



# International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General  
18 December 2020

Original: English

## Committee on the Elimination of Racial Discrimination

### Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 54/2013\*, \*\*

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| <i>Communication submitted by:</i>  | Lars-Anders Ågren et al. (represented by counsel, Mattias Åhrén, head of the Human Rights Unit of the Saami Council)                                      |
| <i>Alleged victims:</i>             | The petitioners   |
| <i>State party:</i>                 | Sweden  |
| <i>Date of communication:</i>       | 16 September 2013 (initial submission)  |
| <i>Date of adoption of opinion:</i> | 18 November 2020  |
| <i>Document references:</i>         | Decision taken pursuant to rule 91 of the Committee's rules of procedure, transmitted to the State party on 22 October 2013 (not issued in document form) |
| <i>Subject matter:</i>              | Granting of mining concessions on Sami traditional territory  |
| <i>Procedural issues:</i>           | Victim status; incompatibility with the provisions of the Convention  |
| <i>Substantive issues:</i>          | Right to property; right to equal treatment before the tribunals and all other organs administering justice; right to effective protection and remedies   |
| <i>Articles of the Convention:</i>  | 5 (a) and (d) (v) and 6   |

1.1 The 15 petitioners are Lars-Anders Ågren, Ellen Marie Anne Anti, Henrik Omma, Ole-Henrik Omma, Elle Merete Omma, Jon Mikael Labba, Inger-Ann Omma, Marja-Kari Omma, Inger Baer-Omma, Lars-Jonas Omma, Liecelotte Omma, Morgan Omma, Lisa Omma, Per-Henning Utsi and Gun-Margret Utsi. They all belong to the indigenous Sami people and are all members of the Vapsten Sami reindeer herding community, practising traditional reindeer herding. They claim that Sweden has breached articles 5 (a) and (d) (v) and 6 of the Convention. They are represented by Mattias Åhrén (head of the Human Rights Unit of the Saami Council).

\* Adopted by the Committee at its 102nd session (16–24 November 2020).

\*\* The following members of the Committee participated in the examination of the present communication: Silvio José Albuquerque E. Silva, Sheikha Abdulla Ali Al-Misnad, Nouredine Amir, Marc Bossuyt, Chinsung Chung, Bakari Sidiki Diaby, Ibrahima Guissé, Rita Izák-Ndiaye, Ko Keiko, Gun Kut, Li Yanduan, Yemhelha Mint Mohamed, Mehrdad Payandeh, Verene Albertha Shepherd, Stamatia Stavrinaki, Faith Dikeledi Pansy Tlakula, Eduardo Ernesto Vega Luna and Yeung Kam John Yeung Sik Yuen.



1.2 The petitioners submit that, as members of the indigenous Sami people, they have their own culture, livelihoods and language, distinct from the cultures of non-Sami populations. In particular, reindeer herding constitutes the most central element of their cultural identity and traditional livelihood. The petitioners have migrated with their reindeer along the same routes used by their ancestors since time immemorial. The traditional territory of the Vapsten community covers approximately 10,000 km<sup>2</sup>, of which 3,000 km<sup>2</sup> are spring, summer and autumn pasture areas and 7,000 km<sup>2</sup> are winter pasture areas. All seasonal pasture areas are of vital importance as, without adequate pasture in all seasons, reindeer herding cannot be practised. The State party granted exploitation concessions to a private mining company in the community's traditional territory, in the form of three open-pit mines located in the Rönnbäcken isthmus, a region with pasture areas of fundamental importance to the Vapsten community's reindeer herding cycle. Each mine would have an associated industrial area, and a road system would connect the three mining sites. The mining system would result in dust spreading about 15 km from the mining sites in all directions, damaging lichen pasture, which is a crucial part of the reindeer's nutrition. The mining system would also cut off the migration routes between various seasonal pasture areas, resulting in serious negative effects on reindeer herding. In addition to the Rönnbäcken triple project, other industrial projects have already been approved by the State party in the Vapsten community's traditional territory; as a consequence, a large part of this territory has already been taken from the reindeer herding community and its pasture land is constantly decreasing, which is creating a real threat to reindeer herding and placing enormous psychological pressure on the community's members. The petitioners claim that it is thus impossible for the community to sustain other mining concessions. They further claim that the State party, by granting, without the petitioners' consent, the concession of three open-pit mines within their traditional property where they pursue a traditional livelihood, breached their right to property as enshrined in article 5 (d) (v) of the Convention. Indeed, under both national and international law, the community has established a property right to the land area in dispute, through traditional use. Without the pasture areas that the mining activities would occupy in line with the concessions granted by the State party, and without the migration routes, the petitioners would no longer be able to practise their traditional livelihood and would therefore need to be forcibly relocated from their traditional territory. In addition, the petitioners claim that the State party breached their right to equal treatment before the tribunals and all other organs administering justice, as enshrined in article 5 (a) of the Convention, by ignoring the fact that the right to non-discrimination requires that the Vapsten community be treated as an indigenous reindeer herding community and not as a Swedish property rights holder. The petitioners claim that the mining legislation and policies discriminate against Sami reindeer herders' groups specifically, not by treating the Sami differently from the Swedish population, but by not doing so. According to the petitioners, this discrimination is the root cause of the violations. Finally, the petitioners claim that the State party also breached their right to effective protection and remedies, pursuant to article 6 of the Convention, by denying them the right to bring to a court the specific issue of their traditional property rights, as the Supreme Administrative Court can only review the application of domestic law when it is the law itself that has caused the breach of rights. The petitioners add that monetary compensation cannot adequately provide for the loss of reindeer pasture land, which is indispensable to the community's reindeer herding, as an element of its cultural identity and traditional livelihood.

1.3 On 22 October 2013, pursuant to rule 94 (3) of its rules of procedure, the Committee requested the State party to suspend all mining activities in the Vapsten reindeer herding community's traditional territory while the petitioners' case was under consideration.

1.4 On 1 May 2015, the Committee asked for additional information from the State party, reiterating its request for interim measures to be taken.

