Relocation of Kiruna and Building the Markbygden Wind Farm and the Sami Rights

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Relocation of Swedish Kiruna and building one of the largest wind farms in the world, Markbygden in northern Sweden (near Piteå) will severely impact the Sami and their livelihood. In the first case the relocated railway already cuts through reindeer pasture land[1] and in the second it will limit the movements of the reindeer herders and endanger the reindeer themselves. Ingrid Inga, the president of the Sami Parliament, stated that "[w]e're not against wind power – but we are against big wind farms like Markbydgen because they affect the reindeer business – the local Sámi herders will lose about a quarter of their winter grazing land. That's really reprehensible from our point of view".[2] According to the Sami, no proper consultations were conducted. In reaction to Sami fears of violations of their rights, the Swedish administration stated that even if the proposed construction of a wind farm will prevent the Sami community from continuation of reindeer husbandry, national interest in combating climate change takes precedence.[3] Thus, ventures associated with renewable energy sources can lead to restrictions of the range of reindeer pasture, and the rights and interests of the Sami in this regard are ignored. Hence, paradoxically, not only climate change is a threat to the survival, human security and development of the Sami people, but also actions taken to prevent or mitigate these changes. The above examples also constitute evidence that very often the requirement of prior free and informed consent is not implemented in practice.[4] Brendan

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[1] L. Khazaleh, *Forced displacement in Sweden: When a mine company demolishes and rebuilds an entire city*, 2017, available at: https://www.sv.uio.no/sai/english/research/projects/overheating/news/2016/lopez.html (last visit: 22.09.2018).

[2] P. Burgess, *Sami Reindeer Herders in Sweden Lose Out to Wind Power*, 2010, available at: http://reindeerherding.org/blog/sami-reindeer-herders-in-sweden-lose-out-to-wind-power/?cn-reloaded=1#more-1371 (last visit: 22.09.2018).

[3] I. L. Stoyanova, *The Saami facing the impacts of global climate change* [in:] R. Abate, E. A. Kronk (ed.) *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Edward Elgar Publishing, 2013, p. 296. See also: International Work Group for Indigenous Affairs, *The Indigenous World 2016*, Copenhagen 2016, p. 33, https://www.iwgia.org/images/publications/0740_THE_INDIGENOUS_ORLD_2016_final_eb.pdf (last visit: 22.09.2018).

[4] B. Tobin, *Indigenous Peoples, Customary Law and Human Rights –Why Living Law Matters*, Routledge, New York 2014, p. 46.

Tobin indicates, however, that prior free and informed consent is generally considered mandatory in enterprises in the field of oil and gas industry and mining, logging, palm oil, protected areas, programs to mitigate the effects of climate change, energy and building dams as well as access to genetic resources, traditional knowledge and others aspects of the cultural heritage of indigenous peoples.[5] This is connected to the obligation emerging from Art. 7 (3) of the *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* (1989) that "Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities".[6] Conducting such research constitutes a safeguard ensuring that, when concessions within the indigenous territory are granted, the restrictions imposed on indigenous or tribal peoples with respect to their land rights do not entail a denial of their survival as a people.[7]

What does international law and (quasi)jurisprudence have to say to this?

International law, relevant in the present context, comprises *ILO Convention169* (mentioned above) and the *UN Declaration on the Rights of Indigenous Peoples* (2007).[8] Apart from the already quoted Art. 7 (3), Art. 7 (1) of the *ILO Convention* states that "[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly".[9] The UN Declaration stipulates that "[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own

[5] Ibidem, p. 48.
[6] *ILO Convention 169* is available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (last visit: 22.09.2018).
[7] Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), paragraphs 204–205, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf (last visit: 22.09.2018).
[8] UN Declaration is available at: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last visit: 23.09.2018).
[9] *ILO Convention 169*, op.cit.

indigenous decision-making institutions (Art. 18). Art. 32 (2) and (3) adds that States "shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact".[10] These are the most important and relevant norms applicable to the two title cases.

Taking into account these regulations, what were the main conclusions reached in the international jurisprudence or quasi-jurisprudence of the treaty monitoring bodies? Here it is worth noting that the Inter-American Court of Human Rights stated that the State must adopt measures necessary to ensuring that establishing protected areas will not constitute an obstacle for the return to indigenous peoples of their lands.[11] On this basis, one may conclude that projects aimed at the environmental protection and/or combating the climate change should be in accordance with the use of their traditional lands by indigenous people. Also in the individual communication to the UN Committee on the Elimination of Racial Discrimination, it was argued that every State must "obtain [indigenous communities'] consent prior to implementation of projects for the extraction of natural resources [and] ensure that the protection of the rights of indigenous peoples prevails over commercial and economic interests".[12]

African Court on Human and People's Rights also recognised that "the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest".[13] Mau Forest is a land traditionally occupied by the Ogiek people, there are their sacred

[10] *UN Declaration*, op.cit.

[11] Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010 (*Merits, Reparations, and Costs*), paragraph 337 (26), http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf (last visit: 22.09.2018).

