



**International Convention on  
the Elimination of All Forms  
of Racial Discrimination**  
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**Committee on the Elimination of Racial Discrimination**

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

<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 the communication:</i>	16 September 2013 (initial submission)
<i>Date of the present decision:</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 an equal treatment before the tribunals and all other organs administering justice; right to an 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

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\* Adopted by the Committee at its 102<sup>nd</sup> session (16 to 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, Amir Nouredine, Marc Bossuyt, Chinsung Chung, Bakari Sidiki Diaby, Ibrahima Guisse, Rita Izák-Ndiaye, Keiko Ko, Gun Kut, Yanduan Li, Yemhelha Mint Mohamed, Mehrdad Payandeh, Verene Alberthe Shepherd, Stamatia Stavrinaki,, Faith Dikeledi Pansy Tlakula, Eduardo Ernesto Vega Luna and Yeung Kam John Yeung Sik Yuen.

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, pursuing traditional reindeer herding. They claim that Sweden has breached article 5 (a) and (d) (v) and article 6 of the Convention. They are represented by Mattias Åhrén (head of the Human Rights Unit of the Saami Council).

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 been migrating with their reindeer on the same routes used by their ancestors since time immemorial. Vapsten's traditional territory covers approximately 10,000 km<sup>2</sup>, of which 3,000 km<sup>2</sup> are spring, summer and autumn pasture area and 7,000 km<sup>2</sup> are winter pasture area. All seasonal pasture areas are of vital importance as, without adequate pasture in all seasons, reindeer herding cannot be pursued. The State party granted exploitation concessions to a private mining company in the Vapsten's traditional territory, consisting of three open-pit mines located in the Rönnbäcken isthmus, a region with pasture areas of fundamental importance to the Vapsten'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 season pasture areas, causing serious negative effects on reindeer herding. In addition to the Rönnbäcken triple project, other industrial projects have already been granted by the State party in the Vapsten's traditional territory; as a consequence, a large part of this territory has already been taken from the reindeer herding community, the community's pasture land is constantly decreasing, leading to a concrete threat to reindeer herding and placing enormous psychological pressure on its members. The petitioners claim that it is thus impossible for the community to sustain other mining concessions. By granting, without their consent, the concession of three open-pit mines within their traditional property where they pursue a traditional livelihood, the petitioners claim that the State party breached their right to property as enshrined in article 5 (d) (v) of the Convention. Indeed, both under national and international law, Vapsten has established a property right to the land area in dispute, through traditional use. Without the pasture areas that the mining activities would consume due to the concessions granted by the State party, and without the migration routes, the petitioners would no longer be able to pursue their traditional livelihood and they 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, as the State party ignored that the right to non-discrimination requires to treat Vapsten as an indigenous reindeer herding community and not as a Swedish property right holder. Indeed, the petitioners claim that the mining legislation and policies discriminate the Sami reindeer herders' group specifically, not because of treating the Sami differently than the Swedish population, but for not doing so. According to the petitioners, this discrimination is the root cause to these violations. Finally, the petitioners claim that the State party also breached their right to an 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 only can double-check the application of domestic law when what caused the breach of rights was precisely the law as such. The petitioners add that monetary compensation cannot adequately provide for the loss of a reindeer pasture land which is indispensable to the Community's reindeer herding, as element of a 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's traditional territory while the petitioners' case was under consideration.

1.4 On 1 May 2015, the Committee requested additional information from the State party, reiterating its interim measures request.

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 were 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, 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 On 16 October 2017, the State party observed that the communication reveals no violation of the petitioners' rights under the Convention. In its submission, the State party first referred to its legislation governing the granting of mining concessions and the Sami's collective reindeer husbandry right, among others; secondly, it applied these provisions to the facts of the present communication; thirdly, it concluded with observations on merits.

#### *Relevant national legislations*

2.2 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 eventual 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 eventual cumulative impact of the operations applied for and other activities must be outlined. 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 the application for exploitation concessions, they are transmitted the environmental impact statement, and are given the opportunity to object. After an exploitation concession is issued, environmental permits and construction permits are required. The Land and Environment Court is competent to examine the submission of the environmental permit 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, other persons than Sami can have land rights in Sami's reindeer husbandry areas, based on tenancy, lease or easement.

