike Barten (n 62) 56.
[243] Dieter Kugelmann, "The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity" in A. von Bogdandy nd R. Wolfrum (eds) *Max Planck Yearbook of United Nations Law Volume 11, 2007* (Koninklijke Brill N.V. 2007) 249-250.

Convention establishes, for example, that the State Parties shall "undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."[244]

Considering other legal instruments protecting minority rights, the European Convention on Human Rights, as has already been discussed in previous chapters, is, perhaps, the most effective instrument when protecting human rights.[245] As for protecting minorities, including indigenous peoples, the ECHR does not explicitly include reference to minority rights. Rather, the ECHR includes provisions which may interface with the conditions of minorities.[246] These provisions, as have already been brought up, include the right to private life, the right to freedom of expression, the right to freedom of religion, and the right to association.[247] As for the only Articles within the ECHR which specifically mentions minorities is Article 14, which deals with the right to non-discrimination.[248] This right to non-discrimination is also included in Protocol No. 12, which makes it possible to claim the Article as is; while as it is in the Convention text, the Article has to be taken in conjunction with other rights under the ECHR.[249]

As to the right to cultural identity, which includes minorities and indigenous peoples right to live their lives according to their own cultural identity, the right is, as previously noted, indirectly protected through Articles 8, 9, and 11 of the ECHR.[250] In this case, it can be noted that the State Party, that is Finland, should follow the same obligations to protect and promote the rights mentioned as described in Chapter 3.1.

[244] FCNM, art 5(1) and (2).
[245] Dieter Kugelmann (n 243) 250.
[246] Tove H. Malloy, "The European Regime and the Applicability of the UN Declaration" in Ugo Caruso and Rainer Hofmann (eds) *The United Nations Declaration on Minorities: An Academic Account on the Occasion of Its 20th Anniversary (1992–2012* (Volume 9 in the series of Studies of International Minority and Group Rights, Brill Nijhoff, 2015) 219.
[247] ECHR, arts 8, 10, 9, and 11.
[248] ECHR, art 14.
[249] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1 November 2000, entered into force 1 April 2005) ETS 177. Note: Finland has ratified the Protocol.
[250] European Court of Human Rights Research Division Cultural, "Rights in the case-law of the European Court of Human Rights" (January 2011, updated 17 January 2017) <https://www.refworld.org/docid/4e3265de2.html> accessed 28 April 2022, para 32.

However, when dealing with specifically minorities, which indigenous peoples may be considered to be included,[251] the State Party may have a positive obligation to protect the interests of the minority. As noted by the ECtHR in the case of *Chapman*:

> there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle […] not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[252]

Therefore, the State Party, in this case Finland, may need to take positive obligations in order to ensure the way of life of minorities. This may hold especially true when making decisions which may, potentially, interfere with aspects which relates to the identity of the minority.[253] Indeed, while the ECtHR holds that being a part of a minority, which may include living your life in accordance with your traditions, does not equate to minorities being exempt from general laws, such as environmental protection or, as in this case, the protection of wildlife, State Parties shall consider in which ways these protection rules and regulations effect the needs and lifestyles of the minority.[254]

While *Chapman* deals specifically with the right to private life, which may encompass a particular way of life for minorities, similar respect to protecting minorities can be found within the other articles mentioned as well. For example, as for the right to assembly and association under Article 11, the ECtHR has held that through ensuring the right of minorities to association, through forming associations and, through it, expressing and promoting the minority's identity, it may serve as an instrument in order to preserve and uphold minority rights.[255] Moreover, the ECtHR "considers that mention of the consciousness of belonging to a minority and the preservation and development of a minority's culture cannot be said to constitute a threat to 'democratic society', even though it may provoke tensions" and that "pluralism is built on, for example, the genuine recognition of, and respect for, diversity and the dynamics of traditions and of ethnic and cultural identities."[256]

[251] See, for example, *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30.
[252] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 93.
[253] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 93.
[254] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 96.
[255] *Gorzelik and Others v Poland* App No. 44158/98 (ECtHR, 17 February 2004), para 93.
[256] *Ouranio Toxo and Others v Greece* App No. 74989/01 (ECtHR, 20 October 2005), paras 40 and 35.

4.3. Wildlife Conservation and Limiting Indigenous Peoples' Cultural Rights

4.3.1. Indigenous Peoples' Right to Develop their Own Culture: Claiming the Right to Hunt as a Part of Internal Self-determination?

Bringing back to mind the fictional case and its potential options, it must be noted that in both option A and B, the State interferes with indigenous peoples right to culture. In option A, the interference takes the form of a ban of hunting for indigenous peoples while in Option B the interreference does not amount to a full ban, but strict limitations as to how the hunting practice can be exercised.

Comparing the analysis made in chapter three, discussing the ban to hunt and everyone's right to cultural life, for the indigenous peoples, the question goes beyond that of the individual right to have and practice their culture and tradition. Instead, when considering Finland's interference with indigenous peoples right to culture, it is also a question of the right of peoples to determine their own culture, cultural practises, and way of life, which, in turn, leads to the question of self-determination. If a group can be considered as to have the right to self-determination, outside interference as to that peoples' right to determine their political status and to peruse their economic, social, and cultural development could be considered going against the right to self-determination.[257] Therefore, in order to analyse the legality of Finland interfering with indigenous peoples right to culture, either through a full ban of hunting (option A) or through strict limitations (option B), the question as to indigenous peoples right to self-determination must be examined.

The right to self-determination is included in both International Covenants, stating that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[258]

The right to self-determination, indigenous peoples' cultural rights, and their right to determine and evolve their cultural heritage are interconnected. As mentioned previously, self-determination includes the rights of peoples to determine their own culture and cultural development. Indeed, cultural rights and the right of peoples to determine their own destiny, that is, self-determination, hold similarities. The right to self-determination is, by its nature,

[257] See ICESCR, art 1, para 1 and ICCPR, art 1, para 1.
[258] ICESCR, art 1, para 1 ICCPR, art 1, para 1.

exercised by the collective, which is similar to cultural rights that may hold both collective as well as individual dimensions.[259]

The question of who have the right to self-determination has long been a contentious one. While a heavily debated topic, as was noted in chapter two discussing collective rights, the current consensus seems to be that indigenous peoples' have, at the very least, the right to what is often referred to as *internal* self-determination,[260] meaning that indigenous peoples have the right to govern matters which relates to them, which may be compared to a form of autonomy.[261]

The UNDRIP, one of the first international instruments to recognize indigenous peoples' right to self-determination, it is stated in Article 3 that "[i]ndigenous peoples have the right to self-determination [and] [b]y virtue of that right they [may] […] freely pursue their economic, social and cultural development."[262] Article 4 continues with that:

> [i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[263]

Considering that the current consensus is that indigenous peoples may have a right to internal self-determination, based on Articles 3 and 4 in the UNDRIP, one could even interpret indigenous peoples to have the right to full self-determination. Such an interpretation would subsequently mean that indigenous peoples are entitled to fully determine their political status and secede from any foreign/colonial powers.[264] However, the UNDRIP includes in Article 46 that:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[265]

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[259] Ana Vrdoljak "Self-determination and Cultural Rights" in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008) 41.
[260] Kalana Senarante (n 94) 306.
[261] Kalana Senarante (n 94) 306.
[262] Mariana Monteiro de Matos, "Cultural Identity and Self-Determination as Key Concepts in Concurring Legal Frameworks for the International Protection of the Rights of Indigenous Peoples" in Evelyne Lagrange et al. (eds) *Cultural Heritage and International Law* (Springer International Publishing 2018) and UNDRIP, art 3.
[263] UNDRIP, art 4.
[264] Timo Koivurova, "From Hight Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)Gain Their Right to Self-Determination" (2008) 15 International Journal on Minority and Group Rights 1, 11.
[265] UNDRIP, art 46.

