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Minority Rights Jurisprudence of the UN Human Rights Treaty Bodies

HANDBOOK

authored by
David Keane

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TOM LANTOS INSTITUTE HANDBOOK ON THE MINORITY RIGHTS JURISPRUDENCE OF THE UN HUMAN RIGHTS TREATY BODIES

Contents

1. INTRODUCTION

This Handbook compiles the jurisprudence or caselaw of the UN human rights treaty bodies as it relates to the protection of minorities. This exercise has not been performed to date in the sense of engaging the full spectrum of all nine of the core UN human rights treaties. Certainly, much literature exists on the jurisprudence of the Human Rights Committee in implementing Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which remains the principal binding international minority rights standard.[1] There are also reports that encompass minority rights angles in the caselaw of other UN treaty bodies.[2] However, these reports do not cover all the UN human rights treaties, and are well over ten years old. As a result, the potential of a number of UN treaty bodes in relation to minority rights protection has not been fully explored, including more recent decisions in this area.

It is important to recognise that for many UN treaty bodies, their jurisprudence is in a relatively embryonic stage; some have only gained an individual communications mechanism and accompanying jurisprudence in more recent years. Furthermore, the optional character of individual communications mechanisms is the most significant factor in limiting both the use and significance of this mechanism. Individual communications are categorically *not* a universal system – far more States Parties to UN human rights treaties from the global North have opted in to individual communications mechanisms than from other regions. As a result, a preponderance of caselaw emanates in relation to Europe, as well as Australia, Canada and New Zealand, although cases do arise in relation to Africa, Asia, and Central and South America.

Hence, individual communications mechanisms cannot be understood in complete isolation from the other monitoring mechanisms of UN treaty bodies. In particular, concluding observations, general comments and other procedures provide a UN treaty body with a means of setting out how its provisions are to be applied in *all* States Parties. This is particularly significant in relation to minorities since, of the nine UN human rights treaties, only two expressly refer to these groups in their text - the ICCPR and the UN Convention on the Rights of the Child (UN CRC). Minority rights protections are often interpreted by UN treaty bodies as forming a part of their mandate despite the absence of an express provision on which to base this. This usually occurs first in concluding observations and general comments, and finds later expression in individual communications. Indeed, for some UN treaty bodies, an individual communications mechanism has been adopted after decades of practice under other procedures. Thus, for many UN treaties, it is important to first set out how their text contains minority rights standards as understood by the relevant treaty body through other procedures such as general comments and concluding observations. Having done that, we may then address their practice in individual communications.

It is well known that international law provides no accepted and binding definition of a minority. Article 27 does not contain a definition, and nor does the Human Rights Committee's General Comment 23 which sets out in more detail the meaning of the rights of minorities under the ICCPR.[3] Early UN studies on the rights of minorities, including the 1979 study by Francesco Capotorti,

[1] Article 27 ICCPR reads: 'In 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.'

[2] See Council of Europe (by Kirstin Henrard), 'The Impact of International Non-discrimination Norms in Combination with General Human Rights for the Protection of National Minorities: Several United Nations Human Rights Conventions' DH-MIN(2006)021 (2006) <https://rm.coe.int/1680097f35>; Minority Rights Group International (by Mauro Barelli, Gulara Guliyeva, Stefania Errico and Gaetano Pentassuglia), 'Minority Groups and Litigation: A Review of Developments in International and Regional Jurisprudence' (2011) <https://minorityrights.org/app/uploads/2024/01/mrg-minority-groups-and-litigation-guide.pdf>

[3] Human Rights Committee, 'General Comment No. 23 on Article 27 (Rights of Minorities)' UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).

included Indigenous peoples in the understanding of minorities under Article 27.[4] It highlighted in relation to Chile that 'minority groups include the Indigenous population', and in relation to the Philippines discussed 'the Indigenous population…officially referred to as "national cultural minorities".'[5] But even then Capotorti considered that Indigenous populations constitute a 'special category of minority'.[6] This prefigured the development of Indigenous peoples' rights as a *sui generis* category distinct from minorities. By 1986, discussions in the UN Sub-Commission saw support for the view that 'Indigenous populations should be treated separately', respecting the wish of Indigenous populations 'to be considered as peoples and not as minorities'.[7] It may be noted that the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) does not contain a single reference to minorities or minority rights.[8] Nevertheless, Indigenous peoples 'may rely on Article 27 to defend their way of life and the specific characteristics of their group'.[9] In fact, the most prominent cases under Article 27 decided by the Human Rights Committee have related to Indigenous peoples.

With that in mind, the Handbook will encompass individual communications that relate to Indigenous peoples as well as minorities, in relation to the ICCPR and all other UN human rights treaties. This is decidedly not to argue that Indigenous peoples are minorities - it is simply to point out that the work of the UN treaty bodies on minorities cannot be separated from its work on Indigenous peoples, which informs and develops our understanding of group rights and protections in the UN context. Indigenous caselaw offers many points of reference by which minority rights caselaw can be developed, even if the categories remain distinct. The jurisprudence of the UN treaty bodies in the area of minority rights, including Indigenous peoples, is not voluminous - this Handbook identifies 75 individual communications across all of the UN human rights treaties that engage to varying degrees minority and Indigenous rights issues. It is not intended to be exhaustive, and cases are identified as illustrative of a particular issue or theme; but it is intended to be comprehensive in setting out how minority and Indigenous rights elements arise under all of the UN treaties. While some cases will be familiar to minority and Indigenous rights advocates, others may not have been previously identified or considered as minority and Indigenous rights cases. In that regard, the Handbook seeks to contribute to the understanding of how all the UN treaty bodies can and do protect minority and Indigenous groups across their jurisprudence, highlighting a growing trend towards intersectionality. There are nine core international human rights treaties, in order of their adoption:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965
- International Covenant on Civil and Political Rights (ICCPR) 1966
- International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)
- Convention on the Rights of the Child (CRC) 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) 1990
- Convention on the Rights of Persons with Disabilities (CRPD) 2006
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED) 2006.[10]

[4] Francesco Capotorti, 'Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities' UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979).
[5] Ibid p. 110 and 112 Annex III.
[6] Ibid p. 10 para 50.
[7] Discussed in Commission on Human Rights, 'Compilation of Proposals Concerning the Definition of the Term "Minority"' UN Doc. E/CN.4/1987/WG.5/WP.1 (1986) p. 10 para 25(b).
[8] Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/47/1 (2007).
[9] Dieter Kugelmann, 'The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity' (2007) 11 *Max Planck UNYB* 233-263, at 248.
[10] OHCHR, 'The Core International Human Rights Instruments and their Monitoring Bodies' <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>

The individual communications procedure did not exist for a number of these treaties for many years, decades even - it took CEDAW and CRC about 20 years, and ICESCR 40 years, from their adoption to achieve this. Although broadly the UN human rights treaties all now have an individual communications system, it remains optional and not all States Parties to the UN treaties have ratified the relevant optional article or Protocol. These numbers affect the volume of caselaw that arises under each treaty. For example, the Optional Protocol to the ICCPR was adopted in 1966 and has 117 States Parties; while the Optional Protocol to the ICESCR was not adopted until 2008 and has 26 States Parties. It has been observed also in relation to all of the UN human rights treaties that 'the world's most populous countries, China, India, Indonesia and the United States of America generally do not accept individual communication mechanisms for treaties to which they are party.'[11] But the numbers of States Parties to optional protocols will grow, and for a number of instruments some initial cases highlight the potential for the development of minority or Indigenous protections under these instruments.

In addition to issues of ratification which means many States Parties cannot be the subject of an individual communication, for those States that have opted in, the procedure is often under-utilised. A report by the Universal Rights Group is instructive in illustrating how a large number of States that have opted in to individual communications procedures have never been the subject of an individual communication - some 34%, with the majority of these from Africa and Asia.[12] The report found, remarkably, that almost 20% of all individual communications in its year of study related to just one country, Denmark.[13] To a certain extent, more recent years have seen greater use of the individual communications mechanism and it continues to grow in terms of ratifications and geographic use. But it cannot be considered at present a *universal* system that reflects the universality of the treaties it seeks to implement.

This is borne out in the present Handbook, in which 75 individual communications in total are examined which raise issues of minority or Indigenous rights across the UN treaties. Of these, 42 are from Europe; 15 are from North America (specifically Canada), Australia or New Zealand; 8 are from Central or South America; 7 are from Africa (with four of these involving just one State, Tanzania); and 3 are from Central Asia. There are *none* from South Asia, East Asia, Southeast Asia, the Middle East or the Pacific Island Countries. For this reason, the State reporting and other compulsory mechanisms remain the heart of the UN human rights treaty system. Nevertheless, individual communications form an important component of UN human rights treaty monitoring and the decisions, although addressed to one State Party, create standards that are applicable to *all* States Parties to a treaty.

To examine the caselaw, recourse was had to the Office of the High Commissioner for Human Rights (OHCHR) "Jurisprudence Database", which is the central repository of the jurisprudence of the UN treaty bodies.[14] This tool allows for searching of jurisprudence by committee as well as by type of decision – in general, the Handbook excludes admissibility decisions and focusses on decisions taken on the merits. Interestingly, the database provides also an "issues" filter which includes the terms "minorities" and "Indigenous peoples". However, searching using these two terms returns caselaw results only from the Human Rights Committee. As this Handbook sets out, this is too narrow an understanding and other treaty bodies also have decisions that relate to minority and Indigenous peoples' rights.

[11] Rhona Smith, 'The Third Optional Protocol to the UN Convention on the Rights of the Child? - Challenges Arising Transforming the Rhetoric into Reality' in Michael Freeman (ed.), *The Future of Children's Rights* (Brill 2015) 178-195, at 184.

[12] Universal Rights Group, 'Reform of the UN Petitions System: An Assessment of the UN Human Rights Communications Procedures and Proposals for a Single Integrated System' (Geneva: URG 2018) <https://www.universal-rights.org/urg-policy-reports/reform-un-human-rights-petitions-system-assessment-un-human-rights-communications-procedures-proposals-single-integrated-system-3/>

[13] Ibid at 22.

[14] OHCHR, 'Jurisprudence Database' <https://juris.ohchr.org/>

It is clear that the treaties vary significantly in their focus on minorities and Indigenous peoples. Thus, the ICCPR and ICERD are very much "minority rights instruments" while at the other end, CRPD or CPED appear only tangentially concerned with these questions. Nevertheless, the minority rights contribution of *all* of the UN treaty bodies, large or small, is addressed. The UN treaty bodies are at different points in terms of the protection of minority and Indigenous rights in their caselaw, but the Handbook seeks to highlight that the door is very much open to litigate minority or Indigenous issues under all of these instruments. With that in mind, we explore the jurisprudence of the UN treaty bodies across a range of themes, specifically - autonomy; children's rights; civil and political rights; climate change; cultural rights; disability; economic and social rights; enforced disappearance; environment; freedom of religion; gender and women's rights; hate speech and freedom of expression; land rights and free, prior and informed consent; migrants and migrant workers; non-refoulement; racial discrimination and ethnic minorities; torture, police violence and minority/indigenous rights defenders; and urgent action. Some conclusions are offered on future directions.

2. MINORITY RIGHTS JURISPRUDENCE OF THE UN TREATY BODIES

AUTONOMY

Relevant Cases:

Tiina Sanila-Aikio v Finland (HRC)

The Human Rights Committee (HRC) has acted in caselaw to protect autonomous institutions of Indigenous peoples. In *Tiina Sanila-Aikio v Finland* (2019),[15] the author, President of the Sami Parliament of Finland, argued that a decision by the State Party's Supreme Administrative Court defining who is entitled to be included on the electoral roll for elections to the Sami Parliament - expanding the number of people eligible to vote or run as candidates in Indigenous parliamentary elections - departed from the consensual interpretation of section 3 of the *Act on the Sami Parliament*.[16] She claimed that this action weakened the voice of the Sami people in the Sami Parliament and the effectiveness of that Parliament in representing the Sami people in important decisions taken by the State Party that may affect their lands, culture and interests, violating the right to self-determination under Article 1 ICCPR. In addition, since the Sami Parliament plays an essential role in the protection of the Sami people's right to enjoy their culture and language and is established by the State Party to be the conduit for securing the Free, Prior and Informed Consent (FPIC) of the Sami people in matters that may affect their interests, this dilution violates Article 27 ICCPR.[17]

The Committee observed that Article 27 interpreted in the light of UNDRIP, and Article 1, enshrines 'an inalienable right of Indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development'.[18] It emphasised that in the context of Indigenous peoples' rights, Article 27 has a 'collective dimension' and the rights to political participation of an Indigenous community in the context of internal self-determination are not enjoyed merely individually.[19] It further held that the Sami Parliament constitutes the institution by which the State Party ensures the effective participation of the members of the Sami people as an Indigenous community in the decisions that affect them. As a result, the State Party's fulfilment of the obligations of Article 27 depend on the effective role that the Sami Parliament may play in decisions that affect the rights of members of the Sami community to enjoy their own culture or to use their own language in community with the other members of their group.[20] By departing from the consensual interpretation of the law determining membership in the electoral rolls of the Sami Parliament, Finland had violated the Article 25 right to take part in public life read in conjunction with Article 27. *Sanila-Aikio* became the first complaint to be decided by the HRC concerning the Sami people's right to self-determination.[21] The case reflects the growing role of self-determination in interpreting Article 27 in the context of Indigenous caselaw.[22]

[15] UN Doc. CCPR/C/124/D/2668/2015 (2019).
[16] Ibid para 1.2.
[17] Ibid.
[18] Ibid para 6.8.
[19] Ibid para 6.9.
[20] Ibid para 6.10.
[21] International Justice Resource Centre, 'Human Rights Committee: Finland's Oversight of Indigenous Politics Constitutes Violation' 14 February 2019 <https://ijrcenter.org/2019/02/14/human-rights-committee-finlands-oversight-of-indigenous-politics-constitutes-violation/>

[22] This may be contrasted with the Committee's early position that Article 1 as a collective right was non-justiciable in individual communications under the Optional Protocol. The argument was first put forward by Canada in *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* UN Doc. CCPR/C/38/D/167/1984 (1990): 'the right of self-determination is a collective one available to peoples. As such…it cannot be invoked by individuals under the Optional Protocol.' (at para 6.3) The Committee then decided the case under Article 27 only: 'Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27.' (at para 32.2)

CHILDREN'S RIGHTS

Relevant Cases:

Chiara Sacchi et al v Argentina (CRC)
M.E.V., S.E.V. and B.I.V. v Finland (CRC)

As noted, only two of the nine UN human rights treaties make express reference to minorities or minority rights - the ICCPR and the UN Convention on the Rights of the Child. The UN CRC is also the only treaty to contain the term 'Indigenous' in the operative provisions of its text. Its Article 30 recalls Article 27 ICCPR through a child rights lens:

> 'In 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.'

As with the ICCPR, the opening phrase of Article 30 'In those States in which ethnic, religious or linguistic minorities or persons of Indigenous origin exist (…)' appears not to have limited the Committee on the Rights of the Child (CRC) in protecting minority and Indigenous children in all States Parties. There are other provisions of the Convention that refer also to these groups.[23] CRC has issued General Comment 11 on Indigenous children, in which it is recognised that the Convention is the first core UN human rights treaty to include specific references to Indigenous children.[24] GC 11 does not relate also to minority children as its title indicates, although it does note: 'the Convention contains references to both minority and Indigenous children. Certain references in this general comment may be relevant for children of minority groups and the Committee may decide in the future to prepare a general comment specifically on the rights of children belonging to minority groups.'[25] That was now 15 years ago, and the Committee has not prepared such a general comment on the rights of children belonging to minority groups. Nevertheless, GC 11 remains of relevance in interpreting Convention obligations in relation to children belonging to minority groups.

In concluding observations, CRC regularly engages the minority rights aspects of its mandate. At its recent reporting session in May 2024, the Committee raised the minority rights obligations of a number of States Parties. In relation to Bhutan, it requested the State Party to '[s]trengthen measures to promote the meaningful and empowered participation of all children, including children belonging to ethnic minority groups'.[26] It called for special protection measures for children belonging to minority groups including Lhotshampa children, noting 'with deep concern the lack of progress in repatriating Lhotshampa children from refugee camps in Nepal'.[27] In the context of Egypt, the Committee considered that 'children of religious minorities, including Coptic Christians, Shia Muslims, Jehovah's Witnesses, Baha'is, and atheists continue to face varying forms of discrimination', requiring the State Party to '[a]ccord children of minority religious groups the freedom to manifest their religion'.[28] In regard to Georgia, it criticised '[p]oor school attendance and limited access to education for children belonging to ethnic minorities, in part due to the insufficient number of teachers in non-Georgian schools.'[29] Under the reporting

[23] See Article 17(d): 'States parties shall…encourage the mass media to have particular regard for the linguistic needs of the child who belongs to a minority group or who is indigenous'; and Article 29(1)(d): 'States Parties agree that the education of the child shall be directed to… friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'.
[24] CRC General Comment 11, 'Indigenous Children and their Rights under the Covenant' UN Doc. CRC/C/GC/11 (2009) para 1.
[25] Ibid para 15.
[26] UN Doc. CRC/C/BTN/CO/6-7 (2024) para 17(a).
[27] Ibid para 42.
[28] UN Doc. CRC/C/EGY/CO/5-6 (2024) para 20(a).
[29] UN Doc. CRC/C/GEO/CO/5-6 (2024) para 36(a).

obligation of the Optional Protocol on the sale of children, child prostitution and child pornography, the Committee requested Panama to '[i]mplement targeted measures to adapt all recommendations to the specific needs and vulnerabilities of minority groups, such as Indigenous communities and communities of people of African descent'.[30]

The jurisprudence of the CRC is relatively small, with around 40 decisions on the merits in total, although its Optional Protocol has only been in force since 2014. The first decision relating to minority or Indigenous children's rights under Article 30 UN CRC was *Chiara Sacchi et al v Argentina* (2021),[31] which litigated a number of States Parties' failure to prevent and mitigate the consequences of climate change as a violation of the Convention. The case was declared inadmissible by the Committee, but was considered to reveal the potential for future caselaw. In *Sacchi*, the authors argued under Article 30 that the States Parties' contributions to the climate crisis 'have already jeopardized the millenniums-old subsistence practices of the Indigenous authors from Alaska in the United States, the Marshall Islands and the Sapmi areas of Sweden.'[32] It submitted that those subsistence practices 'relate to a specific way of being, seeing and acting in the world that is essential to their cultural identity.'[33] The authors requested findings *inter alia* that the State Party is violating 'the cultural rights of the authors from Indigenous communities'.[34] The Committee found the communication failed to exhaust domestic remedies.[35] As a result, substantive aspects including the Article 30 claim were not examined. However, as Aoife Nolan rightly observed, the decision left the door open for future complaints.[36]

This would indeed occur in *M.E.V., S.E.V. and B.I.V. v Finland*, adopted by the CRC on 7 October 2024.[37] This case related to a mineral exploration project on Sami territory which would give rise also to a case before CESCR, discussed below. The present communication engaged the child rights aspects, being taken by three sisters aged 13, 15 and 16 and members of a multigenerational Sami reindeer herding family. The claimants distinguished their communication from that before CESCR, 'as female Indigenous children beneficiaries of the unhindered intergenerational transmission of the Sami culture and way of life.'[38] The CESCR communication related 'not only to different victims but also to a different set of human rights violations', with the claim before CRC involving a right of an Indigenous child to the transmission, from generation to generation, of an Indigenous identity, way of life and traditional economic activity, constituting a core dimension of the rights of Indigenous children.[39] Hence, the case is notable in setting out how a situation can give rise to different actions before different treaty bodies.

The facts provided detail on how the communicants are 'determined to learn the traditions of Sami reindeer herding, which is a cornerstone of Sami culture and way of life', describing *inter alia* how they participate in the earmarking of reindeer calves and traditional Sami ways of singing and handicrafts. They described also a language deeply rooted in nature, with no future for their mother tongue if there is no place for traditional reindeer herding because of activities negatively affecting their ancestral territories.[40] As the continuance of the Sami children culture and way of life is strongly dependent

[30] UN Doc. CRC/C/OPSC/PAN/CO/1 (2024) para 16(f).
[31] UN Doc. CRC/C/88/D/104/2019 (2021). Note that the same complaint was submitted against five States Parties, Argentina, Brazil, France, Germany and Turkey, but given it raised similar issues at the admissibility stage it was examined by the Committee only in relation to Argentina.
[32] Ibid para 3.5.
[33] Ibid.
[34] Ibid para 3.7.
[35] Ibid para 10.21.
[36] Aoife Nolan, 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*' *Ejil: Talk!* 20 October 2021 <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/> The author notes: 'Overall, the decision, while a loss for the specific claimants, was a major win for future climate change complaints under the [Optional Protocol to UN CRC] due to the Committee's expansive approach to the jurisdictional issue and causality.'
[37] UN Doc. CRC/C/97/D/172/2022 (2024).
[38] Ibid para 2.15.
[39] Ibid.
[40] Ibid para 2.3.

on traditional reindeer herding, if this is lost due to threats from mineral exploration, their identity, language and culture will also be lost.[41]

The authors submitted that Finland's granting of a mineral exploration permit did not meet the standards of FPIC. CRC engaged with Finland's argument that the communication should be declared inadmissible due to its *actio popularis* and premature nature. The Committee found that 'the authors are alleging violations of their own rights under the Convention, which occurred already with the granting and upholding of the permit, without the Sámi free, prior and informed consent.'[42] It held that if the granting of a permit on traditional territory is obtained without FPIC, 'this fact may represent in itself, irrespective of future developments, a breach to the authors' rights under the Convention'.[43] Hence, a failure to obtain FPIC of Indigenous peoples in relation to mineral exploration or analogous activities on their territories is in and of itself a violation of UN CRC, specifically Articles 8, 27 and 30.[44]

On the merits, the Committee noted that cultural rights have an intergenerational aspect which is fundamental to the cultural identity, survival, and viability of Indigenous Peoples. It recalled that language is the principal mode of transmission of traditional knowledge and a foundational element of Indigenous cultures and identity, with Indigenous children learning and using their languages key to preserving Indigenous cultures, historical memory and worldview.[45] It considered that precisely because the State Party was aware that transferring Sami culture to Sami children is 'becoming increasingly difficult', that it must be particularly cautious when regulating activities that may endanger the continuity of their culture.[46] In the light of the above, the Committee held that 'Article 30 of the convention enshrines the right of Indigenous children to enjoy their traditional territories and that any decision affecting them should be taken with their effective participation.'[47]

Importantly, the CRC noted the right of children in relation to FPIC. Thus, it noted that States Parties must provide an 'adequate and effective process of free, prior and informed consent whenever Indigenous Peoples' rights may be affected by projects carried out in their traditional territories'.[48] In addition, it held that 'Indigenous children must be particularly at the heart of the processes, from their consideration in impact assessments to their effective participation in processes of consultations aimed at obtaining their free, prior and informed consent.'[49] The decision reads an obligation of FPIC into Article 30 in which Indigenous children must also form part of the process, if it is to be deemed adequate and effective. Finland was found to be in violation since it had failed to demonstrate how the process of granting the exploration permit 'correctly took into account the standards established in international human rights law for the participation of Indigenous Peoples, including Indigenous children'.[50]

The communication referred also to climate change and the *Saatchi* case, in noting how Finland's CO2 emissions put it 57 among all countries in absolute terms, and 29 per capita, as responsible for climate change. This contributed to the argument as to why the mineral exploration project violated UN CRC in the current circumstances created by climate change.[51] However, ultimately climate change was considered as context and not a separate claim.[52] Overall, *M.E.V., S.E.V. and B.I.V.* is the first finding in an individual communication of a violation of Article 30 UN CRC, and the first time FPIC was read into this provision in an individual communication. It is a milestone decision, and one that

[41] Ibid para 2.14.
[42] Ibid para 8.3.
[43] Ibid.
[44] Ibid para 8.6.
[45] Ibid paras 9.14-9.15.
[46] Ibid para 9.16.
[47] Ibid 9.17.
[48] Ibid para 9.20.
[49] Ibid para 9.22.
[50] Ibid para 9.23.
[51] Ibid para 2.2 and n 3.
[52] Ibid para 8.4. The Committee found as a result that domestic remedies had been exhausted.

marks out UN CRC as an important treaty body in the protection of Indigenous and minority rights.

