Digest | Issue #5

Xanharu

Upholding Indigenous Peoples' Rights

Legislation and Jurisprudence:
Global, Regional and National Developments

Photo by: Goldman Environmental Prize

Indigenous Peoples Rights International
Championing Indigenous Peoples Rights

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

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

Cover Photo by: **The Goldman Environmental Prize**
Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala

About the Digest

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

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

IPRI is therefore issuing this Digest as a compilation of legislation and jurisprudence in relation to Indigenous Peoples' rights at the international level (UN system and perhaps others), at the regional level (regional human rights bodies), and at the national level (national courts). We will also include legislation and jurisprudence adopted by Indigenous jurisdictions. Among other things, the cases in the Digest illustrate EMRIP's conclusion that "major international human rights instruments already guarantee many of the rights contained in the Declaration and have been given significant normative strength, including through the work of the treaty bodies, regional and national courts." [2] EMRIP, thus, confirms that UNDRIP is "a contextualized elaboration of general human rights principles" and the minimum standards affirmed therein "connect to existing State obligations under international human rights law…"[3]

IPRI believes that sharing this information with Indigenous Peoples, their allies and others will increase 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 policymakers, 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, whether in state or Indigenous jurisdiction or both.

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

1 *A/RES/77/203 (15 December 2022).*
2 *A/HRC/36/56, para. 10.*
3 *A/HRC/EMRIP/2023/3, para. 8.*

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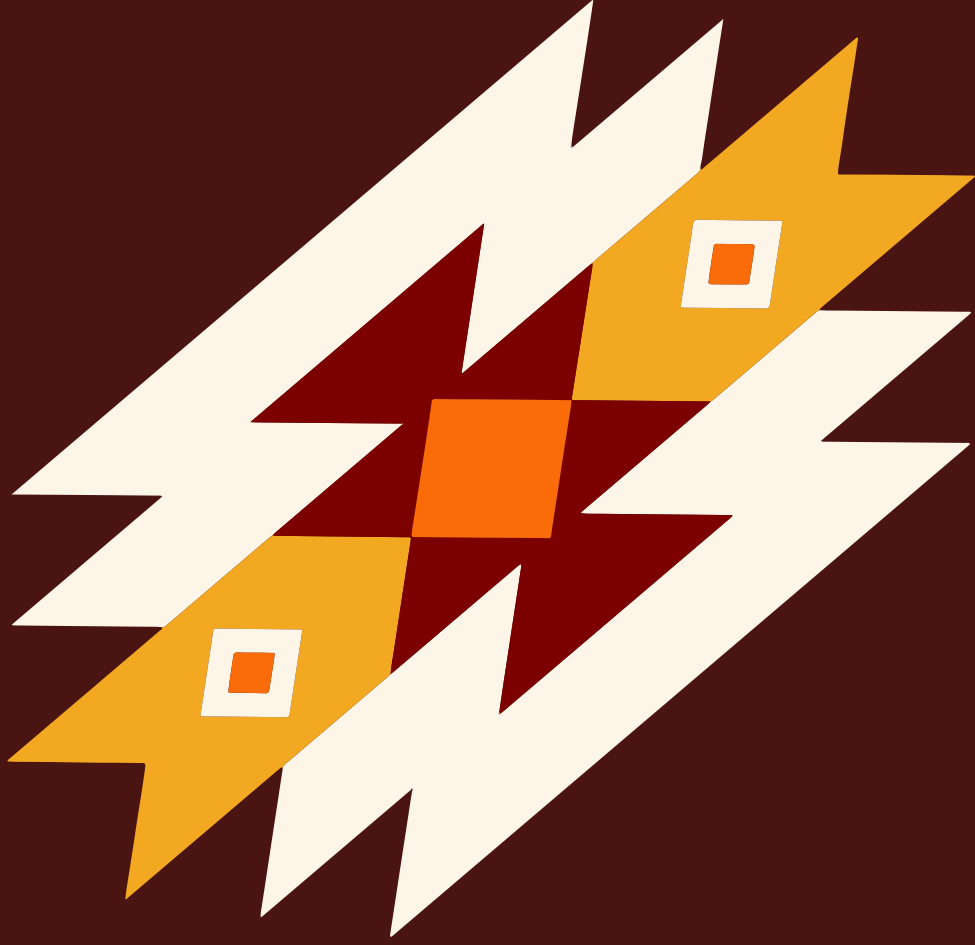

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1. Ailsa Roy & Wunna Nyiyaparli Indigenous People v. Australia CCPR/C/137/D/3585/2019

https://tinyurl.com/24ybtd3d

All languages

Country: Australia | **Body:** Human Rights Committee | **Date:** 13 March 2024 (decided on 10 July 2023)

- **Issues:** determination of indigenous peoples' right to traditional territory[4]; discrimination; fair trial (ICCPR, arts. 1, 2.3, 14.1, 26, 27)
- **UNDRIP arts.** 2, 3, 8, 25-27 and 40

Summary: The Wunna Nyiyaparli indigenous people ("WNIP") is a landholding clan within the larger Nyiyaparli people. Under their laws, WNIP holds the rights to "speak for" its specific territory, which holds "the sacred burial sites of the authors' ancestors and other sacred sites, [and] … is the key to the authors' language, culture and religion" (para. 2.2). It sought legal recognition of its territory in 2012 via an application made under Australia's Native Title Act. This was registered by the National Native Title Tribunal ("NNTT") despite an objection from another Indigenous group. [5] This registration halted ongoing negotiation of agreements between another Nyiyaparli clan and mining companies which would encompass a large area including WNIP's traditional territory. The other clan then sought judicial review of NNTT's decision to register WNIP's application. The Federal Court that heard this application decided to join it with another application and, separately and in response to claims made by the other party, ordered the production of evidence to prove that WNIP are the descendants of the Nyiyaparli people.

To make a long story short, before the case was heard, WNIP's lawyers resigned and WNIP were not informed of important steps in the legal case, nor were they represented in the proceedings. The judge only heard the evidence presented by one party, the one "interested in demonstrating that [WNIP] … are not descendants of Nyiyaparli in order to have the authors' claim rejected, to be able to freely negotiate with mining companies" (2.18). The court then found that the evidence submitted was insufficient to sustain that WNIP constituted descendants of the Nyiyaparli people. [6] It also rejected their application for recognition of their territory. An appeal was rejected. The court then upheld the native title of the other Nyiyaparli clan, including over WNIP's territory.[7] This other clan obtained legal control of the territory, extinguishing WNIP's rights and making it impossible for WNIP to uphold their responsibilities to care for culturally important areas in their traditional

[4] *WNIP clarified "that the central purpose of their communication is to find that the State party failed to provide them with an adequate procedure for the determination of their rights to traditional territory, with implication on multiples violations, but that it is not to request the Committee to rule on which party has a better claim to native title or to pronounce itself on the absence of consultation in relation to the mining projects" (3.1).*

[5] https://tinyurl.com/yxdtuhh9

[6] *Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia [2016] FCA 1528,* https://tinyurl.com/5n79wtca

[7] *Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia (No 2) [2017] FCA 289,* https://tinyurl.com/rbye9xuf

lands. The Human Rights Committee noted that the impact of the court's "ruling will be huge, taking into account that [WNIP's] ability to live, visit, hunt and fish on their traditional lands is essential to their preservation as a people" (2.22).

First, in assessing the admissibility of the communication, the Committee recalled that the right to self-determination may be considered when interpreting other provisions of the Covenant on Civil and Political Rights, in this instance, arts. 14(1), 26 and 27 (7.6). It also recalled that the Committee on the Elimination of Racial Discrimination affirmed in Pérez Guartambel v. Ecuador "that, in 'addition to being a form of intangible heritage, self-determination is linked to the effective realization of the rights of indigenous peoples'" (id.).

Second, the Committee cited jurisprudence upholding Indigenous Peoples' territorial rights and the connection between these rights and cultural survival. It concluded by reciting that "[a]s a consequence, 'the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival'" (8.3). Deprivation of access to sacred sites may also affect rights to spirituality or freedom of religion (8.4). Noting that mechanisms for regularizing indigenous peoples' territorial rights "can legally affect, modify, reduce or extinguish indigenous peoples' rights on their traditional territories," it explained that "it is of vital importance that measures that compromise indigenous peoples' culturally significant territories are taken after a process of effective participation and with the free, prior and informed consent of the community concerned, not to endanger the very survival of the community and its members" (8.5). It also recalled that ICCPR, article 27 "enshrine[s] the inalienable right of indigenous peoples to enjoy their traditional territories and that any decision affecting them should be taken with their effective participation" (8.6). [8]

Applying this to the facts at hand, the Committee found that Australia failed to take any steps to protect WNIP's right to enjoy their culture. Instead, it "attributed their traditional territory to another indigenous group without having ensured their effective participation in the proceedings for the determination of their fundamental right to traditional territory …, [this] being a decision affecting their survival as a people" (para. 8.7). This, the Committee decided, discloses "a violation of article 27 of the Covenant, read in light of article 1 of the Covenant and of the UNDRIP" (id).

