Distr.: General
10 July 2023

Advance unedited version

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3585/2019*,**,***

Communication submitted by:	Ailsa Roy, in representation of the members of the Wunna Nyiyaparli indigenous people (represented by counsel, Scott Calnan)
Alleged victims:	The members of the Wunna Nyiyaparli indigenous people
State party:	Australia
Date of communication:	2 April 2019 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 9 April 2019 (not issued in document form)
Date of adoption of Views:	15 March 2023
Subject matter:	Effective participation of indigenous peoples in the mechanism for the determination of their rights to traditional territory
Procedural issues:	Substantiation of claims
Substantive issues:	Determination of indigenous peoples' right to traditional territory; discrimination; fair trial
Articles of the Covenant:	1, 2.3, 14.1, 26, 27
Articles of the Optional Protocol:	3

1.1 The authors of the communication are the members of the Wunna Nyiyaparli, an indigenous people from Australia constituted by approximately 200 peoples. They are represented by Ms. Ailsa Roy, an elder member with custodial responsibilities in relation to

* Adopted by the Committee at its 137th session (6-24 March 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Carlos Gómez Martínez, Bacre Waly Ndiaye, Marcia V.J. Kran, Hernan Quezada Cabrera, José Manuel Santos Pais, Chongrok Soh, Tijana Surlan, Kobaujah Tchamdja Kpatcha, Koji Teraya, Hélène Tigroudja and Imeru Tamerat Yigezu.

*** The text of individual opinion by Committee member Carlos Gómez Martínez, (dissenting), is annexed to the present Views.

their traditional lands, territories and resources[1]. They claim a violation of their rights under articles 2.3, 14.1, 26 and 27 of the Covenant, all read in light of article 1. The Optional Protocol entered into force for Australia on 25 December 1991. The authors are represented by counsel.

1.2 On 9 April 2019, pursuant to rule 92 of its rules of procedure, the Committee, through its Special Rapporteurs on new communications, registered the communication but decided not to issue a request for interim measures under rule 94 of its rules of procedure[2].

1.3 On 10 June 2020, the Committee, through its Special Rapporteurs on new communications, denied a request for third party intervention submitted by Minority Rights Group International.

Factual background[3]

The Wunna Nyiyaparli indigenous people and their traditional lands

2.1 The Wunna Nyiyaparli indigenous people is a local landholding group of the larger Nyiyaparli people, pertaining itself to the Western Desert Aboriginal People. Prior European contact and assertion of sovereignty by the Crown on 11 June 1829, the authors' ancestors occupied their traditional territory according to rights derived from filiation to a parent having held those rights or by way of incorporation. Pre-contact traditional laws and customs, specifics to their traditional territory and governing the holding of rights in relation to lands, the use and exploitation of resources and the protection of sites of significance, continue to be actively acknowledged and observed by the authors.

2.2 The authors' traditional territory, situated in the Pilbara region, is known as the Roy Hill Pastoral Lease[4]. The Wunna Nyiyaparli are the ones who hold the rights, under Western Desert traditional laws and customs, to "speak for" this specific territory, which hold the sacred burial sites of the authors' ancestors and other sacred sites registered with the Western Australian Department of Indigenous Affairs (such as the Fortescue river marshes). This territory is the key to the authors' language, culture and religion. Their ability to live, hunt and fish on it, according to traditional practices being transmitted from generation to generation, and their ability to control access to and care for their lands, is essential for the preservation of their indigenous people group as such.

Mining exploitations on the authors' traditional territory

2.3 Wunna Nyiyaparli traditional territory is rich in minerals, such as iron ore. Several iron ore mines[5] have already been developed on it without even any information sharing with the authors. As a consequence of such mines, access to many parts of their lands is now restricted; the authors are not able anymore to freely travel throughout them. Moreover, the authors followed some public information, to a limited extent as they were never consulted, in relation to the expansion of the Christmas Creek Iron Ore Mine and a license awaiting

[1] Through a power of attorney, the members of the community have designated her as their representative before the Committee.

[2] The authors claimed that they would be subjected to irreparable harm if the State party allows further expansion of mining explorations on their traditional lands.

[3] These facts have been reconstructed on the basis of the individual communication, the annexes and the information subsequently provided by the parties.

[4] The boundaries of their traditional territory are described as "all those lands and waters commencing at the northernmost corner of the wester severance of pastoral lease PL 1957440 (Roy Hill) and extending generally easterly along boundaries of that severance to a western boundary of reserve 18938; then, easterly to the northernmost northwestern corner of the northeastern severance of pastoral lease PL 1957440 (Roy Hill); then generally easterly and southerly along boundaries of that severance to a northern boundary of reserve 15159; then southerly to the northernmost northwestern corner of the southeastern severance of pastoral lease PL 1957440 (Roy Hill); then southerly and generally westerly along boundaries of that severance to an eastern boundary of reserve 9700; then westerly to the easternmost southeastern corner of the western severance of pastoral lease PL 1957440 (Roy Hill); then westerly, generally southerly, generally northwesterly and generally northerly along boundaries of that severance back to the commencement point".

[5] Including the Roy Hill Iron Ore Mine, the Christmas Creek Iron Ore Mine and the Cloud Break Iron Ore Mine.

approval for the construction of a road, a power line and a pipeline. According to the authors, should any of the mines expand, or should further mineral concessions be granted, it would cause further damage posing a danger to Wunna Nyiyaparli culture, which is intimately and inextricably linked to their territory.

The native title claim filed to secure their territory

2.4 On 7 May 2011, the community held a meeting deciding to file an application to have a native title to their traditional territory recognised under the *Native Title Act*. The authors clarify that the State party has awarded native title to *entire* indigenous peoples, containing *smaller* cultural groups. When this occurs, the larger group does not "speak for" the "country" of the smaller landholding groups, but rather facilitates the obtaining of the native title that secures the ability of such smaller groups to speak for their own "country". But native titles have also been awarded to smaller groups than the whole language group themselves: is this latter course of action that the Wunna Nyiyaparli pursued.

2.5 The authors' application, filed on 27 January 2012 before the Federal Court of Australia, clarifies that, "to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants". The rights and interests claimed by the authors are the rights to access and live in the area, to make decisions about the use and enjoyment of the area and its resources, to control the access of others to the area, to maintain and protect places of importance under traditional laws, customs and practices, and the right to manage, conserve and look after the land, waters and resources. Under the laws and customs of the Western Desert Aboriginal People, this right to "speak for" the application area is roughly equivalent to a right of exclusive possession under English land law: other Nyiyaparli people have standing permission to access and live in the Roy Hill Pastoral Lease and to use and enjoy its resources, however, this standing permission confers on them *privileges* more than *rights*, as the Wunna Nyiyaparli maintain the right to withdraw that permission.

