

# Xanharu

## Upholding Indigenous Peoples' Rights

Legislation and Jurisprudence:  
Global, Regional and National Developments



**Indigenous Peoples  
Rights International**  
Championing Indigenous Peoples' Rights



**Xanharu is from the indigenous Purépecha of México, 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 jurisprudence to assert, protect and claim their individual and collective rights.**



# 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).

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

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). Among other things, the cases in the Digest **illustrate the Expert Mechanism on the Rights of Indigenous Peoples' 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."<sup>1</sup>

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

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

<sup>1</sup>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. Daniel Billy et al v. Australia, CCPR/C/135/D/3624/2019

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 Country: Australia | Body: Human Rights Committee  
Date: 22 December 2022

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**Issues: Climate change, human rights and environment, right to enjoy culture, privacy and home life, right to be secure in the means of subsistence and to freely dispose of natural wealth and resources.**

**UNDRIP arts. 3, 7(2), 8, 11, 12, 23, 25, 28, 29, 31, 32(1), 39**

**Summary:** This case concerns the human rights impacts of climate change on the indigenous people of four islands in the Torres Straits (see also *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* below).<sup>2</sup> The main argument was that Australia's climate-related policies and actions were inadequate and violated human rights (ICCPR, articles 6 (right to life), 17 (right to private, family and home life) 24(1) (right of the child to protective measures), and 27 (right to culture). Self-determination, alone or conjunctively, and particularly the rights guaranteed in ICCPR, article 1(2), could have been added to this list. The authors asserted that severe weather and changes in weather patterns harmed their livelihood, culture and way of life, degrading the land and sea and reducing traditional fishing and farming (para. 2.4-2.7). Flooding also had destroyed family graves, interfering in relations with ancestors. Resettlement was not an option as their most important ceremonies are only culturally meaningful if performed in their native lands.<sup>3</sup> The case was declared admissible in part because "the highest court in Australia has ruled that state organs do not owe a duty of care for failing to regulate environmental harm" (7.3). The Committee also rejected Australia's argument that it cannot be held individually responsible for the effects of climate change or for its failure to implement adaptation and/or mitigation measures within its territory (7.6-7.10).<sup>4</sup>

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<sup>2</sup> On climate as human rights issues in litigation see A. Venn, *Rendering International Human Rights Law Fit for Purpose on Climate Change*, 23 HUMAN RIGHTS LAW REV. 1 (2023), <https://academic.oup.com/hrlr/article/23/1/ngac034/6972876>

<sup>3</sup> See also para. 3.5, stating that "The authors' minority culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas. Climate change already compromises the authors' traditional way of life and threatens to displace them from their islands. Such displacement would result in egregious and irreparable harm to their ability to enjoy their culture."

<sup>4</sup> See e.g., para. 7.7, stating that "With respect to adaptation measures, the Committee recalls that the authors in the present communication have invoked articles 6, 17, 24 (1) and 27, each of which entails positive obligations of States parties to ensure the protection of individuals under their jurisdiction against violations of those provisions."

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**First**, the Committee recounted that “climate change is a matter of fundamental human rights” and a state’s “obligations under international climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the [ICCPR]” (3.1-3.2). It explained that, while “it is not competent to determine compliance with other international treaties or agreements,” the Committee may rely on those treaties to interpret a state’s obligations under the Covenant (7.5).

**Second**, the Committee recollected that states are obligated “to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life ... [and] such threats may include adverse climate change impacts, and ... that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life” (8.3).<sup>5</sup> It observed that the authors were especially vulnerable to the effects of climate change and that the effects likely would be severe and debilitating.<sup>6</sup> Nonetheless, it rejected finding a violation of the right to a life with dignity because the authors failed to show that they:

- a. “have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity” (8.6); and
- b. because the state could still adopt “affirmative measures to protect and, where necessary, relocate the alleged victims,” some of which were already under way, and the Committee was unable “to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors’ right to life with dignity” (8.7).

**Third**, the Committee then turned to the allegation that climate change had already impacted the authors’ private, family and home life due to the prospect of having to abandon their homes and that erosion and degradation causes them significant distress (8.9). The Committee recalled that states must “prevent interference with a person’s privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious. Thus, when environmental damage threatens disruption to privacy, family

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<sup>5</sup> See also para. 8.5, stating that “The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life.”

<sup>6</sup> See also para. 8.6 (where the Committee “recalls that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change”); and para. 8.7 (stating that “given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized”).

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or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious. Thus, when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family and home of individuals under their jurisdiction” (id.).<sup>7</sup> It observed that the authors depend on natural resources for their subsistence and livelihoods and the health of their ecosystems, and that these “constitute components of the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can be considered to fall under the scope of protection of article 17 of the Covenant” (8.10). Finding a violation of article 17<sup>8</sup>, the Committee explained that

when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one’s home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home (8.12).

**Fourth**, the Committee explained that “article 27 of the Covenant, interpreted in the light of the [UNDRIP], enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity” (8.13). Finding a violation of article 27, the Committee explained that “the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen” by the state and the state’s “failure to adopt timely adequate adaptation measures to protect the authors’ collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party’s positive obligation to protect the authors’ right to enjoy their minority culture” (8.14). Note the recognition of the intergenerational aspect of cultural rights in this formulation.<sup>9</sup>

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<sup>7</sup> Observing also, at para. 8.10, “that article 17 should not be understood as being limited to the act of refraining from arbitrary interference, but rather also obligates States parties to adopt positive measures that are needed to ensure the effective exercise of the rights under article 17 in the presence of interference by the State authorities and physical or legal persons.”

<sup>8</sup> The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors’ home, private life and family, the State party violated the authors’ rights under article 17 of the Covenant.

<sup>9</sup> See also ‘Amicus Curiae brief by Professor Martin Scheinin in the case of ‘Daniel Billy et al. ‘Torres Strait Islanders’ v. Australia’ by the UN Human Rights Committee’, Bonavero Reports 2022/02, 29 November 2022, <https://cadmus.eui.eu/handle/1814/75414>

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**Last**, the Committee ruled that Australia was obligated to repair the violations identified in its decision (11). This includes providing adequate compensation for the harm suffered; consulting the authors' communities to determine their needs; implementing measures "necessary to secure the communities' continued safe existence on their respective islands;" monitoring the effectiveness of the measures; and "tak[ing] steps to prevent similar violations in the future" (id.).

### 2. Anne Nuorgam et al v. Finland, CERD/C/106/D/59/2016

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 Country: Finland | Body: UNCERD | Date: 2 June 2022

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**Issues: Non-discrimination, political rights,  
self-determination, collective rights.**

**UNDRIP arts. 3, 4, 5, 8, 9, 33, 34**

**Summary:** This case is related to two prior decisions of the Human Rights Committee, discussed in the first issue of Xanharu<sup>10</sup>, and concerns who has the right to determine eligibility for the electoral roll of the Sami Parliament (basically, who is allowed to vote).<sup>11</sup> This is governed presently by article 3 of the Act on the Sami Parliament, which contains both subjective and objective criteria for determining Sami identity and eligibility to vote.<sup>12</sup> In the 2015 Sami Parliament elections, Finland's Supreme Administrative Court had ruled that almost 100 people not considered to be Sami by the Sami Parliament should be added to the electoral roll, making them eligible to vote in the Sami Parliament elections that year. The Court included 93 of these persons in the electoral roll, even though this was against the decisions of the Finland Electoral Board and of the Executive Board of the Sami Parliament (para. 2.3). This prompted the Executive Board to decide that new elections were required because the "Court's rulings had, in its view, distorted the will of the Sami people" (2.4). This was appealed by some of the 93 persons and, in January 2016, the Supreme Administrative Court annulled the Executive Board's decision and the 2015 election results became final (id.).

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<sup>10</sup> *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (20 March 2019); and *Klemetti Käkkäläjärvä et al. v. Finland*, CCPR/C/124/D/2950/2017 (19 December 2019).

<sup>11</sup> For information on the Sami Parliament in Finland see <https://www.samediggi.fi/?lang=en>

<sup>12</sup> See also O. Kortekangas and R. Johnstone, 'In Finland, Sami Rights take Central Stage in National Politics', *Justice Info*, 9 December 2022, <https://www.justiceinfo.net/en/110023-finland-sami-rights-central-stage-national-politics.html>

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**First**, CERD reviewed its jurisprudence to identify the relevant legal norms and principles, recalling that states parties are required “to ensure that indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent” (9.4). As it did in *Lars-Anders Ågren et al. v Sweden*, it 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” (id.).

**Second**, citing national and international law, CERD determined that the Sami Parliament is the institution that enables the effective participation of the Sami in public life as an indigenous people and that conducts negotiations to ensure free, prior and informed consent is sought, and that these functions correspond to rights vested in the Sami as an indigenous people and rights that are additional to other political rights that Finnish Sami individuals may have as Finnish citizens (9.5, 9.7). Thus, CERD concluded, the electoral process for the Sami Parliament must ensure the effective participation of those concerned, in accordance with the traditions and customs of the community or nation concerned, both as a guarantee for the continued viability and welfare of the indigenous community as a whole and their effective protection from discrimination” (para. 9.5).

**Third**, CERD recalled that article 33 of the UNDRIP provides that “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions, and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures” (9.10). It also cited UNDRIP, arts. 9 (on membership) and 8(1) (the right not to be subjected to forced assimilation or destruction of culture). It also noted that its past reviews of Finland had concluded on the subject of eligibility for the electoral roll that Finland “gave insufficient weight to the Sámi people’s rights, recognized in the [UNDRIP] to self-determination (art. 3), in particular their right to determine their own identity or membership in accordance with their customs and traditions (art. 33), as well as their right not to be subjected to forced assimilation or destruction of their culture” (9.11).<sup>13</sup>

**Fourth**, the exercise of the above-mentioned rights may be subject to legitimate judicial scrutiny (e.g., by interpreting the relevant laws), as the Supreme Administrative Court had done, but, “in the specific context of indigenous peoples’ rights, this should be done in a way that is compatible with their right to determine

<sup>13</sup> CERD qualifies this, at para. 9.12, “highlight[ing] that although the principle of self-determination grants indigenous communities the right to freely determine their own membership in accordance with Art. 33(1) UNDRIP, decisions regarding participation in representative bodies and elections may not be taken in an arbitrary manner or with the aim or the effect to exclude members or voters in violation of international human rights law.”