1.5 On 1 May 2017, under article 14 of the Convention and rule 94 of its rules of procedure, the Committee declared the communication admissible. First, it found that the petitioners had victim status, as the mere fact that the exploitation concessions were granted without prior consultation and consent has had an impact on the petitioners' rights under the Convention, irrespective of future developments that could determine whether the mining plans would be carried out. Secondly, recalling that article 26 (2) of the United Nations Declaration on the Rights of Indigenous Peoples establishes the right for indigenous peoples

to own, use, develop and control lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, and recalling that this definition has been endorsed by the Committee in its general recommendation No. 23 (1997), the Committee found that the petitioners' claims raise issues related to article 5 (d) (v), as well as articles 5 (a) and 6 of the Convention. The Committee requested the parties to submit written observations and comments concerning the merits of the communication. For further information about the facts, the petitioners' claims, the parties' observations on admissibility and the Committee's decision on admissibility, refer to *Lars-Anders Ågren et al. v. Sweden* (CERD/C/92/D/54/2013).

### **State party's observations on the merits**

2.1 In a submission dated 16 October 2017, the State party observes that the communication reveals no violation of the petitioners' rights under the Convention. In its submission, the State party first refers to its legislation governing the granting of mining concessions and the Sami's collective reindeer husbandry right, among others; secondly, it applies those provisions to the facts of the present communication; thirdly, it concludes with observations on the merits.

#### *Relevant national legislation*

2.2 The granting of mining concessions is regulated under the Minerals Act and the Environmental Code. Applications for exploitation concessions are submitted to the Chief Mining Inspector together with an environmental impact statement describing possible effects of the planned operations on people, animals, plants, land, water, air, climate, landscape, cultural environment, human health and environment. The environmental impact statement must also include an analysis of the effects on reindeer husbandry, if relevant, and an outline of the possible cumulative impact of the operations applied for and other activities. When the concession applied for is in an area that is of national interest for the purposes of both reindeer husbandry and mineral extraction, the examining authority must determine which interest is to be given priority: national interest for the purpose of mineral extraction is understood by the State party as the interest of protecting areas that contain valuable substances and minerals against measures that may substantially obstruct their extraction, and national interest for the purpose of reindeer husbandry is the interest of protecting areas that are important for reindeer husbandry against measures that may substantially obstruct its operation. According to the State party, affected property owners and other parties concerned are informed of any application for exploitation concessions, provided with the environmental impact statement and given the opportunity to object. After an exploitation concession is awarded, environmental permits and construction permits are required. The Land and Environment Court is competent to examine applications for environmental permits and to determine the conditions, terms and limitations to be placed on the operations.

2.3 The Reindeer Husbandry Act regulates the Sami's land rights and their collective reindeer husbandry right. The collective reindeer husbandry right is an entitlement of the Sami people based on immemorial usage, which is exercised through membership of a Sami village. According to the legislation, persons other than Sami can have land rights in Sami reindeer husbandry areas, based on tenancy, lease or easement.

2.4 The State party also explains that, under the law, individuals can be compensated for the violation of their fundamental rights and legal provisions exist against discrimination whereby no unfavourable treatment of anyone belonging to a minority group by reason of ethnic origin, colour or other similar circumstances is permissible.

#### *Clarifications concerning the facts of the communication*

2.5 The State party makes some amendments and additions to the facts summarized by the Committee in its decision on admissibility. In this regard, the State party recalls the consultations held between the mining company and the members of the Sami village, which encompassed: (a) a preparatory meeting and a site visit (in June 2008); (b) an overview of the Vapsten Sami village's needs and another site visit (in November 2008); (c) a first draft of a report on the current state of the project, produced in June 2009; (d) a second draft of the report, produced on 10 October 2009; and (e) the final report on the current state of the project,

issued on 11 October 2009. According to the State party, between two and six representatives of the Vapsten Sami village attended the meetings organized by the mining company, during which they highlighted a number of risks connected with the project. Finally, a report on the effects of the project on reindeer husbandry, drafted by a consulting company contracted by the mining company, included suggestions for a number of damage-reduction measures, including appropriate siting of the sand deposits, the open-pit mines and the roads, and of fences to prevent animals from wandering into those areas. According to the State party, the mining company stated that several of the recommendations made would be effective and possible to implement.

2.6 In February 2010, the company applied for exploitation concessions for the areas Rönnbäcken K No. 1 and Rönnbäcken K No. 2. The application documents were sent for observations to the Västerbotten County Administrative Board, affected property owners and other interested parties, including the Vapsten Sami village. The Vapsten Sami village stated that, if the exploitation concessions were granted, important core areas would be lost and the passage over Rönnbäcken would become unusable, obstructing reindeer husbandry. However, the Västerbotten County Administrative Board concluded that there was no impediment to granting the concessions, provided that the mining operations were adapted, as far as possible, to the reindeer husbandry.

2.7 On 23 June 2010, the Chief Mining Inspector granted the exploitation concessions for Rönnbäcken K No. 1 and Rönnbäcken K No. 2, on the condition that the mining company engage in annual consultations with the Vapsten Sami village to clarify the measures required to mitigate disturbance caused by the mining operations to reindeer husbandry. The Vapsten Sami village appealed the decision to the Government, which rejected the appeal, considering that it was possible for reindeer husbandry to continue in the area. The Sami village requested a judicial review by the Supreme Administrative Court. The Court revoked the decision, because it had not included an assessment of which of the conflicting national interests – mineral extraction or reindeer husbandry – should be given priority, and requested a re-examination of the case.

2.8 In December 2011, before the new decision in the case concerning Rönnbäcken K No. 1 and Rönnbäcken K No. 2 had been taken or the assessment requested by the Supreme Administrative Court had been submitted, the company applied for an exploitation concession with respect to the area Rönnbäcken K No. 3. According to the environmental impact statement, the project would be compatible with reindeer husbandry. The application documents were sent for observations to the Västerbotten County Administrative Board, affected property owners and other interested parties, including the Vapsten Sami village. On 1 October 2012, the Chief Mining Inspector granted the exploitation concession sought for Rönnbäcken No. 3, indicating that the mining company must engage in annual consultations with the Vapsten Sami village and work to minimize the adverse impact of the mining operations on reindeer husbandry. The Vapsten Sami village appealed the decision to the Government, requesting that the three cases be processed jointly.

2.9 On 22 August 2013, the appeals concerning all three concessions were rejected, it being noted that the area designated as being of national interest for reindeer husbandry was considerably larger than the areas covered by the exploitation concessions, so that the concessions would only apply to a small part of the areas available for reindeer husbandry. Accordingly, the petitioners would have possibilities to practise reindeer husbandry elsewhere. On 29 October 2014, the Supreme Administrative Court rejected the petitioners' application for a judicial review, ruling that the Government's decision concerning the three exploitation concessions was to be upheld.

