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International Covenant on Civil and Political Rights

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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 (represented by counsel, Scott Calnan)
Alleged victims:	The author and the other 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 issue:	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
Article of the Optional Protocol:	3

1.1 The author of the communication is Ailsa Roy, an elder member of the Wunna Nyiyaparli, an Indigenous People from Australia comprising approximately 200 persons, with custodial responsibilities in relation to the traditional lands, territories and resources of the Wunna Nyiyaparli.[1] She claims that the State party has violated the rights of the Wunna Nyiyaparli under articles 2 (3), 14 (1), 26 and 27 of the Covenant, read in the light of article 1.

* Adopted by the Committee at its 137th session (27 February–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, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

*** An individual opinion by Committee member Carlos Gómez Martínez (dissenting) is annexed to the present Views.

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

The Optional Protocol entered into force for Australia on 25 December 1991. The author is represented by counsel.

1.2 On 9 April 2019, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, 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, acting through its Special Rapporteurs on new communications and interim measures, denied a request for third party intervention submitted by Minority Rights Group International.

Factual background[3]

2.1 The Wunna Nyiyaparli Indigenous People are a local landholding group of the larger Nyiyaparli Indigenous People, who belong to the Western Desert Aboriginal People. Prior to European contact and the assertion of sovereignty by the Crown on 11 June 1829, the ancestors of the Wunna Nyiyaparli occupied their traditional territory according to rights derived from filiation to a parent having held those rights or by way of incorporation. Traditional laws and customs, specifics relating to traditional territory and the governance 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 Wunna Nyiyaparli.

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

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 any information being shared with the Wunna Nyiyaparli. As a consequence of the mining, access to many parts of the lands is now restricted; the Wunna Nyiyaparli are no longer able to freely travel throughout them. Moreover, the Wunna Nyiyaparli learned, through public information, as they were never consulted, about the expansion of the Christmas Creek Iron Ore Mine and a licence awaiting approval for the construction of a road, a power line and a pipeline. According to the author, should any of the mines expand, or should further mineral concessions be granted, further damage would be caused, posing a danger to Wunna Nyiyaparli culture, which is intimately and inextricably linked to the territory.

[2] The author claimed that the Wunna Nyiyaparli would be subjected to irreparable harm if the State party allowed further expansion of mining explorations on their traditional lands.

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

[4] According to the information in the communication, the boundaries of the traditional territory are described as "all those lands and waters commencing at the northernmost corner of the western 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 Cloudbreak Iron Ore Mine.

2.4 On 7 May 2011, the community held a meeting and decided to file an application to have native title to its traditional territory recognized under the Native Title Act. The author clarifies that the State party has awarded native title to entire Indigenous Peoples that contain 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". Native title has also been awarded to groups smaller than the whole language group itself; it is this latter course of action that the Wunna Nyiyaparli pursued.

2.5 In the application filed on 27 January 2012 before the Federal Court of Australia, the Wunna Nyiyaparli clarified that, to the extent that any minerals, petroleum or gas within the area of the claim were wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they were not claimed by the applicants. The rights and interests claimed by the Wunna Nyiyaparli were 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 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 placed the claim of the Wunna Nyiyaparli on the Register of Native Title Claims. In its examination of the case, the Tribunal had regard, in addition to the information contained in the claim, to geospatial assessments and to its own searches. A submission from the Yamatji Marlpa Aboriginal Corporation[6] opposing the registration, stating that the wider Nyiyaparli people did not consent to the filing of the application, was not given weight by the Tribunal, which considered that the situation of the Wunna Nyiyaparli was different to the situation in another case mentioned by the Corporation, in which the application had been brought by only a few members of the peoples holding rights in the claim area. In the current case, the traditional laws and customs of the Western Desert recognize the Wunna Nyiyaparli as the landholding group of the Nyiyaparli people that, alone, possesses the rights to and interests on the Roy Hill Pastoral Lease. According to the Tribunal, the application included therefore that any person who was part of the Wunna Nyiyaparli was entitled to file, alone, the application.

2.7 According to the author, the registration test decision meant that the Wunna Nyiyaparli had a prima facie valid native title claim with a chance of success if it was fully argued before the Federal Court. Indeed, section 190 B of the Native Title Act sets out conditions that test the particular merits of a claim and section 190 C sets out procedural conditions. In particular, on the merits, the National Native Title Tribunal found that sufficient factual material strongly supported that: (a) in accordance with Western Desert traditional laws and customs, the ancestors of the Wunna Nyiyaparli were Nyiyaparli; (b) the Wunna Nyiyaparli had – as did their predecessors – an association with the claimed lands, on which they continued to live a largely traditional life through their mythology and rituals; (c) traditional Wunna Nyiyaparli laws were acknowledged and customs were 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 that existed before the assertion of sovereignty by the Crown, 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 (d) the Wunna Nyiyaparli had continued to treat the lands claimed in accordance with those traditional laws and customs.

