

Digest | Issue #2

Xanharu

Upholding Indigenous Peoples' Rights

Legislation and Jurisprudence:
Global, Regional and National Developments



Photo: Ogiek Peoples' Development Program(OPDP)



**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
jursiprudence 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."¹

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.

Congratulations to Judge, now Justice, Michelle O'Bonsawin on her appointment to the Supreme Court of Canada, the first Indigenous person to serve on that nation's highest court.

¹Ten 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.

Contents

Global	4
1. Matson et al v. Canada (CEDAW)	5
2. Yaku Pérez Guartambel v. Ecuador (CERD)	8
3. PLIV Advisory Services (IFC Project # 602084), IFC CAO (Panama)	11
Regional	14
1. Mau Ogiek v. Kenya. Reparations Judgment	15
2. IACHR Calls on States to Build New Relationships with Indigenous Peoples Based on Respect for their Self-Determination	17
National	20
1. Observatory Civic Association & Goringhaicona Khoi Khoi v. Liesbeek Leisure Properties Trust & Others (South Africa)	21
2. Inter-Governmental Cooperative Agreement for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument (USA)	23
3. Anderson v. Alberta (Canada)	26
4. Sámi Fishing Rights cases (Finland)	28
5. Pawnee Nation of Oklahoma, Declaration on the Rights of Indigenous Peoples Act (USA)	30
6. Massacre of Napalpí: Trial for the Truth (Argentina)	31



Global

Photo: IPRI Colombia

1. Matson et al v. Canada, CEDAW/C/81/D/68/2014



<https://bit.ly/3B2KNWz>



All languages



Country: Canada | Body: Committee on the Elimination of Discrimination Against Women | Date: 11 March 2022

Issues: Indigenous identity, legal personality/status, membership criteria, transgenerational discrimination.

UNDRIP, Arts. 8, 9, 18, 40, 44

Summary: The author of this communication is a male member of the Squamish Nation. He submitted it on his own behalf and on behalf of his daughter and son, both minors at the time of submission. He asserts that Canada's laws that require obtaining "status" as an "Indian," which provides access to legal rights and benefits (e.g., the right to live in indigenous territory), discriminate "against indigenous women and their descendants, denying them indigenous status, the right to determine their indigenous identity and their fundamental right to belong to a group of indigenous people" (para. 2.1). Status also includes "the ability to transmit it to one's children, as well as a sense of acceptance within indigenous communities" (2.2). He alleges that this violates articles 1, 2 and 3 of the International Convention on the Eradication of Discrimination Against Women ("ICEDAW").² While Canadian law that denied status to indigenous women who married non-indigenous men had been previously repealed, other amendments to the Indian Act allowed individuals with only one parent with status to pass that to their children, provided both parents of that child also had status (2.4).³ The law was amended again in 2011 following a judicial decision, whereby the grandchildren of women "who had lost status by marrying someone without status regained their eligibility for status, provided that they were born after 1951" (2.5). However, this conferred only a limited form of status, particular in terms of passing status to their descendants. These restrictions did not apply to those who traced status through the male line, however. This scheme was amended again in 2019 in response to another judicial decision but the gender-based discrimination was still not fully addressed.

Consequently, thousands of Indigenous people and their children were denied status and their right to determine their own identity. This included the author,

² ICEDAW, Art. 1 contains a definition of "discrimination against women;" art. 2 sets out required "policy measures;" and art. 3 affirms a guarantee of basic human rights and fundamental freedoms. See <https://bit.ly/3eut8zn>.

³ See also *Lovelace v. Canada*, Comm. 24/1977, CCPR/C/OP/1 (1979) (finding that the Indian Act violated rights guaranteed by Article 27 of the ICCPR because Sandra Lovelace was denied the right to live on her reserve land because she married a non-indigenous man), <https://bit.ly/3evl0NY>.

Xhanaru: Upholding Indigenous Peoples' Rights

whose grandmother belatedly obtained status under the amended Indian Act, even though she had married a non-indigenous man in 1927. She was able to pass status to the author's father but not the author until the law was again amended in 2011. He successfully obtained status thereafter but his children, born to a non-indigenous woman, were denied due to the limited form of status provided for by the 2011 amendments. The 2019 amendments allowed his children to obtain status, but they were not permitted to pass that status to any future children of theirs, unless the other parent would also have status. The same would not be the case if he/they traced their status to an indigenous grandfather, rather than matrilineally from his grandmother. The author challenged this situation before Canadian administrative and judicial bodies but was denied relief. He then filed a complaint with CEDAW asserting that because he is "of matrilineal, and not patrilineal, indigenous descent," he has been denied his indigenous status and identity a situation that also affects his children as well as having "an impact on their cultural acceptance within the Squamish Nation. [Thus] ... the Indian Act constitutes a violation of the fundamental right ... to belong to an indigenous community or nation, in accordance with its traditions and customs" (para, 3.2). He further alleged that this situation also entails a violation of indigenous peoples' right to participate in decision making insofar as the revisions of the Indian Act were not subject to meaningful consultations and, additionally, that he has been denied access to effective remedies in national law.

Having decided that the communication satisfied the admissibility requirements in the Optional Protocol to ICEDAW (17.1- 17.8), the Committee turned to the merits, commencing with article 1 (the definition of discrimination).

First, it concluded that, despite the amendments to the Indian Act noted above, that the law perpetuates "differential treatment of descendants of previously disenfranchised indigenous women, which constitutes transgenerational discrimination, falling within the scope and meaning of article 1 of the Convention" (18.3).

Second, citing the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), article 9, and rejecting Canada's claims to the contrary, the Committee decided that "indigenous peoples do have the fundamental right to be recognized as such," reaffirming that "indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of

Xhanaru: Upholding Indigenous Peoples' Rights

the community or nation concerned” (18.4). The Committee also concluded that this is also essential to preventing forced assimilation (as addressed in article 8 of the UNDRIP) (id). It recalled that the Inter-American Court of Human Rights had reached similar conclusions (see e.g., *Xamok Kasek v. Paraguay* 2010), finding that “the identification of an indigenous community, from its name to its membership, is a social and historical fact that is part of its autonomy, and therefore States must restrict themselves to respecting the corresponding decision made by the community, i.e., the way in which it identifies itself” (id). In sum, the Committee explained that “the unequal criteria [employed in Canadian law] by which men and women are permitted . . . to transmit their indigenous identity to their descendants, is an element which is precisely contrary to this fundamental right to self-identification” (id).

Third, the Committee assessed the Indian Act, as amended on three separate occasions, in relations to articles 2 and 3 of ICEDAW, observing that due to “the disenfranchisement of his maternal ancestor, the author cannot freely transmit his indigenous status, and his indigenous identity, to his children and, as a consequence, his children in turn will not be able to transmit freely their status to their own children” (18.10). Thus, and in violation of arts 2 and 3, “the consequences of the denial of Indian status to the author’s maternal ancestor has not yet been fully remedied, being precisely the source of the current discrimination faced by the author and his children” (id).


Fourth, and without further elaborating, the Committee held that “failure to consult indigenous peoples and indigenous women whenever their rights may be affected constitutes a form of discrimination” (18.11). Referring to the UN Committee on the Elimination of Racial Discrimination’s decision in *Ågren et al. v. Sweden* (CERD/C/102/D/54/2013), an unnumbered footnote on the same page explains that “the obligation to obtain free, prior and informed consent has been qualified as a general principle of international law.”