#### *Considerations regarding the merits*

2.10 The State party emphasizes that the granting of the exploitation concessions does not constitute a violation of article 5 (d) (v) of the Convention. Indeed, the Sami's right to practise reindeer husbandry under Swedish legislation is not a right of ownership of land and does not entail formal title to or ownership of the land in question, but is a right of usufruct, which allows them to use land and water for their own maintenance and that of the reindeer.

2.11 The State party recalls that the right to property is not absolute, but may be subjected to limitations in the public interest. According to the State party, the authorities considered the relative weights accorded to the interests concerned when evaluating whether the concessions applied for were compatible with the law, and there is nothing to indicate that the decision to give priority to mineral extraction over reindeer husbandry was erroneous. The State party also claims that, should the Committee find that a limitation has been imposed on the petitioners' rights, that limitation was indeed necessary and proportional in relation to a legitimate State objective. Indeed, the area affected by the three concessions is small in relation to that of the Vapsten Sami village's total area; the area designated as being of national interest for reindeer husbandry is considerably larger than the areas concerned by the concessions; thus, if reindeer husbandry were not possible in the those areas, this would not mean that the possibilities available to the Sami village to practise reindeer husbandry elsewhere would be impeded. Moreover, the mining activities primarily concern the extraction of nickel, a metal that the State party imports, and a complicating factor is that findings of minerals are located in a certain area and cannot be reallocated elsewhere, whereas the reindeer have the possibility of using alternative grazing grounds. Finally, the petitioners applied for compensation for alleged incorrect or negligent exercise of public authority in granting the concessions, but the application was rejected. When the petitioners applied for compensation for infringements of their property rights and their right to a fair hearing and for incorrect or negligent exercise of public authority, that application was also rejected, on the grounds that the petitioners had been ensured a hearing and that no violation had taken place. Thus, according to the State party, the limitation is not in breach of the Convention.

2.12 According to the State party, the meaning of the concept of free, prior and informed consent, as expressed, for instance, in article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, has been disputed. That Declaration is not legally binding and the concept does not entail a collective right of veto. The State party recalls the conclusions drawn by the Special Rapporteur on the rights of indigenous peoples to the effect that consultations should be carried out in good faith, with the objective of achieving agreement, and that building consensus and mutual understanding and consensual decision-making should be objectives of the consultations,<sup>1</sup> but that consent may not be required when a limitation on indigenous peoples' rights is considered to be necessary and proportional in relation to a valid State objective.<sup>2</sup>

2.13 The State party further indicates that, even though, before submitting the application for exploitation concessions, the company carried out drilling using a forest tractor with an attached drill and analysed drill core samples from the concession sites to determine whether the identified mineralization is of such grade as to warrant commencing actual mining activities, it has no intention of applying for an environmental permit due to the current price of nickel.<sup>3</sup> It is therefore too soon, according to the State party, to assess the extent of any possible infringement on the petitioners' possibilities to practise reindeer husbandry.

2.14 In relation to articles 5 (a) and 6 of the Convention, the State party alleges that, when determining whether any of the substantive obligations to prevent, protect against and remedy violations have been breached, the Committee must first determine whether an act of racial discrimination has occurred, because the Convention does not protect certain rights as such, but aims to protect persons against racial discrimination.<sup>4</sup> According to the State party, there is no breach of article 5 (a) of the Convention, as racial discrimination did not occur in the current case because the petitioners are treated on an equal footing with landowners concerned by the project. In particular, the State party alleges that the petitioners have been consulted to the extent required under national law in matters regarding mining concessions, as any other party affected, and that they have failed to demonstrate that they have been subjected to discrimination on account of their ethnic origin during the domestic proceedings. Moreover, according to the State party, there is no breach of article 6 of the Convention, as

<sup>1</sup> A/HRC/12/34, paras. 48–49.

<sup>2</sup> A/HRC/24/41, paras. 27, 31–34 and 84–87.

<sup>3</sup> The market price would have to increase substantially for the project to be financially sustainable.

<sup>4</sup> The State party mentions *L.R. et al. v. Slovakia* (CERD/C/66/D/31/2003 and Corr.1), para. 10.2, and *Lubicon Lake Band v. Canada*, communication No. 167/1984, para. 32.2.

the possibility of a judicial review by the Supreme Administrative Court satisfies the petitioners' right to appeal the granting of the concessions.

### **Petitioners' comments on the State party's observations**

3.1 In a submission dated 31 January 2018, the petitioners allege that the State party violated article 5 (d) (v) of the Convention by granting three mining concessions on their traditional territory without obtaining the consent of the reindeer herding community and without even considering whether taking the land amounted to a violation of the community's property rights.

3.2 The petitioners recall that international human rights law provides that indigenous peoples' traditional use of land in accordance with their own cultural practices establishes property rights. In particular, the petitioners recall the Committee's general recommendation No. 23 (1997) and article 26 of the United Nations Declaration on the Rights of Indigenous Peoples concerning indigenous property rights over territories traditionally used. According to the petitioners, the State party's domestic jurisprudence has also acknowledged that Sami reindeer herding communities' traditional use of land has established property rights, and not only rights of usufruct,<sup>5</sup> even though Swedish mining legislation reflects an ignorance of the property rights of Sami reindeer herding communities in respect of their traditional territories. The petitioners claim that their rights have been established through traditional use as they have migrated with their reindeer along the same routes used by their ancestors since time immemorial, in their traditional territory, which covers approximately 10,000 km<sup>2</sup> of spring, summer, autumn and winter pasture areas. Their property right is not based on the Reindeer Husbandry Act but on the customary use of the land. Indeed, indigenous peoples' rights to traditional territories exist independently of domestic legislation, and the fact that the national legislation does not award them formal title is therefore irrelevant, according to international human rights law. A cardinal aspect of structural discrimination directed against indigenous peoples is precisely the lack of official recognition of rights over land, and this is why human rights protection organs have not held official recognition of title to be a prerequisite for the recognition of indigenous peoples' property rights because, in an indigenous context, the right to property does not necessarily have to be expressed in the form of a State-recognized title, but can also present itself in other forms established through customary use. Thus, the term "right to property" is considered as also encompassing property in the context of indigenous peoples whose own traditions and customary laws may include a totally different system of property rights from that laid down in State law. Such an understanding of the right is thus in line with article 5 (d) (v) of the Convention, irrespective of the fact that the wording of the provision speaks only of ownership rights. In international law in general and in the Committee's jurisprudence, the understanding of the right to property has clearly evolved when applied in an indigenous context.

