



International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 61/2017*, **

<i>Communication submitted by:</i>	Yaku Sacha Pérez Guartambel (not represented by counsel)
<i>Alleged victim:</i>	The petitioner
<i>State party:</i>	Ecuador
<i>Date of communication:</i>	10 February 2017 (initial submission)
<i>Date of adoption of opinion:</i>	28 April 2022
<i>Document references:</i>	Decision taken pursuant to rule 91 of the Committee's rules of procedure, transmitted to the State party on 28 March 2017 (not issued in document form)
<i>Subject matter:</i>	Discrimination due to non-recognition of ancestral marriage
<i>Procedural issues:</i>	Exhaustion of domestic remedies; non-substantiation of claims
<i>Substantive issue:</i>	Discrimination on the grounds of national or ethnic origin
<i>Articles of the Convention:</i>	1 (1), (2) and (4); 2 (1) (a) and (2); 5 (a) and (d) (iv); and 9 (1)

1.1 The petitioner is Yaku Sacha Pérez Guartambel, born on 26 February 1969. He is a national of Ecuador, a member of the Escaleras indigenous community belonging to the Kichwa Kañari people, the president of the Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador and the general coordinator of the Coordinadora Andina de Organizaciones Indígenas. He claims that the State party has violated his rights under articles 1 (1), (2) and (4), 2 (1) (a) and (2), 5 (a) and (d) (iv), and 9 (1) of the Convention. The State party ratified the Convention in 1966 and made the declaration provided for in article 14 thereof on 18 March 1977. The petitioner is not represented by counsel.

1.2 The petitioner married Manuela Lavinas Picq, a journalist and professor of Brazilian and French nationality, on 21 August 2013 in the Escaleras indigenous community. The marriage was officiated by the traditional authorities of the Kichwa Kañari people of the

* Adopted by the Committee at its 106th session (11–29 April 2022).

** The following members of the Committee participated in the examination of the communication: Sheikha Abdulla Ali Al-Misnad, Noureddine Amir, Michal Balcerzak, Chinsung Chung, Bakari Sidiki Diaby, Régine Esseneme, Ibrahima Guissé, Gun Kut, Gay McDougall, Vadili Mohamed Rayess, Verene Albertha Shepherd, Stamatia Stavrinaki, Mazalo Tebie, Faith Dikeledi Pansy Tlakula, Eduardo Ernesto Vega Luna and Yeung Kam John Yeung Sik Yuen.



Escaleras indigenous community in keeping with their cultural and spiritual traditions. The marriage was recorded in the ancestral marriage register of the Escaleras indigenous community¹ and an ancestral marriage certificate was issued by the Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador.² In 2015, following the couple's arrest during a march in defence of the rights of indigenous peoples, Ms. Lavinás Picq's visa was revoked. A deportation procedure was initiated, obliging Ms. Lavinás Picq to leave the country. The petitioner and Ms. Lavinás Picq applied for a family reunification visa so that she could return to Ecuador to live with her husband, resume her employment and reintegrate her social network. The visa application was denied because the marriage had not been recorded in the State party's civil register. The petitioner sought to have his marriage registered with the Directorate General for Civil Registration, Identification and Certification; however, his request was denied on the grounds that the State party does not recognize marriages officiated by traditional indigenous authorities but, rather, only those officiated by civil authorities affiliated with the civil registry. The petitioner initiated constitutional protection proceedings before the Criminal Court of the Metropolitan District of Quito, requesting that his marriage be entered in the civil register and that his wife be granted a family reunification visa. The application for constitutional protection was dismissed on the grounds that the marriage was not legally valid because the indigenous authorities were not competent to officiate and register marriages and on the grounds that there was nothing preventing the petitioner and his wife from being married by the competent authority. The petitioner lodged an appeal with the Pichincha Provincial Court, which was dismissed on the grounds that the marriage was not officiated in keeping with the relevant law, namely, the Civil Code and the Organic Act on Identity and Civil Data Management. The petitioner alleges that the State party's refusal to recognize his marriage, which had been officiated by a legally and legitimately constituted community authority that was recognized by the community assembly constitutes discrimination. The petitioner also alleges that his wife's visa was denied in retaliation for his defence of the rights of indigenous peoples, especially in relation to extractive activities in indigenous territories. The petitioner maintains that there has been a violation not only of his individual rights but also of the collective rights of indigenous peoples to preserve their culture, traditions, ways, customs and historical continuity. The facts of the present case violate the right of indigenous peoples to self-determination and autonomy in matters of jurisdiction, procedures and their own age-old institutions, such as marriage, which predates the State and is made up of rites, allegories, ceremonies and formalities that are specific to indigenous peoples and are based on their cultural and spiritual world views. The petitioner also maintains that his right to due process was violated when, after a judge suspended his wife's deportation, the Minister of the Interior requested the court to consult the Ministry in taking the final decision, thus amounting to interference by the executive in judicial affairs.