2.8 This registration, according to the Native Title Act, gave to the Wunna Nyiyaparli rights regarding the use of the lands claimed by third parties. As a consequence, the

[6] See para. 3.8 below.

registration was challenged by another Nyiyaparli clan, which was negotiating, with mining companies, two Indigenous land use agreements for a large area that covered the traditional territory of the Wunna Nyiyaparli. Taking into account that, after the decision of the National Native Title Tribunal, it was no longer possible for the other Nyiyaparli clan to go ahead with the Indigenous land use agreements, that clan filed, on 13 July 2012, an application for judicial review of the Tribunal's decision. The author clarifies that, in 1998, the other Nyiyaparli clan had filed a native title application before the Federal Court, claiming lands comprising a larger area that wholly encompassed the lands claimed by the Wunna Nyiyaparli, with no resolution to date.

2.9 On 2 April 2015, four years after the filing of the Wunna Nyiyaparli 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 native title claim of the Wunna Nyiyaparli.

2.10 In a hearing on 28 October 2015, the Federal Court ordered that the Wunna Nyiyaparli 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 at determining whether the Wunna Nyiyaparli were descendants of the Nyiyaparli,[7] be decided separately.

2.11 The counsel representing the Wunna Nyiyaparli before the Federal Court at that time immediately informed the Court that the Wunna Nyiyaparli did not consent to the proposed order for a hearing on the separate question because the community had never been consulted about it and did not understand how such a separate question had arisen, and recalled that the evidence to answer the question in the affirmative had already been supplied in the application.

2.12 In the absence of a response from the Federal Court, on 4 December 2015, the Wunna Nyiyaparli submitted additional documents in support of their claim and of their Nyiyaparli origin, including an anthropological report and statements by Wunna Nyiyaparli elders.

2.13 On 18 March 2016, the lawyers of the Wunna Nyiyaparli filed a notice of ceasing to act for the Wunna Nyiyaparli. The author clarifies that, prior to that date, because the relations with the lawyers had not been functional, the Wunna Nyiyaparli had been unable to fully understand the implications of the proceedings. Having no funds to hire other lawyers, the Wunna Nyiyaparli, who were no longer represented by lawyers at that point, took no further steps after that date. In particular, they did not attend a hearing on 24 March 2016 as they were unaware that it was necessary for them to attend; similarly, they did not attend a hearing on 13 April 2016 because, on the basis of comments made by the judge that they read in the transcript of the hearing of 24 March 2016, they had thought that the separate question had already been decided in their favour.

2.14 On 20 April 2016, the Registrar of the Federal Court addressed a letter to the Wunna Nyiyaparli, informing them of a direction hearing scheduled for 3 May 2016. They 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 Wunna Nyiyaparli to file a notice indicating whether they wanted to participate in the hearing on the separate question. The Wunna Nyiyaparli only saw this email on 6 May 2016 and responded immediately, stating that it was their understanding, from a transcript that 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 on the same day, that they did not understand how the separate question proceedings had arisen and they asked how the other Nyiyaparli clan had become a party to their claim. On 9 May 2016, a response from the Registrar informed them

[7] 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?".

that the Registrar 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 Wunna Nyiyaparli because they had not filed a 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 the hearing would proceed on the basis that the only evidence that would be adduced would be that from the Nyiyaparli, the three members of the Wunna Nyiyaparli 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 proceedings on the separate question scheduled for that day, the Wunna Nyiyaparli 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 looked for another lawyer in the period since 18 March 2016, they replied that they lacked the funds to do so. Moreover, as the matter was 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, and for the Court to examine the evidence that they had filed previously – and brought again that day – to support their claim that they were indeed Wunna Nyiyaparli, members of the Nyiyaparli people.