Third, turning to the argument that the failure to consider WNIP's rights constitute discrimination, the Committee explained "non-discrimination was precisely the basis for the understanding that indigenous peoples' right to traditional lands and resources deserves equal protection from human rights treaties…" (para. 8.8). However, in this case, it decided that the differential treatment was in relation to another indigenous group, not in comparison with non-indigenous people. This was not discrimination in its view, nor was the disgreard for evidence and participation in judicial proceedings, which should be examing as part of the right to a fair trial instead (para. 8.9).

Fourth, the Committee decided that Australia's failure to allow WNIP "the ability to comment on evidence considered by a court in determining indigenous lands rights is a violation of both principles of equality before the courts and fair trial" (8.12). It then addressed the lack of legal aid available to WNIP. Citing UNDRIP, Article 13(2) and various judgments of the Inter-American Court of Human Rights, it explained that "all effective measures [are required] to ensure that indigenous peoples can understand and be understood in

[8] *Poma Poma v. Peru, CCPR/C/95/D/1457/2006 (2009), para. 7.6 ("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").*

legal proceedings in order to guarantee their right to a fair trial and effective access to justice, and that there specific characteristics, including customary law, values, and traditions, must be taken into account" (8.13).

Fifth, going beyond general "standards on accessing justice," it decided that this case should also be assessed in the light of "specific proceedings created to provide a place for indigenous peoples to claim the recovery, recognition, demarcation, and registration of their traditional territories" (8.14). Citing UNDRIP, arts. 27 and 40, it determined that "States are bound to adopt measures to guarantee and give legal certainty to indigenous peoples' rights in relation to ownership of their traditional territories, through the establishment of such mechanisms and procedures for delimitation, demarcation, and titling in accordance with their customary law, values and customs" (id.). These procedures must be accessible, must not be unduly burdensome, and must contain "a substantial independent review of the historical or other evidence which can allow for a decision on territorial claims over ancestral lands in a substantive manner," not other grounds, and they must be subject to judicial review (8.15). It concluded that these standards were violated based on the facts of the case, leading the Committee to declare a violation of the right to fair trial (8.16).

Finally, the Committee recommended that Australia provide the following remedies: (a) reconsider WNIP's native title application, ensuring its effective participation in the proceedings, ultimately to regularize its rights to its traditional territory. "Until then, the State party should abstain from acts which might lead to affect the existence, value, use or enjoyment of the area where the authors live and carry out their traditional activities;" (b) review the mining concessions granted in WNIP's traditional territory to determine if they should be modified "to preserve the survival" of WNIP; and (c) provide adequate compensation for harm they have suffered (10).

2. Arthur William Taylor, Sandra Hinemanu Ngaronoa and Sandra Wilde v. New Zealand CCPR/C/138/D/3666/2019

https://tinyurl.com/48swy55p

All languages

Country: Aotearoa New Zealand | **Body:** Human Rights Committee | **Date:** 22 February 2024

- **Issues:** Treatment of prisoners; racial discrimination; and voting rights
- **UNDRIP arts.** 1, 2 and 40

Summary: This case concerns various versions of and amendments to New Zealand's legislation concerning prohibitions on incarcerated persons – sentenced prisoners – from exercising voting rights. The last of these, the Electoral (Registration of Sentenced Prisoners) Amendment Act 2020, was adopted one year after the communication was filed with the Human Rights Committee. It prohibits prisoners who are serving sentences of three or more years from voting, amending the prior law of 2010 which contained a blanket ban on all prisoners from voting, irrespective of the length of their sentence. The 2010 law also applied after

release from prison, requiring an application to be made to rejoin the electoral rolls. The authors explained that many persons did not apply to rejoin the electoral rolls for various reasons (e.g., literacy problems) and that, for this and other reasons, "the Māori electoral population declined each year" (para. 3.4).

Two of the three authors are Māori, had been prisoners, and had been denied voting rights under the 2010 law. This case arose from various challenges submitted to New Zealand's courts against the 2010 law (2.19 – 2.23). Māori represent "around 50 per cent of the total prisoner population, while constituting 17 per cent of the total Population." [9] The number is even higher for Māori women (around 58 per cent in 2018/9)[10]. Therefore, one of the issues considered in the national judicial decisions was whether the 2010 Act indirectly discriminated against Māori given the disproportionately high numbers of Māori in the prison population.

In 2017, the Court of Appeal concluded that there was no discrimination, reasoning that the 2010 Act applied equally to all prisoners (2.18).[11] However, the Waitangi Tribunal[12] determined in 2019, in part in response to claims filed by two of the authors, that Māori are disproportionately affected and that this "exacerbate[es] a pre-existing and already disproportionate removal of Māori from the electoral roll" (2.24, 5.6).

First, the Committee commenced its decision by determining that only the alleged violations of voting rights (ICCPR, art. 25) and discrimination issues (ICCPR, art. 26) were admissible (6.1 – 6.11).

Second, on the merits, the Committee considered New Zealand's view that denial of voting rights was intended to deter crime, which the State called a legitimate public interest (7.4). However, the Committee decided that there was no rational connection between denials of voting rights and deterring crime (i.e., it was not proportionate to the stated objective), and that such denials were not inherent to the restrictions that accompany incarceration, but, instead, were "an additional and separate punishment" (id.). In such cases, the Committee's practice requires that clear legal standards demonstrate that the punishment is reasonable in the context of the crime at issue, e.g., it may be reasonable concerning crimes connected to voting or campaign finance rules (7.5). It also considered that prisoners remain citizens and subject to national laws and "thus should – absent compelling reasons – have an opportunity, on an equal footing with others, to participate in democratic electoral processes" by voting (id.).

Without compelling reasons, prisoners retain their right to participate in political processes and decisions about how they are governed. Automatic denials of voting rights violate the right to political participation in ICCPR, art. 25(b) where there is no reasonable connection to the nature of the offence (in the instant case, two of the authors were convicted of drug offenses only, not any connected to voting or related offenses (7.6)). In the Committee's opinion, the 2010 Act did not require or make operational such a connection and

[9] *CAT/C/NZL/CO/7, 24 August 2023, para. 31.*

[10] *R. Gavey, Disempowered to Disenfranchised: An Intersectional Legal Analysis of the Discriminatory Effects of Prisoner Disenfranchisement on Māori (Women), 6 PUB. INTEREST L. J. NEW ZEALAND 76, 88 (2019).*

[11] *The New Zealand Supreme Court denied the authors' request for leave to appeal with respect to the issue of discrimination, stating (as quoted by the Committee) that "[t]he issues of discrimination and Māori over-representation in prison potentially raise matters of general or public importance. We do not, however, consider this is the right case to consider these issues and, in particular, the intersection between them. We would be considering the issues in a very particular context" (2.23).*

[12] *The Waitangi Tribunal has jurisdiction in relation to allegations that principles of the Treaty of Waitangi have been breached.*

the 'additional punishment' of denial of voting rights, therefore, did not meet "the required standards of reasonableness and objectivity…" (7.5).

Third, the Committee decided that it would not review or decide on the discrimination issues related to the authors' claims about disproportionate impacts on Māori as a group or as an Indigenous People. It gave no other reason than it found it unnecessary in the light of its findings on the violations of ICCPR, art. 25. This is particularly disappointing considering the Waitangi Tribunal's findings and because the rationale used by the New Zealand Court of Appeal, which was left untouched by the Supreme Court, would appear to be incompatible with the consistent jurisprudence of the UN Committee on the Elimination of Racial Discrimination on indirect discrimination and the rights of Indigenous Peoples, more broadly.[13] It also seems to contrast with the Committee's concluding observations on New Zealand, which identify discriminatory effects in New Zealand's justice system, effects that would be further amplified in relation to restrictions on voting rights, even more so as it relates to Māori women. [14]

Finally, the Committee turned to reparations, deciding that its decision constitutes a "sufficient remedy for the violation found" (9). Nonetheless, it added that New Zealand also has "an obligation to take all steps necessary to prevent similar violations from occurring in the future, including by reviewing its legislation on voting restrictions for prisoners" (id.).

