Digest | Issue #6

Xanharu

Upholding Indigenous Peoples' Rights

Legislation and Jurisprudence:
Global, Regional and National Developments

Photo by: Jan Helmer Olsen

Indigenous Peoples Rights International
Championing Indigenous Peoples Rights

Xanharu is from the indigenous Purepecha of Mexico, meaning “path.”

Xanharu best describes what this digest aims to accomplish – serve as a way by which Indigenous Peoples are able to use decisions on laws and jursiprudence to assert, protect and claim their individual and collective rights.

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Jovsset Ante Sara v. Norway

About the Digest

The centuries of struggle by Indigenous Peoples around the world against colonization, forced assimilation and systemic discrimination have resulted in the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly in September 2007. The UNDRIP sets the minimum international standards for the respect, recognition, and protection of the rights of Indigenous Peoples (art. 43). The United Nations General Assembly has repeatedly reaffirmed UNDRIP, most recently explaining that it "addresses the individual and collective rights of Indigenous Peoples and has positively influenced the drafting of several constitutions and statutes at the national and local levels and contributed to the progressive development of international and national legal frameworks and policies." [1]

Despite this milestone achievement of Indigenous Peoples, their rights continue to be violated in law and practice in many parts of the world. However, more and more legislation and jurisprudence affirming the rights of Indigenous Peoples, especially to their lands, territories, and resources, to self-determination and to their cultural heritage, are being issued by different authoritative bodies in line with the UNDRIP and with universal and regional human rights treaties. The latter are also increasingly interpreted in a way that is consistent with UNDRIP.

IPRI is therefore issuing this Digest as a compilation of legislation and jurisprudence in relation to Indigenous Peoples' rights at the international level (UN system and perhaps others), at the regional level (regional human rights bodies), and at the national level (national courts and laws). Among other things, the cases in the Digest illustrate EMRIP's conclusion that "many of the rights contained in the Declaration are already guaranteed by major international human rights instruments and have been given significant normative strength, including through the work of the treaty bodies, regional and national courts." [2]

IPRI believes that sharing this information with Indigenous Peoples, their allies and others will drive increased awareness and understanding about Indigenous Peoples' rights as an integral part of human rights law, where states have the duty to recognize, respect, protect and fulfill those rights in domestic law and practice. We hope it will also inspire policy makers, judges, prosecutors, lawyers and others to give increased attention to Indigenous Peoples' rights to eliminate systemic discrimination and social injustice committed against Indigenous Peoples. Finally, we hope it will also encourage and strengthen Indigenous Peoples' commitment and actions in advancing the realization of their rights in law and practice.

This Digest is a regular publication of IPRI and will soon be integrated into the IPRI website with search functions.

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[1] *A/RES/77/203 (15 December 2022).*

[2] *Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007-2017, A/HRC/36/56, 7 August 2017, para. 10. See also M. Barelli, The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples, 58 INT'L COMP L.Q. 957, 966 (2009) (explaining that "the strong relationship between the content of the Declaration and existing law should be recognized. The fact that the Declaration contains provisions that refer to rights and principles already recognized, or emerging, in the realm of international human rights, and, more specifically, within the indigenous rights regime, represents a first important indication of the legal significance of the instrument").*

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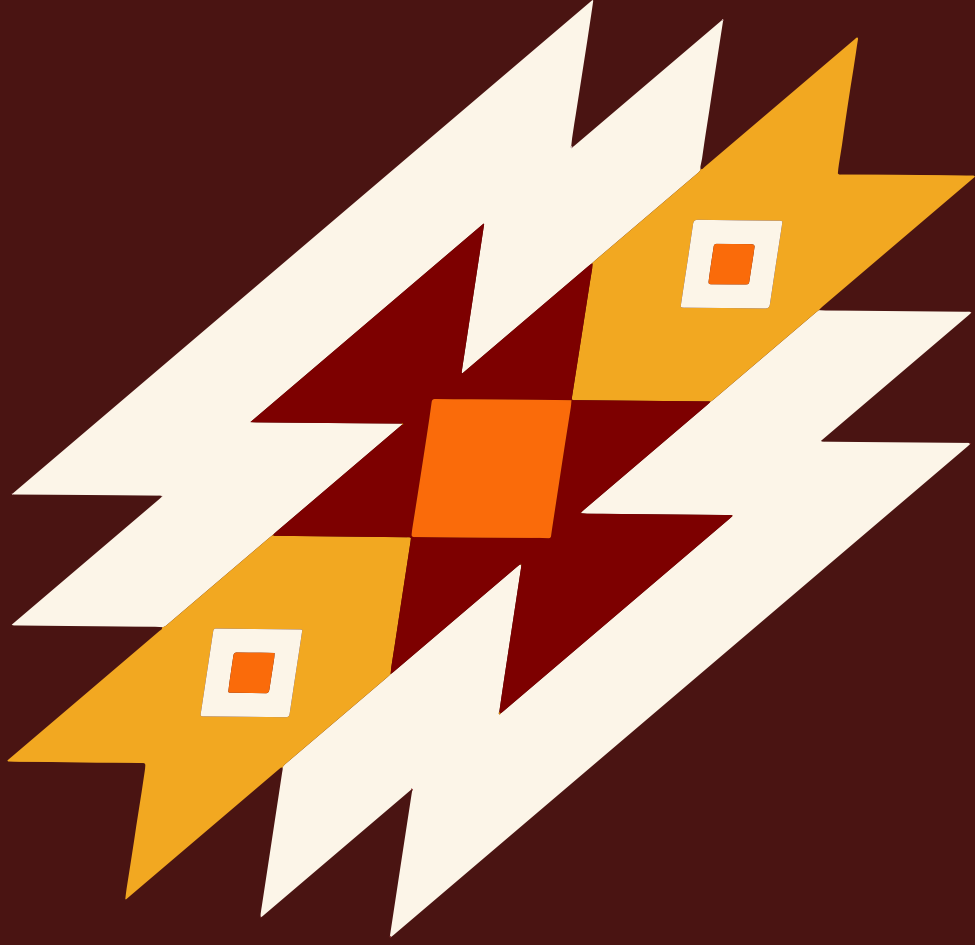

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1. J.T., J.P.V. and P.M.V. and others v. Finland, E/C.12/76/D/251/2022, E/C.12/76/D/289/2022 (advance unedited version)

https://tinyurl.com/bd256dmv **(ENG only)**

Country: Finland | **Body:** UN Committee on Economic, Social and Cultural Rights | **Date:** October 8, 2024

- **Issues:** Self-determination, impact of mining permissions, discrimination, effective participation and FPIC, cultural rights, right to maintain traditional economic activities and adequate standard of living
- **UNDRIP arts.** arts. 2, 3, 8, 11, 19-20, 23, 27-26, 32(2)

Summary: This is the first decision by the CESCR on Indigenous Peoples' rights. It concerns two separate complaints that were filed in 2022 by members of the Kova-Labba Siida, a community of Sámi reindeer herders. They alleged that Finland violated their rights in relation to its approval of two mining permits in their traditional territory. This occurred without proper impact assessment and without obtaining their free, prior and informed consent (FPIC). Related to this, they asserted that Finland had violated their rights under the International Covenant on Economic, Social and Cultural Rights: to take part in the cultural life of their community (art. 15); and to enjoy just and favorable conditions of work that provide a decent living (art. 7(a)(ii)), both interpreted in the light of the right to self-determination (art. 1); to work (art. 6); and to an adequate standard of living (art. 11) and health (art. 12), both in conjunction with the right not to be discriminated against (art. 2(2)) (para. 1.1). They also maintained that climate change is disproportionately impacting Sámi (e.g., their region is "warming more than three times faster than the global average"). In addition to the negative effects of mining, this threatens their ability to herd reindeer as their primary source of income and negatively impacts on their culture, languages and traditional knowledge (2.3).

First, the CESCR declared the complaints to be admissible, in part because domestic remedies had been exhausted or were not available (10.5-10.6). It determined that this applied to cultural rights, both alone and together with rights to an adequate standard of living through their traditional means of livelihood, to non-discrimination, and to self-determination, **"particularly with regard to the economic and cultural dimensions of the right of Indigenous Peoples to self-determination"** (10.8). It distinguished its approach in this regard from that of the Human Rights Committee insofar as the text of the CESCR's Optional Protocol allows it to examine "any of the rights set forth in the Covenant," including self-determination in article 1, whereas Optional Protocol I to the Covenant on Civil and Political Rights has been interpreted to allow only for complaints about arts. 6-27, thus excluding self-determination, directly or autonomously (10.8, footnote 18).[3]

[3] *This was also commented on in an annexed concurring opinion, which observes that "the exclusion of self-determination from justiciable rights, as seen in the past jurisprudence of the Human Rights Committee, must be reconsidered. Self-determination is an autonomous and enforceable right, crucial for Indigenous Peoples, and its full justiciability must be affirmed." Individual opinion of Committee member Ludovic Hennebel, para. 1 (he adds, at para. 3, that "violation of the Sámi's right to self-determination stems directly from the State party's failure to implement a meaningful process of [FPIC]." Moreover, "control over land is not only an economic matter but a core component of self-determination, as it allows Indigenous Peoples like the Sámi to maintain their cultural heritage, livelihoods, and identity").*

It declared the complaints to be inadmissible in relation to the right to work and to health, however (10.9).

Second, the CESCR determined that the general issue to be resolved is whether the approval of the mining permissions by Finland, despite the affected Sámis' "consistent opposition and in the absence of an impact assessment … [and] without obtaining their free, prior and informed consent, in the context of ongoing climate change and the cumulative effect of other interferences with reindeer herding, constitutes a violation" of the above-listed rights (12.5). Related to this, it concluded that "human rights treaties are living instruments," and, therefore, **the CESCR "will read the Covenant in the light of the evolving interpretation of the rights of Indigenous Peoples, as reflected in the Committee's relevant general comments"** (13). The CESCR does not presently have a general comment dedicated to Indigenous Peoples and their rights. Instead, it has addressed some rights in various thematic comments (e.g., on water, land and cultural rights), some of which make direct reference to UNDRIP.