CIVIL AND POLITICAL RIGHTS

Relevant Cases:

Antonina Ignatane v Latvia (HRC)
Arieh Hollis Waldman v Canada (HRC)
Dorothy Kakem Titiahonjo v Cameroon (HRC)
Duncan Ballantyne et al v Canada (HRC)
Francis Hopu and Tepoaitu Bessert v France (HRC)
Ilya Nesterov et al v Russian Federation (HRC)
J.G.A. Diergaardt et al v Namibia (HRC)
Jose Vicente et al v Colombia (HRC)
Mohammad Rabbae et al v The Netherlands (HRC)
Polat Bekzhan et al v Kazakhstan (HRC)
Rakhim Mavlonov and Shansiy Sa'di v Uzbekistan (HRC)
Sandra Lovelace v Canada (HRC)
Zhavlon Mirzakhodzhaev v Kyrgyzstan (HRC)

Article 27 ICCPR is 'the most widely-accepted legally-binding provision on minorities'.[53] In 1994, the HRC adopted GC 23 on Article 27 (Rights of Minorities), in which it stated: 'The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.'[54] GC 23 further established that Article 27 is 'distinct from, and additional to, all the other rights' in the ICCPR.[55] GC 23 built on the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM), which in its Article 2(1) set out the rights of persons belonging to national or ethnic, religious and linguistic minorities, without qualifying that this applied only in States where such groups exist.[56] The UNDM also makes important textual departures from Article

[53] UN Fact Sheet No. 18 (Rev.1), 'Minority Rights' (1998).
[54] Human Rights Committee, 'General Comment No. 23 on Article 27 (Rights of Minorities)' UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 5.2.
[55] Ibid para 1.
[56] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA resolution 47/135 (1992) and Office of the High Commissioner for Human Rights (OHCHR) 'Booklet'

27 'in its wide-ranging specification of participation rights'.[57] Although we have seen recent calls from the UN Special Rapporteur on Minority Issues for a minority rights treaty,[58] this seems unlikely to emerge in the short term. Hence, Article 27 remains the key binding international standard, with the UNDM the principal soft law standard that informs its interpretation.

The Human Rights Committee provides the most extensive jurisprudence of any UN treaty body, with over 1500 decisions to date taken on the merits under its Optional Protocol. However, only around 50 of these have directly invoked Article 27 ICCPR. Indigenous peoples' rights have featured strongly in the Article 27 caselaw; indeed, Indigenous issues were the trigger for the first communication under this provision in *Sandra Lovelace v Canada* (1981),[59] which dealt with the rights of an Indigenous person challenging the removal of her status following marriage to a non-Indigenous man. The literature on Article 27 caselaw tends to treat Indigenous and minority issues together, but if we separate them out, we see that Article 27 is not widely used in relation to non-Indigenous minority groups. This is not due to any obvious shortcomings in the Committee's approach, but rather the relatively low volume of Article 27 cases that relate directly to ethnic, religious or linguistic minorities, or articulate substantive minority rights claims, outside of the Indigenous context.

There are a handful of early minority rights cases. Two of these set out certain parameters to the meaning of a 'minority' under Article 27, and did not result in a finding of a violation. In *Duncan Ballantyne et al v Canada* (1993),[60] the authors were English-speakers in majority French-speaking Quebec seeking to advertise their businesses in English, in circumvention of language laws. The Committee held: 'the minorities referred to in article 27 are minorities within such a State, and not minorities within any province … English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.'[61] In *J.G.A. Diergaardt et al v Namibia* (1996),[62] the authors were members of the Rehoboth Baster community, descendants of Indigenous Khoi and Afrikaans settlers who had moved to their present territory in Namibia in 1872. The Committee was also 'unable to find that the authors can rely on article 27 to support their claim'.[63] It examined the relationship between the authors' way of life and the lands covered by their claims, holding that '[a]lthough the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture'.[64] A recent study found the decision not to recognise the Rehoboth Basters as a minority due to their lack of distinctiveness 'perplexing on multiple accounts'.[65] It considers it a consequence of the portrayal of the

<https://www.ohchr.org/sites/default/files/Booklet_Minorities_English.pdf> Article 2(1) reads: 'Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.'

[57] Patrick Thornberry, 'Indigenous Peoples and Human Rights' (Manchester University Press: 2002) 176. This includes rights of minorities 'to participate effectively in cultural, religious, social, economic and public life' and the right to participate effectively in decisions that affect them, although modalities of such participation remain unspecified.

[58] Fernand de Varennes, 'Strengthening and Mainstreaming the Protection of the Rights of Minorities at the United Nations: An Assessment of the Implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' UN Doc. A/HRC/52/27 (2023). According to the report: 'the Special Rapporteur is putting forth a proposal for a draft global minorities treaty, as an idea whose time has come in the hope that the United Nations will initiate a process that could ultimately lead to a legally binding instrument.' (at para 66)

[59] UN Doc. A/36/40 (1981, date of communication 1977) 166-175.

[60] UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

[61] Ibid para 11.2. However, the Committee did conclude there had been a violation of Article 19 ICCPR on freedom of expression.

[62] UN Doc. CCPR/C/69/D/760/1997 (2000) para 10.6.

[63] Ibid para 10.6.

[64] Ibid. For a critical view of this decision, see Alexander H.E. Morawa, 'Minority Languages and Public Administration: A Comment on Issues Raised in *Diergaardt et al. v. Namibia*' European Centre for Minority Issues (2002) <https://www.ecmi.de/fileadmin/redakteure/publications/pdf/working_paper_16.pdf> Morawa notes *inter alia* that the decision does not answer questions pertaining to the minority-rights based 'administrative language rights' aspect of the claim. (at 21)

[65] Sonya Cotton, 'Who Stands on Land? Transnational Sources of Apartheid and Community (Dis)Placement in Southern African Land Claims' (Unpublished PhD Thesis, University College Dublin 2025).

Rehoboth Basters 'as agents of apartheid' by the Namibian government, a position uncritically endorsed by the Human Rights Committee.[66]

Two other early communications saw the cases settled under other ICCPR provisions, and so did not find a violation of Article 27. In *Francis Hopu and Tepoaitu Bessert v France* (1997),[67] the communicants were ethnic Polynesians and inhabitants of Tahiti, French Polynesia, who argued that the construction of a hotel on land encompassing the site of a pre-European burial ground violated the ICCPR. However, France's declaration upon ICCPR ratification that 'Article 27 is not applicable as far as the Republic is concerned' was considered to operate as a reservation, with the Committee concluding that it was not competent to consider the minority rights aspect of the claim; it did find a violation of other provisions.[68] In *Arieh Hollis Waldman v Canada* (1999),[69] public funding for Roman Catholic schools but not for schools of the author's religion was considered to violate Article 26 ICCPR on non-discrimination, rather than Article 27.[70] Article 27 may also not be raised at all, although a case may well have minority rights elements. We see this in *Antonina Ignatane v Latvia* (2001),[71] in which the author, a member of the Russian minority in Latvia, was struck off an electoral list due to an alleged lack of proficiency in Latvian. Article 27 and the author's minority status was not argued, and the decision was settled under the Article 25 right to participate in elections.[72]

This trend has continued in more recent jurisprudence. Often, Article 27 is one of several provisions raised in communications, and the Committee will either settle the communication under other provisions or decide that the Article 27 arguments have not been made out. We see this in *Dorothy Kakem Titiahonjo v Cameroon* (2007),[73] where the complaint alleged a violation of a number of provisions of the ICCPR in regard to acts of torture and death in custody of the author's husband. It included Article 27 in relation to the author's husband's status as a member of 'a linguistic minority in the State party [who] suffers persecution on that account', including his membership of the Southern Cameroon National Council ("SCNC"). The Committee found this aspect of the communication to be insufficiently substantiated and therefore inadmissible.[74] In *Mohammad Rabbae et al v The Netherlands* (2017),[75] involving alleged incitement to discrimination, violence and hatred by Dutch politician Geert Wilders, the applicants invoked the Article 20(2) prohibition of incitement to hatred in connection with Articles 26 and 27 ICCPR. They argued that 'as members of a minority in the Netherlands' they were also victims of a violation of these provisions.[76] However, the Committee determined the communication under Article 20(2) and did not refer to the minority rights aspects of the claim.[77] In *Polat Bekzhan et al v Kazakhstan* (2021),[78] involving a law prohibiting the import of Jehovah's Witness literature into Kazakhstan, the Committee concluded that the author's claim under Article 27 was insufficiently substantiated.[79] In the same vein, in *Zhavlon Mirzakhodzhaev v Kyrgyzstan* (2021),[80] involving the trial of the author, an ethnic Uzbek, for alleged

[66] Ibid. The study explores in detail the context in which the Rehoboth Baster Community attempted to negotiate their autonomy during apartheid rule, as well as the motivations of the Namibian government in presenting the Rehoboth Basters as perpetrators rather than victims of apartheid.
[67] UN Doc. CCPR/C/60/D/549/1993/Rev.1. (1997).
[68] Ibid paras 4.3 and 11, specifically the Articles 17(1) and 23(1) protections from interference with family. Note also the dissenting views of four Committee members: 'Like the Committee we too are concerned with the failure of the State party to respect a site that has obvious importance in the cultural heritage of the indigenous population of French Polynesia. We believe, however, that this concern does not justify distorting the meaning of the terms family and privacy beyond their ordinary and generally accepted meaning.' (para 7)
[69] UN Doc. CCPR/C/67/D/694/1996 (1999).
[70] Ibid para 10.6. Although see Individual Opinion of HRC member Martin Scheinen, which did emphasise the positive obligations of Article 27 for minority religions in concurring with the decision (at para 5).
[71] UN Doc. CCPR/C/72/D/884/1999 (2001).
[72] Ibid para 7.5.
[73] UN Doc. CCPR/C/91/D/1186/2003 (2007).
[74] Ibid para 5.4.
[75] UN Doc. CCPR/C/117/D/2124/2011 (2017).
[76] Ibid para 3.3.
[77] Ibid paras 10.4-7.
[78] UN Doc. CCPR/C/130/D/2661/2015 (2021).
[79] Ibid para 8.6.
[80] UN Doc. CCPR/C/130/D/2526/2015 (2021).

involvement in inter-ethnic conflict, the Committee found that the claim had failed to provide sufficient information to enable it to consider that the facts of the communication raised issues under Article 27.[81]

Importantly, this approach was criticised by two HRC members in a partially dissenting opinion in *Ilya Nesterov et al v Russian Federation* (2023),[82] in which a Jehovah's Witnesses organization was declared extremist by the State Party and dissolved. The Committee found a violation of Articles 18 and 22 on the rights to freedom of religion and association, and having decided that it had addressed the claims underlying Mr. Yurlov's complaints, decided not to examine separately the aspects of the claim that raised also Articles 26 and 27. The dissent by Committee members Donders and Helfer argued that the author's claims under Article 27 were not fully addressed by the Committee's assessment of Articles 18 and 22. They cited GC 23 whereby the Committee noted that the rights protected under Article 27 are individual rights, but 'they depend in turn on the ability of the minority group to maintain its … religion.' In that regard, '[t]he collective dimension of the protection of religious minorities under article 27 is directly relevant in this case'.[83]

The dissenters argued that the measures, which the Committee rightly found were unjustified, did not merely constitute a violation of the individual freedom to manifest religion 'but also of the right of a religious minority under article 27 to practise religion as a collective group.'[84] Similarly, the dissolution of the specific religious organization did not merely violate the right to freedom of association, 'but also the rights protected under article 27, since the dissolution undermines the survival, continued development and identity of the Jehovah's Witnesses as a religious minority, in contravention of general comment No. 23'.[85] As a result, they regretted that the Committee did not address the collective aspects of the right to profess and practise a minority religion, which is a central purpose of Article 27 that was directly implicated by the facts of the case.[86]

This is an important dissent that should have implications for future Committee assessments as to what extent Article 27 issues ought to be considered separately from other provisions of the Covenant. It may be noted that similar approaches were taken in relation to Indigenous caselaw in the past – in *Jose Vicente et al v Colombia* (1997),[87] the facts related to the torture and killings of members of the Arhuaco Indigenous community. The claim drew in Article 27 in relation to the disappearance, torture and execution of spiritual leaders of the community, which it was argued constituted 'a violation of the cultural and spiritual rights of the Arhuaco community within the meaning of article 27 of the Covenant.'[88] The Committee concluded: 'With regard to the complaint under article 27, the Committee considered that the authors had failed to substantiate how the actions attributed to the military and to the authorities of the State party violated the right of the Arhuaco community to enjoy its own culture or to practise its own religion.'[89] Thus, despite the case establishing the facts as an attack on the leaders of the Arhuaco community, it was decided only in the context of other civil and political rights.

The Committee did articulate a violation of Article 27 in a minority rights context in *Rakhim Mavlonov and Shansiy Sa'di v Uzbekistan* (2009).[90] Here, the authors were an editor and reader of the newspaper *Oina*, the only non-governmental Tajik-language publication in the Samarkand region of Uzbekistan, whose license to publish was cancelled. The Committee held: 'the use of a minority language press as means of airing issues of significance and

[81] Ibid para 6.8.
[82] UN Doc. CCPR/C/139/D/2925/2017 (2023).
[83] Ibid, Joint opinion of Committee members Yvonne Donders and Laurence R. Helfer (partially dissenting) para 4.
[84] Ibid para 5.
[85] Ibid para 6.
[86] Ibid para 8.
[87] UN Doc. CCPR/C/60/D/612/1995 (1997)
[88] Ibid para 3.6.
[89] Ibid
[90] UN Doc. CCPR/C/95/D/1334/2004 (2009).

importance to the Tajik minority community in Uzbekistan, by both editors and readers, is an essential element of the Tajik minority's culture. Taking into account the denial of the right to enjoy minority Tajik culture, the Committee finds a violation of article 27, read together with article 2.'[91]

Article 27 ICCPR remains the principal international legally-binding minority rights standard and the Human Rights Committee has the most developed jurisprudence of the UN human rights treaty bodies. But this combination has not created a significant minority rights jurisprudence outside of the Indigenous context. When we remove Indigenous caselaw, there are hardly any findings of a violation of Article 27 by the Human Rights Committee. This points to a need for greater use of Article 27 by ethnic, religious or linguistic minorities to protect their rights - ultimately, there are relatively few communications submitted. Strategically, cases are likely to engage a number of ICCPR provisions and stand-alone Article 27 cases will probably continue to be comparatively rare. Hence, it is incumbent on the Committee to ensure that the minority rights aspects of a complaint are fully examined, as highlighted in the dissent in *Nesterov et al*. There is also a need to widen the jurisdictional base by encouraging States Parties to ratify the Optional Protocol, in particular from Asia, the Middle East and East Africa, where ratifications are at their lowest.

CLIMATE CHANGE

Relevant Cases:

Daniel Billy et al v Australia (HRC)
Ioane Teitiota v New Zealand (HRC)

A significant application of Article 27 ICCPR in the context of Indigenous peoples' rights is seen in recent decisions related to the environment and climate change. Although not a minority or Indigenous case, the first such communication was *Ioane Teitiota v New Zealand* (2020) in which the author claimed that a Tribunal decision to return him to Kiribati violated his right to life under Article 6 ICCPR due to the effects of climate change and sea level rise.[92] This claim was ultimately held inadmissible, but elements of the decision opened the door to communications related to climate change as violations of the ICCPR.[93] The next such claim would bring a specific Indigenous rights angle. In *Daniel Billy et al v Australia* (2023),[94] the eight communicants were Indigenous peoples of the low-lying Torres Strait islands whose lives and culture were threatened by climate change. The Committee found a violation of Article 27, holding that the authors' ability to maintain their culture has been impaired by the reduced viability of their islands and the surrounding seas owing to climate change impacts.[95] The decision does not escape the problematic text of Article 27, describing the authors as belonging to an 'Indigenous minority group', and Article 27 as 'a right which is conferred on individuals belonging to minority Indigenous groups'.[96] But it does also reference UNDRIP as an interpretive tool for Article 27, allowing the Committee to engage the collective aspect of the provision: 'The Committee

[91] Ibid para 8.7.
[92] UN Doc. CCPR/C/127/D/2728/2016 (2020).
[93] Ibid. The Committee rejected the claim but noted that 'severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life'. It also accepted that 'without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States.' (paras 9.5 and 9.11) There were also dissenting views in favour of the author - see Individual Opinion of Committee member Duncan Laki Muhumuza.
[94] UN Doc. CCPR/C/135/D/3624/2019 (2023).
[95] Ibid para 8.14.
[96] Ibid paras 2.1 and 8.13. See also the reference to 'minority culture' (at para 8.14).

further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity'.[97] The Committee's findings are of clear significance to climate change measures, as well as Indigenous peoples' rights:

> 'the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture.'[98]

The decision is seen as breaking new ground in relation to State obligations to enact adaptation measures, among other aspects.[99] It is also the first case recognition by a UN human rights treaty body of the positive obligations of States Parties to protect Indigenous or minority groups against the adverse impacts of climate change.[100] As noted, climate change and Indigenous rights arose also before the CRC in *Saachi* and *M.E.V., S.E.V. and B.I.V.*, although neither decision reached substantive findings on this aspect.

CULTURAL RIGHTS

Relevant Cases:

J.T., J.P.V. and P.M.V et al v Finland (CESCR)
Yaku Sacha Perez Guartambel v Ecuador (CERD)

Cultural rights are protected across a range of UN human rights treaties. In *Yaku Sacha Perez Guartambel v Ecuador* (2022),[101] before the Committee on the Elimination of Racial Discrimination (CERD), the petitioner was a member of the Escaleras Indigenous community who argued that the failure to recognize the traditional Indigenous authorities who officiated his marriage violated ICERD. The marriage ceremony was conducted 'in accordance with Indigenous culture and customs for millennia, before the construction of the State', with the marriage recorded in the ancestral marriage register of the Escaleras Indigenous community and an ancestral marriage certificate issued.[102] Thus, the communication related to the right of Indigenous peoples to 'self-determination and autonomy in matters of their own age-old institutions, such as marriage, which predates the State and is made up of rites, allegories, ceremonies and formalities that are specific to Indigenous peoples and are based on their cultural and spiritual world views.'[103] The context for the case was the arrest and later deportation of the petitioner's wife, who was a non-national, during a march in defence of the rights of Indigenous peoples. The petitioner considered that denying him a family reunification visa and recommending that his marriage be officiated by an ordinary civil authority amounted to forced assimilation into the State institution of civil marriage.[104] The State Party argued that Indigenous marriages are not banned in Ecuador, and that the refusal to register the ancestral marriage in this case did not stem from an institutional stance against

[97] Ibid para 8.13.
[98] Ibid para 8.14.
[99] Christina Voigt, 'UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change' *Ejil: Talk!* 26 September 2022 <https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change/>
[100] Ibid.
[101] UN Doc. CERD/C/106/D/61/2017 (2022).
[102] Ibid paras 4.2 and 1.2.
[103] Ibid.
[104] Ibid.

any particular racial group or ethnicity.[105] Officiation and registration of civil marriages in Ecuador is the exclusive competence of civil registry officials and the petitioner should have been married by the competent State authority.

CERD cited a range of relevant international sources, including ILO Convention 169 (which Ecuador had ratified) and UNDRIP, which set out rights of Indigenous peoples to self-determination, autonomy, to maintain their distinct social and cultural institutions, and to practise and revitalize their cultural traditions and customs including ceremonies. It recalled the American Declaration on the Rights of Indigenous Peoples, in particular its Article XVII(1) which establishes that 'States must recognize, respect and protect the various Indigenous forms of matrimonial union.' It noted also at the domestic level the provisions of the Constitution of Ecuador as an intercultural and plurinational State, which implies that 'different systems of government and social regulation, based on cultural, political or historical aspects, coexist through various authorities, such as the ordinary jurisdiction and the Indigenous jurisdiction'.[106] The Committee then examined the marriage ceremony in detail, highlighting that 'the traditional authorities of the Escaleras ancestral community who drew up the marriage certificate in accordance with their ancient customs verified the identity of the spouses, their age, their prior civil status, their address, the voluntary nature of their union and the date and place of the marriage - all in the presence of two witnesses.'[107] Article 5(d)(iv) ICERD prohibits racial discrimination in 'the right to marriage and choice of spouse'. CERD held that in order to comply with this provision:

> 'not only must the State party refrain from prohibiting the celebration of Indigenous marriages (para 2.3) and the issuance by traditional Indigenous authorities of registration certificates for marriages officiated in their territories, but it must also take all necessary steps, in cooperation with the traditional Indigenous authorities, to record such marriages in the civil register where they are not contrary to other international human rights obligations or to requirements under national law for the celebration of marriages.[108]

It upheld a violation of Article 5(d)(iv), its first finding under this provision. It required the State party to record the petitioner's marriage in the civil register so that they may apply for a family reunification visa; provide appropriate compensation to the petitioner for the harm caused; apologize to the petitioner for the violation of his rights; amend its legislation to provide for the recognition and registration of marriages officiated by traditional Indigenous authorities in accordance with their customs and customary law that are not contrary to other international human rights obligations; and establish a training programme for civil registry officials and the judiciary and other court personnel regarding the validity and recognition of Indigenous marriages officiated by traditional authorities.[109] These recommendations capture a range of specific and general remedies increasingly evident in CERD jurisprudence as it relates to minority and Indigenous rights.

A recent decision of the Committee on Economic, Social and Cultural Rights (CESCR), *J.T., J.P.V. and P.M.V et al v Finland* (2024),[110] is the first individual communication by CESCR which engages cultural rights. The decision related to the granting of mineral exploration permits which generated the *M.E.V., S.E.V. and B.I.V. v Finland* case before CRC. The authors were Indigenous Sami people who practice traditional Sami reindeer herding. They submitted that by granting a mineral exploration permit and an area reservation on their traditional territory without proper impact assessment and without a process of consultations aimed at obtaining the free, prior and informed consent, Finland violated a number of

[105] Ibid para 4.2.
[106] Ibid para 4.6.
[107] Ibid para 4.10.
[108] Ibid para 4.13.
[109] Ibid para 6.
[110] *J.T., J.P.V. and P.M.V et al v Finland* UN Doc. E/C.12/76/D/251/2022 (2024).

their ICESCR rights including the right to take part in the cultural life of a community (Article 15). Climate change formed a context to the claim:

> 'The regions where the Sami live are warming more than three times faster than the global average. Frozen and moulting pastures and extreme snow conditions pose challenges for reindeer and reindeer herders, threatening the Sami's ability to continue reindeer herding as a main source of income. This has a detrimental effect on the culture, languages and traditional knowledge of the Sami, as it disrupts the practice of traditional livelihoods, which is central to maintaining and transmitting their culture.'[111]

The Committee's decision noted first that a lack of FPIC pertains also to the admissibility stage of the proceedings. Finland argued, as it did before CRC, that the authors' claims were of an *actio popularis* and premature nature, and thus they lacked victim status and were inadmissible. CESCR noted that the authors presented information in their communications alleging that the State party failed to obtain FPIC or undertake good faith efforts to obtain it when granting the exploration permit in the authors' traditional territory, and that 'this allegedly constitutes a violation of their own rights, irrespective of future development'.[112] The Committee affirmed that a failure to obtain FPIC is in and of itself an actionable violation of ICESCR whether or not it results in further rights violations, satisfying the standing requirements for the purposes of admissibility.