Finally, the Committee recommended that Canada recognizes the author and his children as indigenous people “with full legal capacity, without any conditions, to transmit their indigenous status and identity to their descendants” (20(a)). More generally, it also recommended that Canada amends its laws, after informed consultations with indigenous peoples, to fully resolve the adverse, “historical gender inequality in the Indian Act and to enshrine the fundamental criterion of

self-identification, including by ... taking all other measures necessary to provide registration to all matrilineal descendants on an equal basis to patrilineal descendants,” and that it allocates sufficient resources to implement these amendments (20(b)).

2. Yaku Pérez Guartambel v. Ecuador, CERD/C/106/D/61/2017

 <https://bit.ly/3BqHMkc>  ESP only (unofficial translation)

 Country: Ecuador | Body: Committee on the Elimination of Racial Discrimination | Date: 26 July 2022

Issues: Discrimination due to non-recognition of indigenous marriage, indigenous law.

UNDRIP, Arts. 3, 4, 5, 11, 20, 33, 34

American Declaration on Rights of Indigenous Peoples, including Arts. IX, XVII(1), XXII

Summary: Mr. Yaku Sacha Pérez Guartambel (“Mr. Pérez”), a member of the indigenous Kichwa Kañari people, was married on 21 August 2013 to Manuela Lavinás Picq, a Brazilian/French national, by the traditional authorities of his community and in accordance with its cultural and spiritual traditions. The marriage was registered, and an ancestral marriage certificate was issued by the community and by the Confederation of Peoples of the Kichwa Nationality of Ecuador. Two years later, the couple were arrested at a demonstration in support of Indigenous Peoples’ rights. Ms. Lavinás Picq’s visa was revoked and deportation proceedings were initiated, forcing her to leave the country. The couple applied for a “family protection visa” so that she could return but this was denied on the basis that their marriage was not registered in Ecuador’s Civil Registry. An application to register the marriage was also rejected because Ecuador does not recognize marriages conducted by indigenous authorities. Attempts to judicially challenge the legality and constitutionality of these decisions were rejected for the same reason (para. 1.2).

First, the Committee recalled its prior examination of the admissibility of the

Xhanaru: Upholding Indigenous Peoples' Rights

petition submitted by Mr. Pérez (see CERD/C/100/D/61/2017). It concluded that the petitioner's argument that indigenous peoples' collective rights would be violated through the non-recognition of his indigenous marriage was too general and, therefore, it would only examine the individual effects of the refusal to recognize his marriage and the denial of his wife's visa. It rejected the State's arguments that his marriage must conform to national law, noting that in the light of article 1 of the Ecuador's Constitution, providing that the State is "an intercultural and plurinational State, article 11, paragraph 1, of the [UNDRIP], and [the Committee's] general recommendation No. 23 (1997)," that Mr. Pérez allegations should be considered on the merits (1.3).

Second, the Committee began its analysis of the merits by recalling that Ecuador's Constitution and laws include guarantees for indigenous peoples' rights to self-determination, to autonomy and jurisdiction to apply their customary laws within their territories, to their own forms of social organization, and that decisions of the indigenous jurisdictions shall be respected by "public institutions and authorities" (4.4). It further explained that these rights are also guaranteed by the International Labour Organisation Convention No. 169 (in force for Ecuador), the American Declaration on the Rights of Indigenous Peoples (2016) and the UNDRIP (citing specifically arts. 3, 4, 5, 11, 33, and 34). These rights, it said, correspond to "legal pluralism," where the indigenous and non-indigenous State jurisdictions coexist and operate through different authorities (4.6). The Committee further explained in this regard that "the main purpose of the self-determination of indigenous peoples is none other than to recognize the cultural diversity that exists in a national territory and to ensure its special protection and conservation, since, in addition to being a true intangible heritage, it involves the realization of the rights of indigenous peoples, which is materialized through the rights of these populations to conserve and develop their own political, legal, cultural, social and economic institutions" (id).

Third, the Committee recalled its prior case law (citing *Lars-Anders Ågren et al. v. Sweden*) which holds that parties to the Convention "should take positive measures to enable the realization of the human rights of indigenous peoples, either by removing remaining obstacles or by adopting legislation and adopting specific administrative measures to fulfil their obligations under the Convention" (4.7). It further explained that these measures include, e.g., the recognition of the rights of indigenous peoples over their traditional territories, based on their immemorial

Xhanaru: Upholding Indigenous Peoples' Rights

use and the customary law of indigenous peoples, which “implies an obligation to respect and protect those rights in practice. . . . This is because . . . ignoring the inherent right of indigenous peoples to their traditional territories — which is based on indigenous customary law — constitutes a form of discrimination since it nullifies or impairs the recognition, enjoyment or exercise, by indigenous peoples, on an equal basis with others, of their rights to property, linked to their identity” (4.7).

Fourth, the Committee turned to the indigenous marriage and its validity. It quoted from the Register of Family Acts held by Mr. Pérez’s indigenous community, which confirmed that he was legitimately married by the indigenous authorities, that the marriage was duly registered and that a marriage certificate was issued (4.8 – 4.10). Recalling Ecuador’s refusal to recognize the indigenous marriage, the Committee observed that “this may contribute to jeopardizing cultural practices that are cultural heritage,” and, either way, it “meant that [Mr. Pérez] could not enjoy a civil right associated with marriage, such as obtaining a family protection visa, thus affecting his right to respect for his family life” (4.11). The Committee decided that respect for and registration by the State of valid indigenous marriages is part of “the necessary cooperation and coordination that should be at the core of the relationship between the [non-indigenous State] system and the indigenous system — the latter emanating not only from the constitutional framework that promotes interculturality and plurinationality, but also from the right of indigenous peoples to autonomy and self-government” (4.12).⁴ As a consequence, Ecuador’s obligations under the Convention (citing art. 5(d)(iv)) include refraining from prohibiting Indigenous marriages, as well as the registration and certification thereof by Indigenous authorities, in addition to taking positive measures, in cooperation with Indigenous Peoples’ authorities, to register such marriages in the national Civil Registry (4.13).

Finally, the Committee recommended that Ecuador (6):

- registers the Indigenous marriage of Mr. Pérez and Ms. Lavinás Picq in the Civil Registry, allowing them to apply for a family protection visa;
- compensates Mr. Pérez for the damage suffered and apologises for the violation of his rights;
- modifies its legislation to incorporate the recognition and registration of Indigenous marriages conducted by Indigenous Peoples’ authorities according to their customs and customary law, provided that these are not contrary to international human rights obligations or to (amended) domestic legal require-


⁴ Citing article XVII (1) of the American Declaration on the Rights of Indigenous Peoples (providing in pertinent part that States must recognize, respect and protect the forms of marriage union of indigenous peoples) and Ecuador’s Constitution. See <https://bit.ly/3Qs37y6>.

Xhanaru: Upholding Indigenous Peoples' Rights

- ments for the celebration of marriages;
- develops a training programme for civil registry officials and judicial and other court staff on the validity and recognition of Indigenous marriages as celebrated by traditional authorities; and
- disseminate its present decision widely and translate it into the Kichwa language.