2.6 On 30 March 2012, the National Native Title Tribunal (NNTT) placed the authors' claim on the Register of Native Title Claims. In the examination of the case, the NNTT had regard, in addition to the information contained in the claim, to geospatial assessments and to its own searches. A submission from Yamatji Marlpa Aboriginal Corporation (YMAC)[6], opposing the registration –stating that the wider Nyiyaparli people did not consent to the filing of the authors' application–, was not given weight by the NNTT who considered that the situation of the authors was different to the situation in another case mentioned by YMAC –in which the application was brought by *few members only* of the peoples holding rights in the claim area–. In the current case, the traditional laws and customs of the Western Desert recognises the Wunna Nyiyaparli as the landholding group of the Nyiyaparli people which, alone, possesses the rights and interests on the Roy Hill Pastoral Lease. According to the NNTT, the application includes therefore *all the persons* who form part of the native group, the Wunna Nyiyaparli, entitled to file, alone, the application[7].

2.7 According to the authors, this "Registration Test Decision" meant that they had a *prima facie* valid native title claim with a chance of success if it was fully argued before the Federal Court. Indeed, Section 190B of the Native Title Act sets out conditions that test particular *merits* of the claim, in addition to Section 190C that sets out *procedural* conditions. In particular, on the merits, the NNTT found that sufficient factual material strongly supports that: i) in accordance with Western Desert traditional laws and customs, the authors' ancestors were Nyiyaparli; ii) the authors have –and their predecessors had– an association with the claimed lands, on which they continue to live a largely traditional life through their mythology and rituals; iii) traditional Wunna Nyiyaparli laws are acknowledged and customs are observed, recalling that, according to the High Court, a law or custom is *traditional* when it has been passed from generation to generation, usually by word of mouth and common practice, when the origins of the content of the law or custom concerned can be found in the normative rules of a society which existed before the assertion of sovereignty by the Crown,

[6] See para. 3.8.

[7] Pages 22 and 23 of the Registration Test Decision.

when the normative system has had a continuous existence and vitality since sovereignty, and when the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty without substantial interruption; and iv) the authors had continued to deal with the lands claimed in accordance with these traditional laws and customs.

2.8 This registration, according to the Native Title Act, gave to the authors rights regarding the use of the claimed lands by third parties. As a consequence, this registration was challenged by another Nyiyaparli clan who was negotiating with mining companies two Indigenous Land Use Agreements in a large area covering also the authors' traditional territory. Taking into account that after the NNTT's decision it was no longer possible for this other Nyiyaparli clan to go ahead with the Indigenous Land Use Agreements, they filed, on 13 July 2012, an application for judicial review of the NNTT's decision. The communication also clarifies that this other Nyiyaparli clan had filed in 1998 a native title application before the Federal Court, claiming lands comprising a larger area that wholly encompassed the lands claimed by the authors, with no resolution to date.

The judicial rejection of the authors' rights on their traditional territory

2.9 On 2 April 2015 –four years after the filing of the authors' application under the Native Title Act and three years after the Registration Test Decision–, the Federal Court started to make orders concerning the preparation for the hearings of the authors' native title claim.

2.10 In a hearing on 28 October 2015, the Federal Court ordered that the authors' proceedings were to be examined jointly with the native title application filed in 1998 by the other Nyiyaparli clan. The Court also ordered that a "Separate Question", aimed to determine if the authors were descendants of the Nyiyaparli,[8] was to be decided separately.

2.11 The counsel representing the authors before the Federal Court at that time immediately informed the Court that the authors did not consent to the proposed order for a hearing on the Separate Question because their community had never been consulted about it and did not understand how such Separate Question had arisen, and recalled that the evidence to answer positively to such question had already been brought in their application.[9]

2.12 Without response from the Court, on 4 December 2015, the authors submitted additional supporting documents to their claim and to their Nyiyaparli origin, including an anthropological report and Wunna Nyiyaparli elders' statements.

2.13 On 18 March 2016, the authors' lawyers filed a Notice of Ceasing to Act for the Wunna Nyiyaparli. The authors clarify that, prior to that date, because the relations with their lawyers had not been functional, they had been unable to fully understand the implications of the proceedings. Having no funds to hire other lawyers, the authors, who were not anymore represented, took no further steps after that date. In particular, they did not attend a hearing on 24 March 2016 given that they were unaware that it was necessary for them to attend; they did not attend a hearing on 13 April 2016 because, on the basis of comments made by the judge they read from the transcript of the hearing of 24 March 2016, they had thought that the Separate Question had actually already been decided in their favour.

2.14 On 20 April 2016, the Registrar of the Federal Court addressed a letter to the authors, informing them of a direction hearing scheduled for 3 May 2016. The authors responded that they were confused about this letter and that they would not be able to attend without legal representation.

2.15 On 3 May 2016, the Registrar of the Federal Court made orders for the authors to file a notice indicating whether they wanted to participate in the hearing of the Separate Question. The authors only saw this email on 6 May 2016, responding immediately stating that it was

[8] Formulated by the Court as following: "was the paternal grandmother of William Bill Coffin (born circa 1903) being a woman described by the Wunna Nyiyaparli applicants as Maggie, a Nyiyaparli person, that is, a person descended from Nyiyaparli ancestors or possessing rights and interests in the land and waters comprised in the area of the Wunna Nyiyaparli claim and with a connection to those land and waters, both in accordance with traditional laws acknowledged and traditional customs observed by the Nyiyaparli people?".

[9] Transcript of the Court's hearing.

their understanding, from a transcript they had read, that the Separate Question had already been decided in their favour. They also indicated to the Registrar, in a second email sent to him on the same day, that they did not understand how the Separate Question proceedings had arisen and they asked him how the other Nyiyaparli clan became a party to their own claim. On 9 May 2016, the Registrar responded that it could not provide legal advice and that it was inappropriate for them to correspond directly with the Registrar.

2.16 On 18 May 2016, the Federal Court decided that the Separate Question was to be heard without the participation of the authors because they did not file any notice regarding their participation.