The merits of the decision is notable for its detail on cultural rights under Article 15(1)(a), as interpreted in accordance with CESCR General Comment 21.[113] GC 21 provides an emphasis on the need to protect the cultural rights of minority and Indigenous groups.[114] We see these themes emerge consistently in concluding observations by CESCR. For example in a recent session it raised the protection of the cultural heritage of minorities in Iraq: 'The Committee is concerned about reports that sites of religious and cultural importance for religious and ethnic minorities destroyed by Da'esh and/or in armed conflict have not yet been fully restored, and that perpetrators have not been held accountable.'[115] It recommended that Mauritania 'create conditions that will enable minorities to preserve, develop, express and disseminate their identity, history, languages, culture, traditions and customs', specifically recommending that the State party 'strengthen the teaching and use of the Pulaar, Soninke and Wolof languages, including in official documents.'[116] It recommended that Sweden adopt measures for returning cultural heritage items including objects and human remains to the Sami people. This involved 'measures to identify and encourage voluntary repatriation of objects held in private collections that are of cultural significance to national minorities'.[117]

This focus on cultural rights is evident in the decision in *J.T., J.P.V. and P.M.V et al v Finland*. CESCR affirmed that the 'communal dimension of Indigenous Peoples' cultural life, including traditional activities, is closely linked to their traditional lands, territories and resources, and is "indispensable to their existence, well-being and full development".'[118] It noted that the recognition of Indigenous Peoples' right to land as an indispensable part of their right to take part in cultural life is in line with international human rights jurisprudence in this area, citing decisions of CERD and the HRC.[119] It cited also decisions of the Inter-American Court of Human Rights, quoting its finding in *Xakmok Kasek v*

[111] Ibid para 2.3. There are a number of other references to climate change, including that 'violations of the Covenant must be assessed in the context of the cumulative effects of earlier interventions in their lands, aggravated by ongoing climate change' (at para 3.3). Finland countered that the authors had not exhausted domestic remedies on the issue of climate change (at para 4.5). The Committee ultimately noted that the issue of climate change did not present 'a separate claim' and that available remedies in relation to the substantive rights invoked in the communication had been exhausted (at para 10.5).
[112] Ibid para 10.3.
[113] CESCR General Comment 21, 'Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' UN Doc. E/C.12/GC/21 (2009).
[114] Ibid paras 3, 7, 16(a) and (e), 27, 32, 33, 36, 37, 49(d), 50(c), 52(a), (c) and (f), 53, 55(e) and 73, referring to minorities and/or indigenous peoples.
[115] UN Doc. E/C.12/IRQ/CO/5 (2024) para 54.
[116] UN Doc. E/C.12/MRT/CO/2 (2024) paras 56-57.
[117] UN Doc. E/C.12/SWE/CO/7 (2024) para 39.
[118] Ibid para 14.2.
[119] Ibid para 14.3.

Paraguay that the culture of the members of Indigenous Peoples: 'corresponds to a specific way of life, of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are an integral element of their cosmology, their spirituality and, consequently, their cultural identity'.[120] Cultural rights were noted to have an intergenerational aspect, which is fundamental to the cultural identity, survival, and viability of Indigenous peoples. As a result, Article 15(1)(a) requires States parties to take measures to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources. It follows that States Parties must ensure the effective participation of Indigenous peoples in decision-making processes that may affect their way of life, particularly their right to land, based on the principle of FPIC, so as not to endanger the very survival of the community and its members.[121]

The decision elaborated on the meaning of 'an adequate and effective process' of FPIC when the rights of Indigenous Peoples may be affected by projects carried out in their traditional territories, which must include 'not only the sharing of information and the reception of comments from the affected community, but also an interactive and continuous dialogue through Indigenous Peoples' own representative institutions, from the outset and through culturally appropriate procedures, respecting the right of Indigenous Peoples to influence the outcome of decision-making processes affecting them.'[122] The process of granting the exploration permit at issue in the communication did not meet this standard, and Finland was held to be in violation of Article 15(1)(a) ICESCR. This was the first finding of a violation of Article 15(1)(a) by CESCR, and the first time FPIC was read into this provision in an individual communication. It is clearly a milestone decision, and one that marks out the potential of CESCR as an important treaty body in the protection of Indigenous and minority rights.

DISABILITY

Relevant Cases:

Christopher Leo v Australia (CRPD)
Manuway Doolan v Australia (CRPD)
X v United Republic of Tanzania (CRPD
Y v United Republic of Tanzania (CRPD)
Z v United Republic of Tanzania (CRPD)

The Preamble to the UN Convention on the Rights of Persons with Disabilities (UN CRPD) reads:

> 'Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, Indigenous or social origin, property, birth, age or other status.'[123]

All of the key minority groups are referenced in this provision, including national, ethnic, religious and linguistic groups, as well as Indigenous peoples. According to Article 5(2) of the UN CRPD, 'States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination *on all grounds*.' The Committee on the Rights of Persons with Disabilities (CRPD) has issued General Comment 6 on Equality and Non-discrimination, which recognizes that '[p]rotection against "discrimination on all grounds" means that all possible grounds of discrimination

[120] Ibid citing *Xakmok Kasek v Paraguay* (Merits, Reparations, Costs, IACtHR 2010) Series C No 214 2010, para. 174.
[121] Ibid para 14.5.
[122] Ibid para 14.6.
[123] UN Convention on the Rights of Persons with Disabilities, Preamble para (p).

and their intersections must be taken into account.'[124] It indicates that such grounds may include 'Indigenous or social origin' as well as 'belonging to a national minority'.[125] Therefore, there can be little ambiguity that the text of the UN CRPD protects minorities and Indigenous peoples with disabilities. Nevertheless, as Minority Rights Group International concluded in a submission to the CRPD, '[t]he issues faced by Indigenous people with disabilities remain unaddressed in policies relating to disability and those related to Indigenous peoples.'[126] Likewise, 'for people with disabilities belonging to ethnic and religious minority communities around the world, similar issues resulting from structural, systemic and intersectional discrimination remain unaddressed' by States Parties.[127]

The CRPD has raised the issue of intersectional discrimination in State reports, requiring information from States Parties where this has not been provided. Thus, in relation to Israel, the Committee expressed concern about the 'limited information provided on persons with disabilities facing multiple and intersectional discrimination, including … Palestinians with disabilities, Palestinian refugees with disabilities, persons with disabilities in Bedouin or herder communities'.[128] It criticized the incomplete mainstreaming of the rights of persons with disabilities in Kazakhstan, given the limited information on policies to address 'persons with disabilities belonging to ethnic minorities, including Uzbeks, Uighurs, Koreans, Tatars and Azerbaijanis'.[129] It deplored in relation to Peru the 'lack of information, including disaggregated data, on the situation of…Indigenous persons with disabilities and persons of African descent with disabilities'.[130]

CRPD has required greater focus from States Parties on particularly vulnerable minority groups in emergency situations. Thus, in relation to the Rohingya in Bangladesh, it stated: 'Increase the level of humanitarian protection for persons with disabilities, especially women and girls with disabilities and those belonging to ethnic and religious minority groups, including Rohingya refugees, and include them in all evacuation, rescue, shelter, relief and post-disaster rehabilitation plans.'[131] It highlighted the impact of wider rights violations on minority persons with disabilities, expressing concern to China about 'reports of Uighur and other Muslim minority persons with disabilities who are detained in vocational education and training centres without support to ensure their safety and to meet all their disability-related needs.'[132] The Committee then called for 'prompt action to release Uighur and other Muslim minority persons with disabilities deprived of their liberty'.[133]

The CRPD has to date over 40 decisions on the merits under its Optional Protocol. Importantly, issues of minority or Indigenous rights have arisen in individual communications as intersectional aspects of claims. In *Manuway Doolan v Australia* (2019),[134] the claimant was an Aboriginal national of Australia with intellectual and psychosocial impairments who was incarcerated in a high-security section of Alice Springs Correctional Centre following a psychotic episode. The communication alleged that the author's right to liberty and security under Article 14 UN CRPD had been violated because the deprivation of liberty was disproportionate to the justifying factor, and 'was also based on his Aboriginal origins'.[135] The claim highlighted: 'Aboriginal persons with disabilities are significantly more likely to be subject to custodial supervision orders because they are disproportionately exposed to poverty and

[124] CRPD, General Comment 6 'Equality and Non-discrimination' CRPD/C/GC/6 (2018) para 21.
[125] Ibid.
[126] MRG, 'Submission to the CRPD Committee General Discussion on Article 11 People with Disabilities in Situations of Risk and Humanitarian Emergencies: Focus on People with Disabilities belonging to Indigenous Peoples and Ethnic, Religious and Linguistic Minorities' (London: MRG 2023) <https://minorityrights.org/app/uploads/2024/01/mrg-crpd-feb-2023-submission-1.pdf>
[127] Ibid.
[128] UN Doc. CRPD/C/ISR/CO/1 (2023) para 65.
[129] UN Doc. CRPD/C/KAZ/CO/1 (2024) para 7(c).
[130] UN Doc. CRPD/C/PER/CO/2-3 (2023) para 10(b).
[131] UN Doc. CRPD/C/BGD/CO/1 (2022) para 24(b).
[132] UN Doc. CRPD/C/CHN/CO/2-3 (2022) para 32.
[133] Ibid para 33(c).
[134] UN Doc. CRPD/C/22/D/18/2013 (2019).
[135] Ibid para 3.6.

homelessness, and have few or no stable and supportive family and community ties'.[136]

Australia argued for the inadmissibility *ratione materiae* of the author's claims in relation to his Aboriginal status, on the grounds that Article 5 covers only discrimination on the basis of disability. The Committee disagreed, recalling that 'all possible grounds of discrimination and their intersections must be taken into account, including Indigenous origin', citing in support its General Comment 6.[137] Nonetheless, it also noted that the author had not provided arguments to explain the extent to which his Aboriginal origin had any specific impact on the violations of his rights under the Convention.[138] As a result, it found Australia in breach, but on the basis that confining the author to live in a special institution on account of his disability alone amounted to a violation of Article 5.

The decision seems quite strict in relation to its Indigenous aspect. Australia appeared to acknowledge in the communication that 'Indigenous persons were more likely than non-Indigenous persons to have a custodial - rather than a non-custodial - supervision order imposed on them', arguing that even if this was the case, these were only imposed if there was no other practicable alternative.[139] As context, reports clearly show that 'Indigenous Australians are among the most incarcerated population groups worldwide.'[140] Furthermore, 'Indigenous Australians with a known mental health diagnosis are shown to have earlier and more frequent police contact, and more frequent stays in custody compared to non-Indigenous Australians with a mental health diagnosis'.[141] In other words, it appears difficult to disaggregate the Aboriginal status of the claimant in *Doolan* from his treatment, although the Committee did just that. Nevertheless, it did offer an important affirmation that Indigenous status can affect Convention rights and may form part of litigation in individual communications. Note that very similar facts arose in another communication before CRPD, *Christopher Leo v Australia* (2019),[142] again involving incarceration of an Aboriginal claimant, with the same outcome in that the Committee considered that the applicant had failed to explain the extent to which his Aboriginal origin impacted on the violations of his rights under the Convention.[143] This appears to highlight a possible pattern that the Committee may wish to address more closely in any future litigation.

There have been three communications taken under CRPD against Tanzania in relation to violent attacks on persons with albinism - X v *United Republic of Tanzania* (2017),[144] *Y v United Republic of Tanzania* (2018),[145] and *Z v United Republic of Tanzania* (2019).[146] As the UN Independent Expert on the enjoyment of human rights by persons with albinism has described: 'Albinism is a relatively rare, non-contagious, genetically inherited condition that affects people worldwide regardless of ethnicity or gender.'[147] The Independent Expert notes that persons with albinism have normative protection in the International Bill of Rights covering all their fundamental human rights, but that further protection can also be found in specific instruments including ICERD 'which proscribes "racial discrimination" based on colour', as well as the CRPD.[148] We

[136] Ibid.
[137] Ibid para 7.6.
[138] Ibid.
[139] Ibid para 4.14.
[140] Australian Institute of Health and Welfare, 'Improving Mental Health Outcomes for Indigenous Australians in the Criminal Justice System' (Canberra: AIHW 2021) at 5 <https://www.indigenousmhspc.gov.au/getattachment/15fbcd00-30f1-4170-acd3-206c3b884a61/aihw-2021-criminal-justice-system-20210804.pdf?v=1513>
[141] Ibid at 7.
[142] UN Doc. CRPD/C/22/D/17/2013 (2019).
[143] Ibid para 7.6: 'the Committee recalls that all possible grounds of discrimination and their intersections must be taken into account, including indigenous origin. Nonetheless, it also notes that the author does not provide arguments to explain the extent to which his Aboriginal origin has had any specific impact on the violations of his rights under the Convention'.
[144] UN Doc. CRPD/C/18/D/22/2014 (2017).
[145] UN Doc. CRPD/C/20/D/23/2014 (2018).
[146] UN Doc. CRPD/C/22/D/24/2014 (2019).
[147] 'Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism' UN Doc. A/HRC/34/59 (2017), para 15.
[148] Ibid para 17.

may note also that Minority Rights Group International includes persons with albinism in its advocacy work, notably in Tanzania.[149]

The severity of the issue is well illustrated in *Z v Tanzania*. Here, the author was a person with albinism from the village of Ntubeye, in the Kagera Region of Tanzania, who was attacked resulting in amputation of one arm as well as a miscarriage. Her attackers were later acquitted. In the communication, the author submitted that impunity characterizes most cases of violence perpetrated against persons with albinism.[150] The Committee determined that the author had been a victim of a form of violence that exclusively targets persons with albinism in violation of Article 5 UN CRPD.[151] Furthermore, the lack of action by the State Party in order to allow the effective prosecution of the suspected perpetrators of the crime became a cause of revictimization, amounting to psychological torture or ill-treatment in violation of Article 15.[152]

[149] Minority Rights Group International, 'People with Albinism in Tanzania' <https://minorityrights.org/communities/people-with-albinism/>
[150] *Z v Tanzania*, para 8.2.
[151] Ibid para 8.4.

ECONOMIC AND SOCIAL RIGHTS

Relevant Cases:

Hamid Saydawi and Masir Farah v Italy (CESCR)
IDG v Spain (CESCR)
Mohamed Ben Djazia and Naouel Bellili v Spain (CESCR)
Sara Vazquez Guerreiro v Spain (CESCR)
Soraya Moreno Romero v Spain (CESCR)

The rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are of clear relevance in a minority rights context, as Margot Salmon emphasizes:

> 'Failure to allow minorities and Indigenous peoples to progressively realize their economic, social and cultural rights also undermines their ability to preserve their identities, distinct traditions, languages and ways of life. Threats to their cultural identity, coupled with growing economic and social inequalities, can also be a cause of conflict. This underscores the need to appreciate fully the importance of having minorities and Indigenous peoples as the beneficiaries of ESC rights.'[153]

In addition to the cultural rights aspect discussed above, CESCR has set out this remit in relation to economic and social rights. For example, in its General Comment 14 on the right to health, the Committee stated: 'health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic

[152] Ibid para 8.6.
[153] Margot E. Saloman, 'Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples' (London: Minority Rights Group International 2005) 95.

minorities and Indigenous populations … All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities'.[154] This is seen in concluding observations, with the Committee observing in relation to Ireland a 'lack of access to culturally appropriate sexual and reproductive health services and information for women from minority groups', calling on the State Party to '[e]nsure equal access to maternal health services for Traveller, Roma, migrant women and women from minority groups with the aim of reducing maternal and child mortality rates'.[155] Thus, CESCR generally raises minority rights components of economic and social rights in the context of State reports.

Its individual complaints mechanism is recent and it has just 17 decisions on the merits in individual communications to date. Many of these relate to the right to adequate housing under Article 11 ICESCR, notably in the context of forced evictions. Nevertheless, minority rights aspects have emerged even in this relatively small sample. In *Sara Vazquez Guerreiro v Spain* (2023),[156] the Committee noted that 'women, children, youth, older persons, Indigenous Peoples, ethnic and other minorities and other individuals and groups all suffer disproportionately from the practice of forced eviction.'[157] In *Hamid Saydawi and Masir Farah v Italy* (2024),[158] the complainants were observed to be 'five families of North African migrant workers' who were evicted from a block of five small, "neglected" houses close to the railway line at via Latino Silvio, Rome.[159] The Committee found a breach of Article 11 in that case. In *Soraya Moreno Romero v Spain* (2011),[160] the author argued that she had not been granted housing following her eviction 'because she has been discriminated against because of her Roma ethnicity'.[161] The Committee did not pronounce on this aspect of the communication, and ultimately held there was no breach of Article 11.

To date, individual communications under CESCR relate principally to a narrow band of the treaty's scope, the right to housing, and involve almost overwhelmingly one State Party, Spain. Remarkably, 113 out of the 120 CESCR decisions on admissibility and merits have Spain as the respondent State Party. This may in part be explained by a ruling from the Supreme Court of Spain that UN treaty body decisions in individual communications are legally binding,[162] which could make the procedure more attractive to would-be litigants. But we cannot really speak of a global jurisprudence from CESCR when its caselaw is so attenuated. We may however highlight the significance of what the Committee has stated in the Spanish caselaw. In *Mohamed Ben Djazia and Naouel Bellili v Spain* (2017),[163] CESCR warned States Parties to pay particular attention to evictions that involve vulnerable individuals or groups who may be subjected to 'systemic discrimination'.[164] A commentary on CESCR's very first decision, *IDG v Spain* (2015),[165] pointed out its effects that 'the right to adequate housing does not merely impose positive and negative obligations on states, but also requires states to ensure effective judicial remedies for vulnerable and marginalized groups in order to assert their socio-economic rights'.[166]

Thus, the potential of the mechanism for minority or Indigenous groups in the context of housing and other economic and social rights is apparent. The

[154] See CESCR General Comment 14, 'Right to the Highest Attainable Standard of Health' UN Doc. E/C.12/2000/4 (2000) para 12(b) and (c): 'health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations … All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities'. See also para 34.
[155] UN Doc. E/C.12/IRL/CO/4 (2024) paras 46-47.
[156] UN Doc. E/C.12/74/D/70/2018 (2023).
[157] Ibid para 8.9.
[158] UN Doc. E/C.12/75/D/226/2021 (2024).
[159] Ibid para 2.1.
[160] UN Doc. E/C.12/69/D/48/2018 (2021).
[161] Ibid para 7.3.
[162] See Koldo Casla, 'Supreme Court of Spain: UN Treaty Body Individual Decisions are Legally Binding' *Ejil: Talk!* 1 August 2018 <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/> and 'Spain's Supreme Court is at it again: UN Treaty Body Decisions are Binding' *Ejil: Talk! 22* January 2024 <https://www.ejiltalk.org/spains-supreme-court-is-at-it-again-un-treaty-body-decisions-are-binding/>
[163] UN Doc. E/C.12/61/D/5/2015 (2017).
[164] Ibid para 15.2.
[165] UN Doc. E/C.12/55/D/2/2014 (2015).
[166] Ebenezer Durojaye, 'Bringing Justice to the Disadvantaged: A Commentary on CESCR's decision in *IDG v Spain* (Communication No. 2/2014)' (2015) 16(3) *ESR Review* 10-12, at 11.

significance of this first case was seen also in the crucial role played by civil society organizations in making a submission to CESCR.[167] In line with Article 8 of the Optional Protocol to ICESCR, organizations such as the Centre for Economic and Social Rights, the Global Initiative for Economic, Social and Cultural Rights and the Socio-Economic Rights Institute of South Africa, were admitted as third-party interveners in the communication.[168]

ENFORCED DISAPPEARANCES

The International Convention for the Protection of All Persons from Enforced Disappearance (CPED) refers in its Article 7(2)(b) to 'aggravating circumstances' in the commission of an enforced disappearance 'in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons'. It is possible to interpret 'other particularly vulnerable persons' as inclusive of minorities and Indigenous peoples. The parallel Charter body, the UN Working Group on Enforced or Involuntary Disappearances, has noted: 'For all cases, the Working Group highlights the condition of people in situations of vulnerability, including…persons belonging to minorities, Indigenous peoples'.[169] Similarly, in its form to submit a request for urgent action, the Committee on Enforced Disappearances (CED) asks: 'If deemed relevant, please indicate whether the victim belongs to any groups (for example, Indigenous peoples, national minorities (…)'[170]

CED's mandate thus clearly engages minority and Indigenous rights, and it has raised such issues in its work. For example, in a country visit to Iraq, it noted that '[e]thnic and religious minorities were also targeted by acts amounting to enforced disappearance.'[171] It estimated that around 6,800 Yazidis were abducted over a period of just a few days, with 3,000 still disappeared.[172] In a visit to Mexico, it observed how 'Indigenous communities have also been affected by disappearances.'[173] It noted how these occur mainly in the context of social and territorial conflicts linked to mining or energy megaprojects or grabbing of land for economic exploitation by organized crime groups or other private actors, with varying degrees of involvement or acquiescence by public officials. Several victims had made allegations of disappearances of Indigenous persons that had been forcibly recruited by organized crime groups or other

[167] Ibid.
[168] Ibid.
[169] OHCHR, 'Fact Sheet No. 6: Enforced Disappearances' (Geneva: OHCHR 2023) 39 <https://www.ohchr.org/sites/default/files/documents/publications/Fact-sheet6-Rev4.pdf>
[170] Quoted Ibid 118 para 3.20.
[171] UN Doc. CED/C/IRQ/VR/1 (Findings) (2023) para 21.
[172] Ibid.
[173] UN Doc. CED/C/MEX/VR/1 (Findings) (2002) para 21.

private actors.[174] In concluding observations to Burkina Faso, CED was unconvinced by the State Party's argument that disappearances were not linked to minority identity: 'While it takes note of the State party's assurances that the security crisis is not ethnicity-related, the Committee is nonetheless concerned that, according to the reports it has received, most enforced disappearances have been of persons belonging to or perceived as belonging to the Fulani People'.[175]

The CED may receive individual communications under Article 31 of the CPED from States Parties that have declared that they recognize the competence of the Committee to receive such communications. To date, 29 States Parties (out of 75 in total) have opted in to the mechanism. There have been just three decisions to date taken on the merits, in relation to Argentina, France and Mexico - none of these have raised any substantive issues of minority or Indigenous rights.

[174] Ibid.
[175] UN Doc. CED/C/BFA/OAI/1 (2024) para 29. The Committee cited also the conclusions of CERD in support (at n 7).

ENVIRONMENT

Relevant Cases:

Campo Agua'e Indigenous Community v Paraguay (HRC)

Environmental damage can be a central component of communications despite the absence of express protections for the environment in UN human rights treaties. In *Campo Agua'e Indigenous Community v Paraguay* (2022),[176] the Human Rights Committee found that Paraguay's failure to prevent and control the toxic contamination of traditional lands, due to the intensive use of pesticides by nearby commercial farms, violated the Indigenous community's Article 17 right to family life and home. The communication noted how the lack of State oversight of the agricultural activity at the source of the pollution 'poisoned their waterways, destroyed their subsistence crops, killed their livestock, caused the mass extinction of fish, bees and prey and triggered health problems'.[177] It further referenced the authors' rights under Article 27, whereby the serious environmental damage caused by the fumigation had severe repercussions amounting to a negation of the community's right to enjoy their culture. The disappearance of the natural resources needed for their subsistence threatened ancestral practices in the areas of hunting, fishing, woodland foraging and Guarani agroecology, thus leading to the loss of traditional knowledge. More specifically, ceremonial aspects of baptism (*mitakarai*) were no longer practised owing to the disappearance of the materials from the forest needed to build the dance houses (*jerokyha*), of the *avati para* variety of corn with which they made the liquor (*kagui*) that constitutes a fundamental sacred ritual in the ceremony, and of the wax used to make the ceremonial candles due to the mass extinction of forest bees (*jatei*).[178] The loss of this ceremony had left children without a rite crucial to strengthening their cultural identity, and the last religious leaders

[176] UN Doc. CCPR/C/132/D/2552/2015 (2022).
[177] Ibid para 8.2.
[178] Ibid para 8.5.

(*oporaiva*) had been left without apprentices, threatening the preservation of the community's cultural identity.[179]

The Committee recalled that, in the case of Indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of the cultural identity.[180] It found that Article 27, 'interpreted in the light of UNDRIP, enshrines the inalienable right of Indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity'.[181] The Committee found there to be a violation by the State party of Articles 17 and 27 of the Covenant. A concurring opinion criticised the decision for not engaging also the right to life. It held: 'Some of these claims were presented by the authors and examined under Article 27 of the Covenant, which is an important step. Nevertheless, we consider that the serious consequences of the massive use of pesticides are imperfectly covered by this provision', which should also have led to a violation of Article 6.[182]

FREEDOM OF RELIGION

Relevant Cases:

Miriana Hebbadj v France (HRC)
Sonia Yaker v France (HRC)

In *Sonia Yaker v France* (2018)[183] and *Miriana Hebbadj v France* (2022),[184] the authors challenged their prosecutions for the minor offence of wearing a *niqab* in a public space under Articles 18 and 26 ICCPR, the rights to freedom of religion or belief and non-discrimination. In both decisions, the Committee concluded that the author's convictions violated their rights under Articles 18 and 26.[185] These claims were not argued under Article 27. However, despite the claims being articulated under other provisions, the HRC did emphasise the minority rights aspects of the decisions. In *Yaker*, it held: 'The Committee recalls its general comment No. 22 (para. 2), in which it viewed with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they represented religious minorities that could be the subject of hostility on the part of a predominant religious community.'[186] *Hebbadj* also referred to 'religious minorities that may be the subject of hostility by a predominant religious community'.[187]

[179] Ibid.
[180] Ibid para 8.6.
[181] Ibid.
[182] Ibid, Joint opinion of Committee members Arif Bulkan, Vasilka Sancin and Hélène Tigroudja (concurring), para 7.
[183] UN Doc. CCPR/C/123/D/2747/2016 (2018).
[184] UN Doc. CCPR/C/123/D/2807/2016 (2022).
[185] See further Stephanie Berry, 'The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religion by Wearing a Burqa' *Ejil: Talk!* 3 January 2019 <https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/>
[186] *Yaker v France*, para 8.14.
[187] *Hebbadj v France* para 7.14.

