

Upholding Indigenous Peoples' Rights

Digest

Legislation and Jurisprudence:
Global, Regional and National Developments



Issue #1
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Indigenous Peoples
Rights International

Championing Indigenous Peoples Rights

Introduction

The centuries of struggles of Indigenous Peoples around the world against colonization, forced assimilation and systemic discrimination have resulted in the adoption by the UN General Assembly in September 2007 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which sets the minimum standards for the respect, recognition, and protection of the rights of Indigenous Peoples. 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, universal and regional treaties, and the ILO Convention 169 on Indigenous and Tribal Peoples.

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), at the regional level (regional human rights bodies, and at the national level (national courts). Among other things, the cases in the Digest further 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".¹ IPRI believes that sharing this information with Indigenous Peoples, their allies and others will drive increased awareness and understanding of 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 will be a regular publication of IPRI and will soon be integrated in the IPRI website with search functions.

Cover photo by: Eduardo Gutiérrez, IPRI México

¹ *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.

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Global

1. Gallardo et al v. Mexico, Decision adopted by the Committee under Article 22 of the Convention, CAT/C/72/D/992/2020 https://bit.ly/3k5VMqc (ENG, ESP, RUS)		
Country: Mexico	Body: UN Committee Against Torture	Date: 7 February 2022
Issues: Torture, cruel and inhumane treatment, arbitrary detention, ² coerced or manufactured confessions, criminalization of Indigenous Peoples' rights		
Summary: The complainants belong to the Ayuujk Indigenous People of Santa María Tlahuitoltepec in the state of Oaxaca, Mexico. Mr. Gallardo Martínez is a teacher and defender of Indigenous Peoples' rights. In May 2013, he was arrested by federal police officers, who entered his house, beat him, and then, during a two hour-long journey in a van, forced him "to assume degrading and painful positions, threatened to rape and kill his daughter and his partner and to murder his parents, pretended to execute him with a weapon, beat him and caused him to choke" (para. 2.2). He was then "held incommunicado and tortured for approximately 30 hours in a secret detention centre" so that he would inform on other human rights defenders. The authorities also deliberately publicized his arrest "for alleged offences of child abduction and involvement in organized crime, [which] ... caused irreparable damage to his reputation" (2.7). He was charged with these offenses based largely on statements obtained while he was tortured – e.g., he was forced to sign blank sheets of paper, which were later used as confessions – and detained in a maximum-security prison in Jalisco, thousands of kilometres from his home and family. His family was unable to visit often and "when they did manage to make the journey, they were often discriminated against and prevented from entering the centre" (2.11). ³ He was regularly subjected to further torture and inhumane treatment until he was released from prison more than five years after his arrest when the charges against him were dismissed. ⁴ Torture and its physical and psychological effects were verified by medical specialists in opinions issued between 2014 and 2016. His attempts to seek protection and redress in the national court system failed (2.17 et seq). The complaint alleges that the preceding took place as "part of a pattern of torture and criminalization of social protest" and that this was characterized by unusual criminal prosecutions (2.26). Previously "the crimes of terrorism, sabotage and conspiracy were used but, since 2013, the State has been charging activists with offences such as kidnapping, involvement in organized crime and money-laundering," which made it difficult to provide support, mount a legal defence and arrange family visits... In addition, the Government invested millions to ensure that these accusations made the		

² See also *Opinions adopted by the Working Group on Arbitrary Detention: No. 23/2014 (Mexico) concerning Damián Gallardo Martínez, A/HRC/WGAD/2014/23* (2014) (e.g., para. 22 stating that "The case in hand involves serious allegations of violations, not only of human rights but also of the duty to protect human rights defenders, particularly of the rights of indigenous peoples, with the account of the facts mentioning intimidation, threats and repeated acts of torture"), <https://bit.ly/3xNGfTV>.

³ See e.g., para. 3.14 ("Felicitas Martínez Vargas, the mother of Mr. Gallardo Martínez, who cannot read or write Spanish, frequently visited her son in prison, where she suffered ill-treatment for doing so, which has placed a serious physical and emotional strain on her. This has a particularly serious impact, taking into account the differential effect of this humiliation on an older indigenous woman. Moreover, on occasion, she was arbitrarily denied entry for wearing indigenous footwear, which constituted a serious abuse of authority and racial discrimination").

⁴ Para. 2.28 (having spent years in prison "on account of criminal proceedings that never progressed beyond the investigation stage, the Public Prosecution Service requested that the case be dismissed, and Mr. Gallardo Martínez was subsequently acquitted and released").

headlines, which seriously discredited the activists” (*id*). The complainants assert violations of Mr. Gallardo Martínez’s rights under articles 1, 2, 11, 12, 13, 14 and 15 of the CAT Convention, and of their rights collectively under article 14 of the same (3.3). Regarding the latter, they recall the Committee’s General Comment No. 3, which states that “the ‘immediate family or dependants of the victim’ are also considered to be [indirect] victims, in the sense that they are entitled to full reparation” (3.9).

First, the Committee determined the admissibility of the complaint. It noted that “the rule of exhaustion of domestic remedies does not apply if the application of such remedies is unreasonably prolonged or unlikely to bring effective relief” (6.4). It then declared the complaint admissible in relation to arts. 1, 2 and 11 to 15 of the CAT because domestic remedies had been unduly prolonged given the amount of time that had passed without a result in those proceedings (6.5).

Second, the Committee concluded that “the conditions in which Mr. Gallardo Martínez was arrested and subsequently detained, and the circumstances in which he was held during his time in detention constituted acts of torture under article 1 of the Convention” (7.4).

Third, it found that Mexico had “failed to fulfil its obligation to take effective measures to prevent acts of torture as set out in article 2 (1) of the Convention” (7.5).

Fourth, the Committee found that Mexico had violated article 11 of the Convention due to its failure “to put in place mechanisms to assess compliance with existing laws and regulations,” e.g., a systematic review of interrogation and arrest procedures, which may have prevented violations in the instant case (7.6).⁵

Fifth, it found violations of Arts. 12 and 13 of the CAT in connection with Mexico’s failure to carry out a prompt, impartial and effective investigation into the allegations of torture (7.7 et seq).

Sixth, turning to the damage caused to Mr. Gallardo Martínez and members of his family, which had not been repaired, the Committee declared a violation of Art. 14, ruling that “immediate family or dependants of the victim are also considered to be victims, in the sense that they are entitled to full reparation” (7.11). In this regard, “necessary measures of restitution, compensation, rehabilitation, satisfaction and the right to the truth,” are applicable, and states parties are obligated “to provide the means necessary for as full a rehabilitation as possible for anyone who has suffered harm due to a violation of the Convention, which should be holistic and include medical and psychological care as well as legal and social services” (*id*).

Seventh, it also found a violation of Art. 15 in connections with the purported confessions because “any statement made under torture cannot be used in proceedings” (7.12).

Last, in the section on reparations, the Committee recommended, inter alia, that Mexico “award full reparation, including fair and adequate compensation, to the complainants, and provide as full a rehabilitation as possible to Mr. Gallardo Martínez, ensuring that it is respectful of his worldview as a member of the Ayuujk indigenous people; ... [and] to provide guarantees of non-repetition in connection with the facts of the present complaint, including ensuring the systematic review of interrogation and arrest procedures, and the cessation of the criminalization of the defence of indigenous peoples’ rights” (9(c) and (e)).⁶

⁵ Cf. Federal Government of Brazil, Resolução Nº 287 of 25 June 2019, *Estabelece procedimentos ao tratamento das pessoas indígenas acusadas, réis, condenadas ou privadas de liberdade, e dá diretrizes para assegurar os direitos dessa população no âmbito criminal do Poder Judiciário* [Establishing procedures for the treatment of indigenous people accused, defendants, convicted or deprived of their liberty, and providing guidelines to ensure the rights of this population in the criminal sphere of the Judiciary], <https://bit.ly/37HBM7> (also referencing in its preamble UNDRIP, arts. 5, 13(2), 34).

⁶ Cf. *Maui Isherwood v. New Zealand*, CCPR/C/132/D/2976/2017 (2021), e.g., para. 8.3 (noting “the author’s allegation that his rehabilitation was not tailored to Maori people and that they are overrepresented and discriminated against in the criminal justice system. In view of the lack of specific individual information regarding this allegation as to how this has affected the author individually, the Committee is not in a position to determine a violation for this issue”).

2. Chiara Sacchi et al. v. Argentina, Brazil, France, Germany, Turkey

CRC/C/88/D/104/2019 (Inadmissibility Decision)

<https://bit.ly/3K2fiOQ> (all languages)

Country: Argentina, Brazil, France, Germany, Turkey **Body:** Committee on the Rights of the Child
Date: November 2021

Issues: State responsibility for impacts of climate change outside their territory, rights of indigenous and minority children (CRC, Art. 30)

Summary: This is five different cases, brought against five different states, by children from Argentina, Brazil, France, Germany, India, the Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia and the United States of America.⁷ They, collectively and separately, assert that the failure to prevent and mitigate the consequences of climate change has violated their rights under arts. 6, 24 and 30, read in conjunction with article 3, of the Convention on the Rights of the Child. The case was filed pursuant to the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (2011).⁸ Each case was declared inadmissible for failure to exhaust domestic remedies. Nonetheless, the Committee reached several important conclusions and findings that may assist future action.

First, finding that the “communication raises novel jurisdictional issues of transboundary harm related to climate change” (10.4), the Committee examined the argument made by the states that complaints can only be submitted by an individual or group of individuals who are “within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in the Convention” (10.3). The states asserted that the harm alleged was global and not within their jurisdiction, and thus also not justiciable. The Committee rejected this argument, referring to and endorsing a 2017 Advisory Opinion of the IA Court of Human Rights (10.7), which explains that “when transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory” (10.5).⁹ That is, jurisdiction may be found to exist “when the State of origin exercises effective control over the activities that caused the damage and consequent human rights violation,” and states “may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority” (*id.*, 10.7). Additionally, the Committee explained that “while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been

⁷ The quoted text is from CRC/C/88/D/104/2019 (Argentina). See also CRC/C/88/D/105/2019 (Brazil), CRC/C/88/D/106/2019 (France), CRC/C/88/D/107/2019 (Germany), and CRC/C/88/D/108/2019 (Turkey).

⁸ See UNGA Res. 66/138, *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, <https://bit.ly/3OvQfqG>; and *Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, CRC/C/158 (4 November 2021), <https://bit.ly/3v53w1V>

⁹ *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, 15 November 2017. Series A No. 23, p. 32-44 (see also para. 68, stating that “The Court will rule below on the specific environmental obligations in relation to indigenous communities (infra paras. 113, 138, 152, 156, 164, 166 and 169)”), <https://bit.ly/3vhlrTj>.

reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction” (10.7).¹⁰

Second, the Committee clarified that “given its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions” (10.9). It then found “that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location” (10.10).

Third, the Committee turned to whether the authors could be considered victims, i.e., if “the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status” (para. 10.14). Concluding that they had proven this, the Committee recited various facts underlying its conclusion, including “... that life at a subsistence level is at risk for the indigenous authors...” (para. 10.13). It recalled that, “as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken” (*id.*). Also noting that “children are entitled to special safeguards, including appropriate legal protection,” the Committee explained that “States have heightened obligations to protect children from foreseeable harm” (*id.*).

Last, the Committee “accepted that children’s rights to life, health, culture and to have their best interests be a primary consideration in decision-making, are affected by climate change.”¹¹ “Culture” raises issues, inter alia, in connection with CRC, Art. 30, which is largely the same as ICCPR, Art. 27.¹² In particular, the Human Rights Committee’s jurisprudence in relation to Art. 27 holds that it protects various rights vested in Indigenous Peoples, including lands and FPIC, and that economic development objectives, even where justified by the legitimate interests of the majority, may not undermine the rights protected by Art. 27.

Key Text: Paras. 3.5, 10.5, 10.7, 10.8-10.10, 10.12

3. Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ẽ, of the Ava Guaraní People v. Paraguay, Comm. No. CCPR/C/132/D/2552/2015 <https://bit.ly/3v6xCSt> (ESP only)

Country: Paraguay **Body:** UN Human Rights Committee **Date:** 12 October 2021

Issues: Toxic contamination of IP lands, FPIC, cultural rights and identity, interferences with private, home and family life¹³

¹⁰ See also para. 10.11, stating that “... In the light of existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including rights under the Convention, the Committee considers that the potential harm of the State party’s acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party.”

¹¹ Open Letter on Climate Change, CRC to the Authors, no date (explaining its decision in simple language), <https://bit.ly/3OwOPMH>

¹² Art. 30 reads: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”

¹³ See also ‘Paraguay violated indigenous rights, UN committee rules in landmark decision’, UN News, 13 October 2021, <https://bit.ly/390NkWK>; G. Le Moli, *The Human Rights Committee, Environmental Protection and the Right to Life*, 69 INT’L &

Summary: Filed in 2019, this case concerns human rights violations against an indigenous community caused by toxic pesticide run-off from neighbouring GMO soy farms and the state's failure to remedy this and related issues. This had severe impacts on Indigenous People's family life, traditions, and identity, as well as undermining their ability to sustain themselves from their traditional lands. In their complaint to the Human Rights Committee, the community argued "that, in the case of indigenous peoples, the notions of domicile and private life must be understood within the special relationship they maintain with their territories" (para. 8.2).¹⁴

The Committee agreed, finding, **first**, that the definition of "home" may also include relationships with territory, livestock, crops and other ways of life (8.3-8.4).¹⁵ **Second**, the Committee cites three articles of the UNDRIP in its decision (arts. 20, 32 33), and more generally explains that "Article 27 [of the ICCPR], interpreted in the light of the [UNDRIP], establishes the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence, food and cultural identity" (8.6). **Third**, it also upheld FPIC, stating that "it is of fundamental importance that measures that compromise or interfere with the economic activities of cultural value of an indigenous community have been subjected to the free, prior and informed consent of the members of the community, they must also respect the principle of proportionality, so that they do not endanger the very subsistence of the community" (8.7).¹⁶ **Finally**, the Committee observed that the massive use of agrochemicals "constitute threats that were reasonably foreseeable" (8.8), and the state, despite being aware for more than twelve years (after the community filed a criminal complaint) had failed to advance the investigations or to repair the damages; thus, it also incurred a violation of Art. 2(3) (right to effective remedies) (8.9).

Key text: Paras. 8.3 – 8.7

COMP. L.Q. 735 (2020), <https://bit.ly/3LazbVg>; and 'IACHR Files Case Before IA Court on Peru's Responsibility for the Effects of Contamination in La Oroya Community', *IACHR Press Release*, 14 October 2021, <https://bit.ly/3MkkSgQ>

¹⁴ See also *Francis Hopu and Tepoaitu Bessert v. France*, CCPR/C/60/D/549/1993/Rev.1. (1997), para. 10.3 ("... cultural traditions should be taken into account when defining the term 'family' in a specific situation. ... The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy").

¹⁵ See also *Portillo Cáceres v. Paraguay*, /C/126/D/2751/2016 (2019), para. 7.3-7.4 ("States parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution. ... [T]akes note of developments in other international tribunals that have recognized the existence of an undeniable link between the protection of the environment and the realization of human rights and that have established that environmental degradation can adversely affect the effective enjoyment of the right to life. Thus, severe environmental degradation has given rise to findings of a violation of the right to life"); and para. 7.8 ("recalling "that the term 'home' is to be understood to indicate the place where a person resides or carries out his or her usual occupation"), <https://bit.ly/38hS0qP>

¹⁶ See also *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009), para. 7.6 ("In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members").

