

**Digest** | Issue #4

# Xanharu

## Upholding Indigenous Peoples' Rights

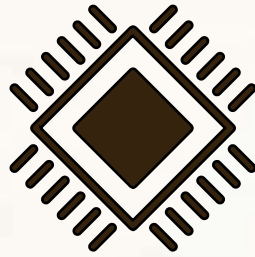
Legislation and Jurisprudence:  
Global, Regional and National Developments



Indigenous Peoples  
Rights International

Championing Indigenous Peoples Rights

Photo by: Erik Mclean



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

**Xanharu best describes what this digest aims to accomplish – serve as a way by which Indigenous Peoples are able to use decisions on laws and 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 EMRIP's conclusion that "many of the rights contained in the Declaration are already guaranteed by major international human rights instruments and have been given significant normative strength, including through the work of the treaty bodies, regional and national courts."<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 policymakers, judges, prosecutors, lawyers, and others to give increased attention to Indigenous Peoples' rights and 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.

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<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. See also M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT'L COMP L.Q. 957, 966 (2009) (explaining that "the strong relationship between the content of the Declaration and existing law should be recognized. The fact that the Declaration contains provisions that refer to rights and principles already recognized, or emerging, in the realm of international human rights, and, more specifically, within the indigenous rights regime, represents a first important indication of the legal significance of the instrument").

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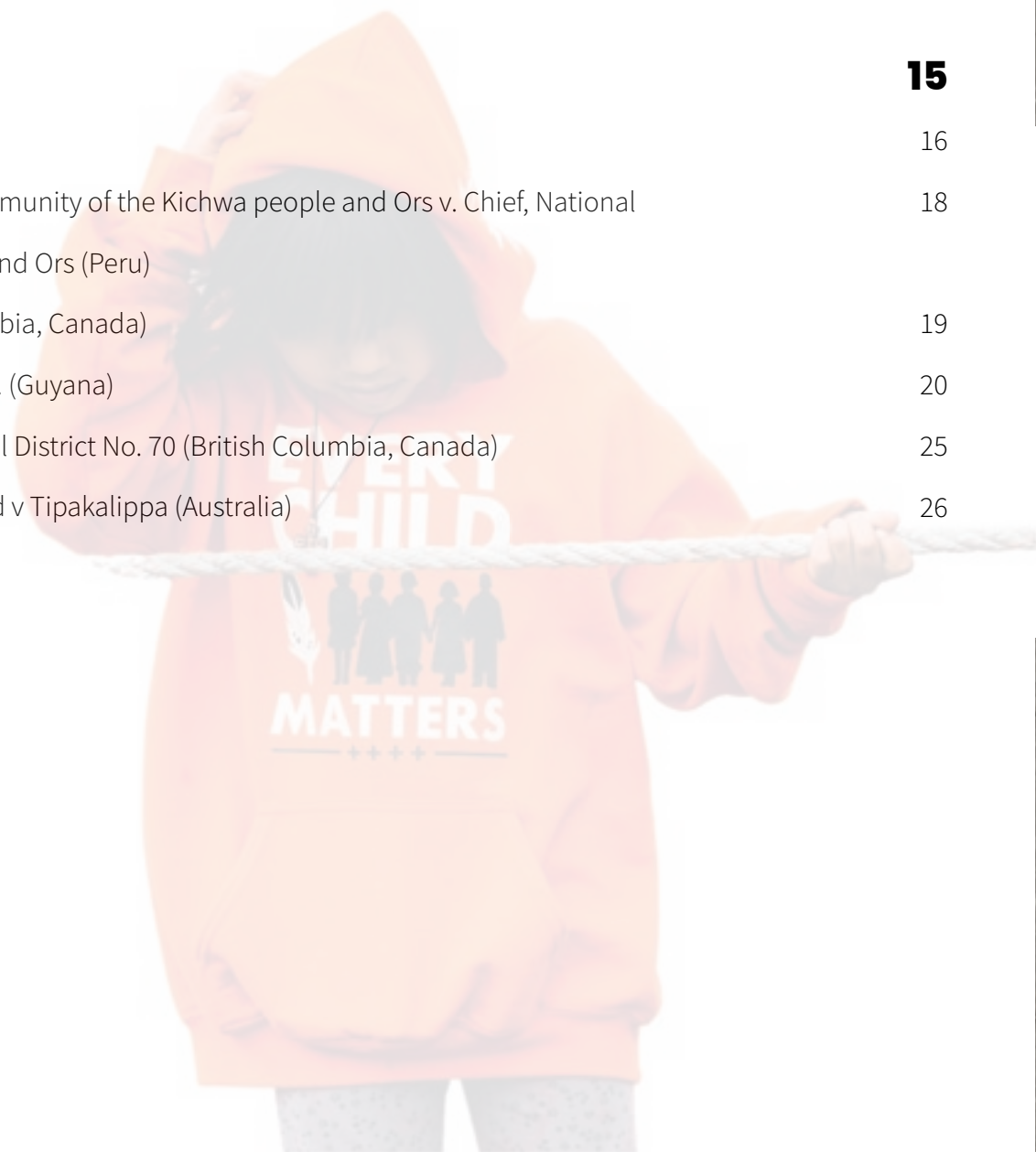
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# Global




Photo: Indigenous Rights Advocacy Centre - IRAC

## 1. Camila v. Peru, CRC/C/93/D/136/2021

 <https://bit.ly/46vnOIO>

 (Spanish only to date. Unofficial translation)

 Country: Peru | Body: Committee on the Rights of the Child | Date: 13 June 2023

Issues: Lack of access to a therapeutic abortion, torture, intersecting forms of discrimination

UNDRIP arts. 1, 2, 7, 14(2)(3) 21-4

**Summary:** This case concerns the rights of a Quechua-speaking indigenous girl, Camila (para. 2.1), who was repeatedly raped by her father until she became pregnant at the age of 13. She then was denied access to a therapeutic abortion and other health care measures; forced to drop out of school and leave her community; and ill-treated and prosecuted by the state for the crime of “self-abortion.” It was filed in 2021 pursuant to the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. It alleges violations of various provisions of the Convention on the Rights of the Child (not art. 30 on the rights of the indigenous child, however),<sup>2</sup> specifically: the right to health, alone and read together with the right to life (art. 24 with art. 6); access to information (art. 17); the prohibition of torture due to sexual violence and forced pregnancy (art. 37); and her right to private life (art. 16) was violated, alone and in conjunction with her right to special protection as a child (art. 2) and her right to participate meaningfully in decisions (art. 12 with 24 and 6).

After confirming that she was pregnant, Camila had to travel for hours with her disabled mother to the nearest health center. Over numerous visits, and despite her emotional pleas to terminate her pregnancy, hospital staff did not advise her of the option of a therapeutic abortion, and they otherwise prescribed prenatal care and treatment as if she would routinely carry the baby to full term (2.5-2.7). This persisted even though Camila expressed suicidal thoughts (2.8). Formal requests for termination of the pregnancy, submitted via legal channels, were either ignored or the response was unduly delayed (months in one instance, when it should have been resolved in days) (2.9). In December 2017, she was admitted to the hospital with severe abdominal pain, miscarried the baby as part of an “incomplete abortion,” underwent surgery, and was discharged after two days (2.12). She was admitted to the hospital again, at which time she was also given a psychological exam. It concluded that “she suffered persecution and harassment by the Huanipaca health center and mistreatment by her mother and brother as a result of the rape. She was found to have childhood depression, signs of psychological abuse, an unstable family situation, and post-traumatic stress disorder” (2.14). The health center team visited Camila at home on numerous occasions, sometimes with the police. It also filed criminal charges against her father, which triggered additional police visits to the community. As a result, “community pressure on her intensified, she was blamed for the miscarriage and sexual violence” and people made humiliating comments to her so that she “felt stigmatized and stopped attending school” (2.13). Eventually she was forced to move to another community to live with her aunt (2.22, 3.2).

<sup>2</sup> Resolution 66/138 adopted by the General Assembly on 19 December 2011 A/RES/66/138 (27 January 2012) <https://bit.ly/3NUaKOD>

Camila filed various formal complaints about her mistreatment, including the failure to comply with Peru's existing technical health care standards (2.15). One aspect was a complaint that these requirements failed to "guarantee access to abortion for girls and adolescents, and for indigenous people,"<sup>3</sup> and that they did not contain "differentiated indications to respond to their particular needs" (id., 3.3, 3.7).<sup>4</sup> A complaint filed with the Intendencia de Proteccion de Derechos en Salud resolved two issues in Camila's favour. It rejected two others, including the complaint about the failure to inform her of a therapeutic abortion. An appeal against this decision was then also rejected.