2.4 The State party also explained that under the law, individuals can be compensated for the violation of their fundamental rights, and that 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 about the facts of the communication*

2.5 The State party made some amendments and additions to the facts summarised by the Committee in its decision on admissibility. In this regard, the State party recalled the

consultations held between the mining company and the Sami village: 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 was elaborated in June 2009; d) a second draft of the report was elaborated on 10 October 2009; e) the final report on the current state of the project was issued on 11 October 2009. According to the State party, between two to six representatives of the Vapsten Sami village attended these meetings organised by the mining company and pointed to 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, suggested a number of damage-reducing measures, including adequate placement of the sand deposits, of the open pit mines, of the roads, and of fences to prevent animals from wandering into other areas. According to the State party, the mining company stated that several of the recommendations suggested would be adequate 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, to affected property owners and 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, as far as possible, were adapted to the reindeer husbandry.

2.7 On 23 June 2010, the Chief Mining Inspector granted the exploitation concessions for Rönnbäcken K no. 1 and no. 2, with the condition that the mining company engage in annual consultations with the Vapsten Sami village to clarify the measures required to mitigate disturbances of the mining operations on reindeer husbandry. The Vapsten Sami village appealed the decision to the Government which rejected the appeal considering that reindeer husbandry could 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 – the 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 matter concerning Rönnbäcken K no. 1 and no. 2 was taken and the assessment requested by the Supreme Administrative Court was 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 and to affected property owners and 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 must work to minimise the adverse impact of the mining operations on reindeer husbandry. The Vapsten Sami village appealed the decision to the Government, requesting that the three matters be processed jointly.

2.9 On 22 August 2013, the appeals concerning all three concessions were rejected, noting that the area designated as being of national interest for reindeer husbandry was considerably larger than the areas included in 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 pursue 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 on merits*

2.10 The State party emphasises that the granting of exploitation concessions does not constitute a violation of article 5 (d) (v) of the Convention. Indeed, the Sami's right to pursue reindeer husbandry under Swedish legislation is not a right of ownership of land, it does not

entail formal title to or ownership to the land in question, but it is a usufruct right 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 weighing up of interests 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 claimed that, should the Committee find that there has been a limitation on the petitioners' rights, the 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 of national interest for reindeer husbandry is considerably larger than the areas in question, so if reindeer husbandry were not possible in the areas in question, this would not mean that the Sami village's possibilities to pursue reindeer husbandry elsewhere would be impeded. Moreover, the mining activities primarily concerned the extraction of nickel which the State party imported, and "a complicating factor" is that "findings of minerals are located in a certain area and cannot be reallocated elsewhere, whereas reindeer can have a possibility of alternative grazing grounds". Finally, the petitioners applied for compensation due to alleged incorrect or negligent exercise of public authority in granting the concessions, but the application was rejected. When the petitioners applied for compensation due to infringements of their property rights and their right to a fair hearing and for incorrect or negligent exercise of public authority, the application was also rejected considering 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 with 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 People, has been disputed. This Declaration is not legally binding and this concept does not entail a collective right to a veto. The State party recalls the conclusions of the Special Rapporteur on the rights of indigenous peoples to the effect that consultations should be in good faith with the objective of achieving agreement and that building consensus and mutual understanding and consensual decision-making should be an objective of the consultations,<sup>1</sup> but that consent may not be required when indigenous peoples' rights involved must be subject to a necessary and proportional limitation in relation to a valid State objective.<sup>2</sup>

2.13 The State party further indicates that, even if before the application for exploitation concessions the company carried out drilling using a forest tractor with an attached drill and has analysed drill core samples from the concession site to determine whether the identified mineralisation 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 to what extent there will be an infringement on the petitioners' possibilities to pursue reindeer husbandry.

2.14 In relation to articles 5 (a) and 6 of the Convention, the State party alleged that when determining whether any of the substantive obligations to prevent, protect against and remedy 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 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 on equal terms with land owners concerned by the project. In particular, the State party alleged that they have been consulted to the extent required under national law in matters regarding mining concessions, as any other party affected, and that

<sup>1</sup> Report of 15 July 2009 (A/HRC/12/34), par. 48.