4. Report of the Committee set up to examine the representation alleging non-observance by Indonesia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), GB.342/INS/8/4.

<https://bit.ly/3K8yE4V>

Country: Indonesia

Body: ILO Governing Body

Date: 21 June 2021

Issues: Discrimination against traditional occupations, relationship to land and other rights, self-identification, and indigenous identity

Summary: This case revolves around a plantation concession granted by Indonesia to a pulp and paper company in the 1990s. The concession includes the traditionally owned lands of over ten indigenous communities, one of which is named Ompu Ronggur (OR). The representation – meaning a petition or complaint – was filed in 2019 by a labour union representing plantation workers (SERBUNDO), on behalf of OR in relation to ILO Convention No 111, *Discrimination (Employment and Occupation) Convention* (1958) (C111). It alleged that Indonesia discriminated against OR because: 1) it has denied OR’s ownership and other rights over its lands when granting the same to the company to use as a plantation, without any form of participation in decision-making, and that these lands sustain OR’s traditional occupations; and 2) because it is also privileged or gave preference to the state-granted rights/occupation of the company over those of OR. OR documented that it has lost over 80% of its income from gathering incense in the forest as part of a traditional agro-forestry system that is tied to its traditional tenure system, self-government, and cultural rights. Other traditional occupations were either impaired or nullified by the company’s operations (e.g., making and selling mats and bags from forest products, planting and harvesting brown forest rice, and the village chiefs’ ability to govern). In a disturbing decision, the ILO Governing Body (ILOGB), **first**, took note of Indonesia’s dislike of the term ‘indigenous’ in its national context, preferring ‘*adat*’ or ‘customary law community’ instead, and decided that it would avoid this discussion as the facts could demonstrate discrimination on the basis of ethnicity (while noting that other parts of the ILO system had found that C111 applies to discrimination against ‘indigenous peoples’ per se) (para. 49-50).

Second, and positively, it found that OR’s traditional occupations are ‘occupations’ for the purposes of C111, “are dependent on access to land,” and “would fall within the scope of application of the Convention” (48).

Third, the ILOGB referred to Indonesian (constitutional) law requiring that Indigenous Peoples “must first be officially recognized as ‘still existing’ through local legislation/regulations” (53). OR had argued that this was an insurmountable obstacle to recognition of their rights as: a) there was no district-level regulation in place, even though it had submitted a draft of one to the district government in 2012, along with its request to be formally recognized as ‘still existing’. Other than amending the language of the draft regulation, however, the district government had done nothing further to recognize the existence of OR. OR presented evidence showing that less than 5 percent of the indigenous communities in Indonesia have been recognized as ‘still existing’ and that this was a national problem. There was no dispute that the absence of formal recognition precluded OR from securing, at the least, access to its traditional lands to perform its traditional occupations, i.e., “[t]he right claimed by [OR] to access productive resources, such as the land, allowing them to perform their traditional occupations is dependent on the acquisition of the status of customary law community” (56). While it received evidence on these points – or could have asked for the same prior to deciding – the ILOGB considered that it was unclear if OR had indeed requested formal recognition and whether the District government responsible for OR had in fact enacted a regulation setting out the recognition procedure (*id*).

Last, raising serious concerns about respect for basic rights that are vested in Indigenous Peoples, the ILOGB’s remedy was merely that the request for recognition should be resubmitted to the District government, which would then “examine without delay the documentation” pursuant to the District regulation (according to Indonesia, enacted in December 2020, many months after the representation was submitted, even though no evidence was provided of the same and the ILOGB was unsure even of its existence (57)).¹⁷ Either way, it was uncontested that OR was not officially recognized when the representation was submitted and when, 18 months later, the ILOGB made its decision, and that this undoubtedly precluded it from seeking protection for its rights. This, in effect, seems to endorse allowing Indonesia to determine whether Indigenous Peoples exist or not for the purposes of the recognition and exercise of their basic rights – an illegitimate power to affirm or deny their legal personality – and no mention was even made of the principle of self-identification in this regard¹⁸ or the fact that such a scheme essentially allows the state to render Indigenous Peoples and their rights legally invisible should it choose not to recognize them.¹⁹ It undermines or negates a basic tenet of the indigenous rights framework, i.e., states do not get to decide if Indigenous peoples exist or are legal persons in order to exercise and enjoy their internationally guaranteed rights.²⁰

Key text: Paras. 48 – 50, 53 – 57.

¹⁷ See e.g., *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1, para. 74 (where the UN EMRIP explains that “Recognition as indigenous peoples is the most basic, critical form of recognition, from which other types of recognition flow”); *Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50, para. 23 (explaining that “To address instances of non-recognition, reference should be made to jurisprudence at all levels where there has been recognition of the collective legal personality of indigenous peoples and their communities”) and; D. Sambo Dorough, *Indigenous People’s Right to Self-Determination and other Rights related to Access to Justice* in W. Littlechild and E. Stamatopoulou (eds.), *INDIGENOUS PEOPLES’ ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES* (New York, NY: Colombia U., Institute for the Study of Human Rights 2014), p. 4 (explaining that Indigenous Peoples “are no strangers to the age old ploy of denying status in order to deny rights...”), <https://bit.ly/3MmTYVR>

¹⁸ See e.g., *Matson et al v. Canada*, CEDAW/C/81/D/68/2014 (2022), para. 18.4 (quoting and citing UNDRIP, arts 8 and 9: “...indigenous peoples do have the fundamental right to be recognized as such, as a consequence of the fundamental self-identification criterion established in international law. ... [A]ccording to the Inter-American Court of Human Rights, the identification of an indigenous community, from its name to its membership, is a social and historical fact that is part of its autonomy, and therefore States must restrict themselves to respecting the corresponding decision made by the community, i.e., the way in which it identifies itself”).

¹⁹ See e.g., *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015. Series C No. 309, para. 250 (where the IA Ct Human Rights explains in relation to access to justice that to “ensure the human rights of the indigenous peoples, the domestic remedies should be interpreted and applied taking the following criteria into account: 1. The recognition of collective legal personality as indigenous peoples...”); and *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, A/HRC/24/50, para. 20 (where the EMRIP observes that “the right to self-determination requires recognition of the legal standing of indigenous peoples as collectives, and of their representative institutions, to seek redress in appropriate forums”).

²⁰ See e.g., CERD, *Urgent Action Procedure: Indonesia*, 30 April 2021 (stating that “information received alleges that very few indigenous peoples have gained official state recognition. It alleges that, in practice, local governments do not give recognition while some of them expressly deny the existence of certain indigenous peoples, a fact which, if verified, constitutes a major impediment to the exercise and protection of their rights;” and reiterating prior concern “that the domestic law of Indonesia does not contain appropriate protections to guarantee the respect for the principle of self-identification in the determination of these communities as indigenous peoples”), <https://bit.ly/37IYXkO>; and *in accord* CEDAW/C/IDN/CO/8, 24 November 2021, para. 45-6.

5. Lars-Anders Ågren et al. vs. Sweden, CERD/C/102/D/54/2013.

<https://bit.ly/36DiSkG> (all languages)

Country: Sweden **Body:** UN Committee on the Elimination of Racial Discrimination **Date:** 18 December 2020

Issues: racial discrimination, FPIC, mining, relationship with UNDRIP

Summary: This case, one of the first decided by CERD on the substance of indigenous rights, was filed by the Sami people of the Vapsten community. It is about the effects of mining concessions on their lands, reindeer herding livelihood, and culture.²¹ The traditional territory of the Vapsten community covers approximately 10 000 km². Sweden had granted mining concessions comprising three open-pit mines in the Rönnebäcken area, a region of fundamental importance to reindeer herding. Other large projects had also been approved by the State, leading the Sami to assert that they would be unable to practice their way of life and enjoy their traditional property and other rights, and that they would have to relocate to survive. They also asserted that Sweden’s “mining legislation and policies discriminate against Sami reindeer herders’ groups specifically, not by treating the Sami differently from the general [Swedish] population, but by not doing so. ... [T]his discrimination is the root cause of the violations” (para. 1.2).

First, discussing the right to property, CERD explained that the complaint was not about whether Sami property rights under national law entail ownership of land or merely a usufructuary right, but, instead, “whether the facts related to the mining concessions before the Committee raise an issue of violation of the Convention” (6.4). Recalling the applicable principles, it then explained that “as the *raison d’être* of these principles, 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,” and “the realization of indigenous peoples’ land rights may also be a prerequisite for the exercise of the right to life, as such, and to ‘prevent their extinction as a people’” (6.6). It also recalled that **disregard for indigenous territorial rights and “for their right to offer free, prior and informed consent whenever their rights may be affected by projects carried out in their traditional territories constitutes a form of discrimination** as it results in nullifying or impairing the recognition, enjoyment or exercise by indigenous peoples, on an equal footing, of their rights to their ancestral territories, natural resources and, as a result, their identity” (6.7).

Second, applying these principles, the Committee noted that it had repeatedly recommended that Sweden adopt legislation “recognizing and protecting traditional Sami land rights ... and enshrining the right to free, prior and informed consent into law...” (6.8). Addressing Sweden’s argument that the mining was in the public interest and a valid limitation on Sami property rights, and that its national law required consultation, not FPIC, and treated all equally (6.11), the Committee explained that Sweden’s “reasoning is misguided and that it has not complied with its international obligations to protect the Vapsten Sami reindeer herding community against racial discrimination by adequately or effectively consulting the community in the granting of the concessions” (6.12). It noted that “indigenous peoples’

²¹ Declaring the case admissible on 1 May 2017, the CERD Committee found that (para. 1.5): “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 under the Convention, irrespective of future developments that could determine whether the mining plans would be carried out. Secondly, recalling that article 26(2) of the [UNDRIP] establishes the right for Indigenous Peoples to own, use, develop and control lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, and recalling that this definition has been endorsed by the Committee in its general recommendation No. 23 (1997), the Committee found that the petitioners’ claims raise issues related to article 5(d)(v), as well as articles 5(a) and 6 of the Convention.”

land rights differ from the common understanding of civil law property rights and considers that reindeer herding is ... a central element of the petitioners' cultural identity and traditional livelihood" (6.14). Moreover, recognition of Sami "land rights and their collective reindeer husbandry right, based on immemorial usage, entails the obligation to respect and protect these rights in practice. The need to safeguard their cultures and livelihoods is among the reasons why States parties should adopt concrete measures to ensure their effective consultation and participation in decision-making" (6.15). Recalling that it "has frequently reaffirmed the understanding that lack of appropriate consultation with indigenous peoples may constitute a form of racial discrimination," the Committee explained that it "**adheres to the human rights-based approach of free, prior and informed consent as a norm stemming from the prohibition of racial discrimination**, which is the main underlying cause of most discrimination suffered by indigenous peoples" (6.16). Observing that the state cannot delegate its obligation to secure Indigenous Peoples' effective participation to a private company, it explained that states must "provide evidence that they fulfil this obligation, either directly, by organizing and operating consultations in good faith and with a view to reaching consensus, or indirectly, by providing sufficient guarantees of effective participation of indigenous communities and by ensuring that due weight is indeed given by any third party to the substantive arguments raised by the indigenous communities" (6.17). Also, "[d]evelopment and exploitation of natural resources, as a legitimate public interest, **does not absolve States parties from their obligation not to discriminate against an indigenous community** that depends on the land in question by mechanically applying a procedure of consultation without sufficient guarantees or evidence that the free, prior and informed consent of the members of the community can be effectively sought and won" (6.20).

Third, the Committee stressed that Indigenous Peoples have a right to participate in environmental and social impact studies, which should be part of the consultation process (6.18).

Finally, turning the article 6 (right to remedies), the Committee observed that Sweden had admitted that decisions to grant mining concessions "did not involve any consideration of the petitioners' property rights," and thus, the "the impossibility of obtaining an effective judicial review of a decision where the fundamental right of indigenous peoples to traditional territory is being questioned is a consequence of the State party treating indigenous communities as private landowners affected by the mining operations, without due regard to the potential irreversibility of the consequences these operations may have on indigenous communities" (6.28). Also, because judicial decisions, per Swedish law, "could not evaluate the taking of the land from the perspective of the petitioners' fundamental right to traditional territory, the Committee concludes that the facts as submitted reveal a violation of the petitioners' rights under article 6 of the Convention" (6.29).

Key text: Paras. 6.5, 6.7, 6.10, 6.13 – 6.17, 6.20, 6.28 – 6.29

6. Flor Agustina Calfunao Paillalef v. Switzerland, Decision adopted by the Committee under article 22 of the Convention, CAT/C/68/D/882/2018

<https://bit.ly/3y3SEn1> (all languages)

Country: Switzerland (re. Chile) **Body:** Committee Against Torture **Date:** 2 January 2020

Issues: Asylum/non-refoulement, patterns of human rights violations, use of Counter-Terrorism Act, impunity

Summary: This case concerned an alleged violation of Article 3 of the Convention against Torture.²² It was filed against Switzerland by a Mapuche woman from Chile in August 2018, arguing that she may be subjected to torture if deported to Chile.²³ Deportation had been ordered after her application for political asylum had been rejected by Switzerland, including the judiciary (para. 2.4–2.12). She had been living in Geneva since 1996, representing the Mapuche in various UN bodies and meetings (2.2). According to the Committee, the Mapuche Indigenous people “is asserting its rights to its traditional territory in the face of timber, hydroelectric and mining concessions granted by Chile to domestic and international companies, road construction without the consent of the indigenous people and the occupation of the land by large non-indigenous landowners” (2.1). It further explains that Mapuche demands have been “met with violent reactions both from the Chilean authorities, including the militarized police ... and from individuals who have formed private armed militias. The[y] ... are victims of assassinations, torture, the criminalization of their demands, set-ups involving judicial officials and the police, and the use of Act No. 18.314, the Counter-Terrorism Act, against their leaders. According to the complainant, the Mapuche are persecuted not for what they do but for who they are” (*id.*).

First, the Committee found the complaint admissible in relation to Art. 3 of the Convention because “the complainant has exhausted all available domestic remedies” (7.2).

Second, it determined that the issue to be resolved was whether Switzerland would violate its obligation “not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment” (8.2).²⁴ To assess this, state parties “must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country to which he or she would be returned” (8.3).

Third, while the Committee determined that there was not a pattern of systematic human rights violations in Chile in general, this was not the case with regard to the Mapuche more specifically (*id.*).²⁵ It recounted various statements of international concern that verified this pattern, including the most recent Universal Periodic Review by the Human Rights Council and the findings of the UN Special Rapporteur on the Rights of Indigenous Peoples, who had explained that “the present situation of indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources” (8.4). The Committee then concluded that “Mapuche leaders are subjected to widespread torture and other cruel, inhuman and degrading treatment or punishment, from which protection should be provided under article 3 of the Convention” (*id.*).

²² Art. 3 reads: “1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

²³ More specifically, she argued that (para. 3.2): “given her commitment to defending the fundamental rights of the indigenous people to which she belongs, she would be at risk of torture and other cruel, inhuman or degrading treatment or punishment, both by the Chilean authorities and by private individuals. She claims that there is both a consistent pattern of violations of the human rights of Mapuche rights defenders and a situation of personal risk.”