Two investigations were initiated against Camila for the crime of self-abortion, based, apparently, on no more than her statements that she wanted to end the pregnancy and the fact that it did end (2.18 et seq). In March 2018, the Provincial Prosecutor asked the Specialized Family Court "to convict Camila as the author of the crime of self-abortion, which carries penalties of up to two years in prison," a request that the Court accepted (2.26). The Court then also refused to reclassify the crime as 'abortion resulting from rape', which would carry a lesser punishment, and it insisted that Camila would have to confess to the crime of self-abortion first if it were to accede to this request (2.26). Additional legal action filed on behalf of Camila was rejected as inadmissible and she was convicted of the crime of self-abortion on 16 August 2018 (2.27-2.28). However, this conviction was overturned in June 2019 after the resolution of another request filed by Camila with the judiciary (2.28).

**First**, the Committee reviewed the admissibility of the communication. Finding it admissible, it concluded that domestic remedies were either unavailable or unduly prolonged. Thus, an exception to the requirement of prior exhaustion of remedies was applied (7.1-7.6). The Committee accepted that the communication was justified due to Camila's allegations about arts. 2, 6, 12, 16, 17, 24, 37(a), 39 and 40 of the Convention on the Rights of the Child as these relate "to the lack of information and access to therapeutic abortion and the criminalization of spontaneous abortion" (7.6). It added that her claims also raised issues under arts. 13 (freedom of expression) and 19 (protection against physical violence and abuse) (id.).

**Second**, turning to the merits, the Committee determined that the main issues to be resolved were whether "the author's lack of information and access to the voluntary termination of her pregnancy, as well as her prosecution for self-abortion have violated her rights in accordance with the Convention" (8.2). Observing that other treaty bodies have reached similar conclusions, the Committee explained that the right of children to enjoy the highest attainable standard of health in art. 24(1) "includes the right to control their own health and body, including sexual and reproductive freedom to make responsible decisions" (8.4). Warning against

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<sup>3</sup> See also *Leo v. Australia*, CRPD/C/22/D/17/2013 (2019), para. 7.6 ("... the Committee notes the State party's plea of inadmissibility ... in relation to his Aboriginal status on the grounds that article 5 of the Convention covers only discrimination on the basis of disability. ... [T]he Committee recalls that all possible grounds of discrimination and their intersections must be taken into account, including indigenous origin").

<sup>4</sup> Explaining further, at 3.3, that "... the lack of an intercultural perspective in the Technical Guide favored the fact that health personnel ignored her as an indigenous and rural girl and did not notify her of the risk situation or respond to her request for therapeutic abortion;" observing, at 3.7, that "Given her vulnerability as a girl victim of sexual violence, said information should have been provided in an appropriate manner, considering her ethnic-cultural origin and her age, respecting her wishes and asking for her consent;" and, at 5.4, that the "author maintains that the lack of specialized care for girls, victims of sexual violence, indigenous people, or women with disabilities fails to comply with the intercultural and gender approach provided for in the Guide itself."



the unjustifiable criminalization of abortion, it further explained that states “must ensure that health systems and services can meet the needs of adolescents in terms of sexual and reproductive health, including through safe abortion and family planning services” (id.). Pregnancies among adolescents are normally considered “high risk” and threats to life are significantly higher than among older women (id.). This heightened risk due to age, the Committee concluded, is also especially important to bear in mind as are aggravating factors of rape or incest (id.).

The Committee concluded that Peru had violated article 24(1) in conjunction with art. 6 by failing to provide Camila with information about therapeutic abortions and by de facto denying her access because it failed to respond to her repeated requests for an abortion, knowing also that she has an increased risk of death from pregnancy complications and without regard for the circumstance of rape/incest (8.7). It likewise failed to provide Camila with access to sufficient psychological therapy, while at the same time retraumatizing her by putting her on trial and convicting her of the crime of self-abortion for no more than the medical condition of having a miscarriage. Peru also violated art. 12 in conjunction with arts. 24 and 6 by failing to take into account – really, failing to listen to – her decision to have an abortion (id.). The Committee also determined that the lack of adequately trained medical professionals and the large distance between the health center and Camila’s village illustrate an illegitimate lack of accessibility re. the right to health, which “includes physical accessibility, especially to people belonging to disadvantaged and marginalized groups, including people who, like the author, live in rural and remote areas” (8.9).

**Third**, the Committee responded to Camila’s submissions that **her status as an Indigenous girl was also relevant,<sup>5</sup> both as an intersecting form of discrimination<sup>6</sup> and as a more generalized intersection between the Convention and the Indigenous Peoples’ rights framework,<sup>7</sup> whereby Camila has both individual and collective rights** that may be relevant, including in the formulation of remedies.<sup>8</sup> It explains that impacts on health, development and life projects should be assessed “based on the age and physical

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<sup>5</sup> See e.g., *General recommendation No.39 (2022) on the rights of Indigenous Women and Girls*, CEDAW/C/GC/39, para. 16 (“The prohibition of discrimination in articles 1 and 2 of the Convention applies to all rights of Indigenous Women and Girls under the Convention, including, by extension, those set out in UNDRIP, which is of fundamental importance to interpretation of the Convention...”).

<sup>6</sup> See e.g., *Brough v. Australia*, CCPR/C/86/D/1184/2003 (2006), para. 8.9 (“Given the author’s age, his intellectual disability and his particularly vulnerable position as an Aboriginal...”), and para. 9.4 (“In the circumstances, the author’s extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal”); *A.S. v. Australia*, CCPR/C/132/D/2900/2016 (2021), para. 3.5; and *Isherwood v. New Zealand*, CCPR/C/132/D/2976/2017 (2022), e.g., para. 8.3.

<sup>7</sup> See also *Rosendo Cantú et al., Ser C No. 216 (2010) (involving severe sexual and physical abuse of an indigenous woman by the Mexican army, and finding, at para. 252, “that it is essential to order a measure of reparation to provide appropriate care for the physical and psychological effects suffered by the victims, having regard to their gender and ethnicity;” and, para. 184, “based on the principles of non-discrimination enshrined in Article 1(1) of the American Convention, in order to guarantee access to justice to members of indigenous communities, “it is essential that States offer effective protection that takes into account their particularities, social and economic characteristics, as well as their situation of special vulnerability, customary law, values, customs and traditions.”); and L.N.P v. Argentina*, CCPR/C/102/D/1610/2007 (2011) (taking note, at para. 13.3, “of the author’s allegations to the effect that she was a victim of discrimination based on the fact that she was a girl and an indigenous person, both during the trial and at the police station and during the medical examination to which she was subjected,” and concluding “that these facts reveal the existence of discrimination based on the author’s gender and ethnicity in violation of article 26 of the Covenant”).

<sup>8</sup> See e.g., *Gallardo et al v. Mexico*, CAT/C/72/D/992/2020 (2022), para. 9(c) and (e) (where CAT recommended that Mexico award reparations that are respectful of the victim’s “worldview as a member of the Ayuujk indigenous people”).



and psychological maturity of the pregnant girl, her family and community support system, as well as other factors that may affect her mental health, including the fact of being victim of rape, incest, or socioeconomic and cultural vulnerability factors” (8.5). As discussed below, it also confirms that the same analysis of “additional factors of vulnerability” should be undertaken about the prohibition of torture or cruel, inhuman or degrading treatment (8.11). In this regard, the Committee explains that any assessment of Camila’s mental health and integrity must consider “her particular vulnerability as a poor, indigenous, rural girl, victim of sexual violence, with a disabled mother and an abusive father” (8.12).

While it may not have been asked to do so, the Committee could have done more with the Indigenous-specific aspects of this case. It could have done so e.g., by reference to art. 30<sup>9</sup> or by employing its 2009 General Comment on the rights of the Indigenous child, which explains that the UNDRIP “provides important guidance ... including specific reference to the rights of indigenous children in a number of areas.”<sup>10</sup> UNDRIP, arts. 21-4 are all relevant. Each could be used to be address the individual violations while also recognizing and operationalizing collective<sup>11</sup> Indigenous autonomy, capacity, and agency<sup>12</sup> in relation to health and social services and responsibility for the well-being of members.<sup>13</sup> Also, the Committee notes that Camila is Quechua-speaking yet linguistic rights are not highlighted in relation to the receipt and dissemination of information and her views under arts. 12, 13(1) and 17 (e.g., 8.14, 9). Similarly, the Committee records that home visits by medical and police personnel “caused community stigmatization to the point of forcing [Camila] to drop out of school and, subsequently, her family and community, creating a situation of uprooting” (8.13). Therefore, and while attaching liability to the state may be more complicated, an additional factor to consider may be the apparent severance of Camila’s relations to her ancestral lands in her home community.<sup>14</sup>

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<sup>9</sup> CRC, art. 30 reads: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”

<sup>10</sup> General Comment No. 11 (2009) on Indigenous children and their rights under the Convention, CRC/C/GC/11, para. 10.