2.18 Nevertheless, according to the judge, the other party had not had the opportunity to prepare for a hearing on the basis that the Wunna Nyiyaparli would be adducing any evidence and the lawyer for the Nyiyaparli submitted that they would suffer prejudice if the Wunna Nyiyaparli were permitted to depart from the position on which they had allowed the parties and the Court to proceed. According to the judge, an adjournment of a hearing of that kind was a very serious matter as they were expensive to organize. There was a public interest in the Court making use of the time that had been set aside for the hearing and making proper use of the public moneys that had been expended in arranging the hearing. Consequently, the judge ruled that the hearing on the separate question would not be adjourned and that the Wunna Nyiyaparli would not be allowed to have any of their evidence considered. As a consequence, the judge listened only to the other party, which was interested in demonstrating that the Wunna Nyiyaparli were not descendants of Nyiyaparli in order to have the claim of the Wunna Nyiyaparli rejected and to be able to freely negotiate with mining companies.

2.19 On 16 December 2016, not considering the evidence filed by the Wunna Nyiyaparli in their native title claim, the Federal Court answered the separate question in the negative, considering that the Wunna Nyiyaparli applicants had not adduced any evidence to support the contention that they were part of the wider Western Desert Society. According to the Court, although it was true that their filed claim included extracts from some anthropological literature that might have supported the contention, that did not become evidence in the separate question. In the judgment, the native title application filed by the Wunna Nyiyaparli was dismissed.

2.20 Despite their limited funds, the Wunna Nyiyaparli managed to hire a new lawyer to draft a notice of appeal against the separate question judgment, submitting that the Court had committed an error by refusing to receive their evidence.

2.21 On 5 September 2017, in its judgment of appeal, the Federal Court admitted that it was possible that the Wunna Nyiyaparli were confused as to some of the procedural orders as a result of a lack of legal representation, but nevertheless dismissed their appeal considering that the first instance decision was "undoubtedly correct". The Court ordered the Wunna Nyiyaparli to pay court costs of US$ 14,561.

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 traditional territory of the Wunna Nyiyaparli. 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 those lands – now has legal control of the Wunna Nyiyaparli lands, to the exclusion of the

Wunna Nyiyaparli. A consequence of that 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 their rights to their traditional territory. The impact of such a ruling will be huge, taking into account that the ability of the Wunna Nyiyaparli to live, visit, hunt and fish on their traditional lands is essential to their preservation as a people.

Complaint

3.1 The author clarifies that the central purpose of her communication is to find that the State party failed to provide the Wunna Nyiyaparli with an adequate procedure for the determination of their rights to traditional territory, with the implication of multiple violations of their rights under the Covenant, 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 mining projects.

3.2 The author submits that no remedies are available for her to appeal against the consent determination of native title made over the traditional territory of the Wunna Nyiyaparli to another Indigenous group (see para. 2.22 above). The Wunna Nyiyaparli are 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 or Territory Minister or the Native Title Registrar. She alleges that the State party has no constitutional bill of rights or Human Rights Act by which the Wunna Nyiyaparli could have asserted their specific human rights as an Indigenous People.

3.3 The author claims that the State party violated article 27 of the Covenant due to the lack of effective participation by the Wunna Nyiyaparli in the judicial proceedings of determination of lands rights, with a direct consequence of 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 held in relation to their traditional lands – and to the destruction of the Wunna Nyiyaparli as such.

3.4 The author argues that, in line with the Vienna Convention on the Law of Treaties, an evolutionary interpretation of article 27 of the Covenant should arise from contemporary international human rights norms regarding Indigenous Peoples' rights, considering that Indigenous Peoples' right to participate in decisions affecting them also applies to proceedings concerning the recognition of rights to traditional territory, which in Australia are judicial proceedings. The author recalls that the Wunna Nyiyaparli 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 author refers to the Committee's general comment No. 23 (1994),[8] previous jurisprudence of the Committee[9] and regional human rights jurisprudence that serves to interpret international human rights. She refers in particular to the decision of the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann v. United States*, in which the Inter-American Commission found multiple violations in relation to the allegations of the victims – members of the Western Shoshone Indigenous People of the State of Nevada – according to which the State had interfered with their use and occupation of their 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 had been determined through a process of informed and mutual consent on the part of the Western Shoshone people.[10] According to the author, the decision of the Inter-American Commission confirms that the correct view of the scope of article 27 is the requirement in general comment No. 23 (1994) that Indigenous Peoples may effectively

[8] Paras. 3.2 and 7.

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

[10] Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States*, Case No. 11.140, Report 75/02, 27 December 2002, para. 141.

participate in decisions affecting them and that the article applies to proceedings before courts in which it is decided whether Indigenous claimants have interests in lands that they have traditionally occupied and to which they have cultural and religious connections.