3. Compliance Investigation of IFC's Environmental and Social Performance: Advisory Services to Empresa de Transmisión Eléctrica, S.A.

 <https://bit.ly/3B0z4Yt>

 Country: Panama | Body: Office of the Compliance Advisor Ombudsman for the International Finance Corporation and the Multilateral Investment Guarantee Agency (World Bank Group) | Date: 28 February 2022

Issues: FPIC

UNDRIP, Arts. 18, 32, among others

Summary: This decision was adopted by the Compliance Advisor Ombudsman (“CAO”) for the International Finance Corporation (“IFC”) and the Multilateral Investment Guarantee Agency,⁵ the latter being private sector-related agencies within the World Bank Group.⁶ It was adopted in response to a complaint filed in June 2018 about the negative environmental and social impacts of the Panama Transmission Line IV project (“PTIV project”). The PTIV project is a major new powerline project supported by the IFC, which would connect the capital city with the province of Bocas del Toro. It was submitted by members of Ngöbe and Buglé Indigenous Peoples living in the project-affected area. The PTIV project affects three different groups of Indigenous Peoples. One group has legally regularized property rights (the Comarca Ngöbe-Buglé); one group is adjacent to the Comarca and is recognized in law but is not yet demarcated; and the third has no legal recognition (the CAO decision only addressed the first two groups, although it also explained that the same rationale would apply to the third).

⁵ <https://www.cao-ombudsman.org/>

⁶ See also *Compliance Appraisal of a Complaint Regarding IFC's Exposure to the Dairi Prima Mineral Mine in Indonesia Through an Investment in Postal Savings Bank of China* (IFC Project: #35461), 6 July 2022, p. 21 (“There are preliminary indications of potential harm associated with the lack of recognition of potentially impacted communities as Indigenous Peoples and the resulting possibility that the need for Free, Prior, and Informed Consent from Indigenous communities may have been overlooked”); and p. 22 (“Based on information from the complainants and other NGO sources, most villagers living around the mine appear to self-identify as Indigenous. Indonesia's leading Indigenous Peoples organization likewise recognizes these communities as Indigenous”), <https://bit.ly/3qjH7e9>.

Xhanaru: Upholding Indigenous Peoples' Rights

IFC support for the PTIV project, which was internally classified as an 'Advisory Services project,' required that IFC advice be consistent with its 2012 environmental and social safeguards, known as 'Performance Standards' ("PS"). One of these focuses on Indigenous Peoples ("PS7").⁷ Among other things, PS7 sets out various requirements for conducting consultations and for obtaining free, prior, and informed consent ("FPIC") in certain situations, e.g., where projects impact land or natural resources under traditional ownership of or customary use by Indigenous Peoples. There was no dispute that this project triggered that requirement, at least with respect to the Comarca. The complainants asserted that the project failed to obtain FPIC from the impacted Indigenous Peoples, excluded some entirely and, otherwise, that the consultation processes were defective. With respect to the latter and in the Comarca, they highlighted that they had not been provided with adequate information (e.g., the exact route of the powerline, no documents); that only Spanish, not the Indigenous languages, was used and presentations were not culturally appropriate; that women were not adequately included; and that consultations were only with government-recognized authorities, which, they said, did not properly represent the communities. Those outside the Comarca asserted that they were not consulted at all.

The company involved in the project maintained that it was consulting the Indigenous representatives who had been appointed to two commissions by the Comarca authorities. These commissions were intended to be the mechanisms to obtain FPIC via two separate processes. First, in a "preliminary FPIC process related to conducting an impact assessment and project studies (but which in practice also involved an agreement on developing the power lines). Second, in "a primary FPIC process," which would have related to the actual construction of the power lines. According to the CAO decision, "FPIC is a principle that pertains specifically to Indigenous Peoples and allows them to give or withhold consent to a project that may affect them or their territories. Where a project involves FPIC, the process of engagement with Indigenous Peoples requires detailed stakeholder mapping, information disclosure, consultation, and negotiation of benefit-sharing arrangements, with a view to achieving consent" (p. 6).

First, the CAO found that the IFC's role in the project had both positive and negative effects in terms of compliance with the IFC's PS. The positive measures were listed as supporting compliance with some of the requirements in the PS, one of which was that the IFC encouraged the company "to commence the FPIC process

⁷ <https://bit.ly/3BnJeUy>.

Xhanaru: Upholding Indigenous Peoples' Rights

early in the project development process.” However, IFC advice was inconsistent with PS1 (on impact assessment) and PS7 regarding certain aspects of both the preliminary and primary FPIC processes. On the first, the defects included the failure to develop a stakeholder engagement plan and associated stakeholder analysis to prepare for the preliminary FPIC process. This resulted in the exclusion of the Indigenous communities outside of the Comarca. Their participation was required, the CAO concluded, even though they do not have legally recognized and regularized lands, because the project would have impacts on lands traditionally owned or under customary use. The exclusion of traditional authorities in favor of the government-recognized authorities was also identified as was the limited involvement of Indigenous women. Lack of culturally appropriate modes of consulting and the failure to employ Indigenous languages completed the list. These same deficiencies were repeated and identified by the CAO in relation to the primary FPIC process. This resulted in verified harm to the complainants that the CAO also deemed to be inconsistent with the requirements in the PS, leading the IFC to conclude that “Absent action to address the shortcomings in IFC’s advice to date, there is significant risk that the project will not achieve FPIC of the affected Indigenous communities as required by the [PS]. This may heighten the risk of negative project impacts on the cultural, economic, and territorial (including customary) rights and interests of those Indigenous communities” (3).

Second, the CAO identified several underlying causes of the IFC’s failure to adequately advise on compliance by the company with the PS. Of particular note is the (common) “shortcoming” of relying on assurances by the company that FPIC would proceed in accordance with national law without any serious analysis of the differences between that law and the PS. “This led to the exclusion of the Indigenous groups outside the government-recognized territory of the Comarca from the FPIC process, and the focus, within the Comarca, on consultations with government-recognized representatives” (10).

Regional

Photo: Eduardo Gutiérrez | IPRI México

1. African Commission on Human and Peoples' Rights (Mau Ogiek) v. Kenya. Reparations Judgment

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

 Country: Kenya | Body: African Court of Human and Peoples' Rights | Date: 23 June 2022

Issues: Reparations, including compensation and restitution.

UNDRIP, Arts. 26, 27, 28, 40, among others

Summary: This ruling on reparations – as opposed to the merits or substance of the case – followed a 2017 judgment of the African Court of Human and Peoples' Rights (“ACTHPR”). This judgment in the merits held that Kenya had violated the right to life, property, natural resources, development, religion and culture of the Ogiek of the Mau Forest.⁸

First, the ACTHPR began its nine page-long judgment by disposing of three preliminary objections raised by Kenya, dismissing each in turn.