2.17 On 11 July 2016, the hearing for the trial on the Separate Question was held. Three members of the Wunna Nyiyaparli attended, thinking that the hearing was related to their native title application. When the Judge said that "today's hearing proceed on the basis that the only evidence that would be adduced would be that from the Nyiyaparli"[10], the authors submitted that they had understood that the Separate Question had already been answered in their favour. When the judge replied that they must have known about the Separate Question scheduled for this day, the authors indicated that they had been unable to effectively participate in the proceedings because they had no stable Internet connection and no legal representation. In response to the judge's comment that they could have sought another lawyer since 18 March 2016, they replied that they lacked the funds to do so. Moreover, as the matter is related to their fundamental rights on their traditional lands, they requested to be able to effectively participate in the proceedings, through consultation in all decisions affecting them and through an adjournment of the hearing on the Separate Question, for the Court to examine the evidence they had already filed previously –and brought again this day– to support their claim that they are indeed Wunna Nyiyaparli, members of the larger Nyiyaparli people.

2.18 Nevertheless, according to the judge, the other party has not had "the opportunity to prepare for a hearing on the basis that the Wunna Nyiyaparli would be adducing any evidence at all" and the lawyer "for the Nyiyaparli has submitted that they will suffer prejudice if the Wunna Nyiyaparli are now permitted to depart from the position which they have allowed the parties and the Court to proceed on"[11]. According to the Judge, "an adjournment of a hearing of the present kind is a very serious matter […] hearings of this kind are expensive to organise. There is a public interest in the Court making use of the time that's been set aside for today's hearing and making proper use of the public moneys that have been expended in arranging today's hearing"[12]. Consequently, the judge ruled that the hearing on the Separate Question would not be adjourned and that the authors would not be allowed to have any of their evidence considered. As a consequence, the Judge only listened to the other party, interested in demonstrating that the Wunna Nyiyaparli are not descendants of Nyiyaparli in order to have the authors' claim rejected, to be able to freely negotiate with mining companies.

2.19 On 16 December 2016, not considering the evidence filed by the authors in their Native Title Claim, the Federal Court answered the Separate Question in the negative, considering that "the Wunna Nyiyaparli Applicants did not adduce any evidence to support the contention that they are part of the wider Western Desert Society. It is true that their filed claim includes extracts from some anthropological literature which may support the contention, but that did not become evidence in the Separate Question"[13]. The judgment also dismissed the authors' native title application.

2.20 Despite their limited funds, the authors managed to hire a new lawyer to draft a Notice of Appeal against the Separate Question judgment, defending that the Court committed an error by refusing to receive their evidence.

2.21 On 5 September 2017, in its judgement of appeal, the Federal Court admitted that it was possible that the authors "were confused as to some of the procedural orders" as a result

[10] Transcript of the hearing, p. 19.
[11] *Ibid*, p. 19 and 20.
[12] *Ibid*, p. 20.
[13] Judgment, para. 65.

of a lack of legal representation[14], but nevertheless dismissed their appeal considering that the first instance decision was "undoubtedly correct". The Court further ordered the authors to pay USD 14.561 in concept of cost.

2.22 On 26 September 2018, the Federal Court made a consent determination of native title in favour of the other Nyiyaparli applicant, over the authors' traditional territory. As a result, another indigenous people –with no traditional rights to control access to the Wunna Nyiyaparli traditional territory but with interest in mining exploitations on these lands– has now legal control of the authors' lands, to the exclusion of the authors. A concrete consequence of such court's decision is the impossibility for the Wunna Nyiyaparli to keep "looking after" the culturally important areas on their traditional lands, and, more generally, the extinction of the authors' rights to their traditional territory. The impact of such a Court's ruling will be huge, taking into account that the authors' ability to live, visit, hunt and fish on their traditional lands is essential to their preservation as a people.

Complaint

3.1 The authors clarify that the central purpose of their communication is to find that the State party failed to provide them with an adequate procedure for the determination of their rights to traditional territory, with implication on multiples violations, but that it is not to request the Committee to rule on which party has a better claim to native title or to pronounce itself on the absence of consultation in relation to the mining projects.

3.2 The authors submit that no remedies are available for them to appeal against the consent determination of native title made over their traditional territory to another indigenous group (*supra* para. 2.22). They are indeed not entitled to alter this native title consent determination because, according to the Native Title Act, once a determination of native title is made by the Federal Court, an application for its variation or revocation can only be made by the registered native title body, the Commonwealth Minister, the State/Territory Minister, or the Native Title Registrar. They further allege that the State party has no constitutional bill of rights or Human Rights Act by which they could have asserted their specific human rights as an indigenous people.

Article 27

3.3 The authors claim that the State party violated in first place their rights under article 27 of the Covenant due to the lack of effective participation in the judicial proceedings of determination of their lands rights, with a direct consequence in the loss of their traditional territory (attributed to another indigenous group interesting in mining concessions), which would lead to the dissolution of their own culture –based on their laws and customs hold in relation to their traditional lands– and to the destruction of the Wunna Nyiyaparli as such.

3.4 The authors argue that, in line with article 32.3 of the Vienna Convention on the Law of Treaties, an evolutionary interpretation of article 27 of the Covenant should arise from contemporary international human rights normative regarding indigenous peoples' rights, to consider that indigenous peoples' right of participation in decisions affecting them also applies to proceedings concerning the recognition of rights to traditional territory, being in Australia a *judicial* proceeding. The authors recall that they could not properly understand the issue of the Separate Question, having not been properly consulted about it and not having been able to provide their free, prior and informed consent to its specific wording.

3.5 The authors substantiate their allegation on the General Comment 23[15], on previous jurisprudence of the Committee[16] and on regional human rights jurisprudence which serves to interpret international human rights. They refer in particular to the decision of the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States*, in which the Inter-American Commission founded multiple violations in relation to the victims' –members of the Western Shoshone indigenous people of the State of Nevada– allegations according to which the State interfered with their use and occupation of their

[14] Judgement of appeal, para. 63.

[15] Paragraph 3.2 and 7.

[16] Poma Poma v. Peru (CCPR/C/95/D/1457/2006) and Lubicon Lake Band v. Canada (CCPR/C/38/D/167/1984).

ancestral lands by purporting to have appropriated those lands as federal property through an unfair procedure before the Indian Claims Commission. The Inter-American Commission observed in particular that the Indian Claims Commission' process was not sufficient in order for the State to fulfil "its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people"[17]. According to the authors, the previous decision confirms that the correct view of the scope of article 27 is that the requirement in General Comment 23 that indigenous peoples may effectively participate in decisions affecting them, applies to proceedings before courts in which it is decided whether indigenous claimants have interests in lands which they have traditionally occupied and to which they have cultural and religious connection.