Therefore, the right of indigenous peoples to self-determination, as it is included in the UNDRIP, stretches at a minimum to the right to internal self-determination. However, not to that of external self-determination.[266]

Moving beyond the UNDRIP, the right to self-determination is, as previously noted, recognised within both the ICCPR and the ICESCR.[267] The HRC has long been cautious when addressing indigenous peoples' right to self-determination. The Committee has not directly considered communications evoking the rights under Article 1 of the ICCPR, as the HRC, according to its Optional Protocol, can only consider *individual* communications.[268]

However, the HRC has evolved in its consideration of indigenous peoples and their relationship to Article 1 of the Covenant through its State observations. At the beginning of its development, the HRC would only urge State Parties to report on the situation of indigenous peoples under Article 1 of the Covenant if the State Party itself had addressed indigenous peoples as peoples or as having the right to self-determination. This has changed as the HRC will now, as they did in the concluding observations to Finland in 2003, ask for answers concerning the situation of the indigenous peoples with regards to Article 1, regardless if addressed by the State Party or not.[269]

The HRC has been adamant in separating the rights of Article 1 and Article 27. However, when considering the case-law from the HRC regarding the right to culture of minorities, the link between self-determination and indigenous peoples' right to culture is evident. For example, as in the case of *Apirana Mahuika*, the HRC held that "the provision of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27."[270]

[266] Dorothée Cambou, "The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective" (2019) 23 The International Journal of Human Rights 34, 36. Note: regardless of the "limitation" that Article 46 of the UNDRIP places on the self-determination of indigenous peoples, it is important to note that this does not exclude *all* indigenous peoples from having a right to "full" self-determination.
[267] ICESCR, art 1, para 1 and ICCPR, art 1, para 1.
[268] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1979) 999 UNTS 171, art 1. Note: In this case, it may be important to note that while aspects of self-determination may be considered when examining indigenous peoples' right to culture, many have voiced criticism in addressing issues related to self-determination through individual complaints procedures.
[269] Timo Koivurova, "From Hight Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)Gain Their Right to Self-Determination" (2008) 15 International Journal on Minority and Group Rights 1, 6–7.
[270] *Apirana Mahuika et al. v New Zealand*, UN Human Rights Committee, Communication no 547/1993, para 9.2.

Indeed, as noted by Ana Vrdoljak, when discussing the HRC not being able to address Article 1 in its individual communications:

> Yet, in order to sidestep argument that the denial of individual claims for self-determination renders Article 1 non-justiciable, the Committee has suggested that the same facts which have been used to bring a complaint about the violation of the right to self-determination could be examined on their merits, under Article 27, in respect of denial of enjoyment of culture, language or religion of the community to which they belong.[271]

For example, within the landmark case of *Lubicon Lake Band*, the HRC notes that while it cannot consider the question "whether the Lubicon Lake Band constitutes as a 'people'," [272] "[t]here is […] no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights." [273] While not being able to address the right to self-determination of the indigenous peoples, as was first intended, through the individual communication, the HRC was able to examine the indigenous peoples' right to culture, including their claim of control of their culture and way of life.[274]

4.3.2. Free, Prior, and Informed Consent

In this fictional case analysed, the indigenous group in question would not be able to call upon their right to self-determination as it is included in Article 1 of the two International Covenants before the HRC. Instead, they would have to rely upon the right to culture under Article 27, which may be subject to limitations. Nevertheless, one principle related to indigenous peoples' right to internal self-determination and cultural rights needs to be considered. That is, *free, prior, and informed consent*.[275] Indeed, following the reasoning made by the HRC in its case-law on Article 27, the principle of free, prior, and informed consent is of *central* importance when considering an interference under the Covenant.

Deconstructing the principle of free, prior, and informed consent, *free* implies "no coercion, intimidation or manipulation," [276] while *prior* refers to that "consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for

[271] Ana Vrdoljak (n 259) 62.
[272] *Lubicon Lake Band v Canada* (1990) UN Human Rights Committee, Communication no 167/1984, para 32.1.
[273] ibid.
[274] ibid.
[275] See *Ángela Poma Poma v Peru* (2009) UN Human Rights Committee, Communication no 1457/2006, para 6.3.
[276] United Nations Permanent Forum on Indigenous Issues, "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples", 17 February 2005, UN Doc. E/C.19/2005/3, para 46.

time requirements of indigenous consultation/consensus processes."[277] As for *informed*, it should be interpreted as to cover, at least, "[t]he nature, size, pace, reversibility, and scope of any proposed project or activity [,] [t]he reason(s) for or purpose(s) of the project and/or activity [,] [t]he duration of [the project and/or activity] [,] [t]he locality of areas that will be affected [,] [a] preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle [,] [p]ersonnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others) [as well as] procedures that the project may entail".[278]

The duty of States to consult indigenous peoples when making decisions that may affect them, including their culture, can be found in several international human rights instruments, including the UNDRIP.[279] According to the UNDRIP, States shall "consult and cooperate […] with the indigenous peoples […] in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".[280] Furthermore States must have consent as the *objective* of consultation when adopting legislative or administrative policies affecting indigenous peoples,[281] or when undertaking projects that concern indigenous peoples' right to land, territory, and resources.[282] On the other hand, under certain circumstances, the State has an obligation to *obtain* consent from indigenous peoples. Such as in cases of relocating indigenous peoples from their lands and territories or when storing or disposing of hazardous waste on indigenous land and territories.[283]

The seeking of indigenous peoples' free, prior, and informed consent is not only included in UNDRIP, but it is also included in treaties such as ILO 169.[284] Furthermore, with regards to the ICERD, in its General Recommendation No. 23 on indigenous peoples, CERD calls upon states to ensure the informed consent of indigenous peoples when making decisions directly relating

[277] ibid.
[278] United Nations Permanent Forum on Indigenous Issues, "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples", 17 February 2005, UN Doc. E/C.19/2005/3, para 46.
[279] UNDRIP, art 19.
[280] ibid.
[281] ibid.
[282] UNDRIP, art 32.
[283] UNDRIP, arts 10 and 29.
[284] ILO 169, art 16. Note: Finland is not a State Party to the Convention and, therefore, not bound by its provisions.

to their rights.[285] Indeed, as previously noted, outside of human rights, treaties such as the CBD, also calls upon its State Parties to respect the principle of free, prior and informed consent when dealing with access to knowledge, innovations, and practices related to indigenous and local communities.[286]

As for the ECHR, the principle of free, prior, and informed consent is not included, given that the principle was evolved much later after the conclusion of the Convention. Therefore, explicit mention of the principle has not made its way to the Court. Consider, for example, the reasoning made in cases concerning the right of Roma people to live in accordance with their traditional lifestyles. In the cases, the ECtHR notes that while the State Party shall take into consideration the particular identity of minorities and the right to lead one's private and family life in accordance with the traditions and culture of that identity, no mention is made as to the need for the State Party to seek free, prior, or informed consent when dealing with issues that relate to minority identity.[287] Nevertheless, going beyond the ECHR and the ECtHR, the Council of Europe does support the consultation of minorities when taking actions that may affect them. While not creating a detailed list of rights of persons belonging to a minority, but rather "programme-type provisions" that should be taken by the State,[288] the FCNM establishes that:

> The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.[289]

According to the Explanatory Report, this includes the following measures:

> – consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;
> – involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly;
> – undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;
> – effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels;

[285] Committee on the Elimination of Racial Discrimination (CERD) "General recommendation XXIII on the rights of indigenous peoples" (Fifty-first session, 1997) U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003) para 4(d) and Katja Göcke, "The Case of *Ángela Poma Poma v. Peru* before the Human Rights Committee: The Concept of Free, Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights" in Armin von Bogdandy and Rüdiger Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (volume 14, Martinus Nijhoff Publishers 2010) 361.
[286] CBD, art 8(j).
[287] See, for example, *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001).
[288] Yvonne Donders (n 78) 252.
[289] FCNM, art 15.

– decentralised or local forms of government.[290]

Moving beyond the Council of Europe, as far as the previously mentioned international human rights instruments go, the two International Covenants have continuously considered the principle of free, prior, and informed consent. As for its inclusion under the right to cultural life as stipulated in the CESCR, in its General Comment No. 21, the ICESCR recognise that, in the case of indigenous peoples' cultural rights, State parties should respect the principle of free, prior, and informed consent when considering matters which affect indigenous peoples' cultural rights as according to Article 15(1)(a) of the CESCR.[291]

The HRC also shares this view of including the principle of free, prior, and informed consent when protecting minority cultures under Article 27 of the ICCPR. The HRC has made it clear during several instances that ensuring the free, prior, and informed consent is essential if interfering with the cultural rights of indigenous peoples, going from previously stressing the "effective participation" to the importance of free, prior, and informed consent.

In its General Comment No. 23 on the cultural rights of minorities, the HRC notes that the enjoyment of the cultural rights of indigenous peoples, which includes the way of life associated with the use of natural resources such as hunting and fishing, "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[292] The HRC has, in its case-law, stressed the importance of effective participation, including in the case of *Mahuika v. New Zealand*.[293] In *Mahuika*, the HRC noted that the restriction of access to fish stocks could interfere with the rights under Article 27 of the ICCPR. However, the HRC found that New Zealand had followed the principle of effective participation, as they had given the indigenous population the right to participate in the decision-making through a complicated process of consultation.[294]

[290] Explanatory Report to the Framework Convention for the Protection of National Minorities (1 November 1995) ETS 157, para 80.
[291] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 37.
[292] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 7.
[293] *Apirana Mahuika et al. v New Zealand* (1993) UN Human Rights Committee, Communication no 547/1993.
[294] Ben Saul (n 123) 64–65 and *Apirana Mahuika et al. v New Zealand* (1993) UN Human Rights Committee, Communication no 547/1993, para 9.6.

