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# Conceptions of Indigenoussness in the Case Law of the European Court of Human Rights

STEFAN KIRCHNER<sup>1</sup>

## I. INTRODUCTION

The forty-seven States which have ratified the European Convention on Human Rights (ECHR) are home to around 800 million people.<sup>2</sup> Due to their location at the periphery of Europe, it is often forgotten that many thousands of Europe's citizens are members of indigenous peoples. In addition to the Sámi people in Norway, Sweden, Finland and Russia, and the "indigenous, small-numbered peoples of the North, Siberia and the Far East,"<sup>3</sup> to use the official term, of Russia, indigenous populations can be found both in France's overseas *département* and *région*<sup>4</sup> (*département d'outre mer et région d'outre-mer*) of French Guiana<sup>5</sup> (which is part of the EU<sup>6</sup> and falls within the geographical scope of the ECHR just as much as every *département* of metropolitan France),<sup>7</sup> as well as in territories of European states which

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2. *Council of Europe*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Council\\_of\\_Europe](https://en.wikipedia.org/wiki/Council_of_Europe) (last visited Jan. 26, 2016).

3. International Working Group for Indigenous Affairs, *Indigenous peoples in Russia*, IWGIA.ORG, <http://www.iwgia.org/regions/arctic/russia> (last visited Oct. 17, 2014).

4. In this particular case, the *région* is geographically identical with the *département*.

5. See JARI UIMONEN, FROM UNITARY STATE TO PLURAL, ASYMMETRIC STATE: INDIGENOUS QUEST IN FRANCE, NEW ZEALAND AND CANADA 45-46 (Lapland U. Press, 1st ed. 2014); Nicholas Bohen, *Indigenous People of French Guiana*, FRENCH GUIANA BLOG, <http://nickbohenanthro.blogspot.fi/2013/04/indigenous-people-of-french-guiana.html> (last visited Oct. 17, 2014).

6. UIMONEN, *supra* 5, at 46. The indigenous peoples of French Guiana are "the European Union's only Indian minorit[ies]." *Id.* Other indigenous populations in France and within the territorial scope of the ECHR (although not fully within the EU, albeit also not devoid of all legal ties to the EU) include the indigenous peoples of Wallis and Futuna, French Polynesia and New Caledonia (*cf. id.* at 45 *et seq.*).

7. *Id.* at 91.

are areas outside the EU, such as the French Overseas Collectivity of French Polynesia (Pōrīnetia Farāni)<sup>8</sup> or Greenland (Kalaallit Nunaat), which is a part of Denmark but not part of the EU.<sup>9</sup> It is the Inuit name which is now the official name for the island commonly referred to as Greenland.<sup>10</sup>

Rather than diminishing the status of the Sámi people, the fact that the human rights situation in the Nordic countries is relatively favorable when compared to most other countries gives the Sámi the chance to serve as trailblazers when it comes to the protection of individual and collective rights of indigenous persons. As will be seen in this article, the case law of the European Court of Human Rights (ECtHR) indicates that Sámi applicants have long (but not often) used the European human rights system in this regard.<sup>11</sup> The initiative shown by Sámi applicants can be a model for future human rights litigants in Strasbourg. It is the purpose of this article to show which kind of cases have already been brought to the Convention organs, the ECtHR and the (since 1998 defunct) European Commission of Human Rights (EComHR).<sup>12</sup> As will be seen, this is a story that is far from over.

The European states that are home to indigenous communities (Norway, Sweden, Finland, Russia, Denmark and France) are also parties to the European Convention on Human Rights.<sup>13</sup> In addition, indigenous persons might find themselves otherwise within the jurisdiction of a state which has ratified the ECHR, which is the requirement for the applicability of the ECHR,<sup>14</sup> without being within the territory of the state in question, for example when applying for a visa at the embassy of a state party to the ECHR in their non-party home country. For the purposes of this text, however, we will not deal with extraterritorial cases. Rather, the focus will be on the legal relationship between the indigenous peoples and the authorities of the country they live in. The rights of indigenous peoples in the ECHR have been dealt with already by Timo Koivurova as late as 2011.<sup>15</sup> The

8. *Id.*

9. See *Greenland*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Greenland>.

10. *Id.*

11. See generally Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, 18 INT'L J. ON MINORITY AND GROUP RTS. 1, 1-37 (2011).

12. *Id.* at 3.

13. *Council of Europe*, *supra* note 2.

14. See European Convention on Human Rights art. 1 (prot. 12), 14, 33, 35(1), 56 (¶ 1), Nov. 4, 1950, 6 I.L.M. 368.

15. See generally Koivurova, *supra* note 11.

question this text seeks to answer is how the Court has dealt with one aspect of indigenous issues so far, more precisely, how the ECHR understands the term “indigenous.”

## II. TERMINOLOGY

Often the terms indigenous and minorities are treated in an incoherent manner. While indigenous peoples are also minorities, they are usually characterized by a special historical, (in the widest sense of the term) colonial experience of dominance by the majority society, a culture distinctly different than that of the majority, and often a cultural attachment to their homeland.<sup>16</sup> The term minorities can be understood in a wider sense, and includes national minorities, i.e. relative minorities. Linguistic minorities can be both, while immigrant groups are usually not considered to be national minorities in the classical sense of the legal concept, which dates back at least to the League of Nations era. In Russia, Norway, Sweden and Finland, the Sámi are an indigenous people.<sup>17</sup> Speakers of Inari Sámi are a linguistic minority within the Sámi people and within Finnish society overall.<sup>18</sup> The drawing of borders has resulted in the presence of national minorities in many European countries, although the intervening time and assimilation processes can impact whether a group considers itself a national minority or ‘only’ a linguistic minority. While some national minorities relate to existing nation states (for example the Danes in Northern Germany or the Germans in Poland), the existence of a nation state is not a requirement for being a national minority (one case in point being the Frisian people) – although there is no universally recognized definition of what constitutes a national minority. On the other hand are large immigrant communities (such as Moroccans in the Netherlands or Turks in Germany) usually not considered to form a national minority, but a minority in the wider sense of the term.

