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Norwegian Law and the Swedish Sami

Rights, Paternalism and International Law

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Abstract

Modern state boundaries often cut through territories currently or formerly occupied by indigenous peoples. In many cases, the unmitigated application of laws on movement across the border can interfere with the rights and way of life of an indigenous group. This paper considers recent legal developments in Canada and Norway concerning cross-border rights and claims. It highlights conflicts that have emerged between constitutional principles that are regarded as fundamental within the state and norms drawn from international law, and in particular the norms set by United Nations Declaration on the Rights of Indigenous Peoples. We focus on the constitutional jurisprudence on cross-border rights of indigenous peoples in Norway, and draw on the Canadian law as a means of demonstrating that the Norwegian approach is unduly restrictive. This, we argue, is primarily due to the preference of the Norwegian court for a paternalistic model of indigenous claims. We contrast this with the recent jurisprudence from the Canadian Supreme Court on cross-border claims, where the reasoning is closer to a model that gives priority to the recognition of indigenous rights, as required under the UN Declaration. The final section returns to Norway, to consider the impact of the European Convention on Human Rights ('ECHR') to Sami rights. The leading case is under review by the European Court of Human Rights, and accordingly the article asks whether the paternalist model will withstand the closer scrutiny against human rights standards.

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Keywords

indigenous peoples – aboriginal rights – Saami – the European Convention on Human Rights – cross-border rights – Arctic

1 Introduction

Modern state boundaries often cut through territories currently or formerly occupied or used by indigenous peoples. They may choose to accept or reject national identity or citizenship aligned with one of the states, but they are unlikely to accept laws that have the effect of dividing their community. Accordingly, they may seek rights or exemptions to enable them to continue their way of life as a single people. Broadly speaking, these fall into several categories. First, there may be claims to mobility rights and exemptions, so that members of the indigenous group may cross the border without incumbrance. Secondly, they may seek equal treatment with their counterparts on the other side of the border, in terms of access to education, employment opportunities, health services and the like. A third concern relates to self-governance, as they may demand a right to be informed and consulted in decisions affecting them in the territory in either state, to the same extent as members of their community that are within the state. Going further, they may demand autonomy from both states, with the power to make laws for all members of the group regardless of their state of residence or citizenship.

The extent of indigenous concern is likely to depend on the extent of control exercised by the state, and how far its laws distinguish between its citizens and residents and others, and between indigenous peoples and others. For example, there would be no concerns over mobility if there were no controls on movement between the states, regardless of indigenous status. However, as the impact of the law becomes greater, it is more likely that the state will see them as more important for its own security and identity. For example, for some states, free mobility is seen as compromising national security. Or, equality may be seen as undermining policies for promoting the national economy, including the interests of indigenous peoples who live within the state. Similarly, recognising indigenous control over land may be seen as interfering with the public interest in managing resources. Perhaps most serious, governance rights may be seen as compromising the fundamental principle that a democratic state is constituted and governed by its own citizens, and not those of other countries.

This paper considers recent legal developments in Canada and Norway concerning cross-border rights and claims. It highlights conflicts that have emerged between constitutional principles regarded as fundamental within the state and compliance with international norms, and in particular the norms set by United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').[1] The Declaration was passed by the UN General Assembly in 2007 by a vote of 144 in favour, four against, and 11 abstaining.[2] Norway was in favour; Canada voted against, but later reversed its position and announced its support for the Declaration in 2016.[3]

As a resolution of the General Assembly, the Declaration is not binding on states. It does, however, represent a standard that all states should work towards. As a resolution of the General Assembly, the Declaration is not binding on states. It does, however, represent a standard that all states should work towards. Moreover, at least some of the rights expressed in the Declaration take effect under customary international law. How far customary international law recognises these rights is an open question: in 2012, the International Law Association published a Resolution stating that "[t]he 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. However it includes several key provisions which correspond to existing State obligations under customary international law."[4] Specifically, the ILA said that these include obligations:

1. "to recognise, respect, protect, fulfil and promote the right of indigenous peoples to self-determination";[5]
2. "to recognise and promote the right of indigenous peoples to autonomy or self-government";[6]
3. "to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate

1 UNGA Res 61/295 (13 Sept 2007) UN Doc A/RES/61/295.

2 UN Doc A/61/PV.107. In addition to Canada, the United States, Australia and New Zealand also voted against the Declaration, but later endorsed it: the United States in 2011, Australia in 2009 and New Zealand in 2010.

3 Carolyn Bennett, 'Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10' (2016) <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html> accessed 22 April 2022.

4 International Law Association, Resolution No. 5/2012, 75th Conference of the ILA, Sofia, 26– 30 August (2012), para. 2.

5 *Ibid*, para. 4.

6 *Ibid*, para. 5.

> with them in good faith – through all possible means – in order to ensure its preservation and transmission to future generations";[7] and
>
> 4. "to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources".[8]

In addition, as Gomez Isa argues, the practice is still evolving and the obligations are likely to be extended:

> there is a significant emerging practice at international, regional and domestic level that constitute a solid basis to defend that the UNDRIP has become a parameter of reference when interpreting and applying indigenous rights, and that at least some of the key provisions of the UNDRIP have already become customary international law, or are in the process of emerging as new rules of customary law.[9]

Our analysis will show that the Canadian approach recognises the distinctive identity of cross-border aboriginal peoples to a greater extent than the Norwegian law. The analysis begins with a description of the UNDRIP before considering the most recent judgment of the Norwegian Supreme Court concerning the cross-border rights of the Sami. It argues that the Norwegian court accepts the government's view that indigenous interests should be weighed under a paternalistic model that balances their interests against wider public goals, including the accommodation of their interests with those of others. In this system, the rights of indigenous people are only one factor to be considered in the wider analysis. It then contrasts this with the most recent judgment from the Canadian Supreme Court on cross-border claims, where the reasoning is closer to a model that gives priority to the recognition of indigenous rights. The final section returns to Norway, to consider the impact of the

7 *Ibid*, para 6.

8 *Ibid*, para 7.

9 F. Gómez Isa ´The UNDRIP: an increasingly robust legal parameter´ 23 The International Journal of Human Rights (1019), doi: 10.1080/13642987.2019.1568994, at 9; see also 7. "This overwhelming support to the UNDRIP shows a clear commitment on the part of the international community to support the protection of the rights enshrined in the Declaration and promote compliance, and can be considered as a clear evidence of opinio iuris that, if accompanied by consistent state practice, may give rise to new rules of customary international law." See also J. Anaya and S. Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowement', *Jurist*, 3 October 2007, http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php, and S. Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law', 6 IHRLR, doi:10.1163/22131035-00602006.

European Convention on Human Rights ('ECHR') to Sami rights. The leading case is under review by the European Court of Human Rights, and accordingly the article asks whether the paternalist model will withstand the closer scrutiny against human rights standards.

2 Cross-Border Rights and the United Nations Declaration on the Rights of Indigenous Peoples

The core question is whether the UNDRIP imposes obligations on states regarding indigenous peoples outside their borders. It does not define 'indigenous people', but equally there is nothing that specifically limits a state's obligations by nationality or residence. In particular, Article 26(1) states that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". There is no requirement of continuous or current occupation, or that the people held recognised rights of private property under national law. Article 27 requires states to set up a "fair, independent, impartial, open and transparent process" for recognising and adjudicating rights pertaining to land, and Article 28 recognises a right to redress, including restitution of land, territories and resources that were "confiscated, taken, occupied, used or damaged with their free, prior and informed consent". None of these rights are restricted to nationals or residents of the state in question. Accordingly, UNDRIP would allow an indigenous group to seek to reverse or obtain compensation for an expulsion from their traditional lands to another state. There are other examples relating to property: Article 31, on intellectual property in indigenous knowledge, would be easily circumvented if a state took no action to stop its own citizens from violating the intellectual property rights of indigenous people in other countries.