<sup>11</sup> E.g., art. 22, providing that “1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”

<sup>12</sup> See e.g., *Yaku Pérez Guartambel v. Ecuador*, CERD/C/106/D/61/2017 (26 July 2022) (concerning State obligations to recognize indigenous legal systems and authorities and to give effect to the acts thereof, all within the paradigm of self-determination and non-discrimination law).

<sup>13</sup> See e.g., UNDRIP art. 35, providing that “Indigenous peoples have the right to determine the responsibilities of individuals to their communities.”

<sup>14</sup> See e.g., *Lovelace v. Canada*, CCPR/C/OP/1 (1979) (finding that the Indian Act violated rights guaranteed by art. 27 of the ICCPR as Ms. Lovelace was denied the right to live on her reserve land because she married a non-indigenous man), <https://bit.ly/3evl0NY>; *Chichupac Village and Neighbouring Communities of the Municipality of Rabinal*, Ser C No. 328 (2016), para. 176 (“... the relationship between indigenous peoples and their territory is vital to maintain their cultural structures and their ethnic and material survival...”); *Xákmok Kásek Indigenous Community*, Ser C No. 214 (2010), para. 263 (relating territorial rights to the rights of the child and cultural identity); and *Río Negro Massacres*, Ser C No. 250 (2012), para. 144 (“... [f]or the full and harmonious development of their personality, indigenous children, in keeping with their cosmovision, need to grow and develop preferably within their own natural and cultural environment, because they possess a distinctive identity that connects them to their land, culture, religion, and language”).

**Fourth**, the Committee found that Peru has also discriminated against Camila during the criminal investigation and prosecution. This was true because of the conduct of the prosecutor, because the author, “an indigenous and rural girl who was the victim of rape, was also repeatedly revictimized at police headquarters and in health centers, as her request for an abortion was repeatedly ignored, and raids were carried out at her home and school, in turn promoting harassment of family and community towards the author” (8.15). Similarly, the same conclusion was warranted because the lack of access to safe abortion and her subsequent criminalization for self-abortion constituted, in and of themselves, “differential treatment based on the author’s gender, since she was denied access to an essential service for her health and she was punished for not complying with gender stereotypes about her reproductive function” (id.). Taken together this “constituted discrimination against the author for reasons of age, gender, ethnic origin, and social situation, in violation of Article 2 of the Convention” (id.).

**Last**, the Committee relates this situation to guarantees against torture and or other cruel, inhuman or degrading treatment or punishment. As noted above, it highlights that Camila’s Indigenous status also may be relevant to various aspects of the associated rights and obligations.<sup>15</sup> It recalled that the article in question (art. 37) prohibits “acts of violence against a child to punish him or her extrajudicially for unlawful or unwanted conduct or compel him to carry out activities against his will, committed by institutions and persons having authority over him. The ... victims of such acts are often marginalized, disadvantaged and discriminated children who lack the protection of adults in charge of defending their rights and their best interests” (8.11). The severe, negative impact on Camila’s mental health was emphasized in this regard as was the repeated revictimization and re-traumatization she suffered at the hands of the health clinic, nurses, police and prosecutors (8.12). The latter especially “exacerbated and prolonged her suffering” (id.). In line with other international authorities, the Committee also suggests that Camila’s dislocation from her community is relevant to assessing pain, anxiety and suffering for the purposes of torture and inhumane treatment (8.12).<sup>16</sup> In common with the Human Rights Committee, it also makes this connection in relation to the right to be free from arbitrary or unlawful interference with his or her privacy, family, home in art. 16 (8.13).<sup>17</sup>

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<sup>15</sup> *General Comment No. 2, Implementation of article 2 by States parties, CAT/C/GC/2, para. 21* (observing that “The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that ... their laws are in practice applied to all persons, regardless of ... indigenous status. ... States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection...”).

<sup>16</sup> See e.g., *Moiwana Village, Ser C No. 145 (15 June 2005), para. 101 et seq* (ruling that prolonged “separation of community members from their traditional lands” was one of three bases for finding a violation of the right to humane treatment); *CAT/C/COL/CO/4 (4 May 2010), para. 26* (urging “the State party to adopt effective measures to ensure the return of land to victims of displacement and to respect the land ownership of peasants, Afro-Colombians and indigenous people”).

<sup>17</sup> See also *Daniel Billy et al v. Australia, CCPR/C/135/D/3624/2019 (2022), para. 8.10* (the authors depend on natural resources for their subsistence and livelihoods, and “these elements can be considered to fall under the scope of protection of article 17 of the Covenant”); *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ẽ, of the Ava Guaraní People v. Paraguay, CCPR/C/132/D/2552/2015 (2021), para. 8.2* (“... in the case of indigenous peoples, the notions of domicile [home] and private life must be understood within the special relationship they maintain with their territories”); *Francis Hopu and Tepoaitu Bessert v. France, CCPR/C/60/D/549/1993/Rev.1. (1997), para. 10.3* (“... cultural traditions should be taken into account when defining the term ‘family’ in a specific situation”).

A photograph of a woman and a young child in traditional white clothing, standing in a rural setting. The woman is in the background, looking down, and the child is in the foreground, also looking down. The image has a warm, yellowish tint and a large, faint watermark in the background. The word "Regional" is overlaid in large, bold, black letters.

# Regional

Photo: IPRI Colombia



## 1. Jhon Anderson Ipia Bubu, Precautionary Measures No. 822-22<sup>19</sup>

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

 Country: Colombia | Body: IA Commission on Human Rights<sup>20</sup> | Date: 11 Dec 2022

Issues: Threats and violence against an indigenous leader, affecting also the community/people he represents

UNDRIP arts. 1, 2, 3, 4, 5, 7, 8, 18, 33(2), 40

**Summary:** This request for precautionary measures (used where irreparable harm is imminently threatened) was filed in October 2022 by the Indigenous authority of the Kwe'sx Yu Kiwe reserve and Jhon Anderson Ipia Bubu ("Mr. Ipia"), a teacher and a local and national indigenous leader (paras. 4, 34).<sup>21</sup> It requests that the Inter-American Commission on Human Rights ("IACHR") recommends that Colombia adopt all necessary measures to protect the life and personal integrity of Mr. Ipia. He is "at risk as a result of threats, harassment, and an assassination attempt in the context of his work as an indigenous leader of the Nasa People in Colombia." These threats arose as part of the land restitution process initiated after the conclusion of much of the armed conflict.

The situation was so bad that, in 2019, the Third Civil Court of the Specialized Circuit in Land Restitution of Santiago de Cali ordered the state: 1) to assess the risk and security situation of the leaders of the Central Cabildo Kwe'sx Yu Kiwe and; 2) to develop a strategic plan to address the risks, in accordance with "their uses and customs, and with the mechanisms defined in the Safeguard Plan for the Nasa people, in agreement with the authorities of the cabildo, considering the collective and individual dimension that the measures must incorporate" (5). The threats persisted and increased as Mr. Ipia campaigned for the election of an Indigenous senator during 2022 and he was issued personal protective equipment by the state (e.g., a bullet

<sup>18</sup> The IA Court held hearings on these cases in March 2023: *Maya Q'eqchi Indigenous Community of Agua Caliente v. Guatemala and Garífuna Community of San Juan v. Honduras*. The IACHR adopted precautionary measures or transferred the following to the IA Court for either a decision on provisional measures or the merits: *Musawas and Wilú Indigenous communities (Nicaragua)*, IACHR Press Release, 26 April 2023 ("the rights of the inhabitants of the Musawas and Wilú indigenous communities are at extreme risk in the context of claiming ancestral territories"), <https://bit.ly/3XBQvtu>; *Pataxó Indigenous People (Brazil)*, IACHR Press Release, 24 April 2023 ("experiencing 'ongoing violence' ... as part of conflicts around the definition of their territory"), <https://bit.ly/3PCLsqg>; *Rights of Mapuche in Criminal Justice Proceedings (Chile)*, IACHR Press Release, 29 March 2023 ("involving rights violations against 140 Mapuche individuals, ... linked to these individuals' participation in protests in 1992"), <https://bit.ly/3CW4Zus>

<sup>19</sup> See also <https://bit.ly/3JHKuFD>; <https://bit.ly/3NRSMgF>; and <https://bit.ly/43YuvLz>.

<sup>20</sup> See also IACHR reports on *Situation of Human Rights in Peru in the Context of Social Protests*, OEA/Ser.L/V/II. Doc. 57/23 (23 April 2023) and; *The Economic, Social, Cultural, and Environmental Rights of Indigenous Peoples and Tribal People of African Descent in El Salvador, Guatemala, Honduras, and Nicaragua*, OEA/Ser.L/V/II. Doc. 52/23 (21 March 2023).

<sup>21</sup> The IACHR explains, at para. 27, that precautionary measures are part of its oversight functions, established in art. 106 of the Charter of the Organization of American States, art. 18(b) of the IACHR Statute, and Art. 25 of the Commission's Rules of Procedure. The IACHR "grants precautionary measures in serious and urgent situations, in which such measures are necessary to prevent irreparable harm."

proof vest). Nonetheless, he was shot and wounded by unknown persons in September 2022. Investigations commenced by the state proved to be both slow and inconclusive (48).