<sup>2</sup> Report of 1 July 2013, Extractive industries and indigenous peoples (A/HCR/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 mentioned *L.R. et al v. Slovak Republic* (31/2003), para. 10.2, and *Lubicon Lake Band v. Canada* (CCPR/167/1984), para 32.2.

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

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) on the rights of indigenous people 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 usufruct rights,<sup>5</sup> even though Swedish mining legislation reflects an ignorance of the property rights of Sami reindeer herding communities as regards their respective traditional territories. The petitioners claim that their rights have been established through traditional use as they have been migrating with their reindeer on the same routes used by their ancestors since time immemorial, in their traditional territory that covers approximately 10,000 km<sup>2</sup> of spring, summer, autumn and winter pasture area. 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 as a prerequisite for the recognition of indigenous peoples property rights, because in an indigenous context, the right to property does not necessarily have to materialize itself in the form of 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 the form of property in the context of indigenous peoples whose own traditions and customary laws may include a totally different system of property rights compared to 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 west-easterly land, 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. But precisely one such vital piece of their yearly reindeer herding cycle puzzle is the area in the centre, Rönnbäcken Istmuus, 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 their property right since, according to the State party own words, it is not possible to pursue 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

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

decision of 1 May 2017 on admissibility, is a limitation to their property rights in contradiction with the convention.

3.5 Regarding the State party's international obligation to consult the Sami community affected by a project on their 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. Vapsten has just been allowed to provide input in the process, to polish the project somewhat from a reindeer herding perspective, but, according to the petitioners, the 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 referred to a report of 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 that a valid public purpose was not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities were primarily for private gain.<sup>7</sup> According to the petitioners, the State party is rather selective when referring to this Special rapporteur report on Extractive industries and indigenous peoples, leaving out that "extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent"<sup>8</sup>, as well as 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. Nevertheless, the petitioners claim that the proportionality test – essential to all expropriation assessments – was even not undertaken. The granting of concessions did not even attempt to establish whether the narrow scope for exception from the right to consent was present. Indeed, acting without their consent, the State party must demonstrate that the granting of the concessions was motivated by a legitimate aim and was proportionate. Nevertheless, the legislative framework does not require to determine whether the granting of the permit complies with the reindeer herding community's property right; rather, the State party only discussed reindeer herding's relevance to the culture in Sweden in general. The State party considered that although the community cannot pursue reindeer herding in Rönnbäcken Istmuus, it can do so elsewhere, without taking into account the cumulative effects, the fact that Vapsten is already hosting other mines, and that in previous exploitation cases, Rönnbäcken Istmuus was precisely that area "elsewhere". 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 destruct a pasture land absolutely vital to the reindeer herding community in the spring and autumn seasons, and, due to 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 made an illustration of the situation with a house analogy: a few steps in the stairs between the first and second floor makes up only a few square meters of a house; nevertheless, if taken away, the possibility to use the entire second floor is lost. The petitioners also claimed that the fact that no attempt has been made to reach an agreement on

<sup>6</sup> The petitioners referred to CESCR 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 referred to CCPR *Poma Poma vs. Peru*.

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

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

compensation is an aggravating factor in a proportionality test, even though they affirmed the lack of relevance of compensation as the loss of this area cannot be compensated 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 in that respect. Indeed, the petitioners claim that the mining legislation and policies discriminate the group Sami reindeer herders specifically, not because of treating them different than the Swedish population, but for not doing so and for 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 materialize 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, mining have *per se* discriminatory effect and amount to discrimination of 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 property right holders to land, for not taking into account their specificity. In this regard, the petitioners recall that the right to non-discrimination does not only demand equal treatment of analogous situations, but also differential treatment of those that are culturally different compared with the majority population; they refer to the jurisprudence of the European Court of Human Rights which has considered that laws that in themselves do not 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 in its report *Sami people in the Sápmi region* 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 an 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 a fundamental property right perspective. 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 double-check the application of domestic law, when, what caused the breach of rights was precisely the law as such. The petitioners clarify that the environmental permit process cannot examine the fundamental right to traditional property, it cannot include 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 Vapsten on 16 September 2015 in which the Land and Environment Court confirmed that there were no previous examples of the Court not allowing a mining project to proceed. Therefore, 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 Vapsten's explicit request for it to do so, considering that the objections raised by Vapsten had already been dealt with at the concession stage and were hence not of such a character that they could be tried at the environmental permit stage.<sup>11</sup> Finally, the petitioners substantiate the violation of article 6 on the ground 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 of 13 November 2007.