Second, it addressed the claims submitted for pecuniary (monetary) and non-pecuniary reparations. In terms of the first category, the African Commission on Human and Peoples' Rights (on behalf of the Ogiek) (“AfCom”) had requested compensation for all damages suffered due to violations of the right to development and the loss of property and natural resources. This involved both compensation for material harm and moral harm. A community survey was used to quantify the material losses suffered but the ACTHPR decided that it was limited, and, thus, it was not bound to follow its conclusions (p. 4). Relying on other information, such as independent experts, the ACTHPR, nonetheless, awarded compensation in the amount of 58,850,000 Kenya Shillings (approx. US\$489,000).⁹ With regard to moral damages, the AfCom requested compensation as a result of violations the principle of non-discrimination, the right to religion, the right to culture and the right to development, including non-recognition of the Ogiek's indigenous identity and related rights. The Ogiek asserted, among other things, that they were denied their rights to bury their dead, to access sacred sites, that

⁸ Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter of Human and Peoples' Rights. See <https://bit.ly/3Rtdhjd>.

⁹ The ACTHPR explained that it arrived at the sum “in the exercise of its equitable jurisdiction.”

Xhanaru: Upholding Indigenous Peoples' Rights

their connections to their ancestral lands were severed, and their right to development had been violated due to Kenya's failure to consult and obtain their consent (4). Kenya opposed any compensation, arguing that the ACTHPR's judgment on the merits had been misunderstood as, in its view, "the Court did not determine that the Ogiek were the owners of Mau Forest ..." and that, instead, they merely had the right to access, use and occupation of the land (4-5). The ACTHPR made no comment on which view was correct at that time but, nonetheless, proceeded to award one hundred million Kenya Shillings (approx. US\$831,500) in compensation for moral harm.

Third, the ACTHPR turned to the non-pecuniary reparations, which were stated as: restitution of Ogiek ancestral lands; recognition of the Ogiek as an Indigenous People; a public apology and erection of a public monument; an order directing effective consultation and dialogue over matters affecting the Ogiek; and guarantees of non-repetition (5).¹⁰ On the first point, the ACTHPR returned to the issue of ownership rights versus access rights, explaining that in international law "granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. What is required is to legally and securely recognise their collective title to the land in order to guarantee their use and enjoyment of the same" (6). Moreover, "ownership, even for indigenous people, entails the right to control access to indigenous lands. The Court emphasised the role of duty bearers, like [Kenya], to attune their legal systems to accommodate indigenous peoples' rights to property such as land" (id). Kenya is therefore obligated to delimit, demarcate and title Ogiek lands in the Mau Forest, guaranteeing "the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest and its various resources" (id). This and other points were elaborated on in a separate opinion penned by Judge Blaise Tchikaya, the ACTHPR's Vice-President, in which he directly quoted from the UNDRIP in order to support various conclusions.¹¹

Fourth, the ACTHPR ordered that Kenya must commence a process of "dialogue and consultations" between the Ogiek and any persons or companies that have acquired concessions or leases in Ogiek ancestral lands to determine if they should be allowed to continue their operations via the benefit sharing and other mechanisms provided for by Kenya's Community Land Act (6-7). Where agreement ("compromise") cannot be reached, Kenya "must either compensate the concer-

¹⁰ Guarantees of non-repetition are measures to safeguard against the repetition of an initial violation(s).

¹¹ See *Individual Opinion, Judge Blaise Tchikaya*, p. 8, quoting UNDRIP Art. 1 and the preamble ("indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such") and p. 17 (referencing UNDRIP, Art. 40). <https://bit.ly/3Bq0hoZ>

Xhanaru: Upholding Indigenous Peoples' Rights

ned third parties and return the land to the Ogiek or agree on appropriate compensation for the Ogiek” (7).

Fifth, on the remaining requests, the ACtHPR ruled that its judgment on the merits had already recognized the Ogiek “as an indigenous population that is part of the Kenyan people,” and that Kenya must adopt the necessary legislative, administrative and other measures to guarantee this in national law and practice, and must do so no more than 12 months from the date the judgment on reparations was notified (id). It rejected the request for a public apology and erection of a monument, considering that the judgment itself was sufficient acknowledgment of the violations. Noting that under international law, indigenous peoples must always be consulted on decisions that may affected them, the ACtHPR ordered Kenya to adopt the necessary legislative, administrative or other measures “to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent...” (8). It also ordered guarantees of non-repetition in the form of additional legislative and other measures to avoid a recurrence of the violations, including the restitution of the Ogiek ancestral lands (id).

Finally, the ACtHPR ordered Kenya to establish a community development fund for the Ogiek, “which should be a repository of all the funds ordered as reparations in this case,” and which should be used “to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek” (id). Kenya is to constitute a committee to oversee the fund, which “must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves” (id).

2. IACHR Calls on States to Build New Relationships with Indigenous Peoples Based on Respect for their Self-Determination



<https://bit.ly/3D7q6eL>



(ENG, ESP, PORT)



Country: OAS Member States | Body: Inter-American Commission on Human Rights | Date: 9 August 2022

Issues: self-determination, autonomy and self-government reparations.

Xhanaru: Upholding Indigenous Peoples' Rights

Text: On the International Day of the World's Indigenous Peoples, the Inter-American Commission on Human Rights (IACHR) calls on States in the Americas to build new relationships with indigenous peoples based on respect for their self-determination, in order to overcome a historical legacy of discrimination, racism, and colonialism.

The American and United Nations Declarations on the Rights of Indigenous Peoples expressly acknowledge the right of indigenous peoples to freely determine their political status and to freely pursue their own economic, social, and cultural development. Based on this, the IACHR report *Right to Self-Determination of Indigenous and Tribal Peoples* explains that, for indigenous and tribal peoples, self-determination is an inherent, pre-existing, and historical right.

It involves, among other factors, the ability to decide on their own forms of governance and self-government; to adopt their own priorities for development on their land and ancestral territories; and to preserve their cultures, identities, and existence into the future. It is therefore a right that is essential for the exercise and enjoyment of other rights—whether collective or individual—for these peoples.

Respect for the self-determination of indigenous peoples and the exercise of this right also entail an opportunity to strengthen State legitimacy at the local level, and therefore to enable and strengthen fully inclusive democracies. Along these lines, the right to self-determination must be understood as the basis for dialogue to build new relationships between these peoples and States, in order to reach specific agreements so these peoples may determine their own economic, social, and cultural development, among other aspects.