Behind these various provisions lies a key message: indigenous people should hold rights by reason of their indigeneity. Rights are not absolute, but the crucial point is that a rights holder chooses whether to exercise them, when to do so, and when to negotiate and settle without a final judgment. Rights therefore give indigenous peoples an element of autonomy and dignity in deciding their own future, especially in relation to the determination and negotiation of their position with their state and other persons. A rights model of the relationship between the state and indigenous peoples therefore rejects paternalist models, where access and use of land is controlled for people, rather than by people. In effect, under rights model, governments cannot assume that indigenous peoples will take their view of resource management or of the cultural importance of access to specific land or the continuation of specific activities.

This is not to say that UNDRIP would never allow a state to limit or restrict indigenous rights. However, there are rules regarding consultation and participation in decision-making. The aspiration of a shared process for decision-making is seen in a number of UNDRIP provisions. Under Articles 10, 11(2), 19, 29(2) and 32(2), the state is expected to seek 'free, prior and informed consent' before making certain decisions affecting indigenous peoples.[10] In addition, Articles 15(2), 17(2), 19, 30(2), 32(2), 36(2) and 38 require consultation and cooperation in certain areas. Arguably, these do not allow a veto to the indigenous communities, but it is clear that they do require a form of participation in decision-making.[11] Again, this distinguishes the underlying philosophy of UNDRIP from a paternalistic model of state-indigenous relations.

3 Cross-Border Rights in the Norwegian Supreme Court

The presence of Sami nomadic hunting communities in northern Fennoscandia is described in the Icelandic sagas from the 1200s,[12] and the right of these communities to hunt was recognised in writing by the Swedish state administration as early as the 1300s.[13] At this time, the Sami's livelihood consisted primarily of hunting and bartering, with limited reliance on reindeer. It was only in 1700s that reindeer husbandry became important for subsistence,[14] and it has since become a cornerstone of Sami culture.[15] When Denmark and Sweden settled their northern boundary in the Strömstad Treaty of 1751, both recognised that a hard border would interfere with Sami reindeer husbandry. Consequently, although the cross-border rights of other citizens were extinguished, the treaty specifically addressed the situation of the Sami in an appendix (now known as

10 Article 28(1) refers to 'free prior and informed consent', although this is in reference to land, territories and resources that were 'confiscated, taken, occupied, used or damaged without their free prior and informed consent': it would provide a right in new cases of confiscation, etc., but not necessarily in relation to historic cases (although it does confer a right to redress).

11 *See* K. Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' 22 EJIL (2011), on the nature of the obligation to seek 'free, prior and informed consent', and whether it provides a veto to indigenous peoples.

12 L. I. Hansen and B. Olsen, *Hunters in Transition: An Outline of Early Sámi History* (BRILL 2013), pp. 48–53; P. Hermann, 'The Sami People in Old Norse Literature' 0 Nordlit (1999).

13 Emil Poignant, *Samling af författningar angående de s.k. Lappmarksfriheterna* (Samson & W 1872), p 3.

14 I. Ruong, *Samerna* (Bokförlaget Aldus/ Bonnier 1969), p 64f.

15 *See e.g.*, Sametinget, *Sápmi – en region som berikar Sverige: Rennäringspolitisk strategi* (2021).

the 'Lapp Codicil'). The Codicil declared that the Sami remained free to cross the border for the purpose of reindeer herding. Linked to this was the question of taxation of the Sami, which had been a historical source of conflict between the states. Therefore, the Codicil also addressed the issue of nationality of the Sami. As such, it marked the categorization of the Sami as belonging to a state or the state.

The Codicil made a significant change in relation to cross-border rights. It required each country to provide access to sufficient land for their needs to the Sami from the other country but left them free to allocate land as they saw fit, and to change the allocation from time to time. In other words, the Codicil did not require the state to allow a specific group of Sami to have access to their traditional or ancestral territory, so long as they had access to sufficient territory somewhere in the state.

Norway and Sweden concluded new cross-borders treaties in 1883, and then again in 1919, 1949 and 1972.[16] Unlike the Codicil, the 1972 Convention explicitly links the cross-border rights to the right to herd reindeer as conferred under national law: only those Sami who have the access to the right under their national law have the right to use grazing areas in the neighbouring country. In Sweden this requires membership in an area formally constituted as a Sami village. A Sami village has a distinct legal status under Swedish law, as only members of a Sami village are entitled to exercise the reindeer husbandry right. Not all Sami are members of villages: accordingly, a Sami individual who is not a member of a Sami village cannot exercise the reindeer husbandry right and neither national law nor the treaties allow them to exercise traditional rights across the border.

The 1972 Convention expired in 2005 and has not been replaced. Since 2005, therefore, the cross-border reindeer husbandry is regulated by the Codicil, which remains in force as it was never repealed. The states negotiated a new convention in the early 2000s, which was rejected after criticism from the Sami, who proposed their own convention.[17] The 1972 Convention was aimed at ensuring the sustainable use of the land. This is clearly a reasonable objective, but the law and regulatory scheme gave no weight to the existing legal rights over the land. Accordingly, each state could modify and adjust the statutory rights of Sami as it thought necessary for the sound management of the land in the face of different claims to it. From this, if one state regarded the

16 Lag (1972:114) med anledning av konventionen den 9 februari 1972 mellan Sverige och Norge om renbetning.

17 *See* Sametinget, 'Samiskt förslag till ny renskötselkonvention' (*Sametinget*, 2014) <https://www.sametinget.se/63556> accessed 18 March 2022.

allocation of land in the other territory as sufficient for the needs of a Sami group, it might reduce the allocation in its own territory.

This situation ultimately led to the *Saarivuoma* cases. In 1968, the Norwegian Supreme Court confirmed the right of Saarivuoma village, recognised as a Sami village under Swedish law, to graze reindeer over a specified area in Norway.[18] However, following the 1972 treaty, Norway enacted the Cross-Border Reindeer Herding Act, under which some of the grazing land of the Saarivuoma Sami was taken from them and allocated to a Norwegian Sami village.[19] The Saarivuoma Sami retained access to some of its territory but the allocation to the Norwegian Sami was incorporated into Norwegian legislation in 1985. These arrangements remained in place after the lapse of the 2005 treaty. In 2018, *Saarivuoma* v. *State/Ministry of Agriculture and Food and Statskog SF*, the village brought a further case, claiming that its rights under the 1968 judgment remained in force, and for compensation for the denial of access to the land.

The Norwegian Supreme Court gave its judgment given on 25 August 2020.[20] Four of the five judges agreed that the regulatory regime did not extinguish the village's grazing rights as determined under the 1968 judgment. Of the four judges who found that the rights were not extinguished, two held that there should be no compensation for the denial of access to the land.[21] In their view, there was no violation of the ECHR or Norwegian constitutional law, as they only require compensation for a full expropriation of a property interest. Here, there was only a control on the use of property, for which compensation is not normally required.[22] Two judges held that compensation should be provided, but that, as a private law claim, it was subject to the law of limitations and so damages would only be available for the denial of access from 2015 (three years back in time from the date of the lawsuit).[23] The fifth judge dismissed

18 Rt-1968-429 (*Altevann*).

19 *See* P. Koch, *'Sámi-State Relations and Its Impact on Reindeer Herding across the Norwegian-Swedish Border', Nomadic and Indigenous Spaces: Productions and Cognitions* (Ashgate 2013); P. Koch and J. Miggelbrink, 'Being in the frontline of a Sámi culture and a private business: cross-border reindeer herding in northern Norway and Sweden' 15 *Nomadic Peoples* (2011).

20 The original, in Norwegian, is available at https://www.domstol.no/globalassets/upload/hret/avgjorelser/2021/juni-2021/hr-2021-1429-a.pdf. For a summary in English, *see* https://www.domstol.no/en/enkelt-domstol/supremecourt/rulings/2021/supreme-court-civil-cases/hr-2021-1429-a/.

21 Judge Falkanger (Judge Bergh concurring).

22 Although international and comparative constitutional law usually holds that this rule only applies to a lawful restriction on the exercise of rights; here, it is doubtful that it was lawful.