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[13] *See e.g., CERD/C/NZL/CO/21-22, 22 September 2017, para. 24 ("… the Committee is concerned at the State party's information that Maori remain overrepresented as offenders in rates of arrest, prosecution, conviction, imprisonment and re-imprisonment and as victims (arts. 2, 5 and 6)"); and Ågren v. Sweden, CERD/C/102/D/54/2013, para. 6.11-6.18 (rejecting arguments that there was no discrimination because there was no differential treatment vis a vis the general population and found that discrimination was evident in relation to rights vested in Indigenous Peoples).*

[14] *CCPR/C/NZL/CO/6, 22 April 2016, para. 24-5 ("The State party should undertake a comprehensive review of law enforcement operational policies in order to ensure their conformity with human rights principles, including the prohibition of discrimination, and to evaluate their impact on indigenous peoples. … [T]he Committee remains concerned about the disproportionately high rates of incarceration and overrepresentation of Māori and Pasifika, particularly women and young people, at all levels of the criminal justice process (arts. 2, 14, 24 and 26)"); and para. 26(b) ("[e]liminate direct and indirect discrimination against Māori and Pasifika in the administration of justice…").*

3. Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) GB.350/INS/17/5

https://tinyurl.com/4pf4exdj

ENG only

Country: Ecuador | **Body:** ILO Governing Body | **Date:** 7 March 2024

- **Issues:** Mining, lack of consultation,[15] violence

Summary: This case – a 'representation' pursuant to Article 24 of the ILO Constitution – was submitted by three labour unions in January 2021. It concerns the granting of 271 mining concessions that cover approximately 56 per cent of the territory Shuar Arutam Indigenous People ("the Shuar"). That territory is not legally recognized under national law (para. 25). The concessions were granted without informing the Shuar, nor did the State seek to consult with them beforehand. The complaint especially focuses on two mining operations: the San Carlos-Panantza project and the Warintza project, both copper mining projects. The Shuar's requests to meet with State officials about these large-scale mining projects were ignored as were the results of investigations by State agencies that had determined that the operations were not validly authorized due to defects in the environmental permitting process. Shuar families were forcibly evicted and the miliary and police were called in to protect the mining operations, leading to physical attacks and deaths on both sides. The Shuar were also not accorded the right to participate in developing Ecuador's national mining policy 2020-2030, which itself also fails to adequately uphold Indigenous Peoples' right to participation in decision-making (24).

A state of emergency was declared in the case of the San Carlos-Panantza project, which was suspended in July 2018 (14). In March 2023, Ecuador's Constitutional Court ruled that the Shuar's right to prior consultation (recognized also in Ecuador's Constitution) had been violated and it revoked the environmental permit and required implementation of a consultation process within a six month-long period (17). In their complaint to the ILO, the labour unions argued that there is no law regulating the right to consultation, rendering such processes uncertain, and that social conflict would likely reoccur or intensify due to a lack of respect for Shuar's governance structures and internal decision-making processes.

The Warintza mining project covers over ten thousand hectares of Shuar territory. It was at the initial exploration stage, which had been suspended due to conflict with the Shuar. In 2019, another company acquired rights to the concessions and negotiated agreements with persons from two affected Shuar

[15] *See also Gobernador del Cabilido Indígena del Pueblo Kankuamo y Otros, Consejo de Estado (Colombia), Sala de Lo Contencioso Administativo, 11001-03-24-000-2016-00164-00, 10 Aug. 2023 (e.g., para. 103-4, 116, reaffirming Constitutional Court jurisprudence on when FPIC is required and/or conditions under which projects may not proceed – cf. UNDRIP, Arts. 8, 10, 29, 32; and Saramaka People v. Suriname, Ser C No. 172 (2007)).*

communities. However, the Shuar denounced these because the agreements were made with persons who were not considered to be legitimate Shuar authorities and who did not represent the communities affected by the project (21). Complaints were also made about military incursions supporting the mining company, threats against Shuar leaders, unresolved complaints to State authorities about the same, and that 44 Shuar activists had been convicted due to complaints filed by the mining companies and/or the State (e.g., for alleged disruption of public services, damage to private property and intimidation) (23).

First, the Committee set up by the ILO Governing Body to examine the Representation ("the Committee") determined that the issues to be examined included the lack of consultation with the Shuar, which led to the eviction of several communities amid a climate of violence; the lack of consultation about the national mining policy; and lack of recognition and protection of the Shuar's territorial rights (35).

Second, concerning the San Carlos-Panantza mining project, it referred to ILO 169, arts. 6 and 15(2), both concerning prior consultation (37-8). It stressed that prior consultation is "a cornerstone of the Convention and the basis for implementing all the rights enshrined therein" as well as "an essential tool of governance, social dialogue and legal certainty for indigenous peoples, the Government and other stakeholders" (36).[16] That the mining operations were in Shuar territory was not contested by the State. Thus, the Committee concluded that ILO 169, art. 7(3) requires that the State must conduct, in cooperation with the peoples concerned, assessments of the social, spiritual, cultural and environmental impacts (42). The results of these studies "should provide the necessary information on which to base consultations" as required by ILO 169, arts. 6 and 15(2) (45-6).

Third, the Committee reiterated that ILO 169, art. 6(2) requires "full formal consultations, in which both the consulting body and the consulted peoples act in good faith and with the intention of genuine dialogue based on communication, mutual respect and a sincere desire to reach agreement" (47). Additionally, consultation must be informed and conducted "through representative institutions of indigenous peoples. While the Convention does not impose a model of what a representative institution should be, it is important that it should be the result of a process carried out by the indigenous peoples themselves" (id.). The State failed to comply with these obligations and, the Committee decided, if it intended to continue to pursue the mining project, it must: 1) conduct adequate impact studies, work with the Shuar to design and implement a consultation process that must respect their representative institutions and provide sufficient and accessible information, allow for adequate time for internal decision making, and "ensure that the agreements that may be reached between the Government and the indigenous communities within the consultation process are complied with, including with regard to the sharing of benefits" (49).

Fourth, discussing the documented violence, the Committee stated that, "for a consultation process based on good faith, understanding and mutual respect to take place, the State must ensure a climate free from any violence that may affect indigenous peoples and their representatives, and must implement the guarantees necessary to ensure respect for their personal integrity, both physical and psychological" (50). It also requested that the State investigate the allegations, punish those found responsible, and "adopt measures to

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[16] *Referencing General Observation on the Convention adopted by the Committee of Experts on the Application of Conventions and Recommendations in 2018 (which states that ILO 169 and UNDRIP "constitute two legal instruments of different nature and scopes which complement and reinforce each other. …[T]he effective implementation of the Convention contributes towards achieving the objective of the Declaration…"). ILO 169, art. 35, however, goes beyond this and requires that ILO 169 be read in a way that is compatible with the minimum standards declared in UNDRIP, which, in most cases, should require reading up ILO 169 to the higher level of UNDRIP.*

safeguard the physical and psychological integrity" of the Shuar (id.).

Fifth, on the Warintza mining project, the Committee concluded, as above, that the project was on Indigenous lands, which triggers obligations to conduct impact assessments and consult with all affected communities, and that the State had breached these obligations (55-6). It urged the State to "continue to take all necessary measures to draw up without delay guidelines for a consultation process" and to then conduct the consultations (57). With respect to the violence and intimidation, it recalled "the importance of taking measures to foster a climate of trust that is free from violence, in which indigenous peoples can participate in consultation processes and assert their rights" (58). It made no mention, however, of investigation of or redress for the 44 Shuar activists who had been convicted due to complaints filed by the mining companies and/or the State. These convictions were in the context of asserting and defending the rights of their people, rights that the Committee itself concluded had been violated by Ecuador, and, thus, the criminalization of Indigenous rights defenders was simply disregarded.

Sixth, concerning lack of regulation of the right to consultation in national law and lack of participation in development of the national mining policy, the Committee requested that Ecuador regulate the right to consultation, involving Indigenous Peoples in that process (61), and, citing the requirement in ILO 169, art. 7(1) that Indigenous Peoples "shall participate in the formulation, implementation and evaluation of plans and programmes" that affect them, emphasized that this also applied to developing a national mining policy (62-3).

Last, referring to the lack of legal protection for the Shuar's territorial rights, the Committee referenced ILO 169, art. 14 and highlighted the importance of taking "necessary measures, with the participation of the [Shuar], to continue determining and titling ownership of lands traditionally occupied by the [Shuar] and to protect their rights of ownership and possession effectively" (66).

REGIONAL

1. Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala Series C No. 488

https://tinyurl.com/4hsexadk

SPA only (unoff. translation)

Country: Guatemala | **Body:** IA Court of Human Rights[17] | **Date:** 16 May 2023 (publicized December 2023)

- **Issues:** Land rights, mining, harassment and violence against community leaders
- **UNDRIP, arts.** 1, 2, 19, 25-32

Summary: This case was first submitted to the Inter-American Commission on Human Rights ("IACHR") in 2011 on behalf of Agua Calientes Lot 9, a Q'eqchi' Maya community ("the Community"). It was declared admissible in 2017 and the IACHR adopted a merits report in May 2020. It was submitted to the IA Court in August 2020 after Guatemala failed to comply with the IACHR's remedial recommendations. Broadly speaking, it concerns Guatemala's failure to adequately and promptly delimit, demarcate and title the Community's collective lands, lack of participation in decision-making and encroachment on those lands by a large-scale nickel mine, harassment and attacks against Community leaders and members, and the denial of effective judicial remedies (noting that Guatemala's Constitutional Court had ruled in favour of the Community, even suspending the mining operation, and that the State and company has not adequately complied with this decision). The IA Court found violations of multiple rights, including property, participation, the right to information, and the right to legal personality.