3.6 The author contends that the scope of article 27 of the Covenant should also be interpreted in line with article 27 of the United Nations Declaration on the Rights of Indigenous Peoples,[11] in order to require that any process adjudicating Indigenous land rights must be established and implemented in conjunction with the Indigenous Peoples concerned, and must be fair and open. An indication of what such fairness might require is given by the Inter-American Commission on Human Rights:

> 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.[12]

3.7 The author claims that the State party violated the rights of the Wunna Nyiyaparli 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 prohibiting discrimination in any field regulated and protected by public authorities.[13] She claims discrimination on the ground of property rights, recalling that the inter-American human rights system has found that lands possessed by Indigenous Peoples pursuant to their traditional customs are property within the meaning of the American Convention on Human Rights. In particular, in *Mary and Carrie Dann v. United States*, the Inter-American Commission on Human Rights found that the victims had "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".[14]

3.8 In particular, the author submits that the Wunna Nyiyaparli experienced unjustified differential treatment in the determination of their rights to traditional lands on the following grounds: (a) 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 proceedings on the separate question having subjected them to a higher standard of proof compared with the other applicant; (b) by the Court's failure to allow the consideration of their evidence in the separate question trial; and (c) by having failed to provide them with legal representation, contrary to the other party. On this last point, the author clarifies that Indigenous Peoples claiming land rights are not eligible for legal aid funding through the Western Australian legal aid system, unlike parties in other types of legal actions. Instead, funding for native title litigation is provided by representatives from representative Aboriginal/Torres Strait Islander bodies (a national network of organizations).[15] In carrying out their functions, such bodies, in matters of competing claims over same lands, have funded only one claimant because they are required to minimize overlapping applications. The Wunna Nyiyaparli 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 had funded the opposing party.

[11] "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".

[12] Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States*, para. 142.

[13] Human Rights Committee, *Broeks. v. Netherlands*, communication No. 172/1984, para. 12.3.

[14] Paras. 144 and 145.

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

3.9 The author claims that the failure of the State party to provide the Wunna Nyiyaparli with legal aid to better understand the complexity of native title proceedings, a complexity already noticed by the Committee,[16] amounted to a violation of article 14 (1) of the Covenant, read alone and in conjunction with article 2 (3). As unrepresented litigants, the Wunna Nyiyaparli: (a) were not able to obtain proper guidance from the Court as to the nature of the separate question proceedings; (b) could not take actions, because of misunderstandings of laws and facts, that might have prevented the Court from reaching its decision to declare the Wunna Nyiyaparli traditional territory as pertaining to another applicant; and (c) were not given the resources or the time to properly test the evidence advanced by the other party. On this last point, the author recalls that, according to the Committee, the failure of a State party to allow parties the ability to comment on evidence considered by a court in determining Indigenous land rights is a violation of the principles of both equality before the courts and fair trial.[17]

3.10 The author claims 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 proved the origin of the Wunna Nyiyaparli 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, the Court having established that it was necessary to file it twice (see para. 2.19 above). Such decision was arbitrary, regardless of the lateness of their request, in the light of the Committee's jurisprudence that tribunals that are not constrained by any prescribed time limit for the submission of evidence violate article 14 (1) by failing to accept new evidence close to hearings.[18] The author recalls that, according to the European Court of Human Rights, "each party must be afforded a reasonable opportunity to present his case".[19]

3.11 Recalling the Committee's jurisprudence that failure to allow access to courts can amount to a violation of article 14 (1) of the Covenant,[20] the author claims that the rights of the Wunna Nyiyaparli were also violated due to the State party's failure to allow them to appeal the consent determination of native title made in favour of another applicant.

3.12 The author also claims that the State party's failure to provide the Wunna Nyiyaparli with an effective remedy and the absence of a forum in which they can request an examination of all the violations are constitutive of a violation of article 2 (3) of the Covenant.

3.13 The author alleges 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. She refers to the Committee's jurisprudence[21] that the provisions of article 1 may be relevant to a determination of whether other rights contained in the Covenant have been violated. The author notes that the Inter-American Court of Human Rights has found that substantive Indigenous rights are underpinned by the right to self-determination, as set out in article 1 of the Covenant.[22]

3.14 The author seeks the removal of all legal effects of the native title determination made in favour of another Indigenous group. She requests the Court to continue the proceedings on the native title claim of the Wunna Nyiyaparli, ensuring their effective participation.

3.15 The author submits that, should a national court decide in favour of the claim of the Wunna Nyiyaparli, the State party must provide just, full and timely reparations, including

[16] See CCPR/C/AUS/CO/5 and CCPR/C/AUS/CO/6.