23 Judge Østensen Berglund (Judge Webster concurring).

the claim on the basis that the Norwegian Sami village that was using the land should be party to any litigation that might affect their use.[24]

The outcome was therefore quite remarkable: the village succeeded, by a 4-1 margin, in establishing the public authorities had prevented them from enjoying their grazing rights, and that it did so without lawful justification for a lengthy period; however, they failed, by a 3-2 margin, to obtain any compensation for it. Not surprisingly, the failure to compensate for an unlawful interference produced a strong reaction in the Sami community. For example, an editorial in the Sami newspaper Ságat stated that:

> It is completely unheard of for the Norwegian state to be exempt from paying compensation for losses caused by unlawful legislation to private rights holders. The effect of this is that the country's highest court has given acceptance that the state can, with impunity, adopt illegalities that prohibit and criminalize legal activity.[25]

It is also worth noting that Saarivuoma village were not awarded anything for their costs, although they succeeded in showing that they still held their grazing rights. Plainly, the judgment would discourage other Swedish Sami villages from making claims to grazing rights in Norway. The judges appeared to feel that the issues were essentially political and could only be resolved through political processes. From their perspective, a judgment in favour of Saarivuoma would disrupt the decisions and negotiations that should be resolved out of court; indeed, it might even be seen as improperly politicizing the courts. For example, the two judges who acknowledge the 1968 judgment but denied compensation also said that the village should have looked to the Swedish government to ensure that they had adequate grazing rights; in effect, it was not appropriate to rely on their legal rights when a political solution might have been found. This view also reflects the longer history of Norwegian policies on reindeer herding in general and specifically on the place of Swedish Sami herders in Norway. For much of the last century, the Norwegian authorities viewed "Swedish-Sami herders as penetrators of Norwegian territoriality".[26] Reindeer herding was initially seen as a dying industry, but the policy gradually shifted from the 1950s to support the production of reindeer meat as a profitable

24 Judge Noer; see para. 216–227: private rights cannot be determined in a claim against the State; the resolution of grazing rights should be left to negotiations, as there is a risk that the Norwegian Sami group may claim against the State and conflicting judgments may be produced.

25 Quoted in Ø. Ravna, 'Norwegian Courts and Sámi Law' 12 *Arctic Review on Law and Politics* 179, at 184 (from *Ságat*, 12 July 2021).

26 Koch, *supra* note 21, p. 127; *see also* Koch and Miggelbrink, *supra* note 21.

activity. Associated with this was a nationalist economic policy that promoted Norwegian Sami herding, sometimes to the detriment of the Swedish Sami, as seen in the re-allocation of the Saarivuoma land to Sami in Norway. In addition to a deterioration in the quality of grazing in the remaining areas as a result of higher usage, the measures had a social and cultural impact on the Saarivuoma village members as they lost connection to ancestral land, without consultation or consent. But even within Norway, the management of reindeer husbandry has been highly paternalistic, where, as Peter Koch argues, the Sami have been viewed as unable to manage their own affairs.[27] The policy is therefore in conflict with UNDRIP, both in terms of law and policy that undermines the identity of the Sami as a cross-border group, and the recognition of rights as the model for securing indigenous interests. Specifically, it is contrary to the UNDRIP provisions on the state's obligation to consult and cooperate with indigenous peoples in relation to the decisions that affect them.[28] As noted above, the UNDRIP does not impose an absolute prohibition on the limitation or restriction of indigenous rights. However, the consultation and cooperation expected under UNDRIP was not seen in the *Saarivuoma* case. This is typical of paternalistic models that sustain a dependency of indigenous peoples on the state. It is this dependency that a rights model rejects, in favour of fostering the autonomy and dignity of the rights holder; the paternalist model, as seen in *Saarivuoma*, emphasises the state's responsibility to balance interests, by a process that is essentially political and hence beyond stark results of a judgment. Indeed, as decisions are political, they lack legitimacy if they allow the law to prioritise the claims of a single community or claimant. This was clearly a matter of concern for the judge who ruled that no judgment could be given because the Norwegian Sami who would be affected were not involved in the case. The fear is that the rights model would frustrate the careful management of the land, by which it is legitimate and appropriate for Norway and Sweden to co-operate in the management of the Sami interest in reindeer herding and the wider public interest in the management of the land (usually, in relation to the Sami areas of Scandinavia, the concern is with resource extraction). This was reflected in the lack of any discussion of consultation and, more tellingly, the apparent lack of concern with the rights of Saarivuoma as an indigenous people.

The fact that Saarivuoma village was able to bring its case at all suggests that Norway does not completely reject the rights model of UNDRIP. Indeed, Norway was one of the many states that voted in favour of UNDRIP when it

27 *Ibid.*

28 See the discussion accompanying *supra* notes 12–13.

came before the General Assembly. The Supreme Court did not refer to the Declaration in its judgment, but perhaps this is not surprising: the Declaration is only a resolution of the General Assembly and as such it is not directly binding on states. Nevertheless, as discussed above, UNDRIP coincides with customary international law in important ways.[29] However, at a fundamental level, the *Saarivuoma* judgment reveals a degree of disquiet amongst the Norwegian judges over the impact of recognising indigenous rights on domestic law. The approach in the judgment almost suggested that a court of law is not an appropriate forum for balancing multiple interests that arise in respect of indigenous rights, nationality and resource management. These, it seems, are seen as essentially political questions, which could be undermined by the application of a rights model for determining the position of indigenous people. The key question is: for whom do the political processes exist? Saarivuoma's claims for compensation and costs were not upheld because it was Swedish and hence not part of the Norwegian polity; clearly, a Norwegian village would not have been expected to negotiate with the Swedish government for redress. On this, the Canadian experience is particularly valuable, as the courts have moved from a more restrictive position to one that is closer to what is required by UNDRIP.

4 Cross-Border Rights in the Supreme Court of Canada

Canada justified its initial vote against UNDRIP on the basis that it would take priority over domestic and international human rights laws.[30] There were also concerns that it would give indigenous peoples an absolute veto over the use of their land, to the detriment of mining and resource extraction.[31] However, in

29 See text accompany notes 4–8 and in particular para. 7 of the ILA Resolution.

30 UN Doc A/61/PV.107, 12. Norway voted in favour of UNDRIP, but its comments indicated that it believed that it already complied with it: see UN Doc A/61/PV.107, 22.

31 Chuck Strahl, then minister of Indian Affairs, explained the government's reasoning: "By signing on, you default to this document by saying that the only rights in play here are the rights of First Nations. And, of course, in Canada, that's inconsistent with our Constitution." S. Edwards, 'Tories Defend "No" in Native Rights Vote,' *The Montreal Gazette,* September 14, 2007 (*from* https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/#_ftn3); this was challenged in an open letter signed by seventy-seven legal academics and professionals: J. Bell et al, 'Open Letter – UN Declaration on the Rights of Indigenous Peoples Canada Needs to Implement This New Human Rights Instrument', *NationTalk*, 3 May 2008; *available a*t https://nationtalk.ca/story/open-letter-un-declaration-on-the-rights-of-indigenous-peoples-canada-needs-to-implement-this-new-human-rights-instrument.

2016, Carolyn Bennett, Canada's Minister of Indigenous and Northern Affairs, issued a statement to the United Nations Permanent Forum on Indigenous Issues that Canada would "adopt and implement the declaration in accordance with the Canadian Constitution".[32] Since then, Canada and British Columbia have both enacted legislation aimed at implementing UNDRIP in their law.[33] The Acts do not incorporate UNDRIP rights directly, as they only require the Canadian and British Columbian governments to conduct reviews and prepare plans for ensuring that they comply with the Declaration.[34] This reflects the official view that UNDRIP is only aspirational, and as such it does not directly confer any rights on indigenous peoples.[35] In any case, Carolyn Bennett's statement also said that "Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including 'free, prior and informed consent'".[36] Some writers agree that Canadian law already meets this standard,[37] but others have expressed doubts.[38] Nevertheless, as the following

32 Bennett, *supra* note 5.

33 United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14 (Canada); Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44 (British Columbia).

34 Nigel Bankes, 'Implementing UNDRIP: An Analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act Special Issue: British Columbia's Declaration on the Rights of Indigenous Peoples Act' 53 U.B.C. Law Review (2020); R. Beaton, 'Performing Sovereignty in a Time of Ideological Instability: BC's Bill and the Reception of UNDRIP into Canadian Law Special Issue: British Columbia's Declaration on the Rights of Indigenous Peoples Act' 53 U.B.C. Law Review (2020).