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their own identity or membership in accordance with their customs and traditions” (para. 9.12). More specifically, CERD explained that “when adjudicating on the rights of indigenous peoples and in particular on the criteria for membership as well as on the membership of individual persons, domestic courts, however, have to pay due regard to the right to self-determination of indigenous communities, in particular when courts deviate from generally established criteria for membership and from the assessment of representative bodies of the community in this regard” (id.). CERD found that the decisions of the Supreme Administrative Court failed to comply with these obligations and did not even apply “the objective requirements” for enrollment as set out in article 3 of the Act on the Sami Parliament (9.12bis).

**Fifth**, CERD determined that the Supreme Administrative Court’s rulings artificially modified “the electoral constituency of the Sami Parliament, affecting its capacity to truly represent the Sami people [and] ... violated the petitioners’ right, as members of the Sami indigenous people, to collectively determine the composition of the Sami Parliament and take part in the conduct of public affairs, as protected by article 5 (c) of the Convention” (9.13).

**Last**, CERD recommended that Finland urgently commence “a genuine negotiation” to review the relevant section of the Act on the Sami Parliament to ensure that “the criteria for eligibility to vote in Sami Parliament elections are defined in a manner that respects the right of the Sami people to provide its free, prior and informed consent on matters relating to their own membership and their political participation for the enjoyment and full realization of other rights of indigenous communities” (11).

# Regional

# 1. Maya Kaqchikel Indigenous Peoples of Sumpango, Interpretation of the Judgment, Series C No. 457

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(ENG)

[bit.ly/3obsj3a](https://bit.ly/3obsj3a)

(ESP)

Country: Guatemala | Body: IA Court of Human Rights<sup>14</sup>

Date: 27 July 2022

**Issues: Criminalization of indigenous community radio operators and its consequences.**

**UNDRIP arts. 16, 40**

**Summary:** This decision of the Inter-American Court of Human Rights (“the Court”) interprets the October 2021 judgment of the same name.<sup>15</sup> That case concerned the criminalization and arrest of Maya community radio operators and discrimination against them in the process for allocating radio frequencies. Submitted by Guatemala, the request for interpretation was made on the basis that clarification of October 2021 judgment was required in connection with five of the Court’s orders (para. 2).<sup>16</sup> The Court rejected four of the five requests, mainly because it determined that the State was illegitimately contesting the judgment, rather than seeking to clarify its meaning.<sup>17</sup> Two issues were highlighted by the Court that illuminate the main judgment.

**First,** the Court was asked to interpret its order which requires that Guatemala “immediately refrain from criminally prosecuting the individuals who operate indigenous community radio stations, conducting raids on said radio stations or seizing their broadcasting equipment, until it has ensured effective legal mechanisms to allow access by indigenous communities of Guatemala to the radio spectrum and allocated the corresponding frequencies” (36). Guatemala had argued that this made it “impossible to ‘conduct a criminal prosecution for acts related to the illegal use of radio frequencies,’ ... ‘would violate the principle of judicial independence

<sup>14</sup> See also *Inter-Am. Commission on Human Rights, Res. 70/2022, Precautionary Measures No. 822-22, Jhon Anderson Ipia Babu (Colombia), 11 December 2022 (inter alia, stating, at para. 36, that “attacks against [indigenous peoples’] authorities, male leaders, and female leaders ‘have an impact not only on the direct victim, but also on the peoples and communities themselves, given the important functions they perform and their central role in the defense and preservation of ancestral culture’”)*, [https://www.oas.org/en/iachr/decisions/mc/2022/res\\_70-22\\_mc\\_822-22\\_co\\_en.pdf](https://www.oas.org/en/iachr/decisions/mc/2022/res_70-22_mc_822-22_co_en.pdf) (EN) [https://www.oas.org/es/cidh/decisiones/mc/2022/res\\_70-22\\_mc\\_822-22\\_co\\_es.pdf](https://www.oas.org/es/cidh/decisiones/mc/2022/res_70-22_mc_822-22_co_es.pdf) (ESP)

<sup>15</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Ser C No. 440 (6 October 2021)*, <https://bit.ly/37wPhTX> (ESP); <https://bit.ly/3Pwx9S3> (ENG).

<sup>16</sup> See also para. 9, explaining that the Court “has indicated that the request or petition for interpretation of a judgment may not be used as a means of challenging it, but must be made for the sole purpose of working out the meaning of the decision when one of the parties maintains that the text of its operative paragraphs or its *consideranda* is unclear or imprecise, provided those *consideranda* affect that operative paragraph.”

<sup>17</sup> See e.g., para. 17 (dismissing the request because “it does not address the meaning or scope of the judgment, but rather reflects the State’s disagreement with operative paragraph two and its queries regarding execution thereof”).

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and impartiality' ... would also entail 'interference in the work' of the Public Prosecutor's Office" (33). The Court referred to its judgment (para. 169-70, 201-02) to recall that it had ruled that the arrest, prosecution and criminalization of the community radio station operators were unnecessary and disproportionate, violating at least three connected rights, and was also tainted by discriminatory treatment in the allocation of frequencies. Thus, the Court clarified that "a full reading of the decision reveals that the State must refrain from prosecuting individuals who operate community radio stations" (39).

**Second**, the Court rejected the State's argument "that it cannot discontinue criminal prosecutions already underway" (40) and then turned to its order that Guatemala "shall annul the convictions handed down against members of indigenous communities for using the radio spectrum" (44). It clarified that the State "must annul the convictions handed down against members of indigenous communities, and all effects deriving therefrom, related to the use of the radio spectrum, in the context of operation of indigenous community radios..." (45). On the State's arguments about judicial independence, it explained further that "a measure of reparations ordered in similar cases has been to 'set aside' all judgments issued by domestic courts whenever the Court has found a violation of the American Convention based on judicial findings of civil or criminal liability contrary to the right to freedom of thought and expression" (46).

### 2. Advisory Opinion OC-29/22, Differentiated Approaches with Respect to Certain Groups of Persons Deprived of Liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)



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(ESP)

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Body: Inter-American Court of Human Rights | Date: 20 May 2022

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**Issues:** Non-discrimination, differentiated measures based on characteristics, treatment of incarcerated persons, cultural, linguistic and religious rights, prohibition of torture.

UNDRIP arts. 1, 2, 7, 11, 12, 13, 24, 31, 40

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**Summary:** This concerns a request for an advisory opinion that was presented to the Court by the Inter-American Commission on Human Rights (“IACHR”).<sup>18</sup> It asks whether states’ have an obligation to adopt differentiated measures or different treatment, pursuant to non-discrimination and other norms (para. 57-71), to protect different categories of persons who are incarcerated in the penal system (3).<sup>19</sup> As discussed below, this includes several specific questions about treatment of indigenous peoples and persons.<sup>20</sup>

**First,** the Court answered the general question affirmatively (32-120), reiterating its jurisprudence which holds that “the right to equality and non-discrimination includes two concepts: a negative concept related to the prohibition of arbitrary differences in treatment and a positive concept related to the States’ obligation to create conditions of true equality for groups that have traditionally been excluded or who are at a greater risk of being discriminated against” (59). Citing various international standards, the Court explained that “measures that are exclusively designed to protect the rights of ... indigenous peoples ... among others, shall not be considered discriminatory” (67). It added that the application of a differentiated approach to prison policies requires “determining the specific risks of the infringement of rights, according to [indigenous peoples’] particular characteristics and needs, in order to define and implement a set of specific measures directed to overcome the discrimination (structural and intersectional) that affects them” (68). If states do not employ this approach, this “would result in treatment that was contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment” (id.).<sup>21</sup>

**Second,** the Court turned to the specific questions, including those on indigenous people (277 et seq),<sup>22</sup> observing in general that “the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples

<sup>18</sup> The Court states, at para. 17-8, that it “has already established that its advisory function permits it to interpret any norm of the American Convention, without excluding any aspect from its scope of interpretation. In this regard, the Court, as the ‘ultimate interpreter of the American Convention,’ has competence to interpret, with full authority, all the provisions of the Convention, including those of a procedural nature. ... [T]he Court’s advisory competence may be exercised, in general, with respect to any provision concerning the protection of human rights of any international treaty applicable to the American States, regardless of whether it is bilateral or multilateral, or of its principal object or that States outside the inter-American system are or can be parties.”

<sup>19</sup> See e.g., para. 46, where the Court explains that “As to the obligation to prevent and sanction torture ... the Court considers that States should pay special attention to the situation of these vulnerable groups that are deprived of liberty and to their specific risk of torture and other ill-treatment so that they strengthen the control mechanisms of prevention and sanction with respect to both prison staff and third persons.”

<sup>20</sup> The general question was formulated as follows: “Regarding the protection of the rights of persons in a special situation of vulnerability such as ... indigenous people ... is it possible to justify ... the need to adopt differentiated approaches or measures to guarantee that their specific circumstances do not affect the equality of their conditions with the other persons deprived from liberty, as regards both their detention conditions, and the remedies filed to protect their rights in the context of the deprivation of liberty? If so, what are the specific implications of the content of the rights established in these articles on the scope of the correlative obligations of the States in this matter?”

<sup>21</sup> See also para. 69, stating that “as has been stated by the Court in other cases, States should pay special attention to those cases in which there is an intersection of multiple factors of vulnerability and risk of discrimination associated with a series of particular conditions and identity traits.”

<sup>22</sup> The Court found, among other things, at para. 33, that “pursuant to Article 5(1) and 5(2) of the Convention, every person deprived of liberty has the right to live in conditions of detention that are compatible with personal dignity. ... Thus, the State’s duty to safeguard the well-being of those detained and to ensure that the manner and method of detention do not exceed the level of suffering inherent in detention. ... [T]he State is obligated to guarantee all the rights of persons under its custody, especially the rights to life and to personal integrity, as well as access to the basic services indispensable for a life with dignity.”