Third, addressing the merits of the case, the CESCR recalled its General Comments Nos. 21 and 26, which recognize the cultural importance of traditional economic activities, the fundamental nature of collective rights, and "the inalienable right of Indigenous Peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" (14.2). It added that **the protection of territorial rights "is also a prerequisite for the right to an adequate standard of living of Indigenous Peoples, as they are an important basis for their livelihoods"** (id), observing also that other human rights authorities have reached the same conclusion (14.3). Quoting General Comment 26 on land, the CESCR further recalled "that 'land is also closely linked to the right to self-determination enshrined in article 1 of the Covenant'" and that "there is a 'growing tendency to recognize more forcefully the right to self-determination as a key principle when it concerns the collective rights' of Indigenous Peoples" (14.4) It reiterated that enjoyment of **the right to self-determination underlies effective guarantees for the rights of Indigenous Peoples, "and is also considered 'the fundamental premise of the right to consultation and consent'" (id).**

Fourth, the Committee concluded that State parties to the Covenant are required to adopt measures to recognize and protect Indigenous Peoples' rights to lands, territories and resources traditionally owned, occupied or otherwise used or acquired (14.5). Citing and quoting part of UNDRIP, art. 26(2), **this includes rights "to own, develop, control and use their communal lands, territories and resources"** (id). Additionally, they "must ensure the effective participation of Indigenous Peoples in decision-making processes that may affect their way of life, particularly their right to land, based on the principle of their free, prior and informed consent," referring to UNDRIP, art. 32(2) and various general comments (id). Finding that Finland had not complied with its obligations (14.6-14.7), the CESCR concluded that it had violated "the right of Indigenous Peoples to land, as part of the right to take part in cultural life, read alone and in conjunction with the rights to self-determination and to an adequate standard of living, and the obligation to ensure their effective participation" (14.8).

Fifth, the CESCR noted that Finland's Mining Act requires the consent of private landowners for the same type of mining permissions that were issued on Sámi traditional lands. However, the Sámi were treated differently in this case because the State is legally considered to be the landowner, precisely because the State has failed to recognize, regularize and respect Sámi rights to land in its national law. Finland argued that there was no discrimination because Sámi and non-Sámi were treated the same by that law (14.9). Addressing this, the CESCR applied non-discrimination principles (art. 2(2)), including those requiring differential and positive treatment of the situations of persons or groups who are different. Treating "in an

equal manner persons or groups whose situations are objectively different will constitute discrimination in effect," it recalled, and "[p]ositive measures are required to prevent and eliminate conditions that perpetuate discrimination and to ensure equal enjoyment of rights in the Covenant (14.10). In the case of Indigenous Peoples, this necessitates measures of legal recognition, including collective ownership, and protection of their rights to their traditional lands, as an essential element of the right to take part in cultural life of the community, and to provide effective remedies when these rights are infringed" (id). It concluded that the unequal treatment of Sámi in Finland's Mining Act has "the effect of nullifying the recognition, enjoyment or exercise by Indigenous Peoples, on an equal footing, of their rights to their traditional territories and natural resources," and thus constitutes illegitimate discrimination (14.11).

Finally, to repair the harm caused by the violations, the CESCR identified two measures, one specific and one general. The specific measure requires an "effective review of the decisions" concerning the mining permissions, "based on an adequate process of [FPIC] … accompanied by an independent assessment of the impact on the [affected Sámis'] rights…" (16). As a general measure (a guarantee of non-repetition), the CESCR stated that Finland has "an obligation to take all steps necessary to prevent similar violations from occurring in the future," including through amending "its legislation and administrative procedures to enshrine the international standard" of FPIC, inclusion of environmental, social and cultural impact assessments, and by initiating "… the process of legal recognition of the rights of Indigenous Peoples to their traditional lands, including through collective ownership" (17).[4]

2. M. E. V., S. E. V. and B. I. V. v. Finland, CRC/C/97/D/172/2022 (unedited version)

https://tinyurl.com/ye4b2r7n **(ENG only)**

Country: Finland | **Body:** Committee on the Rights of the Child |
Date: October 7, 2024

- **Issues:** Impact of mining permissions, discrimination, effective participation and FPIC, cultural rights of the child, right to maintain traditional economic activities, intergenerational transfer of knowledge, and adequate standard of living
- **UNDRIP arts.** all generally; specifically, preamble para. 10, 2, 8, 11, 18-23, 31, 32(2), 33

Summary: This case, submitted to the Committee on the Rights of the Child ("CRC") pursuant to the Optional Protocol to the Convention on the Rights of the Child ("the Convention"), has the same facts as the preceding case. It was filed on behalf of three Sámi children (sisters), all members of a multigenerational

[4] *See also Recognition Decree for Customary Law Communities and Customary Territories, South Sorong Regency, Papua, Indonesia, 6 June 2024 (recognition of land, resource and jurisdictional rights; cf. UNDRIP arts. 4, 5, 9, 11, 19, 25-38, 32-35); and 'Decades of struggle rewarded: Legal recognition of indigenous lands in Konda district', Human Rights Monitor, 7 June 2024 (explaining that another Decree was issued on the same day concerning the Knasaimos Indigenous community, covering 97,441 hectares in Saifi and Seremuk districts),* https://tinyurl.com/mr3zrb9j

Sámi reindeer herding family (para. 2.1-2.3). The sisters are learning and are determined to maintain "the traditions of Sámi reindeer herding, which is a cornerstone of Sámi culture and way of life." They assert that their cultural integrity and way of life is "threatened by outside threats to their culture, such as mining, tourism, wind farms and the rapidly changing environment" (2.2). The mining permits in this case are the same permissions as in the previous decision. The affected Sámis' opposed these permissions due to the expected harm and because of Finland's "lack of effort" to obtain their FPIC (2.5, 2.9). The Sámi Parliament also objected, in part because no impact assessment had been conducted and it considered that assessments are one of the "basic preconditions" for FPIC and the Parliament's related decision (*id*). The matter was raised in the national judicial system in 2016 and Finland's highest court ruled, finally, in 2021 that no violations had occurred (2.10-2.13). The complaint alleges violations of arts. 8 (right to identity), 27 (right to an adequate standard of living) and 30 (rights of the Indigenous child to enjoy their culture) of the Convention, all interpreted in the light of art. 24 (health), and all read alone and in conjunction with art. 2.1 (prohibition of discrimination) (3.2-3.6).

First, while the CRC found the complaint to be admissible in general (8.1-8.7), it ruled out consideration of the alleged violation of the right to health because it decided that it had not been sufficiently substantiated (8.5).[5] It added that the alleged breach of **"the international standard" of FPIC** connected to the granting of the mining permissions "also raises, in substance, issues under articles 8, 27 and 30 read in conjunction with article 12 of the Convention," and decided to include this in its analysis of the merits (8.6).[6] Article 12 concerns the right of the child to be heard in judicial and administrative proceedings.

Second, turning to the merits, it reviewed the arguments made by the parties (9.1.-9.9) and the applicable legal framework (9.12-9.17). Mirroring CEDAW's General Recommendation No. 39 on the Rights of Indigenous Women and Girls (2022),[7] the CRC importantly concluded that:

> … human rights treaties are living instruments. The Committee will therefore read the Convention in the light of the evolutionary interpretation of Indigenous Peoples' rights, **in particular, the United Nations Declaration on the Rights of Indigenous Peoples, as an authoritative framework for interpreting State party obligations** under the Convention concerning Indigenous peoples' rights, keeping also in mind that "Indigenous children are also impacted by the challenges facing their families and communities" (9.12).[8]

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[5] *Cf. CERD, General Recommendation No. 37 on Racial discrimination in the enjoyment of the right to health, CERD/C/GC/37, 23 August 2024, para. 51(h) ("States parties should refrain from … expropriating Indigenous Peoples' lands and from displacing them without their prior, free and informed consent…"),* https://tinyurl.com/3nmenyvn *(ENG only so far).*

[6] *See also para. 8.3 (citing CERD's decision in Ågren v. Sweden, para. 1.5, where CERD "found that the petitioners had victim status, as the mere fact that the exploitation concessions were granted without prior consultation and consent has had an impact on the petitioners' rights … irrespective of future developments that could determine whether the mining plans would be carried out…").*

[7] *See CEDAW/C/GC/39, para. 13 and 16.*

[8] *See also CERD, General Recommendation No. 37 on Racial discrimination in the enjoyment of the right to health, CERD/C/GC/37, 23 August 2024, para. 6 and 51(i) (referencing, respectively, that Indigenous Peoples' definition of health is "… closely tied to their right to self-determination and supported by the principles of [UNDRIP]"); and States should refrain from "imposing restrictions on the permanent rights of Indigenous Peoples endangering their self-determination, traditional livelihoods and cultural rights, in accordance with the standards of the UNDRIP"). Addressing also and explicitly UNDRIP, arts. 2, 3, 4, 5, 20, 21(2), 23, 24-26, 29 and 31.*

It then highlighted other treaty bodies' jurisprudence affirming the relationship between Indigenous Peoples' cultural rights and rights to lands, territories and resources and the right to effective participation, including FPIC (para. 9.13), observing also that **"cultural rights have an intergenerational aspect which is fundamental to the cultural identity, survival, and viability of Indigenous Peoples"** (9.14). It recalled that "language, which is the 'principal mode of transmission of traditional knowledge'," is "a foundational element of indigenous cultures and identity" (9.15). The CRC also explained that it is "precisely because the State party is aware that transferring Sámi culture to Sámi children is 'becoming increasingly difficult', that it must be particularly cautious when regulating activities that may endanger the continuity of their culture" (9.16). Taking the preceding into account, it concluded that **"article 30 of the Convention enshrines the right of Indigenous children to enjoy their traditional territories and that any decision affecting them should be taken with their effective participation"** (9.17).

Third, 'effective participation' includes FPIC, and the CRC recited UNDRIP, article 32(2) in this regard (9.19). In addition to conducting impact assessments as part of consultation processes, States must prove "that they organized and operated consultations in good faith and with a view to reaching consensus. In particular, an adequate and effective process of free, prior and informed consent whenever Indigenous Peoples' rights may be affected by projects carried out in their traditional territories…" (id). Tying this to article 12 of the Convention, the CRC determined that "Indigenous children must be particularly at the heart of the processes, from their consideration in impact assessments to their effective participation in processes of consultations aimed at obtaining their free, prior and informed consent" (9.20). It then found that Finland additionally had violated arts. 8, 27 and 30 read in conjunction with article 12 of the Convention because the approval of the mining permissions had failed to comply with the applicable standards for the participation of Indigenous Peoples, including Indigenous children, in decisions that may affect traditional lands used for reindeer herding, which also illegitimately impacted on their culture, identity and standard of living (9.23).