It is, however, in the case of *Poma Poma* from 2006, in which the HRC strengthened the need for evolvement by indigenous communities, moving from effective participation to the need to seek free, prior, and informed consent from indigenous peoples when interfering with their right to culture. While the HRC did not, unlike for example in the case of *Apirana Mahuika*, refer to effective participation when considering Article 27,[295] the Committee stressed the importance of free, prior, and informed consent. In its consideration of the merits, the Committee notes that:

> In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community *depends on whether the members of the community in question have had the opportunity to participate in the decision-making process* in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be *effective*, which requires not mere consultation but the *free, prior and informed consent of the members of the community*.[296]

The case examined in this thesis does not mention if the indigenous peoples in question have been priorly consulted. Nevertheless, it is safe to say that if it is found that Finland has neglected to seek free, prior, and informed consent from the indigenous peoples in question, the State interference, as to banning/limiting the hunt, could amount to the State Party not fulfilling its obligations under Article 27 of the ICCPR. Thus, deeming the interference inadmissible under Article 27 of the ICCPR. Indeed, it should also be emphasised, as stated by the HRC in the case of *Poma Poma*, that Finland should not *only* seek mere consultation in this matter, but the State should also ensure the *effectiveness* of the decision-making.[297]

4.3.3 Limiting Indigenous Peoples' Right to Culture Due to Wildlife Conservation Serving as a Legitimate Aim?

What is also mentioned in the same paragraph in the case of *Poma Poma*, is that, if interfering with indigenous peoples right to their culture, besides ensuring their free, prior, and informed consent, "the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[298] Indeed, as is mentioned in the case analysed, the hunting of the bird does not only constitute a cultural tradition, both as a practice and as a culinary experience, but it is also something in which the indigenous community rely

[295] *Apirana Mahuika et al. v New Zealand* (1993) UN Human Rights Committee, Communication no 547/1993, para 9.5.
[296] *Ángela Poma Poma v Peru* (1993) UN Human Rights Committee, Communication no 1457/2006, para 7.6. Emphasis added.
[297] *Ángela Poma Poma v Peru* (1993) UN Human Rights Committee, Communication no 1457/2006, para 7.6.
[298] ibid.

upon for subsistence. As previously noted, indigenous peoples' right to subsistence is included in several international human rights instruments, including the UNDRIP as well as the two international Covenants, claiming that "[i]n no case may a people be deprived of its own means of subsistence."[299]

Indeed, indigenous peoples have a right livelihood, which may include having access to certain natural resources. For example, the CESCR has continuously underlined that there is a connection between the right to life and having access to natural resources which one may rely on in order to sustain oneself.[300] In this case, it may be argued that if the ban/limitation of the hunt may amount to a denial of access to traditional means of subsistence, indigenous peoples right to food and right to life is also threatened.[301]

As noted by Jérémie Gilbert, in this regard, other regional human rights courts and monitoring bodies, besides the ECtHR, have been able to examined the connection between indigenous peoples right to access to resources which they may be reliant on for subsistence and the right to life. For example, in the cases of *Sawhoyamaxa Indigenous Community v. Paraguay* and the *Yakye Axa Indigenous Community v. Paraguay* case, the Inter-American Court of Human Rights (IACtHR) noted that failing to ensure indigenous peoples access to their traditional lands, and therefore also natural resources, could amount in a violation of the right to life.[302] In the case of *Sawkoyamaxa*, the IACtHR found that the condition under which the indigenous people were living under, due to them being removed from their ancestral land and thus not gaining access to resources needed for their subsistence constituted a violation of the applicants' right to life under Article 4 of the American Convention on Human Rights (ACHM).[303] Similarly, in the case of *Yakye Axa*, the IACtHR was of the opinion that the displacement of the indigenous community had interfered with the community's subsistence. The IACtHR held that the displacement had "caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate

[299] UNDRIP, art 20 and ICESCR, art 1, para 2 ICCPR, art 1, para 2.
[300] Jérémie Gilbert (n 98) 97 and UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 12: The Right to Adequate Food" (12 May 1999) UN Doc E/C.12/1999/5, para 13, and UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant" (20 January 2002) UN Doc E/C.12/2002/11, para 16.
[301] Jérémie Gilbert (n 98) 98.
[302] ibid.
[303] *Sawhoyamaxa Indigenous Community v Paraguay* I/A Court HR, Judgement of March 29 2006, Series C No 146, paras 145 and 148–149.

conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering."[304] As for the African Commission on Human and Peoples Rights (ACHPR), references has been made to the reasoning made by the IACtHR when considering the relationship between the right to life and indigenous peoples access to natural resources.[305] Nevertheless, as noted by the African Court on Human and Peoples' Rights (ACtHPR) in the *Ogiek* case, in order amount to a violation of the right to life, there must be a proven causality between the loss of subsistence/livelihood and the loss of life.[306]

As to similar cases, regarding indigenous peoples right to livelihood and subsistence connected to the right of life, making its way to the ECtHR, such a case is yet to be considered. Nevertheless, the ECHR does, arguably, protect minorities' way of life from being interfered with, at least in such a way as to ensuring that an interference does not amount to a denial of the right. Concerning indigenous peoples, in *G. and E.*, the Commission was willing to admit that there had been an interference with the applicant's, individuals' part of the Sámi community in Norway, right to private life.[307] In this case, the ECtHR considered the interference, similarly to what the HRC does under Article 27 of the ICCPR, through a test of "impact".[308] The Commission made the assessment, based on its consideration of the impacts that the interference had on the rights, that the building of the hydroelectric plant did not amount to a full denial of the right, as only a "smaller" part of the land used by the Sámi peoples was effected. Furthermore, in this case, the Commission noted that the construction of the hydroelectric plant could be considered as permissible as according to Article 8, Paragraph 2, as it delt with the economic well-being of the country.[309]

In other assessments made by the ECtHR with regards to interfering with the way of life of minorities, the ECtHR has continuously held that, when dealing with the right to way of life of a minority, which includes cultural heritage and traditional lifestyles, a balance shall be made

[304] *Yakye Axa Indigenous Community v Paraguay* I/A Court HR, Judgement of June 17 2005, Series C No 125, para 164.
[305] Jérémie Gilbert (n 98) 98–99.
[306] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Afr Comm'n Hum & Peoples' Rts, 26 May 2017).
[307] *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30, 36.
[308] Yvonne Donders (n 78) 318.
[309] *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30, 36.

between the rights of the minority and the general interest of the community.[310] For example, as in the case of *Buckley*, a case continuously references throughout cases concerning Roma peoples' right to live in accordance with their traditions,[311] the Commission claimed that the United Kingdom had violated the applicant's right under Article 8 of the ECHR. The Commission argued that, due to the Roma's following a traditional lifestyle, the State Party should pay special consideration in the environmental planning matters, which affects their ability to live as according to their tradition. Furthermore, the Commission was of the opinion that a proper balance between the interests of the community and that of the applicant had not been achieved and that the applicant now was left without a suitable location alternative in which she could enjoy her right to private life. The ECtHR, however, when considering the case, was of the opinion that the interference with Article 8 was in accordance with national law and that the measures taken by the State Party was in line with the legitimate aim of public safety, preservation on the environment, as well as public health. As to if the interference falling with what constitutes as "necessary in a democratic society" or, in other words, due to "pressing social needs" and if it was proportionate to the aims perused, the ECtHR noted that the State Parties have a wide margin of appreciation, as they are the best to evaluate local needs and conditions. The ECtHR also noted that, in this case, there was a proper balance between the applicants right to respect for her home and the interest of the community and that her needs, as a part of a minority, had sufficiently been taken into account.[312] Similar conclusions have also been made in cases after *Burkley*, as for example in *Chapman*, in which the ECtHR made a link between the right to private and family life to culture, as well as *Beard v. the United Kingdom*, *Closter v. the United Kingdom*, *Lee v. the United Kingdom*, as well as *Jane Smith v. the United Kingdom*, all of which related to housing of Roma peoples.[313]

To summarise, it may be noted that, follow the case-law from the ECtHR, when considering the interference that environmental protection or, as in this case, wildlife protection may have on minorities way of life, the State Party may be given a wide margin of appreciation by the ECtHR as to making an assessment on the situation in the area. Indeed, as in the case of *Buckley*,