3.6 The authors further contend that the scope of article 27 of the Covenant should also be interpreted in line with article 27 of the UNDRIP,[18] in order to require that any process adjudicating indigenous lands rights must be established and implemented in conjunction with the indigenous people concerned, and must be fair and open. An indication of what such fairness might require is given by the Inter-American Commission:

> "the insufficiency of this process was augmented by the fact that […] the issue of extinguishment was not litigated before […] the Indian Claims Commission [which] did not conduct an independent review of historical and other evidence. […] In light of the contentions by the Danns that they have continued to occupy and use [their] ancestral lands […], it cannot be said that the Danns' claims to property rights in the Western Shoshone ancestral lands were determined through an effective and fair process"[19].

Article 26

3.7 The authors further claim that the State party violated their rights under article 26 of the Covenant, recalling that this article is not limited to the non-discriminatory provision of rights contained in the Covenant but applies to prohibit non-discrimination in any field regulated and protected by public authorities[20]. They claim a discrimination on the ground of property rights, recalling that the Inter-American System of Human Rights found that lands possessed by indigenous peoples pursuant to their traditional customs is *property* within the meaning of the American Convention. In particular, in the *Mary and Carrie Dann* case, the Inter-American Commission found that the victims "have not been afforded equal treatment under the law respecting the determination of their property" because "any property rights that the Danns may have asserted to the Western Shoshone ancestral lands were held by the [Indian Claims Commission] to have been extinguished through proceedings in which the Danns were not effectively represented and where the circumstances of this alleged extinguishment were never actually litigated"[21].

3.8 In particular, the authors submit that they experienced unjustified differential treatment in the determination of their rights to traditional lands: i) by having had to litigate in two separate trials on the same matter (their Native Title Claim and the Separate Question), contrary to the other Nyiyaparli applicant, the second one having subjected them to a higher standard of proof compared to the other applicant; ii) by the Court's failure to allow the consideration of their evidence in the Separate Question trial; and iii) by having failed to provide them legal representation, contrary to the other party. On this last point, they clarify that indigenous peoples claiming lands rights are not eligible for legal aid funding through the Western Legal Aid system, as parties in other types of legal actions are. Instead, funding for native title litigation is provided by representatives from the Aboriginal/Torres Strait Islander Bodies (a national network of organisations)[22]. In carrying out their functions, such

[17] *Mary and Carrie Dann versus United States*, Case 11.140, Report 75/02, 27 December 2002, para. 141.

[18] "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources […]".

[19] *Mary and Carrie Dann versus United States*, *op. cit*., para. 142.

[20] Broeks. v. The Netherlands (CCPR/C/29/D/172/1984), para. 12.3.

[21] *Mary and Carrie Dann versus United States*, op. cit., para. 144 and 145.

[22] Recognized under section 203 AD of the Native Title Act.

bodies, in matters of competing claims over same lands, have fund only one claimant because such bodies are required to minimise overlapping applications. The authors sought funding from the representative body in their region (Yamatji Marlpa Aboriginal Corporation) twice, in 2010 and in 2012, to no avail, as that body funded the opposed party.

Article 14.1, read alone and in conjunction with article 2.3

3.9 The authors also claim that the failure of the State party to provide them with legal aid to better understand the complexity of native titles proceedings, a complexity already noticed by the Committee[23], amounted to the violation of article 14.1 of the Covenant, read alone and in conjunction with article 2.3. As unrepresented litigants, the authors: i) were not able to obtain proper guidance from the Court as to the nature of the Separate Question proceedings; ii) because of misunderstandings of laws and facts, they could not take actions that might have prevented the Court from reaching its decision to declare the authors' traditional territory as pertaining to another applicant; and iii) were not given the resources and the time to properly test the evidence advanced by the other party. On this last point, they recall that, according to the Committee, the failure of a State party to allow authors the ability to comment on evidence considered by a court in determining indigenous lands rights is a violation of both principles of equality before the courts and fair trial[24].

3.10 The authors further claim that the violation of article 14.1 of the Covenant arises from the failure of the State party to even consider, for the Separate Question trial, the evidence filed in the other trial (the native title determination) which precisely proved their origin as Nyiyaparli, as well as the failure to allow an adjournment in the Separate Question trial for the Wunna Nyiyaparli to properly file the evidence, once again, having the Court established that it was necessary to file it twice (*supra* para. 2.19). Such decision was arbitrary, regardless of the lateness of their request, in light of the Committee's jurisprudence that tribunals which are not constrained by any prescribed time limit for the submission of evidence violate article 14.1 in failing to accept new evidence close to the hearings[25]. They also recall that, according to the ECHR, "each party must be afforded a reasonable opportunity to present his case, including his evidence"[26].

3.11 Recalling the Committee's jurisprudence that the failure to allow access to courts can amount to a violation of article 14.1 of the Covenant [27], the authors further claim the violation due to the State party's failure to allow them to appeal the consent determination of native title made in favour of another applicant.

Article 2.3, read alone

3.12 The authors also claim that the State party's failure to provide them with an effective remedy and the absence of a forum where they can claim all the violations are constitutive of a violation of article 2.3 of the Covenant.

Previous articles, read in light of article 1

3.13 The authors finally allege that the right to self-determination, in part related in the context of indigenous peoples to their close connection to their traditional territories, should be taken into consideration when examining their claims. They refer to the Committee's jurisprudence[28] that the provisions of article 1 may be relevant to the determination whether other rights contained in the Covenant have been violated. The authors also note that the

[23] CCPR/C/AUS/CO/6 and CCPR/C/AUS/CO/5.

[24] Äärelä et al. v. Finland (CCPR/C/73/D/779/1997).

[25] Jansen-Gielen v. The Netherlands (CCPR/C/71/D/846/1999) and Vojnović v. Croatia (CCPR/C/95/D/1510/2006).

[26] *Andrejeva v. Latvia*, 2010, para. 96.

[27] Oló Bahamonde v. Equatorial Guinea (CCPR/C/49/D/486/1991) and Sankara et al. v. Burkina Faso (CCPR/C/86/D/1159/2003).

[28] Gillot et al. v. France (CCPR/C/75/D/932/2000), para. 13.4 and Mahuika et al. v. New Zealand (CCPR/C/70/D/547/1993), para. 9.2.

IACrtHR found that substantive indigenous rights were underpinned by the right to self-determination set out, precisely, in article 1 of the Covenant[29].