For the purposes of this article, the phrase “minority in the wider sense of the term” refers to the terminology employed in Article 27 of the International Covenant on Civil and Political Rights (ICCPR): “[i]n

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16. See generally The Finnish Sami Parliament, *Land Rights, Linguistic Rights, and Cultural Autonomy for the Finnish Sami People*, <http://arcticcircle.uconn.edu/SEEJ/sami1.html>.

17. Koivurova, *supra* note 11, at 3.

18. G.A. Res. 50/157, annex, Fact Sheet No.9 (Rev. 1), The Rights of Indigenous Peoples, Programme of Activities for the International Decade of the World’s Indigenous People (1995-2004), at 1 (Dec. 21, 1995), <http://www.ohchr.org/Documents/Publications/FactSheet9rev.1en.pdf>.

those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."<sup>19</sup> The phrase "minority in the narrow sense of the term" refers to Article 27 minorities minus indigenous peoples. Both indigenous peoples and national minorities are minorities in the wider sense of the term, but the coverage of Article 27 ICCPR is not restricted to these two categories.

### III. ANTI-DISCRIMINATION RULES

There is still "resistance to the concrete recognition and protection of minority rights"<sup>20</sup> because minority rights are seen as taking away something from the ability of the state to regulate its own matters.<sup>21</sup> This view is not only due to the "state-centric"<sup>22</sup> nature of contemporary international law, but also due to the view which sees minorities in the widest sense of the term as used in Article 27 ICCPR, be they national minorities or indigenous peoples, as outsiders. Conversely, the state is seen as an entity built on the consensus of the insiders who, in most states, are not only citizens of the state, but also members of the predominant ethnic group or groups.

Unlike the International Covenant on Civil and Political Rights, which in Article 27 contains specific minority rights as human rights, the ECHR contains no such clause.<sup>23</sup> Nevertheless the ECHR can be utilized for the purpose of protecting indigenous rights.

The European Convention on Human Rights and the protocols thereto contain two distinct anti-discrimination clauses. The better-known norm is Article 14, which protects against discrimination as far as the other rights contained in the Convention are concerned: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

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19. International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

20. Tawhida Ahmed & Anastasia Vakulenko, *Minority Rights 60 Years after the UDHR: Limits on the Preservation of Identity?*, INT'L HUM. RTS. L. - SIX DECADES AFTER THE UDHR & BEYOND at 155 (2010).

21. *Id.*

22. *Id.*

23. AUSTRALIAN LAW REFORM COMMISSION, RECOGNITION OF ABORIGINAL CUSTOMARY LAWS ¶ 186 (1977) [hereinafter ALRC Report], <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC31.pdf>.

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>24</sup>

In other words, it is not possible to claim a violation of the Convention solely based on Article 14, but only in conjunction with another right, such as the freedom of religion protected under Article 9<sup>25</sup> or the right to private life under Article 8.<sup>26</sup> Article 1 of Protocol 12 to the ECHR on the other hand provides a general anti-discrimination norm:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.<sup>27</sup>

The latter norm, however, is of limited value because not all states which have ratified the ECHR<sup>28</sup> have also ratified Protocol 12.<sup>29</sup> The European Court of Human Rights cannot take into account other treaty obligations (e.g. under ILO Convention 169) but only the European Convention on Human Rights and its protocols.<sup>30</sup> The ECHR can nevertheless be utilized for the realization of indigenous rights in many different settings.

#### IV. GEOGRAPHICAL SCOPE

From an indigenous rights perspective, the ECHR is relevant with regard to the Nordic countries Norway, Sweden, and Finland, which, in addition to Russia, include the Sámi homeland area (Sápmi), Russia (which is home to a number of indigenous groups in addition to the Sámi), Greenland and French Guyana. The latter is an integral part of the French Republic. As such, it is not only part of the EU, but also falls within the geographical scope of the European Convention on Human Rights. While Greenland enjoys some degree of autonomy from Den-

24. European Convention on Human Rights, *supra* note 14, at art. 14.

25. *Id.* at art. 9 § 1.

26. *Id.* at art. 8 § 1.

27. *Id.* at art. 1 (prot. 12).

28. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953,

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (status as of Oct. 17, 2014).

29. *Id.*

30. See Rules of Court, Registry of the Court, Eur. Ct. H.R., at 1, [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

mark,<sup>31</sup> the ECHR is applicable to Greenland. When Denmark became a party to the ECHR, the Convention only applied to metropolitan Denmark. Denmark made a declaration under Article 56 para. 1 ECHR:

[a]ny State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.<sup>32</sup>

By doing so, Denmark extended the territorial applicability of the Convention to Greenland. However, already in 1953 “Greenland became part of metropolitan Denmark,”<sup>33</sup> thus making the ECHR directly applicable to Greenland.<sup>34</sup> The earlier declaration under Article 56 ECHR thereby became irrelevant.<sup>35</sup> In 2009, Denmark enacted the Act on Greenland Self-Government.<sup>36</sup> This raises the question of the applicability of the ECHR to actions of the autonomous government of Greenland rather than the overall royal Danish government. There have not been many cases involving situations in Kalaallit Nunaat, but the absence of any mention of a special situation in *J. M. v. Denmark*,<sup>37</sup> a case which had been brought in June 2009,<sup>38</sup> indicates that the ECHR continues to apply as before. This impression is strengthened by the continued role of Denmark with regard to Human Rights treaties concerning Kalaallit Nunaat. The issue of autonomy, therefore, is not much different from the legal situation encountered in federal states like Germany, Russia or Switzerland. Regardless of the internal organization of the state, and assuming that there has been no declaration excluding any part of the territory from the geographical scope of the ECHR, the state party to the ECHR is fully responsible for all violations of the Convention by all state organs in the widest sense of the term. The nation state as the party to the ECHR is responsible for human rights violations under its jurisdiction, regardless of the local entity which might have acted

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31. ACT ON GREENLAND SELF-GOVERNMENT, act No. 473 (last updated June 12, 2009), [http://www.stm.dk/multimedia/GR\\_Self-Government\\_UK.doc](http://www.stm.dk/multimedia/GR_Self-Government_UK.doc).

32. European Convention on Human Rights, *supra* note 14, at art. 56 § 2.

33. ROBIN C. A. WHITE & CLARE OVEY, JACOBS, WHITE, & OVEY - THE EUROPEAN CONVENTION ON HUMAN RIGHTS 99 (Oxford U. Press, 5th ed. 2010).

34. *Id.*

35. *Id.*

36. *See generally* ACT ON GREENLAND SELF-GOVERNMENT, act No. 473 (last updated June 12, 2009), [http://www.stm.dk/multimedia/GR\\_Self-Government\\_UK.doc](http://www.stm.dk/multimedia/GR_Self-Government_UK.doc).

37. *J.M. v. Den.*, App. No. 34421/09, HUDOC Eur. Ct. H.R. (Nov. 13, 2012), <http://hudoc.echr.coe.int/eng?i=001-114485>.

38. *Id.*

and the powers which might have been transferred to it. Even if, under domestic law, the federal authorities are unable to prevent the abuse, the state is held accountable for human rights violations by all organs. The domestic organization of the state does not offer states a way to avoid responsibility under the ECHR. The same applies to the form of organization a state chooses. If a *de facto* public authority operates in the form of a fully state-owned and state-controlled corporation, that corporation might be able to claim rights under the ECHR if it “carries out commercial activities subject to the ordinary law of the country in question.”<sup>39</sup> However, the state cannot avoid responsibility under the ECHR if such a state-owned corporation were to violate human rights. In the context of indigenous rights the latter is particularly important if the administration of large land areas is transferred from the state to specific bodies such as the Finnmark Estate in Norway or Metsähallitus in Finland.

## V. ECHR CASE LAW REGARDING INDIGENOUS PEOPLES

### A. Diverse uses of the term “indigenous”

While languages rights have been dealt with by the Convention’s organs already at an early stage in the evolution of European Human Rights law,<sup>40</sup> directly, indigenous issues have played only a very small role in the case law of the European Court of Human Rights. As of 13 March 2014, the word “indigenous” is only mentioned in a few cases.

In *Bertrand Russell Peace Foundation Ltd. v. The United Kingdom* the word “indigenous”<sup>41</sup> is used with the meaning “domestic”<sup>42</sup> or “national”<sup>43</sup> referring to the state’s “domestic legislation.”<sup>44</sup> In *Sramek v. Austria*<sup>45</sup> the Court likewise used the term “indigenous” to refer to the local population as opposed to foreigners who are moving to the area in

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39. *Islamic Republic of Iran Shipping Lines v. Turkey*, App. No. 40998/98, HUDOC Eur. Ct. H.R. ¶ 80 (Dec. 13, 2007), <http://hudoc.echr.coe.int/eng?i=001-83951>.

40. See generally Case “Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium” v. Belgium (Merits), App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 & 2126/64, HUDOC Eur. Ct. H.R. (July 23, 1968), <http://hudoc.echr.coe.int/eng?i=001-57525>.

41. *Bertrand Russell Peace Found. Ltd. v. United Kingdom*, App. No. 7597/76, Eur. Comm’n H.R. (1978), <http://hudoc.echr.coe.int/eng?i=001-73447>.

42. *Id.* at 120.

43. *Id.* at 121.

44. *Id.* at 119.

45. See generally *Sramek v. Austria*, App. No. 8790/79, Eur. Ct. H.R. (1984), <http://hudoc.echr.coe.int/eng?i=001-57581>.



question.<sup>46</sup> In this case, the “indigenous population”<sup>47</sup> is the Austrian majority population. Accordingly, this case is not about indigenous peoples (as the term is commonly understood in international law) either. The same meaning—describing the original majority population as opposed to immigrants—was also employed by the Court in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.<sup>48</sup> “Indigenous” is understood as being the opposite of “foreigner”.<sup>49</sup> The same use can be found in relation to materials or products rather than persons in *Denev v. Sweden*<sup>50</sup> as well as in *F.L. and M.L. v. Austria*.<sup>51</sup> In its 2001 judgment in the inter-state case<sup>52</sup> of *Cyprus v. Turkey*,<sup>53</sup> the Court resorted to the use already outlined, using the word “indigenous”<sup>54</sup> to describe non-immigrants, more specifically, the originally ethnic Turkish part of the Cypriot population as opposed to Turkish settlers who came to the illegally occupied part of the island after Turkey’s invasion.<sup>55</sup> Essentially the same use can be found in the government minister’s statement, which is reprinted in *Murphy v. Ireland*,<sup>56</sup> in a quote in *Andrejeva v. Latvia*,<sup>57</sup> and it appears in the description of the applicant’s view in *Savenkovas v. Lithuania*.<sup>58</sup>

An unnecessary use of the term can be found in domestic rules, which have been reprinted in the case of *Koretsky and others v. Ukraine*<sup>59</sup> and which referred to the preservation of “indigenous [wild] natural systems . . . in cities and towns.”<sup>60</sup>

46. *Id.* ¶ 15

47. *Id.*

48. *Abdulazi et. al. v. United Kingdom*, App. No. 9214/80, Eur. Ct. H.R. (1985), <http://hudoc.echr.coe.int/eng?i=001-57416>.