First, the IA Court was required to assess a claim that another group represented the Community that was brought to its attention by the State and at the last minute (the Community's representatives who had filed the case alleged that the State was engaged in divide and rule tactics and the persons seeking to intervene were not affected by the mining operations) (para. 30-44). The IA Court began by stating that its review of this question "does not entail, in any way, a position on the part of the Court with respect to the form of organization of the Agua Caliente Community, its representative bodies, or its authorities or community leaders" (33). As it has done in other cases,[21] it noted that, while there may be different entities or leadership

[17] *See also Garifuna Community of San Juan v. Honduras, Ser C No. 496 (Aug. 2023) (concerning the State's lack of due diligence in titling ancestral territory and violations of property and other rights in relation to land acquisition by third parties and for tourism projects, lack of consultation, and ineffective remedies); and 'IACHR presented to the Inter-American Court a case against Ecuador for violations of the right to property of the indigenous community of Salango', IACHR Press Release, 30 October 2023,* https://tinyurl.com/5n759ejx

[18] https://tinyurl.com/4fx2am9w ; https://tinyurl.com/527ejdr9

[19] *Report No. 11/20, 7 May 2020.*

[20] https://tinyurl.com/yhs3wn6m

[21] *IACHR and IA Court have repeatedly held that the "… identification of [an indigenous community or people], from its name to its membership, is a social and historical fact that is part of its autonomy." See e.g., Xákmok Kásek Indigenous Community v. Paraguay, Ser C No. 214 (2010), para. 37.*

within communities who hold different views, "within the framework of their right to self-determination, indigenous peoples and communities have the power to adopt decisions in relation to the defense of their rights, through their own forms of organization and decision-making, in accordance with their cultural patterns" (36). It is, the IA Court said, "up to the Community itself, and not to this Court or state authorities, to resolve what is appropriate with respect to its forms of organization, leadership and representation" (40). It restated this with respect to reparations, explaining that "it is not for the Court, nor for the State, to settle controversies that may arise within the Community, nor to rule on its forms of organization, leadership, and representation…. All this corresponds to the Community itself, in the exercise of its rights of self-determination and autonomy" (343). [22] It also highlighted that Guatemala had refused to allow the IA Court to visit the Community, during which time it could have verified the Community's choices about representation (41, 277).

The IA Court reiterated some of these points in its analysis of the merits as it relates to participation rights. It highlighted that "the effective participation of the legitimate representatives of the peoples or communities, who derive from their own forms of organization and decision-making, without State interference, such as traditional chiefs, specialized councils and autonomous governments or parliaments, must be guaranteed" (275).

Second, the IA Court confirmed that it has used and will continue to use UNDRIP "to interpret conventional provisions" (47, 200). It also referenced UNDRIP, art. 19 as part of its analysis of the right to participation (276).

Third, recalling that there is no mechanism to recognize collective Indigenous land rights in national law, the IA Court reviewed its jurisprudence (197-205) and concluded that States are obligated to "adapt their domestic law to ensure that mechanisms relating to collective property … exist, are adequate and effective: they must provide a real possibility for peoples or communities to defend their rights and exercise effective control over their territory without any external interference" (204). Moreover, as it has ruled previously, it highlighted that effective guarantees for collective property rights "'does not imply only its nominal recognition, but also entails the observance and respect of the autonomy and self-determination of indigenous communities over their lands'" (205, 222). States must also "adapt their domestic law … so as to recognize indigenous communities' legal personality, so that they can exercise the relevant rights, including land ownership, in accordance with their traditions and modes of organization" (id.), including "the right to adopt autonomous decisions about the use of their lands…" (362). Noting that Guatemala's Constitutional Court had reach the same conclusions in 2019, as had various international authorities (216-18), the IA Court ruled that Guatemala had failed to comply with these obligations and, therefore, had violated various rights protected by the American Convention on Human Rights (224).

Fourth, turning to the mining project and the alleged lack of participation in decision-making, the IA Court reiterated in prior jurisprudence (245-55), including its view that "the right to consultation of indigenous and tribal peoples, in addition to constituting a treaty norm, is also a general principle of international law…" (248), and "consultation must be carried out in advance, in good faith, in order to reach an adequate, accessible, and informed agreement" (250). Additionally, "in order to safeguard the right to collective

[22] *Adding that "The Court, therefore, must make its determinations on reparation measures in such a way that, on the one hand, it establishes obligations for the State capable of remedying, in an effective manner, the violations of human rights established and, on the other hand, avoids contravening the free exercise of the Community's right to determine, autonomously, the decisions that are within its competence in relation to its territory and the activities that may affect or impact the community life" (343).*

property, [the State] must guarantee the right to consultation and participation in any project or measure that may affect the territory of an indigenous community, or other rights essential to its survival as a people" (id.).

In the case at hand, it found that Guatemala had granted a 25 year-long mining permit in 2006, that this was within the Community's lands, and it had had negative impacts on the Community (260 et seq). A few meetings were held with the Community in 2006 yet the mining began despite protests about the lack of adequate participation, facts that were also verified by Guatemala's Constitutional Court in a 2020 judgment (261-2). The IA Court, therefore, found that Guatemala has failed to comply with its international obligations, among other things, because consultations were not "prior," that they failed to respect "the customs and forms of organization of the communities in the designation of authorities or representatives for the purpose of the consultation and information was not provided in a way that was accessible to the affected population, which implied an act of discrimination" (266, 269). This continued even after the Constitutional Court had suspended the mining project and ordered an effective consultation process with the Community, in part, the IA Court decided, because the State failed to consult with the entire Community (270-85).

Fifth, the IA Court then turned to the allegations of harassment, threats, violence and evictions that affect some members of the Community, including those who had taken on leadership roles opposing the mining operations and seeking protection for the Community's rights.[23] It had raised this also in the context of participation rights, observing that threats and violence may result in "alterations in the modes of organization of an indigenous community, in its leadership, and in its representative authorities," and the "State must take these circumstances into account in order to comply in good faith with its obligation to consult" (273). It decided to address these issues in terms of "whether, in the context of the violations of collective rights already declared, that are centrally linked to the right to property, there has also been an affectation of the right to personal integrity" (321, 323).

The IA Court recalled that threats and harassment "can generate a situation of fear and tension that threatens personal integrity, and this, in particular, can have an impact on indigenous leaders and members of indigenous peoples acting in defense of their territories and human rights" (322). It highlighted the impact on the Community of the prolonged delays in seeking recognition of its property rights, negative interactions with State officials and the mining company, including forcible evictions and "threats and direct attacks on a community leader and others by a large contingent of the company's private security personnel, who sought to prevent a community meeting" (324-6). Taken together, this has had a severe impact on "community life, in which personnel not only from the State, but also from the mining company, have been involved, and that this context responds to a territorial conflict" for which the State has been found liable (327). This rose the level of violating Article 5 of the American Convention (the right to humane treatment), which also protects the right to mental and moral integrity (328).

Finally, the IA Court ordered a series of reparations (345 et seq). It noted that reparations "must recognize the strengthening of the cultural identity of indigenous and tribal peoples, guaranteeing them control over their own institutions, cultures, traditions, and territories, in order to contribute to their development in accordance with their life projects, and present and future needs" (333). Additionally, "the reparation measures granted must provide effective mechanisms, based on their own ethnic perspective, that allow

[23] *According to the IACHR's Merits Report, "the attempts to evict the various communities resulted in (i) two persons disappeared, (ii) more than 350 families evicted, (iii) hundreds of houses dismantled and burned, and (iv) several Maya Q'eqchi' women raped" (295).*

them to define their priorities with regard to their process of development and evolution as a people" (id.) Reparations also must be understood within the context of and "in accordance with the community's right to self-government, considering the [Community] as a unified whole, so that it is allowed to adopt its own decisions, without prejudice to the diversity of leadership that may exist in it, and that all information about reparations "must be provided in the Q'eqchi' language" (id.).