1.3 On 4 December 2019, under article 14 of the Convention and rule 94 of its rules of procedure, the Committee declared the communication admissible. First, regarding competence *ratione personae*, the Committee determined that the complaint presented by the petitioner on behalf of indigenous peoples, whose collective rights he claims were violated by the non-recognition of indigenous marriage, is generic. Consequently, the Committee decided to limit its consideration to the complaint presented by the petitioner on his own behalf as the person directly and personally affected by the refusal to register his marriage and by the denial of his wife's visa. Secondly, the Committee found that the petitioner, having initiated constitutional protection proceedings and lodged an appeal, had exhausted all domestic remedies that could reasonably be considered available and effective in connection with the refusal to register his marriage and the denial of his wife's visa. Thirdly, the Committee found that the petitioner had not exhausted domestic remedies in relation to his allegations of political persecution and declared that part of the communication inadmissible. Fourthly, the Committee found that the petitioner had not sufficiently substantiated the part of the communication dealing with the due process violation and therefore also declared that part of the communication inadmissible. Lastly, regarding the petitioner's allegation that he

¹ Escaleras ancestral community, ancestral marriage register, Victoria del Portete parish, Tarqui, 21 August 2013.

² Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador, ancestral marriage register, 30 August 2013.

is the victim of racial discrimination because the authorities of the State party did not recognize and refused to register his ancestral marriage and, as a result, denied his wife a family reunification visa despite the marriage having been officiated by a legally and legitimately constituted community authority that was recognized by the community assembly, the Committee notes the State party's argument that the petitioner's marriage had to meet the requirements under domestic law in order to be entered in the civil register. However, in light of article 1 of the State party's Constitution, which establishes that Ecuador is an intercultural and plurinational State, article 11 (1) of the United Nations Declaration on the Rights of Indigenous Peoples³ and the Committee's general recommendation No. 23 (1997), the Committee found that, for the purposes of admissibility, the petitioner's allegations concerning articles 1 (4), 2 (1) (a) and (2), and 5 (d) (iv) of the Convention had been sufficiently substantiated and should be considered on the merits. The Committee requested the parties to submit written observations and comments concerning the merits of the communication. For further information about the facts, the petitioner's claims, the parties' observations and comments on admissibility and the Committee's decision thereon, refer to the decision on admissibility.⁴

State party's observations on the merits

2.1 In its observations of 26 March 2020, the State party submitted that the Directorate General for Civil Registration, Identification and Certification is the entity under public law that is responsible for the administration and provision of services to process a person's identity and civil-status-related information.⁵ It is the exclusive prerogative of the civil registry to "solemnize, authorize, enter and register information and changes relating to the civil status of individuals".⁶

2.2 The State party claims that the petitioner recognized the competence of the civil registry when he married for the first time in 1998, when he later registered his status as a widower and when, pursuant to article 78 of the Organic Act on Identity and Civil Data Management, he changed his name from Carlos Ranulfo Pérez Guartambel to Yaku Sacha Pérez Guartambel. Therefore, according to the State party, the petitioner could very well have had his second marriage, in 2013, officiated by the competent State authority.