[310] See partially dissenting opinion by Judge Lohmus in *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001).
[311] See, for example as, *Beard v the United Kingdom* App no 24882/94 (ECtHR, 18 January 2001), *Lee v. the United Kingdom* App no 25289/94 (ECtHR, 18 January 2001), as well as *Jane Smith v. the United Kingdom* App no 25154/94 (ECtHR, 18 January 2001).
[312] Yvonne Donders (n 78) 290.
[313] Yvonne Donders (n 78) 288–297.

the State Party may be given a wide margin of appreciation to what they deem as necessary in a democratic society, especially with regards to environmental planning. Nevertheless, as noted, a balance should be struck between the interests of the individual, in this case, those individuals' part of the indigenous community, and the community as a whole, which, in this case, are all, including those who are not a part of the indigenous community. Furthermore, given that the wildlife conservation is admissible under Article 8, it shall be in accordance with national law and peruse a legitimate aim, in which, at least in the case of *Buckley*, the ECtHR deemed the preservation of environment to be.[314]

Considering the ECHR and the two international Covenants, it may be interesting to point out the difference in the nature of the rights and in what way it may also aims at protecting the interests of minorities. Indeed, as to protecting the cultural identity of minorities and indigenous peoples, the Commission notes in *G. and E.* that "[t]he Convention does not guarantee any specific rights to minorities [. However,] disrespect of the particular life style of minorities may raise an issue under Article 8."[315] This seems to also be a sentiment which follows in the cases surrounding the Roma. For example, in the case of *Buckley*, the ECtHR argued that there was alternative accommodation available for the applicant. While such accommodation might not be as satisfactory as the home she enjoyed now, the right under the Article does not go so far as allowing the living preferences of individuals to override the general interest of the public.[316] Indeed, as note in *Chapman*, while the ECtHR argues that individuals from the Roma community has the right to live their life as according to their traditional lifestyles, which included living in a caravan, Article 8 does *not* impose the state to make available housing which suits the minority's needs. The ECtHR notes that:

> It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.[317]

Compared this to, for example, the rights under the ICESCR in which the rights shall, according to available resources, be progressively realised and take into account cultural aspects, such as

[314] See, for example, *Buckley v the United Kingdom* App No 20348/92 (ECtHR, 29 September 1996).
[315] *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30, para 7.
[316] Yvonne Donders (n 78) 290.
[317] *Chapman v the United Kingdom* App No. 27238/95 (ECtHR, 18 January 2001), para 76.

for example, ensure the right to culturally adequate food, which may also form a part of the community's subsistence.

Moving beyond the ECHR, which does not have any articles specifically aimed at the protection of minorities, the ICCPR aims specific attention and protection at the culture of minorities through Article 27. As a minimum, it may be argued that an interference under the right to culture, should not amount to the peoples in question losing their means of subsistence. Indeed, while a ban/limitation of hunting potentially amounting to a loss of subsistence for the community, cannot, as previously mentioned, due to procedural grounds, be considered by the HRC under Article 1 of the ICCPR, the HRC has, nevertheless, emphasised that subsistence activities, such as hunting and fishing, falls within the ambit of "culture" under Article 27 of the ICCPR.[318] Thus, practices which relates to the livelihood and subsistence of indigenous peoples may also be protected under the Article.[319] For example, as in the case of *Lubicon Lake Band*, in HRC noted that Canadas actions had violated the authors right to culture under Article 27 of the ICCPR, as the development activities had "[t]hreatened the [subsistence] way of life of the Lubicon Lake Band."[320]

As to the admissibility of interreferences of the State to practices closely related to indigenous culture and subsistence, contrary to the ECtHR, there is no margin of appreciation for the state when it permits (economic) activities to operate in the traditional territories of indigenous peoples. In other words, it is a right for the members of the indigenous minority to not have their culture interfered with and it an obligation for the state to ensure non-interference. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27."[321] This was included in the case of *Lansman*, in which the HRC noted that:

> A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27.

[318] Athanasios Yupsanis (n 127) 371.
[319] See, for example, *Lansman et al v Finland* (1992) UN Human Rights Committee, Communication no 511/1992.
[320] *Lubicon Lake Band v Canada* (1990) UN Human Rights Committee, Communication No. 167/1984, para 33.
[321] Timo Koivurova, "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects" (2011) 18 International Journal on Minority and Group Rights 1, 10–11.

> However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.[322]

In other words, State Party measures should be considered from the *obligations* that arise from Article 27. Finland has an obligation to protect indigenous culture, which in this case includes hunting of a specific bird species. Nevertheless, Finland also has a duty to protect endangered species. Therefore, actions needed to be taken in order to fulfil obligations related to wildlife preservation may be permissible.[323] However, while such measures may be needed, in order for the State Party to admissibly interfere with a culturally significant (economic) activity under Article 27 of the ICCPR, the measures must not endanger the survival of the community and, furthermore, the principle of free, prior, and informed consent must be adhered to.[324]

Lastly, as mentioned in option B of the case analysed, the State of Finland also place limitations as to what hunting methods may be used. Considering this outside of the perspective of human rights, through the lens of cultural heritage, Finland, as a State Party to, for example, the 2003 UNESCO Convention, it is imperative to the duties arising from the Convention that Finland should safeguards practices which are related to indigenous peoples' traditional practices, including hunting methods.[325] Nevertheless, from a human rights perspective, specifically from the perspective of Article 27 of the ICCPR, no difference is to be made as to what hunting practices shall be protected under the Article and which shall not.

Indeed, the HRC follows the sentiment made in the General Comments No. 21 from the ICESCR on the right to take part in cultural life, that "[t]he expression "cultural life" is an explicit reference to culture as a *living process, historical, dynamic and evolving, with a past, a present and a future*."[326] In the case of *Lansman et al.* the HRC notes that, in the case of Sámi reindeer herding, that:

> [A]rticle 27 does not only protect traditional means of livelihood of national minorities […] that the authors may have adopted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.[327]

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[322] *Lansman et al v Finland* (1992) UN Human Rights Committee, Communication no 511/1992, para 9.4.
[323] See *Lansman et al v Finland* (1992) UN Human Rights Committee, Communication no 511/1992, para 9.4.
[324] *Ángela Poma Poma v Peru* (2009) UN Human Rights Committee, Communication no 1457/2006, para 7.6.
[325] See Chapter III in 2003 UNESCO Convention. Note, however, that the Convention only intends to safeguard those parts of intangible cultural heritage which fulfils UNESCO's sustainability criteria.
[326] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 11. Emphasis added.
[327] *Lansman et al v Finland* (1992) UN Human Rights Committee, Communication no 511/1992, para 9.3.

Indeed, the HRC does not focus on the methods used, but rather the importance of the culture itself. While it may be in the interest of those hunting, especially among those practising hunting methods linked to tradition, to protect those methods, it may also lead to limiting and stagnant results. Allowing *only* traditional hunting methods also limits the ways in which culture can be practiced and evolved. Take, for example, lessons learned from then North Pacific Fur Seal Interim Convention and the Agreement on Conservation of Polar Bears, both including protection of indigenous hunting. While with the goal as to allow indigenous peoples to hunt species which are, under other circumstances, prohibited, or, at least strictly regulated, to hunt, the exception bears with it *certain* practices: North Pacific Fur Seal Interim Convention allowing the exception of indigenous people to hunt fur seals given that they do so by using traditional hunting methods, using "canoes that are 'propelled entirely by oars, paddles or sails' and manned by no more than five persons; such hunting must be carried out 'in the way hitherto practised and without the use of firearms'," [328] and the Agreement on Conservation of Polar Bears allowing exemptions in its prohibition of killing polar bears, given that it is conducted by local and indigenous peoples, using traditional methods.[329] While intended as to protect indigenous peoples hunt, it may also be criticised as to essentialising and making indigenous hunting and, therefore, also culture stagnant.

If Finland would then limit the hunt as to *only* be allowed using traditional methods, it would be fair to say that such an interference would bring to question the principle of culture being a dynamic, living process which is ever evolving. This notion of culture being dynamic and ever evolving is held, not only by several cultural heritage instruments,[330] but also by human rights treaties, including the ICESCR and the ICCPR.[331] Limiting a culture as to only being that of tradition and practices connected to the archetypal "traditional ways" would go against the case-law found in, for example, the HRC.

[328] Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2016) 125.
[329] ibid.
[330] See, for example, UDCD and 2003 UNESCO Convention.
[331] See CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 11 and *Lansman et al v Finland* (1992) UN Human Rights Committee, Communication no 511/1992, para 9.3.