²⁴ See also *F. F. J. H. v. Argentina*, CCPR/C/132/D/3238/2018 (2021) (concerning attempts to extradite an Argentine Mapuche traditional leader to Chile. While in Chile seeking traditional medical treatment, the author and four others were arrested on suspicion of arson. While awaiting trial, and due to the expenses of staying in Chile, the author returned to Argentina, prompting Chile to request his extradition. He was detained because of information obtained under torture from another person and members of his community were negatively affected during the police operation).

²⁵ Noting “the specific nature of the present case and the complainant’s allegations that, for asserting their fundamental rights, the Mapuche people face widespread and systematic violations of their fundamental rights, ill-treatment and political persecution.”

Fourth, turning to the requirement that the complainant must individually demonstrate a personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, the Committee explained that its “practice in such circumstances has been to determine that ‘substantial grounds’ exist whenever the risk of torture is “foreseeable, personal, present and real” (8.5). Observing that “the complainant’s sister and her nephew were tortured and assaulted on several occasions,” it recalled its General Comment No. 4 (2017), which (in para. 28) refers to torture and inhuman treatment or punishment to which “an individual or the individual’s family were exposed,” and also noted that the Inter-American Commission on Human Rights had adopted precautionary measures in respect of various members of the complainant’s family (8.6). It concluded that the complainant’s ethnic background, the persecution of Mapuche leaders, “... the acts of persecution and torture suffered by several members of her family and her conspicuous protest activities at the international level are sufficient, taken together, to establish that she would personally run a foreseeable and real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment if she were deported to Chile” (8.8).

Fifth, the Committee further explained that state parties should not deport persons “where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities. Moreover, ill-treatment inflicted by private individuals that Chile is unable to stop, acquiesces to or allows by failing to intervene is conduct for which the State, by providing its tacit consent, bears responsibility” (8.9). Where the state knows or has reasonable grounds to believe that torture or ill-treatment is occurring and non-state actors are involved, the state is responsible “and its officials should be considered as authors, complicit or otherwise responsible for consenting or acquiescing to such impermissible acts,” provided that it fails “to exercise due diligence to prevent, investigate and prosecute such non-State officials or private actors” (*id.*).²⁶

Finally, the Committee explained that: a) “... the principle of the benefit of the doubt, as a preventive measure against irreparable harm, must also be taken into account in adopting decisions on individual communications, given that the spirit of the Convention is to prevent torture, not to redress it once it has occurred;” and b) “... the deportation of a person or a victim of torture to an area of a State where the person would not be exposed to torture, unlike in other areas of the same State, is not reliable or effective and that **such a measure makes even less sense in the case of an indigenous victim who is attached to his or her community and land**” (8.10).

Key Text: Paras. 8.3, 8.8, 10

²⁶ Also stating that “Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction constitutes a form of encouragement and/or de facto permission.”

**7. Tiina Sanila-Aikio vs. Finland, CCPR/C/124/D/2668/2015²⁷ <https://bit.ly/38gduVI>
Klemetti Käkkäläjärvi et al. v. Finland, CCPR/C/124/D/2950/2017²⁸ <https://bit.ly/3rKSZXD>**

Country: Finland **Body:** UN Human Rights Committee **Date:** 20 March 2019 and
19 December 2019

Issues: Non-discrimination, political rights, self-determination, collective rights, interrelationship with UNDRIP

Relevant Articles: ICCPR arts. 1, 25, 26, 27; UNDRIP arts. 3, 9, 18, 19, 33, 34

Summary: These two cases (“TSA” and “KK”) have their genesis in 2011 and 2015 decisions of the Finnish Supreme Administrative Court (TSA, para. 3.6), which recognized 97 people as Sami for the purposes of eligibility to vote in and to be elected to the Sami Parliament, despite the prior denial of their applications by the Sami Parliament and its express objections.²⁹ It was alleged that this amounted to “unlawful interference ... in the Sami people’s right to define who is entitled to participate in elections to their Parliament [and] violates article 1 of the Covenant...” (TSA, 1.2). It also “dilutes ... the Sami people’s vote, in violation of their rights to political participation under article 25...” (*id.*). Likewise, as the Sami Parliament “plays an essential role in the protection of the Sami people’s rights to enjoy their culture and language, and is established by the State party to be the conduit for securing the free, prior and informed consent of the Sami people in matters implicating their interests, this dilution violates article 27 of the Covenant” (*id.*).³⁰ The Committee verified that “elections for the Sami Parliament take place every four years, that under section 21 of the Act on the Sami Parliament, every Sami has the right to vote from 18 years of age, and that there are currently approximately 6 000 voters on the electoral roll of the Sami Parliament” (KK, 8.9). However, decisions of the national judiciary since 2011 “have altered the formal rules for determining inclusion on the electoral roll, thus impeding the right to internal self-determination of the Sami indigenous people, and that the decisions could, at least theoretically, lead to the inclusion of 512,000 non-Sami persons on the electoral roll of the Sami Parliament” (*id.*). It recalled the concerns raised previously by the UNCERD that the definition adopted by the national courts in Sweden “gives insufficient weight to the Sami people’s rights to determine their own identity or membership in accordance with their customs and traditions and their right not to be subjected to forced assimilation or destruction of their culture, as recognized under articles 33 and 8 of the [UNDRIP]” (TSA, 6.3 and KK, 9.3).

First, in this case, the Committee continues its practice of interpreting various provisions of the ICCPR (in this case arts 25, 26 and 27) conjunctively with the right to self-determination in article 1 of the same, noting that “Article 1 and the corresponding obligations concerning its implementation are

²⁷ See also T. Joonas, *ILO Convention No. 169 and the governance of indigenous identity in Finland: Recent developments*, THE INT’L J. HUMAN RIGHTS (2019), <https://bit.ly/3OpINXk>

²⁸ See also R. Nilsson, *The Consequences of Swedish National Law on Sámi Self-Constitution—The Shift from a Relational Understanding of Who Is Sámi Toward a Rights Based Understanding*, 19 ETHNOPOLITICS 292 (2020), <https://bit.ly/390VluQ>

²⁹ See also *Nuorgam et al v. Finland*, CERD/C/95/D/59/2016 (2018) (an admissibility decision concerning the same subject matter and (para. 7.11) declaring the petition admissible in part because “decisions taken by institutions of the State party, which have an impact on the composition of the Sami Parliament and the equal representation of the Sami, can have a direct impact on the civil, political, economic, social and cultural rights of individual members of the Sami community and of groups of Sami individuals, in the terms of article 14(1) of the Convention”), <https://bit.ly/3L8adWz>

³⁰ See also *Sanila-Aikio v. Finland*, Admissibility Decision, CCPR/C/119/D/2668/2015 (2017) (finding the petition admissible with respect to arts. 25, 26 and 27 of the Covenant, while declaring violations of Art. 1 inadmissible under Optional Protocol I to the ICCPR, but, nonetheless, “the Committee may interpret article 1, when relevant, in determining whether rights protected in parts II and III of the Covenant have been violated”), <https://bit.ly/3LaEKTH>

interrelated with other provisions of the Covenant and rules of international law” (TSA 6.8; KK, 9.8). However, in these cases, it also does the same with respect to the UNDRIP in general and specific provisions thereof (e.g., arts. 8, 9 and 33). It states e.g., that ICCPR, Art. 27, “interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’” (*id.*). Another consequence is that: “in the context of indigenous peoples’ rights, articles 25 and 27 have a collective dimension...,” and the Committee “must take into account the collective dimension” of violations and associated damages (TSA 6.9; KK 9.9).

Second, the Committee explained that the “electoral process for the Sami Parliament accordingly must ensure the effective participation of those concerned in the internal self-determination process,” and any “restrictions affecting the right of members of the Sami indigenous community to effective representation in the Sami Parliament must have a reasonable and objective justification and be consistent with the other provisions of the Covenant, including the principle of internal self-determination relating to indigenous peoples” (TSA 6.10; KK 9.10). It then found that Finland had “infringed on the capacity of the Sami people, through its Parliament, to exercise a key dimension of Sami self-determination in determining who is a Sami ...; that the Supreme Administrative Court rulings affected the rights of the author and of the Sami community to which she belongs to engage in the electoral process regarding the institution ... to secure the effective internal self-determination and the right to their own language and culture of members of the Sami indigenous people” (TSA 6.11; KK 9.11). This violated “the author’s rights under article 25, read alone and in conjunction with article 27, as interpreted in light of article 1 of the Covenant (*id.*).

Last, The Committee recommended that Finland reviews the *Sami Parliament Act* to ensure “that the criteria for eligibility to vote in Sami Parliament elections are defined and applied in a manner that respects the right of the Sami people to exercise their internal self-determination” (TSA 8; KK 10).

Key text: Paras. TSA 6.4, TSA 6.6/KK 9.6, TSA 6.7, TSA 6.8-6.11/KK 9.8-9.11, TSA 8/KK 10

8. Bholi Pharaka v. Nepal, CCPR/C/126/D/2773/2016

<https://bit.ly/3MpS6vv> (all languages)

Country: Nepal

Body: UN Human Rights Committee

Date: 2 October 2019

Issues: Indigenous children, forced/child labour, torture, arbitrary detention

Summary: This case was initiated by a member of the Tharu Indigenous people (“the author”). It alleges violations of the ICCPR, arts. 2, 7, 8(3)(a), 9, 10, 14 and 24(1). It concerns the systematic use of arbitrary detention and torture in Nepal, especially against children; a situation of generalized inhuman and degrading conditions of detention; and child and forced labour practices, mainly affecting children from indigenous communities.³¹ When the author was 9 years of age, he was sent to Kathmandu to work as a domestic worker, during which time he also attended school. Three years later, in 2010, he was sent

³¹ See also *Fulmati Nyaya v. Nepal*, CCPR/C/125/D/2556/2015 (2019), para. 7.2 (“The Committee considers that the rape and other acts of sexual violence inflicted by the Royal Nepalese Army and the Armed Police Force upon the author, who is indigenous and who was a 14-year-old girl at the time of the events, violated the author’s rights under articles 7 and 24(1) of the Covenant”), and para. 7.3 (“... the author’s uncontested argument that the rape and other acts of sexual violence to which she was subjected to had a discriminatory effect ...”).

to the home of an officer in the Nepalese army, where he was forced to work 18 hours a day and was often subjected to physical and psychological abuse. He was not allowed to attend school and neither he nor his family were paid for his work. He escaped back to his village in 2012, at which time a criminal complaint was filed accusing him of theft of personal property from the Officer's house. The police "arrested his maternal uncle and subjected him to torture and other forms of ill-treatment, including death threats, until he promised to bring his nephew back to the capital" (para. 2.3). On returning to Kathmandu, he was arrested, detained with adults and tortured until he signed "documents that he was not allowed to read, which contained a confession to his involvement in the theft" (2.4). The period of his detention in inhumane conditions was extended three times by a regular court. He had no access to legal representation, even though he was 14 at the time, and he was repeatedly tortured while in detention. In 2012, he was formally charged with theft and, not being able to pay bail, a court ordered his transfer to juvenile detention facility. He was released in June 2013 by order of the Supreme Court of Nepal, which held that "... the decision to keep a minor in detention solely on the basis of his inability to pay bail was unlawful and contrary to the principle of the best interests of the child enshrined both in international treaties and in domestic legislation" (2.12). In June 2014, the Kathmandu District Court found the author guilty of theft and sentenced him to one month's imprisonment and a fine. He was unable to appeal this decision due to a lack of finances. Complaints filed with the domestic authorities about torture and forced labour were either unanswered or their registration was refused, allowing impunity to prevail.

First, the Committee ruled the complaint admissible.

Second, it determined that sufficient evidence was presented to substantiate that Nepal had violated article 7 (prohibition of torture and cruel and inhuman treatment), alone and in conjunction with article 24(1) (right of child to protection and to be free from discrimination) (7.2).

Third, the Committee found violations of article 7, read alone and in conjunction with articles 2(3) (right to effective remedies) and 24(1) in connection with Nepal's failure to investigate the author's allegations of torture, especially given that he was a child, and because the applicable statute of limitations for torture compensation claims under Nepalese law precluded access to an effective remedy (7.6).

Fourth, a violation of Art. 9 (right to liberty and security), alone and in conjunction with Art. 24(1), was also found due to the arbitrary arrest of the author and his detention while a minor; because he was not informed why he was arrested or of the charges against him, and because he did not have access to legal counsel for much of the period in question (7.8).

Fifth, turning to the child and forced labour issues, the Committee decided that the author had "presented a credible description" of the situation, which, when coupled with Nepal's failure "to protect the author, who was 14 years of age at the time, from such abuses and its failure to conduct any investigation into his allegations, especially given that he was a child, constitutes a violation of his rights under article 8(3) [prohibition of forced or compulsory labour], read in conjunction with articles 2(3) and 24(1), of the Covenant" (7.11).

Regional

1. ACHPR/Res. 490 (LXIX) 2021 -- Resolution on Extractive Industries and the Protection of Land Rights of Indigenous Populations/Communities in Africa

<https://bit.ly/3xO956L>

Country: Regional (Africa) **Body:** African Commission Human and Peoples' Rights **Date:** 5 December 2021

Issues: Extractives

Excerpted Text:

The Commission: Urges State Parties to:

1. Adopt policies and laws that safeguard Indigenous populations/communities' rights to customary ownership and control over their lands, and recognize the lifestyle of the indigenous populations, especially in hunting and pastoralism;
2. Ensure that the legislation governing the granting of concessions includes provisions on consultation and FPIC, in consistence with international human rights standards;
3. Together with extractive industries, develop and implement national public participation models for the sector taking into account all citizens of the country including the full participation of Indigenous Populations/Communities;
4. Adopt measures to ensure that Indigenous populations/communities who are actually or potentially impacted by business activities have complete and timely access to relevant information, to guarantee their effective participation in the decision making process;
5. Ensure that in addition to an environmental assessment, a participatory social, cultural, economic and human rights impact assessment is conducted prior to the implementation of any extractive activities within indigenous community lands. Social impact assessments should be required by law and undertaken prior to any phase of the extractive industry project. Assessment should be monitored to ensure full compliance;
6. Recognize Indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution, as well as undertake capacity-building within these communities to develop their own representative structures, and ensure effective participation in key decision-making processes;
7. Adopt laws that safeguard the rights of Indigenous populations/communities and ensure transparency as well as accountability, especially in governance institutions and bodies that deal with indigenous populations/communities;
8. Devote adequate human, financial and technical resources to national human rights institutions, and increase their capacity to effectively monitor and address impacts of the activities of the extractive industries on Indigenous populations/communities' rights;
9. Carry out awareness-raising campaigns, together with relevant stakeholders, to increase the ability of Indigenous populations/communities to access the legal and non-legal remedies available to them;
10. Put in place grievance mechanisms that are accessible to Indigenous populations/communities in the event that their rights are violated.