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and communities... [I]n determining the pertinent international obligations, the Court will interpret the provisions of the Convention by taking into account ‘the characteristics that differentiate the members of indigenous peoples from the general population and that make up their cultural identity’” (279). In this regard, the Court has previously ruled that indigenous peoples “have their own characteristics that make up their cultural identity, such as their customary law, economic and social characteristics, values, traditions and customs. Thus, the Court has deemed it essential that States, in protecting indigenous peoples, take into account their specificities, as well as their special vulnerability” (280). It further advised that “Given their special relationship with the land and their community, indigenous peoples are a group disproportionately affected by deprivation of liberty, which is an obstacle to the full exercise of the right to the cultural identity of indigenous peoples, the effects of which extend to the whole community” (281). It noted also that “imprisonment may be used as a mechanism to censure and to criminalize indigenous leaders [and] ... their prosecution is characterized by prolonged periods of pretrial detention” (283). Discussing the applicable rules, the Court highlighted the UNDRIP, explaining that it understands that it represents “international minimum standards applicable to the protection of the human rights of indigenous persons,” and, as it has done previously in its case law, the Court will use it to respond to the questions presented by the IACHR (285).<sup>23</sup> It also “underscores the necessity that the representatives and authorities of indigenous peoples actively participate in the preparation, implementation and evaluation of the States’ criminal policies and that relations of dialogue and cooperation be established between these authorities and the regular justice” (287).

**Third**, the specific questions were listed by the IACHR and the Court as follows:

What specific obligations do the States have to guarantee that [indigenous] people have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific obligations do States have to ensure that indigenous people deprived of liberty may preserve their cultural identity, in particular their customs, traditions and diet?
2. What are the duties of the State in relation to medical care for indigenous people deprived of liberty in particular with respect to their medicinal practices and traditional medicines?

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<sup>23</sup> The Court also, at para. 286, “welcomes the advances in laws and public policies that some States of the region have undertaken to meet the specific situation of indigenous persons deprived of liberty, which will be taken into account by the Court in the development of the standards in this section, inasmuch as they represent best practices in the oversight of sanctions of this group of persons.”

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3. What special measures must States adopt in relation to the activities or programs implemented within prisons, as well as in disciplinary hearings, in light of the cultural and linguistic particularities of indigenous people?
4. What special obligations do States have to prevent any act of violence with respect to indigenous people deprived of liberty? (3)

The Court began by discussing the preference of non-custodial sentences for indigenous persons (288-94). It observed that various international authorities have determined that, for indigenous people, “deprivation of liberty may be a cruel, inhuman or degrading treatment or punishment and even a form of torture” and have urged states “to give preference to methods of rehabilitation of indigenous persons, rather than confinement” (290, 300).<sup>24</sup> Noting that the same considerations apply also to pretrial detention, the Court explains that it “understands that the separation of indigenous persons from their community and territory, basic components of their cultural identity, may lead to deep suffering that goes beyond that inherent in confinement in prison and may have a negative impact on members of the indigenous community” (292). Thus, states are obliged “to ensure that the deprivation of liberty of indigenous persons is not the norm, but rather the exception,” and they “must offer alternative punishments to prison, as well as precautionary measures other than pretrial detention, that are applicable to indigenous persons, except on those occasions when imprisonment is necessary” (id.).<sup>25</sup> The Court then explained that “when sanctions are imposed on members of indigenous peoples, their economic, social and cultural characteristics must be taken into account,” listing four criteria that must be considered when “assessing criminal responsibility and determining the appropriate punishment of indigenous persons” (293). This also requires “that the jurisdictional authorities establish a dialogue and a coordination with the representatives of the indigenous community” (287, id.).<sup>26</sup>

Next, the Court addressed how to preserve the cultural identity of the indigenous persons deprived of liberty (295-322). It reviewed its case law and other international authorities that recognize the right to transmit and enjoy culture, the right to participate in cultural life, and the right to cultural identity (295-98).

<sup>24</sup> Citing e.g., *Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/50/2, 23 April 2013, para. 93, [https://www2.ohchr.org/english/bodies/cat/opcat/docs/CAT-C-50-2\\_en.pdf](https://www2.ohchr.org/english/bodies/cat/opcat/docs/CAT-C-50-2_en.pdf). See also IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, OEA/Ser/L/V/II.131 doc. 26 (March 2008), e.g., Principle III(1) (providing that when “imposing penalties laid down by general law on members of indigenous peoples preference shall be given to methods of punishment other than confinement in prison, in conformity with their customs or customary laws, where these are compatible with the legal system in force”), <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp>

<sup>25</sup> See also para. 301, stating that “... States must take into consideration the data that differentiate the members of indigenous peoples from the general population and that form their cultural identity. Therefore, in those exceptional cases in which the deprivation of liberty of an indigenous person is necessary, the accommodations and services provided in prison must be adapted as much as possible to the requirements of the proper exercise of the right to cultural identity.”

<sup>26</sup> This is required “to achieve an intercultural approach in the administration of criminal justice [where] the characteristics of the person being prosecuted must be assessed from the perspective of his or her culture, with the support of anthropologists and sociologists, interpreters and on-site visits...” (id.).

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Following these, the Court explained again that indigenous authorities have a right to participate in designing and developing public policies on deprivation of liberty as it affects their peoples as well as to “the exercise of their autonomy, which makes the norms of the domestic legal system complementary to the practices, habits and customs of the indigenous peoples respecting the measures of deprivation of liberty, which are not necessarily directed to confinement in prison” (298). This includes “policies to articulate the needs of indigenous persons with the justice and prison administrations” (299).

The Court then proceeded to provide advice on the following issues: (1) the placement of incarcerated indigenous persons; (2) the preservation of indigenous traditions and customs; (3) access to culturally appropriate food and (4) the use of traditional practices and medicines (302). On the first point, it explained that “States should place indigenous persons deprived of liberty in prisons closest to their communities, in consultation with the corresponding indigenous authorities (304).<sup>27</sup> Concerning the preservation of indigenous traditions and customs, the Court advises that rights to freedom of conscience and religion and to cultural identity are implicated, that these rights are recognized by various international instruments, including the UNDRIP (305-06), and this requires “specific measures by the States” (307). Based on the international standards, the Court concludes that states have the obligation to allow incarcerated indigenous persons “to exercise their cultural and religious practices within the prison” (310).<sup>28</sup> On access to culturally appropriate food, a right that, for indigenous peoples, “is intimately related to the rights to a life with dignity and to participate in cultural life” (311), the Court concluded that, “in addition to meeting the nutritional requirements necessary to maintain their health,” states must also:

- meet the values and traditions of their culture;
- permit, where possible, that indigenous people can prepare their own food, in accordance with their cultural guidelines; and
- facilitate the provision of food “by other members of the indigenous community, as well as by organizations that defend the rights of indigenous peoples” (314).

Turning to the use of traditional practices and medicines while incarcerated

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<sup>27</sup> See also para. 303, explaining that the placement of incarcerated indigenous persons involves “special implications resulting from the separation of indigenous persons from their communities and their lands.... In *Norín Catrimán et al. v. Chile*, the Court stressed that, given the importance of the ties of indigenous persons with their place of origin or their communities, it is especially important that States, to the extent possible, facilitate the transfer of inmates to prisons that are closest to the locality where their families reside.”

<sup>28</sup> The Court explains (at 310) that this “means that the States must ensure that indigenous persons can: (a) profess, manifest, practice, maintain and change their religion, according to their beliefs; (b) participate in religious and spiritual rites and exercise the traditional practices; (c) elect their representatives among the prison population, who can organize periodic ceremonies and visit the prisoners who so request; (d) receive outside visits from representatives of their religion and of their community; (e) have access, as practicable, to specific places to practice their religion and (f) wear their traditional clothing and maintain the length of

**Xhanaru: Upholding Indigenous Peoples' Rights**

315-22), the Court also noted that “the WHO calculated that 80% of the indigenous peoples of the Americas rely on traditional healers as their principal health care providers” (316). Reviewing the applicable standards, the Court determined that the law of human rights “clearly recognizes the right of indigenous peoples to use their own medicinal practices,” (see UNDRIP, art. 24(1)) (317). States, therefore, have the following “specific obligations:

- a. promote intercultural systems or practices in their health services, so that the medical care provided to indigenous persons takes into consideration their cultural guidelines;
- b. allow indigenous persons deprived of liberty to bring into prison those plants and traditional medicines, as long as they do not represent a danger to their health or that of third persons and,
- c. allow the admittance into the prisons of persons who apply the traditional medicine of the indigenous community for the medical care of indigenous persons” (322).

The Court then turned to the use of indigenous languages in prison and culturally appropriate measures of reinsertion and reintegration into society (323-30). Quoting UNDRIP, art. 13 (324), the Court advised the relevant standards require that “indigenous prisoners can express themselves and receive information in their own language” (327). Information that is provided to other prisoners must be “translated to the language of the indigenous persons;” translators must be provided in administrative and judicial proceedings and procedures where indigenous prisoners “do not speak the language in which the proceedings are conducted or when they expressly wish to speak in their own language;” and states must “refrain from prohibiting indigenous persons deprived of liberty to express themselves in the language that they choose” (id.). On culturally appropriate reinsertion and reintegration, the Court explained that when incarcerated persons are indigenous, states are required to adopt culturally appropriate measures, “in coordination with the indigenous peoples, taking into consideration the link that the prisoners maintain with their land and community,” and which “take into account the conditions of socio-economic exclusion and the effects of discrimination that affect persons who belong to indigenous communities” (328). Moreover, again citing the UNDRIP and other standards, states must “allow access to traditional knowledge, education, and intercultural and bilingual educational material.” Prison programs and services “should be appropriate, accessible and meet the cultural needs” of indigenous prisoners, employing an intersectional approach,” and states “should work in conjunction with the corresponding indigenous communities and authorities” to implement such measures (330).