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

<sup>11</sup> The petitioners refer to Umeå District Court, Land and Environment Court, decision of 28 August 2003, in cases Nos. M 112-01 and M 113-01 (*Svartliden, Fäboliden and Stortjärnhobben*).

indigenous peoples when deprived of a 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 further submission**

4.1 On 1 February 2019, the State party reiterated its allegations according to which the petitioners' description of their right as a property right is misleading, insisting 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 is based on a public approach, i.e. that only public interests are considered in the weighing process, and does not take into consideration 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 complainants represents a private interest, as it is a civil right to use real property.

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 as the result of geological processes and mineral deposits cannot therefore, unlike other industrial activities, be relocated. According to the State party, supplying society with necessary metals and minerals 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' further submission**

5.1 On 31 October 2019, the petitioners noticed that they were unsure whether the State party still questions that their right to property, according 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 Vapsten's traditional lands did not involve considerations of their property rights to land; rather, the examinations only included the weighing 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 were lawful – that the encroachment simultaneously not inflict damage on the indigenous people that exceeds the threshold 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 Environmental Court has no mandate to disallow the project due to excessive negative impact on reindeer herding, as it can only establish conditions for the mining, and that another court determines the monetary compensation. The calculation might be lawful with regard to the Swedish property right holders but not with regard to an indigenous Sami reindeer herding community, to which damage to land is damage to its culture, society, way of life and identity.

5.4 Thus, the legislation amounts to structural discrimination of Sami reindeer herding communities. The petitioners refer to general recommendation no. 32 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”<sup>12</sup>. 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 compared with 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 its rules of procedure.

### **Article 5 (d) (v) of the Convention**

#### **The parties’ arguments**

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 conceded, without their consent, 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 usufruct right. 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 materialize itself in the form of 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, as well as 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 the form of 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 pursues traditional Sami reindeer herding, has been migrating on the same routes used by their ancestors. 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>12</sup> General recommendation no. 32. The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination (CERD/C/GC/32), 2009, para. 8.

<sup>13</sup> European Court of Human Rights, *Thlimmenos v. Greece*, (application no. 34369/97), Judgement of 4 April, 2000, para. 44.

## 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 (4.1) but if the facts related to the mining concessions before the Committee raise an issue of violation of the Convention.

## Relevant principles

6.5 The Committee recalls that, in its General recommendation no. 23 on the rights of indigenous peoples, it calls upon State 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”<sup>14</sup>. As recalled in the admissibility decision<sup>15</sup>, 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 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 As a *raison d’être* of these principles, the Committee observes that the close ties of indigenous peoples with 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>16</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>17</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 on their ancestral territories, natural resources and as a result their identity.<sup>18</sup>

### *Application of these principles in this 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

<sup>14</sup> General recommendation no. 23 on the rights of indigenous peoples, 1997, para. 5.

<sup>15</sup> CERD/C/92/D/54/2013, para. 12.3.

<sup>16</sup> Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79, para. 149.

<sup>17</sup> Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*. Judgment of November 28, 2007 Series C No. 172, para. 121. See also *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C No. 146.

<sup>18</sup> The Inter-American Court 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 Sergio García-Ramírez concurring opinion in this case, para. 13. The same principles were recognized in the African Human Rights System. See 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya (2009) and African Commission on Human and Peoples’ Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017).

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>19</sup> The Committee also observes that the Nordic Sámi Convention, negotiated by the Nordic governments together with the Sámi Parliaments of Finland, Norway and Sweden, which builds on existing international law and aims at implementing these in a Nordic context, recognizes that access to land and water is the foundation for the Sami culture, language and social life, and thus protects both individual and collective property's rights of the Sámi to their lands and resources.