Fourth, the CRC determined that the treatment of the children and the community to which they belong also violated guarantees against discrimination. Echoing CERD, CEDAW and regional jurisprudence, it explained that **"to ignore the right of Indigenous peoples to use and enjoy land rights and to refrain from taking appropriate measures to ensure respect in practice for their right to offer [FPIC] whenever their rights may be affected by projects carried out in their traditional territories, constitutes a form of discrimination…" (9.24). Also, "discrimination suffered by an Indigenous people also impacts their children, whose preservation of cultural identity is crucial as they represent the continuity of their distinct people"** (id). Taken together, this amounted to violations of the girls' rights under arts. 8, 27 and 30, read in conjunction with the prohibition of discrimination in article 2.1 of the Convention (9.25).

Finally, the CRC specified reparations for the violations, consisting of: 1) reassessing and revising the mining permissions, "after a child rights-oriented impact assessment, as a first stage that would make it possible to carry out an adequate process of [FPIC] … in which the [children] should effectively participate;" and 2) as a guarantee of non-repetition, "amend its legislation to enshrine the international standard of [FPIC], specifically ensuring the participation of affected Indigenous children, and to include an environmental and social -including children's rights oriented- impact assessment" (10).

3. Jovsset Ante Sara v. Norway, CCPR/C/141/D/3588/2019

https://tinyurl.com/5t58mm7b **All languages now**

Country: Norway | **Body:** Human Rights Committee | **Date:** September 12, 2024

- **Issues:** Cultural rights, rights to effective participation in decision making, right to engage in traditional and other economic activities
- **UNDRIP arts.** 5, 18, 20, 26, 33

Summary: This decision responds to a complaint submitted by a Sámi individual ("the author"), who asserted that Norway had violated his rights by requiring a reduction in the size of his reindeer herd. He is the head of a ***siida***, a Sámi reindeer owners collective in a specific area. The Sámi Parliament of Norway and the Sami Reindeer Herders' Association of Norway submitted a third-party intervention (7.1 et seq, 10.8) in support of the complaint and provided additional information (para. 1.2). [9] The facts concern the application of Norway's 2006 *Reindeer Herding Act*, which requires that herd sizes be reduced, among other reasons, to maintain optimal ecological conditions for herding and to protect Sámi culture and traditional economy (4.6-4.9, 10.3, 10.5).[10] Before it was adopted, the Sámi Parliament commented on the draft law, proposing that *siida* members with less than 200 or fewer reindeer should be exempted, but this was not accepted by Norway (2.4-2.5). In 2013, State authorities ordered the author to reduce his reindeer herd from 116 to 75 animals no later than 31 March 2015 (2.7). He challenged this decision in the District Court, which ruled in his favour. The Court of Appeal upheld the author's rights, finding that it was impossible to make a profit with a herd of only 75 reindeer and, consequently, the author was in effect denied his right to enjoy his culture (2.8-2.9, 2.11). The Supreme Court of Norway, however, ruled in favour of the State, finding no violation of the author's rights (2.10). The Human Rights Committee ("the CCPR") decided that domestic remedies had been exhausted, and the complaint was declared admissible (9.1-9.3).

In his complaint to the CCPR, the author asserted that the failure to exempt *siida* members with fewer than 200 reindeer was not reasonable or necessary to ensure the continued sustainability of reindeer husbandry, especially as the Sámi Parliament considered that an exemption was warranted (3.2). By disregarding the Sámi Parliament's advice, he stressed that Norway "failed to consult properly with the Sami community and to consider the community's rights to self-determination and to real and effective participation in the decision-making process" (3.3).[11] Referring to the CCPR's prior decisions in *Sanila-Aikio v. Finland and Käkkäläjärvi et al. v. Finland*, (in Xanharu No. 1), which emphasized the right to self-determination and

[9] *See Guide to Third Party Interventions before UN Human Rights Treaty Bodies (ISHR 2022),* https://tinyurl.com/xu5xpzf6 *(ENG);* https://tinyurl.com/2ksp7su7 *(SPA).*

[10] *See para. 7.3, 10.2 and 10.5. This is in part a reference to the Human Rights Committee's jurisprudence in Kitok v. Sweden, CCPR/C/33/D/197/1985.*

[11] *The Sami Parliament itself explained, at para. 7.2 and 7.5, that it had not been properly consulted on the Reindeer Husbandry Act, that it objected partly because it is inappropriate that State authorities unilaterally decide on reindeer numbers, and that its proposal to exempt herds below 200 concerned "the importance of enabling young reindeer owners to attain economic sustainability at the stage when they are establishing themselves as reindeer herders."*

relied on UNDRIP, the Parliament argued that the State must demonstrate that it has a compelling reason to legitimately interfere in internal Sámi decisions about resource allocation. They argued that there "should be a presumption that the Sámi Parliament has exclusive jurisdiction in such internal matters," and the State must "… demonstrate that the interference is necessary to the extent that the matter has effects beyond the Sami community" (7.4).

First, the CCPR recalled that Indigenous Peoples' "cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life;" and "the close ties of Indigenous Peoples to the land must be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival; their relations to the land are a material and spiritual element which they must fully enjoy to preserve their cultural legacy and transmit it to future generations…" (10.4). The CCPR specifically cited UNDRIP, arts. 20, 26(1) and 33 in this regard.

Second, the CCPR noted that it was not disputed that the relevant provisions of the Reindeer Husbandry Act were based on reasonable and objective aims, i.e., fostering ecologically, economically and culturally sustainable reindeer herding (10.5). It recalled its jurisprudence on situations where the cultural rights of individuals "conflict with the exercise of parallel rights by other members of the minority group or of the minority as a whole," in particular: "(a) whether the limitation in question is in the interests of all members of the minority; (b) whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected; and (c) whether the limitation is necessary for the continued viability and welfare of the minority as a whole" (*id*). Having decided that the aims of the Act were reasonable and objective, it determined that the issue to be resolved was whether there was a valid justification for not exempting herders with a small number of reindeer and whether issuing herd reduction orders in such circumstances "was necessary for the continued viability and welfare of the community as a whole" (id).

Third, the CCPR determined that the author was directly affected by the application of the law, which would make it "impossible to make a financial profit … [and] which would risk him having to discontinue his reindeer husbandry practice, preventing him from engaging in reindeer husbandry" in accordance with Sámi traditions (10.7). Taking into account the views of the Sámi Parliament, the CCPR further considered that "the author is a young father who, together with his spouse, wishes to continue the centuries-old tradition of reindeer herding and to transmit this constitutive dimension of Sami culture to the next generation" (10.8), noting also that **the Sámi Parliament is "best placed to determine the interests of the Sami community and [whether] the reindeer husbandry industry is consistent with the Committee's jurisprudence**" *(id*). Taking these considerations together, the CCPR held that Norway had violated the author's rights under ICCPR, art. 27 because the failure to exempt herders having 200 or less reindeer, "in accordance with the position of the Sami Parliament and the Sami Reindeer Herders' Association," was not "based on reasonable and objective justifications, nor has it demonstrated" that this was "necessary in order to ensure the continued viability and welfare of the Sami reindeer husbandry industry" (10.10).

Fourth, because it had found a violation of art. 27, as above, the CCPR decided that it was unnecessary to decide on the author's remaining claims concerning the right to effective participation in the decision-making process (10.11). It also took this approach in *Taylor, Hinemanu Ngaronoa & Wilde v. New Zealand*

[12] *CCPR/C/138/D/3666/2019 (deciding not to address arguments about discriminatory, disproportionate impacts on Māori as an Indigenous People).*

(discussed in Xanharu 5). [12] This is troubling insofar as it ignores several important collective rights that require attention (e.g., those raised in 7.4 as above), more so considering the infrequency that such issues are before the CCPR, the efforts of the author (and Sámi Parliament) in raising them, or even the value of better informing the State of its obligations, none of which should be outweighed by this approach of selective expediency in decision-making.

Finally, the CCPR identified two reparations measures, one specific, the other a general guarantee of non-repetition. First, Norway is obligated to review the herd reduction orders as they affect the author. Second, it is also "under an obligation to take all steps necessary to prevent similar violations from occurring in the future, including by reviewing the Reindeer Husbandry Act to ensure that it complies with the State's obligations under ICCPR, art. 27 (12).

4. Union of Rural Workers of Alcântara & Union of Family Agriculture Workers of Alcântara, GB.351/INS/11/3 [13]

https://tinyurl.com/yc27tp2k | https://tinyurl.com/44u7kywj

Country: Brazil | **Body:** ILO Governing Body | **Date:** June 3, 2024

- **Issues:** land rights, consultation, forcible displacement, obligation to conduct impact assessments

Summary: This decision by a Committee of the ILO Governing Body ("the Committee") is based on a complaint (known as a "representation" in the ILO system) submitted by two labor unions. They allege that Brazil violated International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989) ("ILO 169"), specifically: arts. 2(1) and (2)(b); 7(1) and (3); 13(1) and (2); 14(1) and (2); 15(1) and (2); 16(1), (2) and (5); 17(1) and (2) and 23(1).[14] This concerns around 150 Quilombola villages, communities that self-identify as 'tribal peoples' pursuant to ILO 169, art. 1(a).[15] These communities have rights under Brazil's 1988 Constitution, which also establishes the State's obligation to regularize their land rights, including by issuing collective land titles (para. 9). Beginning in 1983, Brazil began taking lands traditionally owned by the Quilombola villages to facilitate the operations of the Alcántara Launch Centre (ALC) and the Alcántara Space Centre (ASC), which are commercial satellite and spacecraft launching facilities. Forcible evictions occurred several times over the years as the ALC and ASC were established

[13] *See also Comunidades Quilombolas de Alcântara, Brazil, Case 12.569 submitted to the Inter-American Court of Human Rights, 5 January 2022 (concerning the same facts),* https://tinyurl.com/m398r9r3

[14] *Respectively: implementation of the Convention; the right to decide priorities for the process of development and the obligation to undertake impact assessments; the duty to respect cultural and spiritual relationship with lands and territories; rights of ownership and possession over lands, including regularization; natural resource rights and consultation requirements; relocation; respect for traditional procedures for transmission of land rights and consultation obligations in relation to alienation; and respect for subsistence economy and traditional activities.*

[15] *Art. 1(a) provides that: "This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations…."*

and expanded, affecting a significant number of Quilombola communities and families (10-14, 41). Despite Constitutional guarantees for their lands and Federal Court decisions in their favour, none of the Quilombola communities received collective land titles – instead, some were issued individual titles in 2021 (23) – and the companies' activities continued and expanded unrestrained (15-20, 24).[16] In 2017, Brazil decided to expand the ALC/ASC by an additional 12 645 hectares, all Quilombola communities' lands, without prior consultation or conducting a prior impact study (19). Brazil also planned to acquire additional land for the ALC/ASC, which would require further relocations if completed (25, 41). The State also failed to provide information on the social, environmental and economic impacts of the expansion, particularly on the livelihoods of the Quilombola (25). There was also no legal regulation on the obligation to consult with Quilombola until 2021 and, even then, it was alleged that Brazil had failed to implement and comply with it (21-2).

