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# Incorporating International Human Rights: The right to cultural life in Scotland

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“ Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.<sup>1</sup> ”

“ [...] culture [...] encompasses, 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.<sup>2</sup> ”

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## EXECUTIVE SUMMARY

In March 2021, the National Taskforce for Human Rights Leadership in Scotland recommended a new legal framework that will bring into law a range of internationally recognised human rights, with the aim of strengthening the enjoyment of human rights in people’s everyday lives. The Scottish Government accepted all of the recommendations. The new legal framework will incorporate four international human rights treaties: the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Elimination of All Forms of Racial Discrimination, and the UN Convention on the Rights of Persons with Disabilities. Additional protections for older people and LGBTI people, and a right to a healthy environment, will also be included. In a parallel process, the UN Convention on the Rights of the Child is also being incorporated into national law.

Provisions related to culture and cultural life feature in all of the treaties to be

incorporated. This research brief aims to provide an overview of the current and future legal framework in Scotland related to cultural rights in order to inform implementation efforts.

This research brief highlights some key issues related to the right to take part in cultural life in Scotland. The researchers and partners received input on these points through a workshop in September 2022. Workshop participants highlighted concerns around awareness and understanding of cultural rights, what it means to engage with culture, and who is enabled to participate effectively, and shared views on how barriers to taking part in cultural life might be overcome.

The research brief outlines **some of the ways that the right to take part in cultural life right is already protected in national legislation** relating to language, education, and land. Several dimensions are also currently protected via the Human Rights Act 1998 based on the European Convention on Human Rights, and international agreements protecting minorities. However,

these frameworks do not include a specific right to take part in cultural life.

The brief then outlines the scope of the right to take part in cultural life as understood in the UN system. The right to take part in cultural life is found in several international human rights treaties. As part of the suite of protections that will be brought into law in Scotland, the key source of the right to take part in cultural life will be the International Covenant on Economic, Social and Cultural Rights. **The UN Committee on ESCR defines the right as including three aspects: (a) participation in, (b) access to, and (c) contribution to cultural life.** The terms 'respect, protect, and fulfil', are used to describe the duties of states with respect to protecting participation in cultural rights.

As noted above, however, **all of the treaties that will be brought into national law contain provisions related to culture and cultural life of particular groups**, and the brief outlines some of these, such as provisions for women, disabled people and ethnic minorities.

The brief shows that the **new legal framework incorporating the right to take part in cultural life into law in Scotland will add value to current legal protection of aspects of cultural life.** It will introduce new legal duties and provide a framework for strategic and operational decision-making.

The brief suggests that there is scope to exchange learning with other sectors on

approaches to implementation, given that the right to take part in cultural life will be brought into law at the same time as a range of other interconnected human rights protections.

The briefing concludes by reflecting, from a legal perspective, on the added value of the right to take part in cultural life in Scotland, and by **highlighting five areas that would benefit from future research and/or discussion.** These relate to:

1. The potential value of developing case studies/worked examples;
2. Key international legal resources for awareness-raising;
3. Exploring the experience of the groups who are protected by additional human rights treaties that are being incorporated into law (women, minority ethnic people, disabled people and children), including intersectional experiences of disadvantage, in relation to cultural life in Scotland;
4. Exploring the experience of older people and LGBTI people, who will be the subject of specific provisions in the new human rights framework, including intersectional experiences of disadvantage, in relation to cultural life in Scotland; and
5. Exploring interconnections between a right to a clean, healthy and sustainable environment, which will be the subject of specific provision in the new human rights framework, and the right to take part in cultural life in Scotland.

## 1. INTRODUCTION

The Scottish National Taskforce for Human Rights Leadership was established to investigate, and put forward proposals for, a statutory human rights framework in Scotland. In 2021, the Scottish Government accepted the Taskforce recommendations for a new Human Rights Bill that will enhance the protection and promotion of human rights in Scotland. The Bill aims to incorporate four UN Human Rights Treaties into Scots law: the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Convention on the Rights of Persons with Disabilities (CRPD). This will give legal standing to a wide range of economic, social and cultural rights that, whilst being internationally recognised, are not referred to in the Human Rights Act 1998 (HRA) (or the European Convention on Human Rights (ECHR) to which the HRA gives effect). Additional protections for older people and LGBTI people, and a right to a healthy environment, will also be included.<sup>3</sup> In a parallel process, the UN Convention on the Rights of the Child is also being incorporated into national law.<sup>4</sup> This will transform human rights law in Scotland. The Taskforce report recommends that, as well as incorporation of UN human rights treaties, there should be a participatory process to define the minimum obligations of states related to economic, social, environmental

and cultural rights that will be brought into national law, and an explicit duty to support the effective implementation of the framework, taking into account the content of each right.<sup>5</sup>

Provisions related to culture and cultural life feature in all of the treaties to be incorporated. Cultural rights have been described as an often-neglected field of human rights law internationally.<sup>6</sup> This is usually ascribed to the fact that culture itself is an elusive and evolving concept, and to a perception that protecting culture was less important than core rights such as freedom from torture or slavery. It has also been suggested that a further reason for limited enthusiasm towards the development of cultural rights in international law was a concern that recognising such rights risked the legitimisation of harmful cultural practices that often disadvantage certain groups of people.<sup>7</sup> However, for the past two decades the UN has focussed increased attention on cultural rights and in 2009 created the position of an independent expert in the field of cultural rights, a Special Rapporteur, reporting to the Human Rights Council.<sup>8</sup>

This research brief aims to provide an overview of the current and future legal framework in Scotland relevant to culture-related rights, with a focus on understandings in international human rights law. It aims to provide a resource which can inform discussion and implementation efforts.