2.3 The State party notes that the fact that the petitioner was able to change his name demonstrates precisely that the right to an identity can be exercised without discrimination. The State party also notes that the petitioner was able to engage in political activities with an intercultural focus when, in 2019, he registered his candidacy for and was elected prefect of Azuay Province. This illustrates, in the State party's view, that there was no violation of article 1 (4) of the Convention. Specifically, the refusal to register the ancestral marriage was not a discriminatory act on the part of the civil registry, as it did not stem from an institutional stance against any particular racial group or particular ethnic origin. The State party recalls that in *L.R. et al. v. Slovak Republic*,⁷ the Committee required convincing evidence regarding the actions that constituted the alleged discriminatory treatment. The State party claims that there was no discrimination in this case. Indigenous peoples are able to officiate ancestral marriage rituals without discrimination because the constitutional and infra-constitutional framework promotes interculturality and plurinationality and does not prohibit the officiation of indigenous ancestral marriages.

2.4 The State party contends that there was no violation of article 2 (1) (a) of the Convention either and recalls that, under article 11 (2) of the Constitution, no person may be discriminated against on grounds of his or her ethnicity, birthplace, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, criminal background, socioeconomic status, migration status, sexual orientation, state of health, HIV

³ Which establishes that "indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures", such as ceremonies.

⁴ CERD/C/100/D/61/2017.

⁵ Organic Act on Identity and Civil Data Management, art. 5.

⁶ *Ibid.*, art. 7.

⁷ CERD/C/66/D/31/2003 and CERD/C/66/D/31/2003/Corr.1.

status, disability or physical difference, or on grounds of any other distinction, whether personal or collective, temporary or permanent, whose aim or effect is to diminish or nullify the recognition, enjoyment or exercise of rights. Furthermore, article 21 of the Constitution safeguards the right to build and maintain one's cultural identity and to decide whether to belong to one or more cultural communities.

2.5 Lastly, the State party contends that there was no violation of articles 2 (2) and 5 (d) (iv) of the Convention, as the Organic Act on National Equality Councils⁸ and the National Agenda for the Equality of Nationalities and Peoples for the periods 2013–2017 and 2017–2021 meet the requirements flowing from these articles. The State party claims that the judicial authorities that ruled on the petitioner's application for constitutional protection and his appeal considered carefully the question of what authority was competent to officiate and register a civil marriage. The authorities competent to officiate a marriage are civil registry officials or any other authorized persons who, by virtue of their profession, engage in activities that fall within the scope of the Organic Act on Identity and Civil Data Management, such as public notaries, but not the traditional authorities of the Escaleras indigenous community. The competent authority for the registration of marriages is the Directorate General for Civil Registration, Identification and Certification, and not the Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador.

Petitioner's comments on the State party's observations on the merits

3.1 In his comments of 15 August 2020, the petitioner claimed that the civil registry must respect the Constitution as the supreme law of the land and takes precedence over all other laws in the legal order. Article 424 of the Constitution establishes that the "laws and actions of the governmental authorities must comply with constitutional provisions; where they do not, they are legally void".

3.2 The petitioner points out that article 1 of the Constitution establishes that Ecuador is a plurinational State. Article 57 safeguards the collective rights of indigenous peoples and nationalities to "freely strengthen their identity, sense of belonging, ancestral traditions and social organization models ... to develop their own models of coexistence and social organization ... and to establish, develop, apply and practise their distinct or customary laws". Furthermore, article 171 grants indigenous peoples and nationalities the right to exercise "judicial functions based on their ancestral traditions and their own law"; the decisions issued by these function-holders must be respected by government institutions and authorities.

3.3 The petitioner therefore argues that, since the judicial functions of traditional indigenous authorities are recognized and protected by the Constitution, the civil registry should have respected and recognized the officiation of his ancestral marriage by his people's traditional authorities.

3.4 The petitioner further argues that, under articles 424 and 426 of the Constitution, the civil registry should also have respected international law. These articles establish that "international human rights treaties ratified by the State that recognize rights that are more favourable than those contained in the Constitution take precedence over any other law or action of the governmental authorities" and that "the rights enshrined in the Constitution and international human rights instruments are implemented and enforced immediately. The absence of a law or lack of awareness of the law cannot be invoked to justify a violation of those rights."