Request for reparations

3.14 The authors seek the removal of all legal effects of the native title determination made in favour of another indigenous group, for the Court to continue the proceedings on their native title claim ensuring their effective participation.

3.15 The authors also submit that, should a national court decide in favour of their claim, the State party must provide just, full and timely reparations, including adequate compensation, for any acts by third parties carried out on their lands after the authors filed their native title claim in 2012 to secure their lands.

State party's observations on admissibility and merits

4.1 On 7 February 2020, the State party submitted that the authors' claims under articles 1, 26 and 27 of the Covenant are inadmissible. The claim on article 1 is inadmissible because the right to self-determination cannot be the subject of a communication and is not relevant to the substance of the current communication which relates to the procedural fairness of the native title proceedings and the ability to effectively participate in them. The claims on articles 26 and 27 are inadmissible for lack of substantiation, not arising separately from the substantive question relating to procedural fairness under article 14.1.

4.2 On the merits, the State party submits that the authors' triple claim on article 14.1 – for lack of consideration of their evidence, lack of legal aid and impossibility to seek the revision of the native title determination–, is without merit.

4.3 On the alleged lack of consideration of the evidence, the State party argues that the Court had provided the authors with numerous opportunities to prepare and submit evidence, and that the filing of such evidence would not have made any difference as the Court's decision was "undoubtedly correct" as observed by the judgement of appeal (*supra* para. 2.21). According to the State party, the Court's decision not to adjourn the proceedings was therefore reasoned and justified on the grounds of the authors' lack of participation and non-compliance with the Court's orders, and considering that the Federal Court must resolve disputes as quickly, inexpensively and efficiently as possible.

4.4 The State party also rejects that it failed to provide legal aid, as the authors were entitled to apply for legal assistance through the National Indigenous Australians Agency which funds the Native Title Representative Bodies. Nevertheless, in assessing applications and considering the availability of funds, the representative body must determine the priorities. With respect to overlapping claims, the representative body must make all reasonable efforts to minimise the number of applications covering same lands or waters. In this sense, if the representative body is already representing a native title claimant in relation to specific lands or waters and receives a request from a new claimant in relation to the same area, it must not represent the new claimant unless it has obtained consent to do so from the original claimant. The State party argues that, in any event, as there is no obligation under article 14.1 to provide legal aid beyond criminal proceedings, the lack of legal aid does not violate the Covenant.

4.5 On the impossibility to seek the revision of a native title determination, the State party submits that it does not constitute a breach under article 14.1, nor deprive the authors from an effective remedy under article 2.3. Indeed, as native title determination provides legal protection regarding lands rights, there is a clear justification and objective behind the limits to revocation and variation of such determinations.

4.6 The State party further submits that, in case the Committee would examine the merits of article 27 of the Covenant, there is no breach because Australia gives effect to its obligations under this article by implementing a system to determine native titles claims.

[29] IACrtHR, Case of the Saramaka People v. Suriname, para. 93, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149.

4.7 Finally, the State party further submits that, in case the Committee would examine the merits of article 26, native title determination claims are not grounds for discrimination under such article and it is unfounded that the authors experienced a differential treatment compared to the other party.

Authors' comments

5.1 On 2 April 2020, the authors responded that they did not deliberately fail to comply with the Court's orders but that they did not have money to access Internet so they were most of the time out of reach and unable to receive emails and were unaware they were required to take steps to prepare the Separate Question hearing.

5.2 The authors contest that their claims on articles 26 and 27 are unsubstantiated. On the admissibility of their claim under article 1, as well as on their allegation of violations of articles 14.1, 26 and 27 read in light of article 1, the authors submit that, based on the definition of the right to self-determination provided by article 3 of the UNDRIP[30], the deprivation of any right for the Wunna Nyiyaparli to "speak for" their traditional territory, and the consequent removal of their ability to freely pursue their economic, social and cultural development by interrupting its relation to such lands, directly implicates the right to self-determination in the facts of the case.

5.3 On the merits of article 27, the authors reiterate that, according to the evolution of indigenous peoples' rights, such article should be read as requiring that indigenous parties are provided with effective participation (including free, prior and informed consent) in procedural and substantive decisions affecting them, including judicial procedures of determination of their fundamental rights. Therefore, the State party's obligations under article 27 of the Covenant cannot be exhausted by simply setting up a native title determination procedure: the State party is required to take positive legal measures to ensure that indigenous peoples can *effectively* participate in such procedure.

5.4 On the merits of article 26, the authors submit that the Separate Question made them prove their case twice instead of once, while the State party is required to take positive measures to ensure *de facto* equality before the law. The failure of the Native Title Representative body to provide legal aid was also disproportionate to the legitimate aims it pursues, as it resulted in the lack of effective participation in the proceedings, having resulted in turn in the extinction of the authors' right to their traditional territory.

5.5 On the merits of article 14.1, the authors reiterate that, without legal representation and given the complexity of the proceedings, they were not concretely able to defend their case, while the Federal Court could have provided them with time to adduce evidence. Furthermore, the State party's argument that the Court found that, in any case, its earlier decision was "undoubtedly correct", is irrelevant: merely repeating what is asserted by a domestic court in relation to the correctness of its own decisions, is an insufficient response to their contentions.

5.6 Specifically on the obligation to provide legal aid, the authors refer to the Committee's General Comment No. 32 to reject the State party's submission that this is confined to criminal proceedings. The authors also contest the State party's argument that the principle of legal certainty justifies their inability to seek the revision of a determination of native title.

State party's additional observations

6.1 On 19 February 2021, the State party maintained that the authors' claim under article 27 of the Covenant lacks substantiation for purposes of admissibility and that, on the merits, article 27 does not provide for indigenous peoples' right to free, prior and informed consent.

6.2 Regarding the authors' claim under article 26, the State party maintains that it is both inadmissible and without merit as there was no differentiation in treatment between the authors and the other litigant.

[30] "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development".

6.3 Regarding the authors' claim under article 14.1, the State party alleges that their failure to respond the steps taken by the Court to notify them by email is not the State party's responsibility.

Issues and proceedings before the Committee

Considerations of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee notes the State party's submission that the claim on article 1 is inadmissible because the right to self-determination cannot be the subject of a communication. The Committee also notes the authors' submission that the right to self-determination should be taken into consideration when examining their claims because, based on the definition of this right provided by the UNDRIP, the deprivation by the Court of their right to "speak for" their traditional lands, and the consequent removal of their ability to freely pursue their economic, social and cultural development by interrupting its relation to such lands, directly implicates the right to self-determination in the facts of the case.