GENDER, WOMEN AND GIRLS

Relevant Cases:

A v Denmark (CEDAW)
Alyne da Silva Pimentel Teixeira v Brazil (CEDAW)
E.S. and S.C. v Tanzania (CEDAW)
Jeremy Matson et al v Canada (CEDAW)
Kell v Canada (CEDAW)
Maria Elena Carbajal Cepeda et al v Peru (CEDAW)
S.B. and M.B. v North Macedonia (CEDAW)

The Preamble of the UN Convention on the Elimination of All Forms of Discrimination Against Women (UN CEDAW) refers to 'the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism', as essential to the full enjoyment of the rights of men and women. However, none of the operative provisions of the Convention then recognise women's intersectional identity, which has been criticised by commentators.[188] The Committee on the Elimination of Discrimination Against Women (CEDAW) has in its practice identified many groups to whom the Convention extends.[189] In that regard, it has made 'repeated references to intersectional discrimination', drawing to the attention of States Parties that 'women of a minority, race or ethnicity disproportionately live in poverty' among other aspects.[190] Its General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, observes: 'During and after conflict specific groups of women and girls are at particular risk of violence, especially sexual violence, such as … women belonging to diverse caste, ethnic, national, religious or other minorities or identities who are often attacked as symbolic representatives of their community'.[191]

More specifically, CEDAW's most recent GR 39 is addressed to the rights of Indigenous women and girls, noting that the Committee has 'an obligation to address the effects of colonialism, racism [and] assimilation policies'.[192] It draws on UNDRIP as 'an authoritative framework for interpreting State party and core obligations under the Convention on the Elimination of All Forms of Discrimination against Women'.[193] GR 39 relates only to Indigenous peoples, and CEDAW could also articulate its mandate in relation to minorities. The UNDM could then be considered an authoritative framework for understanding UN CEDAW in terms of its minority rights obligations. As emphasised by CEDAW member Dubravka Simonovic at the inaugural session of the UN Forum on Minority Issues, the Convention provides 'a consistent human rights framework for the protection of all women and girls including women and girls belonging to minorities'.[194]

CEDAW regularly raises minority aspects of its mandate in concluding observations to State Party reports. In recent sessions, it noted in relation to Brazil '[t]he systematic underpayment of teachers belonging to minority groups, in comparison with their peers, resulting in the low representation of teachers from diverse communities in the education system.'[195] It stated to Montenegro the need to promote the importance of girls' education at all levels, including secondary and higher education, 'with a focus on women and girls belonging to ethnic minorities'.[196] It noted with concern in the Central African Republic '[t]he

[188] See further Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach' (2015) *Revista Direito Gv. Sao Paolo* 479-504, at 480.
[189] Ibid 487.
[190] Ibid 481.
[191] CEDAW General Recommendation 30, 'Women in Conflict Prevention, Conflict and Post-conflict Situations' CEDAW/C/GC/30 (2013) para 36.
[192] CEDAW General Recommendation 39, 'Indigenous Women and Girls' UN Doc. CEDAW/C/GC/39 (2022) para 12.
[193] Ibid para 13.
[194] Human Rights Council, Inaugural Session of the Forum on Minority Issues, Geneva 15-16 December 2008 <https://www.ohchr.org/en/events/forums/2008/inaugural-session-forum-minority-issues> [at Item III hyperlink Dubravka Simonovic]
[195] UN Doc. CEDAW/C/BRA/CO/8-9 (2024) para 30(e).
[196] UN Doc. CEDAW/C/MNE/CO/3 (2024) para 32(a).

barriers faced by women belonging to religious minorities and by Indigenous and nomadic women in accessing birth registration and birth certificates for their children and obtaining and identity documents.'[197] It underlined in Turkmenistan 'reports of discrimination, harassment and hate speech against non-Turkmen women, who are also barred from working in the public sector'.[198] The Committee has at times offered extensive recommendations in relation to minority or Indigenous women, for example in relation to Guatemala:

> 'The Committee notes with concern that Indigenous women, Garifuna women and women of African descent, who account for 44 per cent of the State party's population, face intersecting forms of discrimination, including economic and social inequalities. It is concerned about cases of forced evictions of Indigenous women and women of African descent from lands traditionally occupied or used by them and the exploitation of those lands by private, non-State actors.'[199]

The Committee cited GR 39 in recommending that the State party protect Indigenous women, Garifuna women and women of African descent from illegal occupation and forced evictions from lands traditionally occupied or used by them. It called on the State Party to strengthen procedural safeguards against forced evictions and provide for adequate sanctions and reparations, ensuring that women participate equally in decision-making processes regarding the use of traditional lands.[200] Although coming under the rubric of GR 39, it may be noted that these recommendations apply also to women of African descent and thus extend to minority as well as Indigenous women in Guatemala.

CEDAW has a growing jurisprudence with over 60 decisions on the merits to date which, while analogous to CERD's body of caselaw, was compiled in a much shorter timeframe of around 20 years. Some of these decisions have engaged issues of minority rights intersecting with gender. Thus, in *S.B. and M.B. v North Macedonia* (2020),[201] the authors were nationals of Roma ethnicity whose complaint concerned denial of access to gynaecological services by a private healthcare facility based on their ethnicity. They submitted that the difficulties they faced were 'attributable to prejudices and discrimination against Roma by healthcare professionals working in gynaecological practices in the city of Skopje'.[202] In an important finding upholding the complaint, the Committee observed that discrimination against women based on sex and gender 'is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, … caste'.[203] The Committee further remarked on how Roma women 'systematically face stigma in their access to gynaecological services'.[204] It held that Article 12 in the field of healthcare had been violated.

The issue of forced sterilization in an Indigenous context arose in *Maria Elena Carbajal Cepeda et al v Peru* (2024).[205] The case involved four victims of forced sterilizations performed between 1995 and 2001, which the authors noted constituted a crime against humanity when widespread and systematic in line with Article 7(1)(g) of the Rome Statute of the International Criminal Court.[206] In this time in Peru, more than 300,000 women, mostly Indigenous, were sterilized without their consent, especially in low-income and rural areas of the State party.[207] The complaint described this as 'a systematic and generalized attack

[197] UN Doc. CEDAW/C/CAF/CO/6 (2024) para 35(c).
[198] UN Doc. CEDAW/C/TKM/CO/6 (2024) para 57.
[199] UN Doc. CEDAW/C/GTM/CO/10 (2023) para 44.
[200] Ibid para 45.
[201] UN Doc. CEDAW/C/77/D/143/2019 (2020).
[202] Ibid para 2.1.
[203] Ibid para 7.3.
[204] Ibid para 7.4. See also CEDAW's decision in *L.A. et al v North Macedonia* (2020), which raised similar facts of insufficient access to maternal and child health-care programmes for the five Roma women applicants (UN Doc. CEDAW/C/75/D/110/2016 (2020)). CEDAW noted that 'gynaecologists have refused to register Roma women as patients' (at para 2.11).
[205] UN Doc. CEDAW/C/89/D/170/2021 (2024).
[206] Ibid para 8.9.
[207] Ibid para 2.2. To a lesser extent, men, mostly Indigenous, were also subjected to forced sterilisation.

against rural women of peasant or Indigenous origin, and that the policy resulted in the nullification and substitution of their reproductive autonomy.'[208] It quoted also from the UN Special Rapporteur on Torture, that '[t]argeting ethnic and racial minorities, women from marginalized communities and women with disabilities for involuntary sterilization …is an increasingly global problem.'[209]

The Committee concluded that the State party had failed to act with due diligence to ascertain the facts related to the sterilization of the authors, and that it had not yet implemented a policy of comprehensive reparations. As a result, it found a violation of the general obligation of Article 2 read in conjunction with a number of other provisions. CEDAW took note that forced sterilization is a crime against humanity under the Rome Statute, although it emphasised that 'a conclusion of this nature is outside the Committee's purview'.[210] Nevertheless, it criticised the State Party for enacting legislation preventing the prosecution of crimes against humanity committed prior to 1 July 2002, which the Inter-American Court had urged the State Party to repeal as it violates international law.[211] CEDAW recommended that Peru complete investigations of the forced sterilization programme and develop and implement a comprehensive reparation programme. Commentators have noted that this aspect could be more specific and elaborated on – '[i]t is disappointing that this was not done, even more considering the history and motivations behind forced sterilization of Indigenous women and girls.'[212]

Issues in relation to discrimination in healthcare arose in *Alyne da Silva Pimentel Teixeira v Brazil* (2011).[213] Ms. da Silva Pimentel Teixeira, a Brazilian national of African descent, died when she did not receive timely emergency obstetric care when presenting at a private health centre with pregnancy complications. The Committee concluded that 'Ms. da Silva Pimentel Teixeira was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.'[214] As Meghan Campbell notes of the case, 'women belonging to ethnic minorities or Indigenous populations are among those particularly at risk of maternal mortality'.[215] CEDAW will be required to continue to investigate how intersectional discrimination affects the 'location, funding, quality and staffing of maternal health facilities where ethnic, Indigenous or poor women live', with greater participation of minority and Indigenous women essential in the development of maternal health policies.[216]

The vulnerability of minorities to gender-specific violence was raised in *A v Denmark* (2015).[217] The author was from the Christian minority in Punjab, Pakistan, where she lived until she married her husband, a Pakistani with a Danish permanent residence permit. Ultimately, her request for a permanent residence permit was denied by Denmark, as well as a later claim for asylum, and she had to return to Pakistan. There, she was the subject of several violent assaults and attacks on her place of work. CEDAW recalled the eligibility guidelines used by the UNHCR for assessing the international protection needs of religious minorities from Pakistan, which highlight that 'women from the Christian minority are in danger of gender-specific violence and that "violent anti-Christian attacks reportedly occur throughout the country and in many instances, the authorities are reportedly unable or unwilling to protect the lives of Christians or to bring perpetrators of such violence to justice".'[218] The Committee stressed that gender-related asylum claims may intersect with other proscribed grounds of

[208] Ibid para 8.2.
[209] Ibid para 8.3, quoting Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez UN Doc. A/HRC/22/53 (2013) para 48.
[210] Ibid para 8.9.
[211] Ibid.
[212] International Indigenous Women's Forum and Indigenous Peoples Rights International, 'Guide to CEDAW's General Recommendation No. 39 on the Rights of Indigenous Women and Girls' (2025) p. 33 <https://fimi-iiwf.org/iDocs/en/GuideGR39-CEDAW_2025_ENG.pdf>
[213] UN Doc. CEDAW/C/49/D/17/2008 (2011).
[214] Ibid para 7.7.
[215] Campbell, supra n 188 at 498.
[216] Ibid 499 – 'In their submission to the CEDAW Committee Brazil does mention that the policies included women's participation, it would be helpful to remind Brazil that participation includes voices that are routinely marginalised: the poor, indigenous and rural women'.
[217] UN Doc. CEDAW/C/62/D/53/2013 (2015).
[218] Ibid para 9.5.

discrimination, including ethnicity and religion.[219] Denmark was ordered to refrain from forcibly returning the author to Pakistan.

In *Kell v Canada* (2012),[220] the author was an Indigenous woman who suffered from domestic violence, whose partner removed her name and title from their shared house. The Committee established a number of findings, including that the author's name was removed from the lease making her partner - who was not a member of the aboriginal community - the sole owner of the property; that she lost her share in the house as a result of an alleged fraudulent transaction effected by her partner; that such change was impossible without action or inaction of the Northwest Territories Housing Corporation; and that her partner was serving as a director of the Housing Authority Board and therefore occupied a position of authority.[221] CEDAW, noting that 'the author has established a distinction based on the fact that she was an aboriginal woman victim of domestic violence', emphasised that 'intersectionality is a basic concept for understanding the scope of the general obligation of States parties contained in article 2 of the Convention'.[222] It found that discrimination of women based on sex and gender is inextricably linked with other factors, and that 'an act of intersectional discrimination has taken place against the author.'[223] In addition to specific compensation, the decision provided as a general remedy that the State Party 'Recruit and train more aboriginal women to provide legal aid to women from their communities, including on domestic violence and property rights'.[224]

In *Jeremy Matson et al v Canada* (2022),[225] the author was a member of the Indigenous Squamish Nation submitting on behalf of his daughter. The author contended that since the adoption of the Indian Act of 1876, with its provisions on registration as an "Indian", the State Party has 'discriminated against Indigenous women and their descendants, denying them Indigenous status, the right to determine their Indigenous identity and their fundamental right to belong to a group of Indigenous people.'[226] The complaint directly referenced the *Sandra Lovelace* decision of the Human Rights Committee, arguing that amendments brought in by Canada in response to that decision had not remedied fully the discriminatory character of the Act, in particular by creating a second generation cut-off rule that applied only to maternal descendants of the Indigenous women who had been disenfranchised.[227] At the time of the *Lovelace* case, there was no Optional Protocol to UN CEDAW, and so that case had to be brought under the ICCPR. But it is interesting to see this "descendant" case directed to CEDAW instead as the more appropriate specialist international legal forum, even though it related directly to implementation of the previous HRC decision. CEDAW agreed that the amendments had failed to effectively remedy the earlier discriminatory policy which 'perpetuates in practice the differential treatment of descendants of previously disenfranchised Indigenous women'.[228] As a result, it found a violation of the Convention. Importantly, the decision also emphasised the gender aspect of FPIC, with the Committee reminding the State Party that 'failure to consult Indigenous peoples and Indigenous women whenever their rights may be affected constitutes a form of discrimination'.[229] We thus see an intersectional approach to FPIC, where the rights of women and children to consultation has been underlined in caselaw before CEDAW and CRC.

Finally, an important claim arose in *E.S. and S.C. v Tanzania* (2015),[230] in which the discriminatory effects of customary laws were considered. The authors were deprived of the right to administer their husbands' estates and excluded

[219] Ibid.
[220] UN Doc. CEDAW/C/51/D/19/2008 (2012).
[221] Ibid para 10.2.
[222] Ibid para 10.2.
[223] Ibid.
[224] Ibid para 11(b)(i).
[225] UN Doc. CEDAW/C/81/D/68/2014 (2022).
[226] Ibid para 2.1.
[227] Ibid para 2.4.
[228] Ibid para 18.10.
[229] Ibid para 18.11.
[230] UN Doc. CEDAW/C/60/D/48/2013 (2015).

from inheriting any property upon the death of their spouses on the basis of codified customary law provisions, which prohibited women and daughters from inheriting clan land.[231] CEDAW noted that inheritance matters are governed by multiple legal systems in Tanzania and that the authors were subject to Sukuma customary law on the basis of their ethnicity.[232] It also noted that although the State Party's Constitution includes provisions guaranteeing equality and non-discrimination, it had failed to revise or adopt legislation to eliminate the remaining discriminatory aspects of its customary law provisions. The Committee held that all discriminatory customary laws were to be repealed 'with a view to providing women and girls with equal administration and inheritance rights…irrespective of their ethnicity or religion'.[233] It stated:

> '[U]nder articles 2(f) and 5(a) of the Convention, States parties have an obligation to adopt appropriate measures to amend or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women, including when States parties have multiple legal systems in which different personal status laws apply to individuals on the basis of identity factors such as ethnicity or religion.'[234]

The decision indicates that States Parties to UN CEDAW in which customary laws exist, including religious, Indigenous or other forms, must ensure that these do not discriminate against women and girls in inheritance or other matters. It is also a comparatively rare example of an individual communication involving an African State Party – the only one before CEDAW so far.

[231] Ibid para 2.4.
[232] Ibid para 7.6.
[233] Ibid para 9(ii).
[234] Ibid para 7.2.

HATE SPEECH AND FREEDOM OF EXPRESSION

Relevant Cases:

Jewish Community of Oslo et al v Norway (CERD)
Kamal Quereshi v Denmark (CERD)
P.S.N. v Denmark (CERD)
Stephen Hagan v Australia (CERD)
TBB-Turkish Union in Berlin/Brandenburg v Germany (CERD)

A number of CERD cases have engaged issues of "hate speech" and freedom of expression in relation to minority groups. In *Jewish Community of Oslo et al v Norway* (2005),[235] the Supreme Court of Norway acquitted the giver of an anti-Semitic speech at a rally in commemoration of the Nazi leader Rudolf Hess, on the basis that penalizing approval of Nazism would involve prohibiting Nazi organizations, which it considered to be incompatible with the right to freedom of speech. Article 4 ICERD requires States Parties to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, as well as incitement to racial discrimination, and declare illegal and prohibit organizations which promote and incite racial discrimination. Its provisions are balanced also with 'due regard' to freedom of expression. In the present case, the Committee determined of the relevant speech: 'given that they were of exceptionally/manifestly offensive character, are not protected by the due regard clause … his acquittal by the Supreme Court of Norway gave rise to a violation of article 4'.[236] In *Stephen Hagan v Australia* (2003),[237] the use of an 'offending term' [the "N word"] as a nickname on a stand in a sports stadium originally erected in 1960 should 'at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded'.[238] CERD's decision in this case was the culmination of a long legal

[235] UN Doc. CERD/C/67/D/30/2003 (2005).
[236] Ibid para 10.5.
[237] UN Doc. CERD/C/62/D/26/2002 (2003).
[238] Ibid para 7.3.

journey taken by the Aboriginal author of the complaint to have the sign removed.[239]

It may be noted also that communications involving religious hate speech only have been rejected as falling outside the parameters of the Convention. In *P.S.N. v Denmark* (2007),[240] a Member of Parliament for the Danish People's Party published discriminatory statements related to Muslims. The Committee observed that 'the impugned statements specifically refer to the Koran, to Islam and to Muslims in general, without any reference whatsoever to any race, colour, descent, or national or ethnic origin.'[241] The Committee recognised the importance of the interface between race and religion, and considered that it would be competent to consider a claim of "double" discrimination on the basis of religion and another ground specifically provided for in Article 1 ICERD, including national or ethnic origin. However, this was not the case in the current petition, which exclusively related to discrimination on religious grounds.[242] Recalling that the Convention 'does not cover discrimination based on religion alone', it considered that general references to Muslims fell outside its scope.[243] An analogous decision is seen in *Kamal Quereshi v Denmark* (2004),[244] which involved offensive statements about "foreigners". The Committee held that 'a general reference to foreigners does not at present single out a group of persons, contrary to Article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin.'[245]

In *TBB-Turkish Union in Berlin/Brandenburg v Germany* (2013),[246] a journal interview with Mr. Thilo Sarrazin, former Finance Senator of the Berlin Senate and member of the Board of Directors of the German Central Bank, saw Mr. Sarrazin express himself in a derogatory and discriminatory way in relation to 'Arabs and Turks in this city'. The case revolved around the decision of the Office of Public Prosecution not to prosecute Mr. Sarrazin for these comments, which was reviewed by the Prosecutor General, who agreed that Mr. Sarrazin's comments were made in the context of a critical discussion on structural problems of an economic and social nature in Berlin and did not constitute incitement against an individual.[247] The Committee recalled that it is not its role to review the interpretation of facts and national law made by domestic authorities, unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice. Nevertheless, it considered it had to examine whether the statements made by Mr. Sarrazin fell within any of the categories of impugned speech set out in Article 4. It determined that the statements did amount to dissemination of ideas based upon racial superiority or hatred, and that the State party had failed in its duty to carry out an effective investigation.[248]

The decision was criticised in an individual opinion by CERD member Carlos Vazquez. The dissent accepted that Mr. Sarrazin's statements were 'bigoted and offensive' but it noted that in past decisions the Committee had recognized the "principle of expediency", defined as 'the freedom to prosecute or not prosecute'.[249] It further noted that the Convention does not preclude States Parties from adopting a policy of prosecuting only the most serious cases. The opinion urged taking account of the context and the genre of the discussion in which the statements were made – 'for example, whether the statements were part of a vitriolic ad hominem attack or instead were presented as a contribution, however intemperate, to reasoned debate on a matter of public concern, as the State party found Mr. Sarrazin's statements to be.'[250] This opinion would prove influential in evolving CERD's interpretation of Article 4, with some of its elements

[239] See further Stephen Hagan, 'The N Word: One Man's Stand' (Magabala Books 2005).
[240] UN Doc. CERD/C/71/D/36/2006 (2007).
[241] Ibid para 6.2.
[242] Ibid para 6.3.
[243] Ibid para 6.4.
[244] UN Doc. CERD/C/66/D/33/2003 (2004).
[245] Ibid para 7.3.
[246] UN Doc. CERD/C/82/D/48/2010 (2013).
[247] Ibid para 2.4.
[248] Ibid para 12.9.
[249] Ibid, Individual Opinion of Mr. Carlos Vazquez para 10.
[250] Ibid

seen in CERD General Recommendation 35 on combatting racist hate speech.[251] Today, hate speech caselaw will be considered in light of the contextual factors set out in GR 35 including the content and form of the speech, the economic, social and political climate, the position or status of the speaker, and the reach and objectives of the speech.[252] Criminalisation of forms of racist expression 'should be reserved for serious cases', with the right to freedom of expression integrated into the Committee's work on combating hate speech.[253]

LAND RIGHTS AND FREE, PRIOR AND INFORMED CONSENT

Relevant Cases:

Ailsa Roy v Australia (HRC)
Angela Poma Poma v Peru (HRC)
Apirana Mahuika et al v New Zealand (HRC)
Chief Bernard Ominayak and the Lubicon Lake Band v Canada (HRC)
Ilmari Lansman et al v. Finland (HRC)
Ivan Kitok v Sweden (HRC)
Jouni E. Lansman et al v Finland (HRC)

Early HRC cases such as *Ivan Kitok v Sweden* (1988),[254] *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* (1990),[255] *Ilmari Lansman et al v. Finland* (1994),[256] and *Jouni E. Lansman et al v Finland* (1996),[257] adjudicated Indigenous land rights issues. As former HRC member Martin Scheinen wrote, 'although Article 27 does not employ the notion of "Indigenous peoples", much of the case law developed under the provision has been related to claims by such groups.'[258] Several of these decisions did not ultimately find a violation of Article 27, but they are nevertheless significant for establishing certain principles. Notably, the HRC understood interference can constitute "denial" in the sense of Article 27 by developing a test of meaningful consultation with the group.[259] Scheinen cites as an example the Committee's findings in *Ilmari Lansman* (1994), 'that the authors **were** consulted during the proceedings', the emphasis in bold being added by the Committee with the fact of consultation informing the conclusion that Article 27 was not violated.[260] The Committee examined also the

[251] CERD General Recommendation 35 on Combatting Racist Hate Speech, UN Doc. CERD/C/GC/35 (2013).
[252] Ibid para 15.
[253] Ibid paras 12 and 4.
[254] UN Doc. CCPR/C/33/D/197/1985 (1988).
[255] UN Doc. CCPR/C/38/D/167/1984 (1990).
[256] UN Doc. CCPR/C/52/D/511/1992 (1994).
[257] UN Doc. CCPR/C/58/D/671/1995 (1996).

[258] Martin Scheinen, 'Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights' Aboriginal Policy Research Consortium International (2004) 195 <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?params=/context/aprci/article/1249/&path_info=ind_peoples_land_rights.pdf>
[259] Ibid.
[260] Ibid, citing *Ilmari Lansman et al v. Finland* (1994). The paragraph reads in full: 'Against this background, the Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in

'consultation process' in relation to Maori fishing rights in *Apirana Mahuika et al v New Zealand* (2000),[261] similarly concluding:

> 'While it is a matter of concern that the settlement and its process have contributed to divisions amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.'[262]

Later HRC caselaw involving Indigenous peoples would build on these findings to articulate the principle of free, prior and informed consent (FPIC). In *Angela Poma Poma v Peru* (2009),[263] the communication related to the diversion of water from the Peruvian highlands to a coastal city, depriving the Indigenous Aymara people of access to underground springs essential to their traditional livelihood of raising llamas and alpacas. The HRC held: 'The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.'[264] The reference to 'mere' consultation distinguishes this from the higher threshold required by consent.