35 The most recent judicial statement on UNDRIP can be found in *Thomas and Saik'uz First Nation* v. *Rio Tinto Alcan*, 2022 BCSC (15) (BC SC) at 212. On whether the statutes have an immediate impact on the common law, Kent J said that: "It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, UNDRIP legislation has on the common law."

36 Bennett, *supra* note 5.

37 S. Adkins and others, 'UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects Energy Law Edition' 58 *Alberta Law Review* (2020).

38 S Boutilier, 'Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples' 7 *Western Journal of Legal Studies* (2017); A. M. Robinson, 'Governments must not wait on courts to implement UNDRIP rights concerning Indigenous sacred sites: lessons from Canada and Ktunaxa Nation v. British Columbia' 24 *The international journal of human rights* (2020).

discussion shows, Canada is closer to the rights model than Norway, although there are still lingering concerns with sovereignty in context of cross-border rights.

R v. *Desautel* is the most recent Canadian case on aboriginal cross-border rights and the responsibilities of the state to indigenous peoples.[39] Richard Lee Desautel, a resident and citizen of the United States, was prosecuted for killing an elk on British Columbian territory without the licence required under the Wildlife Act of British Columbia. Desautel argued that, as a member of the Lakes Tribe, he had an aboriginal right to do so. The Lakes Tribe descend directly from the Sinixt people, an aboriginal people whose territory used to straddle the border with the United States and included the land where Desautel shot the elk. However, over time, "a 'constellation of factors' made the Sinixt people move to the United States".[40] In 1956, the Canadian government declared that the Sinixt people were 'extinct' in Canada.[41]

The legal issues in *Desautel* focused on the interpretation of section 35 of the Constitution Act, 1982, which declares that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". The crucial question was whether the Lakes Tribe were 'of Canada'; if they were, Desautel would have a valid claim to an aboriginal right to hunt in the former territory of the Sinixt.[42] On this point, the Court noted that the interpretation of section 35 should be purposive. However, the Constitution Act itself provides very little guidance on this point, as it gives no further explication of the phrase 'of Canada' or its purpose. The background debates and preparatory materials also add little, as it seems that cross-border issues were simply not considered when the provision was drafted. However, previous cases established that "the two purposes of s. 35(1) are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them".[43] From this, Justice Rowe, for the majority, stated that the 'aboriginal peoples of Canada' under section 35 included "the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact".[44]

39 2021 SCC 17. In Canadian law, rights of indigenous peoples are 'Aboriginal' rights.

40 2021 SCC 17, para. 5.

41 2021 SCC 17, para. 6; S. Robertson, 'Extinction is the Dream of Modern Powers: Bearing Witness to the Return to Life of the Sinixt Peoples?' 46 Antipode (2014), p. 773.

42 Côté J and Moldaver J contested this point.

43 2021 SCC 17, para. 22.

44 Justice Moldaver concurred on this point, but dissented on whether Desautel had established an aboriginal right to hunt in the territory.

It is important to note that aboriginal rights and title are a distinct category of rights. Section 35 does not make aboriginal rights absolute, but governments cannot act against them in the same way that they may act against ordinary rights under public or private law. The duty of reconciliation requires Canada to work with the aboriginal peoples, through processes of consultation on matters that affect them. Secondly, denying a special status for aboriginal rights or aboriginal law in the Canadian system would be seen as a move to assimilate aboriginal peoples into the general population. Hence, the scope for restricting or modifying rights in the public interest is greatly reduced. It is not merely a matter of balancing interests, but also of ensuring that aboriginal life and culture can continue.[45] However, aboriginal rights may be extinguished if, for example, the recognition or exercise of the right would be inconsistent with Canada's status as a sovereign state. This point arose in *Desautel*, as it was argued that the right to hunt in Canada would necessarily include the right to enter Canada. This raised concerns that were previously discussed in *Mitchell* v. *MNR*, where the concurring judges stated that recognising a right of free entry would be inconsistent with Canada's sovereign power to control its borders.[46] In *Mitchell*, the chief of the Mohawks of the Akwesasne nation claimed an historic aboriginal right to bring goods into Canada from the United States, free of the ordinary customs duties.[47] However, the majority held that there was insufficient evidence that the Akwesasne people had traded or imported goods across the St Lawrence River (the modern border) when the Europeans arrived. This was sufficient to defeat their claim (no such finding was made in *Desautel,* as the history supported the existence of a right).[48] The concurring judges, Major and Binnie JJ, did not focus on the historical evidence but rather on the impact of allowing cross-border rights on Canadian sovereignty. They stated that any such right of free entry would be inconsistent with Canadian sovereignty, and it was inconsistent when the border was delineated in 1783. Binnie JJ quoted the judgment of the Federal Court of Appeal with approval: "[A]n aboriginal right to enter a sovereign state that is not based on citizenship of that state cannot be reconciled with that state's right to self-preservation by

45 *See* K. McNeil and K. Wilkins, 'Welcome Home: Aboriginal Rights Law after Desautel' *SSRN Electronic Journal* (2021)<https://www.ssrn.com/abstract=3945694> accessed 1 February 2022.

46 2001 SCC 33, Major and Binnie JJ concurring.

47 Mitchell's claim was not based on any special status as chief, but in terms of the rights of any member of the Mohawk nation.

48 To establish an Aboriginal right, the claimant must show (*inter alia*) that the relevant indigenous group engaged in the practice at the time of first contact; see the discussion in *Desautel*, 2021 SCC 17, para 50–64.

effecting an appropriate control of its borders."[49] This seems to put an absolute limit on cross-border rights of entry. One might argue that this was not the view of the British when the border was created, as it agreed with the United States in both the Jay Treaty (1794) and the later Treaty of Ghent (1815) that the aboriginal peoples would have free movement across the border. As with the Lapp Codicil, the aboriginal people were not parties to the treaties, but nonetheless it appears that neither the British nor the Americans thought that allowing free movement would be inconsistent with their sovereign powers. The Lapp Codicil between Denmark and Sweden exhibits a similar approach. Indeed, many modern treaties provide for free movement of persons. Unless the aboriginal right to free entry is absolute, it is not clear how sovereignty would be so seriously compromised that the aboriginal community must remain divided. As explained below, aboriginal rights and title are not absolute, so it seems that the issue concerning sovereignty was more theoretical than real for the concurring judges in *Mitchell*.

The issue of sovereignty and a right of free entry was still unresolved when it was raised in *Desautel*. Justice Rowe, for the majority, stated that the issue did not need resolution, as the claim was not for a right of entry but only to hunt: "I am of the view that, *unlike* the right claimed in *Mitchell*, the very purpose of the right claimed by Mr. Desautel is not to cross the border."[50] Accordingly, it was not necessary to give the question further consideration. In *Desautel*, the Crown and Justice Côté raised the point made by the concurring judges in *Mitchell*, to the effect that recognition of aboriginal rights or title would include argued that recognition of a right to hunt would incorporate a right of entry as a Justice Côté took a different view, as she suggested that rights of entry would follow as required incidental mobility would be a necessary adjunct to its exercise.[51] As McNeil and Wilkins observe, it is not clear why this should be the case. Canada and its provinces allow non-citizens to own land in Canada; ownership of land clearly gives rights that can only be exercised if the owner is in Canadian territory, but ownership does not carry with it an automatic right of entry.[52] Similarly, at the individual level, questions of entry should not necessarily undermine claims of an aboriginal right to engage in an activity somewhere in Canada. But leaving this aside, Justice Côté observed that the duty of reconciliation requires governments to consult with

49 2021 SCC 17, para. 67, quoting Létourneau JA at [1999] 1 FC 375, para. 18.

50 2021 SCC 17, para 66 (the emphasis is in the original).

51 2021 SCC 17, para. 124. Justice Côté was specifically concerned with aboriginal title, which confers control over the use of territory by others, rather than a right to engage in activity on the territory.