**First**, the IACHR recalled that “the facts supporting a request for precautionary measures need not be proven beyond doubt,” rather, they should be assessed from a *prima facie* (on its face) standard of review to determine whether a serious and urgent situation exists, and without making any determinations on the merits of the case (29). The latter is based on the IACHR’s long-standing view that the standards that apply to precautionary measures and to the merits of petitions are different and require different kinds of analyses.

**Second**, when examining a request for precautionary measures, the IACHR is required by its Rules of Procedure (art. 25(6)) to also take into account the context of the request (30). That requires fully considering that Mr. Ipia is “an indigenous leader of the Nasa People, delegate of the Nasa people as political coordinator in different spaces, and ethno-educational teacher;” that acts of violence in regions of Colombia, like where Mr Ipia lives, “disproportionately affect” indigenous peoples and “those who act in the defense of rights or with social and/or community leadership;” and the existence of significant structural issues that impair indigenous peoples’ rights in Colombian law and practice (30-2). The IACHR noted that it had received information that “the confrontation generated by the dispute over these territories has resulted in an increasing number of murders, massacres, and threats against the lives and integrity and harassment of the members of indigenous peoples” (32). Also, in April 2022, the IACHR had specifically “condemned the violence against these groups, identifying the special impact on their leaders” (32).

**Third**, the IACHR assessed the requirements in relation to the elements of precautionary measures. In discussing the ‘seriousness’ of the situation, it recalled again that Mr. Ipia is an Indigenous leader and the threats and violence he has experienced arose due to his specific activities – some of them listed by the IACHR – advocating for land restitution (34-5). Remarking that Indigenous women leaders in Colombia as especially at risk, the IACHR explained that attacks against Indigenous Peoples’ authorities, male or female, **“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”** (36).<sup>22</sup> It also recalled that Colombia was fully aware of Mr. Ipia’s situation and needs, but the measures it had implemented to protect him “have not mitigated his risk situation” (his being shot and wounded was a good indication that they were ineffective), and the investigations undertaken by the state bore no fruit (39, 41-2). The IACHR found that “*prima facie* Mr. Ipia Bubu’s rights to life and personal integrity are at serious risk...” (45). Considering that he had been forced to relocate from his ancestral lands to an urban area, “as a self-protection measure,” the IACHR explained that **“it is vital that the protection measures applied allow the defender to continue carrying out his work and that adopt an ethnic perspective”** (i.e., they are culturally appropriate) (45). For the measures to be appropriate, the IACHR explains that “they must be tailored to the needs of the protected person’s work and must be able to be adjusted if the danger posed by the activities he/she carries out in defense of human rights varies in intensity

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<sup>22</sup> Quoting from: *Report on the situation of human rights defenders and social leaders in Colombia*, OEA/Ser.L/V/II. Doc. 262 (6 December 2019), para. 67. See also *Chitay Nech et al. v. Guatemala*, Ser C No. 212 (2010), para. 115 (where the IA Court explains that Indigenous leaders “exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented”); and *D.V. Gutiérrez Espinoza & M.Y. Robles Garza, Political rights of human rights defenders and indigenous leaders in the Inter-American Court. A case study from Guatemala* in G. Citroni, I. Spigno & P. Tanzarella (eds.), *THE RIGHT TO POLITICAL PARTICIPATION. A STUDY OF THE JUDGMENTS OF THE EUROPEAN AND INTER-AMERICAN COURTS OF HUMAN RIGHTS* (Routledge: London 2022).

## Regional

over time. Special attention should also be paid to the reinforcement of measures when the defender is at a critical stage in the defense of his cause” (45).

Addressing the other requirements of ‘irreparable harm’ and ‘urgency’, the IACHR concluded that the former was satisfied because in this case because “the possible impact on the rights to life and personal integrity constitutes the maximum situation of irreparability” (47). On urgency or the imminency of the threats, the IACHR considered that this had been satisfied because of the ongoing death threats from violent paramilitary units against Mr. Ipia and because of the recent attempt on his life, facts that “are indicators of the need to adopt urgent individual protection measures” (46). Moreover, “such measures are necessary in order to guarantee that the proposed beneficiary can continue with his activities and return safely to the Kwe’sx Yu Kiwe Indigenous Reservation” (id.).


**Finally**, the IACHR adopted a resolution in December 2022, recommending that Colombia: a) adopt the necessary measures, “with the corresponding ethnic approach,” to protect the rights to life and personal integrity of Mr. Ipia; b) adopt the necessary protective measures so that he **“can continue to exercise his indigenous leadership without being subjected to threats, intimidation, harassment, or acts of violence;”** c) consult and agree upon the measures to be implemented; and d) conduct an investigation into the alleged facts, so as to prevent repetition (3, 51).

## 2. Memorandum of Understanding between the National Institute of Indigenous Peoples and the Department of Crown and Indigenous Relations and Northern Affairs of Canada

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 <https://bit.ly/46tgElw>

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 Countries: Canada and Mexico | Date: 11 January 2023

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Issues: affirming the need to respect and promote the inherent rights of indigenous peoples recognized in the UNDRIP

UNDRIP arts. 3, 4, 20, 32, 38, 39

**Summary:** This agreement was signed by the Ministers of Foreign Affairs of Mexico and Canada and by the heads of the National Institute of Indigenous Peoples (INPI) of Mexico and the Department of Relations between the Crown and Indigenous and Northern Affairs of Canada. Its intent is to strengthen cooperation between the two countries with respect to the rights and well-being of Indigenous Peoples, including “but not limited to, political, social, economic, cultural, spiritual and environmental rights and the development of Indigenous Peoples in their respective countries” (Objectives).



**Regional**

It also **affirms the need to respect and promote the inherent rights of Indigenous Peoples recognized in the UNDRIP**. “Guiding principles” include adopting an approach based on partnership between the states and Indigenous Peoples and “recognizing the special relationship of Indigenous Peoples with their lands, territories and natural resources.”

Collaboration focuses in part on “supporting Indigenous-led processes of advancing self-determination, by supporting **Indigenous Peoples’ engaging freely in all their traditional and other economic activities, and by determining strategies and priorities for their right to development and the use of their lands, territories, and resources, in accordance with their own development plans and priorities, and cultural values and norms.**”

# National

Photo: Eduardo Gutierrez | IPRI Mexico

## 1. *Haaland v. Brackeen*, 599 US \_\_\_ (2023)

 <https://bit.ly/448ttNd>

 Countries: USA<sup>23</sup> | Body: US Supreme Court | Date: 15 June 2023

Issues: Adoption/fostering of Indigenous children, Tribal authority over members and best interests of the child

UNDRIP arts. 3, 4, 5, 7(2), 8, 23, 33, 34

**Summary:** On its face, this case corresponds to the UNDRIP preambular paragraph which recognizes “the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.”<sup>24</sup> However, as some of the judges wrote, this case is also about bringing an end to and seeking to remedy prior assimilationist and genocidal policies (e.g., systematically removing children from Indigenous families and communities) as well as the inherent sovereignty of Native American Tribal nations (e.g., to be fully involved in child welfare matters, particularly where it involves Tribal citizens).<sup>25</sup> As the US government concedes, those “policies were a targeted attack on the existence of Tribes, and they inflicted trauma on children, families and communities that people continue to feel today.”<sup>26</sup>

The decision primarily concerns challenges to the constitutionality of the Indian Child Welfare Act (1978) (“ICWA”), a federal law that gives priority to Native families and Tribes in the placement (adoption, fostering) of Native children.<sup>27</sup> Non-native persons, supported by a number of state governments (e.g., Texas), argued that the law violated the Equal Protection Clause of the US federal Constitution because it provides racial preferences in favour of Native interests to the detriment of non-native interests. The states argued that they were denied state law prerogatives in family law matters. In a 7-2 decision, the Supreme Court, in principle, upheld the constitutionality of the law while also finding that the plaintiffs lacked standing to file the case about the racial discrimination aspect because adoption proceedings had ended and there was no actionable injury (p. 30).

<sup>23</sup> See also *Arizona v. Navajo Nation*, 599 US \_\_\_ (2023) (concerning water rights), <https://bit.ly/437iX7q>; and legislation adopted in Oklahoma and Montana (concerning use of Tribal regalia by Indigenous students in school ceremonies (UNDRIP, art. 15), <https://bit.ly/44ppXxl>; and <https://bit.ly/3rhK6Hq>. See also <https://bit.ly/3pAG3FJ> (listing similar statutes in various USA State jurisdictions).

<sup>24</sup> The background to the case and decisions of the lower courts are described at: <https://bit.ly/3XBtO8o>

<sup>25</sup> Tribal sovereignty issues are discussed in more detail in ‘Indigenous historian explains how Supreme Court case could threaten tribal sovereignty’ *Macalester U. News*, 22 December 2022, <https://bit.ly/3XxliY4>.