While *Poma Poma* is notable for its express recognition of FPIC, other aspects of the decision have been criticised. Katja Gocke discusses the framing of the communication in which the complainant did not initially articulate a breach of Article 27, because she wished for the case to be understood as one of a collective right to self-determination under Article 1 rather than individual minority rights under Article 27, with the HRC then "re-interpreting" the communication as a breach of Article 27.[265] As a result, 'it reduced Ms Poma Poma's people, the Aymara, to a minority and thus deprived the Aymara of their collective rights.'[266] The case was a 'step backwards' in not even referring to the Article 1 collective right to self-determination to interpret the content of Article 27,[267] which it had done in previous caselaw - as the Committee held in *Apirana Mahuika* (2000), 'the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.'[268] Hence, *Poma Poma* displayed a certain residual tension in addressing Indigenous peoples' rights under Article 27.

In *Ailsa Roy v Australia* (2024),[269] the Committee affirmed an approach whereby, in an Indigenous context, Article 1 informs decision-making under Article 27, and the concept of minority is avoided. The author claimed that the State Party violated Article 27 due to the lack of effective participation by the Wunna Nyiyaparli Indigenous people in the judicial proceedings demarcating their traditional territories. The communication argued specifically for an 'evolutionary interpretation of article 27',[270] including incorporating regional human rights jurisprudence from the Inter-American Commission on Human Rights to interpret international human rights standards. The Committee concluded that there was a violation of Article 27, read in light of Article 1 of the

particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.' (para 9.6)

[261] UN Doc. CCPR/C/70/D/547/1993 (2000).

[262] Ibid para 9.8.

[263] UN Doc. CCPR/C/95/D/1457/2006 (2009).

[264] Ibid para 7.6.

[265] Katja Gocke, 'The Case of *Angela Poma Poma v Peru*: The Concept of Free, Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights' (2010) 14 *Max Planck Yearbook of United Nations Law* 337-370, at 347 *et seqq*.

[266] Ibid 349.

[267] Ibid 355.

[268] *Apirana Mahuika et al v New Zealand* para 9.2.

[269] UN Doc. CCPR/C/137/D/3585/2019 (2024).

[270] Ibid para 3.4.

Covenant and the UNDRIP.[271] It referred also in its findings to decisions by CERD, as well as jurisprudence from the Inter-American and African Commissions and Courts.[272] The Committee held: '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 considered that such mechanisms require prior consultation of the relevant Indigenous People.'[273] It invoked the established principle that human rights treaties are living instruments, to conclude:

> '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.'[274]

Nowhere in the decision is there a reference to Indigenous peoples as "minorities". Thus, *Ailsa Roy* marks to a certain extent a break of Article 27 from the concept of a minority - in an Indigenous context, the concept of a minority is no longer needed to reach a violation. Nevertheless, the Committee maintained that a stand-alone Article 1 case on self-determination would not be admissible under the Optional Protocol. It recalled 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.'[275] Therefore, it may take Article 1 into account in interpreting Article 27 and other provisions of the Covenant, but self-determination cannot be litigated on its own and Indigenous questions must still be brought under the rubric of Article 27. We may expect the Committee, however, to avoid the language of minority rights in reaching decisions under Article 27 in relation to Indigenous peoples. *Ailsa Roy* is particularly significant in applying the obligation to title Indigenous land that has developed in the regional systems, to the international context. As the Committee found, for Indigenous peoples, the 'recognition, demarcation and registration of lands represent essential rights for cultural survival.'[276] This is now an international standard.

CERD jurisprudence has also expanded on Indigenous peoples' land rights. In *Lars-Anders Agren et al v Sweden* (2020),[277] the 15 petitioners were Indigenous Sami and all members of the Vapsten Sami reindeer herding community practising traditional reindeer herding. They argued that the State party had granted exploitation concessions to a private mining company in the community's traditional territory without their consent in violation of a number of provisions including Article 5(d)(v) ICERD, which relates to '[t]he right to own property alone as well as in association with others'.[278] Sweden countered that the concessions did not violate Article 5(d)(v) since the Sami's right to practise reindeer husbandry under Swedish legislation is not a right of *ownership* of land and does not entail formal title to or ownership of the land in question, but is a right of *usufruct*, which allows them to use land and water for their own maintenance and that of the reindeer.[279] It argued the right to FPIC as expressed in UNDRIP was 'not legally binding and does not entail a collective right of veto'.[280] It referred instead to an obligation of consultation which should be carried out in good faith with an objective of achieving agreement and building consensus, but that 'consent may not be required when a limitation on Indigenous peoples' rights is considered to be necessary and proportional in

[271] Ibid para 8.7.
[272] Ibid para 8.3 n 28.
[273] Ibid para 8.5.
[274] Ibid para 8.14.
[275] Ibid par 7.3.
[276] Ibid para 8.3.
[277] UN Doc. CERD/C/102/D/54/2013 (2020).
[278] Ibid paras 1.1 and 1.2.
[279] Ibid para 2.10.
[280] Ibid para 2.12.

relation to a valid State objective.'[281] Thus, the stakes in the communication were high, with the legal meaning of FPIC in the context of the collective right to property of Indigenous peoples at issue.

Firstly, it should be recalled that in CERD GR 23, the first general recommendation on Indigenous peoples by a UN treaty body, the Committee noted that 'no decisions directly relating to their [Indigenous] rights and interests are taken without their informed consent.'[282] GR 23 referred to consent rather than consultation, and the difference between the terms has since been emphasized by the UN Expert Mechanism on the Rights of Indigenous Peoples - '[c]onsultation and participation are crucial components of a consent process. States must have consent as the objective of consultation'.[283] In *Agren*, the Committee recalled GR 23 and held that 'to refrain from taking appropriate measures to ensure respect in practice for their right to offer free, prior and informed consent whenever their rights may be affected by projects carried out in their traditional territories constitutes a form of discrimination.'[284] The Committee found Sweden's reasoning to be misguided, and that it had not complied with its international obligations to protect the Vapsten Sami reindeer herding community against racial discrimination by adequately or effectively consulting the community in the granting of the concessions.[285] It affirmed that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and '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.'[286] For Indigenous peoples, land rights are not a matter of mere possession, but a prerequisite to their right to life and to 'prevent their extinction as a people'. The Committee upheld a violation of Article 5(d)(v).

The decision articulated what the Committee termed a 'human rights-based approach of free, prior and informed consent as a norm stemming from the prohibition of racial discrimination, which is the main underlying cause of most discrimination suffered by Indigenous peoples.'[287] As Cathal Doyle observes, the decision 'grounds the right to give or withhold free prior and informed consent in the principle of non-discrimination'.[288] The Committee also noted that the duty to consult in the context of FPIC is the responsibility of the State and cannot be delegated without supervision to a private company, as Sweden had done.[289] The remedy was similarly far-reaching. The Committee specifically recommended 'effectively revising the mining concessions after an adequate process of free, prior and informed consent'.[290] It then called for Sweden to 'amend its legislation to reflect the status of the Sami as Indigenous people in national legislation regarding land and resources and to enshrine the international standard of free, prior and informed consent',[291] with this latter recommendation having potential implications for Sami groups beyond the parameters of the case.

[281] Ibid.
[282] CERD General Recommendation 23, 'Indigenous Peoples' UN Doc. A/52/18, Annex V at 122 (1997) para 4(d).
[283] OHCHR, 'Consultation and Free, Prior and Informed Consent (FPIC)' <https://www.ohchr.org/en/indigenous-peoples/consultation-and-free-prior-and-informed-consent-fpic> citing 'Study of the Expert Mechanism on the Rights of Indigenous Peoples' UN Doc. A/HRC/39/62 (2018) paras 3 and 6.
[284] Ibid para 6.7.
[285] Ibid para 6.12.
[286] Ibid para 6.6.
[287] Ibid para 6.16.
[288] Cathal Doyle, 'Agren v Sweden' *International Human Rights Reports* (University of Nottingham, 2021) <https://www.nottingham.ac.uk/hrlc/publications/international-human-rights-reports/index.aspx> Doyle writes that the decision 'provides important insights into the implications of the principle of non-discrimination for indigenous peoples' right to land and territories and in particular their right to give or withhold free prior and informed consent, a right which CERD has been instrumental in incorporating into the corpus of international human rights law'.
[289] *Agren v Sweden*, para 6.17.
[290] Ibid para 8.
[291] Ibid.

MIGRANTS AND MIGRANT WORKERS

The Human Rights Committee includes non-citizen minorities in its understanding of the protections of Article 27 ICCPR.[292] As GC 23 notes: 'The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party.' Others have highlighted the applicability of minority rights to immigrants among other non-citizen groups, given Article 27 refers to 'persons' without distinction as to nationality.[293] Minority Rights Group International includes migrant workers in its advocacy, seen in a recent report focussing on the world of work which addressed 'members of minority communities, Indigenous peoples, migrants and other marginalized communities'.[294] Here, migrant workers are not considered as minorities *per se* but rather are protected as a separate category, with the report referring to 'minorities, Indigenous peoples and migrants'. However, it is also apparent that there are areas of clear overlap, where migrant workers in situations of exploitative work are also minorities or Indigenous peoples. This is seen for example in Thailand, which MRG's report considers 'emblematic of broader issues faced by migrant workers', where many migrant workers are ethnic minorities from Myanmar some of whom also identify as Indigenous peoples.[295] The report documents a range of violations experienced by ethnic minority migrant workers from Myanmar in Thailand, such as the Shan, Karen, Arakan and Rohingya, who often experience different forms of exploitation.[296]

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) provides some recognition of its potential in relation to minority rights protections. Its Article 31(1) reads: 'States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin.' The Committee on Migrant Workers (CMW) has not issued a General Comment in relation to minorities or Indigenous peoples, or referred to these groups in any of its other General Comments to date, but this aspect of its mandate should be further explored. In concluding observations to States Parties, the CMW has raised such issues. The Committee recommended to the Philippines that it conduct a study on the intersection of migration trends of women workers, identifying those 'who are Indigenous [and] those who are Muslim'.[297] It expressed concern in relation to Chile at the 'situation of Indigenous migrant women deprived of their liberty by the investigative police', noting also the 'number of complaints received and investigated for cases of torture or cruel, inhuman or degrading treatment or punishment of Indigenous migrant women'.[298] The Committee raised to Morocco the need for immediate measures to combat the 'social and racial stigmatization of migrant workers, in particular sub-Saharan migrant workers'.[299] It issued recommendations to Libya in relation to 'sexual violence committed against migrant workers and members of their families, especially those from sub-Saharan Africa and belonging to religious minorities, particularly Christians, by Libyan officials'.[300]

Article 77 ICMW provides for individual communications. Because it is an optional article, there is no minimum number of ratifications required for it to

[292] See HRC GC 23, supra n 3. For example, the HRC recommended to China (Hong Kong) that the State Party: 'intensify its efforts to improve the quality of Chinese language education for ethnic minorities and non-Chinese speaking students with an immigrant background'. See CCPR/C/CHN-HKG/CO/3 (2013) para 22.
[293] Elisa Ortega Velazquez, 'Minority Rights for Immigrants: From Multiculturalism to Civic Participation' (2017) X(1) *Mexican Law Review* 103-126, at 111-112.
[294] Minority Rights Group International, 'Minority and Indigenous Trends 2022: Focus on Work' (London: MRG 2022) Chapter 1 <https://minorityrights.org/minority-and-indigenous-trends-2022-focus-on-work/>
[295] Ibid Chapter 4.
[296] Ibid.
[297] UN Doc. CMW/C/PHL/CO/3 (2023) para 28(a).
[298] UN Doc. CMW/C/CHL/CO/2 (2021) para 36(a) and (b).
[299] UN Doc. CMW/C/MAR/CO/2 (2023) para 27.
[300] UN Doc. CMW/C/LBY/CO/1 (2019) para 28.

enter into force, and any State Party that makes the declaration can immediately be the subject of an individual communication. However, just three States Parties to ICMW have opted in to date – Mexico in 2008, Uruguay in 2012 and most recently Ecuador in 2018. There have been no individual communications taken against any of these three States Parties.

NON-REFOULEMENT

Relevant Cases:

A.A.S. v Denmark (HRC)
B.B. v Sweden (HRC)
Flor Agustina Calfunao Paillalef v Switzerland (CAT)
H.A. v Denmark (HRC)
H.U. v Finland (CAT)
L.E.M. v Switzerland (CAT)
N.R. v Sweden (CAT)
S.A.S. v Australia (CAT)
U.I. and G.I. v Switzerland (CERD)

Observers have highlighted the 'increased recourse by refugee advocates to the human rights treaty bodies'.[301] This is linked to the absence of an individual complaints mechanism under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) which leads to such applications under UN human rights treaties, in particular the HRC and CAT.

The ICCPR does not have an article which mentions explicitly refoulement or refugee protection, but this has been interpreted in particular under the Article 6 right to life and Article 7 prohibition of torture.[302] Thus, in *H.A. v Denmark* (2018),[303] the author challenged his deportation to Afghanistan on the grounds, inter alia, that 'he belongs to the Hazara minority, which is under attack from the Taliban, who are mainly ethnic Pashtuns'.[304] Denmark contested the relevance of his minority status: 'The State party finds that the fact that the

[301] Saul Takahashi, 'Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention' (2002) 20(1) *Netherlands Quarterly of Human Rights* 53-74, at 55.
[302] Ibid citing HRC GC 20, in which 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'. (at para 9)
[303] UN Doc. CCPR/C/123/D/2328/2014 (2018).
[304] Ibid para 3.1.

author is an ethnic Hazara from the Wardak Province cannot in itself justify his entitlement to international protection. In this connection, the State party submits that, according to the information available, there is a large minority of ethnic Hazaras in the Wardak Province and that they are not at risk of being subjected to abuse falling within article 7 of the Covenant solely due to their ethnic affiliations.'[305] The Committee did not find a violation of the Covenant. It appeared to largely agree with the State Party's assessment that 'the fact that the author is an ethnic Hazara from the Wardak Province cannot in itself justify his entitlement to international protection'.[306] He had failed to show 'a personal and real risk of treatment' contrary to Article 7 ICCPR. Similarly, in *B.B. v Sweden* (2021),[307] the author contested his deportation to Afghanistan including on the grounds that 'the risk of persecution would be aggravated by factors of vulnerability such as the fact that he belongs to the Hazara ethnic minority group'.[308] This communication was successful in disclosing a violation of the Covenant, although the minority aspect was not decisive with other personal factors creating a real risk that was not adequately assessed by the State Party.[309]

In *A.A.S. v Denmark* (2016),[310] the author's minority status was significant in upholding his deportation to Somalia as a violation of the ICCPR. He belonged to 'an oppressed minority clan named Bagadi', and during the civil war in Somalia, larger clans had oppressed the minority clans in the country.[311] The Committee observed that reports concerning the human rights situation in Somalia 'indicate that abuse of and discrimination against minority clans are widespread', with clan militias and al-Shabaab continuing to commit grave abuses throughout the country.[312] His status as a member of a vulnerable minority clan was one of a number of cumulative factors that would put him at a real risk of irreparable harm in breach of Article 7 ICCPR.[313] In general, minority status is not in and of itself sufficient for contesting deportation under Article 7, but it can be an important factor in setting out a real risk of persecution.

The individual communications procedure before the Committee Against Torture (CAT) provides the highest volume of caselaw after the ICCPR, with the Committee having made almost 500 decisions on the merits. Many of these communications engage non-refoulement, expressly prohibited under Article 3 UN CAT in which 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' As North and Chia observe: 'Indeed, most cases before the Committee against Torture now involve asylum-seekers'.'[314] As with the ICCPR, the communications in relation to non-refoulement include minority or Indigenous status as increasing the risk of torture.

Thus, in *L.E.M. v Switzerland* (2024),[315] the complainant argued against his deportation to Cameroon given that 'the indications of personal risk that he faces may include his ethnic origin'.[316] In *N.R. v Sweden* (2023),[317] the appeal against deportation related to the status of the claimant as a member of Afghanistan's Christian minority.[318] In *H.U. v Finland* (2024),[319] the indications of personal risk of deporting the applicant to the Democratic Republic of the Congo included the complainant's ethnic background.[320] However, membership of an ethnic group alone is clearly not sufficient to trigger the non-refoulement

[305] Ibid para 4.10.
[306] Ibid para 9.6.
[307] UN Doc. CCPR/C/131/D/3069/2017 (2021).
[308] Ibid para 9.2.
[309] Ibid para 9.12.
[310] UN Doc. CCPR/C/117/D/2464/2014 (2016).
[311] Ibid para 2.2.
[312] Ibid para 7.6.
[313] Ibid para 7.7.
[314] Anthony North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' (2006) 5 *Australian Yearbook of International Law* 150.
[315] UN Doc. CAT/C/79/D/1055/2021 (2024).
[316] Ibid para 3.2. The complainant noted that politics in Cameroon are conducted along ethnic and tribal lines.
[317] UN Doc. CAT/C/78/D/1047/2021 (2023).
[318] Ibid para 3.8.
[319] UN Doc. CAT/C/78/D/1052/2021 (2024).
[320] Ibid para 9.4.

obligation. In *S.A.S. v Australia* (2017),[321] involving a Tamil applicant contesting a decision to deport him to Sri Lanka, the State Party's contention that there was no real chance that the applicant would be subjected to serious harm amounting to persecution just because he is of Tamil ethnicity was largely upheld; the individual must be found to be personally at risk of such treatment.[322] In *X and Z v Finland* (2014),[323] two brothers claimed that their deportation to the Islamic Republic of Iran would constitute a breach of Article 3. They were of Kurdish ethnicity and members of the opposition party Komala. In considering the complaints, the Committee examined medical reports evidencing that they might have been subjected to torture in the past. It also examined submissions on the general human rights situation in Iran. Specifically, the Committee gave weight to recent reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran regarding the persecution and execution of members of opposition political parties, such as Komala, and of individuals of Kurdish ethnicity.[324] The Committee concluded that there were substantial grounds for believing that the complainants risked being subjected to torture if returned to Iran.

The issue of non-refoulement under Article 3 UN CAT has arisen also in an Indigenous context. In *Flor Agustina Calfunao Paillalef v Switzerland* (2020),[325] the author, subject to a deportation order from Switzerland, was a member of the Mapuche Indigenous people 'asserting its rights to its traditional territory in the face of timber, hydroelectric and mining concessions granted by Chile to domestic and international companies, road construction without the consent of the Indigenous people and the occupation of the land by large non-Indigenous landowners'.[326] The case is notable for its expansive detail on the situation of the Mapuche. The communication noted how the demands of the Mapuche are being met with 'violent reactions both from the Chilean authorities, including the militarized police known as Carabineros, and from individuals who have formed private armed militias.'[327] The situation was acknowledged by the State Party, that Mapuche people who are trying to maintain their traditional way of life are involved in violent clashes with the Chilean security apparatus, that there have been miscarriages of military justice in trials of Mapuche activists, as well as police violence in Araucania with disproportionately severe acts of repression by the State.[328] CAT referred to the Special Rapporteur on Indigenous Peoples in finding that 'the present situation of Indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources.'[329] The Committee concluded that 'Mapuche leaders are subjected to widespread torture and other cruel, inhuman and degrading treatment or punishment, from which protection should be provided under article 3 of the Convention.'[330]

This case illustrates how the non-refoulement prohibition under UN CAT can result in an in-depth examination of the minority or Indigenous rights situation in a State which is not directly the subject of the communication, including acts which would breach the Convention in relation to Chile. The case also highlights the growing inter-connectedness of the UN treaty bodies and special procedures seen in individual communications, in citing concluding observations of CERD, CEDAW, CRC and a number of thematic Special Rapporteurs in relation to the situation of the Mapuche.[331]

[321] UN Doc. CAT/C/61/D/720/2015 (2017).
[322] See also *T.T. v Australia* UN Doc. CAT/C/77/D/946/2019 (2023), in which the Committee found in relation to a Tamil applicant that he had 'not adduced sufficient grounds for believing that he would face a real, foreseeable, personal and present risk of being subjected to torture in case of his removal to Sri Lanka.' (at para 9)
[323] UN Doc. CAT/C/52/D/483/2011 (2014).
[324] UN Doc. A/69/44 (2013-14) para 144.
[325] UN Doc. CAT/C/68/D/882/2018 (2020).
[326] Ibid para 2.1.
[327] Ibid.
[328] Ibid para 8.3.
[329] Ibid para 8.4. There were also references to "constant monitoring" and "systematic repression" in the rural areas inhabited by the Mapuche, who know that the "slightest misplaced comment could send them directly to prison".
[330] Ibid para 8.4.
[331] See para 8.4 among other passages.

Non-refoulement caselaw arose for the first time before CERD in *U.I. and G.I. v Switzerland* (2024).[332] This was commented on in the decision: 'The Committee observes that the present communication constitutes a new case in that the petitioners are asking it to rule on an obligation of non-refoulement under article 14 of the Convention.'[333] The petitioners were of Macedonian nationality and Roma ethnicity, subject to an order of removal from Switzerland to North Macedonia, which they argued breached their rights inter alia under Article 5(b) and (e)(iv) ICERD, which relate to the prohibition of racial discrimination in the right to security of person and protection by the State against violence or bodily harm, as well as health and social security. The Committee noted that in North Macedonia, perpetrators of violence against women and Roma persons often go unpunished. It also noted the State party's submission that North Macedonia is included in the European Commission's list of safe States which means it meets applicable criteria, including 'respect for and protection of minorities'.[334] It further noted the petitioners' absence of documentary evidence of the violence and threats to which they were subjected. It then set a standard for such claims before it: 'The Committee recalls that it is up to the petitioners to present an arguable case - that is, submit substantiated arguments showing that the risk of their right to security and physical safety being seriously violated because of their ethnic or racial origin is foreseeable, personal, present and real.'[335] It found that such a case had not been made out, and as a result no violation was found. However, it is apparent from the decision that 'safe State' designation does not automatically mean that no such violation can be found, and CERD, as with other UN treaty bodies, provides a means of review where such substantiated arguments are made out.

[332] UN Doc. CERD/C/112/D/74/2021 (2024).
[333] Ibid para 7.3.
[334] Ibid para 7.5.
[335] Ibid para 7.9.

RACIAL DISCRIMINATION AND ETHNIC MINORITIES

Relevant Cases:

Anna Koptova v Slovakia (CERD)
E.I.F. v the Netherlands (CERD)
Grigore Zapescu v Moldova (CERD)
Murat Er v. Denmark (CERD)
Ziad Ben Ahmed Habassi v Denmark (CERD)

The ICERD was adopted on 21 December 1965, one year before the ICCPR. At this point, UN standards on racial discrimination and minority rights had evolved in parallel, so that ICERD was not viewed as a minority rights instrument.[336] The word "minority" or "minorities" does not appear at all in its text. A further obstacle to linking ICERD and minority rights was that the Convention's initial focus was oppressed *majorities*, through practices of colonialism and apartheid. That viewpoint would be quickly challenged by CERD, which began its work in 1970. In this early period, many States Parties reporting for the first time to CERD put forward the view that they had no racial discrimination. Hence, CERD's initial work in relation to minorities took two pathways - first, combatting the view that there was no racial discrimination in the territories of States Parties reporting to the Committee; and second, as part of this, expressly referring to State obligations to protect minorities or minority groups on their territories. For example, as early as 1972, CERD members found in relation to Romania that 'information on the composition of minorities and other social and demographic data was…lacking in the report'. In 1973, the Committee raised in relation to Brazil 'the policy of the Brazilian Government with regard to minority groups'. The Committee would evolve the understanding of its scope as inclusive also of

[336] See further David Keane, 'The Emergence and Evolution of the Protection of Minorities under ICERD', in Anna-Maria Biro, Carole Fink, Jennifer Jackson-Preece and Corinne Lennox (eds.), *The Routledge History of the International Protection of Minorities, 1919-2001* (Routledge 2025, forthcoming).

religious or linguistic minorities in States Parties, where these have a link with ethnicity – what it would come to term "ethno-religious" and "ethno-linguistic" groups. By the 1990s, CERD would view itself as one of the bodies implementing the UNDM, writing in its annual report that it is 'acting on the invitation of the General Assembly to give due regard to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.'[337]

Today, ICERD should be understood as a treaty that clearly engages the protection of minorities. Indeed, given CERD's extensive practice in relation to minorities, it is, following the ICCPR, the most relevant UN human rights instrument in relation to minority rights protection. However, CERD has never articulated the minority rights aspect of its mandate in the form of a general recommendation. It has provided detail on the rights of Indigenous peoples under the Convention in its GR 23 on Indigenous Peoples (1997).[338] GR 23 opens: 'In the practice of [CERD], in particular in the examination of reports of States parties under article 9 [ICERD], the situation of Indigenous peoples has always been a matter of close attention and concern.'[339] We may apply the same to minority groups, but the Committee has not offered a similar detailed consideration of minority rights obligations under the Convention. Nevertheless, CERD sessions regularly invoke minority rights in relation to all States Parties to the treaty.