49. *Id.* ¶ 29.

50. *Denev v. Sweden*, App. No. 12570/86, Eur. Comm’n H.R., ¶ 4 (1989), <http://hudoc.echr.coe.int/eng?i=001-2615>.

51. *F. L. & M. L. v. Austria*, App. No. 17588/90, Eur. Comm’n H.R., ¶ 2 (1993), <http://hudoc.echr.coe.int/eng?i=001-1639>.

52. European Convention on Human Rights, *supra* note 14, at art. 33.

53. *Cyprus v. Turkey*, Eur. Ct. H.R. (2001), <http://hudoc.echr.coe.int/eng?i=001-144151>.

54. *Id.* ¶¶ 330, 333, 346.

55. *Id.* ¶¶ 330, 346.

56. *Murphy v. Ireland*, App. No. 44179/98, Eur. Ct. H.R., 10 (2003), <http://hudoc.echr.coe.int/eng?i=001-61207>.

57. *Andrejeva v. Latvia*, App. No. 55707/00, Eur. Ct. H.R., 52 n.1 (2009) (partly dissenting opinion of Judge Ziemele), <http://hudoc.echr.coe.int/eng?i=001-91388>.

58. *Savenkovas v. Latvia*, App. No. 871/02, Eur. Ct. H.R., 24 (2008), <http://hudoc.echr.coe.int/eng?i=001-89621>.

59. *Koretsky and others v. Ukraine*, App. No. 40269/02, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-85679>.

60. *Id.* at 3.

In *M. v. The United Kingdom*<sup>61</sup> reference is made to “the indigenous Irish national minority of Northern Ireland.”<sup>62</sup> This phrase is most unfortunate as it can lead to confusion between different legal concepts, in particular the concepts of ‘national minority’ and ‘indigenous people,’ but also with regard to the continued British occupation of Ulster.<sup>63</sup> The ethnic Irish population of Northern Ireland is the original population of Northern Ireland. In so far it is ‘indigenous’ within a rather wide meaning of the term, although not within the meaning of the term as it is used today when we talk about the rights of indigenous peoples. In any case, this case does not provide significant information regarding the treatment of indigenous peoples under the ECHR.

In the 1997 Decision in *Kapan v. Turkey*,<sup>64</sup> the term indigenous was used somewhat more in the sense which is of interest for our purposes, although without explicit reference to the tribal lifestyle commonly associated with indigenous groups when the Commission noted that “[i]t is submitted that the Kurds are an indigenous racial group in Turkey.”<sup>65</sup> Adding the legally irrelevant term “racial” is unfortunate, but cannot be blamed on the Convention organs as the Commission here only references a submission that has been made to it. Yet, the phrase “indigenous racial group as well as a distinct national minority” could be read as late as 2001.<sup>66</sup>

The first time the term ‘indigenous’ was used in the modern sense of the rights of indigenous peoples was in the case of *Kara v. United Kingdom*,<sup>67</sup> in which the term was only mentioned in passing. In this case, the Commission found that a public authority’s dress code for employees was not incompatible with the applicant employee’s rights under Article 8 ECHR.<sup>68</sup> The applicant in *Kara* had formerly been employed by the Inner London Education Authority.<sup>69</sup> The applicant in

61. *M. v. United Kingdom*, App. No. 10316/83, Eur. Comm’n. H.R. (1984), <http://hudoc.echr.coe.int/eng?i=001-73633>.

62. *Id.* at 132 n.3.

63. *Northern Ireland*, WIKIPEDIA [https://en.wikipedia.org/wiki/Northern\\_Ireland](https://en.wikipedia.org/wiki/Northern_Ireland) (last visited Jan. 12, 2016, 12:15 AM),.

64. *Siyamet Kapan v. Turkey*, App. No. 25657/93, Eur. Comm’n. H.R. (1997), <http://hudoc.echr.coe.int/eng?i=001-3430>.

65. *Id.* at 3.

66. *Avşar v. Turkey*, App. No. 25657/94, Eur. Ct. H.R. 97 (2001), <http://hudoc.echr.coe.int/eng?i=001-59562>.

67. *Paul Kara v. United Kingdom*, App. No. 36528/97, Eur. Comm’n H.R. (1998), <http://hudoc.echr.coe.int/eng?i=001-4438>.

68. *Id.* at 4.

69. *Id.* at 2.