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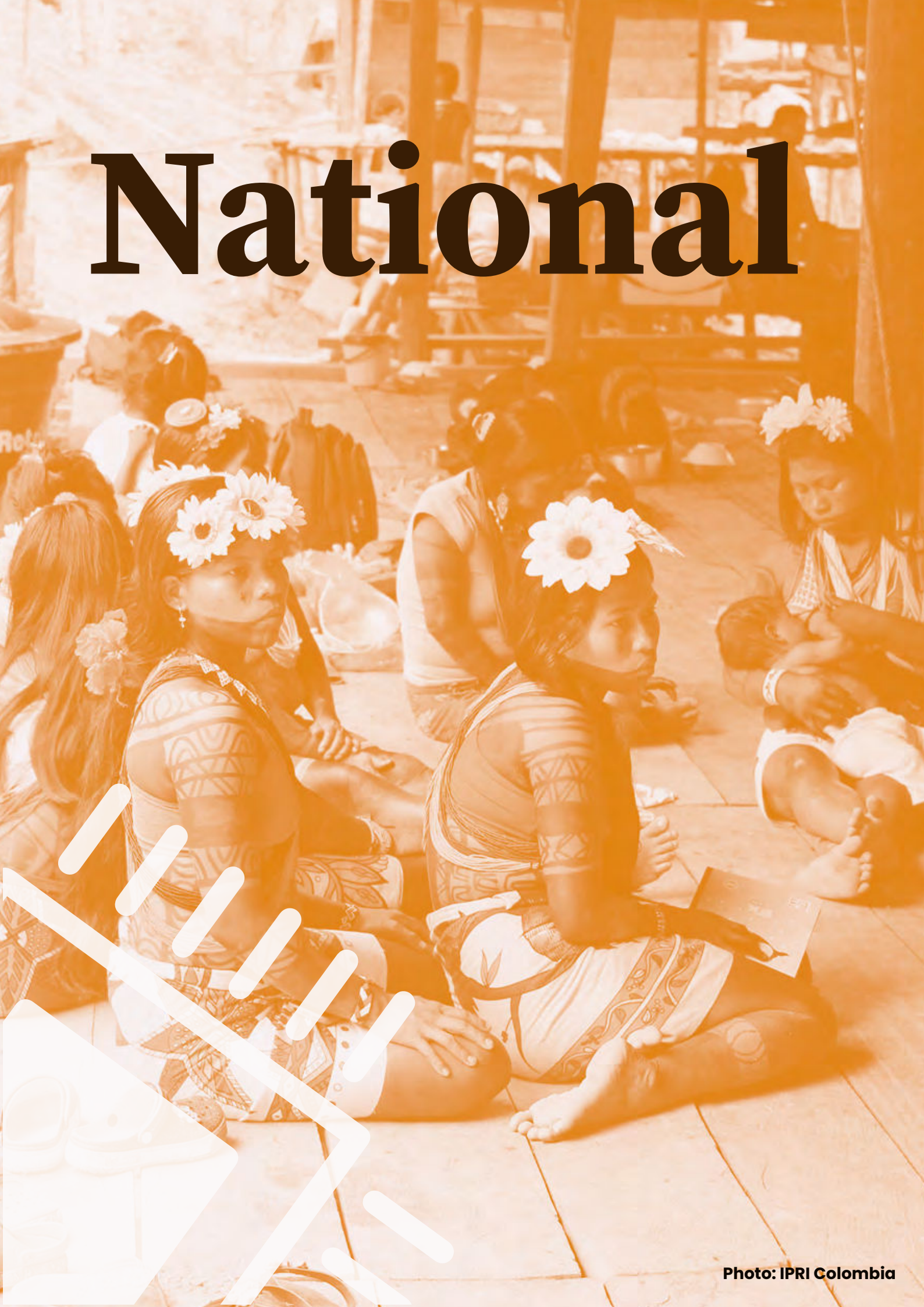
Last, the Court focused on states' specific obligations to prevent violence against indigenous persons deprived of liberty (331-36). The Court explained that states have a general obligation to protect persons from violence, particularly where the state is the sole authority in the prison, and in the case of indigenous peoples, it is under a specific obligation to work with indigenous peoples to alleviate and redress discriminatory treatment and violence in the prison system (332-34). States must also "ensure that indigenous persons are placed in spaces that offer protection of prisoners at high risk and that are equal to those of the majority of the prison population" (334). However, referring to the Human Rights Committee's case law, "measures of protection should never mean isolation, which disproportionately affects indigenous persons" (335).<sup>29</sup> The Court added that the relevant norms impose specific obligations to prevent violence against indigenous persons, including:

- a. "train and sensitize prison personnel on the specificities of the indigenous cultures;
- b. establish mechanisms of supervision in prison, as well as for denouncing and investigating violations of human rights, that are independent and that there are culturally sensitive personnel trained in investigating violence against indigenous persons;
- c. increase the number of indigenous prison personnel;
- d. develop, in conjunction with indigenous communities and authorities, prison policies on violence and discrimination, and
- e. ensure that the adopted measures to protect indigenous persons do not imply an inferior treatment to that provided to other prisoners, including isolation" (336).

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<sup>29</sup> See *Brough v. Australia*, CCPR/C/86/D/1184/2003 (17 March 2006), para. 9(4).

# National



## 1.M. Sabajo v. S. Sabajo

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 [bit.ly/3KXU0FR](https://bit.ly/3KXU0FR)

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 Country: Suriname | Body: First District Court  
Date: 24 November 2022

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**Issues: Autonomy and Self-Government.**

**UNDRIP arts. 3, 4, 5, 33, 34, 35**

**Summary:** This case concerns a dispute between two members of Powakka indigenous village, one the former Village Chief (Merian), who held the position 2015-21, the other (Sergio) the successor to the former and the newly nominated Village Chief. The process of choosing the Village Chief was observed by two indigenous organizations, one national, one regional, and eight Chiefs from other villages. All certified that the village had chosen Sergio as the Village Chief of Powakka and the government was informed of this decision (because Chiefs must be formally installed by the State under extant practice). Merian subsequently claimed that there had been irregularities in the process of choosing the Chief. She sought the intervention of the State to annul the decision to choose Sergio (the village chooses its leaders by consensus, not by elections). The District Commissioner, an official in the local government system, supported her and decided to reject the designation of a new Chief (para. 2.7(6)). After mediation failed, the matter was submitted to the District Court, which decided that the only issue to be resolved was “whether the correct procedure has been observed for the succession by the new village administration of Powakka” (4.2).

**First**, the Court rejected the authority of the District Commissioner to intervene, citing the superior legal authority of the 1992 Forest Act, which provides in its article 41 that “the customary rights of the indigenous and tribal forest land dwellers in their villages and settlements and on their farmland, shall continue to be respected as much as possible” (4.22). This provision, the Court explained, also contains an appeals process (to the President only) should those customary rights be violated.

**Second**, Merian claimed that the State has a legitimate role in the process of choosing Village Chiefs and that, at a minimum, that role was to facilitate the process (4.2.5). However, the Court explained that “since the judgments of the Inter-American Court of Human Rights of 28 November 2007 in the case of Saramaka People vs Suriname and of 25 November 2015 in the case of Kaliña and

## Xhanaru: Upholding Indigenous Peoples' Rights

Lokono Peoples vs Suriname, this role no longer stands alone” (id.). The Court cited paragraph 303 of the latter judgment, which refers to the right of collective legal personality as well as Suriname’s assertions that it was in the process of legislatively recognizing that right in its domestic law (via the Indigenous and Tribal Peoples Collective Rights Bill).<sup>30</sup>

**Third**, the Court referred to UNDRIP, article 33(1). It explained that it “in order to comply with” this provision, the State must recognize that “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions” (4.2.6). It also referred to subparagraph (2), which provides that “Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.” These norms, the Court explained had also been incorporated into the Indigenous and Tribal Peoples Collective Rights Bill, a draft law pending before Suriname’s legislature. The Court recalled that Suriname has committed itself to adhere to the UNDRIP as well as the orders of the Inter-American Court of Human Rights in the above-referenced judgments (concerning recognition of collective legal personality). Therefore, it decided that there was sufficient reason “to align with the definition of tribal association in the Collective Rights Bill, which was based on both sets of norms” (4.2.7). It also referred to Chapter IV of the Bill, which regulates the functions of the traditional authority within the framework of autonomy and self-government, providing (and reversing decades of Suriname’s practice) that the “traditional authorities for the indigenous or tribal people concerned are in office from the moment they are traditionally designated or elected and initiated” (id.).<sup>31</sup>

**Finally**, the Court dismissed the case filed by Merian on the basis that Sergio had been legitimately chosen by the village in accordance with its rights and traditions; there was no valid reason to interfere in their autonomous right to determine the structures and to select the membership of their institutions in accordance with their own procedures (4.2.10 - 4.2.11).

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<sup>30</sup> The Court explains, in para. 4.2.6, that “The recognition of collective legal personality is an essential condition for ensuring that indigenous and tribal peoples can exercise different rights that must be protected because of their common characteristics;” and “failure to recognise the legal personality of the Kaliña and Lokono peoples has consequences for the violation of other rights recognised in Articles 1.1, 21 and 25 of the Convention.”

<sup>31</sup> The Court stated that this chapter “regulates the traditional authority and governance of indigenous and tribal peoples, based on the [UNDRIP].”

## 2. Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21



[bit.ly/40egEhG](https://bit.ly/40egEhG)



ENG only



Country: Australia | Body: Land Court of Queensland

Date: 25 November 2022

**Issues: Upholding aboriginal cultural rights in relation to a proposed coal mine and climate change impacts.<sup>32</sup>**

**UNDRIP arts. 3, 7, 8, 11, 12, 13, 25, 29, 31**

**Summary:** This case involves an administrative law challenge against applications for a coal mining lease and an associated environmental permit (para. 143-49). The decision observes that “Objections based on the climate change implications of the proposed mine lie at the heart of both environmental and human rights objections in this case” (571). The proposed mine would involve both open cut and underground thermal coal mining, all intended for export to Southeast Asian markets. The challenge was filed in a state-level court (the Land Court of Queensland). In line with its jurisdiction,<sup>33</sup> the Land Court decided to advise the responsible Minister to reject the permits because the negative impacts on human rights (property rights in a privately owned protected area), indigenous peoples’ cultural rights and the climate would be greater than the proposed economic and social benefits of the mine.<sup>34</sup> The parties agreed that climate change affects indigenous peoples in specific ways, including disruption of traditional cultural practices, displacement from traditional lands, impediments to the continuation, preservation and development of culture for future generations; and irreversible damage to traditional lands and waters (631).<sup>35</sup> The company has since dropped its appeal against this decision, and it is now for the competent Minister to decide if the mining project should go ahead, taking the Land Court’s decision into account.<sup>36</sup>

<sup>32</sup> For similar issues in the USA, see ‘Federal Court Delivers a Reprieve to Apache Members Seeking to Save a Sacred Site’, Sierra, 1 December 2022, <https://www.sierraclub.org/sierra/federal-court-delivers-reprieve-apache-members-seeking-save-sacred-site>; and ‘Appeals court gives Resolution Copper mine opponents another chance’, AZ Big Media, 18 November 2022, <https://azbigmedia.com/business/appeals-court-gives-resolution-copper-mine-opponents-another-chance/>

<sup>33</sup> Para. 673, stating “This is an administrative process. It is not a question of putting policy to one side. The Court is tasked to advise the ultimate decision maker what decision it should make, including with regard to the policy context.”