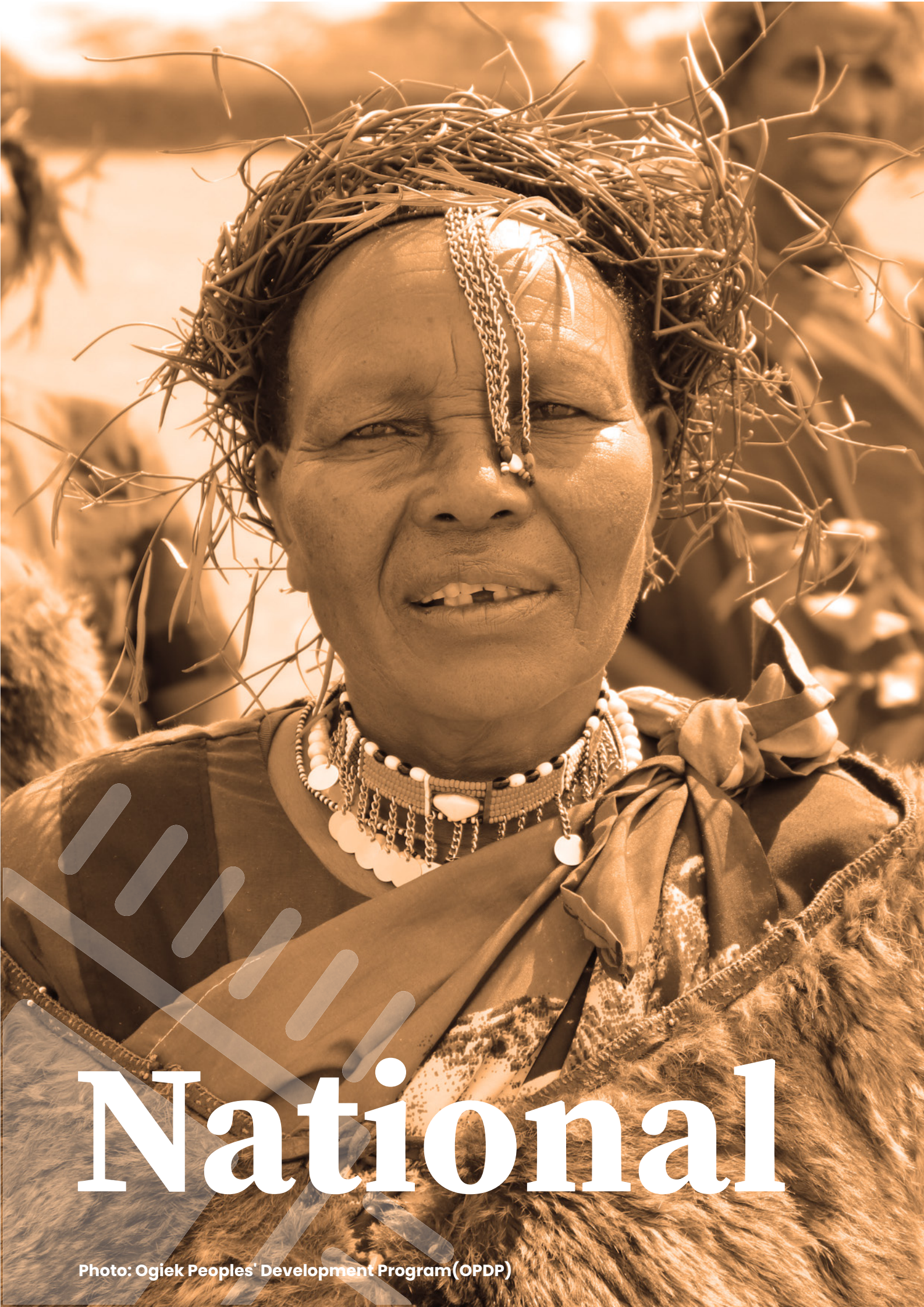
The IACHR calls on States to acknowledge the different world views of indigenous peoples and their different relationships to the natural environment. Indigenous and tribal peoples hold crucial answers to various global crises, like climate change and pandemics, through their ability to preserve their cultures, traditional knowledge, territories, government systems, territorial governance, and other elements that are essential for their self-determination. States must protect, promote, and foster these peoples' practices and knowledge.

State relationships with indigenous and tribal peoples that are based on respect for

Xhanaru: Upholding Indigenous Peoples' Rights

and recognition of these peoples' own expressions of autonomy and self-determination enable a reversal of historical legacies of discrimination, racism, and colonialism. These new relationships also enable the parties to overcome old ties based on assimilation or domination paradigms that have affected the lives of indigenous and tribal peoples in the Americas for centuries.

The Commission notes that its report **Right to Self-Determination of Indigenous and Tribal Peoples** holds recommendations and guidelines to effectively ensure and preserve this right in practice and to build new relationships based on respecting and protecting human rights. Finally, the IACHR recognizes the tireless work done by all indigenous peoples and their organizations in defense of their own rights.



National

Photo: Ogiek Peoples' Development Program (OPDP)

1. Inter-Governmental Cooperative Agreement between the Tribal Nations whose representatives comprise the Bears Ears Commission, the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni and the United States Department of the Interior, Bureau of Land Management and the United States Department of Agriculture, Forest Service for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument



<https://on.doi.gov/3x7XPRu>



Country: USA | Intergovernmental Agreement ¹² | Date: 22 June 2022

Issues: Conservation, territorial rights, FPIC.

UNDRIP, Arts. 3, 11, 12, 18, 24, 25, 26, 28, 29, 31, among others.

Summary: The Inter-Governmental Cooperative Agreement between the Tribal Nations whose representatives comprise the Bears Ears Commission, the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni and the United States Department of the Interior, Bureau of Land Management and the United States Department of Agriculture, Forest Service for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument (“the Agreement”) concerns the management of the 1.36 million-acre Bears Ears National Monument (“BENM”), a ‘protected area’ encompassing traditional indigenous lands and numerous sacred areas pertaining to the above listed “Tribal Nations”. The lands therein are designated to be Federal lands and are under the jurisdiction of various Federal government departments and agencies (“US Government”).

First, the Agreement’s purposes state:

- That the US Government is “charged with the highest responsibility to protect

¹² See also Declaration Act Consent Decision-Making Agreement for Eskay Creek Project between British Columbia and Tahltan Central Government on behalf of the Tahltan Nation, 6 June 2022 (an agreement intended to give effect to the requirements of British Columbia's 2019 Declaration on the Rights of Indigenous Peoples Act), <https://bit.ly/3TSMx1P>. See also A. Hoekstra and V. Berkman, ‘Will the BC/Tahltan Project Consent Agreement Deliver on its Promises?’, 21 June 2022, <https://bit.ly/3x81HLR>.

Xhanaru: Upholding Indigenous Peoples' Rights

Tribal interests and further the nation-to-nation relationship with Tribal Nations” (p. 1).

- “To ensure that management decisions affecting the [BENM] reflect the expertise and traditional and historical knowledge of interested Tribal Nations and people,” a Bears Ears Commission (“BEC”) is established and shall be comprised of members chosen by the Tribal Nations. The US Government is required to “to meaningfully engage with the [BEC] regarding the development of the management plan and to inform management” of BENM.
- The US Government and the BEC “each serve important roles in the planning, management, conservation, restoration, and protection of the sacred lands within the [BENM], as well as in the protection of ceremonies, rituals, and traditional uses that are part of the Tribal Nations' way of life on these lands since time immemorial.”
- The Agreement is intended to implement the requirement that the US Government obtains input “from the [BEC] into the development and implementation of the [BENM] management plan ... to facilitate coordination and cooperative management of the Federal lands within the [BENM] ... and to provide consistent, effective, and collaborative management of the lands and resources” (2).

Second, the stated objective of the Agreement is that the US Government and the Tribal Nations, the latter acting through the BEC, will achieve the above-listed purposes “by coordinating on land use planning and implementation, as well as the development of long-term resource management and programmatic goals ...; work collaboratively to address Tribal issues, including developing robust outreach efforts to Tribal Nations and more effective mechanisms for Tribal government coordination. In doing so, the parties will ensure that Tribal priorities inform the management” of the BENM (id).