7.3 The Committee recalls that, although it does not have competence under the current development of its jurisprudence to consider a claim alleging a violation of article 1 of the Covenant, it may, when relevant, interpret such article in determining whether rights protected in parts II and III of the Covenant have been violated[31]. Therefore, the Committee is of the view that, in the present communication, it may take article 1 into account in interpreting articles 14(1), 26 and 27 of the Covenant. In this regard, the Committee recalls that the Committee on the Elimination of Racial Discrimination affirms that, in "addition to being a form of intangible heritage, self-determination is linked to the effective realization of the rights of indigenous peoples"[32].

7.4 The Committee further notes the State party's submission that the authors have failed to substantiate, for purposes of admissibility, their claims under articles 26 and 27.

7.5 The Committee notes that the authors self-identify as indigenous, whose laws, culture, language and traditions are intimately linked to their care, control and access to their traditional lands. The Committee also notes that the State party made a consent determination of native title over the authors' alleged traditional territory in favour of other applicants, without, allegedly, effective participation of the authors. The Committee therefore considers that the claim under article 27 is sufficiently substantiated for purposes of admissibility.

7.6 In relation to the admissibility of the claim under article 26, the Committee takes note of the allegations that the Wunna Nyiyaparli were discriminated in the determination of their property rights, having experienced unjustified differential treatment in comparison to the other indigenous applicant, having had to litigate in two separate trials on the same matter (firstly the determination of their rights on the lands, and secondly the determination of their Nyiyaparli origin in which they had no possibility to submit evidence), and having the State party failed to provide them legal representation, contrary to the other party. The Committee considers that these issues are closely related to the merits and that, for the purpose of admissibility, the authors have sufficiently substantiated their claim.

7.7 The Committee further notes that the State party does not allege any inadmissibility ground in relation to article 14(1), and does not allege lack of exhaustion of domestic remedies for any of the authors' claims. Therefore, the Committee considers that it is not precluded, under article 5(2)b) of the Optional Protocol, from examining the present communication.

[31] Gillot et al. v. France (CCPR/C/75/D/932/2000), para. 13.4; Sanila-Aikio v. Finland (CCPR/C/119/D/2668/2015), para. 8.6.

[32] Pérez Guartambel v. Ecuador (CERD/C/106/D/61/2017), para. 4.6. See also CESCR, General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights, para. 11.

7.8 Therefore, the Committee declares the communication admissible insofar it raises issues under article 14(1), read alone and in conjunction with article 2(3), and articles 26 and 27, all read in light of article 1, and proceeds with its considerations on the merits.

Considerations of the merits

8.1 The Committee has considered the communication in the light of all the information submitted by the parties, in accordance with article 5.1 of the Optional Protocol.

8.2 The Committee notes the authors' argument that the facts of the present case constitute a violation of article 27 of the Covenant because, due to a lack of effective participation in complicated judicial proceedings of determination of their lands rights, they lost their traditional lands, titled to another indigenous people. The Committee notes that, according to the authors, this would lead to the dissolution of their culture, based on their laws and customs hold specifically in relation to their traditional territory, and to the destruction of the Wunna Nyiyaparli people, as such. The Committee notes in particular the authors' argument that the scope of article 27 of the Covenant contemplates, according to the evolution of indigenous peoples' rights, effective participation in decisions affecting them (including free, prior and informed consent). The native title determination procedure was precisely a decision affecting them but they could not effectively participate in it. The Committee also notes the State party's argument that there is no breach of article 27 because such article does not provide for indigenous peoples a right to free, prior and informed consent and because Australia has established a system to determine claims for native titles.

8.3 The Committee recalls that, in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with their traditional lands, territories and resources, and that the protection of this right "is directed towards ensuring the survival and continued development of the cultural identity"[33]. Therefore, "indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life"[34]. Furthermore, the Committee notes that the Committee on the Elimination of Racial Discrimination has stated, citing regional jurisprudence, that "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 a material and spiritual element which they must fully enjoy "to preserve their cultural legacy and transmit it to future generations" and are, therefore, a prerequisite to "prevent their extinction as a people"[35]. The Committee takes also note that ownership of and control over ancestral territories are "essential to indigenous peoples' survival as peoples, with the preservation of their distinct culture"; indeed, any denial of the exercise of their territorial rights is detrimental to values that are very representative for the members of indigenous peoples, who are at risk of losing their cultural identity and heritage to be passed on to future generations[36]. As a consequence, "the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival"[37].

8.4 The Committee also recalls that "ancestral cemeteries, places of religious meaning and importance, and ceremonial or ritual sites linked to the occupation and use of physical

[33] General comment No. 23, paras. 3.2, 7 and 9; Campo Agua'ẽ Indigenous community v. Paraguay (CCPR/C/132/D/2552/2015), para. 8.6; Poma Poma v. Peru (CCPR/C/95/D/1457/2006), para. 72.

[34] CESCR General comment No. 21, para. 36; Campo Agua'ẽ Indigenous community v. Paraguay (CCPR/C/132/D/2552/2015), para. 8.6; UNDRIP, art. 20, 26.1 and 33.

[35] CERD/C/102/D/54/2013, para. 6.6, citing the IACrtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 149, and the *Case of the Saramaka People v. Suriname*, para. 121. The same principles were recognized in the African Human Rights System: *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 276/03, 2009.

[36] IACrtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, para. 203; African Human Rights System: *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 276/03, 2009, para. 158 and 227, and *African Commission on Human and Peoples' Rights v. Republic of Kenya*, application No. 006/2012, 2017, para. 109.

[37] Inter-American Commission, *Indigenous and tribal people's rights over their ancestral lands and natural resources*, para. 95.

territories, constitute an intrinsic part of the right to cultural identity"; therefore, limitations on the right to traditional territories "can also affect the right to the exercise of one's own religion, spirituality or beliefs"[38].

8.5 As a consequence, it is of vital importance that measures that compromise indigenous peoples culturally significant territories are taken after a process of effective participation and with the free, prior and informed consent of the community concerned, not to endanger the very survival of the community and its members[39]. Precisely, mechanisms of delimiting, demarcating and granting collective titles can legally affect, modify, reduce or extinguish indigenous peoples' rights on their traditional territories. As a consequence, the Committee considers that such mechanisms require prior consultation of the relevant indigenous people.

8.6 In light of the above, the Committee recalls that article 27 of the Covenant does enshrine the inalienable right of indigenous peoples to enjoy their traditional territories and that any decision affecting them should be taken with their effective participation[40].