<sup>34</sup> See e.g., para. 45-6, stating that “... I have decided the importance of preserving the right, given the nature and extent of the limitation, weighs more heavily in the balance than the economic benefits of the mine and the benefit of contributing to energy security for Southeast Asia;” and “... in deciding what recommendation to make, I have taken into account my view of the human rights implications as a matter relevant to the public interest for each application.”

<sup>35</sup> See also para. 1295, stating that “... the right to privacy and home is also engaged by the Climate Change Ground, in particular with respect to First Nations peoples.”

<sup>36</sup> ‘Galilee Coal Project dead in the water after Waratah Coal drops appeal against historic land court refusal’, Environmental Defenders Office, 13 February 2023, <https://www.edo.org.au/2023/02/13/galilee-coal-project-dead-in-the-water-after-waratah-coal-drops-appeal-against-historic-land-court-refusal/>

## Xhanaru: Upholding Indigenous Peoples' Rights

**First,** Queensland's Human Rights Act 2019 requires judges to both consider human rights and not to make a decision that is incompatible with human rights (4, 1323). In the context of the case at hand, the judge explains that he “must properly consider whether granting the applications would be compatible with human rights [and] ... whether any human rights would be limited and, if so, whether the limit would be lawful” (1289). This is part of assessing the public interest in connection with the permitting of the mining project (1290, 1309).<sup>37</sup> The judge accepted that the emissions that would be generated from burning the mined coal and other impacts, even if those emissions were produced in another country, would be “sufficiently connected to the applications that they could constitute a limit to a human right” (1346, 1383). Any limits, the Court explained, “must be reasonable and demonstrably justified” and there must be strong evidence making clear “the consequences of imposing or not imposing the limit” (1420). The judge then applied this to various rights, finding in each instance that the need to respect and protect the affected rights outweighed the projected benefits from the coal mining project.<sup>38</sup>

**Second,** the Court addressed the impact of the proposed mine on indigenous peoples' cultural rights, both as recognized in the Human Rights Act 2019 and international law (1514 et seq). With respect to the Human Rights Act, the judge explains that its explanatory notes refer to both ICCPR, art. 27, and the UNDRIP (1525), and the notes explicitly refer to UNDRIP, arts. 8, 25, 29 and 31 (1526).<sup>39</sup> The judge acknowledged that s.28 and the international standards contain common themes and elements, including:

- “indigenous cultural rights are distinct from other cultural rights” (1529);
- both identify “culture as an expression of self-determination” (1530);<sup>40</sup>
- both “are intended to prevent destruction of culture” (1531);<sup>41</sup>
- both “recognise the holistic nature of indigenous culture, incorporating spiritual, material, and economic relationships with land, waters, and resources” (1533);

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<sup>37</sup> The Court explained in this regard, at para. 1451, “that not approving this Project would negate the benefit to the miner. However, that private financial interest needs to be balanced against the public interest in the mine proceeding or not, taking into account the ecological costs, the contribution to climate change and the implications of those matters for protected human rights.”

<sup>38</sup> With respect to the right to life, the judge ruled, at para. 1513, that “The importance of preserving the right to life, taking into account the nature and extent of the limitation, weighs more heavily in the balance than the economic benefits of the mine and furthering energy security for Southeast Asia.”

<sup>39</sup> Section 28 of the Human Rights Act, quoted in para. 1514, incorporates, verbatim and indirectly, various provision of the UNDRIP, including arts. 8 and 25. It is also modelled on ICCPR, art. 27.

<sup>40</sup> Explaining that “... the international jurisprudence identifies culture as an expression of self-determination. While not explicit in s 28, the importance of self-determination to Aboriginal peoples and Torres Strait Islander peoples is stated in preamble 6 (see [1538]).”

<sup>41</sup> See also *Love v Commonwealth* (2020) 270 CLR 152, [289] per Gordon J., summarized in Xhanaru, Issue 1. Referring to s. 28, which reflects: “the deeper truth ... that the Indigenous peoples of Australia are the first peoples of this country, and 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.’”

## Xhanaru: Upholding Indigenous Peoples' Rights

- both protect “the right to conserve and protect the environment and productive capacity of land, water and other resources” (1534);
- both “protect the right to enjoy, maintain, control, protect, develop and use language and traditional cultural expressions” (1525); and
- both recognize that “cultural rights are both collective and intergenerational” and the “intergenerational aspect is inherent in the right to maintain and develop culture” (1536).

**Third**, the judge then turned to whether these rights could be validly limited by the proposed coal mining project. The evidence supported finding that indigenous peoples “will be disproportionately affected by climate change impacts” (1542), including “disproportionate health impacts” (id.), extreme heat, rising sea levels, and increased coastal erosion (1544), all exacerbated by their “limited adaptive capability” (1547). Sea level rise alone “could well pose an existential threat to Torres Strait Island peoples” (1548). The judge stressed that a “striking and enduring theme in the evidence from the First Nations witnesses was their active commitment to and participation in caring for country ... [which] also has distinct significance because of the specific protection by s 28(2)(e) of the right to conserve and protect the environment and the productive capacity of land, waters, and other resources” (cf. UNDRIP, art. 29) (1557).

**Finally**, reviewing this testimony, the judge concluded that “climate change impacts will have a profound impact on cultural rights and, for some peoples who will be displaced from their country, it risks the survival of their culture, the very thing s 28 is intended to protect” (1565). Thus, the need to respect and protect these rights outweighs the purported benefits of the coal mining project (1566). The judge identified an additional factor, emphasizing that for indigenous peoples, the “right is about the survival of culture. ... More severe impacts mean greater interference with cultural rights. Displacement has the potential to destroy culture. Something that cannot be measured in monetary terms, is at odds with the purpose of s 28 and, set against the history of dispossession of First Nations peoples in this country, counts against the Project being approved (1568).

### 3. Organization Regional de Pueblos Indigenas del Oriente v. Loreto Public Prosecutor, Amparo Action, FILE: 00299-2020-0-1903-JR-CI-02

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 [bit.ly/43xlpEq](https://bit.ly/43xlpEq)  ESP only

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 Country: Peru | Body: Superior Court of Justice Loreto, 2nd Civil Court | 21 November 2022

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**Issues: Ban on logging concessions affecting uncontacted indigenous peoples.**

**UNDRIP arts. 1, 2, 3, 7, 8, 18, 20, 32.**

**Summary:** This case challenges Supreme Decree No. 080-2020-PCM, which sought to recommence extractive operations, logging primarily, in areas that overlap with legally recognized reserves for uncontacted/voluntary isolation indigenous peoples in the Peruvian province of Loreto (referring to Supreme Decree No. 002-2018-MC, recognizing the existence of these peoples).<sup>42</sup> The 2020 Supreme Decree failed to account for the extreme vulnerability of these peoples to diseases, more so in light of the Covid 19 pandemic. This mostly concerned 43 logging concessions, illegally granted over the indigenous reserves between 2016 and 2017 by Loreto's Regional Forestry and Wildlife Authority. This occurred notwithstanding demands issued between 2017-20 by the Ministry of Culture and Peru's Ombudsman's Office to annul the illegally issued logging concessions and to make sure that no further concessions would be granted due to the threat of irreparable harm and violation of constitutionally entrenched rights.

**First**, the judge determined that ORPIO, a regional indigenous federation, was able to stand as a plaintiff because it exercises representation over the named indigenous reserves (Yavarí Tapiche, Yavarí Mirim, Napo Tigre, and Sierra del Divisor Occidental) and, it noted, this is in accord with a judgment of Peru's Constitutional Court (STC No. 06316-2008/PA/TC), and the action concerns halting the imminent threat of initiating the process of granting and/or reactivating forest concessions in the named reserves (page 5).

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<sup>42</sup> See also 'New reserve created for Peru's "uncontacted peoples" after nearly two decades of struggle', *Tenure Facility*, 24 May 2021, <https://thetenurefacility.org/article/new-reserve-created-for-perus-uncontacted-peoples-after-nearly-two-decades-of-struggle/>

## Xhanaru: Upholding Indigenous Peoples' Rights

**Second**, the judge observed that Peruvian law guarantees the rights of uncontacted/voluntary isolation indigenous peoples (referring to Article 4 of Law No. 28736) (6). The judge further noted that the same rights are guaranteed in UNDRIP, arts. 1, 2 and 8, the latter guaranteeing the right “not to suffer forced assimilation or the destruction of their culture” (id.). On this basis, the judge concluded, that natural resource extraction in the territories of the affected indigenous peoples “leads to the possibility of forced contact with these extremely vulnerable peoples, transmission of diseases, destruction and contamination of their living spaces, ... and/or areas where they use natural resources for their subsistence, malnutrition, health problems, internal conflicts and confrontations with outsiders (6-7). In short, logging, “formal or informal, legal or illegal, constitutes a threat to the physical and cultural integrity” of the affected indigenous peoples” (7).

**Third**, the judge concluded that the threats of imminent and irreparable harm were well substantiated, including through evidence of deforestation in another area that well-illustrates the harm that the case sought to avoid (8). This also corresponds to violations or threatened violations of constitutionally protected rights vested in the uncontacted/voluntary isolation peoples.

Finally, the Court ordered that the regional authorities refrain from initiating a process of granting and/or reactivating forest concessions within the affected indigenous reserves (id.), that it not apply Article 1 of Supreme Decree No. 080-2020-PCM to the extent that it allows for resumption of logging in the affected areas, and that the Regional Government of Loreto cease and desist from granting or reactivating any concession or related in the affected reserves, and that failure to do so would incur fines and possible criminal liability (8-9).