*Kara*:

is a bisexual male transvestite and wears clothes which are conventionally considered as "female." He is not transsexual and does not wish to become a woman. He dresses in this way to give expression to his identity and sexuality and to what he regards as the innate feminine aspects of his personality. He also describes himself as a "Berdache Shaman" which is said to be an American indigenous tradition in which certain men express themselves through dressing in conventionally female clothing."<sup>70</sup>

The self-designation as *berdache* surprises, as the word originally meant slave (Arabic: *bardaj*) or prisoner (Persian: *bardah*)<sup>71</sup> and has been used in the early 19th century in North America to describe young male prostitutes.<sup>72</sup> The term should not be used anymore to describe indigenous persons, as the term 'two-spirit' seems to be preferred now in this context.<sup>73</sup> It remained unclear whether the applicant in *Kara v. United Kingdom* actually is an indigenous person, or used an indigenous label or label which has been applied to some indigenous persons by non-indigenous persons in the past.<sup>74</sup> Also, the applicant did not claim the social status of a woman within an indigenous group or to be woman.<sup>75</sup> The absence of such a claim marks a clear difference to the concept of "two-spirits". Therefore, it appears, to be at best very questionable if the applicant in *Kara* actually brought a case related to indigenous rights. The Commission did not elaborate on the applicant's claim to indigenoussness further and treated the case like any other application.<sup>76</sup> The Commission had no reason to deal with the shamanistic aspect of the application any further because Article 8 ECHR would have been applicable anyway also without this particular aspect of *Kara's* claim.

In the case of *Quark Fishing Ltd. v. the United Kingdom*, the ECHR merely referred to the fact that there were no indigenous groups present in South Georgia and the South Sandwich islands at the time they came under British jurisdiction, without any further explanation as

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70. *Id.*

71. Farlex, The Free Dictionary (last accessed Oct. 18, 2014), <http://www.thefreedictionary.com/berdache>.

72. *Id.*

73. *Two Spirit 101*, NATIVEOUT (last accessed Feb. 20, 2016), <http://www.nativeout.com/twospirit-rc/two-spirit-101/>.

74. *Paul Kara v. United Kingdom*, Eur. Comm'n H.R. (1998).

75. See generally *id.* at 2

76. *Id.*

to the legal relevance of this statement.<sup>77</sup> Similarly, in *Rengifo Alvarez v. the Netherlands*,<sup>78</sup> reference is made to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia of 27 May 2010.<sup>79</sup> In explaining this document, reference is made to indigenous persons.<sup>80</sup> Apart from this short reference, indigenous issues do not play a role for this decision. In *M.Y.H. and others v. Sweden*,<sup>81</sup> it is mentioned (in the context of a claim for asylum in Sweden) that “the Yezidi community is indigenous to Nineveh and the KRG governorate of Dahuk.”<sup>82</sup> However, this indigeness is not referred to again later in the case and it appears that here the term indigenous has been used to describe the fact that said community has deep historic roots in the region rather than that the Yezidi are an indigenous community within the meaning of international law norms such as ILO Convention No. 169 (ILO 169)<sup>83</sup> or the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>84</sup> In the *Chagos Islanders* case,<sup>85</sup> it was noted that the islands in question had initially been devoid of any population,<sup>86</sup> essentially only clarifying that indigenous peoples’ rights in the sense the term is usually employed in general international law were not at issue in this case. In the same case, the Court also took into account information received from Minority Rights Group and Human Rights Watch on indigenous rights.<sup>87</sup>

77. *Quark Fishing Ltd. v. United Kingdom*, App. No. 15305/06, Eur. Ct. H.R. (2006), <http://hudoc.echr.coe.int/eng?i=001-77008>.

78. *Alvarez v. Netherlands*, App. No. 14232/07, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-108355>.

79. U.N. High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia (*last accessed* Oct. 18, 2014), <http://www.refworld.org/docid/4bfe3d712.html>; *see also* *Alvarez v. Netherlands*, Eur. Ct. H.R. (2011).

80. *See generally* Asylum Guidelines, *supra* note 79, at 17-20

81. *M.Y.H. and others v. Sweden*, App. No. 50859/10, Eur. Ct. H.R. ¶ 28 (2013) (rectified under Rule 81 on Dec. 3, 2013), <http://hudoc.echr.coe.int/eng?i=001-121567#%22itemid%22:%22001-121567%22>).

82. *M.Y.H. v. Sweden*, *supra* note 79, ¶ 28.

83. Convention concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, ILO 76/169, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

84. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. GAOR, 61st Sess., Supp. No. 53, U.N. Doc. A/61/53 (Mar. 2008), [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf).

85. *Chagos Islanders v. United Kingdom*, App. No. 35622/04, Eur. Ct. H.R. at 2, 15-16 (2012), <http://hudoc.echr.coe.int/eng?i=001-115714#%22itemid%22:%22001-115714%22>).

86. *Id.* at 2.

87. *See id.* at 15-16.

In *D.H. and others v. the Czech Republic*<sup>88</sup> and *Oršuš and others v. Croatia*,<sup>89</sup> inter alia, Article 30 of the Convention on the Rights of the Child<sup>90</sup> (CRC) is reprinted:<sup>91</sup>

[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.<sup>92</sup>

In *Catan and others v. Moldova and Russia*, the Court quoted Article 29 CRC: "1. States Parties agree that the education of the child shall be directed to . . . (c) [t]he development of respect for the child's parents, his or her own cultural identity, language and values."<sup>93</sup>

Similarly, in *Markin v. Russia*,<sup>94</sup> Judge Pinto de Albuquerque made reference to the case of *Maya Indigenous Communities of the Toledo District v. Belize*<sup>95</sup> as well as to the Human Rights Committee's case *Länsman et al. v. Finland, no. 2*.<sup>96</sup> In the same judge's dissenting opinion in *Tatukus v. Lithuania*,<sup>97</sup> reference is made to the Inter-American Court of Human Rights' decision in *Yakye Axa Indigenous Community v. Paraguay*.<sup>98</sup> While the reference to the CRC might be explained with

88. *D.H. v. Czech Republic*, App. No. 5725/00, Eur. Ct. H.R. 37 (2007), <http://hudoc.echr.coe.int/eng?i=001-83256#%22itemid%22:%22001-83256%22>}.