52 *See* McNeil and Wilkins, *supra* note 47.

aboriginal peoples before taking any action that would extinguish or restrict their aboriginal rights or title. In her view, it would also be inconsistent with Canada's sovereignty to require its governments to consult with anyone without Canadian citizenship or residency on before making decisions affecting the use of land in Canada.[53] In her view, groups outside Canada do not "fully participate with other Canadians in their collective governance",[54] nor do they "live and contribute as part of our national diversity".[55] Moreover, allowing the claim in *Desautel* would open the door for groups outside Canada to claim aboriginal title, which carries with it a form of governing power over the land.[56] For Justice Côté, allowing an external group to hold such power within Canada would be contrary to the most fundamental principle of democracy: that the nation's people, and only those people, determine the laws under which they live. For her, it would be "contrary to the organizing constitutional principle of democracy and inconsistent with the purpose of patriation to allow Aboriginal groups located outside of Canada to participate in Canadian democracy".[57]

Justice Rowe did not respond directly to this point, preferring to leave it for consideration at a later stage.[58] However, he did observe that aboriginal rights

53 She also noted (2021 SCC 17, para. 121–124) that the extent of the duty depends on the impact of the proposed decision on aboriginal rights, but if the court finds that the consultation and accommodation were not adequate, the decision is suspended or quashed. Within Canada, the duty includes a duty to identify the groups to which it might apply. Justice Côté asked how Canadian governments could comply with the duty outside Canada, given that they might not be aware of their existence or the nature of their potential claims.

54 2021 SCC 17, para. 114 (quoting from *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 para. 33.

55 2021 SCC 17, para. 114 (quoting from *Mitchell*, 2001 SCC 33, para. 132).

56 Canadian law distinguishes between aboriginal rights and aboriginal title: an aboriginal right is a right of members of an aboriginal community to carry out an activity (such as hunting), whereas "Aboriginal title is not a right to carry out an activity, but a right to the land itself" (see Justice Rowe, *Desautel* 2021 SCC 17, para. 80. As explained in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, para. 88 "Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses."

57 2021 SCC 17, para. 122 ('patriation' refers to transfer of the power to amend the constitution from the UK Parliament to the Canadian Parliament, under the Constitution Act, 1982).

58 However, at 2021 SCC 17, para. 72–76 Justice Rowe said that there would be no positive duty to identify them, as there would be for groups within Canada. Hence, Canada and its provinces would continue to govern as they had been, with no need to make an adjustment unless and until an external body was able to establish title. *See also* McNeil and Wilkins, *supra* note 47.

and title are not absolute: Canada and its provinces may override or modify them in specific circumstances, subject to full consultation and adequate justification.[59] He suggested that the fact that a group is outside Canada could be a factor that could be taken into account in determining the extent of their rights.[60] In other words, the sovereignty point is more a theoretical matter, which need not become a serious practical matter. In any case, McNeil and Wilkins argue that the next step would be negotiation: the issues are likely to be complex and hence some sort of treaty would be required between Canada and the external indigenous body.[61] As Justice Rowe observed, "this Court has held on many occasions, [that] the Crown has an 'obligation to achieve the just settlement of Aboriginal claims through the treaty process'".[62] This is not yet an acceptance of the kind of shared decision-making that is envisioned by the UNDRIP, but it is at least a step away from the belief that sovereignty cannot evolve even to regard people from outside the country as holders of indigenous rights.[63] By contrast, the Norwegian case indicates that their view is that states can allocate or re-allocate responsibility for indigenous peoples amongst themselves, without consultation. This is contrary to the rights model and shared decision-making that is fundamental to the Declaration.

There are two central points that follow from *Desautel*. First, although the minority did raise the issue of sovereignty and the engagement in politics of groups outside the cross-border, the majority did not see this as an insurmountable objection, especially given the importance of reconciliation and the rejection of assimilation as the basis for Canada's relationship with indigenous people. Secondly, the Canadian approach is much closer to the rights model of UNDRIP than that of the Norwegian Supreme Court, in that they seem more open to the idea that indigenous rights can be recognised and integrated with policies for resource management.

59 The primary authority is *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para. 77: they may be modified, but only for the 'broader public good' and subject to three requirements: "the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group".

60 2021 SCC 17, para. 79.

61 McNeil and Wilkins, *supra* note 47.

62 2021 SCC 17, para. 89; Justice Rowe cited *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, para. 32 and *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73, para. 20.

63 See the text accompanying note 10–11.

5 Indigenous Rights and the European Convention On Human Rights

Saarivuoma village has applied to European Court of Human Rights for a declaration that Norway violated its Convention rights in relation to the interference with its grazing rights. The case has the potential to challenge the fundamental principles of the Norwegian approach to indigenous rights, not only in terms of the specific legal issues that arose, but also in terms of the adherence to a paternalist model of the state's relationship with indigenous peoples. The village's application has not yet been heard, but several points are clear. First, the Convention makes no reference to indigeneity. In this case, however, Saarivuoma village would not need to base its claim on its status as an indigenous community, as the Norwegian Supreme Court recognised the village as holding rights under the Norwegian law of private property and that public officials had denied them the opportunity to exercise those rights. Accordingly, the Norwegian Supreme Court considered whether Norway had violated the right to the peaceful enjoyment of possessions under Article 1 of the First Protocol, but held that there was either no interference with possessions that would make Article 1 applicable, or that the restriction on access was merely a 'control on the use' of property under the third sentence of the Article. As controls on use do not normally require compensation, there was no violation of Article 1.

Assuming that the application does proceed to judgment, the question will be whether the European Court of Human Rights approaches the issues on the same lines as the Norwegian court. In particular, in the Norwegian case, there are issues under Article 14 that should be considered. That is, the judges deciding against compensation took the view that the 1972 Treaty on Sami rights put the responsibility on Sweden to ensure that Swedish Sami villages had sufficient grazing land. Without the Treaty, the Sami village would have been in a different position. This amounts to discrimination on the basis of nationality, as Norway treated the Sami who were Swedish differently than the Sami who were Norwegian, in respect of the enjoyment of their possessions. Accordingly, Article 14 should have been considered, in relation to the interference with the enjoyment of possessions under Article 1 of the First Protocol. To be sure, Judge Falkanger did consider the right to equality before the law under Article 98 of the Norwegian Constitution, which states that: "All people are equal under the law. No human being must be subject to unfair or disproportionate differential treatment."[64] However, he also said that the restrictions were not unfair or unreasonable because the village still had access to grazing land in Sweden and,

64 https://lovdata.no/dokument/NLE/lov/1814-05-17.

in any case, Norwegian Sami were also subject to restrictions on grazing. The difficulty here is that, where an indigenous identity involves a close attachment to land and territory, it should be recognised by the state. It should not be enough to say that the culture and way of life could be carried on in some other location. Judge Falkanger recognised they were important, but did not recognise their specifically indigenous character. On this, there are several points to Consider.

5.1 *Nationality and Residency Under the ECHR*

The first question is whether a state's obligations under the ECHR are limited to its nationals or residents. As noted above, UNDRIP does not appear to limit its obligations in this way. The ECHR is similar: obligations are not limited to citizens or residents. This is clear from Article 1 and Article 14, which specifically prohibit discrimination on the basis of citizenship or nationality, as well as other grounds. Although Article 14 makes no reference to indigenous peoples, the Council of Europe has issued resolutions on cross-border movement where it may have cultural significance for a minority. A 1975 resolution of the Committee of Ministers recommended that member states to take measures to protect the cultural heritage and identity of persons whose way of life diverted from the norm, namely, those living of a nomadic origin.[65] The resolution framed the responsibilities of states in terms of enabling the enjoyment of the Convention rights without compromising their nomadic way of life:

> Appropriate measures should be taken in order to avoid as far as possible a situation whereby nomads' way of life would result in preventing them from enjoying the rights and protection and from fulfilling the obligations relevant to the present resolution.[66]

The focus was on gypsy, Roma and traveller communities, but clearly the respect for their way of life would have implications for the Sami people engaged in cross-border herding.