8.7 In the present case, the Committee notes that, beyond indicating the Federal Court that the authors are not *Nyiyaparli* indigenous peoples, the State party does not contest the authors' self-identification as indigenous peoples. The State party does not contest either that they maintain cultural interests in the territory they have used and occupied for immemorial time, known as the Roy Hill Pastoral Lease, which hold their sacred sites and is key to the authors' language, culture, religion and preservation as an indigenous people as such. Nevertheless, the Committee notes that the State party has not demonstrated having taken any steps to protect the authors' right to enjoy their culture, having on the contrary attributed their traditional territory to another indigenous group without having ensured their *effective* participation in the proceedings for the determination of their fundamental right to traditional territory, while being a decision affecting their survival as a people. In the light of the foregoing, the Committee concludes that the facts before it disclose a violation of article 27 of the Covenant, read in light of article 1 of the Covenant and of the UNDRIP.

8.8 The Committee further notes the authors' argument that the facts of the present case constitute a violation of article 26 of the Covenant based on an alleged discrimination on the ground of property rights because the authors experienced an unjustified differential treatment in the proceedings for the determination of their rights to traditional lands, mainly due to the alleged lack of legal representation, the fact that they were made to take part in two separate trials on the same matter, and the Court's failure to consider their evidence.

8.9 The Committee is aware that non-discrimination was precisely the basis for the understanding that indigenous peoples' right to traditional lands and resources deserves equal protection from human rights treaties than non-indigenous' right to properties[41] or to privacy, family and home. Nevertheless, the Committee observes that, in the present case, the alleged discrimination in the enjoyment of the fundamental right to traditional territory is not in comparison with non-indigenous peoples, but with another indigenous group, and considers that the alleged lack of legal representation, the request for their participation in two separate trials on the same matter and failure to consider evidence, should be examined under article 14(1).

8.10 The Committee notes the authors' arguments that the facts of the present case constitute a triple violation of article 14(1) of the Covenant, read alone and in conjunction with article 2.3, due to: i) the State party's failure to provide them with legal aid to better understand the complexity of native titles proceedings; ii) the State party's failure to consider, for the Separate Question trial, the relevant evidence filed in the first proceeding (the native

[38] *Ibid*, para. 151 and 160. See also Hopu and Bessert v. France (CCPR/C/60/D/549/1993/Rev.1), para. 10.3.

[39] Campo Agua'ẽ Indigenous community v. Paraguay (CCPR/C/132/D/2552/2015), para. 8.7; Poma Poma v. Peru (CCPR/C/95/D/1457/2006), para. 7.2 and 7.6; General comment No. 23, para. 7; CERD/C/102/D/54/2013, para. 6.7; UNDRIP, art. 32. See also UN Doc. A/HRC/12/34, para. 62-63; Inter-American Commission, *Indigenous and tribal people's rights over their ancestral lands and natural resources*, para. 273.

[40] Campo Agua'ẽ Indigenous community v. Paraguay (CCPR/C/132/D/2552/2015), para. 8.6.

[41] *Sawhoyamaxa*, para. 120. See also concurring opinion of judge Sergio García Ramírez in Awas Tingni, para. 13.

title determination) which precisely already proved their origin as Nyiyaparli, and to allow an adjournment of the Separate Question proceeding for them to file once again the evidence; iii) the State party's failure to allow them to appeal the consent determination of native title made by the Court in favour of another applicant over the authors' traditional territory.

8.11 The Committee also notes the State party's argument that the authors' claim on article 14(1) is without merit, taking into account that: i) the Native Title Representative Body must minimise the number of applications covering overlapping claims and that there is no obligation under article 14(1) to provide legal aid beyond criminal proceedings; ii) the Court had provided the authors with numerous opportunities to submit evidence; their troubles in receiving emails is not the State party's responsibility; the filing of such evidence would not have made any difference to the outcome of the proceedings; and the Court's decision not to adjourn the proceedings was justified considering the necessity to resolve disputes as quickly, inexpensively and efficiently as possible; and iii) the impossibility to seek the revision of a native title determination is justified because native title determination proceedings need limits to revocation and variation.

8.12 The Committee recalls that the failure of a State party to allow authors the ability to comment on evidence considered by a court in determining indigenous lands rights is a violation of both principles of equality before the courts and fair trial[42]. The Committee also recalls that tribunals which are not constrained by any prescribed time limit for the submission of evidence exercise arbitrary discretion in failing to accept new evidence close to the hearings[43]. Moreover, the Committee recalls that, as the availability or absence of legal assistance often determines whether or not a person can participate in relevant proceedings in a meaningful way, States parties are encouraged to provide free legal aid beyond criminal proceedings for individuals who do not have sufficient means to pay for it, and may be obliged to do so in some cases[44].

8.13 Precisely, specifically related to judicial guarantees in cases of indigenous peoples, the Committee observes that, according to various international instruments, States shall take all effective measures to ensure that indigenous peoples can understand and be understood in legal proceedings in order to guarantee their right to a fair trial and effective access to justice[45]. In particular, it is "indispensable" to consider their "particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions" [46].

8.14 The Committee further considers that, in addition to such standards on accessing justice generally speaking (applying both for non-indigenous and indigenous peoples, *supra* para. 8.12, and applying for indigenous peoples specifically, *supra* para. 8.13), the present communication should moreover be analysed from the perspective of the specific proceedings created to provide a place for indigenous peoples to claim the recovery, recognition, demarcation, and registration of their traditional territories. Indeed, applying the established principle that human rights treaties are living instruments that must be interpreted and applied taking into account contemporary circumstances[47], States are bound to adopt measures to guarantee and give legal certainty to indigenous peoples' rights in relation to ownership of their traditional territories, through the establishment of such mechanisms and procedures for delimitation, demarcation, and titling in accordance with their customary law, values and customs[48].

[42] Äärelä et al. v. Finland (CCPR/C/73/D/779/1997).

[43] Jansen-Gielen v. The Netherlands (CCPR/C/71/D/846/1999) and Vojnović v. Croatia (CCPR/C/95/D/1510/2006).

[44] General comment No. 32 (2007), para. 10.

[45] UNDRIP, articles 13.2 and 40.

[46] IACrtHR, *Tiu Tojín v. Guatemala*, para. 100, and *Fernández Ortega v. Mexico*, para. 200.

[47] Judge v. Canada (CCPR/C/78/D/829/1998), para 10.3; ECHR, Tyrer v. The United Kingdom, 5856/72, judgment of 25 April 1978, para. 31; IACrtHR, Awas Tingni Community v. Nicaragua, judgment of 31 August 2001, para 146.