2. ACHPR/Res. 489 (LXIX) 2021 -- Resolution on the Recognition and Protection of the Right of Participation, Governance and Use of Natural Resources by Indigenous and Local Populations in Africa

<https://bit.ly/3Ot9C3M>

Country: Regional (Africa) **Body:** African Commission Human and Peoples' Rights **Date:** 5 December 2021

Issues: Natural resource rights

Excerpted Text:

The Commission:

1. **Calls on** African States to recognize the rights of indigenous populations & communities over the conservation, control, management and sustainable use of their natural resources including wildlife;
2. **Urges** African States to take the necessary measures to strengthen community governance and institutions;
3. **Strongly encourages** Governments, indigenous and local populations, intergovernmental organizations, national human rights institutions, civil society organizations and academic institutions to support the Working Group on Indigenous Populations/Communities and Minorities in Africa building and enhancing local capacity of communities to govern and manage and sustainably use and benefit from their natural resources;
4. **Tasks** the Working Group, through the Commission, in supporting Indigenous communities and minorities with respect to their rights to natural resources in the territories that they live;
5. **Encourages** States to adhere to the Commission's State Reporting Guidelines on Article 21 and 24 of the Charter relating to Extractive Industries, Human Rights and the Environment.

3. Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala. Merits, Reparations and Costs. Series C No. 440.

<https://bit.ly/37wPhtX> (ESP only)

Country: Guatemala **Court:** Inter-American Court of Human Rights **Date:** 6 October 2021

Issues: Indigenous media (UNDRIP, Art. 16(1)),³² freedom of expression (ACHR, Art. 13), equality before the law (ACHR, Art. 24), participation in cultural life,³³ criminalization

Summary: The case concerns four community radio stations operated by Indigenous People in Guatemala and the lack of domestic legal guarantees for related rights to freedom of expression and culture. These deficits were exacerbated by legal obstacles to access and obtain radio frequencies,

³² Article 16 reads: "1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination."

³³ For the expert testimony of the UN Special Rapporteur on the Rights of Indigenous Peoples in this case, see <https://bit.ly/3OyUMZJ>

discriminatory norms regulating radio broadcasting, and the criminalization of community radio broadcasting. This case was submitted to the IA Commission on Human Rights in 2012, which ruled on the merits in 2019 and then transmitted it to the Court in 2020.³⁴

First, the Court concluded that states' international obligations include making laws and policies to democratize access to all forms of media and to guarantee the existence and free operation of plural forms of media or information, e.g., radio, television, newspapers (para. 91). These obligations also correspond to a right vested in Indigenous Peoples to be "represented in the different communication media, especially by virtue of their particular ways of life, their communal relations and the importance of the communication media for said peoples ... without forgetting that, in the present case, the majority of the inhabitants of Guatemala identify themselves as part of the original indigenous peoples" (92). It observed that the right to freedom of expression in the indigenous context has both individual and collective dimensions, concluding that "the collective dimension of freedom of expression for indigenous peoples is essential for the realization of other collective rights" (e.g., autonomy and cultural rights) (93-4). For these reasons, and citing various standards, including the UNDRIP, Art. 16, the Court decided that Indigenous Peoples have "**the right to establish and use their own communication media ... also taking into account the rights of indigenous peoples to non-discrimination, to self-determination and their cultural rights,**" (95). Moreover, in addition to being the main source of information, these community radio stations sustain the transmission, promotion and protection of indigenous languages and cultures (108); they are "essential tools for the conservation [and] the continuing transmission and development of indigenous cultures and languages" (109).

Second, concerning allocation of and access to radio frequencies, states "must act within the framework of the broadest recognition of freedom of expression without discrimination of any kind" (114). In practice, to guarantee the right to freedom of expression, states must adopt measures to ensure equal access to radio frequencies by "different social sectors that reflect the existing pluralism in society," which includes equal access to radio frequencies by and for Indigenous Peoples, all considering their importance for the exercise and enjoyment of other rights (117).

Third, the Court then related this discussion to standards and jurisprudence on Indigenous Peoples' right to participate in cultural life (which includes a right to cultural integrity) (118-26). An essential aspect of this right is access to the means of communication and the ability to establish autonomous means of communication (127). Thus, "access to their own community radios, as vehicles for the freedom of expression of indigenous peoples, [is] an essential element to promote identity, language, culture, self-representation and the collective and human rights of indigenous peoples," and, in this context, the right to freedom of expression and the right to participate in cultural life are intimately connected" (128). The Court observed that the latter right has both immediate (or core) obligations and those to be realized progressively. It found that the community radios were a fundamental means for the exercise of the right and, given that "the regulation of the radio broadcasting in Guatemala does not in practice allow indigenous peoples to establish and use their own means of communication, they are prevented from exercising their right to participate in cultural life through their its community radio stations" (154).

Fourth, immediate obligations include guarantees that the right can be exercised without discrimination: "the present case refers to the obligations of immediate enforceability derived from article 26 of the Convention regarding the lack of guarantee of the right of indigenous peoples to participate in cultural life without discrimination by not being able to access the means of communication necessary for it" (130). In this regard, it recalled its constant jurisprudence that **non-discrimination and equal protection norms require that states are cognizant of and responsive to Indigenous Peoples' characteristics and needs that differentiate them from the general population**

³⁴ For the IA Commission's merits report, see <https://bit.ly/3LcbMTj> (ESP only).

and that make up their cultural identity, when making, applying and interpreting laws and policies (137-8). Observing that Indigenous Peoples in Guatemala experience “structural discrimination,” historically and presently, it declared that the state has an obligation to correct extant inequalities, including with respect to access to and use of radio frequencies, in order to guarantee substantive equality (139-40). This cannot be achieved, as is the case in Guatemala, through (ostensibly neutral) public auctions where frequencies are assigned to the highest bidder (140-2) because “the majority of the indigenous communities in Guatemala, due to their situation of poverty, social exclusion and discrimination, do not have economic and technical capabilities to compete on an equal footing with would-be commercial radio stations,” which the public auction system “indirectly favors” (147). Guatemala was obligated to correct this to reverse the various factors that disadvantage Indigenous Peoples to enable them to access radio frequencies, including through affirmative actions/special measures, if needed (*id.*). This constitutes “indirect discrimination and a de facto impediment to the exercise of the freedom of expression of indigenous peoples,” more so as the state could have corrected this by adopting measures, such as the reservation of frequencies “to enable indigenous peoples to actually establish and operate their own media outlets” (149).

Last, the Court turned to the arrest and prosecution of the operators (for theft) of the Ixchel and Uqul Tinamit community radio stations, discussing whether the state’s action could constitute a legitimate restriction of the right of freedom of expression (157 et seq). These stations were raided by state authorities pursuant to judicial orders for the criminal offense of theft in relation to operating without a radio license. Their equipment was also seized. In assessing the legitimacy of state action, the Court concluded that it is “imperative to take into account” Indigenous Peoples’ right to establish and operate their own radio stations, that they are prevented by discriminatory laws and practice from doing so, and that the state had failed to mitigate or correct this discrimination (167). In relation to the possible reasons for validly limiting the affected rights (e.g., respect for the rights of others, protection of national security, public order, health or morals), the Court found that the criminal prosecution of the indigenous community radio operators was incompatible with the applicable norms (166). Observing that **the criminal law should be used only to “the extent strictly necessary to protect legal assets from the most serious attacks that damage or endanger them”** (168), it concluded that raids against, seizure of equipment and the criminal prosecution of community radio operators was neither appropriate or necessary (169). Less drastic and intrusive measures could have been employed instead (e.g., administrative procedures and sanctions), “which would achieve the same purpose, but would affect indigenous communities less severely” (*id.*). The criminal prosecution was “disproportionate, since it excessively affected freedom of expression and the right to participate in the cultural life of the Maya Kaqchikel of Sumpango and Maya Achí of San Miguel Chicaj” (170),” and an illegitimate action and restriction on right to freedom of expression contrary to the Art. 13(2) of the Convention.

Key text: Paras. 92-3, 95, 130, 137-40, 150, 155, 166-70

4. Buzos Miskitos (Lemoth Morris et al.) v. Honduras. Merits, Reparations and Costs. Series C No. 432.

<https://bit.ly/3rl2g2r> (ENG)

<https://bit.ly/3K8BEOJ> (SPA)

Country: Honduras

Court: Inter-American Court of Human Rights

Date: 31 August 2021

Issues: Business and human rights,³⁵ right to safe work, social security

Summary: In 2004, the Asociación de Miskitos Hondureños de Buzos Lisiados (Association of Disabled Honduran Miskito Divers); Asociación de Mujeres Miskitas (Association of Miskito Women); and the Almuk Nani Asla Takanka Council of Elders filed a petition with the IA Commission on Human Rights alleging that Honduras had violated the rights of 53 Miskito indigenous persons. These violations concerned either serious accidents or deaths (mainly caused by inadequate decompression) that occurred while working for fishing companies and diving, mainly for lobster, “in dangerous conditions.” The Court confirmed that 98% of the 9,000 divers involved in lobster fishing are Miskito and, of these, “97 per cent have suffered some type of decompression-related syndrome and 4,200 are totally or partially disabled” (para. 31). The case was transmitted to the IA Court in October 2019. In a friendly settlement agreement, Honduras recognized its responsibility for violations of arts. 4(1), 5(1), 8(1), 19, 24, 25(1) and 26 (the rights to life, to life with dignity, to personal integrity, to judicial guarantees, to the rights of the child, to equal protection of the law, to judicial protection, health, work, social security, and to non-discrimination). Nonetheless, both parties requested that the Court analyse the content and scope of the rights affected “by the activities of the extractive fishing industry in the Miskito territory and, in particular, those derived from Article 26 of the Convention...” (para. 13). More specifically, the request was that the Court develop jurisprudence on the rights violated because “the development of such standards would provide Honduras and other States in the region with information on their obligations to respect and guarantee human rights in cases involving private companies and indigenous peoples” (para. 15, 41).

First, the Court began by addressing a “Preliminary consideration” concerning “corporate responsibility with respect to human rights” (para. 42 et seq).³⁶ Recalling that states have obligations to ensure the free exercise of rights and guarantee the same in domestic law, including vis a vis private parties and through the provision of remedies, the Court referred to the UN Guiding Principles on Business and Human Rights (UNGPs), reciting its various elements. It stressed that states have a duty to regulate, supervise and oversee the practice of dangerous activities by private companies, and must effectively prevent and protect against any impairment of rights in the context of business activities. Tracking the UNGPs, the Court explained that, to comply with their responsibility to respect human rights, “business enterprises should have in place policies and processes appropriate to their size and circumstances, including: a) A policy commitment to meet their responsibility to respect human rights; b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

Second, after reaffirming the violations addressed in the friendly settlement agreement, the Court turned to Art. 26 (on economic, social, and cultural rights), which entails both immediate obligations and those of a progressive nature (para. 66). The Court identified the following rights for analysis (para. 67): whether Honduras “fulfilled its immediately enforceable obligations with respect to the right to work and to just, equitable and satisfactory conditions that ensure the safety, health and hygiene of the worker, and the right to health and social security....” It then discussed the content of these rights

³⁵ See also *Nevsun Resources Ltd v Gize Yebeyo Araya et al* [2020] SCC 5 (concerning a limited recognition of standing in Canadian courts for violations committed by Canadian registered companies for human rights violations); and *Kadie Kalma & Ors v African Minerals Ltd & Ors*, [2020] EWCA Civ 144 (where the English Court of Appeal declined to refer to international standards on business and human rights to determine if a legal duty of care was owed by a multinational).

³⁶ See also *Kaliña and Lokono Peoples*, para. 224 (citing UN Guiding Principles on Business and Human Rights, Principle 1); and 225 (citing UN Doc. A/HRC/17/31, 18, concerning human rights due diligence by a business enterprise and stating that this “indicates that businesses must respect the human rights of ... indigenous and tribal peoples, and pay special attention when such rights are violated”).

but, beyond referring to measures to address “vulnerability”, the analysis does not focus much on “obligations to respect and guarantee human rights in cases involving private companies and indigenous peoples,” nor is there attention to intersecting grounds of discrimination in relation to these rights, e.g., ‘indigenous’ and ‘disabled’.³⁷ However, these grounds were emphasized in the Court’s discussion of the prohibition of discrimination and equality.

Third, after reciting principles of non-discrimination law, the Court explained that states are “obliged to adopt positive measures to reverse or change any discriminatory situations existing in their societies that affect a specific group of persons” (para. 103). These positive measures are also part of the duty to protect against third parties, who create or maintain discriminatory situations, and should be designed to account for “the particular protection needs of the subjects of law, whether due to their personal condition or to the specific situation in which they find themselves, such as extreme poverty or exclusion” (*id*). It noted that the victims are indigenous persons without access “to another source of income and were forced to work as divers in underwater fishing activities in conditions of vulnerability” (para. 104). Observing that the State was aware of the situation faced by the Miskito “and the abuses committed by the companies involved in fishing activities in the area,” the Court ruled that “the State’s failure **to adopt measures aimed at changing the situations that violated the human rights of the victims who, as members of an indigenous people belong to a vulnerable group, constituted an act of discrimination**” (*id*). The Miskito “were immersed in patterns of structural and intersectional discrimination, given that they belonged to an indigenous community and lived in poverty” (para. 107). It further found that “by allowing private companies to operate without adequate control and supervision in an area where a substantial part of the population is vulnerable, the State failed in its obligation to ensure that effective measures were implemented to protect the life and health of divers and to guarantee their right to material equality” (para. 109).

Last, in its reparation orders, the Court endorsed the friendly settlement agreement where it provides that “the State shall ensure that the [health] treatment provided is culturally relevant, understanding this to mean the adaptation of criteria and information to the particularities of the customs, traditions, way of life and linguistic identity of the Miskito people and integrating traditional practices of Miskito medicine (para. 116). The state also undertook to build houses, taking into account “the expression of the cultural identity of the Miskito people ... in the construction or remodelling of the homes” and “to grant full ownership titles to the properties located within the *ejido* (communal lands)” (para. 119). Other orders concern “Measures to ensure the adequate regulation, control and supervision of the activities of industrial fishing companies in Miskito territory,” which must comply with international standards on this issue, with full respect for human rights, and specifically the rights of the Miskito people” (para. 134 et seq).

Key text: Paras. 48-9, 51-2, 99-101, 103-4, 107-08, 110

³⁷ Cf. *Corey Brough v. Australia*, CCPR/C/86/D/1184/2003 (2006), para 8.9 (“Given the author’s age, his intellectual disability and his particularly vulnerable position as an Aboriginal...”), and para. 9.4 (“In the circumstances, the author’s extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal”); and *A.S. v. Australia*, CCPR/C/132/D/2900/2016 (2021), para. 3.5 (arguing that “maintaining a physical, spiritual, and emotional connection to his Country is essential for the mental, social and emotional well-being of indigenous Australians”) and; para. 7.8 (stating, in regard to minority rights under article 27, that “the author failed to establish a prima facie case in that the State party had less intrusive means to achieve the aims of his transfer and that the increase of burden on his minority rights went beyond of what is inherent in detention”).