## 2. KEY ISSUES RELATED TO THE RIGHT TO TAKE PART IN CULTURAL LIFE IN SCOTLAND

This briefing paper received input on some of the concerns around, and barriers to, the right to take part in cultural life in Scotland, through a workshop.<sup>9</sup> Workshop participants highlighted concerns around: awareness and understanding of cultural rights, what it means to engage with culture, and who is enabled to participate effectively. Participants also shared views on how barriers to taking part in cultural life might be overcome. Insights from the workshop are summarised below.

### **Awareness and understanding of cultural rights**

There is an identified need to increase the awareness of cultural rights in Scotland, which is closely linked to defining the right to culture. The scope of the term 'culture' may be perceived differently by different groups of people. Both narrow and broad definitions of culture are problematic; a narrow view of cultural rights might equate culture or the cultural sector merely with the creative arts sector, thereby ignoring how the right to culture also extends to other arenas, such as sports, language or marriage ceremonies, for instance. A very broad conception of culture, on the other hand, might create difficulties for monitoring and meaningful implementation. In addition, the notion of culture itself, which is often expressed as differentiating one 'culture'

from another, runs the risk of reproducing difference, rather than focussing on cultural equity.

### **Gaps and tensions around the right to take part in cultural life**

Some of the prevailing tensions related to the right to take part in cultural life revolve around understandings of what it means to engage with culture, and who is enabled to participate effectively.

On the one hand, a statistical analysis of who has access to culture in Scotland may show broad engagement with culture and it could be perceived that there are no significant challenges with respect to access.<sup>10</sup> On the other hand, such statistics are misleading in the sense that the definition of access used is so broad that the analysis misses the nuanced dynamics of the extent to which different groups are (or are not) able to engage with various aspects of the right to participate in cultural life and contribute to it.

At an ideological level, the barriers to accessing the right to take part in cultural life are often related to dominant views of who can access what culture (what counts as 'culture'), how, when and for which purposes. Culture is often defined by dominant groups and their framings are closely linked to gatekeeping activities that control access through decision-making and funding mechanisms. Navigating these power structures in practice can be challenging and workshop participants

raised concerns that access barriers are exacerbated when services are provided by the private or voluntary sector.

Further barriers to access that were identified include prejudice and discrimination, which can be seen in processes and procedures that impede access for those who lack financial means. However, reduced access is not only related to financial barriers. For example, barriers are likely to be based on class – individuals may be denied access to culture due to their (perceived) working class status. In addition, notions of culture and perceptions of migrant groups and communities differ across Scottish cities and rural/ urban areas. Removing financial barriers is not sufficient if discrimination persists.

To promote inclusion in decision-making processes around the right to culture, it was seen as essential that not only diverse voices and viewpoints are considered, but that there is also equity in representation. It was noted that there needs to be an awareness of the role of cultural heritage, and who gets to have a say in how a particular cultural heritage is managed and who can have access to it. One of the identified gaps points to potential hierarchies that create “minorities within minorities”, where certain groups, such as Gypsy Travellers, are often under-represented. Other groups identified as marginalised include refugees and those seeking asylum.

Participants recognised the intersection with other rights and social dynamics. This includes migration and its associated cultural practices and languages, and Scotland’s indigenous languages and culture(s), such as Scottish Gaelic and Scots. Participants also recognised intersections with, in particular, socio-economic rights of other minoritised groups, such as the Gypsy Traveller community.

### **Overcoming barriers to progress the right to take part in cultural life**

Workshop participants suggested that tackling these barriers involves not only addressing the practical dimensions of funding and decision-making but also countering disempowering narratives that ask individuals to ‘prove their need’ or show how they are ‘deserving’. It also means challenging narratives that demand that individuals ought to be ‘grateful’ for what they can get, and instead direct attention to how a different approach may foster dignity and respect.

## **3. HOW ARE CULTURAL RIGHTS ALREADY PROTECTED IN LAW IN SCOTLAND?**

There is existing provision in law relevant to some areas of cultural rights protection. This includes legislation in the areas of language, education and access to land, and legislation which overlaps between these areas. There is also some protection of cultural rights and cultural life through the

existing human rights framework of the Human Rights Act based on the European Convention on Human Rights, and through European agreements that protect minority languages.

### **Scottish legislation: language, education, and land**

The Gaelic Language (Scotland) Act 2005 is a key piece of legislation that aims to secure the status of the Gaelic language as an official language of Scotland. Another key piece of legislation is the British Sign Language (Scotland) Act 2015, which aims to promote British Sign Language and requires the Government and local authorities to publish plans to achieve this.<sup>11</sup>

The Education (Scotland) Act 2016 places a duty on education authorities to promote and support Gaelic Medium Education and Gaelic Learner Education 2016 and establishes a process by which parents can request Gaelic Medium Primary Education from their education authority.<sup>12</sup> Scottish Studies degrees across Scottish universities, Scottish history classes in primary or secondary education and traditional Scots celebrations, such as Burns Night, are on the rise and are viewed as markers relevant to fulfilment of the right to take part in cultural life.<sup>13</sup> It has been observed that Scotland appears to have taken progressive steps with respect to its internal minority populations.<sup>14</sup> However, Smith and others note that how this compares with protections for other minority groups exercising the right to cultural life warrants further consideration.<sup>15</sup>