89. *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R. 38 (2010), <http://hudoc.echr.coe.int/eng?i=001-97689#%22itemid%22:%22001-97689%22>}.

90. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/50/155 (Dec. 21, 1995) (amended Nov. 18, 2002), <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

91. *D.H. v. Czech Republic*, *supra* note 88, at 37; *Oršuš v. Croatia*, *supra* note 89, at 38

92. Convention on the Rights of the Child, *supra* note 90, at 9.

93. *Catan and others v. Moldova and Russia*, App. Nos. 43370/04, 8252/05 and 18454/06, Eur. Ct. H.R. 31 (2012), <http://hudoc.echr.coe.int/eng?i=001-114082#%22itemid%22:%22001-114082%22>}.

94. *Konstantin Markin v. Russia*, App. No. 30078/96, Opinion of Pinto de Albuquerque, Eur. Ct. H.R. 61 n. 2 (2012), <http://hudoc.echr.coe.int/eng?i=001-109868#%22itemid%22:%22001-109868%22>}.

95. *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04 (2004), [http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm#\\_ftn1](http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm#_ftn1).

96. H.R. Committee, *Jouni E. Länsman et al. v. Finland*, Comm. No. 671/1995, annex, U.N. Doc. CCPR/C/58/D/671/1995 (No. 22, 1996), [https://www.escr-net.org/sites/default/files/HR's\\_Committee\\_Decision\\_Annex.html](https://www.escr-net.org/sites/default/files/HR's_Committee_Decision_Annex.html).

97. *Tatukus v. Lithuania*, App. No. 29474/09, Opinion of Pinto de Albuquerque, Eur. Ct. H.R. 31 n. 16 (2012), <http://hudoc.echr.coe.int/eng?i=001-114770#%22itemid%22:%22001-114770%22>}.

98. *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (Jun. 7, 2005),

that Convention's widespread ratification and hence a highly likely familiarity of the Court with it, concerning indigenous rights in the proper sense of the term it can be concluded that they are at least 'on the radar screen' of Court or at least in this case one particular judge.

However, indigenous issues were not necessarily (if at all) at the heart of the cases referred to so far. A more serious claim to indigenouness can be found in *Vatan v. Russia*.<sup>99</sup> The applicant, a political party, "was founded 'to support the renaissance of the Tartar nation and to protect Tartars' political, socio-economic and cultural rights."<sup>100</sup> "The name 'Tartar' applies to the peoples of Turkic origin speaking a language which belongs to the Ural-Altai language family."<sup>101</sup> The applicant used the term "indigenous" to refer to the "tartars, chuvash, erzya, moksha, mari, bashkir" as "the indigenous population of the Volga Region" and as "heirs of the great Islamic culture," and demanded "legitimation of indigenous languages," elections based on ethnicity, and education in minority languages.<sup>102</sup> The Court first found that it did not have enough information as to whether Articles 9, 10, or 11 ECHR had been violated<sup>103</sup> and later held that the applicant was not a victim within the meaning of Article 34 ECHR.<sup>104</sup> In neither case did the Court make any further reference to the claim of indigenouness.

So far, it appears that these cases form several groups, including cases in which the term is used with meanings wider than the one used for indigenous rights law as well as cases in which indigenous issues are only mentioned in passing or in quotations. This leaves only a handful of cases in which the Convention actually had to deal with indigenous issues in the legal sense of the term.

### *B. Indigenous rights cases in the narrow sense of the term*

There have, however, also been a number of cases which actually related to indigenouness in the way the term is most commonly

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[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf).

99. *Vatan v. Russia*, App. No. 47978/99, Eur. Ct. H.R. (2002).

100. *Id.* ¶ 9.

101. *Id.*

102. *Id.* ¶ 12. Although applicant uses the phrase "national language," it is clear from the context that the applicant is referring to the minority language as the language of a "nation" rather than to the Russian language.

103. *Id.* ¶ 42-46.

104. *Id.* ¶ 53.

understood. *G. and E. v. Norway* was the first case before the Commission which dealt with indigenous rights in the proper sense of the term.<sup>105</sup> The case dealt with a part of recent Sámi history which has fundamentally changed the interaction between the Sámi people and the mainstream society in Norway.<sup>106</sup> The applicants were a reindeer herder (Mr G.) and a fisherman and hunter (Mr E.), both living in different locations in the municipality of Alta.<sup>107</sup> In June 1979, the Norwegian government decided to go forward with already controversial plans to construct a dam in the valley of the Alta-Kautokeino river for the purpose of generating electricity.<sup>108</sup> Over the summer of 1979 there had been several demonstrations by Sámi persons, both in the Norwegian side of Sápmi as well as in Oslo.<sup>109</sup> This included the hunger strike by five Sámis in Oslo<sup>110</sup> and the building of a Sámi tent in front of the Parliament building.<sup>111</sup> While the Commission accepted the possibility that the construction of the Alta dam might interfere with the applicants' rights to private life under Article 8(1) ECHR,<sup>112</sup> it held that based on "the careful consideration of the necessity of the project by the national organs, the interference could reasonably be considered as justified under Article 8, para. 2, as being in accordance with law, and necessary in a democratic society in the interests of the economic well-being of the country."<sup>113</sup> Notably, the Commission also stated that a "particular life style," which has its roots in the membership of the applicant in an indigenous people, can be protected under the right to private life which is protected by Article 8 ECHR.<sup>114</sup> Understanding indigeneity as a "particular life style,"<sup>115</sup> though, does not encompass the totality of indigeneity. Being an indigenous person and a member of an indigenous community is more than merely a lifestyle. A lifestyle can be changed, indigeneity is however also a question of identity.