First, on the land titling issues, the Committee observed that Brazil had established an Inter-Ministerial Working Group in 2023 and mandated it to develop options for Quilombola land titling "that are compatible with the interests of the communities and the [ALC]," and that titling should be completed within two years (44). It also noted that there were flaws in this process (e.g., unequal representation in the Working Group) and that despite the proposal for collective land titling, the decrees expropriating lands to further expand the ALC had not been suspended (45). Citing ILO 169, arts. 14(1) and (2), the Committee concluded that it "expects that … the Government will ensure … with the effective participation of the peoples concerned, that the process of titling the lands traditionally occupied by the Quilombola communities of Alcántara is completed without delay" (46).

Second, concerning the prior forcible evictions, the Committee observed, first, that the evicted persons "continue to face restrictions in carrying out their traditional fishing activities, as well as in accessing water and food sources" and, second, that Brazil had committed to provide "financial aid in collective compensation for the violations suffered by the Quilombola communities, which will be used for the adoption of public policies directly benefiting the communities, with the agreement of their representatives" (48). Citing art. 23, the Committee concluded that "the necessary steps will be taken … to ensure that the Quilombola communities that were displaced during phases I and II of the establishment of the [ALC] will be able to carry out their traditional and subsistence activities, including fishing" (49-50).

Third, turning to the duty to conduct impact assessments, the Committee observed that sufficient information had not been provided to the Quilombola about the impact of the proposed expansion of the ALC/ASC. It also recorded that, in 2008, the Federal Court had found that certain activities had been harmful to the physical, social and cultural environment of the Quilombola communities (51-2). Citing art. 7(3), it requested that Brazil conduct impact assessments "without delay … [and] in accordance with existing national legislation," on the expansion of the ALC, and that it does so "in cooperation with the peoples concerned…" (53).

Fourth, the Committee emphasized that prior consultation is a "cornerstone" of IL0 169, that it is fundamental to implementation of the rights therein, and "an essential tool of governance, social dialogue and legal certainty for indigenous peoples" (57). Citing art. 6, it then requested that Brazil conduct "a

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[16] *Para. 16 explains that a November 2008 technical study, published in Brazil's Official Gazette, on the identification and demarcation of the Quilombola lands in Alcántara identified 78,105,357 hectares as lands belonging to the Quilombola communities of Alcántara.*

consultation process, designed with the involvement of the representative institutions of the Quilombola communities," highlighting also "the importance of allowing sufficient time for the communities to carry out their internal decision-making processes, and of providing them with all relevant information well in advance" (58).

Last, with respect to the planned eviction of hundreds of Quilombola families in the further expansion of the ALC, the Committee observed that this should take place only as "an exceptional decision" and "only with the free and informed consent of the Quilombola communities concerned" (citing art. 16(1)) (60). However, "[w]here their consent cannot be obtained [i.e., where they say no] such transfer and relocation should only take place once appropriate procedures, provided for in national laws and regulations, have been concluded" (citing art. 16(2) (*id*). The Quilombola also must have "the opportunity for effective representation" in these national legal proceedings. If the State decides to evict them without obtaining their consent, they must receive alternative lands of "a quality and legal status at least equal to those of the lands previously occupied by them, and which are suitable to provide for their present needs and future development" (*id*.). This decision, albeit reflective of the text of ILO 169, illustrates a right to say yes to eviction and/or relocation, but not to say no to it, and it is also highly questionable whether there are lands of equal quality given the fundamental relations to specific lands that are severed (and the trauma caused) by forcible eviction/relocation.

REGIONAL

Regional[17]

1. Batwa of Kahuzi Biega v. Democratic Republic of Congo, Com. 588/15

https://tinyurl.com/wby877at (ENG) | https://tinyurl.com/ys658kbt (FR)

Country: DRC | **Body:** African Commission on Human and Peoples' Rights | **Date:** June 3, 2024

- **Issues:** forcible eviction, health, cultural rights, right to life with dignity, collective rights
- **UNDRIP, arts.** 2, 3, 8, 10-14, 20, 25-32, 40

Summary: This decision by the African Commission on Human and Peoples' Rights ("the AfCom") concerns the forcible eviction of around 6 000 Indigenous Batwa families between 1970 and 1975 and the ongoing effects thereof (para. 3-6). The evictions were caused by the establishment and expansion of the Kahuzi-Biega National Park ("KBNP"), an area today comprising around 600 000 hectares. This was done without any form of participation in decision-making, resettlement assistance or compensation. Unable to use and enjoy their traditional lands, the evicted Batwa live in improvised camps on the outskirts of the KBNP, almost all in extreme poverty (7). Their attempts to obtain redress in the national legal system were denied or remain inconclusive (e.g., an appeal to the Supreme Court has been pending for over a decade) (9-12). In 2015, they filed a complaint with the AfCom asserting various violations of the individual and collective rights guaranteed in the African Charter of Human and Peoples' Rights ("the Charter"), including rights to culture, to property, to health, to food, to freely dispose of wealth and natural resources, and to development (13-4, 61-104). The AfCom reviewed the admissibility of the complaint (28-60), and decided that the relevant criteria had been satisfied an (48-55).

First, having concluded that the Batwa are "Indigenous" and "a People" (111-24), the AfCom reaffirmed the ruling of the African Court of Human and Peoples' Rights that **the individual and collective rights in the Charter are to be interpreted in light of the applicable norms in the UNDRIP** (151, 155, 164, 201, 208, 223(4)). [18] It determined, for instance, that art. 22 of the Charter (on the collective right to development) should be read in light of art. 23 of the UNDRIP (201).[19] It also quoted UNDRIP, art. 10 on the prohibition of forcible relocation in its analysis of the collective right to an environment conducive to development (208).

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[17] See also EU Corporate Sustainability Due Diligence Directive, 25 July 2024 (annexing a reference to UNDRIP in total as one of the key human rights standards to be applied in legally required due diligence for certain EU-based companies), https://tinyurl.com/43ttx53c (ENG).

[18] AfCom HPR v. Kenya (Merits), 006/2012, 26 May 2017, paras. 125-6, 128, 131, 181 (stating, at para. 131, that "… the Respondent violated their rights to land as defined above and as guaranteed by Article 14 of the Charter read in light of [UNDRIP]").

[19] See also id. para. 209 (ruling that the right to development in the Charter "should be read in light of Article 23 of the UNDRIP"). However, this fails to capture the other provisions of UNDRIP that are relevant to the right to development. See e.g., A/HRC/54/50/Add.2, p. 44-5 (concerning the Draft international covenant on the right to development, art. 17 on Indigenous Peoples, which is based on at least five provisions of UNDRIP).

Second, AfCom found violations of various individual rights. The prohibition of discrimination was violated because the Batwa had been treated differently and worse than others without any valid justification (125-33). For instance, some non-Batwa communities were not only allowed to access the KBNP but also to maintain their occupation of the same, and they were routinely treated better than the Batwa by the KBNP guards (130-2). It found **a violation of the right to life with dignity** due to the severance of the Batwa's relationship with their traditional lands and the severity of their living conditions caused by the evictions and lack of resettlement assistance (136-40). It also examined the right to religious freedom, recalling that for Indigenous Peoples religious practice is normally fundamentally connected to land and the environment and that any **"impediment or interference with accessing [their] land constitutes a violation of the right to engage in religious rituals…"** (142-3). Accepting that these rights may be subject to restrictions where "necessary and reasonable" (144), the AfCom decided that the eviction of the Batwa, without a right of return, did not meet this standard – and thus violated the right – as the purported justification for the KBNP was protection of lowland gorillas and there was no evidence that Batwa ever hunted gorillas or destroyed the forest (145-6). AfCom also found violations of the right to health, highlighting that Indigenous Peoples physical and mental health are directly connected to security of tenure over their territories (164-67). It cited **UNDRIP, art. 24 in this regard to underline Indigenous Peoples' right to maintain traditional health practices and to access traditional medicines, observing also that eviction from traditional lands "undeniably constitutes a violation of their right to health"** in this respect (164). It reached similar conclusions with respect to finding violations of the right to education, particularly as it relates to the transmission of traditional knowledge (169-74) and the right to culture (175-87).

Third, AfCom found violations of property rights in part by referring to UNDRIP, arts. 26 and 27, by virtue of which Indigenous Peoples have rights of ownership over their ancestral lands, "even in the absence of a title deed" (151, 155). It noted that these rights may also be restricted if done in accordance with the law and to satisfy a valid public interest (156). The latter must be understood more broadly and stringently when it concerns encroachment on Indigenous lands because: a) few, if any, restrictions are appropriate because of the connection between Indigenous lands and the enjoyment of fundamental human rights (157); and b) restrictions must be strictly proportional, the least restrictive possible, and absolutely necessary to achieve a valid public interest (158). Afcom decided that this test was not met because the Batwa were dispossessed without compensation or resettlement, there also was no evidence that their presence was harmful, and because their way of life that inextricably tied to their ancestral lands (160).

Fourth, Afcom then turned to the collective rights vested in 'peoples' in arts. 20-24 of the Charter. It began with art. 21 on the right to freely dispose of wealth and natural resources (analogous to common art. 1(2) of the International Covenants), reaffirming that this right applies to peoples within existing states (188-92). Discussing how this right affects the establishment of national parks, such as the KBNP, AfCom explains that it requires that parks are not established and operated to the detriment of Indigenous Peoples, unless the State can prove that they are harmful to the protection of the area (195). It concluded that the right had been violated, both because the KBNP was clearly to the detriment of the Batwa – made worse by discrimination because others continued to occupy and use the KBNP – and there was no evidence proving that their continued occupation was harmful (196-98, 229). With respect to the right to development in art. 22 of the Charter, **AfCom observed that UNDRIP has reinforced Indigenous Peoples' right to development, including by requiring that States collaborate with Indigenous Peoples on health, housing and other social and economic programmes, and provide for control over the same via their own institutions (201). It recalled that any project or development that would have a major impact on Indigenous Peoples' territories requires that the State obtains their free, prior and informed consent** (203,230).