Although CERD has not issued a particular general recommendation on minorities, several of its other general recommendations refer directly to minority groups and rights. For example, its GR 27 on 'Discrimination against Roma' refers to the Roma as a minority group and calls on States Parties to 'endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community'; and '[t]o take the necessary steps, including special measures, to secure equal opportunities for the participation of Roma minorities or groups in all central and local governmental bodies'.[340] Its GR 36 on Racial Profiling by Law Enforcement Officials (2020) states with regard to its scope: 'The Committee has often expressed its concern about the use of racial profiling by law enforcement officials targeting various minority groups based on specific characteristics, such as a person's presumed race, skin colour, descent or national or ethnic origin.'[341] GR 36 recognizes that specific groups, including ethnic minorities, 'are the most vulnerable to racial profiling'.[342] Recommendations include special measures to effectively address the under-representation of national or ethnic minority groups in law enforcement.[343] These documents regularly inform concluding observations on minorities.

CERD has a remarkably small volume of caselaw, certainly by comparison with the HRC, comprising 60 decisions on the merits in total. Many of these communications relate to some extent to the protection of minorities or Indigenous peoples, in particular when we consider minorities in the broader sense as inclusive of "non-citizens".[344] Given the absence of the term "minority" from the Convention, the Committee does not usually articulate violations of ICERD expressly in terms of minority rights, even where minority groups are clearly involved. Nevertheless, the language of minority rights can emerge in CERD individual communications. In *E.I.F. v the Netherlands* (2001),[345] the practices of the Netherlands Police Academy were alleged to discriminate against 'ethnic minority students', including the petitioner who was a Dutch national of Surinamese origin. The Committee did not consider the facts to disclose a violation on the merits.[346] In *Anna Koptova v Slovakia* (2000),[347] the

[337] Ibid.
[338] CERD General Recommendation 23, 'Indigenous Peoples' UN Doc. A/52/18, Annex V at 122 (1997).
[339] Ibid para 1.
[340] UN Doc. A/55/18, annex V at 154 (2000), paras 18 and 41.
[341] CERD General Recommendation 36, 'Preventing and Combating Racial Profiling by Law Enforcement Officials' UN Doc. CERD/C/GC/36 (2020) para 10.
[342] Ibid para 11.
[343] Ibid paras 46-47.
[344] On the scope of ICERD as inclusive of these groups, see further CERD General Recommendation 30, 'Discrimination against Non-citizens' UN Doc. CERD/C/64/Misc.11/rev.3 (2004). GR 30 refers *inter alia* to migrants, refugees and asylum-seekers, as well as stateless persons.
[345] UN Doc. CERD/C/58/D/15/1999 (2001).
[346] Ibid para 7.
[347] UN Doc. CERD/C/57/D/13/1998 (2000).

author of the communication, a Slovak citizen of Roma ethnicity, requested the annulment of two resolutions purporting to ban the author and other Roma from entering two municipalities. The petitioner sought redress for 'the promulgation and maintenance in force of resolutions banning an entire ethnic minority from residing or entering an entire municipality'.[348] CERD jurisprudence can therefore operate to protect minorities whether or not it expressly deploys the language of minority rights. In the *Koptova* case above, CERD agreed that provisions of ICERD had been violated, finding a breach of Article 5(d)(i) which prohibits racial discrimination in the right to freedom of movement and residence.[349]

In *Murat Er v. Denmark* (2007),[350] a policy by a carpentry college in Copenhagen to accept requests from businesses to only send individuals from a certain ethnic background amounted to racial discrimination in regard to the right to education and training in violation of Article 5(e)(v). The Committee rejected the State Party's claim that the author was not a victim since his exclusion from traineeships was due to other factors. It noted that 'the existence of an alleged discriminatory school practice consisting in fulfilling employers' requests to exclude non-ethnic Danish students from traineeships would be in itself sufficient to justify that all non-ethnic Danish students at the school be considered as potential victims of this practice, irrespective of whether they qualify as trainees according to the school's rules'.[351]

In *Ziad Ben Ahmed Habassi v Denmark* (1999),[352] the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality. The author had a permanent residence permit in Denmark and was married to a Danish citizen, and satisfied all the conditions for being granted a loan. The Committee commented that 'Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.'[353] It determined that 'nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context.'[354] It considered it appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis à vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination were being applied. It recommended that the State Party 'take measures to counteract racial discrimination in the loan market.'[355]

In *Grigore Zapescu v Moldova* (2021),[356] the petitioner of Roma origin was rejected for a position as a waiter at a restaurant while his friend was accepted on the same day in an identical recruitment process. The decision of CERD focussed on Article 6 which relates to the right to a remedy.[357] In past jurisprudence, arguments had been made to the Committee that Article 6 should be considered an "accessory right" which can only be violated once a separate violation of a substantive right has been established. The Committee rejected this understanding.[358] As a stand-alone right, Article 6 provides standards on the *proceedings* by which arguable claims are heard, as well as on the outcome of such proceedings and the remedies that are afforded. Under this first procedural aspect, the Committee requires the reversal of the burden of proof where a *prima facie* case of racial discrimination has been made out by the applicant.[359]

[348] Ibid para 5.4.
[349] Ibid para 10.1, specifically Article 5(d)(i) ICERD which provides for no racial discrimination in the right to freedom of movement and residence.
[350] UN Doc. CERD/C/71/D/40/2007 (2007).
[351] Ibid.
[352] UN Doc. CERD/C/54/D/10/1997 (1999).
[353] Ibid para 9.2.
[354] Ibid para 9.3.
[355] Ibid para 11.1.
[356] UN Doc. CERD/C/103/D/60/2016 (2021).
[357] Article 6 ICERD reads: 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination'.
[358] *Kenneth Moylan v Australia* UN Doc. CERD/C/83/D/47/2010 (2013) para 6.2.
[359] *V.S. v Slovakia* UN Doc. CERD/C/88/D/56/2014 (2015) para. 7.4; *Gabaroum v France* UN Doc. CERD/C/89/D/52/2012 (2016) para 7.2.

This is justified by the fact that the main pieces of evidence are usually in the possession of the alleged discriminator, and the burden in civil proceedings, if not shifted, would unduly weigh against the alleged victim.[360] It was held in *Zapescu* that the petitioner presented an arguable claim, but was left with a disproportionate burden to prove the respondent company's discriminatory intent. This amounted to a failure to ensure effective protection and remedies in violation of Article 6.[361] The decision emphasises the important procedural standards in the Convention that operate to protect minority victims of discrimination.

TORTURE, POLICE VIOLENCE AND MINORITY/INDIGENOUS RIGHTS DEFENDERS

Relevant Cases:

Besim Osmani v Serbia (CAT)
Damian Gallardo Martinez et al v Mexico (CAT)
Danilo Dimitrijevic v Serbia and Montenegro (CAT)
Jovica Dimitrov v Serbia and Montenegro (CAT)

The definition of torture in Article 1 of the UN Convention Against Torture (UN CAT) focuses attention on prohibited acts carried out for 'any reason based on discrimination of any kind'.[362] The Committee Against Torture (CAT) has underlined the importance of this aspect of its mandate in its General Comment 2: 'The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment'.[363] As a former CAT member noted, GC 2 'specifically highlights the broad range of "minority or marginalized individuals or populations especially at risk of torture", reflecting the Committee's own past findings.'[364]

Thus, CAT has expressed consistent concern as to torture by the police of members of minority groups. It has urged States Parties to 'increase…efforts to combat police ill-treatment of minorities'.[365] It has also noted that in order to determine whether there are substantial grounds for believing that a person would be in danger of being subjected to torture if deported, the existence in the State concerned of a consistent pattern of 'harassment and violence against minority groups' is an important indicator.[366] CAT has urged States parties to

[360] Ibid.
[361] Ibid para. 8.10.
[362] Felice Gaer, 'Opening Remarks: General Comment No. 2' 11(2) (2008) *City University of New York Law Review* 187-200, at 194.
[363] CAT, General Comment 2 'Implementation of Article 2 by States Parties' UN Doc. CAT/C/GC/2 (2008) paras 1 and 21. See also para 24.
[364] Gaer, supra n 362.
[365] Ronagh McQuigg, 'How Effective is the United Nations Committee Against Torture?' (2011) 22(3) *European Journal of International Law* 813-828, at 823, citing UN Doc. A/56/44 (2001) paras 113-114.
[366] CAT, General Comment 4 'Implementation of Article 3 of the Convention in the context of Article 22' UN Doc. CAT/C/GC/4 (2018) para 43.

establish human rights offices within police forces, and units of officers specifically trained to handle cases of violence against 'religious, national or other minorities and other marginalized or vulnerable groups.'[367] It has spoken also of the importance of minority rights in the provision of redress. Its GC 3 notes that '[c]ulturally sensitive collective reparation measures shall be available for groups with shared identity, such as minority groups, Indigenous groups, and others.'[368]

The concluding observations of CAT can and do raise minority and Indigenous rights issues. In a recent 2024 session, the Committee queried the definition of torture in the domestic legislation of Honduras, which limited aggravating circumstances based on the identity of victims to certain groups of persons and did not take into account others, including 'Indigenous persons and other national or ethnic minorities'.[369] It stated in relation to Azerbaijan: 'The Committee is concerned about the effect that discriminatory statements made by high-level officials and disseminated in both online and offline media may have in creating an environment that greatly increases the likelihood of the commission of violence against persons of Armenian national or ethnic origin and other minority groups.'[370] The Committee expressed concern about reports in Costa Rica 'documenting harassment and attacks against the lives and physical integrity of Indigenous persons, human rights defenders and environmental activists during the period under review'.[371] With regard to Colombia, it also expressed 'serious concern at the numerous murders and attacks, threats, surveillance and other acts of intimidation suffered by human rights defenders, social, Indigenous and Afro-Colombian leaders and journalists and the scant progress made in carrying out effective investigations'.[372] In concluding observations to Ethiopia, CAT discussed extensive violations in the regions of Tigray, Amhara and Afar such as summary executions, attacks on civilian populations, disappearances and torture, that are 'ethnically motivated'.[373]

The Committee against Torture has focussed also on police profiling, brutality and killings of members of minority groups. In concluding observations to the United States, CAT stated its concern about 'the numerous reports of police brutality and excessive use of force by law enforcement officials, in particular against persons belonging to certain racial and ethnic groups'.[374] It expressed extreme concern as to 'frequent and recurrent shootings or fatal pursuits by the police of unarmed black individuals'.[375] It has raised similar issues in diverse States Parties, such as 'police brutality against detained persons and…allegations of racial profiling during security operations' in Cabo Verde;[376] 'discrimination on the basis of racial profiling and the ill-treatment and violent intrusion into the homes of persons of African descent and migrants from other Latin American countries by the security forces' in Argentina;[377] and how police 'continue to target racial minorities during "stop-and-search", leading to degrading treatment' in the Netherlands.[378]

This is reflected also in CAT jurisprudence. In *Danilo Dimitrijevic v Serbia and Montenegro* (2005),[379] the Roma complainant in police custody was locked into an office where 'an unknown man in civilian clothes entered the office, ordered him to strip to his underwear, handcuffed him to a metal bar attached to a wall and proceeded to beat him with a police club for approximately one hour'.[380] The complainant submitted that the allegations of violations of the

[367] CAT, General Comment 3 'Implementation of Article 14 by States Parties' UN Doc. CAT/C/GC/3 (2012) para 35.
[368] Ibid para 32.
[369] UN Doc. CAT/C/HND/CO/3 (2024) para 8.
[370] UN Doc. CAT/C/AZE/CO/5 (2024) para 24. Note that this issue is also the subject of an application under Article 22 ICERD before the International Court of Justice in *Armenia v Azerbaijan*. See further <https://www.icj-cij.org/case/180>
[371] UN Doc. CAT/C/CRI/CO/3 (2023) para 38.
[372] UN Doc. CAT/C/COL/CO/6 (2023) para 36.
[373] UN Doc. CAT/C/ETH/CO/2 (2023) para 14.
[374] UN Doc. CAT/C/USA/CO/3-5 (2014) para 26.
[375] Ibid.
[376] UN Doc. CAT/C/CPV/CO/1 (2017) para 20.
[377] UN Doc. CAT/C/ARG/CO/5-6 (2017) para 35.
[378] UN Doc. CAT/C/NLD/CO/7 (2017) para 44.
[379] UN Doc. CAT/C/35/D/172/2000 (2005).
[380] Ibid para 2.1.

Convention 'should be interpreted against a backdrop of systematic police brutality to which the Roma and others in the State party are subjected'.[381] The violation of UN CAT was upheld, although the decision did not pronounce on the systematic aspect of police treatment of Roma. Similarly, in *Jovica Dimitrov v Serbia and Montenegro* (2005),[382] the author of Roma origin was in police custody where an arresting officer 'struck the complainant repeatedly with a baseball bat and a steel cable'.[383] The complainant also submitted that the allegations of violations of the Convention 'should be interpreted against a backdrop of systematic police brutality to which the Roma and others in the State party are subjected'. The Committee found a violation but did not refer to systematic aspects. However, we may note that UN CAT provides a separate mechanism in its Article 20(1) whereby CAT may consider 'reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party'.[384]

In *Besim Osmani v Serbia* (2009),[385] CAT expressly recognised the link between torture and the vulnerability of the Roma as a minority group. The facts related to the demolition of the "Antena" Roma settlement in Belgrade which had been there since 1962, in which there was ill-treatment of the complainant by police officials in the course of the execution of the eviction order. The complainant's submission argued:

> 'The complainant's association with a minority group historically subjected to discrimination and prejudice renders the victim more vulnerable to ill-treatment for the purposes of article 16, paragraph 1, particularly where, as in the Republic of Serbia, law enforcement bodies have consistently failed to address systematic patterns of violence and discrimination against Roma. He suggests that a "given level of physical abuse is more likely to constitute 'degrading or inhuman treatment or punishment' when motivated by racial animus and/or coupled with racial epithets".'[386]

The Committee pronounced that 'the infliction of physical and mental suffering aggravated by the complainant's particular vulnerability, due to his Roma ethnic origin and unavoidable association with a minority historically subjected to discrimination and prejudice, reaches the threshold of cruel, inhuman or degrading treatment or punishment'.[387] Here, the minority status of the complainant clearly informed the determination of a violation of UN CAT.

CAT has also protected Indigenous peoples in its Article 2 caselaw. In an important decision in *Damian Gallardo Martinez et al v Mexico* (2022),[388] the principal complainant was a member of the Indigenous Ayuujk people in the state of Oaxaca who was a teacher and defender of Indigenous peoples' rights and the right to education. He was arrested and tortured for approximately 30 hours in a secret detention centre, 'beaten so that he would divulge information about other people involved in the education rights movement'.[389] In upholding a violation of Article 2 UN CAT in which States Parties are required to prevent acts of torture in its jurisdiction, the Committee called for 'full reparation, including fair and adequate compensation, to the complainants, and provide as full a rehabilitation as possible to Mr. Gallardo Martinez, ensuring that it is respectful of his worldview as a member of the Ayuujk Indigenous people'.[390] It included also the requirement that the decision be disseminated 'in a widely read newspaper in the state of Oaxaca.' Finally, CAT called for the 'cessation of the

[381] Ibid para 3.2.
[382] UN Doc. CAT/C/34/D/171/2000 (2005).
[383] Ibid para 2.1.
[384] For example, under Article 20(1), CAT has concluded that 'torture was being systematically practised in the territory of Egypt.' See UN Doc. A/72/44 (2016-17) paras 60 and 67-70.
[385] UN Doc. CAT/C/42/D/261/2005 (2009).
[386] Ibid para 3.3.
[387] Ibid para 10.4.
[388] UN Doc. CAT/C/72/D/992/2020 (2022).
[389] Ibid para 2.3.
[390] Ibid para 9(c).

criminalization of the defence of Indigenous peoples' rights', citing a report of the UN Special Rapporteur on Indigenous Peoples.[391] This is in line with the growing concern in relation to the protection of Indigenous human rights defenders exhibited in its State reporting mechanism.[392]

URGENT ACTION

This final section briefly outlines an alternative mechanism developed by CERD. From 1993, CERD adopted an early warning and urgent action procedure as part of its regular agenda. [393] Although the mechanism is not strictly speaking an individual communications mechanism, it does operate in a similar way in allowing individuals or groups to petition the Committee in relation to an individual situation of alleged breach outside of the reporting cycle. As a result, its impact in the realm of minority and Indigenous rights may be briefly considered.

The mechanism is not optional and may be triggered in relation to any of ICERD's 182 States Parties. It is aimed at preventing existing situations escalating into conflicts, and responding to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.[394] The mechanism has a clear relevance to minorities and Indigenous peoples, who are referred to expressly in the documents underlying its use, a 1993 working paper supplemented by 2007 guidelines.[395] Thus, the 1993 working paper discussed the need for a commitment to human rights 'with a special sensitivity to the rights of minorities', as well as preventive measures '[i]n situations of tension related to minorities'.[396] The 2007 guidelines noted that since 1993, the Committee had addressed the presence of serious, massive, or persistent patterns of violations which included acts of extreme violence 'committed against minorities and Indigenous peoples'.[397] One of the indicators for use of the mechanism is: 'Encroachment on the traditional lands of

[391] Ibid para 9(e).
[392] See for example OHCHR, 'In Dialogue with Costa Rica, Experts of the Committee against Torture Praise the State's Legal and Institutional Safeguards against Torture, Ask about Prison Overcrowding and Attacks on Indigenous Human Rights Defenders' 3 November 2023 <https://www.ohchr.org/en/news/2023/11/dialogue-costa-rica-experts-committee-against-torture-praise-states-legal-and> Claude Heller, CAT Chair and Country Co-Rapporteur, noted that it was important that Costa Rica acknowledged the problems it faced, 'particularly regarding indigenous human rights defenders'.

[393] CERD, 'Early-Warning Measures and Urgent Procedures' <https://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx#about>
[394] Ibid.
[395] UN Doc. A/48/18 (1994) 'Prevention of racial discrimination, including early warning and urgent procedures: Working paper adopted by the Committee on the Elimination of Racial Discrimination' Annex III p. 126-130; and A/62/18 (2007) 'Guidelines for the early warning and urgent action procedure' Annex III p. 115-120.
[396] Ibid (1994) paras 2-3.
[397] Ibid (2007) para 7.

Indigenous peoples or forced removal of these peoples from their lands, in particular for the purpose of exploitation of natural resources.'[398] Recommendations for action under the mechanism are to be addressed *inter alia* to the Special Rapporteur on Minority Issues and the Special Rapporteur on the Rights of Indigenous Peoples.[399]

There are many examples of its use to protect minorities. For example, in June 2020 CERD issued a Statement in which it expressed alarm at 'the horrific killing of George Floyd in Minneapolis on 25 May 2020', as well as 'the recurrence of killings of unarmed African Americans by police officers and individuals over the years'.[400] The Statement expressly referenced minority rights in urging the Government of the US 'to publicly recognize the existence of structural racial discrimination in the society, as well as to unequivocally and unconditionally reject and condemn racially motivated killings of African Americans and other minorities'.[401] In 2022, CERD used the procedure to highlight serious human rights violations including mass incarceration against the Uyghur minority in the Xinjiang Uyghur Autonomous Region of China (XUAR).[402] It called on China to 'immediately release all individuals arbitrarily deprived of their liberty in the XUAR', as well as cease intimidation and reprisals against Uyghur and other ethnic Muslim communities, the diaspora and those who speak out in their defence.[403] It sought a 'full review of [China's] legal framework governing national security, counter terrorism and minority rights in the XUAR', to ensure compliance with ICERD.[404]

The mechanism has also been extensively used to protect Indigenous peoples. In the Philippines, the Committee triggered the mechanism in support of the Indigenous Subanon people opposing the destruction of the sacred Mount Canatuan by a Canadian gold mining company.[405] In relation to India, CERD engaged the procedure to raise the situation of Particularly Vulnerable Tribal Groups (PVTGs) in the Andaman and Nicobar Islands.[406] The context was the development of two mega projects - the "Holistic Development of Great Nicobar Island" and the "Sustainable Development of Little Andaman Island Vision Document" - which would have a harmful impact on five PVTGs that inhabit Andaman and Nicobar Islands (Great Andamanese, Jarawas, Onges, Shompens and Sentinelese).[407] The Committee has also engaged the mechanism in relation to the arbitrary depravation of citizenship of Bengali-speaking Muslims in Assam State, reflective of how ethno-religious groups come under the scope of the Convention.[408] The Committee expressed concern at the 'discriminatory approach applied by the Citizenship Amendment Act against Bengali-speaking Muslims on the grounds of their descent, ethno-religious and ethnicity', as well as incidents of violent attacks perpetuated by civilians and organized groups against members of Bengali-speaking Muslims.[409]

Urgent procedures exist also before the Committee on Enforced Disappearance, as noted. In its recent report in 2025, CED registered an urgent action request relating to Chile which noted in relation to the alleged victim: 'Ms. Chunil Catricura is a member of the Mapuche Indigenous community, a human rights defender and an older person', with the Committee requesting the State party 'ensure that the search and investigation strategy followed a differential approach, with a gender and intersectionality perspective, and that all stages of the search were conducted in full respect of her requirements.'[410]

[398] Ibid para 12(h).
[399] Ibid para 14(c)(ii). Three UN special procedures are referenced in total - the Special Rapporteur on contemporary forms of racism, racial discrimination and xenophobia and related intolerance, the Special Rapporteur on the rights of indigenous peoples, as well as the Independent Expert [now Special Rapporteur] on minority issues.
[400] CERD, Statement 1 (2020).
[401] Ibid.
[402] CERD Decision 1(108) (2022).
[403] Ibid.
[404] Ibid.
[405] CERD, 'Letter to H.E. Ms. Erlinda F. Basilio' 7 March 2008 (early warning and urgent procedure).
[406] UN Doc. CERD/EWUAP/111th Session/2023/MJ/CS/ks (2023).
[407] Ibid.
[408] UN Doc. CERD/EWUAP/115thsession/2025/CS/BJ/ks (2025).
[409] Ibid.
[410] UN Doc. CED/C/28/3 (2025), paras 41-43.

As with all UN treaty body mechanisms, concerns and recommendations under urgent action mechanisms are not legally binding. Nevertheless, they offer a crucial route for minority and Indigenous peoples to raise and defend their rights where these are being urgently threatened. It may be noted that none of the States Parties in the CERD examples above - the US, China, the Philippines and India - have opted in to the individual communications mechanism under Article 14 ICERD. As a result, the mechanism is an important tool for the protection of minority and Indigenous rights at the international level, particularly in Asia where no regional human rights complaints mechanism exists and many States have not opted in to individual communications mechanisms.

3. CONCLUSIONS AND RECOMMENDATIONS

The above analysis depicts the range and depth of minority and Indigenous rights protections across the nine UN treaties and treaty bodies. Only two of these have an express mandate to protect minorities or Indigenous peoples in the operative provisions of their text - the HRC and the CRC. The other seven have to various degrees evolved a mandate in relation to minorities and Indigenous peoples based on the interpretation of their texts. Some of these, such as CERD, have decades of minority rights practice to the point where ICERD should be considered as a central instrument in the international protection of minorities. For others this is more tangential to their object and purpose, but nevertheless they display clear mandates to protect minorities and Indigenous peoples within the terms and focus of their Conventions. In that regard, the minority and Indigenous rights aspects of a number of UN treaties, such as ICMW, CRPD and CPED, appears little explored. Similarly, the UN Jurisprudence Database does not recognise the decisions of UN treaty bodies such as CERD, CESCR, CEDAW and CAT as engaging minority or Indigenous rights, when they clearly, and often quite extensively, do. Increasingly, minority and Indigenous rights protection requires an intersectional approach which is reflected in the engagement of these issues under different UN treaty bodies. Thus, a wider database of minority and Indigenous rights in the jurisprudence of UN treaty bodies should be recognised, including all of the cases identified in this Handbook. It is interesting also to see quite focussed caselaw emerge that fits well the scope of the relevant treaty, such as obstetric care for minorities before CEDAW; police brutality or non-refoulement in relation to minority groups before CAT; cultural rights before CESCR; intergenerational transmission of ways of life before CRC; or mental health and incarceration of Indigenous peoples before CRPD. It is encouraging to see focussed expertise being engaged in relation to the facts raised in these communications, even if the examples to date can be relatively few.