5. Rapa Nui People (Chile), Report No. 150/21, Petition 172-15 (Admissibility)³⁸ https://bit.ly/3v5QMbm	
Country: Chile Date: 14 July 2021	Body: Inter-American Commission on Human Rights
Issues: Lack of recognition of the collective property of the Rapa Nui people, violation of the right to self-determination, national park, sacred sites and cultural heritage ³⁹ Articles: Articles 4 (right to life), 8 (fair trial), 12 (freedom of conscience and religion), 21 (right to property), and 25 (judicial protection) of the American Convention, in connection with its arts. 1.1 (obligation to respect rights) and 2 (domestic legal effects)	
Summary: This is an admissibility decision (deciding that the merits can be reviewed, not a decision on whether there are violations). It found that the petition submitted about the situation of the Rapa Nui people is admissible in relation to a range of articles guaranteed by the American Convention on Human Rights. These violations concern the lack of recognition of indigenous property and self-determination rights, restrictions on access and use of the territory due to conservation and other activities, and the impacts on the people.	
Key text: Paras. 35-6	

6. Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Interpretation of the Judgment on Merits, Reparations and Costs. Series C No. 420. https://bit.ly/38julXj (ENG) https://bit.ly/3K6ZoTq (SPA)		
Country: Argentina	Court: Inter-American Court of Human Rights	Date: 24 November 2020
Issues: “[W]hether ... the right to prior consultation was included among the aspects that should be established in the legislative and/or other measures that the State must adopt...” (para. 17).		

³⁸ Other admissibility reports adopted during the relevant period include: *Report No. 279/21, Huitosachi, Mogotavo and Bacajipare Communities of the Raramuri indigenous peoples* (Mexico), 29 October 2021 (asserting violation of rights to collective property, self-determination, and to participation in the decisions and economic benefits of the “Barrancas del Cobre” tourism project); *Report No. 67/21, Navajo Communities of Crownpoint and Church Rock* (USA), 28 March 2021 (alleging multiple violations because of a license granted to conduct uranium mining); *Report No. 113/20, 64 Indigenous communities of the Mojeño, Yuracaré, and Tsimne peoples* (Bolivia), 24 April 2020 (alleging violation of the right to collective property, including peoples in voluntary isolation); *Report No. 202/20, Wayúu Indigenous People* (Colombia), 4 August 2020 (alleging property rights violations as “a result of the omission of prior consultation ... in the approval of the reform of the royalty regime derived from the exploitation of natural resources...”); *Report No. 167/20, Teribe Indigenous People* (Costa Rica), 2 July 2020 (alleging massive illegal occupation and faulty delimitation of their traditional territory; the imposition of a local government body, which disregards their indigenous institutions and authorities and limits their control over the governance of their territory; and in connection to the El Diquís dam, which was initiated without their participation); *Report No. 125/20, Kuna de Gardi Communities, Kuna Yala District* (Panama), 25 April 2020 (alleged massive privatization of their territory); *Report No. 35/20, Indigenous Rural Tourist and Environmental Communities of El Tatío Geysers* (Chile), 14 April 2020 (alleging violations in relation to a geothermal energy project); *Report No. 33/20, Travesía Garífuna Community* (Honduras), 25 February 2020 (failure to secure collective property and violations thereof by incursions).

³⁹ See also J. Siekiera, *Implications of Easter Island Protests—Breach of Rapa Nui Rights by Chile in the Context of National, American and Universal Legal Systems*, 21 ASIA-PACIFIC J. HUMAN RIGHTS & LAW 98 (2020), <https://bit.ly/3Ozo2Q0>

Summary: In this request for interpretation of its judgment on the merits (see no. 7 immediately below), the Court was asked to clarify if the legislative and other measures it had ordered to ensure legal certainty for indigenous lands must also include requirements that Indigenous peoples participate in decision-making.

The Court observed that the purpose of its order was to remedy the inadequacy of Argentina’s domestic law on Indigenous Peoples’ right to communal property (para. 23). It then explained that its order to adopt legislative and/or any other measures on indigenous communal property rights “could not be executed adequately” if it failed to also recognize/or disregarded the right of Indigenous Peoples to effective participation in decision-making. Thus, **“the effective participation of indigenous peoples or communities in actions that may affect their territories ... is a necessary element to guarantee the right to indigenous communal property”** (24). It concluded by stating that the legislative or other measures that the State should adopt “must be appropriate to provide adequate means for claiming and for recognition of indigenous communal property, in a way that ensures legal certainty to the right to communal property considering its different elements, which include the implementation of consultations and participation in them” (29).

7. Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina.

Merits, Reparations and Costs. Series C No. 400.

<https://bit.ly/37yMccP> (ENG)

<https://bit.ly/3K8chwq> (SPA)

Country: Argentina **Court:** Inter-American Court of Human Rights **Date:** 6 February 2020

Issues: Collective property, healthy environment, cultural identity, food, and water, third parties and restitution, including recovery of forest resources

Summary: This case, submitted to the IA Court in February 2018, concerns violations of territorial rights by act and omission, including lack of restitution of lands held by third parties, a failure to control illegal deforestation, construction of public works and state grants of concessions for oil and gas exploration without compliance with applicable guarantees, and violation of rights to judicial guarantees and protection in relation to the absence of an effective procedure to obtain and secure ownership and to perfect title.⁴⁰ It was submitted to the IA Commission 20 years earlier in August 1998, declared admissible in 2006 (Admissibility Report No. 78/06) after an unsuccessful friendly settlement process, and the Merits report was adopted in 2012. Argentina was granted 22 extensions to the deadline for compliance with the IA Commission’s recommendations, “the last one on November 1, 2017. These extensions were granted because the Commission noted some progress in the implementation of its recommendations,” and the last was rejected because “there was no prospect that the recommendations would be implemented within a reasonable time” (para. 2(d)). For example, the judgment records that, as of May 2018, of the 282 criollo families who should have been relocated, only two had completed the process fully (108).

First, on rights to property, the Court observed that there was no dispute about the traditional ownership of the lands in question, and that the dispute was, instead: a) whether Argentina had provided legal certainty to the right to property and its full exercise; and b) whether the impact of activities in the territory that had harmed the environment, food sources and cultural identity violated Indigenous Peoples’ rights (89, 114). The Court’s constant jurisprudence holds that the principle of legal

⁴⁰ For the IA Commission’s merits report see <https://bit.ly/3kmV1t3>

certainty requires that states must demarcate, delimit, and grant title to Indigenous Peoples' territories, which, in turn, results in the peaceful use and enjoyment of the property (97). This includes legislative and administrative measures that create an effective mechanism for delimitation, demarcation and titling that recognizes their rights in practice and "makes them enforceable before the State authorities or third parties," and which **"guarantee the right of the indigenous peoples to truly control and use their territory and natural resources, and to own their territory without any type of external interference from third parties"** (98, 116).⁴¹ The Court concluded that Argentina had failed to comply with its obligations, in part, because it could not "ignore the fact that recognition of indigenous ownership should be carried out providing the right with legal certainty, so that it is enforceable vis-à-vis third parties. The actions to this end have not been completed. ... Even though this Court appreciates the progress made by the State, it must conclude that the indigenous communities' right to ownership of their territory has not been realized" (149). These procedures were also unreasonably prolonged, spanning 28 years and counting (151).

Second, the Court explained that "to assess the full dimension of the characteristics of the failure to ensure the right to property, some particularities of its relationship to the right to juridical personality ... should be noted" (151). It began by underlining that **"the adequate guarantee of communal property does not entail merely its nominal recognition, but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory"** (153). It recalled its jurisprudence holding that Indigenous Peoples are collective subjects of international law and holders of collective rights; upholding their "right to self-determination in relation to the ability to 'freely dispose [...] of their natural resources and wealth,' which is necessary to ensure that they are not deprived of "their inherent means of subsistence;" and affirming that "the right to communal property must be ensured in order to guarantee the control by the indigenous peoples of the natural resources on the territory, and also their way of life," all rights guaranteed by various international instruments (153). These rights are all relevant, it explained, because collective indigenous "juridical personality should be recognized ... to enable them to take decision[s] on the land in accordance with their traditions and forms of organization" (155): i.e., to control the land through their own institutions and procedures in accordance with the right to self-determination. It concluded that there was no violation of the right to collective juridical personality because the way Argentina had recognized indigenous ownership (i.e., all communities were recognized as owners) did not "prevent the collective action of all the communities that are entitled to this right" (156).⁴²

Third, the Court then turned to an assessment of whether the "absence of adequate titling was only related to the State's failure to implement certain actions or the delay in doing so, or whether it was also related to deficiencies in Argentine law" (159), or if "the particularities of the State's legal system have represented an additional obstacle to the safeguard of the relevant right to property..." (160). For various reasons (165), it concluded that Argentina's "existing legal system is not appropriate to ensure the right to communal property" (164), and that the Indigenous Peoples have not "received effective protection" because, in part, they have "been dependent on the progress made through government negotiations and decisions on their property that, in the practice, 28 years after the first claim for the recognition of property rights, have not implemented their right adequately" (166).

⁴¹ See also *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama*, Series C No. 284 (2014); *Kaliña and Lokono Peoples v. Suriname*, Series C No. 309 (2015) and; *Xucuru Indigenous People v. Brazil*, Series C No. 346 (2018).

⁴² See also para. 157 (explaining that "It should be clarified that the establishment of Lhaka Honhat as a civil association was not imposed by the State; rather, it was the result of a valid act of association determined by the people concerned, and then recognized by the State. This State recognition, arising from a free and voluntary act, did not entail a violation of juridical personality, which as indicated was not violated in any other way").

Fourth, the Court discussed participation rights in relation to public works (e.g., roads, bridges) affecting the territory. On the road, it found that it had insufficient evidence to make a decision. On the bridge, there was no evidence that consultation had occurred, even though the National Institute for Indigenous Affairs had concluded that the bridge and related infrastructure would have a significant impact on the affected Indigenous Peoples (182).

Fifth, the Court examined alleged violations of rights to freedom of movement and residence and Art. 26 on the American Convention. The latter guarantees economic, social and cultural rights, including in connection with the right to a healthy environment, adequate food, to water, and to take part in cultural life (194 et seq). The Court discussed the content of each of these rights, their interdependence, and certain issues related to Indigenous Peoples. The Court observed that “this is the first contentious case in which it must rule on the rights to a healthy environment, to adequate food, to water and to take part in cultural life based on Article 26 of the Convention. Consequently, it finds it useful to include some considerations on these rights, as well as on their impact and particularities in the case of indigenous peoples” (201).⁴³ The latter, however, was not undertaken with sufficient depth, particularly about the collective aspects of the rights in the case of Indigenous Peoples (see e.g., 209, 226), although it did acknowledge the interconnections with security of tenure over lands and resources (e.g., 279, 284).⁴⁴ The Court reflected that the associated obligations extend “to the “private sphere” and that states “have the obligation to establish adequate mechanisms to monitor and supervise certain activities in order to ensure human rights, protecting them from actions of public entities and also private individuals” (207, 229). The Court also agreed with the UNCESCR that, in addition to guarantees for access and against unlawful pollution, **states are obligated to “provide resources for indigenous peoples to design, deliver and control their access to water”** (230). Also, the right to take part in cultural life “includes the right to cultural identity” (231).⁴⁵ The Court referenced various provisions of ILO 169, arts. 20(1), 29(1) and 32(1) of the UNDRIP, the CESCR’s General Comment No. 21 on Right of everyone to take part in cultural life,⁴⁶ and even Art. 10(c) of the Convention on Biological Diversity.

⁴³ Cf. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 (2017), <https://bit.ly/3K5PIIH>

⁴⁴ See e.g., CESCR, *General Comment 14, The right to the highest attainable standard of health*, E/C.12/2000/4 (2000), para. 27 (“The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health”); and CESCR, *General Comment No. 15, The right to water*, E/C.12/2002/11 (2002), para. 7 (“[t]aking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples”).

⁴⁵ See also footnote 231, explaining that “... the right ‘to participate in cultural life’ will be addressed from one specific angle: the right to ‘cultural identity.’ In this case, it is alleged that the characteristic or representative cultural features of culture as a “way of life” have been violated. The notion of “cultural identify” is found in ILO Convention 169 and in the American Declaration on the Rights of Indigenous Peoples, and it can be understood to be incorporated in the United Nations Declaration on the Rights of Indigenous Peoples, which expresses similar concepts and has been used by the Court with regard to indigenous communities. The Court has stated that ‘cultural identity’ is a ‘fundamental collective human right of indigenous communities that must be respected in a multicultural pluralist and democratic society’.”

⁴⁶ Para 36 (explaining that “The strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 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, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous

Applying the law to the facts of the case (272 et seq), the Court concluded that the issue to be resolved was whether the impacts on and in the territory “involved the violation of specific [ESCR] rights, in addition to the simple interference in the enjoyment of property... Also, if appropriate, the Court must determine whether the harm that occurred can be attributed to the State” (273). The Court then found that there had been harm caused to cultural identity and connected rights to food and environment (284), that the limited actions taken by the state in the 28 years that it had been aware of the complaints had been ineffective (287), and this had “occurred in a context in which the State has failed to guarantee the indigenous communities the possibility of deciding, freely or by adequate consultation, the activities on their territory” (288). The state thus violated “interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water contained in Article 26 of the American Convention, in relation to the obligation to ensure the rights established in Article 1(1)” (289).

Finally, the Court ordered detailed measures of reparations (319 et seq), including: demarcation and titling of a single territory without prejudice to “any agreements that the victim communities may reach among themselves with regard to the use of their common territory,” and “the administration of which must be autonomous” (327(1) and (2)); restitution of lands held by third-parties and relocation of non-indigenous persons who have failed to reach agreements on remaining; the removal of “the fences and livestock that belong to the criollo settlers” (330); and various actions to remedy the violations of the ESCR identified by the Court (332 et seq), including the establishment of a Community Development Fund of US\$2 million to coordinate and fund “actions addressed at the recovery of the indigenous culture, including among its uses, without prejudice to any others, the implementation of programs relating to food security, and the documentation, teaching and dissemination of the history of the traditions of the indigenous communities victims” (340). This includes guarantees of non-repetition in the form of an order that Argentina must adopt “legislative and/or other measures necessary ... to provide legal certainty to the human right to indigenous communal property,” ensuring that Indigenous Peoples nationwide are consulted about these measures (354-5).

Key text: Paras. 116, 128-29, 133-34, 136, 138-9, 144, 146, 148-9, 151, 153, 155-6, 173, 179, 181-2, 207, 209, 230, 240, 244, 274-5, 284

peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories”).