In Sweden, the right to keep reindeer, a common form of liveli-

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105. *G. & E. v. Norway*, App. Nos. 9278/81 and 9415/81 Eur. Comm'n H.R. Dec. & Rep. 31-32, 35-36 (1983).

106. Irja Seurujärvi-Kari, *Alta Dispute*, in ULLA-MAIJA KULONEN ET AL., *THE SAAMI - A CULTURAL ENCYCLOPEDIA* 11-12 (Ulla-Maija Kulonen et al. eds., 1st ed. 2005).

107. *G. & E. v. Norway*, *supra* note 105, at 31.

108. *Id.*

109. KULONEN ET AL., *supra* note 106, at 11.

110. *Id.*

111. *G. & E. v. Norway*, *supra* note 105, at 32.

112. *Id.* at 36.

113. *Id.*

114. *Id.* at 35.

115. *Id.*

hood for the indigenous Sámi people, is held by the members of Samebys, collectively referred to as Sami Villages, which are not administrative units in the sense of public law but rather geographic-economic-ethnic entities. In two cases, *Könskämä and 38 other Sámi villages v. Sweden*<sup>116</sup> and *Handölsdalen Sami Village and others v. Sweden*,<sup>117</sup> the Strasbourg organs had to deal with conflicts involving reindeer herding rights. In the former case, the applicants had not exhausted all available remedies.<sup>118</sup> In the latter case, the Court did not find a violation of the right to a fair trial under Article 6 (1) ECHR, despite a relative lack of funding on the part of the applicants during the domestic proceedings,<sup>119</sup> but a violation of the same right due to the length of the court proceedings in Sweden.<sup>120</sup> It was, however, the former argument which appears to have carried more weight for the applicant. In this context it has to be kept in mind that it can be extremely difficult, if not impossible, for indigenous persons to prove that they and their ancestors have used a specific area of land in a traditional way for an extended time. Often such land uses will not be registered in writing and due to the passage of time, it will hardly be possible to provide first hand witness statements reaching back a few centuries. Particular claims to land use since time immemorial can thus cause significant challenges from the perspective of indigenous litigants. Overcoming such practical obstacles (if possible at all) will require more historical and legal research than will be necessary by the authorities against which indigenous land use claims might be directed. In the *Handölsdalen* case, the Court found that “the applicants [had not been] prevented by the [domestic] courts from introducing all the material and arguments they considered relevant to the case”<sup>121</sup> and that in so far Sweden had complied with Article 6 (1) ECHR.<sup>122</sup>

In *Johtti Sappmelaccat Ry and others v. Finland*,<sup>123</sup> a change in the

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116. *Könskämä and 38 other Sámi villages v. Sweden*, App. No. 27033/95 Eur. Comm’n H.R. Dec. (1996).

117. *Handölsdalen Sami Village and others v. Sweden*, App. No. 39013/04, HUDOC ¶¶ 58-59, 66 Eur. Ct. H.R. (2010), [http://hudoc.echr.coe.int/eng?i=001-97993#{"itemid":\["001-97993"\]}](http://hudoc.echr.coe.int/eng?i=001-97993#{).

118. *Könskämä v. Sweden*, *supra* note 116, at 7.

119. *Handölsdalen v. Sweden*, *supra* note 117, ¶ 59.

120. *Id.* ¶ 66.

121. *Id.* ¶ 58.

122. *Id.* ¶ 59.

123. *Johtti Sappmelaccat Ry and others v. Finland*, App. No. 42969/98, Eur. Ct. H.R. (2005), <http://caselaw.echr.globe24h.com/0/0/finland/2005/01/18/johtti-sappmelaccat-ry-and-others-v-finland-68136-42969-98.shtml>.



domestic fishing law did not constitute a violation of the Convention<sup>124</sup> because fishing rights were defined not on the basis of residence in a one of the municipalities of the Sámi home area in Northern Finland (which includes the municipalities of Inari, Utsjoki, Enontekiö and parts of the municipality of Sodankylä), but on the basis of residence in the entirety of the Sámi home area.<sup>125</sup> This decision has since been reversed. For individuals in municipalities with particularly good fishing areas, this could mean more competition from residents of other communities as all applicants lived in Enontekiö,<sup>126</sup> the least densely populated municipality in the Sámi home area. The Court did not investigate the factual consequences of the change in the Finnish law for the applicants - and it did not have to do so because it was providing evidence of such a real (and not only hypothetical) victimization in light of an absence of a worsened legal position should have been provided by the applicants. In this case, the Court also clarified that it is not the Sámi villages but rather individuals which have fishing rights under Finland's Fishing Act.<sup>127</sup>

In the 2006 decision in the case *Hingitaq 53 v. Denmark*, concerning the displacement of indigenous Inughuit for the purpose of the construction of a military base in 1940s and 1950s, the Court concluded that there had been no violation of Article 1 to Protocol 1 of the European Convention on Human Rights because Denmark had paid compensation and in doing had "str[uck] a fair balance between the proprietary interests of the persons concerned."<sup>128</sup>

What many of these cases relating to indigenous issues have in common, with the exception of *G. and E. v. Norway* and the *Handölsdalen* case, is that they were declared inadmissible. Today, due to Protocol 14 to the ECHR and recent changes to the Rules of Court of the ECHR (RoC-EctHR), admissibility is an even greater issue. More than ever before, applicants are well advised to retain legal counsel before submitting an application to the European Court of Human Rights. While admissibility is often the biggest hurdle for applicants, it is a hurdle that sometimes must be taken. It follows that the European Court of Human Rights is in principle willing to deal with indigenous issues

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124. *Id.* at 8.