Finding a violation of the right to development, AfCom considered that KBNP had caused a major and negative impact and that the Batwa were not involved in decision-making, generally or in relation to specific developments affecting them, directly or indirectly (204-05). Last, it addressed the collective right to an environment conducive to development, finding violations due to the State's disregard for Indigenous Peoples' rights and specific characteristics and needs (206-13).

Finally, AfCom adopted various measures to repair the above found violations (233). These include the creation of legal mechanisms for demarcation and titling of Batwa territory and the removal of non-Batwa (219), creation of a development fund for the Batwa (222(iv), 224), payment of royalties from existing economic activities in the KBNP (222(v), 224), and various guarantees of non-repetition (223).

2. Case 13.083, Akawaio Indigenous Community of Isseneru. Report No. 8/24, Admissibility and Merits (Publication)

https://tinyurl.com/ykjk39mj (EN) | https://tinyurl.com/bdfsknv9 (SPA)

Country: Guyana | **Body:** Inter-American Commission on Human Rights[20] | **Date:** April 24, 2024

- **Issues:** Self-determination, territorial rights, FPIC, mining, discrimination, economic, social and cultural rights, remedies
- **UNDRIP, arts.** 2, 3, 4, 5 8, 11-14, 18, 20-32, 34-35, 40

Summary: This decision revolves around land titling decisions and mining permits and the consequences for the Akawaio Indigenous community of Isseneru ("Isseneru"), as well as issues with national law, especially the Amerindian Act 2006 (para. 31-126). Under that legislation, lands are classified as "State lands", which may be "granted" to Indigenous villages only (i.e., not to Indigenous Peoples). They may be granted not as a matter of right but at the discretion of the State because Guyana claims that Indigenous Peoples' rights to land were automatically extinguished by colonization and are now property of the State. Isseneru had long objected to various mining permits that had been issued in its traditional lands and, in communications with the State, cited the negative impacts of mining as one of the reasons that it urgently needed a land title. When it received title in 2007 under the procedure established in the Amerindian Act – title it had been seeking since 1987 – Isseneru discovered that the title covered only 25% of the area it had sought title over, and that a large number of mining permits had been excluded from its title and the jurisdiction of its governing authority ("the Village Council") that vested on the same date as the granting of title. Isseneru's original application for title covered around 1 000 square miles (the area encompassed by its customary

[20] *See also Precautionary Measure No. 395-18, Authorities and members of the Gonzaya (Buenavista) and Po Piyuya (Santa Cruz de Piñuña Blanco) reservations of the Siona People (ZioBain), Colombia, 21 August 2024,* https://tinyurl.com/ycmjuzhs *and 'IACHR presented to the Inter-American Court a case of Ecuador for violations of the right to property of the indigenous community of Salango', IACHR Press Release, 30 October 2023,* https://tinyurl.com/84ju6tzt

tenure system) and was rejected by the responsible Minister solely on the basis that the area, in her opinion, was "too big." That the mining permits were excluded from the titled area and that the destructive mining operations could continue were both upheld by the judiciary in two separate judgments. Appeals against these judgments had been pending for over five years without a hearing when Isseneru filed a petition with the Inter-American Commission on Human Rights ("IACHR") in August 2013. The petition alleged violations of various rights, including the right to be free from discrimination, to property, to effective participation in decision making, to autonomy and self-government, and to access to effective judicial remedies, all guaranteed under the American Declaration on the Rights and Duties of Man (1948) ("ADHR") (1, 4.2-5). The IACHR first adopted a confidential decision in December 2021, then did so again in November 2023 after the State failed to provide any satisfactory response to its 2021 decision, and finally published its report on admissibility (10-30) and merits (127-280) in April 2024 (282-299).

First, the IACHR determined that it would interpret the ADHR in the light of the various norms and principles pertaining to Indigenous Peoples' human rights, including rules on "their traditional forms of ownership and cultural survival, and on their right to lands, territories and natural resources, which 'reflect general international legal principles developing out of and applicable inside and outside the Inter-American system'…" (129). **This includes the norms expressed in the UNDRIP**, based on which "the Inter-American Court has held that cultural identity is a 'fundamental collective human right of indigenous communities that must be respected …'" (239).

Second, having noted that "**[i]nternational law on indigenous peoples and communities recognizes them as collective subjects of international law**…" and that they may suffer corresponding "damages as members of a collectivity, be it a community or a people" (130), the IACHR rejected Guyana's argument that Isseneru is not an Akawaio Indigenous community because some of its members have intermarried with other Indigenous but non-Akawaio persons, are members of a Christian church, or use modern building materials (133 et seq). It explained that it is "not reasonable" for the State to invoke these issues because "it was the State itself, in the foregoing decades, who strived to introduce those non-indigenous elements into the community and encouraged them to change their ways and abandon their culture, for the purposes of the public policy then pursued in Guyana" (141).[21]

Third, the IACHR addressed the various aspects of Indigenous Peoples' territorial rights raised in the petition, including as they relate to Guyana's national law. It began by reviewing the relevant jurisprudence, concluding that States have an international obligation "to recognize, respect and protect indigenous peoples' territorial rights," including by "establishing legal provisions that recognize those rights, providing mechanisms for their formalization … and implementing judicial and other remedies to protect them (145, 183 et seq). Contrary to Guyana's claims, respect for Indigenous Peoples' collective rights to property is "an obligation," not a discretionary decision of the State (160-1),[22] and these rights "are not defined

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[21] *Further explaining that "[i]t would be contrary to elementary considerations of justice and fairness to use the cultural changes brought about over time by these State interventions as legal arguments to deprive Isseneru and its members of the human rights that international law undoubtedly recognizes them."*

[22] *Specifying, at 161, that "The Minister has a broad margin of discretion to select the number of hectares of land a given Amerindian Village is to receive. This broad discretion also stems from the fact that the Act does not include an enunciation of indigenous territorial rights that would serve to limit and guide the decision-making power. The lack of enunciation of indigenous territorial rights in the Amerindian Act thus has the effect of depriving the Minister of objective parameters and guiding criteria to adopt a decision on whether, and to what extent, to grant property titles."*

exclusively by their rights or titles within States' formal legal systems, but also include the forms of indigenous communal property that stem from, are derived from or are grounded upon indigenous custom and tradition" (151-3, 175). [23] Because they are defined by customary tenure systems and associated Indigenous law (175), "**indigenous property rights extend in principle over all of those lands and resources with which indigenous peoples and communities preserve their internationally protected special relationship,** that is, a cultural bond of collective memory and awareness of their rights of access or ownership, in accordance with their own cultural and spiritual rules" (157). Thus, and for example, the relevant jurisprudence holds that States violate their obligations "when indigenous lands are considered to be State lands because the communities lack a formal title of ownership…" (154). For this reason, the IACHR also rejected Guyana's claim that colonization somehow nullified Indigenous Peoples' rights (159). Also, "the relationship between indigenous peoples and their territories is not limited to specific villages or settlements" as this "fails to take into account the all-encompassing relationship that members of indigenous and tribal peoples have with their territory as a whole…" (149).[24] Instead, the State is obligated to legally recognize and secure the full extent of their territories as defined by the applicable customary tenure system (161, 163-4, 179, 182).[25] Observing that Guyana's law and practice is incompatible with these norms and fails also to provide for due process and legal certainty (181-2), the IACHR determined that Isseneru's rights to property had been violated (147, 158 et seq).

Fourth, the IACHR reached the same conclusion with respect to the mining permits within Isseneru's titled and untitled lands, including with respect to the automatic privileging of these permits in Isseneru's title deed and judicial orders (190-1), and the lack of provision for restitution of lands held by third parties, including the areas encompassed by the miners' permits (188-92, 242, 259). Observing that Indigenous Peoples' territorial rights incorporate the right to traditionally used natural resources therein (194-5), the IACHR recalled that, in "… this line, the Court has referred to indigenous self-determination in relation to their ability to freely dispose of their natural resources and wealth, in order not to be deprived of their inherent means of subsistence. … **The State is consequently in the obligation of guaranteeing the right of the indigenous peoples to truly control and use their territory and natural resources**" (195, 197). However, IACHR also explains that the State may exceptionally restrict certain resource rights in the public interest, provided it also complies with a series of guarantees (196 et seq, 243-4).

One of these guarantees is compliance with the right to effective participation in decision-making, "in conformity with their customs and traditions" (201), which includes FPIC (202). Noting that Guyana's law distinguishes between small-, medium- and large-scale mining (246-7), it found that human rights

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[23] Put another way, "indigenous territorial property as a form of property whose foundation lies not in official State recognition, but in the traditional use and possession of land and resources. Indigenous peoples' territories 'are theirs by right of their ancestral use or occupancy,' and the right to indigenous communal property is grounded in indigenous legal cultures, ancestral ownership systems and customary land tenure traditions, independently of State recognition" (152).

[24] See also para. 164: "As for the granting of collective title to individual communities, and not to the peoples to which they belong, the inter-American system has held that this affects the respective people's rights to recognition of legal personality, participation, freedom of association, and territorial rights themselves. … For them to be able to make decisions on their territories in accordance with their own traditions and forms of organization, juridical personality should be recognized not only to communities, but also to peoples as such."

[25] "[W]henever a community is granted less than the full extent of its ancestral territory, its property rights will fail to be completely protected, as there will be a given part of its territory which is not formally recognized as being its own" (163).

guarantees were violated (248) because prior consultation is not required for small- or medium-scale mining (a); because consultation is the "responsibility of the interested miner, and not an obligation of the State authorities" (b, d); and, in the case of large-scale mining, because the State may override a decision by Indigenous Peoples not to consent simply by claiming that the project is in the public interest (249). The IACHR explained that "this legal provision is wholly incompatible with the inter-American human rights standard by which large-scale mining operations, which by definition carry the threat of causing equally large-scale destruction of the environment and profound impacts upon the very existence and survival of the affected indigenous communities, **must be preceded by the prior, free and informed consent of those communities in order to proceed in a legal fashion**" (250).

Also, by virtue of national law, none of the above standards even applied until Isseneru, despite decades of requests, received title in 2007 (251), national law that also nullifies its rights in relation to the mining permits that persist in the 75% of its lands that the State declined to title (252-4). [26] Instead, the IACHR explains that the above standards must be applied to activities that affect traditional territory, irrespective of whether the area is titled in national law (252).