In 1983, the Committee of Ministers went further, as it stated that Article 8, Article 14 and Article 2 of the Fourth Protocol[67] were relevant to people of

65 CoE, 'Resolution (75) 13 containing recommendations on the social situation of nomads in europe (adopted by the Committee of Ministers on 22 May 1975 at the 245th meeting of the Ministers' Deputies)' (1975), Appendix. Nomads were defined as "persons who for historical reasons are accustomed to following an itinerant way of life".

66 *Ibid*, [A (5)].

67 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (EIF 2 May 1963) ETS 46.

nomadic origin.[68] The recommendation also explained that the historic ties of a nomadic people to a country can be as important as their citizenship or residency in assessing a state's responsibility to respect and facilitate their way of life.[69] If, for example, a nomadic group had historically travelled through the territory of a state, they should be permitted to continue to do so, even if other individuals would not be permitted to do so and even if the nomadic individuals were not citizens and did not seek to establish permanent residence. By extension, it would seem that the historic ties of the Saarivuoma village to their Norwegian grazing lands would also be relevant in assessing whether respect for a traditional way of life is maintained. That is, in the terms of the 1975 resolution, Norway should have recognised their status as a semi-nomadic people in order allow them full enjoyment of their Convention rights.

5.2 *Culture, Minorities and ECHR*

As noted above, the *Saarivuoma* case involves a clear interference with the peaceful enjoyment of possessions, but the Norwegian Supreme Court held that it was not disproportionate. In doing so, it gave little weight to the impact on the cultural identity of the Sami people, especially in terms of the impact of excluding them from areas traditionally used for reindeer husbandry. The European Court of Human Rights has in several cases indicated that cultural values of a group may be relevant in assessing the proportionality of an interference with the enjoyment of possessions.[70] In *Halvar From* v. *Sweden* (1998), an admissibility decision, the European Commission on Human Rights stated that the Sami's special culture and way of life, including activities such as reindeer husbandry and hunting, justified restrictions on the hunting rights of non-Sami landowners.[71] Subsequently, in *Chapman* v. *the United Kingdom* (2001), the Court clarified the obligation to actively protect ways of life that form a central part of private life and ethnic identity, specifically in reference to a Gypsy family.[72] Moreover, in *Muñoz Díaz* v. *Spain* (2009), the Court ruled that Spain had violated Article 14 of the Convention in conjunction with Article 1 of the First Protocol on the ground the national authorities had failed to take

68 CoE, 'Recommendation (83) 1 of the committee of ministers to member states on stateless nomads and nomads of undetermined nationality (Adopted by the Committee of Ministers on 22 February 1983 at the 356th meeting of the Ministers' Deputies)' (1983).

69 *Ibid*, Appendix III, para. 2.

70 *Dogan and others v Turkey* (2005) 41 EHRR 15, para. 139; *Chiragova and others v Armenia* ECHR 2015-III 135, para. 144–151; *Maharramov v Azerbaijan* App no 5046/07 (ECtHR, 9 May 2019), para. 47–55.

71 *Halvar From v Sweden* App no 34776/96 (Commission Decision, 4 March 1998), at b.

72 *Chapman v the United Kingdom* (2001) 33 EHRR 18, para. 73; *Compare Botta v Italy* (1998) 26 EHRR 241, para. 31–34.

due account the applicant's affiliation to the Roma minority. Specifically, Spain had failed to consider how the social and cultural framework of this affiliation affected the applicant's expectation of being granted a survivor's pension based on a marriage according to Roma customs.[73] In relation to this, the Court highlighted the general value preserving cultural diversity has for the community as a whole.[74]

Culture is therefore relevant to Article 1 of the First Protocol, but the question is one of degree. As the Norwegian Supreme Court noted, a restriction on access is usually treated as a control on use under Article 1 of the First Protocol. Cultural factors relating to a minority may be relevant in such cases, as indicated by *Halvar From* v. *Sweden, Chapman* v. *UK,* and *Muñoz Díaz* v. *Spain*, but the Court tends to see Article 1 of the First Protocol as safeguarding economic interests. In *Saarivuoma*, the Court held that it was not disproportionate to deny access or compensation for the denial of access in part because the impact of the interference was limited, due to the availability of grazing land in Sweden. This focuses on economic harm, rather than the disruption to the way of life of an indigenous people. The cultural impact tends to be more important in cases brought under Article 8, either alone or in conjunction with Article 14. Several points are worth considering in this context.

In cases under Article 8 dealing with restrictions on cross-border movements, the European Court of Human Rights has emphasised the impact of a restriction on the right to private life.[75] It appears that Saarivuoma does not intend to raise Article 8 before the European Court of Human Rights, and there is no discussion of it before the Norwegian Supreme Court,[76] although

73 *Muñoz Díaz v Spain* (2010) 50 EHRR 49, para. 51–71.

74 *Ibid*, para. 5. *Compare Molla Sali v Greece* (2019) 69 EHRR 2, para. 128–162 and *see* U. Mattei, R. A. Albanese and R. J. Fisher, 'Commons as possessions: The path to protection of the commons in the ECHR system' 25 European law journal (2019) U. Mattei, R. A. Albanese and R. J. Fisher, 'Commons as possessions: The path to protection of the commons in the ECHR system' 25 European law journal (2019), pp. 243–245.

75 *See e.g., Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 7 EHRR 471, para. 59; *Nada v Switzerland* (2013) 56 EHRR 18, para. 150–166; *Garib v the Netherlands* (2018) 66 EHRR 29, para. 140.

76 The Communication for *Saarivuoma Sameby v Norway*, Case 2381/22, 24 May 2022, states that: "Relying on Article 1 of Protocol No. 1 to the Convention and Article 14 of the Convention taken together with the former provision, the applicant community complains about the situation that persisted from 1972 up to the Supreme Court's judgment in 2021 and the fact that no compensation was awarded. The applicant community also maintains that it was discriminated against in its status as a Swedish reindeer-herding community, to which less advantageous rules allegedly applied than had they been Norwegian reindeer herders." It does not refer to Article 8. Although there is no discussion of Article 8 specifically, Judge Falkanger did, however, consider Article 108 of

it could have provided them with an alternative and arguably stronger basis for its claim. In *İletmiş* v. *Turkey* (2006), for example, the Court emphasised the need to consider the value of cross-border movement for private life. The specific context concerned obstacles on leaving the country of birth to return to the country of domicile, to which close ties had been established through work and family life.[77] Crucially, the Court explained that when a person has ties to several countries, cross-border movement may be "essential to the full development of a person's private life".[78] If so, any restriction on that movement might require justification under paragraph two of Article 8. Similarly, in *Chiragov and Others* v. *Armenia* (2015), the Court held that obstacles on returning to an area of origin may be incompatible with the right to respect for private and family life.[79] In this case, a displacement for which the applicant was not responsible could not be considered to have caused the ties to the area to be broken, "notwithstanding the length of time that has passed".[80] In addition to the fact that the applicants had their homes in the area, which according to the case is sufficient for the Court to consider there to be an interest worthy of protection, the Court found reason to highlight the applicant's ancestral ties to the area.[81] Accordingly, a strong link to a territory cannot be reduced to merely economic: other ties of a different character may be equally important for assessing whether respect for the right to private life in Article 8 is upheld.

The cases suggest that Norway was under an obligation to consider impact of the denial of access on the Sami way of life, which would be much broader than concentrating on the economic impact. For indigenous peoples, the necessity to take due account of historic ties to traditional territories is an established principle of international law.[82] Moreover, denial of access on the

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the Constitution, which provides that: "The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life." (at https://lovdata.no/dokument/NLE/lov/1814-05-17).

77 *İletmiş v Turkey* (2011) 52 EHRR 35, para. 47.

78 *Ibid*, para. 50.

79 *Chiragova v Armenia*, *supra* note 72, para. 206–208.

80 *Ibid*, para. 206.

81 *Ibid*, para. 206. *Cf Dogan v Turkey*, para. 135–139 and *Sargsyan v Azerbaijan* (2017) 67 EHRR 4, para. 253–261 where the Court highlighted the cultural and social framework of the applicant's ties to a territory as factors to be taken into account in assessing the negative effects of an exclusion of access to an area has on the applicant's private life. Compare UNHCR, *Francis Hopu and Tepoaitu Bessert v. France* (1997).