National

1. Re the Act respecting First Nations, Inuit and Métis children, youth and families https://bit.ly/37BPoEp (ENG) https://bit.ly/3Ms6Rh8 (FR)		
Country: Canada	Court: Quebec Court of Appeal	Date: 10 February 2022
Issues: Self-determination, self-government, children, family, ⁴⁷ application of UNDRIP Act (no. 7 below)		
<p>Summary: In this case, the Court was asked to interpret the <i>Act respecting First Nations, Inuit and Métis children, youth and families</i> (2020). This Federal law recognizes aboriginal self-government authority in general (s. 18) and specifically over child and family services, including aboriginal legislative authority in relation to both. Quebec argued that there was no such right and that the law unduly encroached on matters reserved to the provinces. The Act provides that an aboriginal “governing body” can choose either to exercise its authority over child and family services alone or it can seek to conclude a “coordination agreement” with the provincial and federal government(s) (s. 20). The latter triggers ss. 21-22 of the Act, which, if certain conditions are met, provide that aboriginal law on child and family services shall prevail over any conflicting or inconsistent provisions of federal or provincial laws on child and family services. This does not apply to aboriginal laws adopted without a coordination agreement, however.</p> <p>First, dismissing Quebec’s contentions, the Court ruled that Aboriginal peoples have always maintained a form of self-government, derived from their original sovereignty over their territories, and that this right is both “inherent” and guaranteed by Canada’s constitutional protection for aboriginal rights (s. 35). It also extends to child and family services, a particularly relevant concern e.g., in the light of the horrors of the residential school system. Likewise, the 2016 census confirmed that, although less than 8% of children in Canada, Aboriginal children amounted to 52% of children in foster care.</p> <p>Second, the Court found that Aboriginal customary law relating to children and families is integral to addressing these issues and, more generally, regulation of child and family services by Aboriginal peoples is fundamentally related to their identity and cultural development.⁴⁸ It referenced various articles of the UNDRIP, among other things, to reach this conclusion, observing that “this interpretation of s. 35 [of Canada’s Constitution], relating to the right to self-government, seems entirely consistent with the principles set out” in the UNDRIP (para. 61).</p> <p>Third, the Court nonetheless found that ss. 21 and 22 were unconstitutional to the extent that they accord primacy to Aboriginal laws over those of the provinces and federal government. Instead, the Court ruled that, although provinces could enact provincial child and family services law and programmes that apply to Aboriginal persons, these cannot prevail over or displace aboriginal</p>		

⁴⁷ See also P. Choate et al, *Sustaining Cultural Genocide—A Look at Indigenous Children in Non-Indigenous Placement and the Place of Judicial Decision Making—A Canadian Example*, 10 LAWS 59 (2021), <https://bit.ly/3L8pZ3O>

⁴⁸ See also *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs*, Series C No. 214 (2010), para. 263 (relating territorial rights to the rights of the child and cultural identity); and *Río Negro Massacres v. Guatemala*, Series C No. 250 (2012), para. 144 (“... [f]or the full and harmonious development of their personality, indigenous children, in keeping with their cosmovision, need to grow and develop preferably within their own natural and cultural environment, because they possess a distinctive identity that connects them to their land, culture, religion, and language”).

legislation enacted pursuant to the right of self-government unless they satisfy the test developed by the Canadian Supreme Court in prior cases for limitation of the rights guaranteed by s. 35 of the Constitution.

2. Judgment No. 273-19-JP/22: Prior Consultation in the A’I Cofán de Sinangoe Community

<https://bit.ly/3Mk71qQ>

Country: Ecuador

Court: Constitutional Court

Date: 27 January 2022

Issues: Territorial rights, consultation, rights of nature, healthy environment, mining (outside titled lands, but within lands traditionally owned). References various international standards, including the UNDRIP, ILO 169 and various judgments of the Inter-American Court of Human Rights.⁴⁹

Summary: Ecuador (the Ministry of Mines) granted over 20 mining concessions on one side of the Aguarico River and was processing 32 more. It did so without any attempt to consult with and obtain the FPIC of affected indigenous communities, including the Cofán, who have title to the lands on the opposite bank of the river. This omission was justified on the basis that the lands were not within a titled indigenous area and, therefore, there was no state obligation to seek their participation in decisions.

The Court rejected the state’s arguments, **first**, because indigenous territorial rights derive from traditional ownership/customary tenure systems, not from the state (para. 78). Thus, the extent of titled areas, previously demarcated and issued by the state, was not dispositive of the question of whether indigenous territorial rights also encompass the area where the state had granted mining concessions.

Second, having observed that extractive operations or other unauthorized intrusions into traditional territory always constitutes a ‘direct affect’ on Indigenous Peoples, the Court ruled that consultation with the objective of reaching consent was required (para. 79). Additionally, it highlighted the state’s “duty of accommodation,” which includes an obligation to modify or even cancel the initiative based on the consultations or to justify why changes cannot be made (para. 95, 116-8, 123).⁵⁰ The Court ruled that, “in exceptional cases where it is decided to implement the project even without the consent of the community” (para. 123), the state must justify why the project should go ahead, provided that “under no circumstances may a project be carried out that generates disproportionate sacrifices to the collective rights of the communities and nature” (para. 123). This is true no matter the asserted public interest justification (para. 125). Additionally, those affected must share in project benefits, and the state must ensure their participation in decision-making, minimize impacts, and mitigate and compensate for damages, and, where agreed, integrate community members into the project (para.

⁴⁹ See also D. Vela-Almeida and N. Torres, *Consultation in Ecuador: Institutional Fragility and Participation in National Extractive Policy*, 48 LATIN AMERICAN PERSPECTIVES 172 (2021), <https://bit.ly/3vBXtkj>

⁵⁰ See also *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* [2017] SCC 41; *Clyde River (Hamlet) v Petroleum Geo-Services Inc* [2017] SCC 40 (referring to the Crown’s duty to consult and, where necessary, accommodate Indigenous Peoples in relation to aboriginal title and rights extended to situations where the aboriginal rights and title had not yet been proved, and confirming that the Crown can rely on steps taken by an administrative body or regulatory agency to partially or completely fulfil its duty to consult and accommodate); and *Äärelä and Näkkäläjärvi v Finland*, CCPR/C/73/D/779/1997 (2001), para. 7.6.

124). The Court concluded by quoting the 2009 UNSRIP report, which stresses that “A direct and substantial impact on the lives or territory of Indigenous Peoples establishes a strong presumption that the proposed measure should not be taken without the consent of the Indigenous Peoples. In certain contexts, the presumption may become a prohibition on the measure or project in the absence of indigenous consent (para. 126, citing A/HRC/12/34, para. 47).

Third, the Court upheld the lower court rulings that the right to a healthy environment and the rights of nature had been violated e.g., by the destruction of a plant sacred to the Cofán (para. 127-30). Referring to an internal ‘territorial protection’ law adopted by the Cofán, including the establishment of an “indigenous guard” in this respect, the Court ruled that both measures were protected as part of the “exercise of self-determination” (para. 138).

Last, the Court referred to illegal mining as always having an impact on Indigenous Peoples and the environment and an activity that by definition negates the rights to participate in decisions, etc. (para. 141). The state is obligated to adopt “efficient and effective mechanisms” to control, stop and sanction illegal mining (para. 142).

3. Kochale and Ors v. Lake Turkana Wind Power Ltd and Ors, Meru ELC No. 163 of 2014

<https://bit.ly/37Hr1VL>

Country: Kenya

Court: Environment and Land Court at Meru

Date: 19 October 2021

Issues: Land rights, traditional and other economic activities, cultural rights, negative impact of wind power project, expropriation, and compensation

Summary: The plaintiffs are members of pastoral communities, including the Turkana, Samburo, Rendille and El Moro peoples. Around 600 km² of ancestral lands had been alienated to a wind power company, which obtained a 33 year-long lease (without any guarantees for community access and use or other rights) and erected a series of turbines across the land, investing around US\$670 million.⁵¹ These were intended to produce 300MW and to provide about 17% of Kenya’s national power needs via the national grid.⁵² Approximately 2 000 Turkana were resettled due to road construction for the project. This allegedly took place in violation of various statutory rules, the Constitution and Kenya’s international obligations, such as obtaining FPIC from the affected Indigenous Peoples and providing compensation for lost land and resources. This area was critically important to the Indigenous Peoples, including for subsistence, grazing, settlement, water, and cultural rites/practices. There was a dispute as to whether the affected peoples were notified or provided the opportunity to participate in decision-making. The affected peoples asserted that they were not even aware that the land had been formally alienated, whereas the company claimed that several meetings were held with communities between 2009 and 2015.

The Court found, **first**, that due process had not been followed in the decisions taken about alienation of the land, including express requirements in the *Trust Land Act*. For this reason, it determined that it was not relevant if any consultation had taken place as there was no statutory requirement (para. 115-

⁵¹ See also ‘Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project (Kenya) Cases’, *Opinio Juris*, 15 December 2021, <https://bit.ly/3Ms8Thg> ; and G. Achiba, *Navigating Contested Winds: Development Visions and Anti-Politics of Wind Energy in Northern Kenya*, 8 LAND 7 (2019), <https://bit.ly/3k32VY7>

6). It then discussed arguments that the project served the public interest and was already generating electricity for the benefit of the nation or that it was consistent with government policy, even though the policy departed from statutory requirements. The Court, however, decided that the purported benefits could not justify a “blatant violation of the law” (para. 119).

Second, the Court turned to whether the land, environmental, social and cultural rights of the affected peoples were violated. It ruled that no or insufficient evidence had been presented that could allow it to find violations of any of the rights identified by the plaintiffs.

Third, on the issue of compensation, the Court found that, if due process had been followed (which it was not), the affected peoples would have been entitled to compensation for the alienation and deprivation of their property rights. The Court declined to order compensation however, maintaining that the plaintiffs had not requested the same, at least not with the requisite specificity, it would be premature considering its orders, and that others were better able to assess compensation.

Fourth, the Court ruled that due to the illegality of the process of acquiring the land and the 33 year-long lease that the lease was null and void and should be cancelled (para. 142-8). It declined to suspend or nullify the project because it was unsure what that would entail in practice and because of measures it ordered in the case (para. 153).

Last, citing special circumstances (e.g., the project has been completed and was producing power), the Court allowed the defendants one year to correct the illegality in the land acquisition process, “failing which the titles will automatically stand cancelled and the suit land will revert to the community” (para. 158).

4. Fosen Vind Case, HR-2021-1975-S, (nr. 20-143891SIV-HRET), (nr. 20-143892SIV-HRET) and (nr. 20-143893SIV-HRET)

<https://bit.ly/3rKBkzs>

Country: Norway

Court: Supreme Court

Date: 11 October 2021

Issues: “The case concerned whether the construction of Storheia and Roan windfarms on Fosen peninsula amounts to a violation of the reindeer herders’ right to enjoy their own culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). A grand chamber of the Supreme Court unanimously found a violation, and ruled the licence and expropriation decisions invalid.”⁵³ Violation of Article 5(d)(v) of ICERD also cited as a basis for the illegality of permits.

Summary: This case concerns part of the largest onshore wind power project in Europe and its impact on Sami Indigenous people. The wind farm licenses were first issued in 2010 (the Roan and Storheia windfarms, among others). The state also issued a licence to build two power lines, through Roan to Storheia and its consent was given for expropriation of land. The Sami objected, citing violations of their cultural and other rights and the importance for two groups of Sami of the affected areas for reindeer herding. This was rejected by Norway in 2013 and Fosen Vind, the operating company, was allowed to start construction, which finished in 2020. The matter was brought before the courts, landing eventually in the Supreme Court of Norway in 2020. Much of the judgment concerns the validity of the

⁵³ See also ‘Licences for wind power development on Fosen ruled invalid as the construction violates Sami reindeer herders’ right to enjoy their own culture’, *Supreme Court of Norway Case Summary*, October 2021, <https://bit.ly/3rKBkzs> . See also D. Cambou, *Uncovering injustices in the green transition: Sámi rights in the development of wind energy in Sweden*, 11 ARCTIC REVIEW 310 (2020), <https://bit.ly/3k35Ik3> ; and D. Cambou et al, *Reindeer husbandry vs. wind energy: Analysis of the Pauträsk and Norrbäck court decisions in Sweden* in M. Tennberg, E. Broderstad & H-K. Hernes (eds.), *INDIGENOUS PEOPLES, NATURAL RESOURCES AND GOVERNANCE. AGENCIES AND INTERACTIONS* (London: Routledge, 2021), <https://bit.ly/3ribUm0>

lower courts' findings and rulings. The Court then turns to the main issue: Whether the wind farms separately or cumulatively contravene the rights of Sami as guaranteed by ICCPR, Art. 27 (persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture..."). The Court explained that pursuant to section 2(3) of Norway's *Human Rights Act*, the ICCPR has the status of Norwegian law and, where there is a conflict, the ICCPR will prevail; "[t]his implies that the licence is void if [Art. 27] is violated" (para. 100).

First, the Court rejected Norway's contention that Art. 27 only protects individuals and, thus, cannot be invoked by Sami groups. It observed that "the minorities' culture is practiced in community, which gives the protection a collective nature," and that groups of Sami practice reindeer husbandry jointly, making it "difficult to draw a sharp distinction between the individuals and the group" (106).

Second, the Court assessed the 'threshold test' for violations in relation to Art. 27, considering whether a complete "denial" was required. Reviewing the jurisprudence, the Court concluded that "there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment," (119) considering also cumulative actions and impacts (116). Another factor deemed relevant was whether the affected people had effectively participated in decision-making, even if consultation would not prevent a violation "where the consequences of the interference are sufficiently serious" (121, 142).

Third, the Court ruled that "**the wording of Article 27 does not allow the States to strike a balance between the rights of indigenous peoples and other legitimate purposes**" (124) and "economic development may not undermine the rights protected by Article 27 (126, 143). Indeed, **the protection of a minority "would be ineffective, if the majority population were to be able to limit it based on its legitimate needs"** (129).

Fourth, the Court recalled that the Human Rights Committee's jurisprudence holds, inter alia, that "the admissibility of measures depends on whether the members of the community in question 'will continue to benefit from their traditional economy'," noting also that the Sami had asserted that there would be a violation if the interference prevents them from benefiting from reindeer herding (132). The question to be resolved by the Court was defined as "whether Storheia and Roan windfarms have a substantive negative impact on the Sami people's possibility to enjoy their own culture" (135).

Fifth, applying this to the facts, the Court concluded that the wind farms had "changed the character of the area completely: the winter pastures were "lost in important areas connected to reindeer husbandry – and thus to the reindeer herders' culture;" and grazing resources were eradicated "to such an extent that it cannot be fully compensated by the use of alternative pastures. As a result, the reindeer numbers will most likely have to be dramatically reduced" (136). Moreover, this reduction of reindeer numbers will mean "that the herders may no longer benefit from the trade, or at least that the profit will no longer be proportionate to the efforts" (137, 144). The Court also factored in that "the South-Sami culture is particularly vulnerable," and that reindeer husbandry "carries this culture and the South-Sami language" (141). It then found "after an overall assessment that the wind power development will have a substantive negative effect on their possibility to enjoy this culture" (*id.*).

Sixth, agreeing with Fosen Vind that renewable energy is crucially important, the Court again recalled that Art. 27 "**does not allow for a balancing of interests,**" and, **at any rate, the objective "could also have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives"** to the wind power farms (143).

Last, after reiterating that the wind farms "have a substantive negative effect on the reindeer herders' possibility to enjoy their own culture," the Court explains that "[w]ithout satisfactory remed[ial] measures," this violates Art. 27, "which will render the licence decision invalid" (144). The Court then turned to determining if the licenses would survive "if compensation is awarded for the winter feeding

of the reindeer” (*id.*). It concluded that they did not survive and that the proposed measure of winter feeding “deviates considerably from traditional, nomadic reindeer husbandry” (149).

Key text: Paras. 129, 131, 143

5. Trans-Tasman Resources Ltd v. Taranaki-Whanganui Conservation Board and Ors, SC 28/2020 [2021] NZSC 127

<https://bit.ly/36EUD5H>

Country: Aotearoa New Zealand

Court: Supreme Court⁵⁴

Date: 30 September 2021

Issues: Seabed mining, treaty rights, customary law as part of national law,⁵⁵ requirement to account for customary norms and rights when issuing permissions, duty to accommodate, spiritual and other relations to ocean territory, including self-determination (e.g., UNDRIP, Art. 25)⁵⁶

Summary: This case concerns a challenge brought against permits for seabed mining within New Zealand’s exclusive economic zone, which had been granted by a body within the Environmental Protection Authority (the DMC) under the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (the EEZ Act). The High Court ruled against the government, a decision that was upheld by the Court of Appeal and then heard by the Supreme Court.