**N.B.** Politicians in Peru have presented a bill to the legislature that would amend Law No. 28736 and allow regional governments, like Loreto, to simply cancel the reserves for uncontacted/voluntary isolation indigenous peoples. This bill is pending at the time of this writing.<sup>43</sup>

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<sup>43</sup> See e.g., ‘Peru lawmakers propose bill to strip Indigenous people of protections’, *The Guardian*, 22 December 2022 (“Peru’s umbrella Indigenous federation Aidesep said passing the bill ‘would cause genocide’, pointing out their ‘brothers and sisters’ were ‘highly vulnerable and threatened by the increasing pressures on their territories’ from infrastructure projects, logging, illegal mining and drug trafficking”), <https://www.theguardian.com/world/2022/dec/23/peru-indigenous-protections-bill>

## 4. Judgment 111-Hsien-Pan-Zi No.17



[bit.ly/41IKVX5](https://bit.ly/41IKVX5)



Summary English only



Country: Taiwan | Body: Constitutional Court

Date: 28 October 2022

**Issues: Recognition as indigenous peoples.**

**UNDRIP arts. 2, 3, 8, 9, 33**

**Summary:** The case concerns a demand by the Siraya people to be legally recognized as one of the indigenous peoples of Taiwan. It came to the Constitutional Court after the Taipei High Administrative Court (Division No.3) determined in 2020 that the Status Act violated the Siraya's constitutional rights, suspended the proceedings in its pending case and requested an interpretation of the law by the Constitutional Court. The case follows on from a 2016 apology by the President of Taiwan and her commitment that the Siraya and others would be granted equal rights and the same status as fellow indigenous Taiwanese. It also follows repeated denials of the Siraya's indigenous status by the Council of Indigenous Peoples (a government ministry responsible for indigenous affairs) over a thirty year period because they failed to register as indigenous during the relevant time periods.<sup>44</sup> The demand was based on the argument that certain articles of the 2001 Status Act for Indigenous Peoples are unconstitutional because they deny the Siraya and others' indigenous status and, thus, their right to equality before and equal protection of the law.<sup>45</sup> Article 2 of that law provides that only indigenous peoples living in the mountains and plains can be lawfully recognized, a "Japanese colonial classification," but the Siraya do not neatly fall into either category.<sup>46</sup> It also follows another decision of the Constitutional Court, notified on 1 April 2022, which declared Article 4(2) of the Status Act unconstitutional (concerning whether children of mixed marriages could acquire indigenous status by taking the surname of the Indigenous parent or using the traditional Indigenous name).

**First,** the Court unanimously ruled that Austronesian peoples, including the Siraya, who originally inhabited Taiwan are indigenous peoples, and their status cannot be denied by the law, provided they satisfy specific qualifications (both subjective and

<sup>44</sup> See <https://www.cip.gov.tw/en/index.html?cumid=B54B5C7E1E0F994092EDA9D0B7048931>. The Council's enabling law, the 2014 Organization Act of the Council of Indigenous Peoples is available at: <https://www.cip.gov.tw/en/news/data-list/74DD1F415708044A/2D9680BFECBE80B6A17FB652D1B9EF7B-info.html>

<sup>45</sup> For the Status Act, see <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0130001>

<sup>46</sup> Yu Liang, *Unsettled Transitional Justices: Indigenous Sovereignty and the Limit of Democracy*, TAIWAN INSIGHT, SPECIAL ISSUE: INDIGENOUS RECOGNITION FOR THE SIRAYA PEOPLE, December 2022, <https://taiwaninsight.org/past-special-issues/indigenous-recognition-for-siraya-people/>

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objective).<sup>47</sup> This includes recognition of their collective rights, rather than only individual rights, a first in Taiwan's judicial system. The right to (legal) personality protected by Article 22 of Taiwan's Constitution, the Court held, includes the right to recognition of indigenous identity (para. 19). When read together with paragraphs 11 and 12 of Article 10 of the Additional Articles of the Constitution, this "not only protects an individual's indigenous identity, but also protects the collective indigenous identity of each group of indigenous peoples" (20). In relation to the purpose of protection of indigenous culture in the Constitution, the Court also observed that the "definition of indigenous peoples and its parameter of protection should not be in contradiction with historical facts and the international trend of the protection of indigenous peoples. Instead, it should be more lenient; in other words, the exclusion from such protection should be put under strict examination" (26).

**Second**, the Court ruled that the Status Act, art. 2, is unconstitutional because it denies the Siraya the possibility to be legally recognized. In part, this addresses discrimination not only against the Siraya in State law but also among indigenous peoples in general as some can be legally recognized whereas others cannot, creating an unequal situation in which the Siraya are unable to exercise their rights on an equal footing with other indigenous peoples.<sup>48</sup> The Court also ruled that this conflicts with Article 22 of the Constitution, which protects the freedom of identity of the indigenous peoples, and sub-paragraphs 11 and 12 of Article 10 of the Additional Articles of the Constitution of the Republic of China, which protects the culture of the indigenous peoples. The Court allowed the Government a three year-long period to amend the Status Act or to promulgate new laws to correct these deficiencies. At present, approximately 580,000 indigenous people are legally recognised in Taiwan. If implemented effectively, it is estimated that the number could rise to as much as 980,000 persons because of this judgment.

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<sup>47</sup> The Court explained, at para. 38, that the following criteria trigger "the right to be recognized and legally approved as indigenous peoples" (and "the competent authority is legally obligated to issue such approval"): "Austronesian Taiwanese Peoples who meet the elements of (1) having preserved their cultural characteristics such as their ethnollect, custom, and tradition until the present; (2) having maintained their ethnic identity; (3) and there is a verifiable historical record of them being Austronesian Taiwanese peoples...."

<sup>48</sup> See e.g., CERD/C/GUY/CO/14 (4 April 2006), para. 15-6 (expressing deep concern about Guyana's "practice of granting land titles excluding bodies of waters and subsoil resources to indigenous communities on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy"). As a general proposition, CERD recommended that Guyana "remove the discriminatory distinction between titled and untitled communities."

## 5. Resolution No. 24725 – 2022, File: 21-017138-0007-CO

 [bit.ly/3KAIDn1](https://bit.ly/3KAIDn1)  ESP only

 Country: Costa Rica | Body: Supreme Court, Constitutional Chamber | Date: 19 October 2022

**Issues: Constitutionality of the Indigenous Law 1977, particularly its prohibition on occupation/acquisition of indigenous lands by non-IPs and requirement of restitution.**

**UNDRIP arts. 7, 8, 25, 26, 27, 28, 32**

**Summary:** The Constitutional Chamber of Costa Rica's Supreme Court was asked to review the constitutionality of article 3 of the 1977 Indigenous Law. That article prohibits non-indigenous people from occupying, leasing, acquiring or selling land inside any of Costa Rica's 24 legally titled indigenous territories.<sup>49</sup> Any person occupying these areas, prior to 1977, would have to be relocated and compensated by the state, whereas those acquiring land after 1977, for any reason, shall be deemed to be acting in bad faith and shall be relocated but are not entitled to compensation. The case was brought by a non-indigenous person who had purchased lands within the reserve in 2013 (37 years after the Reserve was established and 36 years after the enactment of the Indigenous Law). He argued that it was a violation of his rights (Constitutional and under the American Convention on Human Rights) that his land would be taken and returned to the owners of the reserve without compensation.

He further argued that the law should be properly interpreted to mean that 'private property' located in an indigenous reserve is only legally incorporated into that reserve after the expropriation procedure provided for in art. 5 of the Indigenous Law had been completed.<sup>50</sup> He also sought to a declaration that the jurisprudence of the First Chamber of Cassation that upholds the Indigenous Law was unconstitutional and should be annulled, particularly its holdings that those who obtained land in indigenous reserves after 1977, even without knowing that the

<sup>49</sup> Art. 3 provides that "Indigenous reserves are inalienable and imprescriptible, non-transferable and exclusive for the Indigenous communities that inhabit them. Non-Indigenous persons may not rent, lease, buy or otherwise acquire land or farms within these reserves. Indigenous people may only negotiate their lands with other Indigenous people. Any transfer or negotiation of lands or improvements thereto in Indigenous reserves, between Indigenous and non-Indigenous, is absolutely null, with the legal consequences of the case."

<sup>50</sup> Article 5 provides "In the case of non-indigenous persons who are owners or possessors in good faith within the indigenous reserves, the ITCO must relocate them to other similar lands, if they wish; if it is not possible to relocate them or they do not accept the relocation, it must expropriate and compensate them in accordance with the procedures established in the Expropriation Law...."

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the land was in the reserve, should be deemed 'acquirers in bad faith' and not entitled to compensation.

**First**, in upholding the constitutionality of the Indigenous Law and the jurisprudence of the First Chamber, a majority of the Court ruled that anyone acquiring land in an indigenous reserve after 1977 or the publication of the Decrees establishing specific reserves, knew or is presumed to have known that the land was in an indigenous reserve and, thus, cannot be a good faith occupier and entitled to compensation (55).<sup>51</sup> They are instead 'bad faith' purchasers or occupants, who shall be removed without compensation "since the physical delimitation of that reservation had already been established, and, therefore, such lands already had the conditions of non-transferable and inalienable" (page 8). Moreover, 'good faith' cannot be proven "when a person acquires property within the limits of such restricted space, since, from the moment in which this area is established as an indigenous reserve, it becomes legally inappropriate to execute such a transferable act of ownership, since the property in question is non-transferable by law" (9-10). In sum, constitutional protections for property and against expropriation without compensation do not apply as the land is the property of the indigenous owners only. People who are good faith holders "of a property prior to it joining the regime of indigenous property must be compensated for the damage suffered, since ownership of such property subsequently passed to an indigenous community..." (14).

**Second**, the Court ruled that indigenous reserves are the private property of the indigenous owners and "a special land tenure regime in which the main characteristic is that they are the exclusive property of Indigenous Peoples" (57). Citing ILO Conventions No. 107, art. 11, and No. 169 (art. 14), the Court explained that indigenous property rights arise "from an ancestral and original right of possession" (id.). Citing various judgments of the Inter-American Court (e.g., *Mayagna v. Nicaragua*), it then listed a series of characteristics that distinguish indigenous and non-indigenous property rights, including that indigenous custom prevails over incompatible positive law, where "the rules on individual rights enshrined in the positive legal system for the protection of individual property and possession being inapplicable, since among indigenous people the collective and distributive interest of property must prevail ... over the purely individual interest" (58).<sup>52</sup>

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<sup>51</sup> The Court explained that "Indigenous territories are created by laws or executive decrees that are published for the general knowledge of the population and from that moment on they are mandatory knowledge of all the inhabitants of the country, without it being possible to allege ignorance of their existence, major reason, for the performance of due diligence of the acquirer."

<sup>52</sup> The Court elsewhere, at p. 59, describes this principle thus: "In indigenous property disputes, indigenous custom – indigenous customary law – prevails over national positive law."