The right to access land is enshrined in law via the Land Reform (Scotland) Act 2003, which gives a right of responsible access – for transit or certain purposes, including recreation – to most undeveloped land and inland water in Scotland.<sup>16</sup> Similarly, the Community Empowerment (Scotland) Act 2015 and Land Reform (Scotland) Acts 2003 and 2016, allow various levels of community participation in relation to land and buildings local to them.<sup>17</sup>

### **European Convention on Human Rights: education, freedom of expression, and freedom of religion and belief**

Human rights in Scotland are already incorporated into law by the Human Rights Act 1998. The key function of the Human Rights Act is to embed rights set out in the European Convention on Human Rights<sup>18</sup> within UK law. This Convention was drafted by the Council of Europe and came into force in 1953. Where there is an alleged violation, individuals have the right to petition the court set up to interpret the Convention. Prior to the Human Rights Act coming into force, individuals in the UK could petition the European Court of Human Rights in Strasbourg, but the UK courts could not uphold the Convention rights as these were not part of UK law. Following incorporation, it has been possible for individuals to enforce their human rights in the UK courts (including in Scotland). The Human Rights Act has offered valuable protections, but one of the key criticisms is that this legislation (and the European Convention on Human Rights on which it is



based) only protects a narrow group of rights (often referred to as civil and political rights).

The ECHR is primarily concerned with the protection of civil and political rights, but it recognises substantive rights that may be considered as 'cultural'. The provisions mostly invoked in relation to culture are Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression) of the Convention, as well as Article 2 of Protocol No. 1 (right to

education). It does not offer any specific protection for the right to take part in cultural life, although if this is given its widest understanding then the Convention can be said to afford protection to some degree in relation to education, freedom of expression, right to private and family life, and religion and belief.

## THEME

Artistic expression

## CASE LAW EXAMPLES

In *Müller and Others v. Switzerland*<sup>19</sup> the Court set out that Article 10 covered artistic impression and that this imposed an obligation on the state not to encroach on the creative expression of artists, although this freedom is not without limits. The Court found that the art in question was a series of paintings depicting 'crude sexual relations' and was part of an open exhibition. As such, the state was entitled to intervene. In the case of *Otto-Preminger-Institut v. Austria*,<sup>20</sup> the seizure of a film containing a provocative portrayal of God, the Virgin Mary and Jesus Christ, which meant that cinema viewings could no longer go ahead, was justified in order to protect the others religion being insulted. Article 10 was found to provide broad freedom of literary expression. In *Karata v. Turkey*<sup>21</sup>, the Court held that poetry that could be understood as enticing people to revolt against the Turkish state was protected from state censure.

Access to Culture

In the case of *Khurshid Mustafa and Tarzibachi v. Sweden*,<sup>22</sup> the Court considered access to culture via connections with country of origin. It concerned the evictions of Iraqi tenants

## Cultural Identity

who refused to remove a satellite dish that enabled them to receive television programmes in Arabic and Farsi from their country of origin. The Court developed its case-law on freedom to receive information under Article 10. It noted the importance of these links for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin. Other key cases include consideration of access to the internet for prisoners.<sup>23</sup>

In *Chapman v. UK*,<sup>24</sup> the applicant was a member of the Gypsy/Traveller community and argued that measures taken to remove her from her land were not compatible with Article 8 (respect for private and family life), and that she faced discrimination for being part of the Gypsy/Traveller community which was not compatible with Article 14 (non-discrimination in protection of the rights in the Convention). The Court found that 'the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant's stationing of her caravan therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.'<sup>25</sup>

## Academic Freedom

The Court has found that Article 10 includes academic freedom. This included where a university lecturer was denied a permanent contract at a Catholic university as it was thought that their views did not adhere to Catholicism<sup>26</sup>. Similarly, an academic denied entry to Turkey after expressing opinions on Kurdish and Armenian issues was declared a national security risk<sup>27</sup>. The Court found this had violated his academic freedom under Article 10.

## Protection of Cultural and Natural Heritage

The Court has not acknowledged this as a free standing right but has noted that protection of heritage is a legitimate aim that states may pursue when limiting property rights.<sup>28</sup>

### Regional European agreements: minority languages

The right to take part in cultural life is inextricably linked to language. For minority groups, using one's own language plays an important role in protecting individual and collective identities and culture and allows for meaningful participation in public life. The Framework Convention for the Protection of National Minorities (1995) holds that the UK, as a signatory party, must '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', including 'the right to use freely and without interference his or her minority language, in private and in public, orally and in writing' and the right to learn his or her minority language. States should also 'encourage a spirit of tolerance and intercultural dialogue' and uphold values such as mutual respect, understanding and co-operation 'among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.'<sup>29</sup>

Scots and Scottish Gaelic receive protection under the European Charter for Regional or Minority Languages (the Charter), to which the UK is a signatory. These receive protection as an expression of cultural wealth (cultural heritage) and this places responsibility on the state and local authorities (in tandem with NGOs/ speakers of the language) for the implementation and monitoring of specific measures of protection and promotion. According to the Charter, regional or minority languages should be used in all contexts. Particularly in times of crisis, such as the Covid-19 pandemic, a recent report of the Committee of Experts stated that regional and local authorities should make active use of regional or minority languages in their response, emphasising that 'the communication of relevant recommendations in all minority languages is important for the health and well-being of the speakers of regional or minority languages'.<sup>30</sup> Although the Charter's protections are limited to historical regional or minority languages of Europe (dialects of the official language(s) of the State or the languages of migrants are not included), the Committee of Experts' emphasis on making communication accessible in different languages demonstrates how cultural and

linguistic elements intersect with other human rights, such as the right to health.