First, the Court explained that the effect of the reference to the Treaty of Waitangi in s. 12 of the EEZ Act required “a broad and generous construction,” providing “a greater degree of definition as to the way Treaty principles are to be given effect...” (para. 8, 151, 296). This ‘treaty clause’ required that the DMC take into account the effects of the proposed seabed mining on Māori “existing interests” so as to adhere to “the Crown’s obligation to give effect to the principles of the Treaty” (*id.*).

Second, the Court found that Māori “tikanga-based customary rights and interests” constitute ‘existing interests’ under the EEZ Act, “including kaitiakitanga and rights claimed, but not yet granted, under the Marine and Coastal Area (Takutai Moana) Act 2011” (*id.*).⁵⁷ Moreover, building on prior precedents, the Court ruled that tikanga constitutes “other applicable law,” which “must be taken into account by the DMC ... where its recognition and application is appropriate to the particular circumstances of the consent application at hand” (*id.*). Recalling that the *Resource Management Act* defines tikanga as ‘Maori customary values and practices’, it explained that this definition “is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of Māori customs and practices, part of which is properly described as custom law” (169).

Third, the Court agreed that “the existing interests that the DMC needed to consider here are kaitiakitanga of iwi [tribes] of their relevant rohe [territory]; rights recognised by the [*Marine and Coastal Area (Takutai Moana) Act 2011*]; and interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992” (154). This was tied to and derives from article 2 of the Treaty of Waitangi, which

⁵⁴ See also *Mercury NZ Limited v The Waitangi Tribunal* [2021] NZHC 654 (“[102] In my view, the statutory provisions to be applied by the Tribunal do not give it a discretion to make decisions that are inconsistent with tikanga, or which would involve a contemporary breach of the principles of the Treaty. [103] It is now well accepted that tikanga Māori is part of New Zealand’s common law...”), <https://bit.ly/38a0LDr>

⁵⁵ See also *Ngawaka v. Ngāti Rehua-Ngātiwai ki Aotea Trust Board*, [2021] NZHC 291 (26 February 2021), <https://bit.ly/3rMdHGp>

⁵⁶ Art. 25 reads: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

⁵⁷ ‘Kaitiakitanga’ (noun) “guardianship, stewardship, trusteeship, trustee.”

guarantees Māori tino rangatiratanga in the context of the marine environment (transl. self-determination, sovereignty, autonomy, self-government, control) (*id.*).

Fourth, the DMC was required, but failed to, understand “the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply. Here, while there was some reference to spiritual aspects, the primary focus does appear to have been on physical and biological effects” (161).

Key text: Paras. 149-152, 154-7, 160-2, 169, 296, 297

6. United Organisation for Batwa Development in Uganda v. AG, [2021] UGCC 22

<https://bit.ly/3rNuCbL>

Country: Uganda

Court: Constitutional Court

Date: 19 August 2021

Issues: Displacement for conservation, discrimination, reparations

Summary: The Batwa comprise around 6 000 persons, living mostly in south-west of Uganda. National parks to protect mountain gorillas and a forest reserve were established over their traditional territory in the 1930s, during the British colonial era, and then subsequently modified and/or reaffirmed up until 1991. This led to the forced displacement of the Batwa and their dispossession and exclusion from their ancestral lands to the present day. This often occurred by force, with fatalities and with the ongoing criminalization of their use of the forest, including denial of access to sacred sites within the protected areas. This was done without seeking their effective participation and consent and without any form of compensation. After their eviction, the Batwa became squatters on lands peripheral to the protected areas and owned by others, usually in deplorable conditions that include contemporary forms of slavery. The Batwa challenged this as a violation of various provisions of Uganda’s Constitution and several international instruments, including the UNDRIP. After the case was decided, Uganda appealed and the case is now before the Uganda Supreme Court, rather than the High Court as ordered in this case.

First, after deciding that it had jurisdiction to hear the case (p. 6-17), the Court (per Musoke JCC) determined that the main issue was the applicability of “affirmative action in favour of marginalized groups” per Art. 32(1) of the Constitution (17). In particular, what does it mean, does it apply to the case, and, if so, what affirmative action measures may be required in relation to the Batwa in the light of the circumstances of the case (*id.*)? The Court concluded that ‘affirmative action’ means “remedial action which ... is required to be done in order to rectify effects of past discrimination of historical injustice,” and depends on the facts of each case (18).

Second, the Court then reviewed the arguments presented, including the basis for finding that the Batwa had a right to or interest in the land in question and whether these rights/interests were lawfully extinguished (24), referencing domestic, comparative, and international law (19 et seq). It found that the evidence proved that the Batwa had a right/interest in and to the lands now enclosed by the three protected areas, explaining that: “[t]he relevant land is the land to which the Batwa heritage is attached, and therefore their eviction therefrom left them landless” (33). The Court declined to rule on whether the Batwa hold aboriginal title at common law to the land, deeming it unnecessary as the case “requires only that this Court determine whether it is necessary to take affirmative action measures in

favour of the Batwa; and further, to determine what those measures may be” (38) (noting that it was the Court itself that so restricted the analysis).

Third, the Court turned to the application of Art. 32 of the Constitution (on affirmative action), concluding that the eviction of the Batwa without compensation had resulted in their “marginalization” (39-40). Tracking the language of Art. 32, the Court then found that this marginalization was grounded in reasons created by history, specifically the eviction of the Batwa “from the land where their ancestors had lived for years, centuries or even millennia ... without seeking their consent and without the Government making provision for payment of adequate compensation or at all, to the Batwa” (40). This rendered them landless squatters “and has severely affected not only their livelihoods, but has destroyed their identity, dignity and self-worth as a people and as equal citizens with other Ugandans” (43). The Court thus found that the Batwa were entitled to affirmative actions “to redress the imbalance which exists against” them (41).

Finally, the Court assessed the remedies that may apply, all of which concerned the content and application of affirmative action measures. It concluded that it did not have sufficient evidence to determine which affirmative action measures “must be taken to improve the Batwa people’s situation” and the matter should be remanded to the High Court (45). It exhorted the High Court to adopt measures to “ameliorate” the “vulnerable and appalling situation” in which the Batwa find themselves and to ensure that any measures ordered “do not expose the Batwa people to further exploitation, are practically effective and are enjoyed by all the Batwa people” (45-6).

7. United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14)

<https://bit.ly/3MIXHCY>

Country: Canada

Legislation⁵⁸

Date: 21 June 2021

Issues: Per s. 4, “The purposes of this Act are to (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and (b) provide a framework for the Government of Canada’s implementation of the Declaration.”

Summary: This is an important legislation that gives effect to the UNDRIP in Canadian law. It requires that the Canadian government and its agencies assess and develop action plans in relation to implementation of the UNDRIP as it relates to their various competencies.

See also: *Thomas and Saik’uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 (7 January 2022), where the British Columbia Supreme Court refers to the Federal and Provincial UNDRIP Acts (also citing UNDRIP, arts 26-29 as “a source for the interpretation of British Columbia and Canadian law” in the case at hand (para. 207).⁵⁹ The Court also used the UNDRIP to support its conclusions in paras. 192 and 280. Therein, the Court opines that (212):

It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is

⁵⁸ See also ‘Two years after B.C. passed its landmark Indigenous Rights act, has anything changed?’, *The Narwahl*, 21 December 2021, <https://bit.ly/3K9n9u7>

⁵⁹ See also K. McNeil, ‘Indigenous Rights and Private Party Liability’, 25 January 2022 (commenting on the case), <https://bit.ly/3rL9tPD>

one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, UNDRIP legislation has on the common law.

8. Ical and Jalacte Maya Village and Ors v. AG Belize and Ors, Claim No. 190 of 2016

<https://bit.ly/3LdyGdc>

Country: Belize

Court: Supreme Court (trial court)

Date: 16 June 2021

Issues: Damages and other relief sought by the Maya village of Jalacte against Belize as compensation for the acquisition, use and damage of their lands without first obtaining FPIC

Summary: This case concerns the taking of Maya lands for a road upgrade project and associated buildings. These lands are not titled; they are owned by virtue of Maya customary tenure. They are also, in principle, protected by constitutional guarantees as explicated by the Caribbean Court of Justice (CCJ) in *Maya Leaders Alliance v. AG Belize* (2015).⁶⁰ Compensation for the taking was neither discussed with Jalacte village or its leaders, nor was any provided, nor was its FPIC sought or obtained at any stage of the process (para. 5). Over 30 acres of various farming lands, active and fallow, used by the village were destroyed, sacred sites were negatively affected, and traditional medicinal resources were harmed.

First, as a trial court, the Court began by reciting the evidence and testimony presented (para. 6-117).

Second, the Court ruled that the lands in question were subject to Maya customary land tenure rights, which “gives rise to collective and individual property rights” guaranteed by the Belize Constitution (page 74, 133-5). The Court held that this issue had been litigated and ruled on previously by Belize’s highest court, the CCJ, and, therefore, “the doctrine of issue estoppel precludes parties from re-litigating an issue already decided by the highest court” (75-6). It thus confirmed that the lands in question belonged to the Maya village. Belize argued that Jalacte’s lands had not yet been formally delimited and demarcated and, thus, it was not possible to determine whether “the land in issue is in fact Jalacte lands” (76). The Court rejected this view, stating that the evidence confirms that “Jalacte village and its residents hold the lands at issue pursuant to rights arising from Maya customary land tenure, it is irrelevant to this claim where the rest of Jalacte village’s lands may lie, or where the boundaries of its entire village lands may be” (79).⁶¹

Third, the Court found that Belize had arbitrarily taken, used and damaged the village’s collective property and that it had failed to apply mandatory constitutional and statutory safeguards (e.g., the *Lands Acquisition (Public Purposes) Act*) (79-81).

Fourth, the state’s lack of regard for Maya rights and applicable laws was even more “egregious” because it also failed to articulate a valid public purpose for the deprivation of lands, which also precluded the village from challenging the validity of the same before the judiciary, and, in at least one case, a purported and *post hoc* public health justification put forward by the state was deemed to be unjustified (81-7).

⁶⁰ <https://bit.ly/37xn2LD>

⁶¹ The Court also quoted a 2010 Supreme Court judgment, itself citing *Mabo v Queensland No. 2*, in support of its decision, stating that: “... it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or membership of the community or of representative of the community, which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law” (p. 77).

Fifth, Belize argued that either its “constitutional authority” in general or the language of the *National Lands Act* – allowing for takings of granted or leased national/state lands– permitted its acts and omissions. The Court rejected this view, stating that Maya “customary title is not derived from any grant or lease of national lands from the central government; it arises out of Maya customary land tenure system, a system that has been operating in what is now southern Belize since before Belize became a British colony” (90, 135-6⁶²).

Sixth, the Court found that the takings and damages also contravened two applicable court orders, both requiring that Belize refrain from affecting Maya land tenure rights without FPIC, and constitutional safeguards (e.g., due process and compensation) (93). It concluded that Belize’s failure to “abide by the order of this nation’s highest court, the [CCJ], by securing the prior informed consent of the village of Jalacte before the commencement of this project is ... unacceptable” (134).

Seventh, the Court then turned to Belize Constitution, Art. 3(a), which guarantees the right to the protection of the law without discrimination. It recalled the CCJ’s 2015 judgment (CCJ, para. 59), which determined that “**the right to protection of the law encompasses the international obligations of the State to recognise and protect the rights of indigenous people**” (95). The Court opined in this regard, again citing the CCJ, that “the failure of Belizean statutory law to extend protection to Maya customary rights violates the Maya people’s right to protection of the law and ‘cannot go unchecked.’ This case presents the clearest possible example of the effect of the government’s repeated violation of the constitutional guarantee to equal protection of the law” (*id.*). Moreover, “By treating lands used collectively by Maya villages as vacant national lands, government officials continued to deny the Claimants’ rights to equal protection of the law when the Defendants knew that to do so violates the Constitution” (97).

Eighth, the Court reviewed and applied the rules concerning damages, observing that the law in Belize has yet to accommodate judicial decisions on Maya land rights and has not moved beyond viewing land only as a commodity (97 et seq). Opining that it would be “absurd to quantify ‘reasonable compensation’ for such lands with reference to a market in which the property does not and cannot participate [being inalienable], and which does not reflect the value of the village’s relationship with the land,” the Court ruled that “international law holds that compensation for the taking of Indigenous Peoples’ lands must take their unique context into account. In particular, restoration or replacement of lands should be the preferred method of compensation” (99-100).⁶³ It further concluded that Jalacte was entitled to “vindicatory damages” (normally used in connection with violations of constitutional rights) because Belize’s “behaviour in this case has been particularly egregious, in that it not only arbitrarily deprived the Claimants of their customary rights without extending constitutional protections, but [it] expressly denied the very existence of those rights...” (108). It concluded more generally that: “Like the first European arrivals in the Americas, [Belize] treated these lands as though they were *terra nullius*; empty lands under the jurisdiction of the Crown, in which Maya occupation was of no legal consequence. The Claimants’ beg this Court to vindicate the worth and value of the Maya people and their lands in a manner [that Belize] will no longer be able to ignore” (112). Rather, because the lands in question were traditionally owned by Jalacte and subject to rights affirmed by Belize’s highest court, it “follows from this is that the informed prior consent of the affected people must be obtained before the commencement of any project that will affect their land” (135).

⁶² Stating that “the CCJ decision was a clear directive to the Government of Belize that these villages in southern Belize contained lands to which Mayan customary title applied. Thus, title to these lands was not derived in the usual manner through the Government process of lease or grant; customary title is derived through traditional use of the lands by the Mayan people for food, hunting, farming, medicinal treatment, etc. It therefore behooved the government to set about, in consultation with the Mayan people, demarcating the extent to which these lands have been so used.”

⁶³ *Cf.* UNDRIP, Art. 28.

Finally, the Court ordered that some of the lands be returned to Jalacte (142) and that compensation in the amount of US\$3 127 375.00 be paid for the arbitrary deprivation of and damages to Jalacte’s lands.

Key text: Pages 74-6, 79-81, 87, 90, 93, 95, 97, 99-100, 108, 112, 133-6

9. R. v. Desautel, 2021 SCC 17

<https://bit.ly/3xOIRCe>

Country: Canada

Court: Supreme Court

Date: 23 April 2021

Issues: Can aboriginal rights be exercised within traditional territory bisected by an international border (USA – Canada), where the person exercising the right is not a citizen of the country (Canada) in which the right was exercised (and who was arrested and convicted of illegal hunting).

Summary: In this case, Mr. Desautel, a Native American living in Washington State, U.S.A., was convicted of hunting without a license in British Columbia, Canada. He asserted as a defence that he was exercising aboriginal rights within his traditional territory and that such rights were protected by Section 35(1) of the Canadian Constitution. This section recognizes and affirms existing aboriginal and treaty rights vested in the “Aboriginal peoples of Canada.” Whether this could include Mr. Desautel or the Indigenous People to which he belongs, which, today, no longer exists as a distinct community in Canada, was the main issue. The Supreme Court thus was required to interpret the meaning of “Aboriginal peoples of Canada” and, separately, to determine whether hunting was also a protected aboriginal right in the context of the case.