3.3 The Vapsten indigenous Sami reindeer herding community pursues traditional Sami reindeer herding in northern Sweden, in an area stretching from mountainous terrain by the Norwegian border in the west to forested landscapes approaching the Baltic Sea in the east. This area running from west to east, which is their traditional land, is a prerequisite for Sami reindeer herding, which requires access to different pasture areas during different seasons over a yearly cycle. One vital piece of their yearly reindeer herding cycle puzzle is the area in the centre, Rönnebäcken isthmus, where mining concessions were granted in violation of their right to property as enshrined in article 5 (d) (v) of the Convention. Thus, it is undisputed that the mines constitute an infringement of the community's property right since, according to the State party's own words, it is not possible to practise both reindeer husbandry and mine extraction.

3.4 In this regard, the removal of the area from the community without consultation and without its free, prior and informed consent, as already established by the Committee in its decision of admissibility of 1 May 2017, is a limitation on the community's property rights, in contradiction with the Convention.

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<sup>5</sup> The petitioners refer to the Supreme Court's rulings in the *Taxed Lapp Mountain* and *Nordmaling* cases.

3.5 Regarding the State party's international obligation to consult the Sami community affected by a project on its territory, the petitioners claim that, even though the State party continues to argue that the community has been consulted, the Committee has already correctly concluded that this was not the case. The Vapsten community has only been allowed to provide input into the process, to polish the project somewhat from a reindeer herding perspective, but, according to the petitioners, that process cannot be characterized as anything close to consultation, in any international legal understanding of the term. Consultations must involve a serious engagement with the community, with a genuine and sincere ambition to reach consensus.

3.6 Regarding the State party's higher international obligation to obtain the free, prior and informed consent of the Sami community affected by a mining project, the petitioners recall that one of the consequences of the fundamental right to traditional property, or traditional territory, is the right to control access to the land, according to article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by United Nations treaty bodies,<sup>6</sup> which reaffirms that indigenous peoples' property rights over land embrace the right to offer or withhold their consent to enterprises that seek access to the land in cases of such negative impacts of mining on indigenous peoples' traditional livelihoods. The petitioners also refer to a report by the Special Rapporteur on the rights of indigenous peoples, according to which expropriation of land used by indigenous peoples constitutes a limitation of indigenous property rights and a valid public purpose is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain.<sup>7</sup> According to the petitioners, the State party is rather selective when referring to this report by the Special Rapporteur, omitting to note that "extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent",<sup>8</sup> or the narrow scope of permissible exceptions to the general rule. Only in "exceptional cases" may the State legally impose infringements on this right to property, and only provided that certain criteria are met. The petitioners claim that the proportionality test – essential to all expropriation assessments – was not even undertaken. There was no attempt made during the process of granting the concessions to establish whether the narrow scope for exception from the right to consent applied to the case. Indeed, having acted without the petitioners' consent, the State party must demonstrate that the granting of the concessions was motivated by a legitimate aim and was proportionate. However, the legislative framework does not require that the State party determine whether the granting of the permit complies with the reindeer herding community's property right; rather, the State party only discussed the relevance of reindeer herding to the culture in Sweden in general. The State party's assertion that, although the community cannot practise reindeer herding in Rönnbäcken isthmus, it can do so elsewhere, did not take into account the cumulative effects, the fact that the Vapsten community is already hosting other mines and that, in previous cases related to exploitation concessions, Rönnbäcken isthmus was defined as the area "elsewhere" in which reindeer herding could be practised. The petitioners are left with an unreasonable burden as a result of the infringement. The mining system will have fundamental and multiple negative impacts on its reindeer herding. Indeed, even though the mining system does not consume a major part of the total traditional territory, the concessions will destroy an area of pasture land that is absolutely vital to the reindeer herding community in the spring and autumn seasons, and, due to the topography, will cut off the only migration route between the mountainous pasture areas in the west and the forested areas in the east. The petitioners illustrate the situation with an analogy with a house: a few steps in the stairs between the first and second floors make up only a few square metres of a house; nevertheless, if those steps are taken away, it is impossible to use the entire second floor. The petitioners also claim that the fact that no attempt has been made to reach an agreement on compensation is an aggravating factor in a proportionality test, even though they affirm the

<sup>6</sup> The petitioners refer to E/C.12/COL/CO/5, CERD/C/KHM/CO/8-13, para. 16, and CERD/C/SWE/CO/19-21, para. 17, according to which prior consent of indigenous peoples should be required before industrial concessions are granted when the projects in question may affect the rights of those peoples. The petitioners also refer to the Views of the Human Rights Committee in *Poma v. Peru* (CCPR/C/95/D/1457/2006).

<sup>7</sup> A/HRC/24/41, para. 35.

<sup>8</sup> *Ibid.*, para. 27.

lack of relevance of compensation, as the loss of the area cannot be compensated for in monetary terms.

3.7 In addition, the petitioners claim that the State party breached their right to equal treatment before the tribunals and all other organs administering justice, as enshrined in article 5 (a) of the Convention, as it neglected, when allowing mining concessions on indigenous lands, to consider the fundamental property right of Vapsten as an indigenous reindeer herding community (and not as a Swedish property right holder) not to be discriminated against in that respect. Indeed, the petitioners claim that the mining legislation and policies discriminate against the group of Sami reindeer herders specifically, not by treating them differently from the Swedish population, but by not doing so and by being blind to the particularities of the indigenous Sami culture, with its dependence on reindeer herding for survival. Mining activities have a devastating effect on the Sami group that does not occur in the context of the Swedish majority population, as it places their traditional livelihoods and very cultural identity at imminent risk. In this regard, due to their nature-based means of livelihood, the Sami are disproportionately affected by mining activities, since mining per se has a discriminatory effect and amounts to discrimination against persons of Sami ethnicity. According to the petitioners, this discrimination contained in the mining legislation is the root cause of these violations, and all breaches of their rights are a direct result of the law discriminating against Sami reindeer herding communities compared with Swedish land property rights holders, by not taking into account their specificity. In this regard, the petitioners recall that the right to non-discrimination demands not only equal treatment of analogous situations, but also differential treatment of those that are culturally different from the majority population; they refer to the jurisprudence of the European Court of Human Rights, which has considered that laws that do not, in themselves, involve impermissible discrimination but which nonetheless disproportionately and adversely affect members of a particular group, are discriminatory.<sup>9</sup> The petitioners also recall that both the Committee<sup>10</sup> and the Special Rapporteur on the rights of indigenous peoples, in her report on Sami people in the Sápmi region,<sup>11</sup> have already drawn the State party's attention to that aspect of its mining legislation, which does not conform with the Convention.