82 *See* International Covenant on Civil and Political Rights (16 December 1966, EIF 23 March 1976) 999 UNTS 171; 1057 UNTS 407 (ICCPR), Art 1; International Covenant on Economic, Social and Cultural Rights (16 December 1966, EIF 3 January 1976) 993 UNTS 3 (ICESCR), Art 1; ILO 'Convention Concerning Indigenous and Tribal Peoples in Independent Countries' (27 June 1989, EIF 05 September 1991) 28 ILM 1382 (ILO C169), Art 13; UNGA 'Declaration on the Rights of Indigenous Peoples' (13 September 2007) UN Doc A/RES/61/295, Art 25.

basis of nationality fails to recognise the cross-border identity of the Sami people. It is worth noting that, in respect of minorities, the European Court of Human Rights has recognised the importance of territorial connection, but also allowed states a wide discretion in severing that connection. This was a central point of *Noack and others* v. *Germany* (2000), concerning the relocation of a village including persons belonging to the Sorbian minority for the purpose of expanding a mine.[83] In its reasoning on Article 8, the Court took account of the applicant's cultural ties to the area.[84] However, after considering the measures taken by the German authorities to ensure the preservation of the local community and the Sorbian cultural identity, and that the move took place within the same cultural environment, the Court concluded that the relocation was not disproportionate.[85]

A similar result was reached in a relatively early case, *G and E* v. *Norway* (1983). This is of particular significance because it concerns Sami and claims to cultural heritage. Here, the European Commission of Human Rights was faced with a complaint connected to the loss of Sami cultural heritage and ethnic identity due to the construction of a dam submerging parts of traditional Sami territory.[86] The applicants emphasised the threat that the loss of access to grazing and hunting areas and fishing water posed to their cultural existence, as it put them at risk of being forced to abandon their traditional Sami lifestyle, thereby losing part of their ethnic identity.[87] The applicants did not rely on the right to private life in Article 8. Instead, they alleged a violation of, *inter alia*, Article 14 and Article 1 of the First Protocol. The Commission however considered it necessary to examine the case in relation to the right to private life, as a measure affecting a way of life could lead to a lack of respect for the

83 *Noack and Others v Germany* App no 46346/99 (ECtHR, 25 May 2000).

84 *Ibid*, p. 12ff.

85 *Ibid*, p. 13f.

86 *G and E v Norway* (1984) 6 EHRR 357 (Commission Decision). *See also Halvar From v Sweden* an admissibility decision, which recognized the Sami's special culture and way of life, which includes activities such as reindeer husbandry and hunting, as justifying restrictions on the hunting rights of non-Sami landowners. Of importance for the balancing of competing interest is the extent of the intrusion into the applicant's personal sphere, and in the case of minorities, states have an increased obligation to take direct measures to ensure respect for their way of life in accordance with traditions. An obligation that especially arises when there is "a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life". *See Botta v Italy*, *supra* note 74, para. 34.

87 *G and E v Norway*, *supra* note 88, *complaints*, para. 4.

right to private life.[88] The Commission accepted that large scale construction projects could, through their environmental impact, affect the private life of the applicants. However, it also found that the potential interference with the applicants' way of life could be justified under the second paragraph of Article 8, as the applicants could continue reindeer herding, hunting and fishing as part of their traditional lifestyle in other areas.[89] This would appear to support the analysis of the Norwegian Supreme Court, in terms of impact on culture. That is, even if the impact is serious enough to engage Article 8, it is unlikely to be disproportionate if pursued for a legitimate purpose, and the impact on a minority's distinctive way of life is minimised. As noted above, the judges who ruled against compensation in *Saarivuoma* cited the availability of grazing in Sweden. In effect, the impact on the herders of Saarivuoma was minimal, irrespective of the economic impact, because they could continue their traditional way of life, although not in the same territory. This reasoning does consider the Sami status as a minority, and the importance of the culture as a minority, but it does not take into account their status as an indigenous people or the international norms on indigeneity and territory.

The reasoning in *G and E* v. *Norway* and *Noack* v. *Germany* are both in line with the more traditional approach to cultural protection that, according to Mariana Monteiro de Matos (2018), the UN Human Rights Committee (HRC) uses in relation to Article 27 of the international Covenant on Civil and Political Rights (ICCPR).[90] This approach focuses on the preservation and maintenance of a certain cultural activities that are determined to have significance for minority identity.[91] As long as it is possible to continue a traditional way of life, it is, according to this approach, difficult to show that there has been a lack of respect for private life.[92] This is not, however, consistent with developments in international law, as outlined in the opinion of the International Law Association on customary international law and reflected in UNDRIP.[93] The UNDRIP emphasises the attachment of indigenous people to specific territory, and hence the rights described in UNDRIP relate to specific territory.

88 *Ibid*, *the law*, para. 2.

89 *Ibid*, *the law*, para. 2.

90 M. Monteiro de Matos, 'Cultural Identity and Self-Determination as Key Concepts in Concurring Legal Frameworks for the International Protection of the Rights of Indigenous Peoples' in E. Lagrange, S. Oeter and R. Uerpmann-Wittzack (eds), *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer International Publishing 2018), p. 278f.

91 *Ibid*, p. 278f.

92 *Compare Halvar From v Sweden* and *Johtti Sampelaccat RY and Others v Finland* App no 42969/98 (ECtHR, 18 January 2005).

93 See text accompanying notes 4–8.

For the Sami, the key point is that the pre-UNDRIP approach effectively treats them as a minority, but not as an indigenous people, for whom the cultural importance of their attachment to ancestral land is essential to their identity. Without recognition of the attachment to land, they would still be protected as a minority but this would overlook one of the key attributes of indigeneity, as recognised under Article 26. As Stefan Kirchner notes, the European Court of Human Rights "seems not to have a concept of indigeneity or indigenous identity, but different conceptions relating to such terms".[94] By focusing on specific circumstances but disregarding the specifics of indigenous identity as adopted in UNDRIP, the earlier cases of the European Court of Human Rights depart from a general understanding of the difference between minorities and indigenous peoples. On the other hand, as Yvonne Donders argues, there has been a development of the case law that shows how the Court has come to apply a broader perception of what constitutes as relevant factors for determining the presence of respect for a characteristic way of life and ethnic identity.[95]

Whilst some of the European cases reflect the older approach, there is also evidence that the European Court of Human Rights may have become more receptive to a consideration of specifically the importance of a cultural attachment of indigenous people to specific territory. In this respect, Ugo Mattei *et al.* highlight *Winterstein and Others* v. *France* (2013) where the Court, in connection with the eviction and the threat thereof of travellers from land illegally occupied for caravan placement for several years, emphasised the value that the use of the place represented for the full development of a private life.[96] The underlying notion in *Winterstein* was that during the five to 30 years that travellers had used the land, although illegally, a community had been established creating social ties of importance to private and family life. Consequently, a measure interfering with a continued use of the land in the interest of the applicants risked having negative effects on the right to respect under Article 8. Without further measures that ensure the possibility of maintaining an identity in accordance with a traditional way of life, an obstacle to continued land use may amount to a disrespect for the rights and freedoms in Article 8.[97]

94 S. Kirchner, 'Conceptions of Indigenousness in the Case Law of the European Court of Human Rights' 38 Loy LA int'l & Comp L Rev (2016), p. 186f.

95 Y. Donders, 'Do cultural diversity and human rights make a good match?' 61 International Social Science Journal (2010), pp. 19, 27–29. *Compare* ECtHR, *Cultural rights in the case law of the European Court of Human Rights* (2011), 4, pp. 14–18.

96 Mattei, Albanese and Fisher, *supra* note 76; *Winterstein and Others v France* App no 27013/07 (ECtHR, 17 October 2013), para. 69–71. Compare *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012), para. 121.

97 *See Winterstein*, *supra* note 98, and *cf*., *Hirtuy et Autres c. France* App no 24720/13 (ECtHR, 14 May 2020), para. 75.