5. Prioritising Whose Rights? No Winner Without Losers?

5.1. A Right Based on Group Belonging? The Differences in the Right to Culture Between Indigenous Peoples and Non-Indigenous Individuals

As has already been mentioned, the loss of wildlife creates the need for action, conserving and protecting species from going extinct. Option A in this thesis limits the hunt for all individual, not taking any consideration into who is and who is not indigenous. Option B allows hunting to a certain degree, given that the hunt is performed under certain circumstances and using certain methods. Similar to option A, option B does not make any difference between those indigenous versus those non-indigenous people living in the area. Option C, however, which will be examined in this chapter, limits the hunting of the bird but makes an exception for those individuals who are part of the indigenous community. In option C, the state of Finland justifies its exceptions for indigenous peoples due to the hunt constituting a part of indigenous culture and identity.

Option C, that is making exceptions for individuals who are part of the indigenous community, raises the question of not only of the lawfulness of unequal treatment, prioritising the protection one person's culture before the other, but also the issue of potential conflicts between collective/community rights and individual rights, and how collective human rights and individual rights interact.

As has been previously noted, the cultural right of those who are indigenous versus non-indigenous differ in one fundamental way. That is, one mainly concerns the right of the individual, having the right to enjoy their culture with other individuals, while the other concerns the right to take part in culture, as an individual part of a community, or as a community in whole.[332]

Considering indigenous peoples' cultural rights through the lens of the UNDRIP or the ILO 169, indigenous peoples' right to culture is based in their right to self-determination.[333] If, however, seen out of the perspective of the ICCPR, indigenous peoples right to culture is based on indigenous peoples constituting a minority. Therefore, the right to culture under the ICCPR

[332] Yvonne Donders (n 72) 2–3.
[333] See UNDRIP, arts 3, 8, 11, 31 and ILO 169, art 7.

is of individual, rather than collective, nature. Nevertheless, as was noted in the second chapter of this thesis, the right to cultural life under Article 27 of the ICCPR, can described as a *communal* right.[334] While the HRC has previously been reluctant in addressing collective rights, especially with regards to indigenous peoples' self-determination, the cultural rights of indigenous peoples, protected under Article 27, may be regarded as not only protecting the individual but also the *community* and their identity.[335] Compare this to the right to cultural life under Article 15(1)(a) of the ICESCR. While recognising the collective elements of cultural life, the right to take part in cultural life is an individual right, not a collective right. As according to Article 15(1)(a), everyone, as individuals, have the right to take part in cultural life not only by themselves, but in association with others or within a community.[336]

While collective rights are contested, and while the HRC has been reluctant in addressing collective rights, there is hardly any doubt that indigenous versus non-indigenous peoples and their cultural rights are addressed differently under current international human rights law. While Article 27 might not be a collective right, the communal aspects of protecting indigenous peoples' culture is of central importance. Indeed, as has been previously mentioned, the individual right to take part in cultural life includes collective elements and these collective elements may exist, regardless of who practices it.[337] In other words, all cultures, not only indigenous culture, can exhibit collective dimensions. Nevertheless, as to the right to take part in cultural life, the CESCR adds that cultural life for indigenous peoples carries a "strong communal dimension […] *indispensable* to their existence."[338] Compare this statement to culture having a collective dimension, culture for indigenous peoples does not only *have* a communal dimension to it, it is the very *fabric* in which they are able to keep their *identities* as peoples.

Therefore, when considering the differences, and, ultimately, the prioritisation of the cultural rights of indigenous versus non-indigenous individuals, it is perhaps not solely a question if the

[334] Yvonne Donders (n 72) 12–13.
[335] See, for example, *Lubicon Lake Band v Canada*, UN Human Rights Committee, Communication no 167/1984, para 32.1.
[336] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 9.
[337] ibid.
[338] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 36.

is considered as an individual or collective right, but rather the *weight* in which culture gives to the identity of the community in which it is practices. In this case, while hunting can be considered as a part of someone's culture, regardless of group belonging, hunting may constitute a part closely linked to the *identity* and *way of life* of some groups, posing obligations for Finland to take action in order to protect culture associated with the way of life.[339] This is not to take away from the fact that Finland, in this case, must also protect the cultural rights of all, but that protecting hunting, as a part of a culture which constitutes an integral part of a community's identity and way of life goes beyond just protecting cultural life, but the very survival and core identity of a group.

Looking at the ECtHR and the ways in which they have addressed the difference between culture and way of life, while not claiming a community rights *per se* but rather that they had been discriminated against on the basis that they were hunters which, the applicants in the case of *Friend and Other* argued that their hunting practices amounted to form an ethnic minority. The ECtHR did, however, not accept this claim, saying that a hunting practice does not, by itself, make an ethnic minority, at least not an ethnic minority as commonly understood through the Council of Europe Framework Convention for the Protection of National Minorities.[340] Why were the applicants in *Friend and Others* then so adamant about hunting forming an ethnic minority? The answer may be that the applicants, following the reasoning made in *G. and E.* and *Chapman*, which was also referenced throughout the case, had come to the conclusion that, through the status of a minority which may have a traditional way of living, they would be able to claim protection over their cultural practice. That is, through claiming that they, as an ethnic minority, were subject to discrimination under Article 14 of the ECHR. Again, highlighting the State obligation to take into consideration the way of life of those who's culture and traditions form an essential part of their identity.[341]

The differences in protecting culture and protecting culture forming a way of life for its practitioners is also evident under international human rights law. Apart from protecting *everyone's* right to cultural life,[342] Finland should also take measures in order to protect

[339] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 7.
[340] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 44.
[341] See applicants' submission in *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 37.
[342] ICESCR, art 15(1)(a).

minority and indigenous cultural rights due to the groups' culture's innate connection to the identity of the community.[343]

From the viewpoint of promoting cultural diversity, protecting and prioritising one's groups culture, in this case hunting, over another group might could seem inconsistent the view held by organisations such as UNESCO, where the value of culture, and in particular intangible cultural heritage, shall be determined by those who practice it.[344] However, as approached through, at least international and European human rights law, it is not the value, as determined by those who have and practice the culture, that will determine to what extent your right to culture might be interfered with. Rather, ones right to culture and ways in which such right will be protected, will, to a large extent, be determined by the *status* of the culture-holder and if there is evidence that the practice forms an essential part of their way of life.[345] In other words, as it seems with current international human rights law, it is not the *culture* in itself that is being protected, it is the *people who hold it*.

In the fictional case analysed, it may be concluded that the loss of access to a cultural practice will have different implications on the basis of group of which it is practiced. The interference that a hunting restriction or ban might lead to, with regards to the right to take part in cultural life, it will, most probably, not amount to harming the very fabric of existence and way of life of the non-indigenous persons, unless otherwise proven. While the ICESCR aims to protect everyone's right to partake in cultural life, regardless of status, the status, or rather, *group belonging* of the person of which the right is being interfered with will, inevitably, play a part in the ways in which one's right to culture is protected.[346] However, taking into consideration one's status, may however, arguably, be justified in order to resolve deep-rooted inequalities. Indigenous people are, often, due to historical reasons, at a disadvantage when it comes to having their (cultural) rights recognised.[347] Giving indigenous peoples what can be perceived

[343] ICCPR, art 27.
[344] Lucas Lixinski (n 19) 36.
[345] HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)" (n 58), para 6.1.
[346] Note the importance stressed by the CESCR with regards to protecting indigenous peoples right to cultural life: CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), paras 36–37.
[347] See, for example, the preamble of UNDRIP: "*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

as an additional protection, in comparison to non-indigenous individuals, may therefore serve a purpose in order to ensure equality, which will be analysed in the following chapter.

5.2. Creating Equality Through Differential Treatment? Assessment under the European Convention on Human Rights

Analysing option C of the fictional case and its compliance with current human rights standards, the question lies with if differential treatment, in this case allowing hunting for one group and banning it for another, can constitute discrimination. As previously mentioned, the creation of minority and indigenous rights came out of the need to protect the interests of those who have, due to historical as well as current events, been disadvantaged in society. In that sense, minority and indigenous rights *is* differential treatment, aimed at protecting disadvantaged individuals as groups. Therefore, it is the, the *effect* that the differential treatment in option C of the fictional case creates that shall be considered and analysed, in this case paying particular focus on the ECHR and the reasoning made by the ECtHR in similar cases.