3.8 Finally, the petitioners claim that the State party also breached their right to effective protection and remedies, pursuant to article 6 of the Convention, as they have not had access to any domestic institution that could evaluate the taking of the land from the perspective of fundamental property rights. Indeed, Swedish mining legislation prevents them from arguing a violation of the right to property before domestic courts, and the Supreme Administrative Court is only allowed to review the application of domestic law when it is the law itself that has caused the breach of rights. The petitioners point out that the environmental permit process cannot include an examination of the fundamental right to traditional property, nor an evaluation of whether the mining activities should be disallowed due to their negative impact on Sami reindeer herding; it will only decide on what mitigation measures must be taken. The petitioners refer to an electronic message received by the Vapsten community on 16 September 2015 in which the Land and Environment Court confirmed that there were no previous examples of it not allowing a mining project to proceed. Thus, since the Court does not consider whether there has been a violation of the right to property, the petitioners had no access to an effective remedy. To substantiate their claim, the petitioners recall that, in a similar case, the Land and Environment Court had refused to consider the impact of a mine on reindeer herding, despite the community's explicit request for it to do so; the Court was of the opinion that the objections raised by the Vapsten community had already been dealt with at the concession stage and thus were not of such a character that they could be tried at the environmental permit stage.<sup>12</sup> Finally, the petitioners substantiate the violation of article 6 on the grounds that, whereas Swedish landowners can be adequately provided with full market-value compensation for their property, monetary allotment cannot compensate Sami

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<sup>9</sup> European Court of Human Rights, *D.H. and others v. Czech Republic*, application No. 57325/00, judgment, 13 November 2007.

<sup>10</sup> The petitioners refer to CERD/C/SWE/CO/19-21, para. 17.

<sup>11</sup> A/HRC/33/42/Add.3.

<sup>12</sup> The petitioners refer to Umeå District Court, Land and Environment Court, decision, 28 August 2003, in cases No. M 112-01 and No. M 113-01 (*Svartliden, Fäboliden and Stortjärnhobben*).

indigenous peoples when they are deprived of reindeer pasture land which is indispensable to the community's reindeer herding and which forms the very basis of their cultural identity and traditional livelihood.

#### **State party's additional submissions**

4.1 In a submission dated 1 February 2019, the State party reiterates its allegations according to which the petitioners' description of their right as a property right is misleading. It insists on the fact that it is not a right of ownership of land but a usufructuary right, and that they do not hold a formal title to ownership of the land in question.

4.2 The State party also reiterates that the Vapsten Sami village has been consulted throughout the domestic proceedings to the full extent required under international law in matters regarding mining concessions, and that the authorities have made every effort to build consensus with all concerned.

4.3 The State party clarifies that the weighing up of the different interests involved is based on a public approach, i.e. only public interests are considered and no consideration is given to any private interests linked to the land. Areas that are of importance for reindeer husbandry under the Swedish Environmental Code represent a public interest, whereas the specific reindeer husbandry right of the petitioners represents a private interest, as the use of real property is a civil right.

4.4 Moreover, the State party explains that, from an international geological perspective, Sweden's bedrock has unique geological potential for mineral extraction and that extraction of minerals has been a key feature of Swedish history. The location of deposits in the bedrock is the result of geological processes, and mineral deposits, in contrast to the sites of other industrial activities, cannot, therefore, be relocated. According to the State party, supplying society with the metals and minerals it needs requires legislation enabling a party to apply for a permit to extract metals and minerals, regardless of who owns the land. Indeed, when a prospector has discovered a potentially profitable deposit, the first step towards starting mining operations is to apply for an exploitation concession; a concession decision determines who has the right to extract the metals or minerals and this right also applies vis-à-vis the property owner and without their consent, which is the main purpose of the concession system.

#### **Petitioners' additional submissions**

5.1 In a submission dated 31 October 2019, the petitioners observe that they are unsure whether the State party still questions the assertion that their right to property, pursuant to article 5 (d) (v) of the Convention, is protected under the Convention.

5.2 The petitioners also note that the State party admits that the decisions to grant mining concessions for a mining system consisting of three open pit mines and associated infrastructure within the Vapsten community's traditional lands did not involve consideration of their land property right; rather, the examinations only included the weighing-up of two public interests (mining and reindeer herding) against one another. The petitioners claim that the State party fails both tests under the Convention for assessing whether encroachments on indigenous lands are lawful – that the encroachment should simultaneously not inflict damage on the indigenous people beyond the threshold that the right allows (the right's material requirement) and have been duly consulted with the community (the right's procedural requirement).

5.3 The petitioners also reiterate that the Land and Environment Court has no mandate to disallow the project on the grounds that it will have an excessive negative impact on reindeer herding, as it can only establish the conditions for the mining; a different court determines the monetary compensation. The calculation might be lawful with regard to the Swedish property right holders but it is not with regard to an indigenous Sami reindeer herding community, for which damage to land is damage to its culture, society, way of life and identity.

5.4 Thus, the legislation amounts to structural discrimination against Sami reindeer herding communities. The petitioners refer to the Committee's general recommendation No.

32 (2009), according to which the term “non-discrimination” does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment, that to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same and that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration (para. 8). The petitioners also recall the jurisprudence of the European Court of Human Rights, according to which there is a violation when a State fails to treat differently persons whose situations are significantly different.<sup>13</sup> The petitioners claim that, as an indigenous Sami reindeer herding community, they are profoundly culturally different from the Swedish majority population when it comes to expropriation of land for mining purposes.

### **Issues and proceedings before the Committee**

#### *Consideration of the merits*

6.1 The Committee has considered the present communication in the light of all the submissions and documentary evidence produced by the parties, as required under article 14 (7) (a) of the Convention and rule 95 of the Committee’s rules of procedure.

(a) Article 5 (d) (v) of the Convention

(i) Arguments submitted by the parties

6.2 The Committee first notes the petitioners’ claim that their right to own property, protected under article 5 (d) (v) of the Convention, has been violated, as the State granted, without their consent, concessions for three open-pit mines within their traditional property where they pursue a traditional livelihood, leading to a concrete threat to reindeer herding and placing enormous psychological pressure on its members.