Third, this objective is given effect via various measures, including dialogue and knowledge sharing on “critical resource management ... and a shared awareness of the Tribal context of the landscape, including the need to protect both visible and sacred Tribal uses and activities” (3). Several specific requirements to consult and coordinate are also listed, including meeting quarterly on Tribal Nations' land management priorities and opportunities for joint program development and ensuring that Tribal Nations' “knowledge, priorities, and interests are incorporated

Xhanaru: Upholding Indigenous Peoples' Rights

into the management” of the BENM (3-4). The Agreement further requires that all reasonable measures will be taken “to protect information regarding sacred sites, traditional ceremonies and other rituals from disclosure;” to explore opportunities for repatriating cultural resources;” and to work “collaboratively to ensure Tribal Nations have access to sacred sites and other areas of Tribal importance” for cultural and other purposes (4).

Fourth, in relation to the BENM, the US Government agrees specifically to “[e]nsure that Federal policies reflect the needs of Tribal Nations and that Tribal leaders have a meaningful seat at the table before decisions are made that impact their communities by centering Indigenous voices, including increasing the recognition of the value of traditional Indigenous knowledge and empowering Tribal Nations to make decisions for their cultural, natural, and spiritual values” (5). It also agrees to “[e]nsure that Tribal knowledge and local expertise is reflected in agency decision making processes...” (id).

2. **Observatory Civic Association and Another v Trustees for the Time Being of Liesbeeck Leisure Properties Trust and Ors, (12994 of 2021) [2022] ZAWCHC 2**¹³



Country: South Africa | Body: High Court of South Africa
Western Cape | Date: 18 March 2022

Issues: FPIC, cultural heritage.

UNDRIP, Arts. 1, 2, 11(1), 13(1) 18, 25, 31, 32(2)

Summary: This case concerns a request to halt the construction of an industrial center, which includes proposed headquarters for Amazon Africa. It had been touted as an important part of the local development strategy and efforts. This occurred after various unsuccessful challenges to environmental and heritage impact assessments, permits and authorizations which had been issued between 2018 and 2020 by the national, provincial and local authorities in relation to untitled indigenous lands. These lands that had been previously converted to recreational, business and cultural heritage protection purposes, the latter pursuant to the 1999 National Heritage Resources Act (“NHRA”). The affected indigenous peoples (the Koi and San, referred to as “the First Nations” in the judgment and hereinafter)

¹³ See also *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Ors, (3491/2021) [2022] ZAECKMHC 55 (1 September 2022)*, <https://bit.ly/3eAwIYC>.

Xhanaru: Upholding Indigenous Peoples' Rights

especially highlighted that intangible heritage resources were not recognized and, more generally, that “ecological rather than cultural” values were protected in the various permits (27).¹⁴ There was no dispute that the area was of significant cultural heritage value nor was it disputed that consultations with some persons within the First Nations had taken place. The latter was documented in two 2019 reports commissioned by the Provincial Government. Various administrative challenges and appeals were filed by the First Nations between 2020-21, all of which upheld the permits and authorizations, and construction had commenced at the site.

The First Nations contested the validity of the consultation process, asserting that it gave undue prominence to one faction (that supporting the development and that this was allegedly due to bias by the author, who was himself associated with that group); and that it had “undermined the standing of the Chief of the Goringhaicona in relation to the development ... and downplayed the significance of the ... site and its associated heritage to the Goringhaicona and other Indigenous People” (34). They also maintained that the process had disregarded tangible and, especially, intangible cultural heritage in the various assessments and reviews, asserting that both would be adversely affected if the development proceeded further. In seeking an injunction, they also argued that “there exists no good reason why the financial interests of a single developer should trump the rights of ordinary citizens to have their heritage respected and protected” (39).

First, the High Court reviewed the requirements for an injunction (an “interim interdict”), recalling that the applicant, among other things, must establish that they have a right and a reasonable fear of “irreparable and imminent harm to the right if an interdict is not granted” (114-16). It concluded in part that the “involvement and interests of First Nations Peoples inevitably triggers various international human rights instruments and best practices...” (118). It also reviewed various international norms concerning tangible and intangible cultural heritage (118-19).

Second, the Court recited evidence showing that a substantial number of First Nations’ groups and their authorities opposed the development, yet their views were not recorded in the consultation reports or considered in the associated decisions on the permits and authorizations that had been granted (120). Even one Provincial Government agency had concluded that “there had not been meaningful consultation with First Nations...” (123). That there were substantial flaws in the

¹⁴ See e.g., para. 32, where “Mr Tauriq Jenkins, the Supreme High Commissioner of the Goringhaicona Khoi Khoi Traditional Indigenous Council under Paramount Chief Aran, deposed to an affidavit setting out the significance of the River Club site to Indigenous Peoples, and the living heritage associated with it. He expounded on the history of Khoi and San culture and pointed out that narratives about the First Nations Peoples groupings are often contested on various grounds. He stated that there are a number of Indigenous/First Nations Peoples whose cultural heritage is affected by the proposed development.”

Xhanaru: Upholding Indigenous Peoples' Rights

process was confirmed by other sources (124-27), one of which concluded that “exclusion of certain groups made it impossible for decision makers to take into account all relevant considerations with respect to the impacts of the development” (127). The San have also adopted the “SAN Code,” which governs their expectations for how research must take place as it may affect their rights (it is considered to be “the golden standard for the conduct of research with indigenous people in South Africa” (id)), and this code required their prior, informed consent. There was “no documentation at all of informed consent as envisaged in the SAN Code,” and the consultation process, therefore, “failed to comply with international best practice standards for identifying, researching and assessing intangible heritage” (id). The High Court concurred that the consultation report was biased and that the inability of the state authorities and developer “to provide the Court with precise details of First Nations Peoples who have an interest in this matter, but [who were] excluded from the consultation process was a significant and glaring omission” (130). The Court was thus “satisfied that all affected First Nations Groups were not adequately consulted regarding the ... development. I am further satisfied that those who were excluded or not adequately consulted may suffer irreparable harm should the construction continue pending review proceedings” (131).¹⁵

Third, the High Court addressed the argument that because construction had already commenced, an order halting the same would unduly prejudice the developer, particularly as an urgent judicial review process could also be initiated. The Court responded that this “does not detract from the duty on the relevant decision makers to properly consult with the First Nations Peoples, and the duty of the Courts to ensure that the rights of vulnerable Indigenous Groups are protected” (137). Ultimately, the Court decided that the “the construction must be halted in order to embark on a proper consultation process” (id), even if “further engagement with First Nations Groups may result in a delay in the review hearing” (142).

Finally, the High Court began its concluding remarks by stating that the area in question is central to the tangible and intangible heritage of the First Nations (143).¹⁶ Also, the “fact that the development has substantial economic, infrastructural and public benefits can never override the fundamental rights of First Nations Peoples (id). More specifically, “the fundamental right to culture and heritage of Indigenous Groups ... are under threat in the absence of proper consultation, and

¹⁵ The Court explained in this regard that “The harm to be prevented in the present circumstances is the continuation of the building construction in the event that the review Court finds any irregularity in relation to the constitutionally protected rights of indigenous groups” (131).

¹⁶ This was based on the proven facts that they have “a deep, sacred linkage to the development site through lineage, oral history, past history and narratives, indigenous knowledge systems, living heritage and collective memory...” (143).

that the construction of the ... development should stop immediately, pending compliance with this fundamental requirement” (id).