Considering differential treatment under the ECHR, the ECtHR has held that not all differential treatment can be regarded as discriminatory. Rather, if a State Party choose to take positive measures as to enhance the status of a minority group, the majority cannot necessarily claim that such measures would be discriminatory. Instead, differential treatment may be used as a tool in which one can achieve *de facto* equality. As noted by the ECtHR, if the same treatment is given to all, without addressing or accommodating the potential disadvantage of one group, such treatment (or rather, the lack of special measures) may also be considered as discriminatory under the ECHR.[348]

Recalling the different options in the fictional case being analysed, according to option A and B, all hunters are treated the same. That is, both indigenous and non-indigenous peoples are subject to hunting bans/limitations. The question is then, if not considering the vulnerable status of indigenous peoples' culture, if such inaction, that is not taking actions as to protect the culture of indigenous peoples, constitutes discrimination under the ECHR. Similarly, the question as if differential treatment based on an individual's group belonging, which is the case in option C

[348] See, for example, *Çam v Turkey* App No 51500/08 (ECtHR, 23 February 2016) para 54 and *D.H. and Others v the Czech Republic* App No 57325/00 (ECtHR, 13 November 2007) paras 175–176.

in which indigenous peoples are given exclusive hunting rights, may be considered as a form of discrimination is also up for consideration.

As to determine if an action, or an inaction, may be considered as discriminatory under the ECHR, the ECtHR utilises a discrimination test, which includes questions as (1) if there has been differential treatment or a failure to treat differently persons in comparable or relevantly similar situations, and, if so, (2) is the treatment or lack thereof justified, (3) pursuing a legitimate aim, and/or (4) being reasonably proportionate to the aim pursued.[349]

In this case, one may argue that persons in analogous treatment may be other hunters in the same area who participate in the hunt. If being considered as in a similar situation by the ECtHR, considering option C, there is a clear differential treatment between those hunters who are indigenous and those who are not. That is, based on belonging to a minority group, one may or may not be exempt from the hunting ban.

In regards to the objective assessment, the decisions as to only allow hunting for indigenous hunters or allow hunting for all, making no exceptions for indigenous peoples, must pass the ECtHR's proportionality test. The proportionality test is divided into assessing the legitimate aims of the measures and its proportionality.[350] First and foremost, there must exist a link between the action and the aim. In this case, the aim is to ensure the protection of the bird species, while also ensuring everyone's cultural right and the way of life of an indigenous population.[351]

As to determining the legitimate aim, the ECtHR has, through its case-law, found several aims which they considered to be legitimate.[352] For example, following the reasoning in cases

[349] See, for example, *Molla Sali v Greece* App No 20452/14 (ECtHR, 19 December 2018) paras 137–162, *D.H. and Others v the Czech Republic* App No 57325/00 (ECtHR, 13 November 2007) paras 197–204, and *Fabris v France App* No 16574/08 (ECtHR, 7 February 2013) paras 60–72.
[350] ibid.
[351] Note: As was noted in *Friend and Others*, hunting, as practiced by as a social activity, does not fall within the ambit of what the ECtHR considers "private life".
[352] See, for example, *Advisory opinion made by the Grand Chamber on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date* Request no. P16-2021-002 (ECtHR, 13 July 2022) para 80: "The right to hunt on one's own land, or on the land of others, is not as such protected by any provision of the Convention or the Additional Protocols thereto. In contrast, environmental protection, in the wide sense, and, in this context, the more specific protection of the countryside and forests, endangered species,

concerning Roma and the legitimate aim in which the State Party is able to interfere with the right to home and private life of the Roma people due to environmental needs and interests, it is plausible that a similar aim could be legitimate under Article 1 and Article 14 of Protocol 12.[353] In a similar vein, it would also be conceivable that the ECtHR could consider strengthening the status of a minority group, in this case the indigenous peoples, as a legitimate aim for differential treatment among hunters. [354]

Similarly, as to the margin of appreciation under Article 8 of the ECHR, the ECtHR is of the opinion that the State is often deemed more suitable determining the proportionality due to their direct knowledge of their societies and their needs.[355] However, the margin of appreciation may be reduced if dealing with ethnic minorities. As in the case of *D.H. and Others v. the Czech Republic*, the ECtHR held that:

> Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment […] *The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures*.[356]

If considering the reasoning made in *D.H. and Others v. the Czech Republic*, it seems that the ECtHR is of the opinion that no differential treatment is to be preferred when dealing with ethnic minorities, leaving the question if measures which allow only indigenous peoples to hunt and no other non-indigenous hunters is proportionate according to the current view of the ECtHR.

With this is mind, it should be noted that the ECtHR has previously identified instance in which State Parties should take actions which include differential treatment. That is, the Court has

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biological resources, heritage or public health, are, for their part, included among the aims considered to date as relating to the "general interest" for the purposes of the Convention".

[353] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) EST No. 177, art 1 and 14 see, also, *Lee v the United Kingdom* App no 25289/94 (ECtHR, 18 January 2001) and *Buckley v the United Kingdom* ECHR Reports 1996-IV 1271.

[354] See *Chapman v the United Kingdom* App No 27238/95 (ECtHR, 18 January 2001) para 129.

[355] See, for example, *Carson and Others v. the United Kingdom* App No 42184/05 (ECtHR, 16 March 2010) para 61.

[356] *D.H. and Others v. the Czech Republic* App No 57325/00 (ECtHR, 13 November 2007) para 176. Emphasis added.

identified that it may be needed, in some instances, to take actions which aim to correct those situations in which one group is at a disadvantaged position. For example, as in the case of Roma people, the Court has been in favour of positive measures, including the State Parties intruding appropriate support structures in order to enable Roma children access to the right to education.[357] However, it is rather the notion of "levelling the playing field" which has been the underlying reasoning as for the ECtHR identifying State Party duties to differential treatment.[358] In other words, as for example in the case of *Thlimmenos v Greece* concerning the rights of religious minorities, the duty of differential treatment did not directly concern the expression of a separate identity or a separate way of life. Rather, the treatment was based in order to ensure that the law of the State Party did not overreach and adversely affect persons part of a minority.[359] As noted by Kristin Herard, the duty to differential treatment "is clearly not about accommodating special identity-related needs, but rather about acknowledging the problematic nature of discriminatory violence in democratic societies."[360] Hence, it is uncertain if, given that the fictional case would be brought before the ECtHR, the Court would find the differential treatment that is giving a minority a right to hunt, would serve a purpose of "levelling the playing field."

Unlike Article 14 of the ECHR, which needs to be taken in conjunction with a substantive right under the Convention, Protocol No. 12, adds a free-standing prohibition of discrimination.[361] In order to find a breach of Article 14 and Article 1 of Protocol No. 12, the discrimination must be based on "an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another."[362] In the fictional case analysed, there are reasons to believe that the ECtHR would find that the individual's part of the indigenous community would be considered to have identifiable, objective or personal characteristics.[363] Nevertheless, as has already been noted, if the different options, namely the

[357] *Horvath and Kiss v Hungary* App no 11146/11 (ECtHR, 29 January 2013).
[358] Kristin Henrard, "The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?" (2016) 34 Nordic Journal of Human Rights 3, 167.
[359] *Thlimmenos v Greece* App No 34369/97 (ECtHR, 6 April 2000), para 47.
[360] Kristin Henrard (n 358) 168.
[361] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) EST No. 177.
[362] *Molla Sali v. Greece* App No 20452/14 (ECtHR, 19 December 2018), para 134.
[363] See, for example, *Timishev v. Russia* App No 55762/00 and 55974/00 (ECtHR, 13 December 2005), para 55.

limitation/ban of hunting, is enough to be considered as treatment leading to discrimination, remains unsettled.

However, as with regards to those hunters not being a part of the indigenous community, it would be difficult to find that hunters, based on their status as hunters, could constitute a status distinguishable from another. For example, as seen in *Friend and Others*, a social activity, in this case hunting, cannot be considered as amounting to a characteristic which can be discriminated against under the ECHR.[364] Therefore, the non-indigenous hunters in this case would find it difficult, if not impossible, to make a case as to them amounting to a specific group and consequently being subject to discrimination on these grounds.

6. Conclusion

While lacking a universal definition, it may be argued that culture influences almost all aspects of the life of individuals and groups. Culture determines the food we eat, the clothes we wear, the stories we tell, the practices we participate in, and, ultimately, the ways in which we identify ourselves. Culture is ever present in and an important part of our lives and, in order to live dignified lives that align with our values and identities, cultural rights must be taken into consideration. The right to culture is, similarity to other human rights, closely connected and reliant upon the realisation of other human rights, such as but not limited to the right to self-determination, the right to education, the freedom of expression, and the freedom of association.[365]

As noted in the beginning of this thesis, cultural rights have long been considered as an underdeveloped part of human rights law, this due in part because of its exclusion or paucity within many human rights instruments. However, one may argue that cultural rights have finally started to gain the attention long craved, partially due to the attention given to culture and cultural through those instruments created by, for example, UNESCO. [366] This is an important

[364] *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009), para 44.
[365] See CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), paras 1, 2, and 16 and Unesco, *Cultural Rights as human rights* (Unesco 1970) 10.
[366] Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008) 1–2.

evolution, as in a time of globalisation, where we are becoming more and more reliant upon each other, respect for cultural differences also become more pressing.