#### 4. THE RIGHT TO TAKE PART IN CULTURAL LIFE IN INTERNATIONAL HUMAN RIGHTS LAW

In international human rights law, the core 1960s legal agreements within the UN separated civil and political rights from economic, social, and cultural rights.<sup>31</sup> It is now well-established that all human rights are interconnected, and are indivisible from each other, and that the drafters of the foundational Universal Declaration of Human Rights in the 1940s never intended to create a hierarchy of rights.<sup>32</sup> The operation of economic, social and cultural rights as enforceable legal rights has been realised in practice around the globe<sup>33</sup> and these rights have been significantly developed. In the UK, human rights related to culture have primarily been present via the European agreements outlined above rather than tied to international law. In UN recommendations, there have been few references to cultural rights in the UK. One example is found in a 2013 report of the UN Special Rapporteur on Adequate Housing, which refers to 'culturally adequate' accommodation and Gypsy/Traveller communities.<sup>34</sup>

This section briefly traces the development of the right to take part in cultural life from an international law perspective, clarifies the key UN agreements that protect and define this right, outlines what the right

covers, and clarifies the current understanding of what states need to do to protect this right for all and for groups requiring special protection.

#### Development of the right to take part in cultural life in international law

Culture is a contested term. Historically it was used to mean fields of intellectual pursuit such as the arts and sciences. This is sometimes referred to as 'high culture' today, and often conjures images of the arts. Yet, in the nineteenth century, a wider view of culture as the culmination of all manifestations encompassing human life emerged. Different views and understandings of culture remain and as such this makes it difficult to pin down what cultural rights encompass. There is no set legal definition of culture. In 1977, the Canadian Commission for UNESCO developed a helpful working definition: 'Culture is a dynamic value system of learned elements, with assumptions, conventions, beliefs, and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential'.<sup>35</sup>

The Fribourg Declaration (2007) emerged from a landmark project designed to define cultural rights as protected by human rights agreements, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The aim was to further the recognition of cultural participation as a basic human right. This document gained prominence by promoting the recognition of

cultural rights at local, regional and universal levels by state, civil society and private actors. A leading motivation to produce this text was that although cultural rights were asserted in previous human rights agreements, they were not clearly defined and often solely focused on the rights of minorities and Indigenous people, without recognising entitlements of other marginalised groups such as those facing destitution.<sup>36</sup> Therefore, the Fribourg Declaration reaffirmed the importance of cultural rights by reinforcing their universality and their indivisibility. It sets out six principles of cultural rights:

1. identity and cultural heritage;
2. cultural communities;
3. access and participation;
4. education and training;
5. information and communication; and
6. cultural cooperation.<sup>37</sup>

However, one of the most significant aspects of the Fribourg Declaration was the implementation of a person-centred approach to cultural rights, assuring freedom of self-determination in regard to identity.<sup>38</sup> This is expressed in the Declaration's definition of 'cultural identity', which is described as 'the sum of all cultural references through which a person, alone or in community with others, defines or constitutes oneself, communicates and wishes to be recognised in one's dignity'.<sup>39</sup> This therefore recognises the individual's freedom to associate themselves with more than one cultural identity and prevents

against the forced assimilation into a certain cultural group.

The Fribourg Declaration sets out one of the most comprehensive and wide-ranging understandings of culture and cultural rights. This declaration has not been officially adopted by the UN and therefore has no legal status.

However, the Fribourg Declaration has been cited by various UN bodies and adopted by wider cultural organisations.<sup>40</sup> Since its publication, the UN began to pay more attention to cultural rights in relation to the general human rights framework (General Comment No.21 was published by the UN Committee on Economic, Social and Cultural Rights in 2009). This added to a clearer framework surrounding the pivotal role that culture plays in humanity.<sup>41</sup> The Fribourg Declaration asserts that 'the universality and indivisibility of human rights still suffer as a result of the marginalisation of cultural rights' and thereby highlights the importance of recognising that other human rights have a cultural dimension.<sup>42</sup>

Important contributions to the development of cultural rights have also now been made by the UN Special Rapporteur on Cultural Rights. The Special Rapporteur has now issued several reports with a range of themes, such as climate change and cultural rights,<sup>43</sup> Covid-19 and cultural rights,<sup>44</sup> cultural rights as impediments to women's rights,<sup>45</sup> the importance of public spaces,<sup>46</sup> artistic freedom,<sup>47</sup> and the writing and teaching of

history.<sup>48</sup> The first report in 2010 emphasised that cultural rights covered a broad range of issues.<sup>49</sup> In later reports, the Special Rapporteur added concerns regarding scientific freedom.<sup>50</sup> Further reports have specifically referred to adequate housing, and to non-discrimination in this context.<sup>51</sup> The Special Rapporteurs have regularly stressed that the purpose of their mandate is not to protect culture or cultural heritage per se, but rather the conditions allowing all people, without discrimination, to access, participate in, and contribute to, cultural life in a continuously developing manner.<sup>52</sup>