NB: the High Court decision was appealed by the developer and the government authorities. The applicants also sought contempt of court orders in July 2022 as they allege that the High Court order above has not been respected by the developer due to its ongoing construction work.¹⁷

3. Anderson v. Alberta, 2022 SCC 6



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



Country: Canada | Body: Supreme Court of Canada
| Date: 18 March 2022

Issues: Access to remedies.

UNDRIP, Arts. 4, 20(2), 23, 28, 39, 40

Summary: This case is an appeal concerning an application for costs to fund litigation in a case filed by the Chief of the Beaver Lake Cree First Nation “on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No. 6 and of Beaver Lake Cree Nation.” The larger case was filed in 2008 and alleges that Canada has violated Beaver Creek’s aboriginal and treaty rights – as guaranteed in Section 35(1) of Canada’s Constitution – because it permitted the taking and use of its lands for industrial activities and resource extraction, thereby compromising its ability to pursue its traditional way of life (9). The trial is scheduled to commence in January 2024 and is estimated to cost approximately 5 million Canadian dollars. Acting through its Chief, Germain Anderson, Beaver Creek maintained that could not afford these costs and, thus, it had applied for advance costs to fund the litigation (Government funds which may be awarded by a court upon application).¹⁸ Beaver Creek did have funds available, but, it said, these were allocated for other more critical needs (e.g., housing and infrastructure and addressing high levels of unemployment and social assistance needs). The trial court had ruled in favor of Beaver Creek, whereas the Court of Appeal of Alberta ruled that Beaver Creek didn’t meet the requirements for advanced costs because there was not enough evidence that it was “impecunious,” or impoverished, mostly as it had available funds but chose to spend them on other things.¹⁹ The Supreme Court of Canada was asked to deter-

¹⁷ See e.g., <https://bit.ly/3B0J8Rk>

¹⁸ The Supreme Court observed, para. 20, that “Access to justice is an important policy consideration underlying advance costs awards where a litigant seeks a determination of their constitutional rights and other issues of broad public significance, but lacks the financial resources to proceed. ... Further, costs awards can permit litigants of limited means, including vulnerable and historically disadvantaged groups, to have access to the courts in cases of public importance.”

¹⁹ In *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), the Supreme Court of Canada set out the rules for assessing claims for advance costs to offset public interest litigation costs, one of which was that the “applicant demonstrate impecuniosity – meaning, that it ‘genuinely cannot afford to pay for the litigation’” (para. 2).

mine the correct approach. In particular, “how a First Nation government applicant may demonstrate impecuniosity where it has access to resources that could fund litigation, but says it must devote those resources to other priorities” (para. 3).

First, the Court explained that “the imperative of reconciliation,” was a critical part of the analysis, even if, by itself, it did not override the requirements for advanced costs. It further observed that an “approach to impecuniosity that focuses exclusively on an applicant’s available financial resources is contrary to the objective of reconciliation inherent in s. 35 litigation” (17).

Second, the Supreme Court recalled its prior case law that affirms “the Crown’s obligation to consult and accommodate Indigenous groups” and which highlights that “the ‘fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions’” (25). It then explained the significance of “reconciliation” in connection with decisions about granting advanced costs. For instance, the courts may decide that advanced costs are warranted “where the litigation raises novel issues concerning the interpretation of Aboriginal and treaty rights and the infringement of those rights,” or where “the Crown has employed tactics to delay the resolution of the applicant’s claim” (27). Also, when assessing whether an applicant is impoverished, the courts must “respectfully account for the broader context in which First Nations governments such as Beaver Lake make financial decisions” because “[p]romoting institutions and processes of Indigenous self-governance fosters a positive, mutually respectful long-term relationship between Indigenous and non-Indigenous communities, thereby furthering the objective of reconciliation (id). This means, it further explained, that a First Nation’s “pressing needs” must be understood in the light of the “perspective of its government that sets its priorities and is best situated to identify its needs” (id., 32, 44).

Third, the Supreme Court rejected arguments that all First Nations should be presumed to be impecunious, reaffirming that this is to be established based on evidence, even though “access to justice is of particular importance” in aboriginal rights litigation (35). Nonetheless (citing its 2012 judgment in *R v. Ipeelee*), the courts must consider e.g., the history of colonialism and displacement and the ongoing effects, such as lower incomes and higher unemployment, “insofar as they may be relevant to understanding a First Nation government’s financial situation

Xhanaru: Upholding Indigenous Peoples' Rights

and spending priorities” (36). A court may thus “decide that a First Nation government is impecunious when its prioritization of ‘pressing needs’, properly understood, has left it unable to fund public interest litigation” (38). Much of the rest of the judgment is a more detailed discussion of what kind of evidence should be presented and how (41 et seq). This is followed by a closer look at how the lower courts had assessed Beaver Lake’s situation, including its pressing needs, to determine whether advanced costs should be award.

Finally, the Supreme Court sent the case back to the trial court to decide if, based on the instant judgment and the available evidence, advanced costs should be granted. It noted that it was “mindful of the time and resources expended by the parties in the nearly 14 years since this litigation began” (72). It also awarded costs related to litigation of the application for advanced costs to Beaver Lake because “the question of advance costs for a First Nation government claimant possessing resources of its own represents a truly exceptional matter of public interest” (74).

4. Sámi Fishing Rights Cases, KKO:2022:25 (R2019/424) and KKO:2022:26 (R2019/425)



<https://bit.ly/3qoOrF7>
<https://bit.ly/3RuJwhY>



Summaries in English



Country: Finland | Body: Supreme Court | Date: 13 April 2022

Issues: Validity of restrictions to fishing rights considering indigenous cultural rights.

UNDRIP, Arts. 20(1), 25, 29(1)

Summary: These two cases concern criminal prosecutions of Sámi persons for fishing out of season – a season shortened and then eliminated by the State – and with banned stationary nets (R2019/424) and without permits in state-owned lands/waters (R2019/425). In R2019/424, the Supreme Court had to decide whether a Sámi man was guilty of an offence, considering his constitutional rights and rights in international human rights law, particularly cultural rights.²⁰ Similarly, in

²⁰ The Supreme Court referenced Article 27 of the International Covenant on Civil and Political Rights, which provides that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

Xhanaru: Upholding Indigenous Peoples' Rights

R2019/425, the issue before the Court was whether the four Sámi persons had committed offenses in the light of their constitutional and internationally guaranteed cultural rights. The laws in question were enacted with the intention of protecting vulnerable fish stocks (salmon and trout), a measure further provided for in the first case in an international treaty between Finland and Norway. In both cases, the Court recalled the long recognition, entrenched in the Constitution, that fishing and other traditional economic activities (e.g., reindeer herding) were integral elements of the Sámi culture and “a right[s] within the sphere of property rights.”