[17] *Äärelä and Näkkäläjärvi v. Finland* (CCPR/C/73/D/779/1997), para. 7.4.

[18] *Jansen-Gielen v. Netherlands* (CCPR/C/71/D/846/1999), para. 8.2; and *Vojnović et al. v. Croatia* (CCPR/C/95/D/1510/2006), para. 8.3.

[19] *Andrejeva v. Latvia*, Application No. 55707/00, Judgment, 18 February 2009, para. 96.

[20] *Oló Bahamonde v. Equatorial Guinea*, communication No. 486/1991, para. 10; and *Sankara et al. v. Burkina Faso* (CCPR/C/86/D/1159/2003), para. 13.

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

[22] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment, 28 November 2007, para. 93.

adequate compensation, for any acts by third parties carried out on their lands after they filed their native title claim in 2012 to secure their lands.

State party's observations on admissibility and the merits

4.1 On 7 February 2020, the State party submitted that the author's claims under articles 1, 26 and 27 of the Covenant were inadmissible. The claim under 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 native title proceedings and the ability to effectively participate in them. The claims under 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 author's triple claim on article 14 (1) – for lack of consideration of the evidence of the Wunna Nyiyaparli, lack of legal aid and the impossibility of seeking 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 Federal Court provided the Wunna Nyiyaparli 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 Federal Court in the judgment of appeal (see para. 2.21 above). According to the State party, the Federal Court's decision not to adjourn the proceedings was therefore reasoned and justified on the grounds of the lack of participation of the Wunna Nyiyaparli and their non-compliance with the Court's orders, and considering that the Court must resolve disputes as quickly, inexpensively and efficiently as possible.

4.4 The State party rejects that it failed to provide legal aid, as the Wunna Nyiyaparli 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 priorities. With respect to overlapping claims, the representative body must make all reasonable efforts to minimize 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 of seeking the revision of a native title determination, the State party submits that it does not constitute a breach under article 14 (1), nor does it deprive the Wunna Nyiyaparli 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 submits that, should the Committee examine the merits of the communication under 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 title claims.

4.7 Finally, the State party submits that, should the Committee examine the merits of the communication under article 26, native title determination claims are not grounds for discrimination under that article and it is unfounded that the Wunna Nyiyaparli experienced differential treatment compared with the other party.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 2 April 2020, the author responded that the Wunna Nyiyaparli had not deliberately failed to comply with the Court's orders; they did not have the money to access the Internet, so most of the time they were out of contact and unable to receive emails and had been unaware that they were required to take steps to prepare for the hearing on the separate question.

5.2 The author contests the State party's assertion that the claims under articles 26 and 27 are unsubstantiated. On the admissibility of the claim under article 1, as well as on the allegation of violations of articles 14 (1), 26 and 27, read in the light of article 1, the author submits that, based on the definition of the right to self-determination provided by article 3 of the United Nations Declaration on the Rights of Indigenous Peoples,[23] 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 their relation to such lands, directly implicates the right to self-determination in the facts of the case.

5.3 On the merits of the claim under article 27, the author reiterates that, in line with the evolution of Indigenous Peoples' rights, that article should be read as requiring that Indigenous parties be provided with effective participation (including free, prior and informed consent) in procedural and substantive decisions affecting them, including judicial procedures relating to the determination of their fundamental rights. Therefore, the State party's obligations under article 27 of the Covenant cannot be fulfilled 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 that procedure.

5.4 On the merits of the claim under article 26, the author submits that the separate question made the Wunna Nyiyaparli prove their case twice instead of once, even though 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 right of the Wunna Nyiyaparli to their traditional territory.

5.5 On the merits of article 14 (1), the author reiterates that, without legal representation and given the complexity of the proceedings, the Wunna Nyiyaparli were not able to defend their case, even though 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 the author's contentions.

5.6 With specific reference to the obligation to provide legal aid, the author refers to the Committee's general comment No. 32 (2007) to reject the State party's submission that this is confined to criminal proceedings. The author contests the State party's argument that the principle of legal certainty justifies the inability of the Wunna Nyiyaparli 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 author's claim under article 27 of the Covenant lacked substantiation for the purposes of admissibility and that, on the merits, article 27 did not provide for Indigenous Peoples' right to free, prior and informed consent.

6.2 Regarding the author's 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 Wunna Nyiyaparli and the other litigant.