125. *Id.* at 2.

126. *Id.* at 12.

127. *Id.* at 9.

128. *Hingitaq 53 v. Denmark*, App. No. 18584/04, Eur. Ct. H.R. 3, 19 (2006), <http://caselaw.echr.globe24h.com/0/0/finland/2005/01/18/johtti-sapmelaccat-ry-and-others-v-finland-68136-42969-98.shtml>.

within the framework of the ECHR. It also has to be kept in mind that the admissibility criteria have become stricter and stricter over the last years in response to the Court's enormous workload and the large backlog of cases. Potential indigenous applicants are therefore well advised to retain legal counsel (although neither the Convention nor the Court's own Rules make this obligatory) in order to make best use of the possibilities provided by the ECHR.

The case of *G. and E. v. Norway*, decided in the early 1980s, prior to the entry into force of ILO 169, still shows a significant lack of understanding on the part of the European Court of Human Rights as far as the identity of indigenous persons is concerned.<sup>129</sup>

## VI. ECHR LITIGATION

Proceedings before the European Court of Human Rights take place in English or French. While in the past, it was possible to write the application in any of the official languages of a member state, a recent change to the RoC-ECtHR<sup>130</sup> under Rule 47 RoC-ECtHR requires that an application form has to be filled out in leading official languages of the states parties but, with the exception of Catalan,<sup>131</sup> not in regional or indigenous languages. Initially, this may not seem to be a hurdle given the widespread availability of academic education in leading languages across Europe, but taking into account that in many countries access to education in remote areas (often the homelands of indigenous peoples) can be very limited, this can indeed make it much harder for an indigenous person to file a claim. This could be a problem in particular for potential applicants from Russia. However, at this present moment, saying so would be mere speculation. While applicants of the ECHR are not required to pay a fee or to be represented by an attorney, the new application form requirements make the Court less accessible than it used to be.<sup>132</sup> While it is understandable that States want to ease the Court's enormous workload, doing so by making it harder to bring a case to the Court is not in the best interest of human rights. Instead, the number of staff and judges could have been increased as there is currently one judge per member state. This, however, would have meant an increase in expenses which would have to be carried by the member

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129. *G. & E. v. Norway*, *supra* note 105, at 31-32, 35-36.

130. Rules of Court, *supra* note 30, at 24-25.

131. See <<http://www.echr.coe.int/Pages/home.aspx?p=applicants/ol&c=>>>.

132. Rules of Court, *supra* note 30, at 24-25.

states. Rather than funding and equipping the Court, an institution of such importance for the administration of justice for 800 million people, states have elected to save money and make it harder for victims of human rights violations to achieve justice even in those cases where justice has been denied on the national level. The debates about the future of the Court are far from over, but in the meantime, applicants will have to live with the current restrictions. For potential indigenous applicants, this means that they will have to obtain language skills or be represented by a lawyer with both expert knowledge and ideally, language skills in the official languages of the Court as well as national and indigenous languages. Many of the cases which are brought before the ECHR are brought by attorneys who have already dealt with the case on the national level. This is primarily because bringing a case before the ECHR requires the prior exhaustion of all domestic legal remedies.<sup>133</sup> This includes all possible appeals proceedings and is a process which can take many years. Due to this, a client will often be reluctant to change his or her attorney after that attorney already has handled the case for seven or more years. It is therefore necessary that attorneys have at least a basic understanding of the procedure before the ECHR. Unfortunately this is not always the case. A very small number of attorneys across Europe, including this author, have specialized in providing legal services specifically with regard to proceedings before the ECHR. Making this highly specialized service in European Human Rights Consultation and Litigation accessible to a wider potential clientele requires attorneys to learn languages to the point at which they can handle legal matters. The wide range of indigenous languages does not make this an easy task.

## VII. CONCLUSIONS

Despite the presence of indigenous groups in several states which are parties to the European Convention on Human Rights, the ECHR has dealt with indigenous rights only on a few occasions. The terms "indigenous", "native" and the like have been used in ways which are not commonly associated with the legal field of indigenous rights. The Court seems not to have a concept of indigeneity or indigenous identity, but different conceptions relating to such terms. The Court will take into account the special circumstances of cases, as it has shown in the *Handölsdalen* case, but not necessarily the identity of indigenous per-

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133. European Convention on Human Rights, *supra* note 14, at art. 35.

sons *qua* indigenous persons. In light of Article 14 of ECHR,<sup>134</sup> it should not be surprising that no such distinction is made. Nevertheless, the European Convention on Human Rights provides a useful, but underutilized, way for indigenous peoples to assert and protect their rights. The fact that the ECHR applies to the homelands of a number of indigenous peoples and that indigenous groups and individuals fall under the jurisdiction of states which have ratified the ECHR opens the question as to how the ECHR can be utilized to protect the rights of indigenous peoples. The ECHR and indigenous rights documents protect both groups and individuals, although the indigenous rights protect indigenous persons *qua* members of an indigenous group. The function of indigenous rights, when compared to individual or collective human rights, is however wider in that indigenous rights also are not only meant to address current but also to compensate for past injustices suffered by indigenous peoples. Using the ECHR for the protection of the rights of indigenous individuals and groups, requires that an increased awareness of their collective and individual rights is created among indigenous peoples. The cases which have been dealt with by the Convention organs so far cover only a fraction of what is possible. Unable to provide a comprehensive overview over indigenous rights under the Convention, any survey of the existing case law can only serve to mark what has been achieved so far.<sup>135</sup> Most of the journey is still ahead.

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134. *Id.* at art. 14.

135. *Id.*