<sup>26</sup> See e.g., ‘Secretary Haaland Issues Statement on *Brackeen v. Haaland* Decision’, Dept. Interior Press Release, 15 June 2023, <https://bit.ly/3rckbkN>.

<sup>27</sup> *Id.* explaining that “Ideally children were reunited with their parents, but if the parents were unable to care for the children, the preference was for placement with an extended family member, then another tribal member. If no one could be found, then any Indigenous family willing and able to support the child was preferred before opening an adoption to non-Native family.” The child’s Tribe also may pass a resolution altering the prioritization order as well as having the right to intervene in proceedings related to the placement or well-being of Indigenous children.



**First**, the majority of the Court ruled that passage of ICWA by the federal government was a legitimate exercise of its powers to legislate about Native Americans (10 et seq). One judge opined that the case concerns how the Constitution “mediates between competing federal, state, and tribal claims of sovereignty.”<sup>28</sup> He explained further that “the Court safeguards the ability of tribal members to raise their children free from interference by state authorities and other outside parties. In the process, the Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution envisioned” (id.). Moreover, **“Under our Constitution, Tribes remain independent sovereigns responsible for governing their own affairs. And as this Court has long recognized, domestic law arrangements fall within Tribes’ traditional powers of self-governance,”** and that includes the rights and well-being of Indigenous children as citizens of those Tribes and beyond (36).

**Second**, while it declined to address the equal protection/racial discrimination argument because the petitioners lacked standing (thus, it also did not formally reject the claim),<sup>29</sup> various commentators have explained that such arguments routinely run afoul of long-standing jurisprudence which holds that federal Indian statutes do not violate the Equal Protection Clause because they are based on government-to-government relationships and inherent sovereignty, i.e., the political – not racial – character of the Tribes. In *Morton v. Mancari* (1974), the Supreme Court held that the federal government’s ‘special treatment of Indians’ is political and non-racial when it “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” The Court ruled in the case at hand that ICWA aims “to keep Indian children connected to Indian families” (3) and to correct generations of the forcible removal of indigenous children from their families and Tribes. An Indigenous leader explains that “There’s nothing that is more central to core self-governance and sovereignty than having the next generation of citizens in your government.”<sup>30</sup>

These are thus valid objectives, and the survival of Indigenous Peoples is undoubtedly one of the primary obligations owed to them by the federal government. Likewise, this political character is further reinforced by the recognition that Tribes have an inherent right to determine their own membership and the best interests of their children.

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<sup>28</sup> Gorsuch J, *Concurring*, p. 2. However, the majority decision explains, at *Syllabus* p. 3, that “The Court has characterized Congress’s power to legislate with respect to the Indian tribes as ‘plenary and exclusive,’ *United States v. Lara*, 541 U. S. 193, 200, superseding both tribal and state authority, *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56.”

<sup>29</sup> In his concurring opinion, p. 2, Kavanaugh J, even opined that there are “significant questions under bedrock equal protection principles,” and then explained how standing may be apply in the future.

<sup>30</sup> ‘Should Native Americans get preference over White people in adopting Native children? The Supreme Court may decide,’ CNN, 13 November 2022, <https://bit.ly/3pzwAyz>.

## 2. Puerto Franco native community of the Kichwa people and Ors v. Chief, National Service of Protected Areas and Ors, EXP. 00038-2021-0-2202-JM-CI-01

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

 Spanish

 <https://bit.ly/440EWyd>

 English

 Country: Peru | Body: Mixed Court of Bellavista of the Superior Court of Justice of San Martín | Date: 17 April 2023

Issues: Territorial rights<sup>31</sup>

UNDRIP arts. 3, 4, 8, 18, 25-9, 32

**Summary:** This urgent request for the protection of constitutional rights was submitted by the Puerto Franco Native Community of the Kichwa People (“PFNC”). It seeks to compel the regularization and perfecting of PFNC’s territorial rights by Peru, including via the titling process and by the revocation of permission for competing land uses (e.g., the Cordillera Azul National Park and forestry concessions).

**First**, the Court recalled that land includes the ‘concept of territory’ for Indigenous Peoples and Peru’s Constitution (art. 89) explicitly upholds Indigenous Peoples’ **“autonomy in the use and free disposition of their lands, ownership of these lands being imprescriptible”** (para. 4.4.4). It also recalled that Peru’s Constitutional Court has ruled that constitutional rights must be interpreted in conformity with human rights obligations (4.6.3., 5.8.1) and **that there is a “right to titling” that is and enforceable part of Indigenous territorial rights** (5.8.1-2). Consequently, the state must delimit, demarcate and title PFNC’s traditional territory, also guaranteeing it legal certainty, especially in the light of resource extraction operations (5.9, 2.1). The Court also ordered that several laws, including the Forestry and Wildlife Law, not be applied as part of the titling process because, it said, these laws contradict guarantees for Indigenous property rights in the Constitution and international law (5.10, 2.1). It concluded that the ongoing failure to legally title and secure FPNC’s property rights violated various constitutionally entrenched provisions of international law, including UNDRIP, arts. 26 and 27 (id).

**Second**, the Court turned to the various forestry concessions previously granted in FPNC’s territory. Citing various judgments of the Inter-American Court, it stressed that where title has not yet been granted and remains pending, grants of concessions in or affecting Indigenous Peoples’ territories would be unlawful (5.11.2). Such grants would be an “intrusion,” an “unauthorized use of their natural resources,” and a “form of dispossession” (5.11.4). It ordered that an extant production forest concession be resized to ensure no overlap with FCPN’s territory and the cancellation of various other forestry concessions (2.2-2.3). On the demand for the initiation of a post hoc consultation process on the national park and its management plan, the Court began by explaining that **consultation is both a right in and of itself and a means by which**

<sup>31</sup> See also *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al.*, 2023 ONSC 2056, 3 April 2023 (concerning treaty rights and (novel views on) the right to restitution; UNDRIP arts. 27, 28, and 37), <https://bit.ly/43a9Frc>.

**Indigenous Peoples can seek to protect their substantive rights** (5.12.1). The Court recalled that consultation is mandatory and that a good faith agreement is always required as the objective of the process. It ordered that such a process be initiated by the relevant state authorities (id., 2.4). Park rangers were ordered also to not interfere in community member's accessing natural resources in the national park and the responsible state agency was ordered to comply with FPNC's right to effective participation in national park management, "with decision-making capacity" (2.6-2.7).

**Last**, the Court observed that a Peruvian state agency had been trading millions of US dollars of carbon credits from lands traditionally owned by FPNC and now within the national park. It ordered that the state comply with Indigenous Peoples' right to benefit from the carbon trading activities (2.5). It provided no further analysis however beyond a generic reference to ILO 169, art. 15(1)'s requirement that Indigenous Peoples participate in the utilization, management and conservation of natural resources (5.14.3).

### 3. R. v. Kehoe, 2023 BCCA 2

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

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 Country: Canada | British Columbia Court of Appeal | Date: 3 January 2023

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Issues: Indigenous heritage as a factor in sentencing <sup>32</sup>

UNDRIP arts. 1, 2, 13, 40

**Summary:** This judgment concerns the application of the "Gladue Principles". <sup>33</sup> These derive from a 1999 Supreme Court of Canada decision that held that judges must take Canada's colonial past into account when criminally sentencing Indigenous offenders. <sup>34</sup> It also concerns section 718.2(e) of Canada's Criminal Code, which provides that: [A]ll available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." In the trial court, the crown successfully argued that because the offender, Mr. Kehoe, had been 'disconnected' from his indigenous heritage while growing up, the Gladue Principles "should play essentially no role in determining a fit sentence for Mr. Kehoe. Mr. Kehoe's difficulties were related primarily to his non-Indigenous step-father's behaviours, not his heritage" (para. 52). This point was then appealed and is the subject of the instant judgment.

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<sup>32</sup> See also 'Disconnection from Indigenous heritage grounds to reduce man's sentence, B.C. court rules', Global News, 5 January 2023, <https://bit.ly/3NWDmrw>.

<sup>33</sup> R. v. Gladue [1999] 1 SCR 688, <https://bit.ly/447dWgm>.

<sup>34</sup> See also R. v. Ipeelee [2012] SCC 13, para. 60 (where the Canadian Supreme Court refers to "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples").