6.9 The Committee recalls that, while analysing in its concluding observations 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 hunting and fishing rights which are threatened by, *inter alia*, the privatization of traditional Sami lands and 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 Sweden's indigenous people and enshrining the right to free, prior and informed consent into law, in accordance with international standards<sup>20</sup>.

6.10 The Committee considers that it has to examine the petitioners' claims regarding the alleged failure of the State party to consult the Vapsten Sami Reindeer Herding Community and obtain the community's free, prior and informed consent in the granting of mining concessions on the community's traditional territory, noting that the concession is valid for 25 years and entails rights to extraction and utilisation of nickel, iron, chromium, cobalt, gold, silver, platinum and palladium, and to fulfil its obligations under Article 5 (d) (v). Indeed, even though the right to property is not absolute, the Committee considers that 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 *et seq.*), "so as not to endanger the very survival of the community and its members"<sup>21</sup>.

6.11 The Committee notes the petitioners' allegation that, in addition to already existing industrial projects granted by the State party in the Vapsten's traditional territory, the three additional mining exploitation concessions, which motivated the current communication, would result in the impossibility for the petitioners to pursue their traditional livelihood and that they would therefore need to be forcibly relocated from their traditional territory. The affected Sami community was only able to provide input to the triple project, which, in the petitioners' opinion, cannot be characterized as anything close to consultations as consultations must involve a serious engagement with the community with a genuine and sincere ambition to reach consensus. Indeed, the petitioners alleged that the State party has to obtain their free, prior and informed consent for 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 the area designated as being of national interest for mineral extraction priority over the area of national interest for reindeer husbandry, was erroneous. 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 valid State's objective. Indeed, extraction of nickel is important and located in a certain area that cannot be reallocated elsewhere, whereas reindeer can have a possibility of alternative grazing grounds. Moreover, the Vapsten Sami village has been consulted but the legislation allows 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 the fact that the petitioners, which are on equal terms with land owners concerned

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<sup>19</sup> Supreme Court's rulings in the Taxed Lapp Mountain and Nordmaling cases (Case No. T 4028-07, decided on April, 27, 2011).

<sup>20</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; CERD/C/SWE/CO/22-23, para. 17. See also the requests for free, prior and informed consent in concluding observations related with other States party CERD/C/SUR/CO/13-15, para. 26; CERD/C/NAM/CO/13-15, para. 24; CERD/C/PRY/CO/4-6, para. 18, as well as in the framework of the Early Warning and Urgent Action Procedure, Decision 1 (100) Canada.

<sup>21</sup> CCPR/Poma Poma vs. Peru, CCPR/C/95/D/1457/2006, para. 7.6.

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 the State party does not comply with its international obligations to protect the Vapsten Sami Reindeer Herding Community against racial discrimination by adequately/effectively consulting them in the granting of the concessions.

6.13 . The prohibition of racial discrimination underpinned in the Convention requires from the States parties to guarantee to everyone under their jurisdiction the enjoyment of equal rights de jure and the facto. According to Article 2 (1) (c), each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists. States must take positive measures to enable 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, the Committee has called the States Parties to recognise 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, as it has been and still is jeopardized (GR 23). The Committee recalls that indigenous peoples' land rights are different to the common understanding from the civil law property right, and considers that reindeer herding is not an "outdoor recreational exercise" as qualified in the Chief Mining Inspector's decision,<sup>22</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 for their effective consultation and participation in decision-making. The Committee recalls that in its General Recommendation No. 32 it clarified that the notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised 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 recognised within the framework of universal human rights (para. 26). Rights to lands traditionally occupied by indigenous peoples are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its agencies (GR No. 32, para. 15).<sup>23</sup>

6.16 The Committee has frequently reaffirmed the understanding that the 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>24</sup>.

6.17 The Committee notes that it is incumbent upon the States Parties to provide evidence that they fulfil this obligation, either directly by organizing and operating the consultations in good faith and with a view to reach consensus, or indirectly by providing sufficient guarantees on effective participation of indigenous communities and by ensuring that due weight is indeed given by any third party to the substantive arguments raised by the indigenous communities. The Committee considers that the duty to consult in such a

<sup>22</sup> Words used in the Chief Mining Inspector's decision granting the exploitation concession for Rönnbäcken K no. 3 [State party's observations on merits, 16 October 2017, Appendix 2].