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It additionally explained that “it is necessary to emphasize that indigenous people have an original right over land that goes beyond and overlaps any existence of titles registered later, since they are the historical and primary holders of said lands, and that this right of original property is framed in a human rights system t contains, undoubtedly, a supralegal, and even supra-constitutional position...” (59).<sup>53</sup> This original ownership together with the state’s corresponding obligations under international law negate the arguments presented against the constitutionality of the Indigenous Law and interpretations thereof by the First Chamber (60-2).<sup>54</sup>

**Last**, the Court observed that the Indigenous Law and related interpretations are part of Costa Rica’s obligations to comply with “the American Convention on Human Rights (Pact of San José), Convention 169 of the International Labour Organization, [the UNDRIP] ... and the Brasilia Rules” (5, 37, 66, 83).<sup>55</sup> It recalled its jurisprudence that the various international instruments that specifically address indigenous peoples’ rights have a supra-constitutional status – i.e., “they are above the Political Constitution insofar as they grant more rights than it” – and that includes the UNDRIP and the American Declaration on the Rights of Indigenous Peoples 2016 (69).

## 6. Ellis v The King, [2022] NZSC 114



[bit.ly/415IHB7](https://bit.ly/415IHB7)



Country: Aotearoa New Zealand<sup>56</sup> | Body: Supreme Court  
Date: 7 October 2022

**Issues: Relationship between indigenous law and national law, especially common law.<sup>57</sup>**

**UNDRIP arts. 2, 3, 4, 5, 19, 28, 34, 40**

<sup>53</sup> The Court recalls, at p. 69, that “The Constitutional Chamber repeatedly (13408-2003, 14623-2008, 18896-14, 5968-2017, 8892-20, 10034-20, 18854-20 and 19856-20, among others) has ruled that international conventions are supra-constitutional, that is, they are above the Political Constitution insofar as they grant more rights than it. Among these are the international conventions relating to indigenous peoples, namely: 1. Convention concerning the Protection and Integration of Indigenous Peoples and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (ILO Convention 107) 2. Indigenous and Tribal Peoples Convention, 1989 (ILO Convention 169). 3. [UNDRIP] 4. OAS American Declaration on the Rights of Indigenous Peoples 2016.”

<sup>54</sup> The Court explains in this regard, at p. 61, that “Through the Indigenous Law and the laws and decrees that create the Indigenous Territories, the Costa Rican State, only, is fulfilling its obligation contained in Conventions 107 and 169 ... what these norms do is a declarative recognition of a previously existing property right that is prior to any other property right, especially of non-indigenous people, so that, when each norm that creates an indigenous territory is promulgated, immediately, that ancestral right is recognized and no other formality is required for that land to be recognized as belonging to the indigenous people who inhabited and inhabit those lands...”

<sup>55</sup> For the Brasilia Regulations Regarding Access to Justice for Vulnerable People, approved by the XIV Ibero-American Judicial Summit (March 4 to 6, 2008), see (esp., Regulations 9 and 48), <https://www.icj.org/wp-content/uploads/2018/11/Brasilia-rules-vulnerable-groups.pdf>

<sup>56</sup> See also Maniapoto Claims Settlement Act 2022, Public Act No. 50, 27 September 2022 (inter alia, concerning treaty rights, remedies (restitution, compensation), return of cultural heritage, sacred sites; UNDRIP arts. 11, 12, 28, 34, 37, 40, <https://www.legislation.govt.nz/act/public/2022/0050/latest/096be8ed81c9adaf.pdf>). The Act gives effect to the Deed of Settlement of 11 November 2021 between the Crown and Maniapoto, settling “all the historical Treaty of Waitangi claims of Maniapoto resulting from acts or omissions by the Crown before 21 September 1992,” <https://bills.parliament.nz/v/6/5e499a57-68b0-4326-b1c3-16863d55c728?Tab=history>

<sup>57</sup> See also A. Hughes, *Rebalancing wrongs: Towards a new law of remedies for Aotearoa New Zealand*, 53 VICTORIA U. WELLINGTON L. REV. 303 (2022), <https://ojs.victoria.ac.nz/vuwlr/article/download/7763/6907>

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**Summary:** This case concerns the relationship between tikanga Māori (Māori law and practice) and the common law. It has its origin in the criminal conviction of Mr. Ellis, a non-Māori, for 16 sexual offenses in 1993. Following two unsuccessful appeals in 1994 and 1999, the Supreme Court granted leave to appeal against the convictions in July 2019. However, Mr. Ellis died in September 2019 before the appeal was heard. The Court then had to decide whether it should exercise its discretion to hear the appeal despite his death. A majority of the Court agreed that the appeal should go ahead because “the grounds of appeal are strong and raise systemic issues” (para. 14).<sup>58</sup> Two of the judges raised questions about the role of tikanga Māori, among other things, in relation to the reputational and other interests of the deceased and their kin (145), and, in particular: “whether tikanga might be relevant to any aspect of the Court’s decision on whether the appeal should continue; b. if so, which aspects of tikanga; and c. assuming tikanga is relevant, how tikanga should be taken into account.”<sup>59</sup> Tikanga experts were convened and provided a report to guide the Supreme Court (85 et seq).

**First**, the Court unanimously ruled “that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant” and that it “may be a relevant consideration in the exercise of discretions” (meaning, decisions made by Government) (19).<sup>60</sup> The majority agreed that “tikanga was the first law of Aotearoa/New Zealand and that it continues to shape and regulate the lives of Māori. ... Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right” (22, 168). The majority also held “that the colonial tests for incorporation of tikanga in the common law should no longer apply. Rather the relationship between tikanga and the common law will evolve contextually and as required on a case by case basis” (21, 177, 260). These tests were described as follows: “Generally colonial courts also required a custom to be certain, consistent, longstanding and not ‘repugnant to justice and morality’, nor contrary to principles at the ‘root’ of the colonial legal system” (92).

**Second**, after reviewing how tikanga has been incorporated into statutes, case law

<sup>58</sup> While no Māori were involved in this case, the Court decided, at para. 80, that “The principles developed on posthumous appeals must, however, be capable of meeting the needs of all New Zealanders, including Māori. Māori values in relation to the interests of tupuna or ancestors are different from what are often termed Western values. Further, and more generally, a consideration of tikanga may provide valuable insights into the appropriate test to apply when courts are faced with an application to continue an appeal despite the death of an appellant.”

<sup>59</sup> Hon. S. Glazebrook, *Tikanga and Culture in the Supreme Court: Ellis and Deng*, 4 AMICUS CURIAE 287, 291 (2023), <https://journals.sas.ac.uk/amicus/article/download/5583/5268/9751>

<sup>60</sup> See also *Te Rūnanga o Ngāti Awa & Ors v Bay of Plenty Regional Council & Ors*, CA48/2021 [2022] NZCA 598, 2 December 2022, [https://www.justice.govt.nz/jdo\\_documents/workspace\\_\\_SpacesStore\\_34526578\\_Sffe\\_4d73\\_a2ce\\_72efac204153.pdf](https://www.justice.govt.nz/jdo_documents/workspace__SpacesStore_34526578_Sffe_4d73_a2ce_72efac204153.pdf); and *Bamber v Official Assignee* [2023] NZHC 260, 23 February 2023, <https://www.courtsofz.govt.nz/assets/cases/2023/2023-NZHC-260.pdf>

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and policy, the role of tikanga in connection with the common law was considered, including questions left open in the Supreme Court's judgment in the Trans-Tasman case (discussed in Issue 1 of Xanharu, e.g., the suitability of colonial tests for incorporation of indigenous law or custom into the common law and whether these should continue to apply (112)). As noted above, the majority ruled that they should not, e.g., per Glazebrook J: "I consider the tests to be colonial relics with no place in modern Aotearoa/New Zealand" (113).<sup>61</sup> The same judge also determined that "tikanga is a separate or third source of law," in addition to statutes and the common law (111). She explained further that "tikanga as law is a part of the common law of Aotearoa/New Zealand" and "what this means in practice will need to be worked out on a case by case basis..." (116). Further observing that "tikanga-derived principles are part of the fabric of Aotearoa/New Zealand's law," she noted that this is a manifestation of the Treaty of Waitangi and "highlights Aotearoa/New Zealand's commitment to the United Nations Declaration on the Rights of Indigenous Peoples" (126, citing UNDRIP arts. 19 and 34).

### 7. Sustaining the Wild Coast and Ors v. Minister Natural Resource and Ors (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk)

 [bit.ly/3GCStT6](https://bit.ly/3GCStT6)  ENG only

 Country: Rep. South Africa | Body: High Court of South Africa, Eastern Cape | Date: 1 September 2022

**Issues:** oil exploration in coastal seas, consultation, right to food, spiritual rights.<sup>62</sup>

**UNDRIP arts. 18, 20, 25, 32(2)**

**Summary:** This case concerned judicial review of objections submitted about an offshore oil and gas exploration license (allowing for seismic surveys) that had been issued to the Shell Oil company.<sup>63</sup> Filed by the affected communities and a number

<sup>61</sup> Glazebrook J explained, at para 114-15, that "Traditional legal systems tend to be more focused on values and principles rather than rules oriented. Further, one of the essential strengths of tikanga is its ability to adapt to new conditions and to have local variations as appropriate. These tests for certainty and consistency, being contrary to the very nature of tikanga, are therefore clearly inappropriate. In a similar vein, the requirements for a custom to be reasonable and not repugnant to justice and morality were based on colonial attitudes that are artefacts of a different time."

<sup>62</sup> See also Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193, para. 80 (where the Australian Federal Court "consider[ed] it clear that Mr Tipakalippa and the Munupi clan had interests ... that required them to be consulted. Within this regulatory framework, 'interests' includes cultural and spiritual interests of the kind described in the sea country material in the Drilling EP and attachments").