2. Report No. 51/23, Petition 624-14 (Admissibility), The Onondaga Nation (USA)

https://tinyurl.com/5n9y7y3w

ENG only

Country: USA | **Body:** IACHR | **Date:** 12 May 2023

- **Issues:** Territorial rights, equality before the law and right to fair trial/judicial protection
- **UNDRIP, arts.** 2, 25-28, 40

Summary: This is an admissibility decision.[24] It does not examine the merits of the case, but only whether the IACHR can admit it to later review and decide whether violations have occurred. It concerns the alleged unlawful taking of around 2.5 million acres (1,011,714 hectares) of land by the State of New York between 1788 and 1822, and the lack of remedies in national law to address the same. These lands were transferred to non-Indigenous persons and entities. This occurred despite treaties with the United States of America ("USA") that guaranteed Onondaga territorial rights and left them with a mere 6,900 acres. Consequently, they were deprived of the resources essential to their health and welfare and their lands were damaged by extractive industries that left a legacy of severe pollution and continuing harm. They asserted their claims could not be heard in Federal courts between 1929 and 1974 and that New York state courts could not hear their claims until 1987. They pursued numerous judicial and political avenues to obtain redress but were denied in each instance. This was in part based on legal doctrine upholding the rights of non-Indigenous landholders and because of the length of time between the claim arising and the filing of legal action.[25] The Onondaga argue that this situation contravenes Indigenous Peoples' territorial rights in international law, including under UNDRIP.

[24] *See also Report No. 179/23, Petition 3004-18 (Admissibility), Southeast Alaska Indigenous Transboundary Commission (Canada), 25 August 2023,* https://tinyurl.com/mry773fc *; Report No. 185/23, Petition 1533-17 (Admissibility), Q'eqchi's indigenous Communities of Santa María Cahabón (Guatemala), 27 September 2023,* https://tinyurl.com/3ejtrs58 *; Report No. 67/23, Petition 1503-11 (Admissibility), Neighbour of the Community of El Triunfo (Guatemala), 30 May 2023,* https://tinyurl.com/ye4nyrnd *; and Report No. 135/23, Petition 844-13 (Admissibility), Member of Tzeltal de San Sebastián Bachajón Indigenous Peoples (México), 31 July 2023.*

[25] *Para. 24 ("… the United States Supreme Court ruled in 1985 that such tribes could bring a claim to court under federal common law. However, in 2005 the United States Supreme Court ruled (in the case of City of Sherrill v. Oneida Indian Nation) that, in consideration of the long passage of time and settled expectations of those currently in possession, equitable considerations precluded court-ordered return of sovereign authority over the Tribe's historic lands. The State indicates that based on this judicial precedent, the suit of the petitioners (filed in 2005) was dismissed by the federal courts (both at first instance and appeal)."*

First, the IACHR determined whether it was competent to admit and hear the case. The USA argued that the IACHR should declare the petition inadmissible, among other things, because the right to property in Inter-American law is an individual right only and not "a right pertaining to collectives like the Onondaga Nation" (para. 30 and 36). The IACHR squarely rejected this, observing that it "… has long established that the right to property … applies to not only individuals, but also to collectives, such as indigenous groups" (36).[26] The USA also argued that the facts of the case began a long time before the IACHR was created and before 1965, when it acquired the authority to receive complaints. Noting that states "may be liable for violations that originated prior to a state's ratification of a treaty or other international instrument but continue thereafter" (in other words, where there are ongoing effects that themselves may amount to violations), [27] the IACHR decided that it "does not have competence … to consider the alleged misappropriation of land (that took place that between 1788 and 1822)" (41).

Second, because it arose after 1965, it decided that it was competent to examine whether violations of rights to judicial protection and to equality before the law may have occurred in relation to the litigation that took place between 2005 and 2013 and which ruled against the Onondaga. It also decided that it should review the litigation outcomes and process on the merits (48) as it concerns the Onondaga's unsuccessful attempts "to obtain redress for the historical taking of their treaty recognized traditional lands and territories" (45). It recalled in this regard "the general international legal principles applicable in the context of indigenous human rights," which include rights to their "specific forms and modalities of their control, ownership, use and enjoyment of their lands and territories; the recognition of the lands, territories and resources they have historically occupied; and 'where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent … when they have full knowledge and appreciation of the nature or attributes of such property…'" (46).

It also recalled its prior jurisprudence in cases involving the USA that the State is obligated "… to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole…;" and that denial of Indigenous land claims based on the "extinguishment" of their land rights due to the encroachment by non-Indigenous persons, and "without a due process where indigenous peoples' rights and interest were adequately represented, were incompatible with the rights of equality before the law, right to fair trail and property…" (47). It also recalled jurisprudence holding that Indigenous Peoples "who have lost total or partial possession of their territories preserve their property rights over such territories, and [they have] a preferential right to recover them even when they are in the hands of third parties" (48). Where restitution is not possible, "on objective and reasonable grounds … it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures" (id.)

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[26] *See also para. 37 ("The Commission has established that the corpus of international law that is relevant in examining complaints concerning indigenous territories under the American Declaration 'includes the developing norms and principles governing the human rights of indigenous peoples' and 'with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples.'…").*

[27] *See e.g., Moiwana Village v. Suriname, Ser C No. 125 (2005), para. 39 (where the Inter-American Court of Human Rights ruled that "… in the case of a continuing or permanent violation, which begins before the acceptance of the Court's jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects").*

3. Resolution No. 41/23, PM 196-23, Indigenous Carib Community of Chinese Landing

https://tinyurl.com/jmefkbj4 (ENG)
https://tinyurl.com/562ymru2 (SPA)

Country: Guyana | **Body:** IACHR | **Date:** 21 July 2023

- **Issues:** Mining, lack of judicial protection, violence
- **UNDRIP, arts.** 1, 2, 19, 20, 22-3, 25-32, 40

Summary: This concerns the granting of precautionary measures, a mechanism provided for in Article 25 of the IACHR's Rules of Procedure.[28] Precautionary measures are intended to prevent or halt threats of serious, urgent/imminent, and irreparable harm. In this instance, precautionary measures were granted because of "threats, harassment and acts of violence perpetrated against the [Indigenous community of Chinese Landing] in the context of their opposition to [gold] mining activities carried out in their lands, as well as the environmental impact of this activity on their health" (para. 1).

Chinese Landing obtained legal title to part of its lands in 1976 and this was reaffirmed by the issuance of title deeds to the same area again and under different laws in 1991 and 2014. Pursuant to a government-led bidding process, a Guyanese miner obtained several medium-scale mining permits in 1995. These permits cover a significant area of Chinese Landing's titled lands.[29] The legality of these permits is contested and pending a judicial decision in Guyana's Court of Appeal, which maintains that the Mining Act does not allow for medium-scale mining to be conducted on any titled lands (this is in fact stated on the mining permits themselves).

First, the IACHR determined that two kinds of serious and urgent risks to rights to life and personal integrity required assessment: a) threats, including death threats, harassment and acts of violence by mines workers and police officers and b) environmental contamination of subsistence resources that negatively affect health, life, and personal integrity (50).

Second, on the serious nature of the threats and violence, the IACHR referred to various kinds of evidence substantiating threats, harassment and violence, and concluded that these were regular, "repetitive … [and] sustained over time;" included violent acts against minors and the elderly; involved the "extensive use of firearms, with firing incidents;" and included the involvement police officers reportedly "in conjunction with mine workers (53). Some of these threats were "death threats of a group nature … connected to their collective opposition to the mining activities in their lands:" e.g., the miners at various times said they would

[28] *See also PM No. 61-23 Members of the Pataxó Indigenous People located in the Barra Velha and Comexatibá Indigenous Lands in the state of Bahia (Brazil) 24 April 2023 (due to threats, harassment and acts of violence, including murder, all related to the regularization of their territorial rights),* https://tinyurl.com/yc3uuuky *; PM No. 279-22 Triqui families from the Community of Tierra Blanca Copala who have been displaced to the neighboring community of Yosoyuxi Copala (Mexico), 27 October 2023 (due to threats, harassment, and forced displacement),* https://tinyurl.com/4w8ypyu3 *; and PM No. 416-13, Tolupan indigenous members of the Broad Movement for Justice and Dignity in Honduras (Follow-up, Extension, and Partial Lift), 27 December 2023 (due to acts of violence and threats in the context of their work in defense of human rights),* https://tinyurl.com/3axe2st3

[29] *See e.g., 'Tiny Amerindian village in Guyana fights gold mine in key court battle over indigenous land rights', Associated Press, 17 May 2023,* https://tinyurl.com/2znmjy45