### UN treaties that protect and define cultural life

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the key UN agreement, or treaty, that outlines and protects the right to take part in cultural life. It is also the only treaty to specifically refer to cultural rights in its title. This treaty groups rights broadly into the categories of economic (including labour and union rights), social (including adequate standard of living and highest attainable standard of health rights), and cultural (including participation in cultural life, and enjoyment of the benefits of science). Article 15 is the key provision on taking part in cultural life.<sup>53</sup> It is influenced by Article 27<sup>54</sup> of the Universal Declaration of Human Rights.<sup>55</sup> It states that:

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

As is common in international agreements, the treaty itself does not define what constitutes 'taking part in cultural rights', and the provision has not been interpreted very often.

Other key UN treaties often replicate the language of ICESCR when guaranteeing specific rights, but they similarly do not progress the definition of cultural life or set out what protection should look like:

- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) aims to remedy gender-based discrimination. Several provisions refer to women's participation in cultural life and

mention women's full right to economic, social, and cultural life.<sup>56</sup> This treaty recognises that culture is often a basis for discrimination against women,<sup>57</sup> although it again does not provide a definition of culture.

- Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for access to cultural life and cultural enjoyment free from discrimination.<sup>58</sup>
- The Convention on the Rights of Persons with Disabilities again makes similar references to cultural rights and the equal participation of disabled people in cultural life.<sup>59</sup>
- The UN Convention on the Rights of the Child enshrines the rights of children. It notes the importance of traditions and cultural values for the development of the child.<sup>60</sup>

Other UN treaties that refer to cultural rights, the right to take part in cultural life and cultural identity include: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>61</sup> the Declaration on the Rights of Persons belonging to National, or Ethnic, Religious, and Linguistic Minorities (1992), the Framework Convention for the Protection of National Minorities (1995), the European Charter for regional or Minority Languages (1992), and the International Covenant on Civil and Political Rights (ICCPR).<sup>62</sup> Although the ICCPR focusses on civil and political rights rather than social, cultural, and economic rights, it still refers to the enjoyment of

economic, social, and cultural rights.<sup>63</sup> Article 27 of the ICCPR specifically protects minority rights. It states that:

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

There are also a variety of treaties concerned with safeguarding cultural heritage, although these tend not to confer rights on individuals.<sup>64</sup>

### **What does the 'right to take part in cultural life' encompass?**

Article 15 ICESCR sets out the right of every person to take part, or participate, in cultural life.<sup>65</sup> This is primarily protected by the state's commitment to not interfere with the full enjoyment of the right. The right is secured by ensuring every person – individually or as part of a community – is able to participate in, access and contribute to cultural life.

Article 15 then protects three rights:

1. to take part in cultural life;
2. to enjoy benefits of scientific progress and its applications; and
3. to benefit from the protection of the moral and material interests resulting from scientific, literary, or artistic production of which he or she is the author.

ICESCR is monitored by the UN Committee on Economic, Social and Cultural rights. The Committee can issue General Comments that clarify interpretation of the treaty. General Comment No. 21 clarifies the term ‘cultural life’ in article 15 ICESCR and sets out the most comprehensive interpretation of the term. Since the treaty itself does not define culture or cultural rights, or the right to participate in culture, the General Comments are particularly helpful. General Comment No. 21 is likely to be a key resource in the Scottish context since the proposed Human Rights Bill will allow or require those interpreting the rights to take into account relevant General Comments.

General Comment 21 defines cultural life as ‘a multifaceted’ concept encompassing:

‘[...] 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.’<sup>66</sup>

General Comment No.21 also clarifies that the terms ‘to participate’ and ‘to take part’ have the same meaning and are used interchangeably. There are three, interrelated main components of the right to take part in cultural life:

- (a) participation in,
- (b) access to, and
- (c) contribution to cultural life.

Participation in cultural life

Access to cultural life

Contribution to cultural life

- choosing your own identity,
- expressing yourself and
- engaging in your own cultural practises and language.
- knowing your own culture and others’ culture via education and information,
- following a cultural way of life, and
- benefiting from the cultural heritage and creations of others.
- being involved in creating the spiritual, material, intellectual and emotional expressions of the community.



## State duties

The Committee on Economic, Social, and Cultural Rights utilises the terms ‘respect, protect, and fulfil’, to describe the duties (or obligations) of states with respect to protecting participation in cultural rights. These obligations are laid out in substantial detail in General Comment No.21.<sup>67</sup> In summary:

The **obligation to respect** means that states should not interfere with the enjoyment of this right.