Fifth, the IACHR concluded that the preceding also violated the right to equality and equal protection of the law (184-87, 193), in part because Guyana had failed to comply with its "obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied" (186).[27] The automatic protection of the rights and interests on the holders of the mining permits also "implies a situation of racial discrimination, which is derived from the differential and diminished degree of protection that is granted to indigenous ownership …" (193). It also found that Section 8 of Guyana's Mining Act, which reserves certain mineral rights to private persons where they held title to land prior to 1903 is discriminatory because the same rights are denied to Indigenous title holders, even though their "territorial rights actually predate 1903, being grounded in their ancestral historical presence and use of the land" (245).

Sixth, noting that Isseneru Village Council has authorized village members to conduct mining operations in its titled lands, the IACHR explained that "under inter-American standards, indigenous peoples have the right to freely decide whether they wish to carry out mining operations upon their ancestral lands, and to engage in these activities if they consider it appropriate. **This is part of their right of self-determination, and of their right to exert full control over their natural resources and their development, exploitation, and use**" (264).[28] It concluded that "the mining activities undertaken by the members of Isseneru themselves are in principle in accordance with their right to autonomous control over the natural resources in their

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[26] *Explaining, at 253, that "Isseneru, through its Village Council, is legally powerless under Guyanese legislation to address the issues of mining concessions and environmental destruction in its untitled lands, given that the Amerindian Act only grants certain attributions of land management to Village Councils over those lands that they have been formally granted in property by the Government."*

[27] *Further explaining, at 187, that "should it abstain from adopting the special measures required to protect their territorial and cultural rights, it would be incurring in discrimination of indigenous peoples for lack of the special, differential treatment that international law requires. This is precisely what happened in the case under review, because Guyana abstained from adopting the special measures required by Isseneru to gain prompt and secure access to legal property over its entire ancestral territory."*

[28] *Also explaining that "in accordance with its own cultural norms and procedures, the Isseneru Village Council is empowered by international law to grant its community members whatever mining authorizations it considers acceptable."*

territories…" (267). Nonetheless, "the right to property over natural resources, and the right to autonomy in their possession and management, does not incorporate a right to destroy them, or to cause unjustified environmental harm" (265). This requires the State to collaborate with Indigenous Peoples to develop and implement environmental protection measures as well as to control the actions of private actors that may harm the environment (266) (cf UNDRIP, art. 29).[29]

Seventh, the IACHR discussed a series of economic, social and cultural rights and how these rights were violated in the case at hand (205 et seq). These include rights to a healthy environment (206 et seq), to food (227 et seq), to water (232 et seq), to health (236 et seq) and to cultural identity and participation in cultural life (239 et seq). With respect to a healthy environment, the IACHR explicitly linked this to the State's obligation to ensure the "integral development for their peoples" pursuant to Articles 30, 31, 33 and 34 of the OAS Charter (208) (cf. Batwa above). Rights to food, water, health and culture are all expressly connected to "the preservation of [Indigenous Peoples'] relationship to their territories…" (227, 235, 236, 240), which is broadly consistent with UN treaty body jurisprudence.

Last, the IACHR specified various remedies (283, 299) to correct the over 20 violations (282, 299) found in this case. These are (verbatim):

1. Adopt the necessary measures so that the Isseneru community and its members receive comprehensive reparations for the material and non-material damages they suffered due to the violation of their human rights, as stated in the previous section. Such reparations should include compensation, satisfaction and any other measures that may be appropriate in accordance with Inter-American standards, including the provision of the required health services to the members of the community affected by the environmental contamination.

2. Amend its legislation in order to ensure that the provisions of laws and regulations related to indigenous territorial property are in harmony with the American Declaration, in accordance with international law in accordance with this merits report.

3. With full respect for the Isseneru community's right to autonomy and free management of its natural resources, adopt the necessary measures to support Isseneru and its members in the due fulfillment of their own duty to preserve and protect the environment, particularly in relation to the mining operations that they themselves carry out in their ancestral territory.

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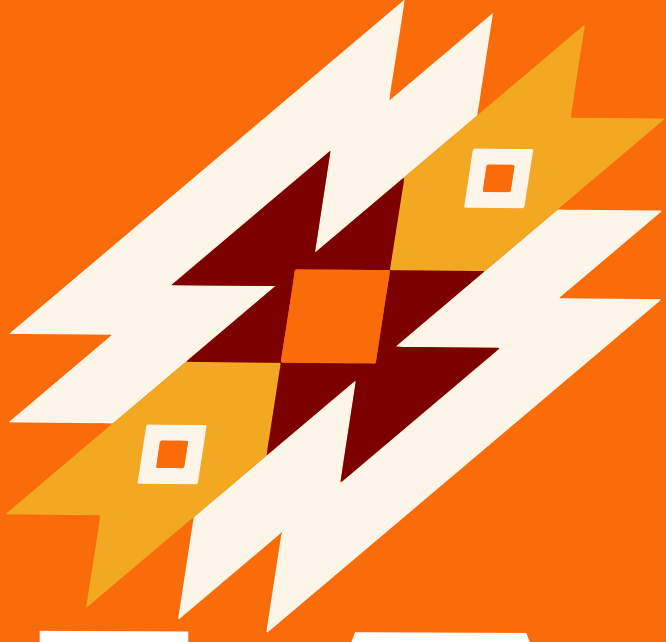
[29] *"… [T]he specificity of this particular State obligation lies in the fact that indigenous communities have an internationally protected right to autonomy in the management of their natural resources; therefore that autonomous title can and must be made compatible with properly designed State actions -including regulation, monitoring, support, and damage mitigation- aimed at helping indigenous peoples protect their own environment, with the full participation of the respective indigenous authorities, in a proportionate and respectful manner that is mindful of the cultural specificities and environmental characteristics of the corresponding indigenous land."*



NATIONAL

National[30]

1. Decree: Reform of Article 2 of the Constitution regarding Indigenous and Afro-Mexican Peoples and Communities (unofficial translation)

https://tinyurl.com/3tadahhp (SPA only)

Country: Mexico | **Body:** Legislature/Executive | **Date:** September 30, 2024

- **Issues:** Self-determination, autonomy and self-government, Indigenous legal systems, collective legal personality, cultural heritage, linguistic rights, education, traditional medicine
- **UNDRIP, arts.** 3, 4, 5, 9, 11, 12, 14, 18, 19, 20, 23, 24, 29, 31, 33, 35, 35, 38, 40, 44

Summary: Indigenous Peoples have consistently called for reform of the Mexico's Federal Constitution to make it consistent with international human rights standards. Following the 1996 San Andres Larrainzar Agreements between the State and the Ejército Zapatista de Liberación Nacional, the Constitution was first amended in 2001. As amended, Article 2 recognized the pre-existence of Indigenous Peoples and their rights to self-determination and autonomy, including their rights to apply their own normative systems in internal conflicts and to elect their own representative authorities. These rights were to be given effect in domestic legislation, eliminating also any "restrictions which make it difficult to implement [them] in practice."[31] Indigenous Peoples were recognized as 'entities of public interest', dependent on State action for the protection of their rights, rather than subjects of the law capable of autonomous and collective action. To make matters worse, Article 27 of the Constitution on land and property rights was not amended, leaving many Indigenous lands subject to unsuitable agrarian laws. UN human rights mechanisms consistently pointed out the limitations of this reform.[32] In response, a new reform proposal was developed between 2019 and 2021. The Instituto Nacional de Pueblos Indígenas coordinated a process of national consultations that resulted in a proposal to amend 15 different articles of the Constitution, including Article 2. This included the recognition of Indigenous Peoples as 'subjects of public law' with legal personality and consolidated the recognition of rights to self-determination and autonomy, lands, territories and resources, and FPIC.[33] After considerable delay, a draft amendment was submitted by the Government and approved

[30] *See also Haida Nation Recognition Amendment Act 2024, 16 May 2024 (entered into force 8 July 2024), British Columbia, Canada (recognizing aboriginal title over 10,000 km2 and a staged transition to Haida jurisdiction),* https://tinyurl.com/4mxkd27n*; 'Governor Newsom announces historic land return effort on the 5th anniversary of California's apology to Native Americans,' Resources of CA, 18 June 2024 (announcing, among other things, the Governor's support for the return of over 2,800 acres of ancestral land to the Shasta Indian Nation),* https://tinyurl.com/2dysdyah*; and 'Governor Mills Signs Bill Expanding Tribal Rights to Prosecute Crimes,' State of Maine, 22 April 2024,* https://tinyurl.com/4vm8mdz8

[31] *A/HRC/39/17/Add.2, para 49.*

[32] *See e.g., E/C.12/MEX/CO/5-6, para. 67-8 (on lack of land rights protection); CCPR/C/MEX/CO/6, para. 44-5 (on the legal voids on land rights and consultation); A/HRC/39/17/Add.2, para. 10 (recalling that "Indigenous peoples continue to call for recognition in the Constitution as subjects of public law rather than entities of public interest").*

[33] *Propuesta de Reforma Constitucional sobre Derechos de los Pueblos Indígenas y Afromexicano. Resultado del proceso de diálogo y consulta,* https://tinyurl.com/t5k99wf3*. For a full description of the process,* https://tinyurl.com/27c4wkkc

by the legislature in September 2024. While the new text (below) recognizes Indigenous Peoples as 'subjects of public law', it does not fully reflect what was agreed in the consultation process and still conditions the exercise of the enumerated rights on yet-to-be-drafted legislation. The land rights provisions were again left untouched, which raises serious questions about autonomy and jurisdiction, among other things. While acknowledging progress, many Indigenous organizations consider that this latest reform is a lost opportunity to adequately enshrine their rights in the Constitution.[34]

Text Excerpts:
The Mexican Nation is unique and indivisible, based on the greatness of its peoples and cultures.

The Nation has a multicultural and multiethnic composition originally based on its indigenous peoples, which are those collectivities with a historical continuity of the pre-colonial societies established in the national territory; and that preserve, develop and transmit their social, normative, economic, cultural and political institutions, or part of them.

Awareness of their indigenous identity should be a key criterion in determining to whom the provisions on indigenous peoples apply.

They are communities that are part of an indigenous people, those that form a social, economic and cultural unit, settled in a territory and that recognize their own authorities in accordance with their regulatory systems.

The right of indigenous peoples to self-determination shall be exercised within a constitutional framework of autonomy that ensures national unity. In addition to the general principles established in the preceding paragraphs of this article, ethnolinguistic, physical settlement and self-identification criteria must be taken into account for the recognition of indigenous peoples and communities.