6.3 Regarding the author's claim under article 14 (1), the State party alleges that the failure of the Wunna Nyiyaparli to respond the steps taken by the Court to notify them by email is not the State party's responsibility.

[23] "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".

Issues and proceedings before the Committee

Consideration 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 under article 1 is inadmissible because the right to self-determination cannot be the subject of a communication. The Committee also notes the author's submission that the right to self-determination should be taken into consideration when examining the claims because, based on the definition of this right provided in the United Nations Declaration on the Rights of Indigenous Peoples, the deprivation by the Court of the right of the Wunna Nyiyaparli to "speak for" their traditional lands, and the consequent removal of their ability to freely pursue their economic, social and cultural development by interrupting their 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 that article in determining whether rights protected in parts II and III of the Covenant have been violated.[24] 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 has affirmed that, "in addition to being a form of intangible heritage, self-determination is linked to the effective realization of the rights of indigenous peoples".[25]

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

7.5 The Committee also notes that the Wunna Nyiyaparli self-identify as Indigenous, and that their laws, culture, language and traditions are intimately linked to their care and control of and access to their traditional lands. The Committee further notes that the State party made a consent determination of native title over the Wunna Nyiyaparli alleged traditional territory in favour of other applicants, without, allegedly, the effective participation of the Wunna Nyiyaparli. The Committee therefore considers that the claim under article 27 is sufficiently substantiated for the 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 against in the determination of their property rights, having experienced unjustified differential treatment in comparison with 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, the proceedings for which they had no possibility to submit evidence), and the State party having failed to provide them with legal representation, unlike the other party. The Committee considers that these issues are closely related to the merits and that, for the purpose of admissibility, the author has sufficiently substantiated her claim.

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

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 the light of article 1, and proceeds with its considerations of the merits.

[24] *Gillot et al. v. France*, para. 13.4; and *Sanila-Aikio v. Finland* (CCPR/C/119/D/2668/2015), para. 8.6.

[25] Committee on the Elimination of Racial Discrimination, *Pérez Guartambel v. Ecuador* (CERD/C/106/D/61/2017), para. 4.6. See also Committee on Economic, Social and Cultural Rights, general comment No. 26 (2022), para. 11.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's 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 on the determination of their land rights, the Wunna Nyiyaparli lost their traditional lands, which were titled to another Indigenous People. The Committee also notes that, according to the author, this would lead to the dissolution of the Wunna Nyiyaparli culture, which is based on their laws and the customs held specifically in relation to their traditional territory, and to the destruction of the Wunna Nyiyaparli people as such. The Committee further notes the author's 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 a decision affecting them but they could not effectively participate in it. The Committee notes the State party's argument that there was no breach of article 27 because that article does not provide the right to free, prior and informed consent for Indigenous Peoples 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 that 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 … cultural identity".[26] 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.[27] 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 that 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.[28] The Committee notes 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 members of Indigenous Peoples who are at risk of losing their cultural identity and the heritage to be passed on to future generations.[29] As a consequence, the recovery, recognition, demarcation and registration of lands represent essential rights for cultural survival.[30]

[26] Human Rights Committee, general comment No. 23 (1994), para. 9. See also *Oliveira Pereira et al. v. Paraguay* (CCPR/C/132/D/2552/2015), para. 8.6; and *Poma Poma v. Peru*, para. 7.2.

[27] Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009), para. 36; *Oliveira Pereira et al. v. Paraguay*, para. 8.6; and United Nations Declaration on the Rights of Indigenous Peoples, arts. 20, 26 (1) and 33.

[28] CERD/C/102/D/54/2013, para. 6.6. The Committee was citing Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, para. 149, and *Saramaka People v. Suriname*, para. 121. The same principles were recognized in the African human rights system: see African Commission on Human and People's Rights, *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, No. 276/03, Decision, 2009.

[29] Inter-American Court of Human Rights, *Yakye Axa Indigenous community v. Paraguay*, Judgment, 17 June 2005, para. 203. See also African Commission on Human and People's Rights, *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, paras. 158 and 227; and African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment, 26 May 2017, para. 109.

[30] Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources* (OEA/Ser.L/V/LL), para. 95.

8.4 The Committee recalls that ancestral cemeteries, places of religious meaning and importance and ceremonial or ritual sites linked to the occupation and use of physical 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 religion, spirituality or beliefs.[31]

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, so as not to endanger the very survival of the community and its members.[32] Mechanisms of delimiting, demarcating and granting collective titles can legally affect, modify, reduce or extinguish Indigenous Peoples' rights with regard to their traditional territories. As a consequence, the Committee considers that such mechanisms require prior consultation of the relevant Indigenous People.