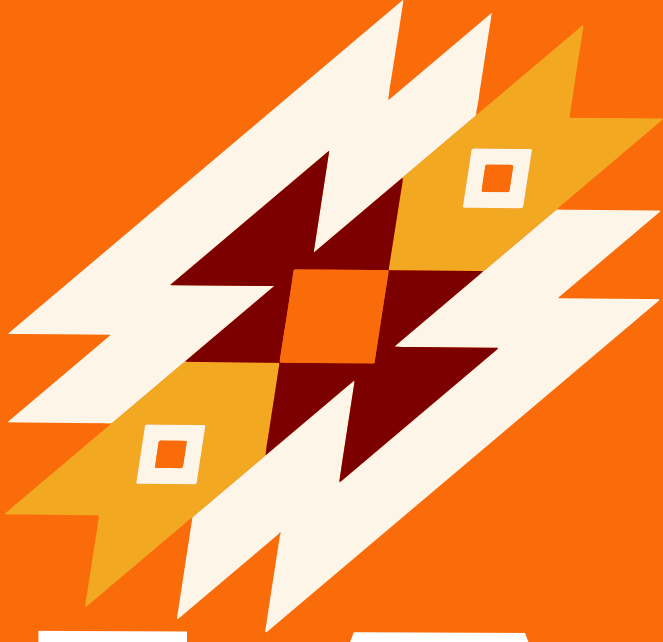
"kill all of the Amerindians," that the miners have "150 guns" and would "kill all the Amerindians" or that if "the village wins back its lands, [the miners] would not leave easily and that people would die…" (54). Consequently, members of the village "no longer even attempt to access or pass through the parts of their lands blocked by the mining concession or have left the Community" (55). With respect to this, the IACHR highlighted the "negative impact on social cohesion and cultural identity of the group, generating the rupture of the social fabric, the weakening and fragmentation of the community and, in the most serious cases, the total loss or serious deterioration of its ethnic and cultural identity" (id.).

The IACHR concluded that the State has failed to adopt any meaningful or effective measures to address the preceding, even though it was fully aware of the situation (57-61). It also determined that the few investigations conducted by the State had been inconclusive and ineffective, explaining also that where "authorities are aware of the attacks, but the attacks continue because no progress is made in the investigation and apprehension of the responsible parties, the human rights defender is at even greater peril" (58). It further explained that protection measures adopted by the State must be "adequate and effective, they must be, respectively, suitable to protect the persons at risk, and they must produce the expected results so that the risk ceases" (61).

Third, turning to the physical and environmental impact of the mining operations, including mercury contamination, the IACHR considered that it did not "have enough information to substantiate the existence of a risk (62). Noting that the State has claimed that studies were underway, it referred to its 2009 report on Indigenous Peoples' land rights and reminded that State that that it "must adopt special and specific measures aimed at protecting, favoring and improving the exercise of human rights by indigenous and tribal peoples and their members. The need for special protection arises from the greater vulnerability of these populations, their historical conditions of marginalization and discrimination, and the deeper impact on them of human rights violations" (62). Despite there being no scientific verification, it concluded, in sum, that Chinese Landing and its members were subject to serious risks that required protective measures (64).

Fourth, discussing urgency and irreparable harm, the IACHR concluded that the requirement of urgency had been met because of the ongoing nature of the threats and violence, "which indicates, in view of the situation of lack of protection, the possibility that new high-risk incidents may occur again at any time," especially as Chinese Landing continues to oppose the mining, including via an ongoing judicial process, which may raise new conflicts (65). The requirement of irreparable harm was also met because "possible impairment of the rights to life and personal integrity constitutes, by its very nature, the maximum degree of irreparability" (66). It added also that the granting of a concession cannot "affect the survival of the indigenous or tribal people in accordance with their traditional ways of life," where 'survival' is much more than physical survival (67). Quoting the IA Court of Human Rights it explained that 'survival' in this context is understood to mean Indigenous and Tribal Peoples' ability "to 'preserve, protect and guarantee the special relationship that [they] have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected […]'" (id.). In this sense, it refers not only to the obligation of the State to ensure the right to life, "but rather to take all the appropriate measures to ensure the continuance of the relationship of the [Indigenous and Tribal Peoples] with their land or their culture" (id.).

Last, the IACHR gave Guyana 20 days to report on the measures it would adopt to comply with the following recommendations: that Guyana: "a. take the necessary measures to protect the rights to life and personal integrity of the members of the Indigenous Carib Community of Chinese Landing … with a cultural, gender-based, and age-appropriate perspective to prevent threats, harassment, and other acts of violence…; b. consult and agree upon the measures to be adopted with the beneficiaries and their representatives; and c. report on the actions taken to investigate the events that led to the adoption of this precautionary measure, so as to prevent such events from reoccurring" (69).



NATIONAL

National

1. Writ of Kalikasan, Indigenous Cultural Communities of BICAMM Ancestral Domain, Brooke's Point, Palawan v. DENR, MGB, INC, and Celestial Mining G.R. No. 268140

https://tinyurl.com/3uhduf4k

Country: The Philippines | **Body:** Supreme Court | **Date:** 15 August 2023

- **Issues:** Mining, FPIC
- **UNDRIP, arts.** 25, 29, 32(1), 32(2) and 40

Summary: This case concerns a challenge filed by Indigenous Peoples of the Palawano Indigenous communities of the BICAMM Ancestral Domain in Brooke's Point, Palawan, against a nickel mining project that proceeded without their free, prior and informed consent ("FPIC"), both as it affects their rights and the ecological integrity of their lands and environment. A Writ of Kalikasan is a legal instrument/process that is designed to avoid or halt activities that compromise the right to a balanced and healthy ecology. [30] The Supreme Court of the Philippines issues the Writ, in this instance on 16 August 2023. In addition to alleging harm to the right to a balanced and healthy ecology, applicants for the Writ must also show that the alleged violation is linked to an unlawful act or omission of a public official or private individual or entity and that the environmental damage is serious enough to prejudice the life, health, or property of inhabitants in two or more municipalities, cities or provinces.

This case originates in a 1993 a Mineral Production Sharing Agreement (MPSA), entered into by the Philippines and Celestial Mining for a period of 25 years. It covers 2,835.06 hectares of land. Celestial designated another company, Ipilan Nickel Corporation ("INC"), to be the mining operator. The companies' Environmental Compliance Certificate expired in October 2015 and required renewal, necessitating, in 2018, that it also obtain a "Certificate Precondition" from the National Commission on Indigenous Peoples ("NCIP"), certifying that the project does not overlap with Indigenous Peoples' lands and that FPIC has been validly obtained.[31] In both cases, the companies ignored the requirements to obtain the permits, although it belatedly commenced an FPIC process, and continued the mining operation, including cutting trees inside a designated national park as well as in the Indigenous Peoples' lands.

Despite various requests to intervene that were directed to different government agencies, no action was taken to halt the mining operations until, in June 2023, the NCIP ordered the suspension of the FPIC process due to complaints by Indigenous Peoples of bribery to obtain their support. This led to issuance of a Cease and Desist Order against Celestial and INC after a "resolution of non-consent" was adopted by the affected Indigenous Peoples, which also requested the halt of all mining operations for irregularities in the FPIC process and due to the companies' continuing operations despite not having valid permits. The request for the Writ Kalikasan was then filed with the Supreme Court.

[30] *See e.g., H. Davide Jr., The Environment as Life Sources and the Writ of Kalikasan in the Philippines, 29 PACE ENVTL. LAW REVIEW 592 (2012),* https://tinyurl.com/2s36sjbf

[31] *NCIP Administrative Order No. 3 Series of 2012, Revised Guidelines on Free, Prior and Informed Consent and Related Processes, Sec. 59.*

First, the Court reviewed the requirements for seeking the Writ and concluded that they were met. It determined that there were threats to the right to a balanced and healthy ecology caused by the mining, that it affected more than one municipality, that the State had illegally failed to act, that there was mining in a national park, which is not permitted, and that the companies were operating without the required permits, including the requirement to obtain FPIC from the affected Indigenous Peoples. It found that the mining operations resulted in environmental damage in the mountains that caused extreme flooding and contamination of fishing areas and prejudiced the life, health, and property of the affected peoples.

Second, the Supreme Court referenced the precautionary principle, which requires that the companies, not Indigenous Peoples, provide evidence demonstrating that there is no environmental and other harm caused by their operations. This shifts the burden of proof away from the Indigenous Peoples and on to the companies. It also required that two government agencies provide the same evidence in relation to impacts on the rights of the affected Indigenous Peoples to a balanced and healthful ecology.

2. Recurso Extraordinário 1.017.365, Santa Catarina ("Marco Temporal")

https://tinyurl.com/bdfu4fjm

Portuguese only

Country: Brazil | **Body:** Supreme Federal Tribunal | **Date:** 27 September 2023

- **Issues:** Whether indigenous land rights are tied to and restricted by the date Brazil's 1988 Constitution entered into force
- **UNDRIP, arts.** 8, 25-28, 40, 43.