Indeed, while this thesis mainly focusses on human rights instruments and provisions aimed at protecting cultural rights, consideration of culture and cultural rights are not only limited to human rights law. As aforementioned, international law aimed at protecting the environment, and, as in this case, wildlife often takes, at least to some extent, into account and includes the importance of culture and often, most specifically, indigenous peoples' culture and subsistence. Cultural inclusion and understanding are of grave importance when, intentionally or unintentionally, affecting the lives of several often-vulnerable groups. As mentioned by the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, conservation efforts and the establishment of protected areas has, in some cases, have led to violations of indigenous peoples' human rights. Indeed, conservation measures and, in particular, the expropriation of land have amounted to indigenous peoples' denial to self-governance and access to justice and reparations, forced displacement, inability to access their livelihood, and, ultimately, loss of culture and, thus, identity.[367]

The inclusion of cultural rights in international instruments aimed at protecting nature and natural resources may therefore be regarded as a way to, on at least a very basic level, ensure that the identities and lives of those closely connected to and reliant upon the use of nature and natural resources. As seen in, for example, those international agreements concerning the protection of certain wild animals, exceptions have been made in order to protect those groups who rely on hunting and fishing as a part of their traditional subsistence.[368] These groups are often those indigenous peoples who have a long history of hunting and fishing which form a part of their culture, way of life as well as their traditional subsistence.

While indigenous peoples have, within international human rights law, an established close relation to their traditional lands, nature and its resources,[369] this does not equate to the connection between nature and culture being exclusive to indigenous peoples. Nature and

[367] UNGA "Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz" (29 July 2016) 71st session UN Doc A/71/229, para 9.
[368] See, for example, Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333.
[369] ICCPR, art 27.

activities related to the use of its resources, such as fishing and hunting, may be essential to the way of life of indigenous peoples, but it also activities practiced by several, non-indigenous individuals. Hunting and fishing hold traditions, memories, and significance for many of those who practice it, regardless of group belonging, and should, arguably, also be respected.

Summarising the fictional case and the findings analysing the three different options, what may be noted, is that limiting banning hunting activities, due to wildlife protection and conservation, may be, in some cases be justified. Calling in to mind the different options in the, in option A, Finland decided on a full ban on the hunting practice for all. In option B, the hunt was permitted, but under strict limitations whilst, in option C, the hunt was banned for all except for those part of the indigenous population.

What can be concluded from analysing the mentioned options, following the ICESCR, Finland may interfere with and limit the right to cultural life, given that it serves a legitimate aim and that the least restrictive measures are taken. Protecting wildlife and biodiversity through a hunting ban may be legitimate, as it may be considered as promoting the general welfare in a democratic society.[370] Nevertheless, in order for a ban or limitation to be justified, Finland should continue to consider its available resources and take the least restrictive measure. Namely, if there is a possibility to not impose a full ban on hunting, such measures should be taken.[371]

Considering the right to cultural life for all, nothing within, at least, the ICESCR, speaks against hunting and fishing also forming a part of culture for non-indigenous individuals. A total ban of hunting for all, as according to option A in the fictional case, could then, potentially, constitute an interference with the right to cultural life for those who participate in hunting and for whom it may be considered as constituting a part of their cultural life, regardless if they are a part of an indigenous community or not. Indeed, Finland should, as according to its obligations under the ICESCR, ensure its minimum core obligations, as well as, respect, protect, and fulfil the right of everyone to take part in culture. On the face of it, Finland limiting individual's participation in their cultural life, through imposing limitation or bans on hunting,

[370] Silvia Borelli and Federico Lenzerini (eds) (n 11) 90.
[371] CESCR, "General Comment No. 21: Right of everyone to take part in cultural rights (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (n 53), para 19.

would go against the positive and negative obligations of the ICESCR. However, Finland may interfere with and limit the right to cultural life under Article 15(1)(a) of the ICESCR, given that such a limitation is "determined by law only in so far as this may be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society."[372] Arguably, protecting wildlife and biodiversity through temporarily banning hunting may be considered as a legitimate aim and what is considered as promoting the general welfare in a democratic society.[373] With this in mind, given that the right to cultural life is not an absolute right and may therefore be subject to limitations, Finland should, nevertheless, take steps in order to realise the right to cultural life under the ICESCR and consideration should continue to be given as to available resources and the aim of the interference.

When limiting the hunting practice, special consideration should be given to the rights of indigenous peoples. As mentioned in the fictional case, the indigenous peoples are reliant upon the hunt as a part of their subsistence. Indeed, a limitation or a ban of hunting may not be in accordance with both the ICESCR and the ICCPR, if it deprives the indigenous peoples from their subsistence.[374] Following the reasoning made by the HRC in several of its communications, subsistence activities fall within the ambit of what is considered as culture under Article 27 of the ICCPR. While State Parties may interfere with the right to culture under the ICCPR, such interference should not amount to a full denial of the right. A ban on hunting, severely limiting indigenous peoples to accesses an important part of their traditional subsistence practice may, therefore, be incompatible with Article 27 of the ICCPR.[375] Furthermore, when considering actions which may result in an interference with indigenous peoples right to culture, in order for the Finland to fulfil its obligations under Article 27 of the ICCPR, the state should ensure that the principle of free, prior, and informed consent from the indigenous peoples has been fulfilled.[376]

[372] ICESCR, art 4.
[373] Silvia Borelli and Federico Lenzerini (eds) (n 11) 90.
[374] ICCPR, art 1(2) and ICESCR, art 1(2).
[375] See *Lubicon Lake Band v Canada* (1990) UN Human Rights Committee, Communication No. 167/1984, para 33 and *Ángela Poma Poma v Peru* (2009) UN Human Rights Committee, Communication No. 1457/2006 para 7.4.
[376] See *Ángela Poma Poma v Peru* (2009) UN Human Rights Committee, Communication No. 1457/2006 para 7.6.

Compared to the two international covenants, analysing the limitation or ban on hunting practices through the lens of the ECHR, does not include examining provisions directly referring to the right to culture or cultural life, as the ECHR does not include provisions making direct mention of a right to culture. Nevertheless, through a dynamic interpretation of the right to private life and the right to freedom of association, it is possible to address hunting and ways in which it is protected and can be interfered with under the ECHR.

Considering the fictional case, it may be concluded that it is unlikely that non-indigenous hunting practices would be protected under the ECHR, as has been shown in the case of *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom*.[377] However, as for indigenous peoples, given that the practice forms a part of their way of life, hunting may be protected under Article 8 of the Convention. Therefore, limitations or bans, which are not justified, do not pursue a legitimate, and is reasonably proportionate may give rise to a violation of the right to private life under the ECHR.[378]

Concluding the fictional case, one may note that all three options, ultimately, have their weaknesses and can be subject to scrutiny. Option A, which imposes an overwhelming ban for all of those practicing the hunt, interferes with everyone's right to culture and cultural life. While temporary bans may be necessary in order to safeguard the continuity of a species, such bans may disproportionally affect those who consider the hunt to form an integral part of their identity or subsistence. In this regard, option B, that is limiting the hunt, given that such limitation is possible before a full ban, is to be preferred, as it means that the cultural practice can continue, while also considering the state of the species. Nevertheless, as has been mentioned with regards to indigenous peoples, when imposing a limitation, the right to free, prior, and informed consent shall be respected and fulfilled. The last option, option C, the right to cultural life is interfered with for those not part of the indigenous communities, while indigenous peoples can continue practising their hunting culture. In option C, the question concerns as to if differential treatment can be justified. As was discovered in the previous chapter, as far as the reasoning made by the ECtHR is concerned, it may not be obvious that

[377] See *Friend and Others v the United Kingdom* and *Countryside Alliance and Others v the United Kingdom* App no 16072/06 and 27809/08 (ECtHR, 24 November 2009).
[378] See *G. & E. v Norway* App No. 9278/81 (ECtHR, 3 October 1983) 30.

the differential treatment, that is allowing hunting for one group, falls within what the ECtHR considers as being proportionate and serving a legitimate aim.