3.5 In that regard, the petitioner recalls that International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), which Ecuador has ratified, defends the maintenance and strengthening of peoples' distinct culture, way of life and institutions, which cannot serve as grounds for discrimination in the exercise of civil rights. In particular, article 2 establishes that "governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples" through measures "ensuring that members of

⁸ Adopted in 2014 to promote, encourage and protect respect for the principle of equality and non-discrimination. Pursuant to the Organic Act, five specialized councils were established (gender, intergenerational, peoples and nationalities, disability and human mobility).

these peoples benefit on an equal footing from the rights and opportunities which national laws grant to other members of the population". Article 5 also establishes that "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected" and that "the integrity of the values, practices and institutions of these peoples shall be respected". Lastly, article 8 establishes that "in applying national laws to the peoples concerned, due regard shall be had to their customs or customary laws" and that indigenous peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights". The United Nations Declaration on the Rights of Indigenous Peoples establishes that indigenous peoples' right to self-determination includes the right to freely determine their political status and freely pursue their social and cultural development and that, in exercising their right to self-determination, they have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions (arts. 3–5). The Declaration also establishes that indigenous peoples have the right to practise and revitalize their traditions, cultural customs and ceremonies (art. 11), to maintain their political and social institutions (art. 20) and to determine their own identity in accordance with their customs (art. 33). The petitioner recalls that the American Declaration on the Rights of Indigenous Peoples states that indigenous peoples "have the right to preserve, maintain and promote their own family systems" (art. XVII).

3.6 In light of the foregoing, the petitioner alleges that the State party has violated articles 1 (4), 2 (1) (a) and (2), and 5 (d) (iv) of the Convention, read in conjunction with the above-mentioned international instruments, in that the civil registry cannot have exclusive competence to solemnize, authorize and register marriages since the recognition of marriages officiated by traditional authorities is based on the principle of the self-determination of peoples and the constitutional recognition of Ecuador as a plurinational State.

3.7 The petitioner underscores that indigenous peoples organized their lives and societies, including through ancestral marriages officiated by their institutions in accordance with their own cultures, for millennia before the construction of the State of Ecuador. The petitioner claims that the failure to recognize the jurisdiction of traditional indigenous institutions constitutes a discriminatory act by virtue of excluding indigenous peoples and their family systems from the scope of civil rights (e.g. access to family reunification visas) and thus forcing assimilation into the State institution of civil marriage.

3.8 The fact that a number of indigenous marriages have been officiated in Azuay, a point raised by the State party to prove that there is no discrimination, is precisely why the existence of such marriages should be legally recognized and "indigenous ways of life should stop being treated as folklore". The petitioner clarifies that he is not denouncing an inability of indigenous authorities to officiate ancestral marriage ceremonies but, rather, the lack of recognition by the State party of the validity of such marriages. Indeed, indigenous institutions have always officiated marriages, but those marriages must be recognized by the State in order for couples to enjoy equal civil rights (in this case, the right to be issued a family reunification visa).

3.9 In response to the State party's point that his first marriage in 1998 was officiated in accordance with domestic legislation, the petitioner argues that not having practised his customs in the past – owing to the difficulties many indigenous peoples have, as a result of colonization, in living and feeling on their own terms and following their own philosophy and social organization – should not be held against him in the present case. The petitioner notes that it is only recently that indigenous identity has begun to reassert itself following recognition in the 2008 Constitution.

3.10 As for the State party's argument that his name change is evidence of non-discrimination, the petitioner argues that a lack of discrimination in relation to a name change cannot be used to justify the discrimination inherent in not recognizing the officiation of an ancestral marriage. In addition, the petitioner notes that part of the colonization process was to impose Christian names on indigenous peoples, hence the current trend among indigenous persons of changing names in an effort to dissociate themselves from the colonial past.

3.11 Concerning the intercultural approach to his role as prefect in the Kichwa Kañari province of Azuay, which, according to the State party, is further evidence that there is no discrimination in Ecuador (see para. 2.3 above), the petitioner notes that, on the contrary, it was precisely to suppress his work that criminal proceedings were initiated against him, to the point that the Inter-American Commission on Human Rights was compelled to request precautionary measures on his behalf.⁹ In addition, the petitioner recalls that political analysts have described the detention of Ms. Lavinás Picq as an act of racism and retaliation against him on account of his work defending the rights of indigenous peoples, which he also carries out in his capacity as prefect.¹⁰

3.12 Lastly, the petitioner requests the Committee to safeguard his right to a marital union under indigenous jurisdiction by recommending that his marriage be recorded in the civil register so that he and his wife can obtain a family reunification visa on an equal footing with the rest of the population.