Summary: This case was filed in 2016 by the Santa Catarina State Environment Institute against Brazil's National Indian Foundation (FUNAI) and the Xokleng Indigenous People. It argues that part of the Sassafras Biological Reserve had been illegally included in the Indigenous territory and should be returned to Santa Catarina state ownership. The judgment mainly examines the validity of the so-called marco temporal, the notion that Indigenous Peoples may only seek legal recognition of their land rights to the extent that they could prove that they were occupying them on 5 October 1988, the date that Brazil's Federal Constitution was adopted. In April 2019, the full bench of the Supreme Federal Tribunal ("STF"), Brazil's highest court, unanimously decided that the case raised important issues and that the ruling would serve as a precedent for all cases involving Indigenous lands at all levels of Brazil's judiciary (in fact, its resolution could and should have decided 266 other pending land titling cases that had been suspended for the same reasons). It was one of the longest hearings in the history of the STF, concluding with a vote of nine judges to two in favour of Indigenous Peoples' rights. The judgment exceeds 1000 pages in length, containing opinions from all eleven judges (some of them selectively summarized below).

Indigenous Peoples across Brazil celebrated the judgment. Nevertheless, Brazil's legislature simply

disregarded the ruling and enacted the marco temporal into Federal law, provoking yet another (pending) challenge of its constitutionality before the STF.[32] This law was approved by the Senate less than a week after the judgment was announced. Parts of it were vetoed by the President of Brazil, and then this veto was annulled by the legislature in December 2023, making marco temporal federal law, at least until the STF rules again.

First, the majority ruled that Indigenous Peoples' rights to lands, territories and resources are inherent rights that do not depend on the date the Constitution was enacted to be valid and enforceable. These rights are 'original rights', rights considered ancestral and extant prior to the establishment of the Brazilian State. They were not created by the State; the Constitution simply declares their existence, requires the State to regularize the corresponding lands and when demarcated, any public or private property claims in Indigenous territories are nullified.[33] Also, the concept of "traditional ownership" requires assessing not only occupation but also accounting for the Indigenous laws and customs that define Indigenous Peoples' relations to their lands, territories and resources. Moreover, the majority decided that traditional ownership is not wholly dependent on current, physical possession of the lands, and, if the marco temporal was upheld, the regularization of lands belonging to Indigenous Peoples who had been forcibly removed or denied access before the adoption of the Constitution would be impossible.

Second, according to the STF rapporteur of the case, the land rights protected by Article 231 of the Constitution guarantee Indigenous Peoples' survival and dignified life, which makes them fundamental rights as well as rights that are essential to the enjoyment of other fundamental rights.

Third, the majority ruled that traditional possession by Indigenous Peoples is distinct from civil law property rights. The lands encompassed thereby include, in addition to the lands permanently occupied, lands used for productive activities, and those lands essential to the preservation of environmental resources that sustain well-being and physical and cultural reproduction, according to Indigenous Peoples' customs and traditions.

Last, the majority concluded that the rights arising from Article 231 of the Constitution are both fundamental rights as well as international law obligations assumed by the Brazilian State by virtue of its endorsement of ILO 169 and UNDRIP. They are "structural duties" to be performed by the State that are immune from decisions of the majority population, including legislative measures that purport to restrict the exercise of these rights. UNDRIP, Article 26 was especially and repeatedly highlighted in this regard as were the preamble and Arts. 1, 2, 11(2) and 28. One opinion concluded that Brazil's Constitution as it relates to Indigenous Peoples is "in harmony with the precepts of the [UNDRIP] … such as 'the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources'."

[32] https://tinyurl.com/3wpezssj

[33] *See also Xucuru Indigenous People v. Brazil, IA Court of Human Rights, Ser C No. 346 (2017) (considering Brazilian law on titling of Indigenous lands, including the restitution requirements therein).*

3. Whakatōhea Kotahitanga Waka (Edwards) & Ors v. Te Kāhui and Whakatōhea Māori Trust Board and Ors [2023] NZCA 504

https://tinyurl.com/mry2cjue

ENG only

Country: Aotearoa New Zealand | **Body:** Court of Appeal | **Date:** 18 October 2023

- **Issues:** Rights to coastal and marine territory, operation of Indigenous law and custom, treaty rights
- **UNDRIP, arts.** 5, 25, 26, 27, 34, 37

Summary: This is a complicated case involving overlapping and disputed claims, among and between Māori and between Māori and non-Māori. It is the latest in the long-running saga about Māori rights to coastal and marine areas in Aotearoa New Zealand. This has its more recent origins in the Court of Appeal's 2003 decision in Ngati Apa v. A.G., which suggested that Māori rights to the foreshore and seabed may be valid and enforceable.[34] This prompted Parliament to override the decision through enactment of the Foreshore and Seabed Act 2004, which sought to extinguish those rights through legislative action. That law was later found to be racially discriminatory by the UN Committee on the Elimination of Racial Discrimination.[35]

Acknowledging the CERD decision and others, the Marine and Coastal Area (Takutai Moana) Act ("MACA") was enacted in 2011. MACA recognizes three kinds of rights, which may be established via agreement with the State or by application to the High Court (the trial court): a right to participate in conservation processes, a customary marine title ("CMT") and a protected customary right (para. 1). The High Court may recognize a CMT if it finds that the applicant holds a specified area in accordance with Māori law and customs (tikanga), and that the applicant(s) has "'exclusively used and occupied' that area from 1840 to the present day 'without substantial interruption'" (3).

The judgment, which was not unanimous (2-1), mostly concerns the statutory requirements for recognizing CMT, including the role that tikanga plays in such determinations. Two of the applications were sent back to the High Court to be adjudicated again under a new test formulated by the Court of Appeal, including a less restrictive understanding of 'substantial interruption'. It also found that title may be established over navigable rivers that form part of the common marine and coastal area. The New Zealand Supreme Court agreed to review the Court of Appeal's judgment in April 2024,[36] while the government has vowed to amend the MACA, section 58, to reverse the Court of Appeal's judgment, claiming that the judgment is contrary to the intent of Parliament. [37]

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[34] *Ngati Apa & Anor v. Attorney-General & Ors, [2003] NZCA 117.*

[35] *Decision 1(66), Early Warning and Urgent Action Procedure, CERD/C/DEC/NZL/1, 27 April 2005 ("… the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress…").*

[36] https://tinyurl.com/mry2cjue

[37] https://tinyurl.com/2hdhbj49

First, the Court extensively reviewed the MACA, highlighting various provisions, requirements and the intent thereof (38-88). This was followed by an overview of the decision of the High Court as it concerned the issues under appeal (89-95) and the various submissions of the parties (96-103). It then discussed Canadian and Australian judicial authorities on customary title to land, which had been relied on to some extent when drafting MACA (104-117), and the differences between these authorities and MACA as enacted (118-22), including the intention give effect to the Treaty of Waitangi "by recognising intrinsic, inherited rights and translating them into legal rights and interests" (120).[38] It also discussed the relevance of tikanga and how it is used in MACA, particularly section 58 thereof. The Court noted the use of experts on tikanga in the proceedings before the High Court (124 et seq), highlighting that "selective application of aspects of custom law by cultural outsiders (however well-meaning) who operate within the state legal system may turn out to be just as subversive for the ongoing vitality and potency of tikanga Māori as attempts in the past at direct suppression or extinguishment" (126).

Second, the majority of the Court determined that MACA "employs tikanga when assessing whether an applicant group holds a specified area, and also when deciding whether the group's use and occupation is exclusive (120, 140-2, 160 et seq). On the latter, "the concept of exclusive use and occupation must be viewed through the lens of tikanga, and not that of the common law alone" (134). This is the case with respect to CMT and protected customary rights. Thus, "a court must ascertain what tikanga applies to that part of the rohe moana [sea territory] which is the subject of an application for a recognition order" (124).

Third, turning to the requirements of exclusive use and occupation of the applied-for area from 1840 to the present day "without substantial interruption," the majority determined that 'continuity' may be substantiated by "evidence of present occupation and the persistence of cultural practices which maintain connection to a specified part of the marine and coastal area" (173). Assessing whether there had been a substantial interruption "expressly takes account of the Treaty [of Waitangi], in which the Crown promised that Māori would continue to enjoy the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties" (175, 183). To fail to recognize breaches of those guarantees when assessing interruptions and their seriousness may reward those who violated those guarantees, perpetuating injustice (id.). Likewise, the presence of non-Māori, the inability to assert certain legal claims, including unsuccessful challenges to commercial fishing, and other resisted incursions are not evidence of substantial interruption. Instead, this "tends to show Māori never surrendered their connection to the area or abandoned their claims to control it" (180). According to the majority, the trial judge made an error in this regard and "set a more rigorous standard for substantial interruption than the legislation permits" (178).

Last, discussing rights to navigable rivers that form part of the common marine and coastal area, the Court recalled that the High Court had deemed that rights over these rivers and their beds had been extinguished due to the Coal Mines Act, which vested ownership of the bed of navigable rivers in the Crown (240) (if upheld this would have also precluded the vesting of rights under MACA) (242). The Court decided, however, that MACA itself had reversed previously asserted Crown ownership over common coastal and marine area and, therefore, even if Māori rights had been extinguished by the Coal Mines Act, this was no longer the case and rights over riverbeds could be established as part of a CMT (244).