**First**, the Court began by recalling that consistent jurisprudence holds that the section of the Criminal Code in question **“is remedial and is intended to deal with the continuing crisis of over representation of Indigenous offenders in the Canadian criminal justice system”** (36).<sup>35</sup> This ‘crisis’ “is driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and prejudice experienced by Indigenous people in Canada” (37).<sup>36</sup> The Court also recalled that “the circumstances of Indigenous offenders are different from other offenders because many indigenous people are ‘victims of systemic and direct discrimination’ and ‘dislocation’ and are ‘substantially affected by poor social and economic conditions’” (38).<sup>37</sup> The EMRIP explains in this regard that “Injustices of the past that remain unremedied constitute a continuing affront to the dignity of the group. This contributes to continued mistrust towards the perpetrators, especially when it is the State that claims authority over indigenous peoples as a result of that same historical wrong.”<sup>38</sup>

**Second**, the Court overruled the trial court to the extent that the latter had found that the Gladue Principles do not apply because of Mr. Kehoe’s purported cultural dislocation. It explained that such dislocation is precisely one of the outcomes of Canada’s colonial history.<sup>39</sup> The Crown’s view that the Principles “should

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<sup>35</sup> Explaining also, at 39, that “The over representation of Indigenous people in Canada’s prison population is tied to broad societal issues. Nevertheless, the Supreme Court in Gladue and Ipeelee recognized that culturally attuned sentencing for Indigenous offenders has a role to play in addressing this crisis.” See also C. Verdon, *Improving the Present to Repair the Past: A Proposal to Redefine the Guiding Principles of Reparation for Gross Violations of Human Rights*, 53 NYU J. INT’L L. & POL. 587 (2020), p. 611 et seq (discussing reparations in relation to gross violations of indigenous and tribal peoples’ rights).

<sup>36</sup> Further explaining that “Sentencing judges are to take judicial notice of how Canada’s colonial history and post-colonial assimilationist policies have translated into these terrible outcomes.... These systemic and background factors do not excuse or justify criminal conduct. Rather, they provide the necessary context for understanding and evaluating case specific information during the sentencing exercise....”

<sup>37</sup> See also *Servatius v. Alberni School District No. 70*, 2022 BCCA 421 below (e.g., para. 104 “A direct link can be drawn between the residential schools’ legacy of harm and the lower success rates of Indigenous children in schools as compared to other students;” at 105, “[i]n recent years, Canada has begun to reckon with its historical mistreatment of Indigenous people. There has been great pressure on all of Canada’s institutions to take concrete steps to address the the harms and prejudices of the past, and to forge a mutually respectful path forward. The word reconciliation is sometimes used to encompass this goal, and I use it in this context;” and, at 101, “The federal government followed an assimilationist policy towards Canada’s Indigenous peoples in the late 19th century, continuing well into the 20th century. In modern times and after much evidence-gathering and study, this policy was identified as cultural genocide by the Truth and Reconciliation Commission...”).

<sup>38</sup> Access to justice in the promotion and protection of the rights of indigenous peoples, A/HRC/24/50 (2013), para. 6-7 (observing also that “A particular dimension of access to justice relates to overcoming long-standing historical injustices and discrimination, including in relation to colonization and dispossession of indigenous peoples’ lands, territories and resources”). See also *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019); K. Roach, *Remedies for Violations of Indigenous Rights* in K. Roach, *REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW* (Cambridge: CUP 2021) (explaining that “remedies involve the challenges of responding to the harms of colonialism and avoiding new neo-colonial harm”); and P. Macklem, *THE SOVEREIGNTY OF HUMAN RIGHTS* (Oxford: OUP 2015), p. 136 (concluding that indigenous rights in international law “recognize differences, partly denied and partly produced by the international distribution of territorial sovereignty initiated by colonization. ... The morally suspect foundations of the sovereign power that a State exercises over indigenous peoples residing on its territory are why indigenous rights merit recognition in the international legal register”).

<sup>39</sup> Citing, at 54, the Canadian Truth and Reconciliation Commission’s report *Honouring the Truth, Reconciling for the Future*, the Court explained that “Canada developed and implemented ‘a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will.’ Canada ‘pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources.’ Residential schooling was one of many tools Canada used to achieve its assimilationist objectives.”



play a very limited role in this case because Mr. Kehoe was disconnected from his Indigenous culture, community and supports **subverts the remedial purpose of s. 718.2(e) of the Code and penalizes Mr. Kehoe for the success of Canada's destructive policies**" (58).<sup>40</sup> Instead, the Court ruled that the factors to be considered are "(1) the role Canada's colonial history and post-colonial assimilationist policies played in causing that disconnection; and (2) the role that disconnection played in his coming before the court" (55).

**Last**, the Court elaborated on the situation of indigenous women in relation to Mr. Kehoe's mother. Observing generally that "[w]omen of [Indigenous] heritage have poor outcomes in our society," the Court explained that these "poor outcomes include social and economic marginalization, instability, vulnerability to living in abusive and dangerous environments and the development of mental health issues and substance use disorder. **It is widely recognized that an Indigenous woman's disconnection from a functional and protective Indigenous community increases her risk of experiencing these outcomes**" (68).<sup>41</sup> It concluded that it is not "difficult to infer that Canada's colonial history and assimilationist policies played a role in bringing Mr. Kehoe before the court" (69). Ultimately, it concluded that "without policies specifically designed to disconnect Indigenous people from their communities, cultures and supports, Mr. Kehoe's mother stood a much better chance of raising him in a stable and functional environment where his heritage was celebrated and where he would develop pro-social and community-oriented values" (id).

**NB.** Some of these issues are discussed in a 2021 report by the UN Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence.<sup>42</sup>

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<sup>40</sup> Explaining also, at 58, that "Disconnection is one of the very harms associated with Canada's colonial history and assimilationist policies that Gladue and Ipeelee seek to address;" and, at 55, that "[a]s a consequence of Canada's colonial history and assimilationist policies, many Indigenous people have become disconnected from their ancestral communities, cultures, and associated positive social structures. This disconnection has contributed to the social and economic marginalization of Indigenous people in Canada, including their disproportionate interactions with the criminal justice system."

<sup>41</sup> See also General Recommendation No. 39 on the Rights of Indigenous Women and Girls, CEDAW/C/GC/39 (31 October 2022), <https://bit.ly/3NUc2sX>.

<sup>42</sup> Promotion of truth, justice, reparation and guarantees of non-recurrence, A/76/180 (19 July 2021) (e.g., para. 10, explaining that "the impact of colonialism remains evident in the overrepresentation of indigenous people in detention, the distrust harboured by indigenous people for the police, the general social disadvantages experienced by these people and the lack of any official and comprehensive commitment fully to redress the abuses suffered by them. Colonialism resulted in a State that perpetuated it through a legal, institutional and cultural apparatus that subjected colonized populations to discrimination, assimilation, criminalization and, in some cases, violence; and denied them basic rights such as ownership of ancestral lands and resources, and access to justice, health, education and economic opportunities"), <https://bit.ly/3NvNkPj>.

## 4. Van Mendason & Ors v. AG Guyana, 1114-W 1998 HC Demerara

 <https://bit.ly/3JHJG3Q>

 Country: Guyana | Body: High Court (trial court) | Date: 22 December 2022

Issues: Traditional ownership rights, aboriginal title, inadequate delimitation, demarcation and titling, lack of consent for mining, racial discrimination, denial of prompt and effective remedies.

UNDRIP arts. 3, 4, 8, 10, 13, 18, 19, 20, 25-9, 32, 34, 40

**Summary:** Filed by six Indigenous communities (one Arekuna and five Akawaio) (“the Indigenous Peoples”), this is a landmark case in Guyana, marking the first occasion that the local judiciary has accepted that the doctrine of aboriginal/native/Indian title exists and is enforceable in Guyana’s common law. It also found that various sections of the Amerindian Act 1951/1976 were unconstitutional due to its provision for takings of Indigenous lands and despite its repeal in 2006. The Indigenous Peoples explained that they now have title to approximately 50% of their territory, titles that were arbitrarily determined and “granted” in 1991 under the State Lands Act as a gift from the President. The other half is almost entirely covered by various kinds of gold and diamond mining concessions, some granted prior to 1991, some afterwards. The Indigenous Peoples argued that they are the lawful owners of the full extent of the land pursuant to Indigenous law and title and the mining concessions were illegally granted without their consent. They sought a declaration to that effect, one which also excludes all others from any right to occupy their lands without their permission. Guyana argued that any rights to land were “extinguished” in 1814 when now-Guyana was ceded to the British by the Dutch and any legitimate rights must derive from a valid grant by the state (in other words, Indigenous Peoples’ rights depend on and derive only from the good will of the state itself!). It likewise argued that the mining concessions are valid and within the power of the state to issue, irrespective of whether the Indigenous Peoples agreed or not, and that this was especially true where the concessions were issued prior to the grant of title in 1991 (when, according to the state, they had no rights to land at all).