Ultimately, as this report has consistently emphasised, individual communications must move towards becoming a more universal system and States Parties have to be consistently encouraged to opt in to these mechanisms, by UN treaty bodies as well as other UN actors such as special procedures, civil society, and States through the Universal Periodic Review. Large parts of the world and its population remain outside the system, and indeed outside of any human rights complaints mechanism. In that light, it is worth highlighting the geographic significance of the EWUA procedure of CERD in providing a means of "petitioning" a UN treaty body as to a particular alleged violation for 182 States Parties. It is only under this mechanism that certain systematic minority rights violations in recent years, such as police violence in the US or the mass incarceration of the Uighurs in China, as well as encroachment on Indigenous lands in the Philippines, India and elsewhere, can and have been raised before a UN treaty body outside the reporting cycle.

Beyond the scope of the current Handbook, the question of implementation of UN treaty body decisions in individual communications should be flagged. The aim has been to identify and highlight minority and Indigenous rights in the jurisprudence of the UN treaty bodies. All of these decisions carry instructions for implementation, and also means of follow-up. But decisions of human rights bodies and their implementation are often quite separate processes, and so the extent to which the jurisprudence of the UN treaty bodies is effectively realised requires greater study. For now, this Handbook has sought only to set how decisions of all the UN treaty bodies in individual communications can and do protect minorities and Indigenous peoples. While some treaty bodies are clearly more significant than others in this area, all contribute in protecting these groups in their decision-making. A number of final practical recommendations can be suggested to improve and enhance the protection of minorities in the jurisprudence of the UN treaty bodies, as follows.

OPTING IN TO INDIVIDUAL COMMUNICATIONS

While there have been proposals in the past for reforming the UN treaty bodies such as the creation of a unified treaty body, such changes seem unlikely at the present time. Hence, a first step to improvement of the system is the critical need for all States Parties to UN human rights treaties to opt in to the individual communications mechanisms. There is no obvious pathway to achieving this, but at the same time, there seems little concerted effort to analyse why States do not do so. Certainly, when States do not ratify treaties attention is paid to that, but none at all when they do not allow for individual communications - for example, it well known that the US has not ratified UN CRC, but rarely commented on that it has not opted in to *any* individual communications mechanisms. As noted, the greatest gaps are in Africa and Asia, and international jurisprudence cannot reflect the issues faced by minority and Indigenous groups in these regions unless States opt in under the relevant articles and protocols. It is recommended that UN treaty bodies request States Parties that do not opt in to individual communications mechanisms to consider providing reasons why in their State reports, creating a "dialogue" around this. The UPR mechanism should focus on lack of ratification of individual communications mechanisms by States under review. Minority rights advocacy groups could focus on particular States and particular regions, in relation to particular UN treaties, with the goal of gaining ratifications of optional individual communications procedures. The simple ability to bring a case at the international level to defend minority and Indigenous rights is critical, and the shutting off of this basic avenue of redress warrants greater focus.

GENERAL COMMENTS

Just one UN treaty body, the Human Rights Committee, has issued a general comment on minority rights. By contrast three treaty bodies have issued a general comment on Indigenous peoples' rights, specifically CERD, CEDAW and CRC. All UN treaty bodies should consider issuing a general comment in this area. For example, CAT's mandate in relation to minority and Indigenous rights emerges clearly from the Convention text and its practice, and it would seem useful for it to provide more detailed guidance to States Parties in the form of a general comment. In addition, while the UNDRIP is clearly guiding the implementation of UN treaties in relation to Indigenous peoples, the UNDM is not providing the same guidance in relation to minorities. General comments that set out in detail State obligations appear essential if a stated framework of UN action for mainstreaming minority rights, which the previous UN Special Rapporteur has noted has been the subject of 'inaction and negligence', is to be realised.[411] The UNDM should inform any future general comments in this area, as well as guide decisions in individual communications.

A "WHOLE TREATY" APPROACH AND INTERSECTIONALITY

As noted, the UN jurisprudence database does not reflect the range of minority rights caselaw that emerges before UN treaty bodies, recognising only Article 27 ICCPR cases. This underlines the fact that the minority and Indigenous rights aspects of the mandates of a number of UN treaty bodies is not particularly prominent. Meanwhile, CERD, CEDAW and CAT display a considerable jurisprudence in this area, with a number of significant decisions that relate to minority and/or Indigenous rights under their respective mandates. CESCR, CRC and CRPD have a smaller body of relevant caselaw but nevertheless all three have an emerging minority and/or Indigenous rights jurisprudence. CMW and CED have the potential for such caselaw, given the interpretation of their standards through concluding observations and other actions clearly establishes a minority and Indigenous rights competence, with patterns of violations in relation to these groups evident before both bodies. In sum, all nine UN human rights treaties are engaged to protect minorities and Indigenous peoples' rights, and while some are clearly more applicable than others, all have a role to play. A "whole treaty" approach to minority and Indigenous rights, whereby every UN

[411] Fernand de Varennes, supra n 58 at para 49.

human rights treaty is considered to have a competence in this area, needs to emerge more fully. This would support the growing understanding of minority and Indigenous rights in terms of intersectionality. We increasingly see issues of minority or Indigenous rights arising in individual communications as intersectional aspects of claims, in particular in relation to gender and disability among other aspects.

MINORITY RIGHTS OUTSIDE THE INDIGENOUS CONTEXT

It is clear that far more international caselaw relates to Indigenous peoples than it does to minority rights. Even the principal minority rights standard, Article 27 ICCPR, has been used largely in relation to Indigenous peoples rather than non-Indigenous minority groups. There is therefore room for non-Indigenous minority groups to further engage the UN treaty bodies in the form of individual communications. In addition, and as Inter-American caselaw illustrates, issues of customary land ownership as well as cultural identity and traditions may also arise in a non-Indigenous context.[412] However, caution is advisable given that Indigenous peoples and minorities remain distinct, even if there can be some blurring of the boundaries in relation to certain groups with similar characteristics. Ultimately, the individual communications mechanism is under-used by minority groups by contrast with Indigenous peoples and this has prevented an evolution of minority standards which is clearly seen in Indigenous caselaw. Furthermore, the HRC has not always articulated violations of minority rights where these are evident, as highlighted by the dissenting views in *Nesterov et al v Russian Federation*. When taken as a whole, the minority rights caselaw of the HRC in terms of a substantive finding of a breach of Article 27, as opposed to other ICCPR provisions, is seen rarely, such as its decision in *Rakhim Mavlonov and Shansiy Sa'di v Uzbekistan*. There is an absence of an evolution of minority rights standards through caselaw that is clearly evident in relation to Indigenous peoples. It is incumbent on all UN treaty bodies to better understand their mandate in relation to minority as well as Indigenous protections, and to draw this out in individual communications that raise these issues.

REMEDIES

Remedies are increasingly taking precise forms in terms of both specific and general recommendations. As Cali and Galand highlight, 'all eight Committees have recommended additional individual remedies alongside compensation tailored to the specifics of violations'.[413] Specific remedies may take the form of directions for repairing the violation; providing adequate financial compensation to the victim; or issuing an apology. General remedies may include recommendations for enacting legislative change; reforming administrative practices; or implementing training programmes for judiciary, law enforcement and other actors. For Indigenous peoples, States have been required to recognise the principle of FPIC and adopt measures in relation to ownership of traditional territories through the establishment of mechanisms and procedures for delimitation, demarcation and titling of land in accordance with customary laws and values. UN treaty bodies increasingly provide detail and direction on how violations and harms are to be comprehensively repaired, engaging individual and structural aspects that affect minority and Indigenous groups as a collective. This is the strength of individual communications as a mechanism, which makes it vital that it evolves to better protect minority and Indigenous groups globally and across all of the UN treaties.

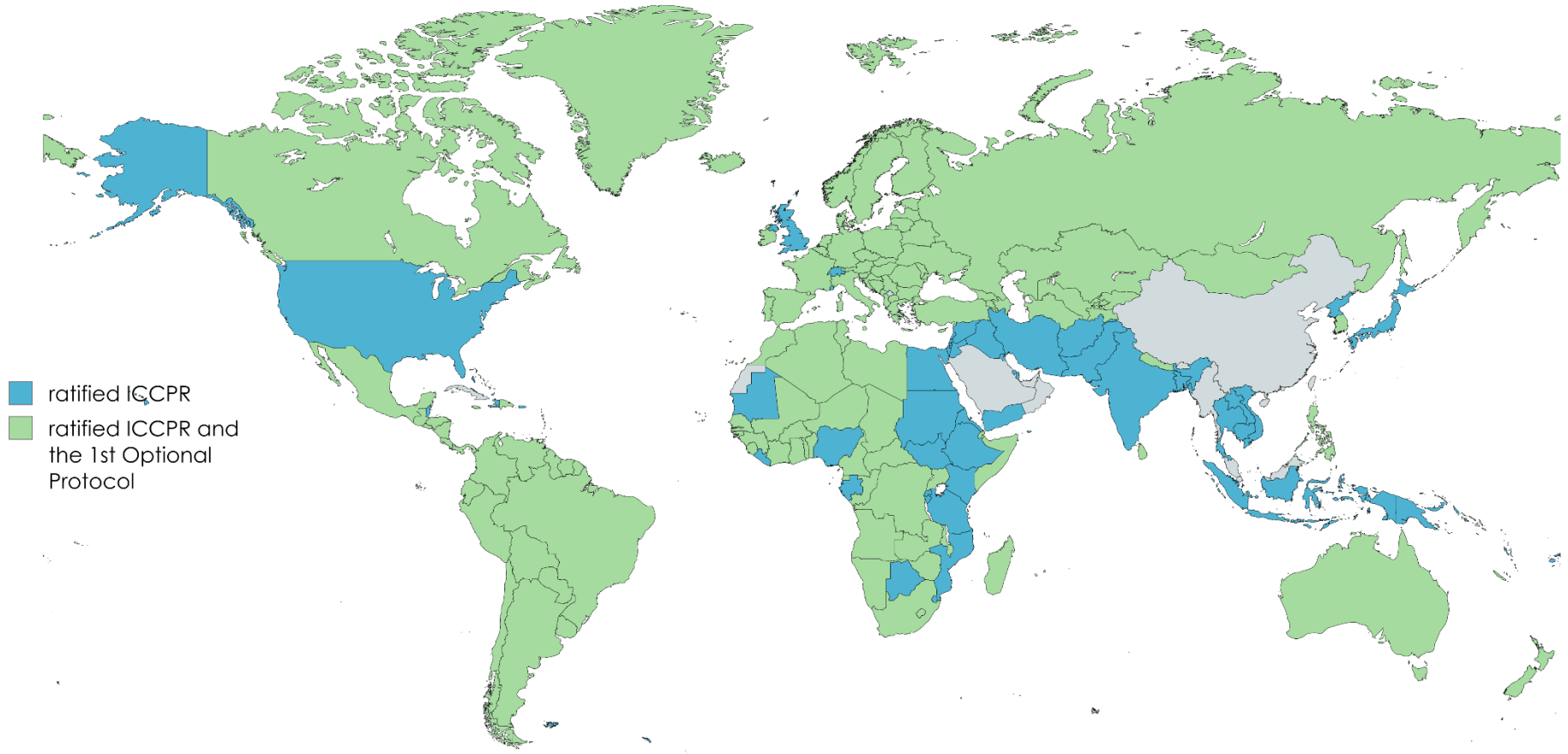
[412] See *Saramaka v Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007). The case related to customary land rights of the Saramakas who are not indigenous, being one of six Maroon groups in Suriname whose ancestors were enslaved during European colonization in the 17th century and escaped to the interior regions of the country. The IACtHR held that its jurisprudence on collective land title was applicable to them given that 'land is more than merely a source of subsistence; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people'. (at para 86)

[413] Basak Cali and Alexandre Skander Galand, 'Towards a Common Institutional Trajectory? Individual Complaints before UN Treaty Bodies during Their "Booming Years"' (2020) 24 *The International Journal of Human Rights* 1103-1126, at 1112.

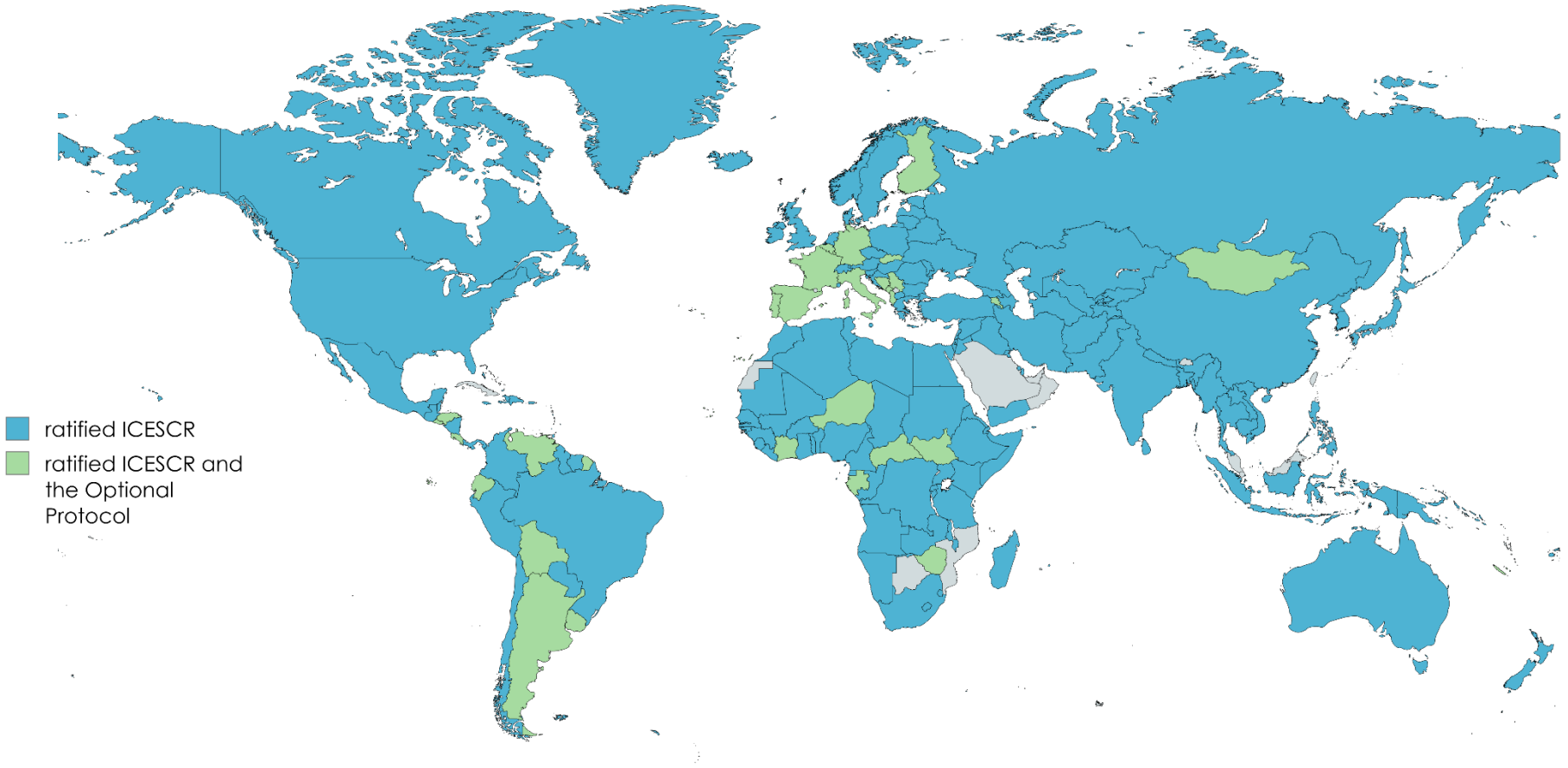
4. ANNEXES

Annex 1: Ratification Status by State Party

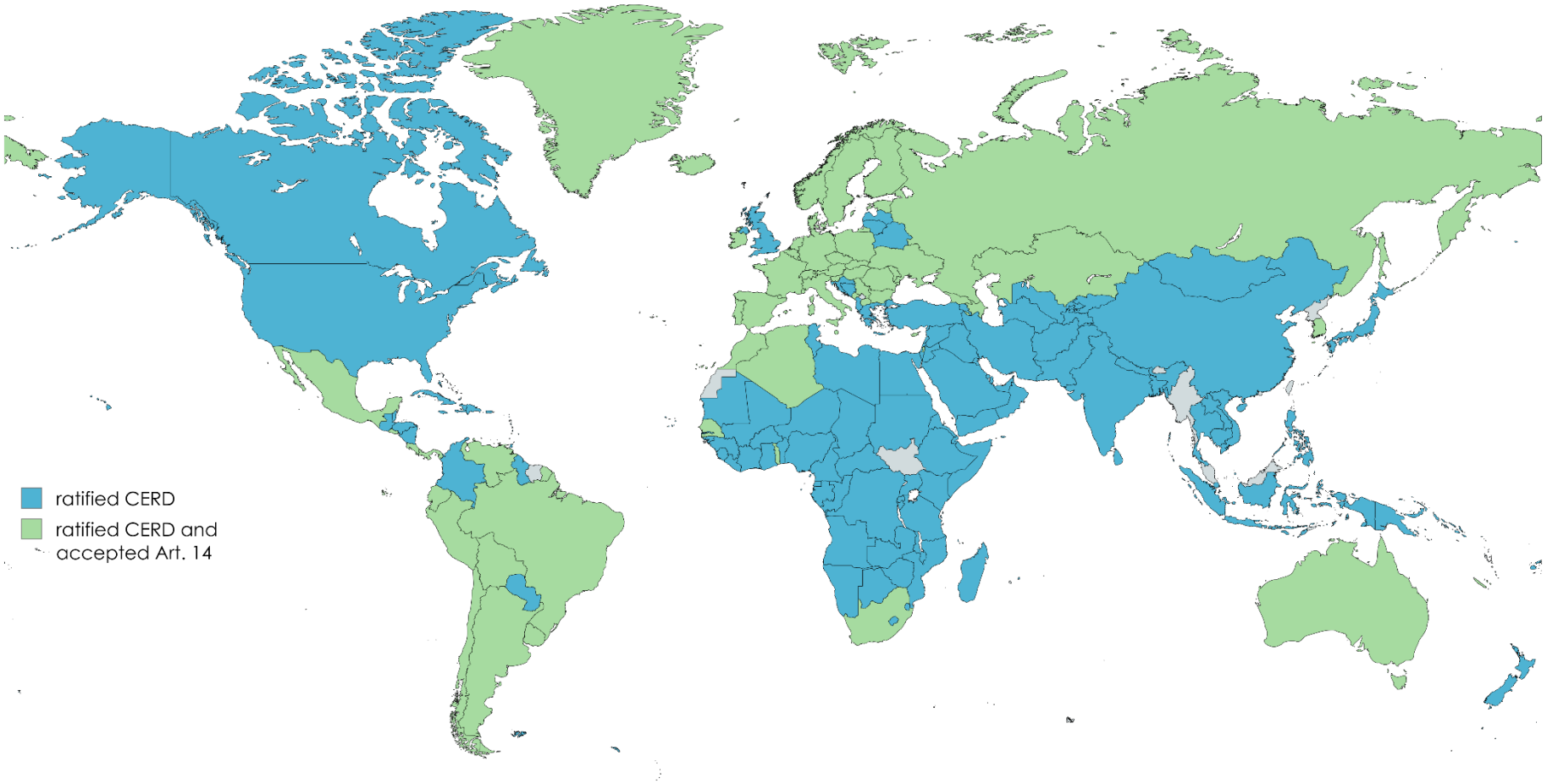
International Covenant on Civil and Political Rights



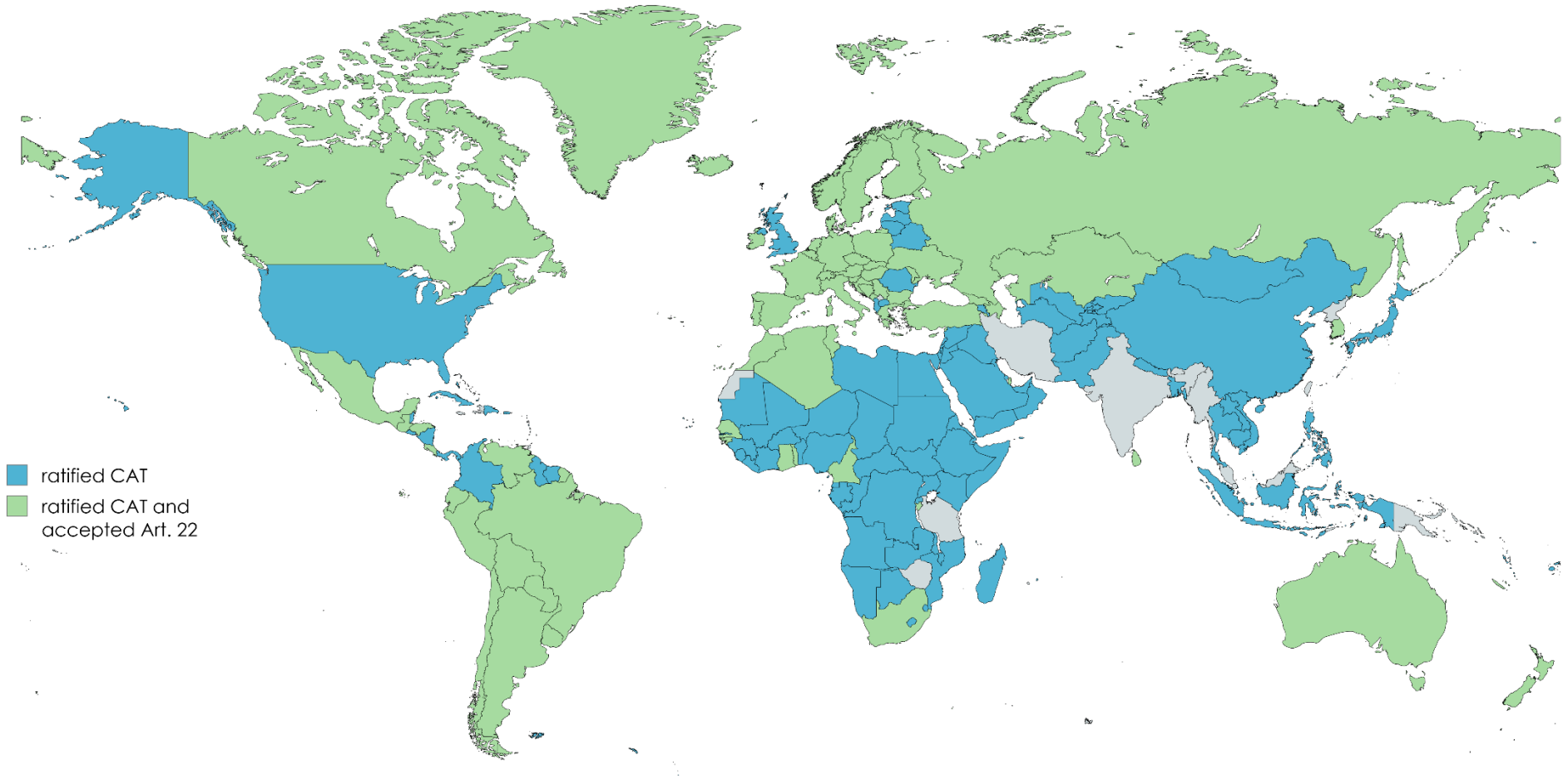
International Covenant on Economic, Social and Cultural Rights