Indigenous peoples and communities are recognized as subjects of public law with legal personality and their own patrimony.

This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination and, consequently, to autonomy to:

I. To decide, in accordance with its normative systems and in accordance with this Constitution, its internal forms of government, coexistence and social, economic, political and cultural organization.

II. To apply and develop its own normative systems in the regulation and solution of its internal conflicts, subject to the general principles of this Constitution, respecting individual guarantees, human rights and, importantly, the dignity and integrity of women. The law shall establish the cases and procedures for validation by the corresponding judges or courts.

Indigenous jurisdiction shall be exercised by the community authorities in accordance with the normative

[34] https://tinyurl.com/MexicoReformaInd

systems of the indigenous peoples and communities, within the framework of the legal order in force, under the terms of this Constitution and applicable laws.

III. To elect, in accordance with its normative systems, the authorities or representatives for the exercise of its own forms of internal government, guaranteeing that indigenous women and men will enjoy and exercise their right to vote and to be voted for in conditions of equality; as well as to access and hold the public and popularly elected positions for which they have been elected or appointed. in a framework that respects the federal pact, the sovereignty of the States and the autonomy of Mexico City. In no case shall their regulatory systems limit the political-electoral rights of citizens in the election of their municipal authorities.

IV. To preserve, protect and develop its tangible and intangible cultural heritage, which includes all the elements that constitute its culture and identity. Collective intellectual property with respect to said patrimony is recognized, under the terms provided by law.

V. To promote the use, development, preservation, study and dissemination of indigenous languages as a constituent element of the cultural diversity of the Nation, as well as a multilingual language policy that allows their use in the corresponding public and private spaces.

VI. To participate, in terms of Article 3 of the Constitution, in the construction of educational models to recognize the multicultural composition of the Nation based on its cultures, languages, and methods of teaching and learning.

VII. To develop, practice, strengthen, and promote traditional medicine, as well as midwifery for the care of pregnancy, childbirth, and puerperium. The people who practice them are recognized, including their knowledge and health practices.

VIII. To conserve and improve the habitat, and to preserve the bioculturality and integrity of their lands, including their sacred places declared by the competent authority, in accordance with the applicable legal provisions on the matter.

IX. To have access, with respect to the forms and modalities of ownership and tenure of land established in this Constitution and to the laws of the matter, as well as to the rights acquired by third parties or by members of the community, to the preferential use and enjoyment of the natural resources of the places inhabited and occupied by the communities, except for those that correspond to strategic areas, in terms of this Constitution. For these purposes, the communities may associate under the terms of the law.

X. To elect, in municipalities with indigenous populations, representatives in the municipalities, in accordance with the principles of gender parity and multiculturalism in accordance with the applicable regulations. The constitutions and laws of the states shall recognize and regulate these rights, with the purpose of strengthening their participation and political representation.

XI. To have full access to the jurisdiction of the State. In order to guarantee this right, in all trials and proceedings in which they are parties, individually or collectively, their normative systems and cultural specificities must be taken into account with respect for the precepts of this Constitution. Indigenous

persons have, at all times, the right to be assisted and advised by interpreters, translators, defenders and experts specialized in indigenous rights, legal pluralism, gender perspective, and cultural and linguistic diversity.

XII. To exercise their right to integral development based on their forms of economic, social, and cultural organization, with respect for the integrity of the environment and natural resources in terms of the applicable legal provisions.

XIII. To be consulted on the legislative or administrative measures that are intended to be adopted, when these may cause significant effects or impacts on their life or environment, in order to obtain their consent or, where appropriate, reach an agreement on such measures.

Indigenous consultations shall be held in accordance with principles and norms that guarantee respect for and effective exercise of the substantive rights of indigenous peoples recognized in this Constitution. When the administrative measure to be adopted benefits an individual, the cost of the consultation must be covered by the individual.

The natural or legal person who obtains a profit from the administrative measures subject to consultation must grant the indigenous peoples and communities a fair and equitable benefit, under the terms established by the applicable laws.

The indigenous peoples and communities are the only ones entitled to challenge, through the established jurisdictional channels, the failure to comply with the right recognized in this section. The law of the matter shall regulate the terms, conditions and procedures for carrying out the challenge.

B. The Federation, the states, the municipalities and, where appropriate, the territorial demarcations of Mexico City, shall establish the institutions and determine the public policies that guarantee the effective exercise of the rights of indigenous peoples and their integral, intercultural and sustainable development, which shall be designed and operated jointly with them.

To this end, these authorities have the obligation to:

I. Promote the community and regional development of indigenous peoples and communities, to improve their living conditions and common well-being, through development plans that strengthen their economies and promote agroecology, traditional crops, especially the milpa system, native seeds, agri-food resources and the optimal use of land, free from the use of hazardous substances and toxic chemicals.
The law shall establish the mechanisms that facilitate the organization and development of the economies of indigenous peoples and communities, and shall recognize community work as part of their social and cultural organization.

II. To determine, by means of compensatory, equitable, fair, and proportional norms and criteria, budgetary allocations for indigenous peoples and communities, which shall be administered directly by them.

III. Adopt the necessary measures to recognize and protect the cultural heritage, collective intellectual

property, knowledge, and traditional cultural expressions of indigenous peoples and communities, in the terms established by law.

IV. Guarantee and strengthen intercultural and multilingual indigenous education, through:

(a) Literacy and education at all levels, free, comprehensive and culturally and linguistically relevant;

(b) Training of indigenous professionals and implementation of community education;

(c) The establishment of a scholarship system for indigenous persons at any level of education;

(d) The promotion of bilingual educational programmes, in accordance with the teaching and learning methods of indigenous peoples and communities;

(e) The definition and development of educational programmes that recognize and promote the cultural heritage of indigenous peoples and communities and their importance for the nation; as well as the promotion of intercultural relations, non-discrimination and free of racism;

V. Ensure effective access to health services by expanding the coverage of the national system with an intercultural perspective, as well as recognizing the practices of traditional medicine.

VI. Guarantee the right to nutritious, sufficient, and quality food with cultural relevance, especially for the child population.

VII. Improve the living conditions of indigenous peoples and communities and their spaces for coexistence and recreation, through actions that guarantee access to financing for the construction and improvement of housing, as well as expand the coverage of basic social services, in harmony with their natural and cultural environment, their traditional knowledge and technologies.

VIII. Guarantee the effective participation of indigenous women, under conditions of equality, in the processes of integral development of indigenous peoples and communities; their access to education, as well as to the ownership and possession of land; their participation in public decision-making, and the promotion and respect of their human rights.

IX. Guarantee and extend the communications network that allows the articulation of indigenous peoples and communities, through the construction and expansion of communication routes, artisanal roads, broadcasting, telecommunications and broadband Internet.

X. To establish and guarantee the conditions for indigenous peoples and communities to acquire, operate, promote, develop and manage their means of communication, telecommunications and new information technologies, guaranteeing optimal spaces for the radio spectrum and networks and infrastructure, making use of their languages and other cultural elements.

XI. Adopt measures to ensure that indigenous peoples and communities have access to the media and information in conditions of dignity, equity, and interculturality, without any discrimination so that they reflect indigenous cultural diversity.

XII. To support the productive activities and sustainable development of indigenous communities through actions that make it possible to achieve the sufficiency of their economic income, the creation of jobs, the incorporation of technologies and their traditional production systems, in order to increase their own productive capacity, as well as to ensure equitable access to supply and marketing systems.

XIII. Establish public policies to protect migrant indigenous communities and individuals, both in the national territory and abroad, in particular, through actions aimed at:

(a) To recognize the organizational forms of resident indigenous communities and indigenous migrants in their contexts of destination in the national territory;

(b) To guarantee the labour rights of agricultural labourers, domestic workers and persons with disabilities;

(c) To improve the health conditions of women, as well as to provide special education and nutrition programmes to children, adolescents and young people from migrant families;

(d) To ensure that their human rights are constantly respected;

(e) To promote, with full respect for their identity, the dissemination of their cultures and social inclusion in the places of destination that promote actions to strengthen family and community ties; The law will establish the mechanisms so that resident indigenous people and migrants can maintain Mexican citizenship and the link with their communities of origin.

XIV. To consult the indigenous peoples in the preparation of the National Development Plan and the plans of the states, municipalities and, where appropriate, the territorial demarcations of Mexico City and, where appropriate, to incorporate the recommendations and proposals they make.

XV. To hold consultations and cooperate in good faith with indigenous peoples and communities, through their representative institutions, before adopting and applying legislative or administrative measures that may cause significant effects or impacts on their lives or environment, in the terms of section XIII of Section A of this article.

The Chamber of Deputies of the Congress of the Union, the legislatures of the states and the municipalities, within the scope of their respective competences, shall establish the specific items in the expenditure budgets that they approve, as well as the forms and procedures for the indigenous peoples and communities to administer and exercise them in accordance with the laws on the matter.

Without prejudice to the rights established herein in favor of the indigenous peoples, their communities and peoples, every community comparable to them shall have the same rights as established by law.

2. Cauper Pezo on behalf of AIDESEP v. Tubino. Amparo, 08874-2018-0-1801-JR-CI-02

https://tinyurl.com/yck485wn (SPA only)

Country: Peru | **Body:** Lima High Court Constitutional Chamber |
Date: August 8, 2024

- **Issues:** Public attacks on the dignity and reputation of Indigenous Peoples
- **UNDRIP, arts.** 2, 8(2)(e), 11, 12, 15

Summary: This judgment concerns an appeal from a lower court about discriminatory and offensive statements made about Indigenous Peoples (the Shipibo-Konibo people) by a then-member of the national legislature (Mr. Tubino). While in the legislature, Mr. Tubino was a vocal supporter of the industrial development of the Amazon region, advocating for the building of roads without regard for their impact on Indigenous Peoples, including those in voluntary isolation. The judgment was prompted by a complaint filed in 2018 by Lizardo Cauper, the president of the national Amazonian Indigenous Peoples' organization, AIDESEP. In short, Mr. Tubino reacted on social media to the alleged murder of an Indigenous spiritual knowledge holder by a Canadian citizen in 2018 (who was also allegedly killed in retribution), claiming more than once on Twitter that the Shipibo-Konibo were "savages" and that the use of Ayahuasca was to blame for the killings (p. 1-2). His statements connected the use of Ayahuasca, a plant used ritually by Shipibo-Konibo and other Indigenous Peoples, with criminal behavior, more than suggesting that it causes criminality. The Shipibo-Konibo and others took great exception to these statements, demonstrating in the streets and considering them to be highly discriminatory and denigrating towards their ancestral and cultural practices.[35]

First, the Court recalled that Peru's Constitution Court had ruled that Indigenous Peoples are "legal persons capable of exercising and defending their right to honor, as well as good reputation within the framework of cultural plurality and diversity," and that its 1993 Constitution recognizes that Peru is pluricultural, upholding the equality of the various cultures (3). The Constitutional Court had also ruled that discrimination based on racial or ethnic identity is prohibited and that respect for dignity has both an individual and collective aspect and is fundamentally tied to the protection of honor. (4-5).