Mattei argues that it is the connection to a specific place and the life created based on this connection that is central to use becoming a factor in the assessment under Article 8.[98]

The question is whether, or how, European Court of Human Rights would take UNDRIP into account. The Court considers wider developments in international law as evidence of evolving standards, and hence they are particularly important in relation to the doctrine of dynamic interpretation.[99] One recent example concerning the international law on cultural heritage is *Ahunbay and others* v. *Turkey, Austria and Germany* (2016). The case concerned the Ilisu dam project, which threatened the ancient city of Hasankeyf, located along the banks of the Tigris River in south-eastern Turkey.[100] Moreover, the reservoir threatened to put several places of cultural and historical value for Kurds under water, as well as cut across routes used by some of the last nomadic shepherding communities in the region.[101] However, the complaint was not filed by the Kurds or the nomads but by a group of researchers involved in the work related to Hasankeyf.[102] The decision is interesting since it draws on wider international law, acknowledging cultural heritage as a factor for the purpose of the right to respect under Article 8.[103] In particular, the Court highlighted multilateral agreements related to protection of archaeological and cultural heritage, such as the European Convention for the Protection of the Archaeological Heritage of Europe and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (which Turkey has not ratified). Reference was also made to cultural rights and the right to participate in cultural activities outlined in Articles 22 and 27 of the Universal Declaration of Human Rights (UDHR) and Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[104] In relation to Article 15, ICESCR, the Court underlined the broad interpretation of the concept of

98 Mattei, Albanese and Fisher, *supra* note 76, p. 243f.

99 *An early example outlining this doctrine is Marckx v Belgium Series A no 31, (1979–80) 2 EHRR 330, p. 22.*

100 *Ahunbay and Others v Turkey, Austria and Germany* (*dec*) App no 6080/06 (ECtHR, 21 June 2016).

101 Durrie Bouscaren, 'The UNESCO Site That Never Was', *Sapiens*, 29 april 2020, <https://www.sapiens.org/archaeology/hasankeyf/> accessed 2023-05-10.

102 Although the application was framed in terms of Article 1 (obligation to respect human rights), Article 2 (right to life), Article 5 (right to liberty and security), Article 9 (freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 14 (Prohibition of discrimination) and Article 2 of Protocol No. 1 (right to education). *Ahunbay and Others v Turkey, Austria and Germany* (*dec*), *supra* note 102, para. 86–87.

103 *Ibid*, para. 95.

104 *Ibid*, para. 79–81.

culture used by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 21, which includes an duty to respect and protect for cultural freedom by taking due account of the cultural dimensions of human rights, including ties between different lifestyles and environments, natural or human, thus covering both tangible and intangible cultural assets.[105] The basis for this is the notion that cultural rights, according to the Committee, are an integral part of human rights and "[t]he full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world".[106] This statement is similar to the broad view expressed by the European Court of Human Rights linked to respect for private life and identity highlighted above. Against this background, it is understandable that the Court found that the complaint fell within the scope of Article 8. Thus, the Court indicated that a negative impact on a cultural heritage may be a key factor in the interpretation of whether there is respect as required by Article 8. As Bahar Yakan notes, one of the attempts with the complaint was also to try to prove that the destruction of cultural heritage is a violation of human rights.[107]

In *Ahunbay* v. *Turkey*, the applicants succeeded on the point of applicability but failed in relation to their standing to make an application.[108] The Court noted that international law focused on the rights of minorities and indigenous peoples to their cultural heritage. This connection was missing in *Ahunbay*, because the applicants were neither a minority nor an indigenous group.[109] Clearly, this would not be an obstacle to the claims of Saarivuoma village. Whilst the Court did not expressly refer to the UNDRIP, it did acknowledge that relevance of "international instruments and the common denominators of norms of international law, even if they are non-binding", as referred to the "right of indigenous peoples to conserve, control and protect their cultural heritage".[110] This is very similar to the wording of Article 31 of UNDRIP, which explicitly prescribes indigenous peoples' rights related to their cultural heritage, including the right to maintain, control, protect and develop their cultural heritage. By referring to international law linked to cultural rights and

105 *Ibid*, para. 81.

106 *Ibid*, para. 81; *See* ECOSOC, *General Comment No. 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*), 21 December 2009, E/C.12/GC/21, Section 1.

107 B. Aykan, 'Saving Hasankeyf: Limits and Possibilities of International Human Rights Law' 25 *International Journal of Cultural Property* (2018), p. 26.

108 *Ibid* p. 29f; Mattei, Albanese and Fisher, *supra* note 76, p. 246f.

109 *Ahunbay and Others v Turkey* (*dec*) App no 6080/06 (ECtHR, 29 January 2019), para. 21–24.

110 *Ibid*, para 23.

underlining the right of indigenous peoples to preserve, control and protect their cultural heritage, the European Court of Human Rights appears to bring the cultural protection for indigenous peoples' cultural heritage into the scope of the right to respect in Article 8. Given that the preamble of UNDRIP explicitly prescribes a right to cultural heritage and rests on existing principles of the UDHR and ICESCR, to which the Court referred in its 2016 decision, this interpretation is not unreasonable. The Court has also pointed out that the preservation of a cultural heritage has a greater essential value which is incumbent on authorities to protect:

> The Court reiterates that the conservation of the cultural heritage and, where appropriate, its sustainable use, have as their aim, in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants. As such, they are an essential value, the protection and promotion of which are incumbent on the public authorities.[111]

The Court has, therefore, emphasised, in relation to the protection of property, the duty to take due account of all relevant factors in the balancing of interests, including the social function of an interest and historical circumstances in which the interest protected by the Convention arose.[112] An obligation to take such factors into account also exists under Article 8. Whilst it does not appear that Saarivuoma put this argument before the Supreme Court, or that it will do so before the European Court of Human Rights, it is worth noting that the Convention is relevant to the assessment of whether a measure, such as a demarcation, has a legal effect on an individual's status preventing him of her from enjoying a private life in accordance with a cultural heritage by restricting the use of traditional territories.[113]

These issues therefore open up important questions about the interpretation of the European Court of Human Rights, and its application to the cross-border rights at stake in the *Saarivuoma* case. As it stands, the Norwegian judgment gave very little weight to the Sami as an indigenous people, or the impact of international boundaries on their identity.

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111 *Potemska and Potemska v Poland* (2015) 60 EHRR 27, para. 64.

112 *See ibid*, para. 67; *Volchkova and Mironov v Russia* App now 45668/05 and 229/06 (ECtHR, 28 March 2017), para. 122; *Kristiana LtD v Lithuania* App no 36184/13 (ECtHR, 6 Februay 2018), para. 107–110.

113 Compare *Potemska and Potemska v Poland*, *supra* note 113, para. 69–70; *Petar Matas v Croatia* App no 40581/12 (ECtHR, 4 October 2016), para. 38–39.

6 Concluding Remarks

This paper has considered the judicial perspective on cross-border rights, and in particular the extent to which they reflect the principles of UNDRIP. We have argued that the Canadian approach, as seen in the Supreme Court of Canada's judgment in *Desautel*, shows more sensitivity to the impact of an international border on the life of an indigenous community than the Norwegian Supreme Court's reasoning in *Saarivuoma*. Moreover, it demonstrates an acceptance of a rights model, as adopted in UNDRIP, even if, as some scholars argue, Canadian law falls is inconsistent with it in important respects.[114] However, it is interesting to note that neither court referred to UNDRIP, although in fairness it is not a binding instrument of international law. Nevertheless, the European Court of Human Rights may take the view that it is an indication of the direction of international law and international values relating to indigenous peoples, and hence it should inform the interpretation of the European Convention on Human Rights. If so, it casts doubt on the Norwegian judgment and its wider approach to the Sami as an indigenous people. UNDRIP sees the legal relationship between indigenous people and the states in which their historic territory is found as a relationship that is based by rights, whether in the form of access to or ownership of the territory itself, or more broadly in terms of rights relating to consultation and consent in relation to administrative decisions concerning the use of the land. That is, it is not one that is established by paternalism, with an emphasis on administrative discretion for which rights play a relatively minor role in the relationship.

114 Boutilier, *supra* note 40; Robinson, *supra* note 40.