In conclusion, while one can, in theory, analyse culture and cultural rights and how they relate to environmental and wildlife protection, it is important to remember that the reality is often much complex and the conclusions made based on current legal standards is not always reflecting reality. For example, while, considering the sheer volume, here may exist more human rights provisions aimed at protecting indigenous peoples culture compared to that perhaps that of non-indigenous individuals their culture, this does not equate to indigenous peoples having an upper hand when it comes to having their culture accepted and promoted in times of change. Indeed, when adapting to changes caused due in part to habitat destruction, pollution, climate change, invasive species, and overexploitation of wildlife, indigenous peoples have often gotten the short end of the stick, having their ancestral lands not only exploited for economic interests, but subject to environmental degradation and biodiversity loss. As states are faced with tough decisions as to how to divide already limited resources, indigenous peoples, who are often not only culturally connected to nature and natural resources but often also dependent on it for subsistence, have, justifiably, stressed the importance of ensuring their rights in the process of protecting nature and its resources.

Lastly, the question, as posed in the title of this thesis, still stands. That is, can there be any losers without winners and, furthermore, does the winner take it all? Without wanting to end on a sad note, it may be argued that, yes, someone will always lose when resources are limited. As seen through analysing the fictional case and it's three different options, prioritisations are, unfortunately, inevitable when dealing with limited resources and a need for prioritising right would then mean that someone will, at least temporarily, be on the bottom of the priory list, thus perhaps also perceiving themselves as the losers. However, if the accumulative "sting" will be less or justified if one puts someone's right over the other is up for interpretation. Nevertheless, what is certain is that if there is no wildlife left *everyone* loses.

Summary in Swedish – Svensk sammanfattning

Kan det finnas vinnare utan förlorare? Urfolk- och icke-urfolkgruppers jakt efter kulturella rättigheter när tillgången till vilda djurarter är knappa

Jakt och fiske är aktiviteter som utövas av många. För urfolk utgör jakten och fisket ofta en central del av deras kultur och livsstil. Likaså kan jakten och fisket anses vara en viktig aktivitet kopplad till kultur och tradition bland de utövare som inte är en del av ett urfolk.

Flera vilda djurarter riskerar idag att försvinna på grund av bland annat förstörelse av livsmiljöer och klimatförändringar. Minskandet av antalet vilda djurarter gör att stater ställs inför svåra beslut i hur stater på bästa sätt ska skydda den biologiska mångfalden och samtidigt trygga de mänskliga rättigheterna.

I avhandlingen undersöks ifall jakt och fiske kan anses vara en kulturell rättighet och hur dessa rättigheter påverkas av staters skyddande av vilda djurarter. Vidare analyseras hur urfolkens kulturella rättigheter samspelar med icke-urfolkens kulturella rättigheter och ifall en prioritering av den enes rättigheter framför den andres utgör en grund för diskriminering.

För att utreda frågorna som ställs i avhandlingen analyseras ett fiktivt fall. I det fiktiva fallet väljer staten Finland mellan tre olika alternativ för att skydda beståndet av en viss fågelart. I det första alternativet väljer Finland att förbjuda jakten medan i det andra alternativet tillåts jakten att fortsätta men under strikta regler. I det tredje och sista alternativet tillåts jakten för de som är en del av urfolket medan jaktförbud råder för de övriga i samhället.

Jakt och fiske faller innanför ramen för vad flera människorättsinstrument anser vara kultur. Bland annat menar Förenta Nationernas (FN) kommitté för ekonomiska, sociala och kulturella rättigheter att rätten för var och en att delta i kulturlivet innefattar kulturella uttryck relaterade till naturresurser. FN:s människorättskommitté har också betonat att artikel 27 i Internationella konventionen om medborgerliga och politiska rättigheter omfattar tryggandet av urfolkens levnadssätt, där traditionell jakt och fiske anses vara en del av urfolkens levnadssätt.

Utöver människorätten tas kultur och kulturella rättigheter i beaktande i flera delar av folkrätten. Bland annat tryggas jakt- och fisketraditioner inom ramen för FN:s organisation för utbildning, vetenskap och kulturs (Unesco) arbete. Flera avtal inom miljörätten tar också i hänsyn kultur och kulturella rättigheter. Bland annat tar många avtal som reglerar jakt av vissa djurarter i beaktande urfolkens jakttraditioner. Avtalen ger urfolken rätt att fortsätta sina traditioner genom att tillåta jakten att ske under de omständigheter som föreskrivs i avtalen.

Finland som konventionsstat till Internationella konventionen om ekonomiska, sociala och kulturella rättigheter är skyldigt att trygga allas rätt till att delta i kulturliv. Det innebär att Finland måste undvika att lägga sig i och hindra individens rätt till kulturliv. Finland bör också säkra en tillfredsställande standard för alla att delta i kulturlivet. Vidare ska Finland också till fullo utnyttja sina tillgängliga resurser så att tryggandet till rätten att delta i kulturlivet gradvis kan förverkligas i sin helhet. Att tillfälligt begränsa jakten på grund av bristande resurser kan därför vara i enlighet med konventionen, givet att Finland säkrar en tillfredsställande standard för alla att delta i kulturlivet. En tillfredsställande standard innefattar bland annat allas rätt till ett godtagbart minimiuppehälle.

Eftersom jakt och fiske kan anses utgöra en del av urfolkens traditionella livsstil och uppehälle bör Finland först och främst se till att deras rätt till uppehälle inte nekas då man tar till åtgärder för att skydda faunan. Vidare bör principen om fria och väl underbyggda förhandsgodkännanden respekteras. Principen har inkluderats i flera instrument ämnade till att trygga urfolkens rättigheter och enligt den ska staten söka urfolkens godkännande före beslut som berör eller påverkar urfolkens kultur tas. FN:s människorättskommitté har i granskandet av individuella klagomålsförfaranden betonat konventionsstaternas skyldighet att söka fria och väl underbyggda förhandsgodkännanden från urfolken i de fall då urfolkens kultur påverkas.

Europakonventionen om de mänskliga rättigheterna innehåller inga artiklar som uttryckligen skyddar rätten till kultur. Rätten till kultur kan däremot tryggas tack vare en så kallad dynamisk tolkning av Europakonventionen. Flera artiklar i konventionen behandlar och tryggar aspekter relaterade till kultur. Vad gäller jakt och fiske som en del av kultur kan bland annat rätten till privat- och familjeliv, rätten till tankefrihet, samvetsfrihet och religionsfrihet samt rätten till mötes- och föreningsfrihet vara av betydelse.

Enligt Europadomstolen kan jakt och fiske utgöra en del av privatlivet givet att de utförs av en (minoritets)grupp och där aktiviteten utgör en del av gruppens livsstil. Europadomstolen är i övrigt av den åsikt att jakt och fiske inte är aktiviteter som skyddas genom rätten till privatliv. Jakt och fiske vanliga aktiviteter som utförs i det offentliga och inte i det privata. Finland kan ha rätt att begränsa urfolkens jakt och fiske och Europakonventionen har tidigare gett konventionsstaten en relativt bred bedömningsmarginal i avgörandet för vad som kan anses vara ”nödvändigt i ett demokratiskt samhälle”. Bland annat har Europadomstolen i tidigare fall varit av den åsikten att bevarandet av miljön kan anses vara en legitim anledning för ingripandet i rätten till privatliv. Finland bör däremot se till att de åtgärder som påverkar urfolkens livsstil är proportionerliga.

Kulturella rättigheter för urfolk skiljer sig från icke-urfolk kulturella rättigheter. Urfolkens kulturella rättigheter är ofta kollektiva medan kulturella rättigheter för de som inte är en del av ett urfolk är individuella rättigheter vars förverkligande kan vara beroende av det kollektiva. Det är däremot inte urfolkens kulturella rättigheters kollektiva natur som gör att deras rättigheter ibland prioriteras framför icke-urfolks rättigheter. För att kunna uppnå sann jämlikhet kan det finnas behov för olika behandling. Urfolkens kultur är ofta i underläge i jämförelse med majoritetskulturen. Deras traditioner är också ofta kopplade till deras identitet och därmed också överlevnad. Därför kan en särbehandling vara befogad för att säkerställa urfolkens överlevnad samt uppnå sann jämlikhet.

I skyddandet av den biologiska mångfalden bör Finland ta hänsyn till de kulturella rättigheterna. Finland måste särskilt respektera rättigheterna för de urfolk som är kulturellt beroende av jakt och fiske. Så länge det finns knappa resurser kommer stater att tampas med prioriteringen av en grupps rättigheter framför en annans, vilket kan leda till att en grupp upplever sig vara förlorare. Det som däremot är säkert är att ifall biologiska mångfalden inte skyddas och arter försvinner helt förlorar *alla*.

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