First, writing for the majority, Justice Rowe explains that the Supreme Court’s jurisprudence confirms that s. 35(1) has two main purposes: “to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown’s assertion of sovereignty over them. These purposes are reflected in the structure of Aboriginal rights and title doctrine, which first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order” (para. 22).⁶⁴

Second, the Court concluded that “The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada” (31). This includes Indigenous Peoples, present when the Europeans arrived, who “later moved or were forced to move elsewhere, or on whom international boundaries were imposed.... The displacement of Aboriginal peoples as a result of colonization is well acknowledged” (33). It further explained that “an interpretation that

⁶⁴ See also *Newfoundland and Labrador (Attorney General) v. Uashaunuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (21 February 2020), p. 7-8 (“In the context of s. 35 claims that straddle multiple provinces, access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land. Moreover, the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters. Where a claim of Aboriginal rights or title straddles multiple provinces, requiring the claimant to litigate the same issues in separate courts multiple times would erect gratuitous barriers to potentially valid claims. This would be particularly unjust when the rights claimed pre-date the imposition of provincial borders on Indigenous peoples. The later establishment of provincial boundaries should not be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights”).

excludes Aboriginal peoples who were forced to move out of Canada would risk ‘perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers’” (*id*).

Third, the Court deferred to the factual findings made by the lower courts to determine that Mr. Desautel was in fact hunting within the traditional territory of his Indigenous/Aboriginal People, even though this people no longer lived in Canada but across the border in the U.S.A. (48-9, 62).

Fourth, the Court examined if the modern practice of hunting is “connected to, and reasonably seen as a continuation of,” pre-contact hunting practices, thus qualifying as a protected ‘aboriginal right’ under s. 35(1) (54). The majority, therefore, ruled that that Mr. Desautel “has a s. 35(1) Aboriginal right to hunt in [his] ancestral territory ... in British Columbia” (70).

Fifth, the Court observed that even though Indigenous People(s) “outside Canada can assert and hold s. 35(1) rights, it does not follow that their rights are the same as those of communities within Canada,” citing state obligations to consult, or the scope or extent thereof (71 et seq), and the criteria for justifying infringement of Aboriginal rights as examples of where there may be a difference (77 et seq). Last, the Court upheld the decisions of the lower courts to dismiss the charges against Mr. Desautel.

Key text: Para. 22-3, 31, 33, 48-9, 71 et seq.

10. Asociación Interétnica de Desarrollo de la Selva Peruana (AIDSEP) v. Procurador Público Especializado en Materia Constitucional y Otros, Sentencia A.P. No. 29126-2018-LIMA
<https://bit.ly/3K6OZHm>

Country: Peru **Court:** Supreme Court, Constitutional Chamber **Date:** 13 January 2021

Issues: Does prior consultation law apply to public works/services, e.g., highways, power transmission lines, waterways, health and education facilities, among others; and should provisions of the Regulations (Supreme Decree No. 001-2012-MC) concerning the Peruvian Prior Consultation Law (Law No. 29785) allowing exemptions for public works/services be revoked. Compatibility with international conventions in force for Peru.
Referencing UNDRIP, arts. 3, 4, 19, ILO 169, arts. 6, 7, and various judgments of the Inter-American Court of Human Rights.⁶⁵

Summary: This case concerns a challenge brought against regulations made to implement the Peruvian *Prior Consultation Law* of 2012 insofar as those regulations exempted public works and public services from the prior consultation requirements. This was opposed as a violation of (superior) international norms incorporated into Peruvian law as well as the terms of the *Prior Consultation Law* itself. In reaching its decision, the Court, **first**, analysed Peru’s international obligations derived from the UNDRIP, ILO 169 and the inter-American human rights system, and related these to domestic law and practice. The Court rejected the state’s argument that the *Prior Consultation Law* cannot amount to “a veto,” observing that “the legal support of prior consultation with indigenous and tribal peoples is linked to the fundamental recognition of cultural identity, is based on its recognition in international human rights norms and jurisprudence of a binding nature for the State of Peru so it is not possible to make decisions or carry out activities that violate this fundamental right” (para. 4.7). Referring to

⁶⁵ See also *Comarca Naso Tjer Di*, No. 29167-A, Supreme Court of Panama, 28 October 2020 (concerning land rights, confirming the constitutionality of the law establishing the Naso Tjër DI Comarca, control over resources, relationship to biodiversity protection), <https://bit.ly/3xHS7XA> (Spanish only).

UNDRIP, Art. 3 (self-determination) and ILO 169, Art. 7(1) (control over development), the Court explained that “**these peoples must participate in the formulation, application and evaluation of the national and regional development plans and programs likely to affect them**” (*id.*).

Second, discussing the challenged regulation, the Court found that the exemption of public works/services from the prior consultation requirement contravened the referenced international standards (e.g., because it “violates the right to cultural identity, to make their own decisions, to evaluate and decide what is convenient or not;”) and the *Prior Consultation Law* itself (para. 5.4).

Finally, the Court ordered the nullification of regulation 15 with “retroactive effect.”

Key text: Paras. 4.3.1-4.3.2, 4.4.1-4.4.2, 4.6

11. Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3,⁶⁶ <https://bit.ly/3rM44Yu>

Country: Australia

Court: High Court of Australia

Date: 11 February 2020

Issues: Membership, connection to traditional territory, nature and characteristics of aboriginal rights

Summary: This case concerns the claims of Mr. Love and Mr. Thoms that they were Aboriginal people and not subject to Australia’s immigration laws as “aliens,” even though both were born outside of Australia and held citizenship of other countries (Papua New Guinea and New Zealand, respectively). Both had lived in Australia for many years with immigration/residency visas, which were revoked after convictions for violent crimes and made them liable to deportation. Both asserted that they satisfied the test in *Mabo (No. 2)*: i.e., “aboriginality depends upon biological descent and upon recognition of the person’s membership of the group with which the person identifies. ... [M]embership of the group depends upon recognition by the Elders or other persons having traditional authority amongst those people” (para. 23). On this basis, they argued that they could not be considered as “aliens” for the purposes of Australian constitutional and statutory law and, ultimately, deportation.

In a 4 to 3 judgment, a majority of High Court, **first**, accepted that profound connections to traditional territory, including as recognized via associated rights in the common law (known as native title in Australia) could also be used to interpret the term ‘alien’ (e.g., 340,⁶⁷ 349, 364, 451). Justice Gordon, for instance, explains that: “Failure to recognise that Aboriginal Australians retain their connection with land and waters would distort the concept of alienage by ignoring the content, nature and depth of that connection;” it “would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance” (298). Justice Bell, citing the UNDRIP, explained that “It is not offensive, in the context of contemporary international understanding, to recognise the cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands, and in light of that recognition to hold that the exercise of the sovereign power of this nation does not extend to the exclusion of the indigenous inhabitants from the Australian community” (73). Further, she observes that “The position of Aboriginal Australians ... is *sui generis*,” or unique (see also 262, 333⁶⁸), and the power conferred on the state by the Constitution “does not extend to treating

⁶⁶ See also S. Morris, *Love and Thoms: Implications for Indigenous Constitutional Recognition*, FEDERAL LAW REVIEW (fthcming), <https://bit.ly/38g8P5N>

⁶⁷ Acknowledging “... the deeper truth recognised by *Mabo* [No 2]: that the Indigenous peoples of Australia are the first peoples of this country, and that the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European settlement.”

⁶⁸ Stating that “... Aboriginal Australians occupy a unique or *sui generis* position in this country, such that they are not aliens.”

an Aboriginal Australian as an alien because, despite the circumstance of birth in another country, an Aboriginal Australian cannot be said to belong to another place” (74, 262).

Second, the majority concluded that Mr. Thoms was legally an Aboriginal person under Australian law, having satisfied the test noted above, whereas this issue was not fully resolved with respect to Mr. Love (e.g., 75 et seq), mainly whether he met the third part of the test: “the person is accepted by other members of the Aboriginal community as an Aboriginal person” (e.g., 185).

Third, in this regard and more generally, Justice Nettle concludes that “a person [cannot] be a member of such an Aboriginal society unless he or she is accepted as such by other members of the society according to the traditional laws and customs of the society.... Thus, for present purposes, the most significant of the traditional laws and customs of an Aboriginal society are those which allocate authority to elders and other persons to decide questions of membership. Acceptance by persons having that authority, together with descent (an objective criterion long familiar to the common law of status) and self-identification (a protection of individual autonomy), constitutes membership of an Aboriginal society: a status recognised at the ‘intersection of traditional laws and customs with the common law’” (271). He also explains that “To classify any member of such an Aboriginal society as an alien would have been to recognise that the Crown had power to tear the organic whole of the society asunder, which would have been the very antithesis of the common law’s recognition of that society’s laws and customs as a foundation for rights and interests enforced under Australian law” (272). Citing the UNDRIP, Nettle J states that “... although more recently formulated in terms of self-determination, the capacity to represent and obligations to protect indigenous peoples continue to be proclaimed in and by international instruments” (274, 278). Moreover, “Underlying the Crown’s unique obligation of protection to Australian Aboriginal societies and their members as such is the undoubted historical connection between Aboriginal societies and the territory of Australia which they occupied at the time of the Crown’s acquisition of sovereignty. As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with ‘country’, including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations” (276).⁶⁹ Nettle J then concludes that “... Australia owes an obligation of permanent protection to a resident non-citizen of Aboriginal descent who identifies as a member of an Aboriginal society and is recognised as such according to laws and customs continuously observed since before the Crown’s acquisition of sovereignty, and that the obligation of permanent protection extends to not casting that person out of Australia as if he or she were an alien” (280). Likewise, Justice Gordon observes that “the common law can and does recognise that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and cannot be possessed by, the non-Indigenous peoples of Australia. Those who have these rights and duties are determined by Indigenous laws and customs. They include rights and duties with respect to land and waters within the territory of Australia. Those to whom Indigenous laws and customs give those rights and duties with respect to land and waters within the territory of Australia are, and must be recognised as being, part of the ‘people of Australia’ and not aliens” (357, 374).

Key text: paras. 73-5, 185, 271-2, 262, 274, 276, 278, 280, 298, 333, 340, 349, 364, 357, 374, 451

⁶⁹ See also para. 277, stating that: “Being a matter of history and continuing social fact, an Aboriginal society’s connection to country is not dependent on the identification of any legal title in respect of particular land or waters within the territory. The protection to which it gives rise cannot be cast off by an exercise of the Crown’s power to extinguish native title.”

12. Girjas Sameby v. Sweden , Case No. T 853-18 (2020) https://bit.ly/3v6uu9b (Swedish only) ⁷⁰		
Country: Sweden	Court: Supreme Court	Date: January 23, 2020
Issues: Exclusive right to confer hunting and fishing rights for small game in Sami area, UNDRIP and international law		
<p>Summary: Girjas is a Sami village, which, in 2009, brought a case against Sweden, arguing that it alone has the “exclusive right” to issue permissions for and to regulate small game hunting and fishing in its traditional territory, and it can do so without the consent of the state (para. 2). Sweden rejected this view, arguing that the state was the sole authority in this regard because, as ‘owner of the land’, “the right to hunt and the right to fish therefore belong to the state [as] the area constitutes a national common” (9). The Sami argued that their exclusive right is derived from long-standing customary law and practice and from the internationally guaranteed rights of the Sami as an Indigenous People (6).</p> <p>First, the Court took notice that who owned the land (Sami or the state) was not determinative of the issues to be resolved as hunting and fishing rights, and control thereof, can exist without an ownership title. It then reviewed various statutes, including the 1971 <i>Reindeer Husbandry Act</i>, which also addresses hunting and fishing (87 et seq). It concluded that these laws do not confer any right on Sami to lease hunting and fishing rights, at least when they are interpreted in a way that does not account for rights protected by international law (90-1).</p> <p>Second, the Court referred to various international instrument that guarantee the rights of Sami as an Indigenous People, including common Art. 1(2) of Covenants (the right to freely dispose of natural wealth and to secure in the means of subsistence) and the UNDRIP, particularly art 26 thereof (93). Noting that international law that has not been formally incorporated into Swedish national law can be used only as an interpretative aid, rather than the basis for a decision, the Court further opined that international law also cannot change the express meaning of statutory language. That said, the Court found that statutory provisions in question may be outdated and discriminatory insofar as they deemed Sami incapable of managing their own affairs (96). It nonetheless ruled that there was no discrimination, at least not for the purposes of invalidating the laws in question (122-4).</p> <p>Third, the Court then assessed if the Sami may assert and sustain rights based on ancient occupation and use and customary law. Concluding that they can, the Court examined whether the rights also include an exclusive right to grant leases and permission to hunt and fish (126). It noted that the customs of Indigenous Peoples must be taken into account when applying national law, and this “may be considered to be a general principle of international law” (130). It cited several provisions of international instruments, including the UNDRIP, Art. 26 and ICCPR, Art. 27, as underlying the importance ascribed to custom and customary law in relation to Indigenous Peoples’ land and related rights, holding that it must be given due weight when resolving disputes (131) because, among other things, “it provides better opportunities to meet the legitimate land use claims that the Sami have as</p>		

⁷⁰ See also ‘The “Girjas” case’, *Swedish Supreme Court Press Release*, 23 January 2020, <https://bit.ly/38fv8bu>; Øyvind Ravna, *A Sámi Community Wins Case against the Swedish State in the Supreme Court*, 11 ARCTIC REVIEW ON LAW AND POLITICS 19 (2020); and C. Allard and M. Brännström, *Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case*, 12 ARCTIC REVIEW ON LAW AND POLITICS 56 (2021), <https://bit.ly/3vw4x8a>

an indigenous people” (147). It ultimately concluded that “if the established right constitutes an exclusive right, it is normally considered to include a power to grant the right to others” (160).

Fourth, the Court discussed applicable rules of evidence and which party may have the burden of proof (161 et seq). Noting that some evidence is codified in Sami oral history, the Court observed that a “certain ease of proof is therefore necessary as a Sami village should have reasonable opportunities to take advantage of the rights that can be linked to areas traditionally used by the Sami” (162). It cited UNDRIP, Art. 27 in connection with this point (on the establishment of procedures to recognize and adjudicate the rights of Indigenous Peoples to their lands, territories and resources, “giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems”).

Fifth, the Court reviewed the evidence, including as far back as the Middle Ages, and concluded that, while the scope and conditions of hunting and fishing activities in the area in question are uncertain, “it can be assumed that it normally took place with the consent of the Sami” (181). It further found that the Sami and others perceived that “the right to hunt or fish ... essentially constitutes an exclusive right and this included a right [for the Sami] to decide on leases for hunting and fishing for others” (193, 205-6, 216, 224). The Court also concluded that the Sami did not relinquish these rights and nor were they extinguished by legislation (215-8). Also, today, “the Sami village holds on behalf of its members the right to lease hunting and fishing in the area. This means that the state does not hold the right to hunt and fish that normally accompanies land and water ownership” (222). It follows that “the Sami village may grant the right to hunt and fish the area without the consent of the state and that the state may not make such leases” (226).

Finally, a partially dissenting opinion signed by two of the judges highlighted that a different starting point for the analysis was required: “The Sami are an indigenous people in the sense referred to in, for example, the [UNDRIP]. It follows from the principles of international law that indigenous peoples typically have the right to have their traditional territory delimited, demarcated and [legally recognized via title]” (Dissenting 98).

Key text: Paras. 90-1, 93, 96, 122-4, 126, 130-1, 147, 160, 162, 181, 193, 206-6, 216, 222, 224, 226



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