<sup>63</sup> See also K. Surma, 'A Court Blocks Oil Exploration and Underwater Seismic Testing Off South Africa's "Wild Coast"', Inside Climate News, 2, September 2022, <https://insideclimatenews.org/news/02092022/oil-exploration-south-africa-wild-coast/>

of NGOs, it requested that the Court annul the permit because it has been unlawfully issued. They argued, among other things, that the permit was granted unlawfully due to a lack of consultation with affected communities and that consultation with traditional leaders only was insufficient, and that the Minister failed to consider potential harm to livelihoods, impacts on cultural and spiritual rights, and how the oil and gas, if exploited, would contribute to climate change.<sup>64</sup>

**First**, the High Court recalled that Shell and its partners had held some form of consultation with the traditional chiefs of some of the affected people and surrounding areas but there had been no consultation with the affected communities themselves (as required by law, including the Mineral and Petroleum Resources Development Act and its Regulations) (para. 85 et seq). The Court noted that consultants contracted by Shell had “identified the interested and affected parties, not through a public process, but through an analysis of potential stakeholders engaged in previous similar studies in the area. ... There is no evidence that the applicant communities were involved in such studies” (90). Observing that consultation had not occurred at all in some instances, the Court then ruled that “the topdown approach whereby kings or monarchs were consulted on the basis that they spoke for all their subjects is a thing of the past which finds no space in a constitutional democracy. There is no law, and none was pointed to, authorising traditional authorities to represent their communities in consultations” (92). Emphasizing that all members of the community that are directly affected must be part of the consultations, the Court stated that the “community is a separate entity from the Chief and ‘Chief’ does not denote the community” (93).<sup>65</sup> Citing recent case law, the Court affirmed that this approach is especially required where collectively held lands are involved (93, 97).<sup>66</sup>

In sum, the Court explained that “...meaningful consultations consist not in the ticking of a checklist, but in engaging in a genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus...” (95). It also

<sup>64</sup> See also *Shuar Arutam People*, Ecuador Constitutional Court, 18 November 2022 (revoking the license for Chinese mining company due to lack of participation); and L. Etchart, *Indigenous Peoples and International Law in the Ecuadorian Amazon*, 11 *LAWS* 55 (2022) (discussing this and related cases), <https://www.mdpi.com/2075-471X/11/4/55>

<sup>65</sup> See also “Constitutional Court to hear Traditional and Khoi San Leadership Act challenge”, Legal resources Center, 23 February 2023 (“Members of traditional communities and two rural community-based organisations will challenge the passing of the Traditional and Khoi San Leadership Act in the Constitutional Court this Thursday, 23 February. The Act, passed in 2019, replaces the previous traditional leadership legislation that has been in force since 2003. For the past two decades, many rural communities have voiced their outrage at how that legislation empowers traditional leaders at the expense of their communities, leading to some traditional structures abusing their powers and trampling on the rights of community members”), <https://lrc.org.za/20-february-2023-constitutional-court-to-hear-traditional-and-khoi-san-leadership-act-challenge/>; and *Saramaka People v. Suriname*, Ser C No. 172 (2007), para. 169, where the Inter-American Court of Human Rights rejected the State’s assertions that consultation with the Paramount Chief was sufficient and explained that “a recognition of the right to juridical personality of the Saramaka people as a whole would help prevent such situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members.”

<sup>66</sup> See also *Hidalgo v. EDF, Agrarian Tribunal of Oaxaca (Mexico)*, 5 Sept 2022 (cancellation of leases with individuals for wind farm, ruling that collective territory requires collective decision making), [https://www.business-humanrights.org/documents/38026/Press\\_release\\_UHvsDemex.pdf](https://www.business-humanrights.org/documents/38026/Press_release_UHvsDemex.pdf); and J. McClure, *Conquest by Contract: Property Rights and the Commercial Logic of Imperialism in the Isthmus of Tehuantepec (Southern Mexico)*, 41 *BULL LAT AM RES* 557 (2022), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/blar.13356>

noted that the consultation process was “woefully lacking” in other respects (e.g., language, lack of notification) (101-2). Taken together, these factors rendered the consultation process “procedurally unfair” and “fatally defective,” and the same considerations would apply to any future applications to renew the permit (103).

**Second**, the Court turned to the allegation that the Minister had failed to consider potential harm to livelihoods, impacts on cultural and spiritual rights, and the potential contribution to climate change (the latter was invoked also in relation to South Africa “complying with its international climate change commitments” (121)). With regard to the impact on marine mammals and other wildlife, the Court observed that there was a dispute among the experts, so that the impact was not agreed or clear. For this reason, the Court ruled that “it would have been incumbent on the decision-maker to invoke the precautionary principle” (109). On cultural, spiritual and livelihood rights, the Court explained that the issue was “whether it was incumbent on the relevant authorities to consider the spiritual and cultural rights at the particular point when the decision-making process was under way” (112).<sup>67</sup> It ruled that such a duty does exist (114) and that deference to the authoritative views of the holders of such rights is required (113).<sup>68</sup> It then found that there is “no evidence that when the impugned decisions were taken the possibility of harm was considered. None of the measures contended for by the respondents addresses the potential harm to the applicants and their religious or ancestral beliefs and practices. In any event, there is no evidence of the decision-maker having taken into account the alleged remedial measures” (119). Turning to the climate aspect, the judge rejected Shell’s contention that there is no duty to consider climate impacts, stating also that “had the decision-maker had the benefit of considering a comprehensive assessment of the need and desirability of exploring for new oil and gas reserves for climate change and the right to food perspective, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable” (125).

Shell and others succeeded in obtaining leave to appeal this decision in December 2022.<sup>69</sup>

<sup>67</sup> The affected communities had testified that: “they bear duties and obligations relating to the sea and other common resources like our land and forests; it is incumbent on them to protect natural resources, including the ocean, for present and future generations; the ocean is the sacred site where their ancestors live and so have a duty to ensure that their ancestors are not unnecessarily disturbed and that they are content. If there is a potential for disturbance, they contend, they must be given the opportunity to follow their customary practices for dealing with the anticipated disturbance” (115).

<sup>68</sup> The Court referred, at para. 113, to the views of Bloem J in *Sustaining the Wild Coast NPC*, who explained that: I accept that customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How ancestors can reside in the sea and how they can be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the Constitution those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.

<sup>69</sup> ‘Leave to appeal granted – applicants confident in Supreme Court win to save the Wild Coast’, Legal Resources Center, 13 December 2022, <https://lrc.org.za/13-december-2022-leave-to-appeal-granted-applicants-confident-in-supreme-court-win-to-save-the-wild-coast/>

## 8. An Act providing for state recognition of federally recognized tribes

 [bit.ly/3MGFrHK](https://bit.ly/3MGFrHK)  ENG only

 Country: USA | Body: State of Alaska | Date: 28 July 2022

**Issues:** State recognition of indigenous peoples; existence and status as self-determining entities.

**UNDRIP arts. 2, 3, 4, 5, 7, 8, 19, 20, 21, 23, 33, 34, 35, 38**

**Summary:** For the first time, the State of Alaska has legally recognized the 230 tribes in Alaska (the tribes already had federal recognition since the 1994 Tribal List Act), entrenching government to government relations at the state level, furthering recognition of tribal jurisdiction and providing a stronger basis for indigenous peoples to autonomously deliver services.<sup>70</sup> This finally and legally reverses what some have described<sup>71</sup> as Alaska's "long, hostile and tenuous legal relationship" with the tribal governments.<sup>72</sup> The Alaska Federation of Natives commented that the law "recognizes the status of Alaska Tribes and represents an important step forward to modernizing state policy toward Alaska Native Tribes, ... [and it] is a step toward building a stronger relationship with our state government."<sup>73</sup> Recalling the EMRIP's view about one of the purposes of the UNDRIP,<sup>74</sup> others saw the law "as a way to heal a painful past and create more opportunities for productive partnership with state government in the future."<sup>75</sup>

Section 1(a) of the Act provides in this regard that "The history of tribes in the state predates the United States and predates territorial claims to land in the

<sup>70</sup> The State of Alaska adopted two other laws at the same time: HB 184, "An Act relating to state participation in a tribal child welfare compact," and SB 34, "An Act relating to a demonstration state-tribal education compact; relating to demonstration state-tribal education compact schools; and providing for an effective date."

<sup>71</sup> See e.g., J. Estus, 'State of Alaska recognizes tribes with historic bill. Alaska catches up with federal government, which already recognized hundreds of tribes in the state', *Indian Country Today*, 30 July 2022, <https://ictnews.org/news/state-of-alaska-recognizes-tribes-with-historic-bill>

<sup>72</sup> See e.g., 'Federal Recognition of Alaska Tribes and Relations with the State of Alaska', U. Alaska Fairbanks, n.d. (explaining the background and stating that until recently, challenged the existence of tribes, even declaring that there were none in Alaska), <https://uaf.edu/tribal/academics/112/unit-4/federalrecognitionofalaskatribesandrelationswiththestateofalaska.php>

<sup>73</sup> 'Bill Signing Ceremony for HB 123 "State Recognition of Tribes"', AFN, July 2022, <https://www.nativefederation.org/2022/07/bill-signing-ceremony-for-hb-123-state-recognition-of-tribes/>

<sup>74</sup> Expert Mechanism Advice No. 5: Access to justice in the promotion and protection of the rights of indigenous Peoples (2013), A/HRC/24/50, para. 1 (where the EMRIP concludes that "implementation of the [UNDRIP] should be seen as a framework for reconciliation and as a means of implementing indigenous peoples' access to justice"). See also D. Sambo Dorrough, *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., Inst. Study of Human Rights 2014), p. 4 ("... the starting point for access to justice at every level is directly related to, dependent upon, and connected to the right to self-determination"), <https://academiccommons.columbia.edu/doi/10.7916/D8GT5M1F>

<sup>75</sup> "A historic milestone": Alaska formally recognizes Native tribes, *Anchorage Daily News*, 28 July 2022, <https://www.adn.com/politics/alaska-legislature/2022/07/28/a-historic-milestone-alaska-formally-recognizes-native-tribes/>. See also 'Investigation of Forced Population Control in Greenland', Danish Ministry of Health, 25 September 2022, [https://bioedge.org/public\\_health/population/denmark-to-investigate-shameful-campaign-of-population-control-in-greenland-in-the-60s-and-70s/](https://bioedge.org/public_health/population/denmark-to-investigate-shameful-campaign-of-population-control-in-greenland-in-the-60s-and-70s/); and 'Inuit Greenlanders demand answers over Danish birth control scandal', BBC, 30 September 2022, <https://www.bbc.com/news/world-europe-63049387>

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state by both the United States and Imperial Russia. Indigenous people have inhabited land in the state for multiple millennia, since time immemorial or before mankind marked the passage of time.” Section 1(b) provides that “Passage of this Act is nothing more or less than a recognition of tribes’ unique role in the state’s past, present, and future.”



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