8.6 In the light of the above, the Committee recalls that article 27 of the Covenant enshrines the inalienable right of Indigenous Peoples to enjoy their traditional territories and that any decision affecting them should be taken with their effective participation.[33]

8.7 In the present case, the Committee notes that, beyond indicating that the Federal Court did not consider the Wunna Nyiyaparli to be Nyiyaparli Indigenous Peoples, the State party does not contest their self-identification as Indigenous Peoples. The State party also does not contest that they maintain cultural interests in the territory that they have used and occupied for immemorial time, known as the Roy Hill Pastoral Lease, which holds their sacred sites and is key to their 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 right of the Wunna Nyiyaparli 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, 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 the light of article 1 of the Covenant and of the United Nations Declaration on the Rights of Indigenous Peoples.

8.8 The Committee notes the author's 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 Wunna Nyiyaparli experienced 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 is the basis for the understanding that Indigenous Peoples' right to traditional lands and resources deserves equal protection under human rights treaties than non-Indigenous peoples' right to property,[34] 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

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

[32] *Poma Poma v. Peru*, paras. 7.2 and 7.6; *Oliveira Pereira et al. v. Paraguay*, para. 8.7; Human Rights Committee, general comment No. 23 (1994), para. 7; *Ågren et al. v. Sweden* (CERD/C/102/D/54/2013), para. 6.7; and United Nations Declaration on the Rights of Indigenous Peoples, art. 32. See also A/HRC/12/34, paras. 62 and 63; and Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources*, para. 273.

[33] *Oliveira Pereira et al. v. Paraguay*, para. 8.6.

[34] Inter-American Court of Human rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, 29 March 2009, para. 120. See also *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, concurring opinion of Sergio García Ramírez, para. 13.

trials on the same matter and failure to consider evidence should be examined under article 14 (1).

8.10 The Committee notes the author's 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: (a) the State party's failure to provide the Wunna Nyiyaparli with legal aid to better understand the complexity of native title proceedings; (b) the State party's failure to consider, for the separate question trial, the relevant evidence filed in the first proceeding (the native title determination), which already proved their origin as Nyiyaparli, and to allow an adjournment of the separate question proceeding for them to file the evidence once again; and (c) the State party's failure to allow the Wunna Nyiyaparli to appeal the consent determination of native title made by the Court in favour of another applicant over their traditional territory.

8.11 The Committee also notes the State party's argument that the author's claim under article 14 (1) is without merit, taking into account that: (a) the native title representative body must minimize the number of applications covering overlapping claims and there is no obligation under article 14 (1) to provide legal aid beyond criminal proceedings; (b) the Court provided the Wunna Nyiyaparli with numerous opportunities to submit evidence, their troubles in receiving emails were 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 (c) 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 a party the ability to comment on evidence considered by a court in determining Indigenous land rights is a violation of the principles of both equality before the courts and fair trial.[35] The Committee also recalls that tribunals that are not constrained by any prescribed time limit for the submission of evidence exercise arbitrary discretion in failing to accept new evidence close to hearings.[36] The Committee further 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.[37]

8.13 Specifically in relation to judicial guarantees in cases involving Indigenous Peoples, the Committee observes that, according to various international instruments, States are to 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.[38] 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".[39]

8.14 The Committee considers that, in addition to such standards on accessing justice, generally speaking (see para. 8.12 above, in relation to both non-Indigenous and Indigenous Peoples, and para. 8.13 above in relation to Indigenous Peoples specifically), the present communication should 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

[35] *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

[36] *Jansen-Gielen v. Netherlands*, para. 8.2.

[37] Human Rights Committee, general comment No. 32 (2007), para. 10.

[38] United Nations Declaration on the Rights of Indigenous Peoples, arts. 13 (2) and 40.