6.3 The Committee notes the State party’s argument that the petitioners’ description of their right as a property right is misleading, as the Sami’s right to pursue reindeer husbandry under Swedish legislation is not a right of ownership of land and does not entail formal title to or ownership of the land in question, but consists only of a right of usufruct. The Committee also notes the petitioners’ allegation that international human rights law provides that indigenous peoples’ traditional use of land in accordance with their own cultural practices establishes property rights, so that their rights to traditional territories exist independently of domestic legislation. According to the petitioners, a title is not a prerequisite for the recognition of indigenous people’s property rights, as a cardinal aspect of structural discrimination directed against indigenous peoples is precisely the lack of official recognition of rights over land. According to them, in an indigenous context, the right to property does not necessarily have to be expressed in the form of a State-recognized title. In this regard, the petitioners recall the Committee’s general recommendation No. 23 (1997), the United Nations Declaration on the Rights of Indigenous Peoples and reports by the Special Rapporteur on the rights of indigenous peoples. The petitioners claim that the term “right to own property” used in the Convention is considered as also encompassing property in the context of indigenous peoples, as the understanding of the right to property has clearly evolved when applied to an indigenous context. The Vapsten Sami reindeer herding community, which practises traditional Sami reindeer herding, has migrated along the same routes used by its ancestors since time immemorial. Thus, the petitioners claim that, even though Swedish mining legislation and the Reindeer Husbandry Act ignore these international human rights law standards, their property rights have been established through traditional use.

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<sup>13</sup> European Court of Human Rights, *Thlimmenos v. Greece* (application No. 34369/97), judgment, 6 April 2000, para. 44.

## (ii) Scope

6.4 Regarding the scope and applicability of article 5 (d) (v) in this case, the Committee notes that the complaint does not raise the issue of legal determination of Sami property rights under national law, in other words, whether the right is of ownership of land or a usufructuary right but, rather, that of whether the facts related to the mining concessions before the Committee raise an issue of violation of the Convention.

## (iii) Relevant principles

6.5 The Committee recalls that, in its general recommendation No. 23 (1997), it calls upon States parties 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 deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories (para. 5). As recalled in the decision of admissibility, these human rights law standards are also found in the United Nations Declaration on the Rights of Indigenous Peoples, which Sweden voted in favour of. Article 26 of the Declaration reads as follows:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous 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, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

6.6 The Committee observes that, as the *raison d'être* of these principles, the close ties of indigenous peoples to the land must be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival. Their "relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations".<sup>14</sup> In this regard, the realization of indigenous peoples' land rights may also be a prerequisite for the exercise of the right to life, as such, and to "prevent their extinction as a people".<sup>15</sup>

6.7 In this context, the Committee recalls that to ignore the inherent right of indigenous peoples to use and enjoy land rights and to refrain from taking appropriate measures to ensure respect in practice for their right to offer free, prior and informed consent whenever their rights may be affected by projects carried out in their traditional territories constitutes a form of discrimination as it results in nullifying or impairing the recognition, enjoyment or exercise by indigenous peoples, on an equal footing, of their rights to their ancestral territories, natural resources and, as a result, their identity.<sup>16</sup>

<sup>14</sup> Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, para. 149.

<sup>15</sup> Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment, 28 November 2007, para. 121. See also *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, 29 March 2006.

<sup>16</sup> The Inter-American Court of Human Rights has acknowledged in several cases that indigenous peoples' rights are indeed protected within the framework of communal property. See for further reference constant jurisprudence since the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and the concurring opinion of Sergio García-Ramírez in this case, para. 13. The same principles were recognized in the African Human Rights System. See *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 276/03, 2009, and *African Commission on Human and Peoples' Rights v. Republic of Kenya*, application No. 006/2012, 2017.

## (iv) Application of these principles in the present case

6.8 The Committee observes that the State party did not refute that Vapsten is part of the petitioners' traditional territory. Moreover, the Committee observes that the Supreme Administrative Court has acknowledged that Sami reindeer herding communities' traditional use of land has established property rights, based on immemorial prescription and customary law.<sup>17</sup> The Committee also observes that, under the Nordic Saami Convention, negotiated by the Nordic Governments together with the Sami parliaments of Finland, Norway and Sweden, which builds on existing international law and aims at implementing it in a Nordic context, access to land and water is recognized as the foundation of the Sami culture, language and social life, and thus both the individual and the collective property rights of the Sami to their lands and resources are protected.

6.9 The Committee recalls that, in its concluding observations concerning the implementation by Sweden of article 5 of the Convention, it has expressed concern over the issue of land rights of the Sami people, in particular their hunting and fishing rights, which are threatened by, inter alia, the privatization of traditional Sami lands. It has repeatedly recommended the adoption of legislation recognizing and protecting traditional Sami land rights, reflecting the centrality of reindeer husbandry to the way of life of the indigenous people of Sweden and enshrining the right to free, prior and informed consent into law, in accordance with international standards.<sup>18</sup>

6.10 The Committee considers that it needs to examine the petitioners' claims regarding the alleged failure of the State party to consult the Vapsten Sami reindeer herding community and obtain its free, prior and informed consent in the granting of mining concessions on its traditional territory. It notes that the concessions are valid for 25 years and entail rights to the extraction and utilization of nickel, iron, chromium, cobalt, gold, silver, platinum and palladium. In respect of the petitioners' claim that the State party failed to fulfil its obligations under article 5 (d) (v) of the Convention, the Committee considers that, even though the right to property is not absolute, States parties must respect the principle of proportionality when limiting or regulating indigenous peoples' land rights, taking into account their distinctive status as described above (paras. 6.5–6.7 above), so as not to endanger the very survival of the community and its members.<sup>19</sup>

6.11 The Committee notes the petitioners' allegation that, when added to the existing industrial projects granted by the State party in the Vapsten community's traditional territory, the three mining exploitation concessions which motivated the present communication would result in the petitioners being unable to pursue their traditional livelihood, meaning that they would need to be forcibly relocated from their traditional territory. The affected Sami community was able to provide only input to the triple project, which cannot, in the petitioners' opinion, be characterized as anything close to consultations having taken place, as consultations must involve a serious engagement with the community, with a genuine and sincere ambition to reach consensus. Indeed, the petitioners maintain that the State party must obtain their free, prior and informed consent in the case of such negative impacts. The Committee also notes the State party's argument that the granting of exploitation concessions does not constitute a violation of article 5 (d) (v) of the Convention because there is nothing to indicate that the decision to give priority to the designation of the area as being of national interest for mineral extraction over its designation as being of national interest for reindeer husbandry was erroneous. In the opinion of the State party, should the Committee find that there has been a limitation on the petitioners' rights, it should be noted that the limitation was necessary and proportional in relation to the State's valid objective. Indeed, extraction of nickel is important and, as deposits are located in a certain area, extraction cannot be carried

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<sup>17</sup> Supreme Court's rulings in the *Taxed Lapp Mountain* and *Nordmaling* cases.