[12] *Individual communication submitted under the Optional Protocol to the International Convention on the Elimination of All Forms of Racial Discrimination, Lars-Anders Ågren et al. versus Sweden*, point 5.10, https://sverigesradio.se/diverse/appdata/isidor/files/2327/13804.docx. (last visit: 22.09.2018).

[13] African Court on Human and People's Rights, *African Commission on Human and People's Rights v. Republic of Kenya (Ogiek people case)*, 26 May 2017, point 130; http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf (last visit: 22.09.2018).

sites and their hunter-gatherer places.[14] In other words, the justification comprising the environmental protection can not be a basis for the denial to indigenous peoples of access to their lands.

In its opinions of 2003, 2007 and 2012 regarding Sweden the Advisory Committee on the Framework Convention on the Protection of National Minorities indicated that status and role of the Sami Parliament should be enhanced, particularly the obligation to consult the Sami Parliament in the decision-making process. This especially pertains to the land use.[15] Similar conclusions were reached by the Committee on Economic, Social and Cultural Rights in its Concluding observations of 2016[16] and Human Rights Committee in its Concluding observations of 2002 and 2009.[17] The significance of these decisions is evident when taking into account the two above cases of Kiruna and Markbygden wind farm. With reference to the Kiruna case, the Advisory Committee added that "the traditional way of life of [the Sami] is threatened, in particular in and around Kiruna municipality, due to the impact of urban development and expanding mining activities on reindeer herding and grazing lands. The representatives of Sami also complained that they have not been sufficiently consulted to ensure that their traditional way of life will be maintained and negative impacts of spatial planning decisions minimised".[18]

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[14] Ibidem, points 145, 155, 158.

[15] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Sweden*, 20 February 2003, point 63, https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=15967938&_101_type=-content&_101_urlTitle=sweden-details&inheritRedirect=false (last visit: 22.09.2018); Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Sweden*, 23 May 2012, points 21, 55, 149–151, https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=15967938&_101_type=content&_101_urlTitle=sweden-details&inheritRedirect=false (last visit: 22.09.2018).

[16] Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Sweden*, 14 July 2017, point 15, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5 (last visit: 22.09.2018).

[17] Human Rights Committee, *Concluding observations of the Human Rights Committee. Sweden*, 24 April 2002, point 15, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (last visit: 22.09.2018); Human Rights Committee, *Concluding observations of the Human Rights Committee. Sweden*, 7 May 2009, point 20; http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (last visit: 22.09.2018).

[18] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Sweden*, 23 May 2012, point 57, https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p

In this context one should point to the *Saramaka People v. Suriname* case of the Inter-American Court of Human rights which rightly distinguished between two situations where free prior and informed consent is required or where consultations are sufficient. The Court introduced two tests applicable to those situations: the first one is the scale of the project and the second is its impact on indigenous peoples' lands. In the Court's opinion, "States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories".[19] Accordingly, this may amount to some kind of a veto right. Similar conclusion was reached by the African Commission on Human and Peoples' Rights in the *Ogoni people case* of 2001.[20] What is important, the consent must be expressed in accordance with indigenous peoples customary laws and traditions.[21] It is also worth stressing that the Inter-American Court added that "[i]t should be emphasized that the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted".[22] It is especially relevant for the Kiruna case as the whole process of relocation, including the obligation to consult the Sami, has been managed by the mining company without much intervention by State authorities.[23] Even though LKAB is a State-owned mining company the above conclusion of the Inter-American Court is applicable.

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[19] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment of 28 November 2007 (*Preliminary Objections, Merits, Reparations, and Costs*), paragraphs 136–137, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

[20] African Commission on Human and People's Rights, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, 27 October 2001, paragraph 53, http://www.achpr.org/communications/decision/155.96/ (last visit: 23.09.2018).

[21] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, op.cit., paragraph 137; Inter-American Court of Human Rights *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), paragraph 180, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf (last visit: 23.09.2018); African Commission on Human and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya*, 25 November 2009, paragraph 291, http://caselaw.ihrda.org/doc/276.03/ (last visit: 23.09.2018).

[22] Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), paragraphs 187, 199, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf (last visit: 23.09.2018).

[23] L. Khazaleh, op.cit.

The UN Human Rights Committee also emphasised that "[t]he Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27 [the rights of minorities to enjoy their culture]. Thus, the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27".[24]

All of those judgments and observations are relevant for the Kiruna relocation and building the Markbygden wind farm. They all indicate that the economic development and the environmental protection, clearly connected to combating climate change, may not serve as a justification for violating the Sami rights, in particular their land rights and the right to the maintenance and development of their culture. Sweden must respect its obligation to consult the Sami and obtain their free prior and informed consent in these two cases. Sami rights and interests may not be ignored and sacrificed at the altar of the environmental protection or economic development.

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[24] Human Rights Committee, *Poma Poma v. Peru*, 2009, CCPR/C/95/D/1457/2006, point 7.4, http://juris.ohchr.org/ (last visit: 23.09.2018).

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