Filed in October 1998, the first hearing was held in 2009. The decision was issued – after numerous complaints about the delay by the communities – in December 2022, a period of more than 24 years. The presiding judge verbally apologized for taking more than five years to draft the decision after the final hearing was held in 2017, but no explanation was provided for the extraordinary and unreasonable delay in the proceedings. The case is now pending review by the Court of Appeal based on requests made by the Indigenous Peoples and by the state. It will likely land at the Caribbean Court of Justice (“CCJ”), Guyana’s apex court, for a final decision.<sup>43</sup>

<sup>43</sup> See also *Maya Leaders Alliance v. AG Belize*, [2015] CCJ 15 (AJ), <https://bit.ly/37xn2LD> (para. 53, citing UNDRIP, arts 26-8, and para. 54, explaining the relevance of the UNDRIP to interpretation of Belize’s Constitution; *Cal et al. v. AG of Belize et al. and Coy et al. v. AG of Belize et al.*, Consolidated Claims No. 171 & 172 of 2007 (Sup. Ct. Belize), 18 October 2007 (C.J. Conteh), para. 131 (observing that “where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them,” and the UNDRIP reflects “the growing consensus and the general principles of international law on indigenous peoples and their lands and resources.” Endorsed by Morrison JA in *AG Belize v Maya Leaders Alliance et al*, Civil Appeal No. 27 of 2010, para. 276-7); and S. Caserta, *The Contribution of the Caribbean Court of Justice to the Development of Human and Fundamental Rights*, 18 HUMAN RIGHTS LAW REV 1 (2017).

**First**, the Court began by narrowing the issues for decision, summarily rejecting several of the claims made by the Indigenous Peoples (para. 86-9). These included the question of whether Indigenous Peoples' rights had been affected during the Dutch era (1613-1814) and, if so, to what extent. This is relevant because, importantly, the British (and then Guyana) could only acquire from the Dutch what it legally held at the time of cession. This is also a strange omission given that the Dutch affirmatively recognized indigenous rights to land in constitutional-level instruments that were likely in effect in Guyana until the second decade of the 20th century. It also curiously rejected claims for compensation due to encroachment, finding that there was no evidence of harm. The High Court then determined that the two issues to be resolved were: 1) whether the indigenous peoples had occupied the area since "time immemorial to the exclusion of all others;" and 2) whether the court could decide issues of constitutionality, even though the law in question had been repealed in 2006 (these issues are not discussed further herein as they are not relevant to the main ruling) (90).

**Second**, addressing the first point above, the High Court commenced by reviewing relevant jurisprudence, mainly from the Judicial Committee of the Privy Council and other Commonwealth jurisdictions (e.g., *Mabo v. Queensland (no.2)*). This includes the recognition in English common law of "communal or community ownership and entitlement to land based on the custom of the community" (92). Narrowing the issues even further, the Court concluded that the Indigenous Peoples must prove that they occupied the land at the time sovereignty was asserted by the British Crown in 1814. Discussing the evidence required to establish this proof, the Court further concluded that "the historical and other circumstances of the particular jurisdiction" must be considered when determining issues of evidence as "there is no uniform solution to the problem of establishing indigenous occupation and thereby title" (102). This, in turn, requires that the judiciary ensure that rules of evidence are applied flexibly and do not prejudice Indigenous offers of proof, particularly with respect to oral history and the expertise of Indigenous witnesses (105). Importantly, the presiding judge then stated that "it must be acknowledged, and I hereby acknowledge the oral histories of the Amerindians of what is now Guyana" (112). Putting this together, the High Court ruled that the Indigenous Peoples had sufficiently proved "**a substantial connection between the Akawaio and Arekuna people and the subject land such as to permit me to conclude that as peoples they have occupied the said subject land from time immemorial**" (116, 120).

**Third**, the preceding ruling confirms that Indigenous Peoples' rights to traditional lands and territory derive in the first instance from Indigenous law and custom, not state law, and that those rights survived an asserted change of sovereignty between Europeans. According to the High Court, these rights are now a matter of evidence and proof and would be enforceable when provided. However, taking back with the other hand, the High Court then pronounced that the evidence disclosed that "the communities do not now have exclusive possession of the subject land" (121). While the first non-indigenous person did not permanently reside in the area until the 1950s, the judge refers in this respect to persons providing health, education and other governmental services, travelers on the rivers, and even a few missionaries temporarily resident in one of the villages around 1900 (121-2). She otherwise refers to a few Indigenous villages that she thinks may be in occupation of some of the lands in question. In fact, these villages are not even within the area that is part of the case (124).

The judge made other geographical errors that also impacted her decision – about the actual size and extent of the lands in question even - and it is unclear why these matters were not corrected during the proceedings. She acknowledged the extent of this problem, observing that, without "evidence that allows for an understanding of exactly where title and extension lands are and to which communities they apply,

and where State lands are, it would not be prudent to grant an order that includes the term ‘to the exclusion of all others’ (124, 129). This is an peculiar assertion given that the judge took judicial notice of the meagre school curriculum as it relates to Guyanese history and Indigenous Peoples (113), but she apparently felt constrained not to do the same with the files at the Guyana Lands and Surveys Commission, the Lands Registry, the Mining agency, or in relation to any other maps or title deeds issued and registered by the state.

The preceding will hopefully be corrected on appeal. For one thing, the exclusive occupation test in almost all commonwealth jurisprudence concerns the point in time that sovereignty was asserted by the Crown (1814 in Guyana), not subsequently or **now** as the High Court would have it. This would render the subsequent presence of travelers and missionaries irrelevant beyond triggering an assessment of restitution and other remedies. Likewise, the presence of government service providers (e.g., teachers) is not contrary to the Indigenous Peoples’ title and, at any rate, the state is obligated to provide equal services to all its citizens, Indigenous and non-indigenous alike, and presumably this can be done without simultaneously and fatally undermining Indigenous property rights.

**Finally**, the Court declined to address the mining issues, citing a lack of evidence as well as the 2017 decision of the CCJ in *Viera v. GGMC*. It concerns medium-scale gold mining within the titled lands of Chinese Landing Indigenous village in northwest Guyana. It is unclear what the High Court has in mind with this reference, however. That decision holds only that Guyana’s mining agency cannot enforce provisions of the Amerindian Act 2006, a power that falls only to the competent minister (who has affirmatively chosen not to exercise such powers or to provide the basis for others to do so). The High Court also declined to employ international law as either a means of interpretation or a direct source of rights, including as set out in the various human rights conventions incorporated into Guyana’s Constitution. This is true despite rulings of Guyanese courts, including the CCJ, that human rights, at a minimum, must be taken into account when interpreting the fundamental rights sections in Guyana’s Constitution.<sup>44</sup>


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<sup>44</sup> See e.g., *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 55 (recalling that the Guyana High Court has held that these provisions “placed courts under a duty ‘to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution.’” Per Saunders PCCJ: “Article 39(2) of the Guyana Constitution expressly mandates the courts to ‘pay due regard to international law, international conventions, covenants and charters bearing on human rights’ when interpreting any of the fundamental rights provisions of the Constitution. In *Thomas v AG*, one of the first cases to examine Article 39(2), George J (as she then was) held [at [12]] that the provision placed courts under a duty ‘to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution.’”).



## 5. Servatius v. Alberni School District No. 70, 2022 BCCA 421

 <https://bit.ly/44pArwN>

 Country: Canada | Body: British Columbia Court of Appeal |  
Date: 12 December 2022

Issues: Teaching about Indigenous cultures in schools

UNDRIP arts. 5, 15, 31, 34

**Summary:** This decision is one of the first to touch on the incorporation of the UNDRIP into Canadian federal and provincial law.<sup>45</sup> It concerns the objections of a non-Indigenous parent to the performance of Indigenous cultural activities (hoop dancing/prayer and smudging) in a public school. As an evangelical Christian, she claimed that this violated her right to religious freedom by forcing her children to take part in ceremonies and activities she does not condone. She also claimed that the school was unlawfully promoting and favouring a particular religion in violation of the Canadian Charter of Rights and Freedoms. However, sec. 25 of said Charter provides that the guarantees therein "... shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada..." (para. 39).

**First**, the Court recalled that the UNDRIP is relevant to understanding the nature and extent of the rights vested in Indigenous Peoples, including for the purposes of sec. 25 of the Canadian Charter (42). It specifically stated that UNDRIP, art. 15, is directly relevant in the context of the case (45).<sup>46</sup> It also recalled the federal (2021) and provincial (2019) legislation affirms that UNDRIP is "a universal international human rights instrument with application in Canadian law," and that the federal and British Columbia provincial governments are required to "take all measures necessary to ensure" that their laws are consistent with UNDRIP (43-4).

**Second**, the Court ruled, "[a]fter considering all of the evidence ... that mere presence at the smudging demonstration and the prayer by the hoop dancer did not interfere with Ms. Servatius's religious beliefs but, rather, were efforts to teach children about Indigenous beliefs" (204).<sup>47</sup> With respect to certain claims made

<sup>45</sup> See also 'Canada's UNDRIP plan draws mixed reactions from Indigenous leaders,' *Indian Country Today News*, 23 June 2023 (*inter alia*, explaining that "On June 8, the federal government introduced legislation proposing the inclusion of a standardized non-derogation clause in the federal Interpretation Act indicating the law should be used to uphold – and not diminish – the rights of First Nations, Inuit and Métis people"), <https://bit.ly/3pzs8vu>.