Second, having disposed of various defenses asserted by Mr. Tubino (e.g., that he had a privilege to say anything as a member of Congress by finding that he made the comments in his personal capacity), the Court upheld the judgement of the lower court. It concurred that Mr. Tubino's public statements violated the rights "to honor and the ethnic and cultural identity of the Shipibo-Konibo people," and that his comments were discriminatory and pejorative against the traditions of the Shipibo-Konibo people (11, 14). The Court ordered that its judgment be posted on social media by either of the parties and that Mr. Tubino not make any similar statements in the future (12).

[35] *See e.g., 'Shipibo people's overwhelming march rejects discrimination', Servindi, 19 May 2018,* https://tinyurl.com/2p8yu5c3

Last, in a separate concurring vote, Judge Tapia Gonzales specifically cited and quoted UNDRIP, arts, 15(1) and (2), which read (12-3):

> **1.** Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
>
> **2.** States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Judge Gonzales explained that Mr. Tubino's comments about ayahuasca offend Indigenous Peoples because it "establishes in the collective imagination that their ancestral practice is the cause of acts of violence, reinforcing stereotypes of discrimination and intolerance, with a serious connotation because these expressions come from a congressman of the republic who as such has access to the media and whose opinion impacts society" (13). Moreover, as respect for and equality of all cultures are legally protected, the judiciary is obligated to sanction such comments "because they alter social peace and healthy democratic coexistence. This judgment serves to ensure that all officials or authorities will henceforth address our compatriots belonging to the original peoples with respect for their culture and practices on a plane of horizontality, that is, without discrimination and prejudices" (13-4).

3. Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10 2024

https://tinyurl.com/yzfzn8eb (ENG) | https://tinyurl.com/mp68tphw (FR)

Country: Canada[36] | **Body:** Supreme Court | **Date:** March 28, 2024

- **Issues:** self-determination, autonomy and self-government, right to define membership in institutions and the operation of Indigenous legal systems, conflict between individual and collective rights, treaty rights, national implementation, equal guarantees for male and female members
- **UNDRIP, arts.** 1, 3, 4, 5, 20, 33, 34, 35, 37, 38, 44

Summary: This case concerns what looks like a simple problem: whether the Vuntut Gwitchin Indigenous Nation ("VGIN") may adopt and enforce laws concerning participation in its elections, including where its citizens may be excluded by the requirement that they must reside on VGIN lands or move to those lands. However, it is much more consequential and complicated. Ms. Dickson, a citizen of VGIN, wanted to run for

[36] *See also Shot Both Sides v. Canada, 2024 SCC 12, 12 April 2024 (affirming that treaty rights flow from the treaties themselves, not their recognition in the Canadian Constitution, and that the treaties give rise to enforceable obligations under Canadian law),* https://tinyurl.com/2r6xzscv*; and Ontario (Attorney General) v. Restoule, 2024 SCC 27, 26 July 2024 (concerning the obligations of the Crown (Canada) and the rights of Anishinaabe of Lake Huron and Lake Superior in two historic treaties, and the actions required to address breaches thereof),* https://tinyurl.com/mrxpv7bm*. Cf. UNDRIP, arts. 37 and 40.*

office but she was declared ineligible by the VGIN due to the residency rule. She lives some 800 kilometers away and maintained that she could not move to VGIN lands for family reasons. She submitted a complaint challenging the validity of the VGIN's rules based on Canada's Charter of Rights and Freedoms ("the Charter"), asserting, among other things, that she was discriminated against and that the Charter should supersede the VGIN's Constitution (the law containing the residency requirement). The VGIN's Constitution, its highest law, was adopted after a 20-year process of negotiation between VGIN, Canada and the Province of the Yukon that resulted in a "Final Agreement" and a "Self-Government Agreement". This not only ended the application of Canada's Indian Act to the VGIN and settled various land rights issues, but it also provided for its right to enact and enforce its own laws, including the VGIN Constitution. The VGIN argued that the Charter – a legal instrument upholding individual rights – does not apply to the VGIN Constitution because it is not a "legislature", nor does it exercise governmental authority delegated by legislature (both requirements for its application). It further argued that even if the Charter does apply, the residency rule would be sheltered by section 25 thereof, which protects "aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal Peoples of Canada" from annulment or derogation by claims made under other sections of the Charter (in this case, the prohibition of discrimination). Yukon provincial courts dismissed Ms. Dickson's claims (2020-21) as did the Supreme Court of Canada ("SCC") (2024), albeit in a divided opinion.

First, the majority of the SCC ruled that the Charter applies to VGIN's residency requirement because its enactment "flows from an exercise of statutory power" by Canada's Federal Parliament under its jurisdiction over "Indians, and Lands reserved for the Indians" (para. 91). That is, the basis for the VGFN's law-making authority was operationalized by Canada enacting a law to bring the Self-Government Agreement into effect, rather than being explicitly grounded in an inherent right of Indigenous self-government, which, while it may exist, was deemed to be an issue that the SCC need not resolve in this case (*id*).[37]

Second, the majority further ruled that the intent of section 25 is to prioritize the collective rights of Indigenous Peoples over individual rights where there is an irreconcilable conflict (139, 143).[38] The rights protected by section 25 are associated with Indigenous difference, "understood as interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process" (150, 180). Moreover, this applies only "if it is determined that there is irreconcilable conflict between the claimed Charter right and the s. 25 right, such that giving effect to the Charter right would undermine the Indigenous difference protected or recognized by the collective right" (152, 158, 164). Explaining further, the majority states that "the conflict between the rights must be real and irreconcilable, such that there is no way to give effect to the individual Charter right without abrogating or derogating from the right within the scope of s. 25" (161, 181). This requires that courts interpret the substance of the conflicting rights, an exercise that "must be informed by, and respectful of, Indigenous perspectives" (163). The same analysis applies whether or not the

[37] *Explaining that "We make no comment on whether an exercise of an inherent right of self-government untethered from federal legislation would be subject to the Charter, which in our view need not be decided in this case in view of the self-government arrangements in issue."*

[38] *Explaining, at para. 143, that "… the purpose of s. 25 is to protect certain Indigenous collective rights from the application of conflicting individual Charter rights or freedoms, when such application would diminish the Indigenous difference protected and recognized by the collective rights. When the application of the individual right would undermine in an essential or non-incidental way the Indigenous difference protected by the collective right, s. 25 directs that the collective right be given primacy."*

person invoking the Charter "is Indigenous, whether s. 25 is being asserted by an Indigenous group, or, as in this case, both parties are Indigenous" (164).[39] Last, a definite limit to collective rights was identified based on section 35(4) of Canada's Constitution, which provides that "the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons" (173, 182; cf UNDRIP, art. 44).[40]

Third, the majority and other opinions referred to UNDRIP in connection with some of the rights at issue in this case (47, 110).[41] The majority explains that "an inherent right to Indigenous self-government has now been affirmed" in UNDRIP, art. 4, and federal law has affirmed that UNDRIP is "a universal international human rights instrument with application in Canadian law" (id). It likewise cites and quotes UNDRIP, art. 34 on the right to promote, develop and maintain "juridical systems or customs, in accordance with international human rights standards" (117). [42] The majority also explains that section 25 of the Charter is compatible with the recognition in Canada's UNDRIP Act and the VGIN Constitution that individual and collective Indigenous rights can coexist: "[f]undamentally, the protection of Indigenous difference in s. 25 reflects the central place of Indigenous peoples and their governments in Canada's constitutional fabric. Recognizing constitutional protection under s. 25 allows Indigenous peoples to make decisions about their communities' individual and collective needs" (171). In a separate opinion, Justices Martin and O' Bonsawin explain that while the Charter protects individual rights, it is nonetheless highly relevant "that Indigenous peoples also have collective rights and interests, including group title to land and the right to self-government recognized in [UNDRIP], Articles 3 and 4," rights restated in Canada's UNDRIP Act (283, citations omitted). Noting that extant jurisprudence had not addressed the unique situation of Indigenous Peoples, they "reject the idea that VGFN's governmental status is based on the delegation of authority from another level of government" (260-1, 263-4), observing also that the "emphasis the majority places on the VGFN deriving at least some of its lawmaking authority from federal law gives insufficient weight to the VGFN's independent governmental nature" as a self-governing Indigenous People (265, 266, 273).[43]

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[39] *Explaining further, at para. 168, that "… s. 25's protection of Indigenous difference seeks to shield a collective right. The inquiry into whether the claimed Charter right would diminish Indigenous difference is an inquiry into the protection of Indigenous difference as understood and established by the collective, rather than by individual Indigenous community members" (original emphasis).*

[40] *UNDRIP, art. 44 provides that "All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."*

[41] *The summary of the judgment explains, at p. 24, that UNDRIP, "… which is binding on Canada, recognizes the need to protect both the collective and individual rights of Indigenous peoples and is illustrative of how one type of right cannot absolutely trump another. Further, Indigenous nations, as governments in their own right, can entrench the rights of their citizens in constitutional documents. These Indigenous legal orders form an integral part of Canadian law and Indigenous governments are not immunized from the responsibility of respecting the individual rights and freedoms articulated in the Charter, subject to the interpretive function performed by s. 25 when collective Indigenous rights are implicated."*

[42] *Explaining that "Section 25 echoes the aspiration to reconcile the guarantee of individual rights and freedoms in the Charter for all Canadians with the distinctive collective rights of Indigenous peoples. Protecting collective rights and freedoms in this way is also consonant with [UNDRIP], as brought into Canadian law by the UNDRIP Act. We recall in particular Article 34 of the Declaration…."*

[43] *Explaining also, at para. 275, that "Given the historic and ongoing self-governance practices of Indigenous societies, it would be inapt to characterize Indigenous self-government as a delegated authority."*

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