<sup>18</sup> CERD/C/304/Add.103, para. 13; CERD/C/64/CO/8, para. 12; CERD/C/SWE/CO/18, para. 19; CERD/C/SWE/CO/19-21, para. 17; and CERD/C/SWE/CO/22-23, para. 17. See also the requests for free, prior and informed consent in the Committee's concluding observations related to reports of other States parties: CERD/C/SUR/CO/13-15, para. 26; CERD/C/NAM/CO/13-15, para. 24; and CERD/C/PRY/CO/4-6, para. 18; and in the framework of the Committee's early warning and urgent action procedure, decision 1 (100) Canada.

<sup>19</sup> *Poma Poma v. Peru*, para. 7.6.

out elsewhere, whereas it is possible for reindeer to use alternative grazing grounds. Moreover, the Vapsten Sami village has been consulted, but the legislation allows the Government to grant a mining permit regardless of who owns the land and without the prior consent of the property owner. Thus, according to the State party, no racial discrimination is proven in the present case, given that the petitioners, who are treated on an equal footing with landowners concerned by the project, had been consulted, as any party affected, to the extent required under national law in matters regarding mining concessions.

6.12 The Committee considers that the State party's reasoning is misguided and that it has not complied with its international obligations to protect the Vapsten Sami reindeer herding community against racial discrimination by adequately or effectively consulting the community in the granting of the concessions.

6.13 The prohibition of racial discrimination underpinned in the Convention requires that States parties guarantee to everyone under their jurisdiction the enjoyment of equal rights *de jure* and *de facto*. Pursuant to article 2 (1) (c), each State party must take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination, wherever it exists. States must take positive measures to enable the realization of human rights for indigenous peoples, either by removing remaining obstacles or by adopting specific legislative and administrative measures to fulfil their obligations under the Convention.

6.14 In particular, in its general recommendation No. 23 (1997), the Committee has called on the States parties to recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation, which has been and still is jeopardized. The Committee recalls that indigenous peoples' land rights differ from the common understanding of civil law property rights and considers that reindeer herding is not an "outdoor recreational exercise" as qualified in the Chief Mining Inspector's decision,<sup>20</sup> but a central element of the petitioners' cultural identity and traditional livelihood.

6.15 Indeed, the recognition of the Sami communities' land rights and their collective reindeer husbandry right, based on immemorial usage, entails the obligation to respect and protect these rights in practice. The need to safeguard their cultures and livelihoods is among the reasons why States parties should adopt concrete measures to ensure their effective consultation and participation in decision-making. The Committee recalls that, in its general recommendation No. 32 (2009), it clarified that the notion of inadmissible "separate rights" must be distinguished from rights accepted and recognized by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights (para. 26). Rights to lands traditionally occupied by indigenous peoples are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies.<sup>21</sup>

6.16 The Committee has frequently reaffirmed the understanding that lack of appropriate consultation with indigenous peoples may constitute a form of racial discrimination and could fall under the scope of the Convention. The Committee adheres to the human rights-based approach of free, prior and informed consent as a norm stemming from the prohibition of racial discrimination, which is the main underlying cause of most discrimination suffered by indigenous peoples.<sup>22</sup>

6.17 The Committee notes that it is incumbent upon States parties to provide evidence that they fulfil this obligation, either directly, by organizing and operating consultations in good faith and with a view to reaching consensus, or indirectly, by providing sufficient guarantees of effective participation of indigenous communities and by ensuring that due weight is

<sup>20</sup> Words used in the Chief Mining Inspector's decision granting the exploitation concession for Rönnebäcken K No. 3, State party's observations on the merits, 16 October 2017, appendix 2.

<sup>21</sup> The Committee recalls that, in accordance with its general recommendation No. 32 (2009), the distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures (para. 15).

<sup>22</sup> A/HRC/39/62, paras. 9–10.

indeed given by any third party to the substantive arguments raised by the indigenous communities. The Committee considers that the duty to consult<sup>23</sup> in such a context is the responsibility of the State and cannot be delegated without supervision to a private company, especially to the very company that has a commercial interest in the resources within the territory of the indigenous peoples.<sup>24</sup> As observed by the Special Rapporteur on the rights of indigenous peoples, in addition to not absolving the State of ultimate responsibility, such delegation of a State's human rights obligations to a private company may not be desirable, and can even be problematic, given that the interests of the private company, generally speaking, are principally lucrative and thus cannot be in complete alignment with the best interests of the indigenous peoples concerned.<sup>25</sup> In the present communication, by delegating the consultation process to the mining company without effective guarantees and thus failing in its duty to respect the land rights of the Vapsten Sami reindeer herding community, the State party did not comply with its international obligations.

6.18 Moreover, the Committee further considers that environmental and social impact studies should be part of the consultation process with indigenous peoples. These studies should be conducted by independent and technically competent entities, prior to the awarding of a concession for any development or investment project affecting traditional territories. Based on these studies, consultations must be held from the early stages and before the design of the project, not only at the point when it is necessary to obtain approval; they should not start with predefined ideas according to which the project must necessarily be carried out, and they must involve constant communication between the parties. The Committee recalls that, since the uncertainty of the outcome on the Vapsten Sami reindeer herding community has been identified and admitted by the State party, it is even more so the responsibility of the State party, in the context of the process of awarding the concessions, to impose strict terms on studies and to supervise their implementation in order to limit as much as possible their impact on reindeer husbandry. Although the need to achieve a balance between the mining operations and the reindeer husbandry was invoked by the administrative authorities, the procedure does not allow that to be done as, according to the State party, when a prospector has discovered a potentially profitable deposit, the first step towards starting mining operations is to apply for an exploitation concession; a concession decision determines who has the right to extract the metals or minerals and this right also applies vis-à-vis the property owners and without their consent, which is the main purpose of the concession system.

6.19 The Committee notes that the concession process is in practice dissociated from the environmental permit process, since the Land and Environment Court is competent to examine the submission for the environmental permit and to determine the conditions or terms and limitations to be placed on the operations after an exploitation concession is issued. In other words, the consultation process takes place at a stage of the procedure where, as the State party admits, "it is too soon to assess to what extent there would be an infringement on the petitioners' possibilities to pursue reindeer husbandry".