- The **obligation to protect** means that states should also take steps aimed at ensuring that non-state actors do not prevent individuals from exercising their right. This encompasses the protection of cultural heritage in all forms, the protection of cultural heritage of all groups and communities in economic development and environmental policies, the protection of cultural productions of indigenous peoples, and a duty to prevent discrimination based on cultural identity. States must consult with indigenous peoples and obtain their informed consent with dealing with development that may impact on cultural territory.<sup>68</sup>
- The **obligation to fulfil** means that states must take a wide range of appropriate measures (legislative, administrative, judicial, and other measures) necessary for the full realisation of the right. This includes facilitating and promoting the right to

take part in cultural life. Facilitation includes the establishment and support of cultural institutions, developing policies for the protection of cultural diversity, granting assistance (financial and more broadly) to individuals or organisations engaged in creative and scientific activities, and supporting minorities and other communities in their efforts to preserve culture.<sup>69</sup> Promotion means that states should ensure appropriate education and public awareness about participation in cultural life, particularly in rural and deprived areas, and in relation to minorities.<sup>70</sup> States must also provide individuals with the means necessary for the enjoyment of the right when people are unable to realise this themselves. This might include, for example, access to libraries, museums, and theatres. It also requires the establishment of mechanisms to allow for individuals or groups to effectively take part in decision-making processes.<sup>71</sup>

The Committee also sets out the ‘core obligations’ in respect of implementing the right to take part in cultural life. This refers to the minimum level of implementation in contrast with those obligations that can be progressive over time. The minimum requirement is that states create an environment in which people can participate in a culture of their choice.<sup>72</sup> The Committee sets out a number of components of this respectful environment, including allowing members of minority

groups to participate in the ‘design and implementation’ of relevant law and policy.<sup>73</sup>

promote general welfare in a democratic society or to avoid the infringement of others’ human rights.<sup>74</sup>

The right to participate in cultural life can be limited but only to the extent necessary to

**Groups requiring special protections**

GROUP	SUMMARY	EXAMPLE QUOTE
Women	States should eliminate barriers that prevent women from fully participating in cultural life.	‘Ensuring the equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties. Implementing article 3 of the Covenant, in relation to article 15, paragraph 1 (a), requires, inter alia, the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research.’ <sup>75</sup>
Children	<p>States should ensure children’s access to culture particularly via education.</p> <p>Education allows for the transmission of common cultural and moral values.</p> <p>Right to education in minority languages.</p>	‘Children play a fundamental role as the bearers and transmitters of cultural values from generation to generation. States parties should take all the steps necessary to stimulate and develop children’s full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians [...]. States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the

## Persons with disabilities

States must take steps to allow persons with disabilities to access cultural materials.

Includes respecting cultural and linguistic identity, such as sign language.

Encourages promotion of participation in recreational, leisure and sporting activities

individual and society find their identity and worth. Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies.

Educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples, and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations.<sup>76</sup>

'States parties should, inter alia, recognize the right of these persons to have access to cultural material, television programmes, films, theatre and other cultural activities, in accessible forms; to have access to places where cultural performances or services are offered, such as theatres, museums, cinemas, libraries and tourist services and, to the extent possible, to monuments and places of national cultural importance; to the recognition of their specific cultural and linguistic identity, including sign language and the culture of the deaf; and to the encouragement and promotion of their participation, to the extent possible, in recreational, leisure and sporting activities.'<sup>77</sup>

<p>Older Persons</p>	<p>Refers to the Vienna International Plan of Action on Ageing (1982), which encourages states to support programmes aimed at promoting access to cultural institutions for older people.</p> <p>Emphasizes the important role that older persons play by reason of their creative, artistic and intellectual abilities, and as the transmitters of information, knowledge, traditions and cultural values.</p> <p>Calls for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture and spiritual values.</p>	<p>‘The Committee therefore urges States parties to take account of the recommendations contained in the United Nations Principles for Older Persons, and in particular of principle 7, that older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well being and share their knowledge and skills with younger generations; and principle 16, that older persons should have access to the educational, cultural, spiritual and recreational resources of society.’<sup>178</sup></p>
<p>Persons living in poverty</p>	<p>States urged to put in place measures to allow persons living in poverty to enjoy all aspects of cultural life.</p>	<p>‘It must be borne in mind that, in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture... Culture as a social product must be brought within the reach of all, on the basis of equality, non-discrimination and participation.’<sup>179</sup></p>

## Minorities

Minorities, as well as persons belonging to minorities, have the right not only to their own identity but also to development in all areas of cultural life.

Specific human rights protections for minority groups in other treaties are also linked to the right to take part in cultural life.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) has historically been considered a very significant cultural rights provision.<sup>80</sup> It has mostly been used in relation to sacred land, traditional hunting practices, and language rights.

The UN Human Rights Committee, which monitors and enforces the ICCPR, issued a General Comment in 1994 calling on states to take steps to ensure cultural rights of minority groups.<sup>81</sup>

‘This right entails the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. Consequently, minorities have the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership... Any programme intended to promote the constructive integration of minorities and persons belonging to minorities into the society of a State party should thus be based on inclusion, participation and non discrimination, with a view to preserving the distinctive character of minority cultures.’<sup>82</sup>

## Indigenous Peoples

States are urged to take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use

‘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

Migrants	<p>their communal lands as well as to develop their cultural heritage, traditional knowledge and traditional cultural expressions.</p> <p>States should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events.</p> <p>States should not prevent migrants from maintaining their cultural links with their countries of origin.</p> <p>States should adopt appropriate measures to enable the children of migrants to attend state-run educational institution and programmes.</p>	<p>resources which they have traditionally owned, occupied or otherwise used or acquired.’<sup>83</sup></p> <p>‘As education is intrinsically related to culture, the Committee recommends that States parties adopt appropriate measures to enable the children of migrants to attend, on a basis of equal treatment, State-run educational institution and programmes.’<sup>84</sup></p>
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Further General Comments that relate to the interpretation of Article 15 of ICESCR for particular groups set out that:

- culture encompasses enjoyment of the benefits of scientific progress;<sup>85</sup>
- the right to adequate housing includes that cultural expression in housing should be maintained;<sup>86</sup>
- persons with disabilities should have the right to engage in in scientific cultural advances and should have access to technology that allows for equal participation in cultural life;<sup>87</sup>
- men and women should have equal access to the enjoyment of cultural rights;<sup>88</sup>
- persons should not be discriminated on the basis of regional languages or accents;<sup>88</sup>
- scientists and artists should have the benefit of their works;<sup>90</sup> and
- communities should not be deprived of access to spiritually significant land for social cultural or religious practises.<sup>91</sup>

## 5. DISCUSSION

This research brief has aimed to provide an overview of the current and future legal framework in Scotland relevant to culture-related rights, with a focus on an international human rights law perspective which will become more prominent with changes to the human rights framework. By setting out current legal understandings, it aims to provide a resource which can inform discussion and implementation efforts. **International law intends to provide a baseline (or minimum floor) that national states should comply with; it does not limit national ambitions which may go further.** Understandings of the international legal provisions continue to evolve and non-legal sources, like the Fribourg Declaration and other emerging understandings<sup>92</sup>, will continue to inform international law developments and remain relevant for informing best practice and implementation efforts.

In the Scottish context, incorporation of the right to take part in cultural life alongside the other treaties and protections is already highly ambitious in a legal sense. However, international human rights law which applies to many different countries does not provide detailed guidance on implementation. **This must instead be developed in a context-sensitive way at the national level, which provides the best chance of effective implementation.** It is also the case that incorporation of international human rights standards is

unlikely to be able to address all concerns and tensions related to participation in cultural life.

The workshop that provided input on some of the concerns around, and barriers to, the right to take part in cultural life in Scotland suggested some key next steps. Participants said that it will be important to decide on a common language of cultural rights to inform how the right to take part in cultural life can best be progressed. Participants recognised that an approach which takes account of the national level but also of specified needs at the regional and local levels will be required, as these will differ across geographical areas. Participants noted that needs and priorities must, crucially, be identified at grassroots level, with local groups engaging in information exchange and solidarity building to claim their rights and pave the way to impacts that are meaningful to local communities.

The international human rights approach that has been set out in this research brief can potentially add value in number of ways. Where there are diverse understandings of 'culture' and a lack of awareness of cultural human rights, **the international human rights law definition of culture could be a useful, authoritative starting point for national conversations.** There is scope to exchange learning with other civil society sectors and the public sector on approaches to implementation of broad legal standards, given that the right to participate in cultural life will be brought

into law at the same time as a range of other rights.<sup>93</sup> While there are likely to be narratives and dynamics unique to the cultural sector, there is evidence of shared challenges relating to the implementation of human rights broadly in Scotland.<sup>94</sup> Equal participation rights (such as Article 30 of the Convention on the Rights of Persons with Disabilities<sup>95</sup>) as well as the principle of participation underpinning a human rights-based approach also supports cross-cultural dialogues, in ways that allow for open conversations, recognising competing or conflicting values and welcoming different beliefs. **If concrete disagreements arise at the point of implementation between the cultural rights of different individuals, or between cultural rights and other human rights, human rights law offers a framework for decision-making.**

Incorporation of the International Covenant on Economic, Social and Cultural Rights in tandem with the treaties providing additional recognition of the human rights of particular groups, will provide a framework which emphasises both cumulative experiences of disadvantage (intersectional discrimination) and interconnectedness with other rights. This can reinforce, at the level of implementation, the importance of duty bearers giving effect to rights in a way that is as holistic as possible. For example, recent legislation in England and Wales that criminalises a nomadic way of life<sup>96</sup> should be seen under a new legislative framework as engaging human rights at the

intersection of the right to take part in cultural life and the right to adequate housing. Greater recognition that participation, access and contribution to cultural life is a human right can help to shape policy and decision making in relevant areas, as well as place a duty on public bodies (within the parameters that will be set out in future legislation).

**In summary, incorporation of the right to take part in cultural life can provide an empowering narrative, based on the entitlement of individuals acting alone or in community, to participate, access and contribute to cultural life.** This will be further strengthened if the legal framework for incorporation explicitly recognises that all human rights, including cultural rights, are grounded in respect for human dignity.<sup>97</sup>

Key issues to consider in future research and discussion:

1. As a next step, it could be useful to develop a case-study, or worked example, of the difference that incorporation of the right to take part in cultural life might make. This would allow for a detailed examination of one illustrative context of practice, including mapping of relevant provisions in existing national law and relevant policy frameworks. As such, this could provide a model for more detailed examination of the potential impact of the new human rights framework in specific circumstances, supporting rights holders and duty bearers to see what