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[38] *See also The Marine and Coastal Area (Takutai Moana) Act 2011, Inquiry, Stage 2 Report, Waitangi Tribunal, Wai 2660 (2023),* https://tinyurl.com/3n9sm7zf

4. Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5

https://tinyurl.com/yn493t7h

Country: Canada [39] | **Body:** Supreme Court | **Date:** 9 February 2024

- **Issues:** Indigenous authority to legislate for the well-being of Indigenous children and youth[40]
- **UNDRIP, arts.** 3, 4, 5, 7(2), 13(1), 14, 22, 33, 34, 38[41]

Summary: This case concerns the validity of a Canadian federal law that was filed by the Attorney General of Quebec. It was an appeal from the decision of the Quebec Court of Appeal, which mostly upheld the validity of the law. The law in question – An Act respecting First Nations, Inuit and Métis children, youth and families – has three main components: 1) it affirms that Indigenous Peoples have an inherent right of self-government concerning child and family services, a right purportedly protected under Canada's Constitution and which includes the right to exercise their jurisdiction over child and family services, where so desired; 2) it establishes child and family services standards applying to Indigenous, federal and provincial laws; and 3) it provides a mechanism for resolving conflicts between those laws should they arise. It provides that Indigenous laws will "have the force of federal law, meaning they will prevail over provincial laws if there is a conflict. If there is a conflict between Federal and Indigenous law, the latter prevails unless there is a conflict with the standards set in the Act or in Canada's Human Rights Act (para. 22-7). Quebec argued that these provisions unlawfully encroached on the jurisdiction and powers of the provincial governments.

First, the Supreme Court of Canada primarily upheld the law because it "falls within Parliament's legislative jurisdiction over 'Indians, and Lands reserved for the Indians'" (2, 93-5). It further explained that Parliament has authority to affirm in the Act "that Indigenous peoples have jurisdiction to make laws in relation to child and family services" and that this affirmation, "through which Parliament declares that the inherent right of self-government …, includes 'legislative authority' in relation to Indigenous child and family services" (9, 64). Likewise, Parliament may also validly "affirm that the laws of Indigenous groups, communities or peoples will prevail over other laws in the event of a conflict" (id., 120 et seq).

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[39] *See also Bill S-13, An Act to amend the Interpretation Act (approved by the Senate; 1st reading in the House of Commons, 26 February 2024): "Rights of Indigenous peoples. 8.3(1) Every enactment is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them,"* https://tinyurl.com/2e83ejhk *. If enacted, it would apply to the interpretation of all acts of Parliament,* https://tinyurl.com/ecvcf345

[40] *This case is an appeal from the decision of the Quebec Court of Appeal, 2022 QCCA 185 (see Xanharu Issue 1), which found, at para. 61, that the law "seems entirely consistent with the principles set out" in UNDRIP.*

[41] *See also R. v. Montour and White, 2023 QCSC 4154, 1 November 2023, p.17 ("After reviewing the historical background of the adoption of the [UNDRIP] and the content of the Canadian UNDRIP's Act adopted in 2021, the Court concludes that the UNDRIP, despite being a declaration of the General Assembly, should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1)"). This decision has been appealed by both parties to the Quebec Court of Appeal,* https://tinyurl.com/33uhtas4

Second, nonetheless, the Court declined to explicitly rule on the existence of an inherent and constitutionally entrenched right to self-government, stating that, in this case, the Act constitutes "the promise to act as though Indigenous peoples' right of self-government in relation to child and family services were recognized, while awaiting a formal court ruling on the question" (66, 107, 115). It was "unnecessary" for the Court to rule on that point when it was only asked "to provide the requested opinion on the constitutionality of the Act" (112, 114).[42] It added that "the Court is taking care not to exclude the possibility that the right of self-government has a distinct constitutional source. In particular, our conclusion certainly does not negate the possibility that such a right of self-government may be recognized under s. 35 of the Constitution Act, 1982. This remains an open question" (127).

Third, it also found that the Act is part of an objective "to achieve reconciliation" with Indigenous Peoples and that UNDRIP constitutes "[t]he framework serving as the foundation for this reconciliation…" (3-5, 14-9).[43] It also concluded that "Parliament intended the Act as a whole to be a concrete legislative measure to implement the UNDRIP in Canadian law" (45-7, 52-3, 85-7, 89, 91-2). Among other things, the Supreme Court referenced UNDRIP, art. 4, "the right to autonomy or self-government in matters relating to their internal and local affairs" in support of its views (3).[44]

The Court observed that the "metaphor of 'braiding' together these three types of norms has been helpfully proposed to explain how [UNDRIP] should be implemented in Canada, so as to 'work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope'" (7). "Parliament's effort to braid this 'rope' with three strands constitutes the specific framework for reconciliation when it comes to Indigenous child and family services, in the spirit of the [UNDRIP]," an effort that is operationalized in the Act (8). In conclusion, the Court opined that the Act "creates space for Indigenous groups, communities and peoples to exercise their jurisdiction to care for their children. The recognition of this jurisdiction invites Indigenous communities to work with the Crown to weave together Indigenous, national and international laws in order to protect the well-being of Indigenous children, youth and families" (134).

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[42] The Court explains, at para. 110, that "Parliament … can enact legislation that affirms its position on the meaning of the Constitution. As mentioned above, it is for the courts to interpret the Constitution where a case so requires."

[43] The Supreme Court explains, at para. 21, that the preamble states that the Act is intended to implement the UNDRIP, to recognize "the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices"….

[44] The Supreme Court notes also, at para. 43, that the preamble to the Act states that "Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services," an affirmation that is repeated in s. 18(1) of the Act.

5. Indigenous Education for All Students (Legislation): Minnesota Statutes, Section 120B.021, Subd. 5

https://tinyurl.com/3p9kvbvf

ENG only

Country: USA[45] | **Body:** Minnesota State Legislature | **Date:** June 2023

- **Issues:** Education
- **UNDRIP, arts.** 11, 14, 15

This is an amendment to Minnesota's state-wide laws concerning 'Required Academic Standards'. It is entitled "Indigenous education for all students." It provides (verbatim) "that to support implementation of Indigenous education for all students, the commissioner must:

(1) **provide historically accurate,** Tribally endorsed, culturally relevant, community-based, contemporary, and developmentally appropriate resources. Resources to implement standards must include professional development and must demonstrate an awareness and understanding of the importance of accurate, high-quality materials about the histories, languages, cultures, and governments of local Tribes;

(2) **provide resources to support** all students learning about the histories, languages, cultures, governments, and experiences of their American Indian peers and neighbors. Resources to implement standards across content areas must be developed to authentically engage all students and support successful learning; and

(3) **conduct a needs assessment** by December 31, 2023. The needs assessment must fully inform the development of future resources for Indigenous education for all students by using information from American Indian Tribes and communities in Minnesota, including urban Indigenous communities, Minnesota's Tribal Nations Education Committee, schools and districts, students, and educational organizations. The commissioner must submit a report on the findings and recommendations from the needs assessment to the chairs and ranking minority members of legislative committees with jurisdiction over education; to the American Indian Tribes and communities in Minnesota, including urban Indigenous communities; and to all schools and districts in the state by February 1, 2024."

Also included in the legislative amendments enacted at the same time are provisions on:

- Recognizing the Minnesota state holiday of Indigenous Peoples Day with school programs to observe the day, such as professional development for educators, or instruction for students focused on treaties, Tribal sovereignty, current issues affecting Indigenous communities, or Indigenous languages, traditions and culture.
- Increasing American Indian Education Aid funding.
- Establishing Native Language Revitalization Grants so that districts and charter schools can offer

[45] *See also 'Indigenous History Lessons Get a Boost', NEA Today, 7 November 2023,* https://tinyurl.com/yc7xu79t

language instruction in Dakota and Anishinaabe or other Indigenous languages in the United States and Canada.
- Funding the Minnesota Indian Teacher Training Program to provide grants for American Indian teacher candidates.
- Allowing American Indian students to wear items of Indigenous cultural significance at graduation.
- Prohibiting mascots depicting American Indians or Indigenous American culture without Tribal Nations exemption.
- Using the state definition of American Indian students throughout the state.
- Updating the definition of American Indian Parent Advisory Council memberships.
- Requiring Tribal Nations Education Committee representation on academic standards reviews.
- Providing funds for mentoring, inducting and retaining American Indian teachers.
- Adding a requirement for professional development in the contributions and culture of American Indians to teacher license renewals.[46]

[46] https://tinyurl.com/3p9kvbvf

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