First, in both cases, the Supreme Court ruled that the legal restrictions on fishing rights contained in the laws in question were reasonable and had valid objectives (protection of fish stocks and the environment, noting that Sámi would be unable to exercise their culturally significant fishing rights if the fish stock was not sustainably managed). These rights could therefore be restricted, provided that the restrictions were proportionate to the proposed benefits, that less intrusive means were not available, and provided that Sámi would continue to benefit from their traditional economy.²¹

Second, the Supreme Court ruled in both cases that the existence and nature of Sámi rights required differential treatment in relation to the general population. In R2019/424, it explained that “[e]ven though the responsibility for the environment is everyone’s responsibility, the Committee has noted that regulation can be used to give effect to the responsibility by addressing different restrictions and obligations to different legal subjects, where such differentiation is permissible especially on grounds relating to the protection of fundamental rights.” In R2019/425, the Court noted that the Fishing Act “did not allow for any rights-oriented interpretation that would allow local Sámi to fish in salmon and trout migration areas without a separate fishing permit,” and that “local Sámi were in the same position with all other fishermen/women, such as tourists, when it came to [issuing] permits.” More generally, the Court observed that environmental protection laws should promote Sámi rights to maintain and develop their language and culture and that “fishing restrictions should have been directed more strictly on such fishing that is not protected” by constitutional and human rights.

Finally, the Court in both cases ruled that the legal provisions under which the Sámi were prosecuted were inapplicable and without effect, upholding the deci-


²¹ Cf. *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009) (a case decided by the Human Rights Committee with specific reference to Article 27 of the ICCPR), <https://bit.ly/3apGKyl> (all languages).

sions of the lower District Court to dismiss the charges brought against the Sámi.

NB: On 21 April 2022, Finland, following negotiations with Norway, proposed that salmon fishing in the area covered by these decisions should be prohibited altogether throughout 2022. The Sámi Parliament in Finland has argued that this would conflict with the Supreme Court's judgments and demanded that this proposal be amended accordingly.²²

5. Pawnee Nation of Oklahoma, Declaration on the Rights of Indigenous Peoples Act

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

 Country: USA | Body: Pawnee Nation of Oklahoma (Legislation) | Date: 12 May 2022

Issues: Self-determination

UNDRIP, Arts. 3, 4, 5, 33, 34, 37, 38, 40, among others

Summary: This is a law adopted by the Pawnee Nation of Oklahoma.²³ It was enacted in May 2022 pursuant to the Constitution of the Pawnee Nation of Oklahoma. Its stated purposes are to:

- Strengthen the domestic legal framework in the United States for defining and protecting the Pawnee Nation's legal, political, cultural, property and Indigenous rights;
- Strengthen the Pawnee Nation's relationships with Federal and State governments, including federal protection of the human and Indigenous rights of the Pawnee Nation and its citizens.
- Promote Federal implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in domestic law and policy;²⁴ and
- Adopt policies for protecting the rights of Pawnee citizens set forth in the UNDRIP.

The Act, among other things, provides that "The UNDRIP asks countries to discard the lingering ill-effects of Colonialism that remain embedded in domestic law and

²² See e.g., <https://bit.ly/3TUsE5T>.

²³ See also <https://bit.ly/3D6Elek> and; <https://bit.ly/3etqHGN>.

²⁴ See also *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15, 7 January 2022 (where the Supreme Court of British Columbia (Canada) considered the potential implications of provincial UNDRIP legislation), <https://bit.ly/3qnUh9V>.

policy and replace those outmoded legal doctrines with the minimum standards of the UNDRIP. Those standards see Indigenous rights as human rights..." (Sec. VI(3)). It further provides that "[h]enceforth it shall be the policy of the Pawnee Nation of Oklahoma to ensure that future Tribal statutes, rules, regulations, and policies are consistent with the UNDRIP standards" (VIII(1)). Focusing outwards, it "calls upon the United States and State of Oklahoma to implement the UNDRIP provisions into their laws and policies," and "requests the President of the United States to develop a national plan to implement the UNDRIP in partnership and consultation with Tribal Nations, Alaska Natives, and Native Hawaiians" (VIII(3) and (4)).

6. Massacre of Napalpí: Trial for the Truth, FRE 9846/2019

 <https://bit.ly/3KWEd8A>

 Country: Argentina | Body: Chaco Federal Criminal Court
| Date: 22 May 2022

Issues: Genocide, reparations.
UNDRIP, Arts. 1, 7(2), 8, 40

Summary: This case concerns a criminal prosecution for the horrific massacre of Moqoit and Qom Indigenous People that occurred in 1924.²⁵ This happened as part of systematic reprisals for Indigenous resistance to an official policy of the Argentine State. This policy comprised taking Indigenous lands and allocating them to non-indigenous persons/entities, confining the Indigenous people to small areas ('reductions', similar to concentration camps; in this instance "the Reduction of Napalpí Indians") and subjecting them to conditions that were analogous to slavery. About 1,000 Indigenous persons assembled and protested this situation in the area of El Aguará, prompting an armed and coordinated attack that resulted in the murder of 400-500 persons by agents of the State. Most were buried in unmarked, mass graves. The survivors and their descendants have suffered serious, negative consequences since that time, including trauma and loss of culture and language. The massacre was then covered up by the State, investigations were obstructed or quashed, and a situation of impunity has prevailed until this year.

First, the court judicially declared as a proven fact that the Argentine State was and

²⁵See also 'The ruling on the Napalpí Massacre in Argentina: justice for the past and inspiration for the present,' IWGIA, 4 July 2022, <https://bit.ly/3RSW1DX>.

remains responsible for the planning, execution and concealment of the massacre. In the terms of the applicable Criminal Code, legal responsibility for the crime of “aggravated homicide” of between 400 and 500 Moqoit and Qom persons and for their enslavement and reduction to servitude (para. 2).

Second, the court declared that the “Napalpí Massacre” and subsequent events constitute “crimes against humanity, committed within the framework of a process of genocide of indigenous peoples” (3).

Third, the court order a series of measures of reparation, concluding also that the judgment itself constituted a form of reparation insofar as it officially made known the events and consequences. The judgment was read in the Indigenous languages and the judge also ordered its translation in writing to the Indigenous languages. Similarly, the court acknowledged that a prior apology by the Governor of the Chaco Province also constituted a form of reparation as did number of prior laws that provide for bilingual and intercultural education, declaring that the Qom, Wichi and Moqoit languages were official languages in the Chaco Province, and the construction, in 2021, of a monument memorializing the victims of the massacre (“the Napalpí Memorial Historic Site”).

In addition, the Court order the publication of its judgment in various places, including “to the international organizations for the protection of indigenous rights,” and that the State show the trial on public television (6a-d). It further ordered exhumation of the mass graves and return of the remains to the Moqoit and Qom, “the timing and form of which shall be determined after consultation” with them (6e-f). The Ministry of Education was ordered to include information on the proven facts set out in the judgment in all levels of the national curriculum (6g). The State, more broadly, was ordered: “to carry out a public act of recognition of its responsibility with the participation” of the Qom and Moqoit peoples (h); to constitute a museum “and site of memory of the Massacre of Napalpí” (6i); to create and finance a digital archive of all documents related to the case (6j) and to institute a training course for federal and provincial forces on respect for the human rights of Indigenous Peoples and the facts of the massacre (6k).

²⁵See also ‘The ruling on the Napalpí Massacre in Argentina: justice for the past and inspiration for the present,’ IWGIA, 4 July 2022, <https://bit.ly/3RSW1DX>.



Indigenous Peoples Rights International

Championing Indigenous Peoples Rights

You can support our efforts to protect
Indigenous Peoples rights, and
unite and amplify the call for justice
to victims of criminalization
and impunity:

Visit our website
iprights.org

Follow us on social media



Donate here