[48] UNDRIP, articles 27 and 40; IACrtHR (constant jurisprudence since Awas Tingni. Nicaragua, Judgment of 31 August 2001, para. 164); African Human Rights Commission (*Centre for Minority Rights Development and Minority Rights Group International (on behalf of Endorois Welfare Council)*

8.15 Accordingly, said administrative or judicial procedures must respond to the requirements of judicial guarantees and effectiveness, be accessible and simple, conducted with respect for the right to a fair trial, free of "unnecessary formalisms or requirements that undermine their prompt development", free from excessive legal rigors or high costs, must imply a substantial independent review of the historical or other evidence which can allow for a decision on territorial claims over ancestral lands in a substantive manner and not on "other grounds such as arbitrary stipulations or negotiations", and the decisions must also be subject to judicial review[49].

8.16 The Committee considers that these provisions on the evolution of indigenous peoples' rights, in combination with article 14(1) of the Covenant, places the State party under the obligation to provide due process guarantees to the authors in their claim for traditional territory. The Committee observes that the State party provided only two weeks to the authors to prepare a hearing on the Separate Question (*supra* para. 2.14), not respecting indigenous peoples' timelines to meet among themselves to prepare the trial. The Committee further observes that, contrary to the other party, the authors were not legally represented after having been denied funding for legal aid, and had difficulties in accessing Internet to get informed about the Court's orders (*supra* para. 2.17 and 5.1) while the State party considers that this is not his responsibility (*supra* para. 6.3). The Committee further observes that the Federal Court, in its appeal decision, recognized that the authors might have been confused as to the procedural orders. The Committee considers that, in the absence of the authors' response to Courts' emails, with difficulty in accessing Internet, without legal representation, and whilst contemplating the possibility that they were confused regarding the proceedings, the State party failed to take measures to ensure that they understood the implications of the proceedings and could effectively participate in such proceedings. The Committee considers moreover that, in the authors' circumstances, due to the absence of legal counselling and the important implications of the Separate Question proceedings for the exercise of their fundamental rights to traditional territories, the Court's decision not to allow them to adduce evidence and adjourn the proceedings was arbitrary and violated the principles of fair trial and equality of arms. In light of all the above, the Committee considers that the facts before it amount to a violation of the authors' rights under article 14(1), read alone and in conjunction with article 2(3) of the Covenant.

9. Acting under article 5(4) of the Optional Protocol, the Committee is of the view that the information before it discloses a violation by the State party of articles 14(1), read alone and in conjunction with article 2(3), and 27 of the Covenant read in light of article 1.

10. Pursuant to article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to provide full reparation to persons whose rights have been violated. Accordingly, the State party should, *inter alia*, (a) reconsider the Wunna Nyiyaparli's native title claim and ensure their effective participation in the proceedings, in order to carry out the delimitation, demarcation, and titling of their claimed traditional territory. Until then, the State party should abstain from acts which might lead to affect the existence, value, use or enjoyment of the area where the authors live and carry out their traditional activities; (b) review the mining concessions already granted within the claimed traditional territory without consulting the authors, in order to evaluate whether a modification of the rights of the concessionaires is necessary to preserve the survival of the Wunna Nyiyaparli; and (c) provide adequate compensation to the authors for the harm they have suffered. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future, by reviewing the legal aid and funding model with respect to overlapping indigenous native title claims, in order not to leave an applicant without legal representation.

v. Kenya, 276/03, 2009, and *African Commission on Human and Peoples' Rights v. Republic of Kenya*, application No. 006/2012, 2017).

[49] *Yakye Axa Indigenous Community v. Paraguay*, 2005, para. 102. See also *Sawhoyamaxa Indigenous Community v. Paraguay*, para. 82 and 109; Inter-American Commission, *Indigenous and tribal people's rights over their ancestral lands and natural resources*, para. 335, 341 and footnote 277, para. 346, 350 et 359.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party, and particularly in a daily newspaper with a large circulation in Western Australia and in the Nyiyaparli language.

Annex

Opinión individual del miembro del Comité Carlos Gómez Martínez (Disidente)

1. No estoy de acuerdo en la conclusión de violación del artículo 14. 1 del Pacto.

2. Los autores sostienen que no pudieron obtener del tribunal asesoramiento adecuado y que no entendieron bien los elementos de hecho y de derecho que hubiesen evitado que el tribunal dictase sentencia en contra de su titularidad sobre la tierra disputada, lo que constituiría una violación tanto de los principios de igualdad ante los tribunales como de juicio justo e imparcial (párrafo 3.9 del dictamen).

3. Hemos de recordar que nos hallamos ante un proceso civil en el que las partes son dos distintas comunidades indígenas que se disputan la titularidad de tierras. El principio de igualdad de armas en un proceso civil implica que ambas partes litigantes tengan las mismas oportunidades de comparecer en juicio, alegar hechos, aportar prueba y mantener los argmentos jurídicos en los que basan sus pretensiones.

4. Por ello, la valoración del tratamiento a las partes para determinar si este ha sido igualitario o no, solo puede hacerse en términos comparativos con la otra parte litigante, el pueblo indígena que sí compareció en el proceso judicial y a favor del cual se dictó sentencia, aspecto este sobre el que Comité carece de datos.

5. El Comité llega a la conclusión de violación del artículo 14.1 con base en que el tribunal no proporcionó asistencia letrada a los autores, no tuvo en cuenta la prueba presentada y no les permitió apelar. Sin embargo, el Comité no aprecia que la parte adversa tuviese que soportar cargas procesales distintas o de menor onerosidad.

6. La alegación de los autores de no haber disfrutado de asistencia letrada gratuita, a la que habrían tenido derecho por carecer de recursos, está insuficientemente sustanciada pues ellos mismos reconocen que sí dispusieron de medios para designar inicialmente un letrado (párrafo 2.13) y, además, relatan que, en un estadio procesal posterior, sí contrataron un abogado para que interpusiese un recurso de apelación (párrafo 2.20)

7. Los autores añaden que no dispusieron de tiempo suficiente para preparar sus alegaciones y que Internet no funciona bien en el territorio que habitan. Sin embargo, no aportan prueba alguna que sustente dichas alegaciones ni tampoco de que el litigante contrario tuviera que soportar menores cargas para poder comparecer; por tanto, no puede concluirse que hubiese trato desigual para el acceso a la justicia que implique vulneración del artículo 14.1 del Pacto.