<sup>23</sup> The Committee recalls that according to its General recommendation no. 32 "The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures". CERD/C/GC/32, para. 15

<sup>24</sup> A/HRC/39/62, Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples, paras. 9-10

context,<sup>25</sup> is the responsibility of the State and cannot be delegated without supervision to a private company, especially to the very company with commercial interest in the resources within the territory of the indigenous peoples.<sup>26</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>27</sup>. In the present communication, by delegating without effective guarantees the consultation process to the mining company (*supra* para. 2.5, 2.7 and 2.8) 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 awarding a concession for any development or investment project affecting traditional territories. Based on these studies, consultations must intervene from the early stages and before the design of the project – not when it is necessary to obtain approval –, should not start with predefined ideas according to which the project must necessarily be carried out, and must imply a 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 (paras. 2.6-2.8), it is even more so the responsibility of the State party, in the context of the concession process, to impose strict terms on studies and to supervise their implementation in order to limit as much as possible the impact on the reindeer husbandry. Although the balance between the mining operations and the respect of reindeer husbandry was invoked as necessary by administrative authorities, the procedure does not allow in substance for such endeavour 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 owner 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 of the environmental permit and to determine the conditions/terms and limitations to be placed on the operations after an exploitation concession is issued (para. 2.2). 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” (para. 2.13).

6.20 It is not up to the Committee to decide which public interest should prevail regarding the same land, namely, the mineral extraction on the one hand, or “protecting areas that are important for reindeer husbandry against measures that may substantially obstruct its operation” (para. 4.4) 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 can 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 the States parties from their obligation not to discriminate against an indigenous community which depends on the same land by applying mechanically

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<sup>25</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 of June 27, 2012. Series C No. 245, para. 164.

<sup>26</sup> United Nations Declaration on the rights of indigenous peoples, article 19.

<sup>27</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, A/HRC/12/34 of 14 July 2009, para. 55.

a procedure of consultation without sufficient guarantees or evidence that the free, prior and informed consent of the members of the community can be effectively pursued and achieved.

6.21 In the present case, the State party did not demonstrate how the process of granting of the three mining concessions under the Minerals Act and the Environmental Code (*supra* para. 2.2 and 2.5 to 2.9) correctly took into account the previous standards and petitioners' specific rights.

6.22 In light of the above considerations, 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.

#### **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 when 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 the Sami reindeer herders specifically, not because of treating them differently from the rest of the Swedish population, but for 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 as a mere 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 on equal terms with land owners concerned by the project.

6.24 The Committee considers that, in the present case, the petitioners did not sufficiently substantiate their claim under article 5 (a) of the Convention. As a consequence, the Committee is in no position to consider whether the State party has violated article 5 (a) of the Convention.

#### **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 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 the very source of the breach of rights. The petitioners recalled previous similar refusals.<sup>28</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 a reindeer pasture land which is indispensable to the Community's reindeer herding, as 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>29</sup> and notes that the State Party did not submit any evidence on available domestic remedies that could provide an 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>28</sup> See *supra* footnote 12.

<sup>29</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 (GR 23, para. 5).

6.28 The Committee observes that the State party admits that the decisions to grant mining concessions did not involve any considerations of the petitioners' property rights (*supra* para. 4.4). The Committee is of the view that the impossibility for obtaining an effective judicial review of a decision where the fundamental right of indigenous peoples to traditional territory is being questioned is precisely a consequence of treating indigenous communities as private land owners 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 Land and Environment Court's and Supreme Administrative Court's decisions could not evaluate the taking of the land from the petitioners' fundamental right to traditional territory' perspective, 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 on the Elimination of Racial Discrimination, acting under article 14 (7) (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, 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 provides an effective remedy to the Vapsten Sami Reindeer Herding Community by revising effectively the mining concessions after an adequate process of free, prior and informed consent. The Committee also recommends that the State party amends its legislation, in order 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 give wide publicity to the Committee's views and to translate it into the official language of the State party as well as into the petitioners' language.

9. The Committee wishes to receive, within 90 days, information from the State party about the measures taken to give effect to the Committee's opinion.

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