- change might look like in particular areas of practice.
2. International human rights law states that human rights are interconnected. International sources that elaborate on what the right to take part in cultural life means (notably the Fribourg Declaration and General Comment No. 21), highlight the interconnection between this right and other human rights with cultural dimensions. As such, consideration could be given to how to engage rights holders and duty bearers with these two key sources as a way of increasing knowledge of what the right to take part in cultural life means, and of understanding best practice that could guide aspirations in Scotland.
  3. International human rights law recognises that certain groups require special protection of the right to take part in cultural life (including women, children, disabled people, and people within minority groups). Since the new human rights framework in Scotland will give effect to international human rights and equality protections for these groups, as a next step it would be useful to draw out current challenges for specific groups in securing the right to take part in cultural life in Scotland. Further research and/or discussion on the experience of particular groups, including on intersectional experiences of disadvantage in relation to cultural life, could provide a baseline to support future implementation plans.
  4. Although international human rights law does not include group-based equality treaties protecting older people and LGBTI people, the new human rights framework in Scotland will include protections for these groups and as such it would be useful to draw out current challenges for older people and LGBTI people in securing the right to take part in cultural life in Scotland. Again, this could include an examination of intersectional experiences of disadvantage in relation to cultural life.
  5. International human rights law increasingly recognises a human right to a clean, healthy and sustainable environment and the new human rights framework in Scotland will include protection of this right. As a next step, it would be useful to further research and/or discuss interconnections between this right and the right to take part in cultural life in Scotland.

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## Footnotes:

1. UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 21: Right of everyone to take part in cultural life (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 1, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en).
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7. *Ibid.*
8. Human Rights Council res 10/23 (26 March) 2009. In 2012 this position was given the status of Special Rapporteur in the field of cultural rights.
9. The workshop, organised by the Human Rights Consortium Scotland (HRCS) and Art27, took place on 12 September 2022. We are grateful to the participants for sharing their valuable insights and expertise, which have contributed to shaping section 5 of this briefing.
10. Based on the Scottish Households Survey, which measures cultural engagement by asking respondents, "in the last 12 months have you been to any of these events or places?". Participants are provided with 15 options to choose from, including museums, cinemas and libraries, (and the option to respond 'none'). Additionally, respondents are asked "in the last 12 months have you done any of these activities?". They are provided with 15 options to choose from, including crafts and reading, (and the option to respond 'none'). In 2019, the Scottish Household Survey found that 90% of adults were culturally engaged. Scottish Household Survey. 'Scottish household survey 2019: culture and heritage – report' [2019] The Scottish Government, Available at: 1 Introduction and Context - Scottish household survey 2019: culture and heritage - report - gov.scot ([www.gov.scot](http://www.gov.scot))
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15. *Ibid.*
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21. Application no. 23168/94, 08 July 1999, available at <https://hudoc.echr.coe.int/eng?i=001-58274>.
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24. Application no. 27238/95, 18 January 2001, available at <https://hudoc.echr.coe.int/eng?i=001-59154>.
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34. 'The lack of appropriate and culturally adequate residential and transit accommodation is often at the root of the stigma and discrimination faced by Gypsies and Travellers.' UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 30 December 2013, A/HRC/25/54, available at: <https://www.refworld.org/docid/52e0f4924.html>
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36. UNESCO and the Fribourg Group (2007), available at: <http://hrlibrary.umn.edu/instree/Fribourg%20Declaration.pdf>.
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39. The Fribourg Declaration (2007) 2[b], available at <http://hrlibrary.umn.edu/instree/Fribourg%20Declaration.pdf>.
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Heritage Studies cites the declaration, stating its importance in relation to the clarification of cultural rights in the human rights system and its reinforcement of the right to identify with 'cultural communities'. However, it notes that 'cultural heritage' is not touched upon and is focussed on more in the Declaration Concerning the Intentional Destruction of Cultural Heritage (2003). It is also briefly cited in the European Cooperation in Science and Technology as a landmark document related to the sustainable development of culture.

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51. UN Human Rights Council, 'Cultural Rights: an empowering agenda' (Special Rapporteur in the field of cultural rights 2022) UN Doc A/HRC/49/54, paras 10 & 38, OHCHR | A/HRC/49/54: Cultural rights: an empowering agenda - Report of the Special Rapporteur in the field of cultural rights.
52. Three further thematic reports, issued in 2012 and 2015, have been dedicated to the specific rights recognized in article 15 (1) (b) and (c) of the International Covenant on Economic, Social and Cultural Rights, the right to benefit from scientific progress and its applications (A/HRC/20/26) and the right to the protection of the moral and material interests from any scientific, literary or artistic production of which one is the author (A/HRC/28/57 and A/70/279). Addressing two aspects of intellectual property rights, copyright law and patent policy, with a human rights approach offered new perspectives on the interactions between those two fields of international law. In the reports the Special Rapporteur highlighted the importance of guarding against the privatization of knowledge to such an extent that it deprives individuals of opportunities to take part in cultural life, and considered the balance needed between benefiting from the creativity of others and recognizing the rights of authors. In all three reports, the development of a "common good" approach to knowledge and creative production was encouraged.
53. International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966) UNGA Res 2200A (XXI) Article 15, available at International Covenant on Economic, Social and Cultural Rights | OHCHR.
54. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Article 27, available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>.
55. The UDHR is one of the UN's founding documents and the basis of the early human rights treaties. However, the document itself is not legally enforceable.
56. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force

September 1981) 1249 UNTS 13 (CEDAW), Preamble, Article 1, 3, 5, 13, 15 available at <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>.

57. Ibid.

58. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD), Article 1, 2, 5, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

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60. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), Preamble, Article 4, 17, 20, 23, 29, 31, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

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68. This principle has been endorsed by the UN Human Rights Committee in the context of Article 27 ICCPR. See HRC, General Comment 23, HRI/GEN/1/rev.9 (vol 1) 207, para 7. [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.5&Lang=en)

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