6.20 It is not up to the Committee to decide which public interest should prevail on the land, namely, mineral extraction, on the one hand, or "protecting areas that are important for reindeer husbandry against measures that may substantially obstruct its operation", on the other hand. However, it was the responsibility of the State party to strike a balance in fact and not only in theory or *in abstracto*, to identify and indicate during the consultation process to the Vapsten Sami reindeer herding community where they could find alternative grazing grounds and to fulfil the obligation to operate an effective consultation process. Development and exploitation of natural resources, as a legitimate public interest, does not absolve States parties from their obligation not to discriminate against an indigenous community that depends on the land in question by mechanically applying a procedure of consultation

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<sup>23</sup> The obligation to consult has been qualified as a general principle of international law: Inter-American Court of Human Rights, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012, para. 164.

<sup>24</sup> United Nations Declaration on the Rights of Indigenous Peoples, art. 19.

<sup>25</sup> A/HRC/12/34, para. 55.

without sufficient guarantees or evidence that the free, prior and informed consent of the members of the community can be effectively sought and won.

6.21 In the present case, the State party did not demonstrate how the process of granting the three mining concessions under the Minerals Act and the Environmental Code correctly took into account previous standards and the petitioners' specific rights.

6.22 In light of the above, due to the lack of consideration of the petitioners' land rights in the granting of the mining concessions, the Committee concludes that the petitioners' rights under article 5 (d) (v) of the Convention have been violated.

(b) Article 5 (a) of the Convention

6.23 The Committee has further taken note of the petitioners' claims under article 5 (a) of the Convention to the effect that the State party breached their right to equal treatment before the tribunals and all other organs administering justice by legally allowing mining concessions on their traditional lands without considering their fundamental property right. In particular, the petitioners claim that mining legislation and policies discriminate against the Sami reindeer herders specifically, not by treating them differently from the rest of the Swedish population, but by not doing so, ignoring the particularities of the indigenous Sami cultural identity, traditional livelihoods and dependence on reindeer herding for survival. According to the petitioners, the right to non-discrimination requires that Vapsten be treated as an indigenous reindeer herding community and not simply as a Swedish property right holder. The Committee also notes the State party's argument that no act of racial discrimination on account of their ethnic origin has occurred as the petitioners are treated on an equal footing with landowners concerned by the project.

6.24 The Committee considers that, in the present case, the petitioners have not sufficiently substantiated their claim under article 5 (a) of the Convention. As a consequence, the Committee is not in a position to consider whether the State party has violated article 5 (a) of the Convention.

(c) Article 6 of the Convention

6.25 Regarding the petitioners' allegations under article 6 of the Convention, the Committee considers that the main issue is whether the State party fulfilled its obligations under that provision to ensure respect for the petitioners' right to seek effective protection and remedies for any damage suffered as a result of the granting of three mining concessions in their traditional territory. The Committee notes the petitioners' affirmation that they have not had access to any domestic institution that could evaluate the fundamental right to traditional property and include an evaluation of whether the mining activities should be disallowed due to their negative impact on Sami reindeer herding. The Land and Environment Court and the Supreme Administrative Court, while applying the mining legislation, can only examine the application of domestic law, which is itself the source of the breach of rights. The petitioners recall previous similar refusals.<sup>26</sup> In addition, the petitioners allege that, whereas Swedish landowners can be provided with full market-value compensation for their property, monetary compensation cannot adequately compensate Sami indigenous peoples when deprived of reindeer pasture land that is indispensable to the community's reindeer herding and an element of the very basis of their cultural identity and traditional livelihood. The Committee also notes the State party's argument that there is no breach of article 6 of the Convention as the possibility of a judicial review by the Supreme Administrative Court satisfies the petitioners' right to appeal against the granting of the concessions.

6.26 The Committee recalls that article 6 provides protection to alleged victims if their claims are arguable under the Convention<sup>27</sup> and notes that the State party did not submit any evidence on available domestic remedies that could provide adequate reparation or satisfaction for the damage the petitioners have suffered as a result of the ineffective consultation process in the context of the mining concessions. Moreover, the Committee

<sup>26</sup> The petitioners refer to Umeå District Court, Land and Environment Court, decision of 28 August 2003, in cases No. M 112-01 and No. M 113-01 (*Svarliden, Fäboliden and Stortjärnhobben*).

<sup>27</sup> *Durmic v. Serbia and Montenegro* (CERD/C/68/D/29/2003), para. 9.6.

notes that the judicial review by the Supreme Administrative Court does not entail a review of the sustainability of reindeer husbandry on the remaining lands.

6.27 The Committee also recalls that, where indigenous peoples have been deprived of lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, the State should take steps to return those lands and territories. Only when this is for factual reasons impossible should the right to restitution be substituted by the right to just, fair and prompt compensation, which should, as far as possible, take the form of lands and territories.<sup>28</sup>

6.28 The Committee observes that the State party admits that the decisions to grant mining concessions did not involve any consideration of the petitioners' property rights. The Committee is of the view that the impossibility of obtaining an effective judicial review of a decision where the fundamental right of indigenous peoples to traditional territory is being questioned is a consequence of the State party treating indigenous communities as private landowners affected by the mining operations, without due regard to the potential irreversibility of the consequences these operations may have on indigenous communities.

6.29 Since the decisions of the Land and Environment Court and the Supreme Administrative Court could not evaluate the taking of the land from the perspective of the petitioners' fundamental right to traditional territory, the Committee concludes that the facts as submitted reveal a violation of the petitioners' rights under article 6 of the Convention.

7. In the circumstances of the case, the Committee, acting under article 14 (7) (a) of the Convention, considers that the facts before it disclose a violation by the State party of articles 5 (d) (v) and 6 of the Convention.

8. The Committee recommends that the State party provide an effective remedy to the Vapsten Sami reindeer herding community by effectively revising the mining concessions after an adequate process of free, prior and informed consent. The Committee also recommends that the State party amend its legislation to reflect the status of the Sami as indigenous people in national legislation regarding land and resources and to enshrine the international standard of free, prior and informed consent. The State party is also requested to widely disseminate the present opinion of the Committee and to translate it into the official language of the State party, as well as into the petitioners' language.

9. The Committee requests the State party to provide, within 90 days, information on the steps taken to give effect to the Committee's opinion.

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<sup>28</sup> General recommendation 23 (1997), para. 5