<sup>46</sup> The Court explained also, at 46-7, that "The courts in BC have not decided on the extent to which UNDRIP creates substantive rights under s. 25 of the Charter, and it is not necessary to decide it here as the issue is not raised on this appeal. Nevertheless, as will be seen when I summarize the background facts, BC seeks to incorporate Indigenous culture and perspectives into the public school curriculum, which is consistent with UNDRIP."

<sup>47</sup> Explaining further, at 196-7, that "[t]here was no suggestion in the evidence that the smudging demonstration was part of a belief system that sought to convert someone from one religion to the religion of the person smudging or to involve an unwilling observer by making them a participant. ... In short, there was simply no objective evidence to support the inference that merely watching the smudging demonstration and learning about its relevance to Indigenous culture amounts to some kind of involuntary participation in a ceremony akin to a 'religious ceremony.'"

about the cultural activities, the judge was clear that **“It is not for Ms. Servatius to impose her own beliefs on what an Indigenous person is experiencing when demonstrating a cultural tradition to non-Indigenous people...”** (184).<sup>48</sup> The complaints about the alleged favoring of one religion over another were similarly dismissed. The trial judge’s conclusions were deemed sound by the Court of Appeal, particularly that the purpose of the activities was not “to profess or favour Indigenous beliefs but, rather, to teach students about Indigenous culture and to introduce them to Indigenous perspectives and worldviews as consistent with the curriculum” (218). Moreover, the trial judge had correctly reviewed “the history of government efforts to destroy Indigenous culture, which included placing Indigenous children in abusive school environments, and noted that **one purpose of the curriculum was to make schools safe for Indigenous students. He found that the purpose of the events in question served the goal of making schools a culturally safe space for Indigenous students to learn by reflecting and respecting their culture”** (219).

## 6. Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

 <https://bit.ly/3NVpy0t>

 Country: Australia | Body: Federal Court of Australia | Date: 2 December 2020

Issues: revocation of offshore oil permit due to lack of consultation with traditional owners

UNDRIP arts. 18, 25, 32(2)

**Summary:** This case is about objections filed against the National Offshore Petroleum Safety and Environmental Management Authority’s (“NOPSEMA”) decision to authorize an Environment Plan for an offshore gas project in the Barossa gas field, north of Darwin. The complaint was lodged by Mr. Tipakalippa, an elder of the Munupi clan and a resident of the Tiwi Islands. He asserted that his clan and other traditional owners (“the traditional owners”) have traditional connections to ‘sea country’ that is affected by the project and, therefore, there is a legal requirement for direct and prior consultation with them (para. 33 et seq). Because there had been no consultation conducted with them by the oil company, Santos, the traditional owners argued that the Environmental Plan should be set aside and the project halted.<sup>49</sup> The Full Federal Court agreed (on appeal from a decision of a single judge of the Federal Court) and set aside the Environmental Plan.<sup>50</sup>

<sup>48</sup> Observing, at 209, that Ms. Servatius “... seems to suggest that the smudging demonstration crossed the line from teaching about a cultural practice into a ‘religious’ or ‘spiritual’ practice if the Elder demonstrating the smudging had ‘spiritual beliefs’ about the smudging. Likewise, Ms. Servatius seems to suggest that any prayer is forbidden in a secular public setting because it crosses the bright line from a cultural practice to a ‘religious’ or ‘spiritual’ practice regardless of the context.”

<sup>49</sup> See also Pan American Silver’s Escobal mine in Guatemala, where operations have been suspended since 2017 because the “Constitutional Court of Guatemala determined that the Guatemalan Ministry of Energy and Mines must conduct an ILO 169 consultation process with the Xinka Indigenous People before the mining license for Escobal can be reinstated,” <https://bit.ly/3PAQGTN>.

<sup>50</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121, <https://bit.ly/447e2Vg>.

**First**, as part of developing and approving an Environmental Plan, the law in question requires that consultation must be undertaken with any person where their interests or activities may be affected by the proposed operations. The traditional owners assert rights to and over 'sea country' in and around the proposed oil wells. Their rights "are based upon **longstanding spiritual connections as well as traditional hunting and gathering activities in which they and their ancestors have engaged**" (5). The law further requires that the decision maker, in this instance, NOPSEMA, is "reasonably satisfied" that any required consultations have taken place, yet neither the consultation nor its verification occurred, even though the Environmental Plan specifically noted that the traditional owners had interests in the area (38-42). The Court explained that, while the information presented by Santos did not determine that the traditional owners have proprietary rights in sea country, "there is no real doubt that this material acknowledged the traditional connection of Tiwi Islanders to at least part of the sea ... , the potential environmental risks to, and impacts on, marine resources closer to the Tiwi Islands, and recognised **those resources were integral to Tiwi Islanders' traditional culture and customs**" (42).<sup>51</sup> Consultation was thus required by law (61, 78) because, the Court explained, 'interests' includes "cultural and spiritual interests of the kind described..." (80, 157).

**Second**, tracking the language of Inter-American Court of Human Rights' judgment in Saramaka People, the Court elaborated on the consultation requirements, explaining that the information generated thereby as well as impact assessments and the like would allow NOPSEMA to comprehend impacts on environment, communities, and cultural heritage, so that it could effectively discharge its statutory duties. This also allows for NOPSEMA's considerations of "the measures, if any, that a titleholder proposes ... to lessen or avoid the deleterious effect of its proposed activity on the environment..." (54, 89). The consultation thus serves three purposes:

- 1) to provide information to the traditional owners so that they can make informed decisions about impacts and benefits. Consultation must be "genuine," the traditional owners are "given a 'reasonable period' for the consultation, that is, a reasonable time to identify the effect of the proposed activity on their functions, interests or activities and to respond to Santos with their concerns" (56);
- 2) so that the company "adopts appropriate measures in response to the concerns conveyed" by the traditional owners (57); and
- 3) to inform NOPSEMA of the identity of the traditional owners, consultations with them, and measures to address concerns raised (id). This enables its due diligence and verification functions and ultimately, compliance with its statutory duties.

**Third**, the Court rejected Santos' argument that the traditional owners had no legal rights or interests in the area and, thus, consultation with them was not required. It explained that there was no requirement that an interest be a legal interest and that **the traditional connections to sea country manifest in the information are precisely the type of interests that the consultation requirement is intended**

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<sup>51</sup> Explaining also, at 60, that "It does not follow from this, however, that Mr Tipakalippa and the Munupi clan do not have functions as traditional owners of the Tiwi Islands with spiritual and cultural connections to sea country... It is, however, unnecessary to determine this point because we are of the clear view that they have "interests" that may be affected by the activities to be carried out by Santos..."

**to protect** (64-7).<sup>52</sup> The Court stressed that the key point to be assessed is how the interest “is affected, rather than the nature of that interest” (id). Also, where “**interests are held communally, in accordance with tradition, the method of consultation will need reasonably to reflect the characteristics of the interests affected**” (104). In this case, the Court concluded that the traditional owners’ interests in sea country and the marine resources closer to the Tiwi Islands “are immediate and direct” (65). It determined that there was no need to assess the adequacy of the consultation as there had been “no attempt to consult with Mr Tipakalippa and the Munupi clan, or any other Tiwi Islanders, and therefore the method or adequacy of consultation does not arise for consideration” (105).

**Fourth**, the Court rejected Santos’ arguments about supposed difficulties of consulting Indigenous Peoples, even claims about problems identifying who to consult, made the requirement unworkable (86-109).<sup>53</sup> The Full Court had no “particular difficulty with the proposition that the First Nations peoples who have a traditional connection to the sea, and to the marine resources it holds ... are reasonably ascertainable” for the purposes of consultation (90). Likewise, the “cultural or spiritual interests of the kind described in the sea country material ... were sufficiently ascertainable by Santos” (158). The Court noted that consultations, while not always easy, were occurring all over Australia, so consultations are clearly not “unworkable, in the sense that it is just too hard to consult with traditional owners as was required in this case” (109).

<sup>52</sup> Explaining also, at 74, that “the law recognises the kind of interests that Mr Tipakalippa contends required Santos to consult with him and the Munupi clan. Reference to the Heritage Protection Act demonstrates that by this Act the federal Parliament has expressly contemplated the protection of areas of the sea from activities harmful to the preservation of Aboriginal tradition. The Parliament has done so without requiring the existence of particular proprietary interests; rather requiring only the existence of a connection by Aboriginal tradition.”

<sup>53</sup> Explaining, at 95, that “Santos submitted that if the obligation to consult in reg 11A were to be construed as extending to communal interests, it would operate so as to require consultation of each and every person forming part of the group holding that communal interest.”





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