[39] Inter-American Court of Human Rights, *Fernández Ortega et al. v. Mexico*, Judgment, 30 August 2010, para. 200. See also Inter-American Court of Human Rights, *Tiu Tojín v. Guatemala*, Judgment, 26 November 2008, para. 100.

account contemporary circumstances,[40] 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.[41]

8.15 Accordingly, such administrative or judicial procedures must respond to the requirements of judicial guarantees and effectiveness, be accessible and simple, be conducted with respect for the right to a fair trial, be free of unnecessary formalisms or requirements that undermine their prompt development, be free from excessive legal rigours or high costs, imply a substantial independent review of the historical or other evidence that 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 negotiation, and provide for the decisions to be subject to judicial review.[42]

8.16 The Committee considers that these provisions on the evolution of Indigenous Peoples' rights, in combination with article 14 (1) of the Covenant, place the State party under the obligation to provide due process guarantees to the Wunna Nyiyaparli in their claim for traditional territory. The Committee observes that the State party provided only two weeks to the Wunna Nyiyaparli to prepare a hearing on the separate question (see para. 2.14 above), not respecting Indigenous Peoples' timelines to meet among themselves to prepare the trial. The Committee also observes that, contrary to the other party, the Wunna Nyiyaparli were not legally represented, after having been denied funding for legal aid, and had difficulties in accessing the Internet to allow access to information about the Court's orders (see paras. 2.17 and 5.1 above), which the State party considers not its responsibility (see para. 6.3 above). The Committee further observes that the Federal Court, in its appeal decision, recognized that the Wunna Nyiyaparli might have been confused as to the procedural orders. The Committee considers that, in the absence of a response from the Wunna Nyiyaparli to the Court's emails, given their difficulty in accessing the Internet, the fact that they were without legal representation and as 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 circumstances, owing 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 the Wunna Nyiyaparli to adduce evidence and no to adjourn the proceedings was arbitrary and violated the principles of fair trial and equality of arms. In the light of all the above, the Committee considers that the facts before it amount to a violation of 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 the light of article 1.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author 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

[40] *Judge v. Canada* (CCPR/C/78/D/829/1998), para 10.3; European Court of Human Rights, *Tyrer v. The United Kingdom*, Application No. 5856/72, Judgment, 25 April 1978, para. 31; and Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 146.

[41] United Nations Declaration on the Rights of Indigenous Peoples, arts. 27 and 40; Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164; African Human Rights Commission, *Centre for Minority Rights Development and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya*; and African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*.

[42] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, para. 102. See also *Sawhoyamaxa Indigenous Community v. Paraguay*, paras. 82 and 109; and Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources*, paras. 335, 341, 346, 350 and 359 and footnote 277.

claimed traditional territory; (b) abstain from acts that might affect the existence, value, use or enjoyment of the area where the Wunna Nyiyaparli live and carry out their traditional activities; (c) review the mining concessions already granted within the claimed traditional territory without consulting the Wunna Nyiyaparli, in order to evaluate whether a modification of the rights of the concessionaires is necessary to preserve the survival of the Wunna Nyiyaparli; and (d) provide adequate compensation to the Wunna Nyiyaparli 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.

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 language of the State party, in particular in a daily newspaper with a large circulation in Western Australia, and in the Nyiyaparli language.

Annex

[Original: Spanish]

Individual opinion of Committee member Carlos Gómez Martínez (dissenting)

1. I do not agree with the finding that the information before the Committee discloses a violation of article 14 (1) of the Covenant.

2. The authors argue that they did not obtain proper guidance from the Court and that they did not sufficiently understand the laws and facts in order to prevent the Court from ruling against their title to the disputed land, in violation of the principles of both equality before the courts and of fair and impartial trial (see para. 3.9).

3. We must remember that we are dealing with civil proceedings in which the parties are two different Indigenous communities fighting over a land title. The principle of equality of arms in civil proceedings entails that both parties have the same opportunities to appear in court, present allegations, provide evidence and defend the legal arguments underpinning their claims.

4. Therefore, the assessment of whether the authors received equal treatment can only be made in comparison with the other party – namely, the Indigenous People heard during the judicial process and in whose favour the judgment was handed down – something on which the Committee lacks information.

5. The Committee found a violation of article 14 (1) of the Covenant on the grounds that the Court failed to provide the authors with legal assistance, to take into account the evidence and to allow them to appeal. However, the Committee did not consider whether the procedural burdens on the other party were different or less onerous.

6. The authors' claim that they did not receive free legal aid, to which they should have been entitled due to their lack of resources, is insufficiently substantiated, as they admit that they had the means to appoint a lawyer initially (see para. 2.13) and that, at a later stage in the proceedings, they hired a lawyer to file an appeal (see para. 2.20).

7. The authors add that they did not have enough time to prepare their arguments and that the Internet does not work well in the area where they live. However, they do not provide any evidence to support these claims or the claim that the opposing party faced lesser burdens in appearing before the Court; therefore, it cannot be concluded that there was unequal access to justice amounting to a violation of article 14 (1) of the Covenant.