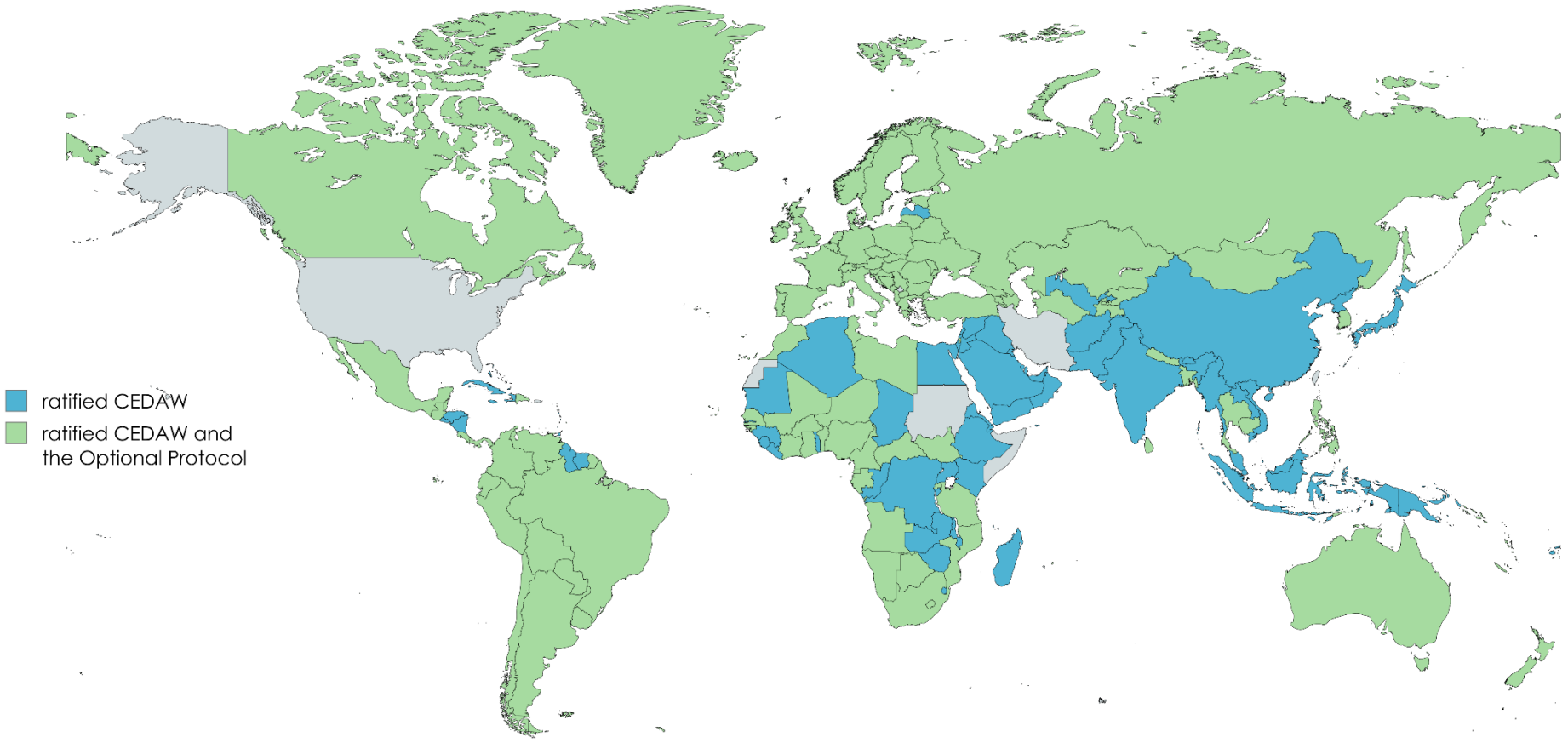
International Convention on the Elimination of All Forms of Racial Discrimination



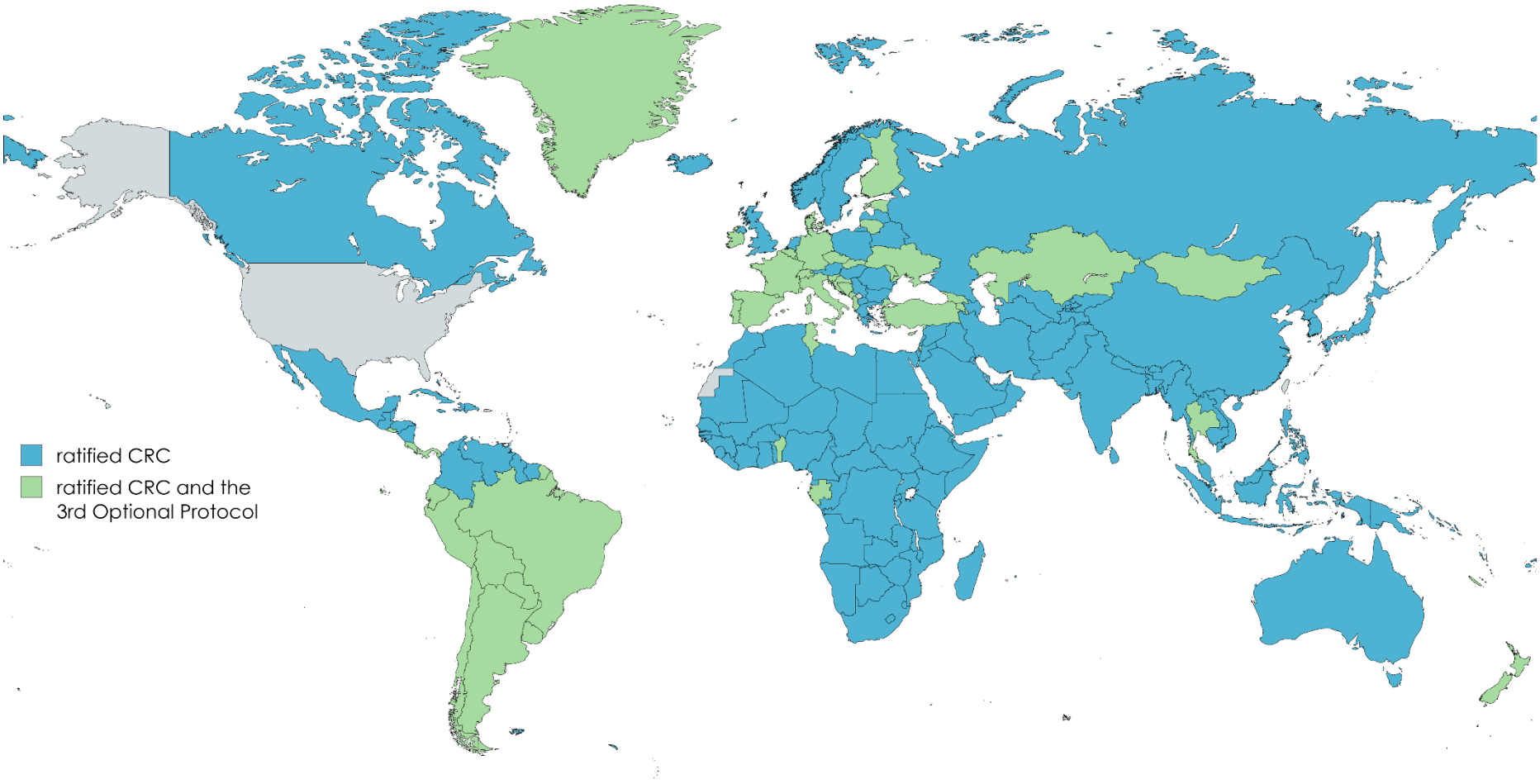
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment



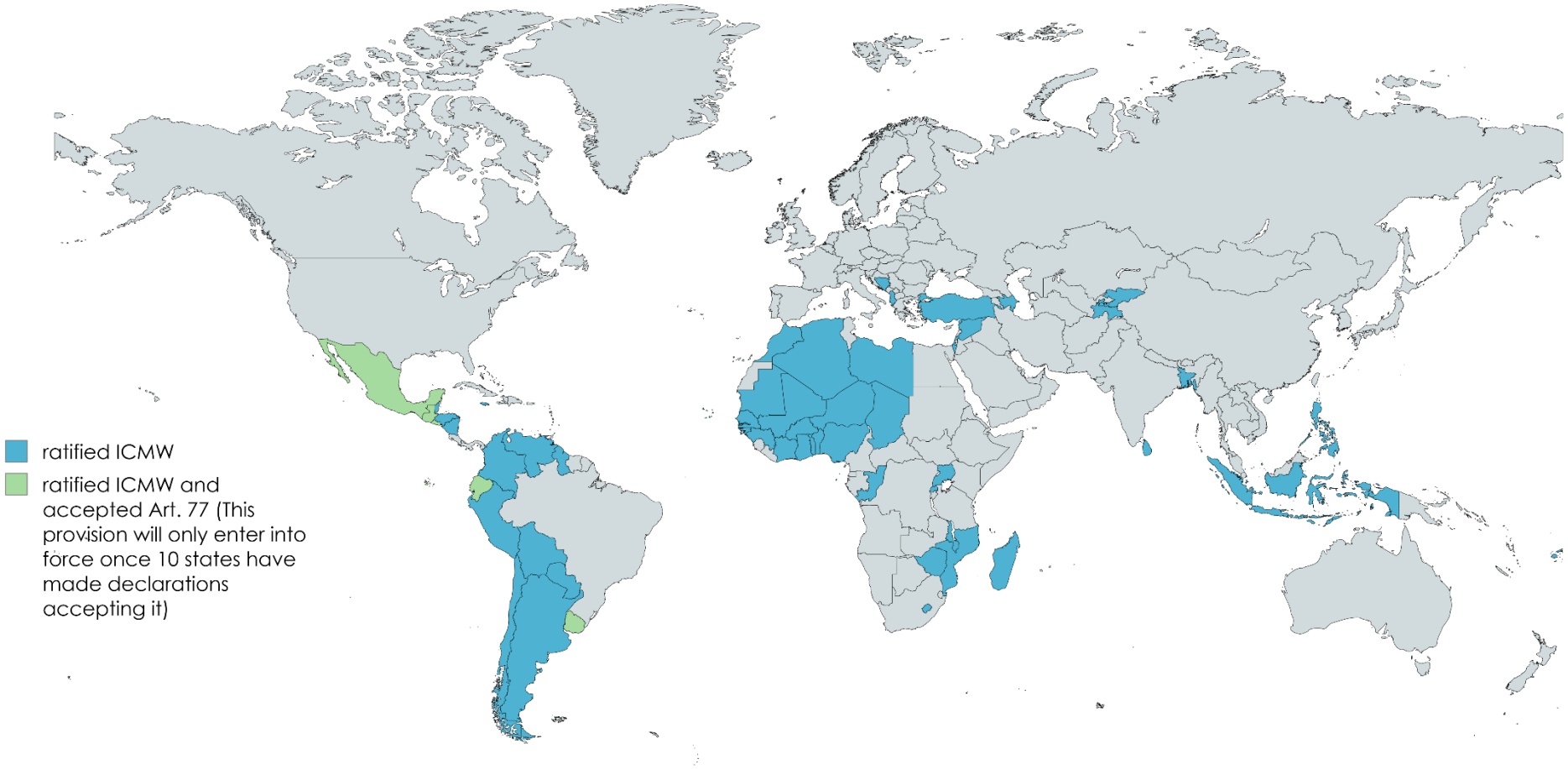
Convention on the Elimination of All Forms of Discrimination Against Women



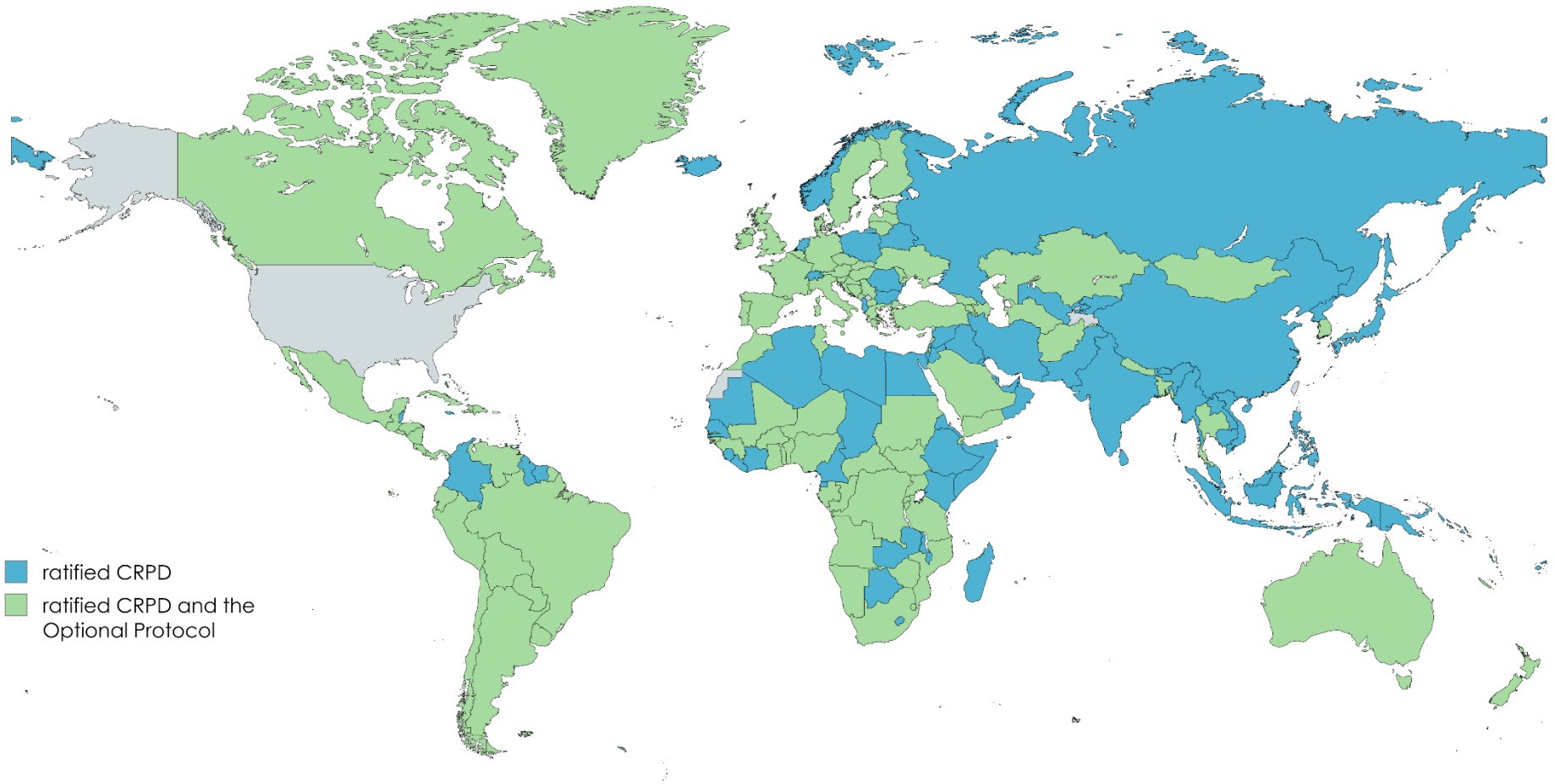
Convention on the Rights of the Child



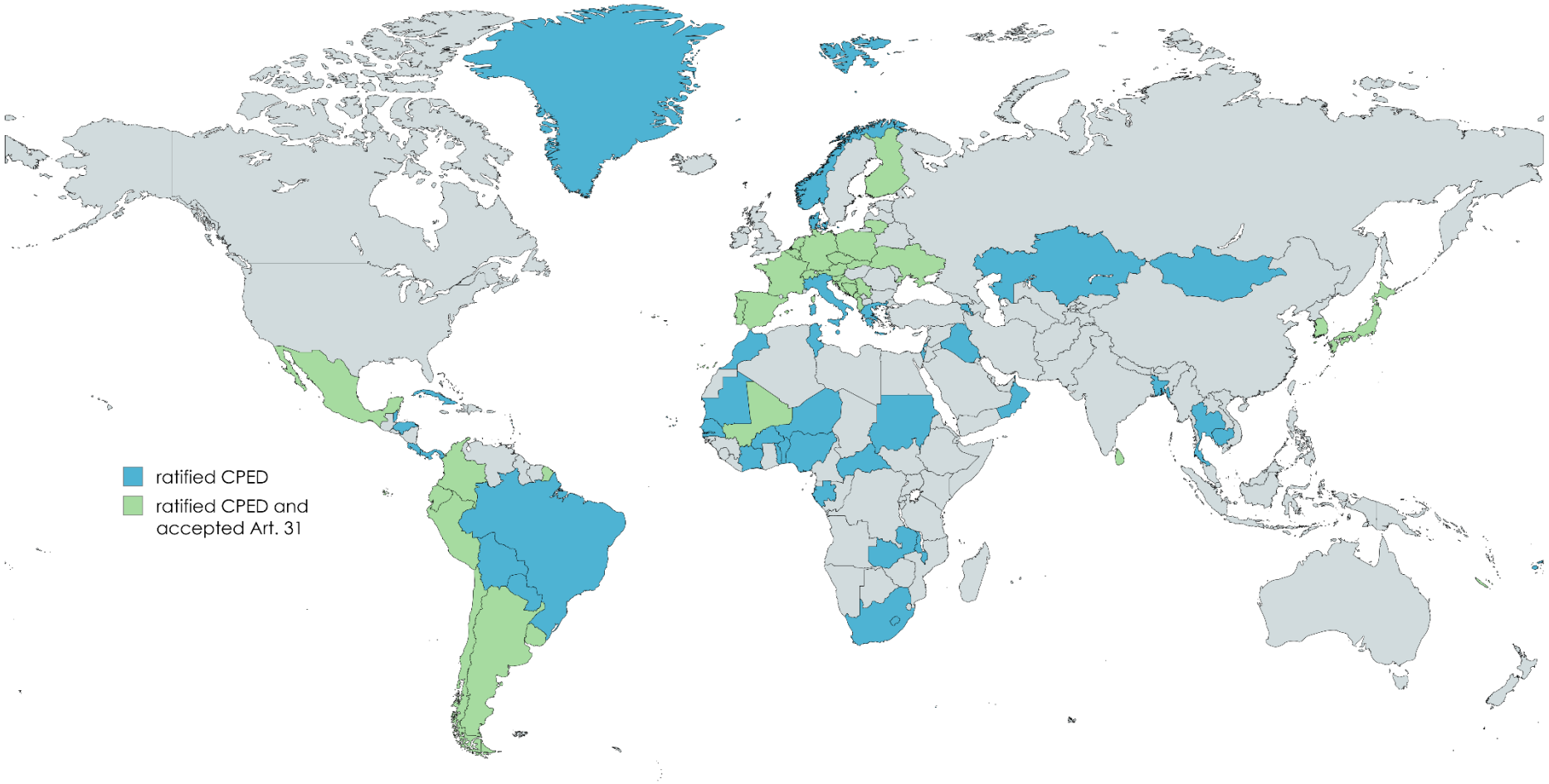
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families



Convention on the Rights of Persons with Disabilities



International Convention for the Protection of All Persons from Enforced Disappearance



Annex 2: Table of Cases by Committee

UN Treaty Body	Case name	Number
HRC	A.A.S. v Denmark, Ballantyne et al v Canada, B.B. v Sweden, Bekzhan et al v Kazakhstan, Billy et al v Australia, Campo Agua'e Indigenous Community v Paraguay, Diergaardt et al v Namibia, H.A. v Denmark, Hebbadj v France, Hopu and Bessert v France, Ignatane v Latvia, Kitok v Sweden, Lansman et al v Finland (I), Lansman et al v Finland (II), Lovelace v Canada, Lubicon Lake Band v Canada, Mahuika et al v New Zealand, Mavlonov and Sa'di v Uzbekistan, Mirzakhodzhaev v Kyrgyzstan, Nesterov et al v Russian Federation, Poma Poma v Peru, Prince v South Africa, Rabbae et al v The Netherlands, Roy v Australia, Sanila-Aikio v Finland, Titiahonjo v Cameroon, Vicente et al v Colombia, Yaker v France, Waldman v Canada	29
CERD	Agren et al v Sweden, E.I.F. v The Netherlands, Er v Denmark, Guartambel v Ecuador, Hagan v Australia, Habassi v Denmark, Jewish Community of Oslo v Norway, Koptova v Slovakia, Moylan v Australia, P.S.N. v Denmark, Quereshi v Denmark, TBB-Turkish Union in Berlin/Brandenburg v Germany, U.I. and G.I. v Switzerland, V.S. v Slovakia, Zapescu v Moldova	15
CESCR	Djazia and Bellili v Spain, Guerreiro v Spain, IDG v Spain, J.T., J.P.V. and P.M.V et al v Finland, Romero v Spain, Saydawi and Farah v Italy	6
CEDAW	A v Denmark, Cepeda et al v Peru, E.S. and S.C. v United Republic of Tanzania, Kell v Canada, Matson et al v Canada, S.B. and M.B. v North Macedonia, Teixeira v Brazil	7
CAT	Dimitrijevic v Serbia and Montenegro, Dimitrov v Serbia and Montenegro, H.U. v Finland, L.E.M. v Switzerland, Martinez et al v Mexico, N.R. v Sweden, Osmani v Serbia, Paillalef v Switzerland, S.A.S. v Australia, T.T. v Australia, X and Z v Finland	11
CRC	M.E.V., S.E.V. and B.I.V. v Finland, Sacchi et al v Argentina et al	2
CMW		0
CRPD	Doolan v Australia, Leo v Australia, X v United Republic of Tanzania, Y v United Republic of Tanzania, Z v United Republic of Tanzania	5
CED		0
Total		75

Annex 3: Table of Cases by Geographic Region

Geographic Region	Case Name	Number
Europe	A.A.S. v Denmark, A v Denmark, Agren et al v Sweden, B.B. v Sweden, Dimitrijevic v Serbia and Montenegro, Dimitrov v Serbia and Montenegro, Djazia and Bellili v Spain, E.I.F. v The Netherlands, Er v Denmark, Guerreiro v Spain, H.A. v Denmark, Habassi v Denmark, Hebbadj v France, Hopu and Bessert v France, H.U. v Finland, IDG v Spain, Ignatane v Latvia, Jewish Community of Oslo v Norway, J.T., J.P.V. and P.M.V et al v Finland, Kitok v Sweden, Koptova v Slovakia, Lansman et al v Finland (I), Lansman et al v Finland (II), L.E.M. v Switzerland, Nesterov et al v Russian Federation, M.E.V., S.E.V. and B.I.V. v Finland, N.R. v Sweden, Osmani v Serbia, Paillalef v Switzerland, P.S.N. v Denmark, Quereshi v Denmark, Rabbae et al v The Netherlands, Romero v Spain, Sanila-Aikio v Finland, Saydawi and Farah v Italy, S.B. and M.B. v North Macedonia, TBB-Turkish Union in Berlin/Brandenburg v Germany, U.I. and G.I. v Switzerland, V.S. v Slovakia, X and Z v Finland, Yaker v France, Zapescu v Moldova	42
North America	Ballantyne et al v Canada, Kell v Canada, Lovelace v Canada, Lubicon Lake Band v Canada, Matson et al v Canada, Waldman v Canada	6
Central and South America	Campo Agua'e Indigenous Community v Paraguay, Cepeda et al v Peru, Guartambel v Ecuador, Martinez et al v Mexico, Poma Poma v Peru, Sacchi et al v Argentina et al, Teixeira v Brazil, Vicente et al v Colombia	8
Africa	Diergaardt et al v Namibia, E.S. and S.C. v United Republic of Tanzania, Prince v South Africa, Titiahonjo v Cameroon, X v United Republic of Tanzania, Y v United Republic of Tanzania, Z v United Republic of Tanzania	7
Asia Pacific	Billy et al v Australia, Doolan v Australia, Hagan v Australia, Leo v Australia, Moylan v Australia, Mahuika et al v New Zealand, Roy v Australia, S.A.S. v Australia, T.T. v Australia	9
Central Asia	Bekzhan et al v Kazakhstan, Mavlonov and Sa'di v Uzbekistan, Mirzakhodzhaev v Kyrgyzstan,	3
South Asia		0
East Asia		0
Southeast Asia		0
Middle East		0
Total		**75**

The Tom Lantos Institute (TLI) is an independent human and minority rights organisation with a particular focus on Jewish and Roma communities, and on Hungarian and other ethnic or national, linguistic and religious minorities. It is a Budapest-based organisation with a multi-party Board of Trustees, an international Executive Committee, and Advisory Board. TLI operates internationally in terms of scope, funding, staff and partners. As a research and education platform, TLI aims to bridge the gaps between research and policy, norms and practice. TLI focuses on three specific issue areas. These are: Human Rights of Minorities; Roma Rights and Citizenship; and Jewish Life.

AUTHOR: David Keane
EDITORS: Anna-Mária Bíró and Marcus Oda
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1062 Budapest, Bajza utca 44. Hungary
info@tomlantosintitute.hu
www.tomlantosinstitute.hu

TOM LANTOS INSTITUTE