Issues and proceedings before the Committee

Consideration of the merits

4.1 The Committee has considered the present communication in light of all the submissions and documentary evidence produced by the parties, as required under article 14 (7) (a) of the Convention and rule 95 of its rules of procedure.

4.2 The Committee notes that the petitioner alleges a violation of articles 1 (4), 2 (1) (a) and (2) and 5 (d) (iv) of the Convention in that the failure to recognize the jurisdiction of the traditional indigenous authorities who officiated his marriage – a ceremony that was conducted in accordance with indigenous culture and customs for millennia, before the construction of the State – and the consequent failure to recognize his marriage constitute an act of discrimination, as a result of which he is being prevented from enjoying the same civil rights as those whose marriages are officiated in accordance with the State party’s laws. The Committee also notes that, according to the petitioner, denying him a family reunification visa and recommending that his marriage be officiated by an ordinary civil authority amounts to forced assimilation into the State institution of civil marriage. That is in contravention of the Constitution, which establishes Ecuador as a plurinational State, safeguards the right of indigenous peoples and nationalities to apply and practise their distinct or customary laws and permits them to exercise judicial functions based on their ancestral traditions and their own laws. In the petitioner’s view, the Directorate General for Civil Registration, Identification and Certification is obliged to respect these constitutional norms, as well as international law, which recognizes the right of indigenous peoples to self-determination in matters of jurisdiction, procedures and their own, age-old institutions and establishes that, in applying national laws to indigenous peoples, States must have due regard to their customs and customary laws.

4.3 The Committee notes the State party’s argument that indigenous marriages are not banned in Ecuador and that the refusal to register the ancestral marriage in this case did not stem from an institutional stance against any particular racial group or ethnicity. The Committee also notes the State party’s argument that the officiation and registration of civil marriages in Ecuador is the exclusive competence of civil registry officials and the Directorate General for Civil Registration, Identification and Certification and not that of the

⁹ The Commission considered that “Yaku Pérez Guartambel was in a serious and urgent situation, given that his rights to life and personal integrity were at risk of irreparable harm” and requested that Ecuador: (a) adopt the necessary measures to guarantee the rights to life and personal integrity of Yaku Pérez Guartambel; (b) adopt the necessary and culturally appropriate measures to guarantee that Yaku Pérez Guartambel could continue to carry out his duties as a human rights defender without being subjected to threats, harassment or acts of violence in the exercise thereof. No. 67/2018, precautionary measure No. 807-18, 27 August 2018. Available at https://www.oas.org/en/iachr/decisions/pdf/2020/res_85_mc-807-18-ec_en.pdf.

¹⁰ *El Comercio*, “Carlos Pérez Guartambel solicitó al Registro Civil la inscripción de su matrimonio ancestral” (Carlos Pérez Guartambel applies to the civil registry for registration of his ancestral marriage), 27 June 2016. Available at <https://www.elcomercio.com/opinion/racismo-protestas-opinion-ecuador-indigenas.html>.

traditional authorities of the Escaleras indigenous community or the Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador. Therefore, the petitioner should have been married by the competent State authority.

Self-determination, autonomy and indigenous jurisdiction

4.4 The Committee notes that the 2008 Constitution, which establishes Ecuador as an intercultural and plurinational State (art. 1), recognizes and guarantees that “indigenous communes, communities, peoples and nationalities” hold collective rights to “freely maintain, develop and strengthen their identity, sense of belonging, ancestral traditions and forms of social organization”, to “preserve and develop their own systems of coexistence and social organization and methods for establishing and exercising authority in their legally recognized territories and on their communal lands of ancestral possession”, to “establish, develop, apply and practise their distinct or customary laws, provided that these do not breach constitutional rights, especially those of women, children and adolescents” and to “establish and maintain organizations to represent them, in the spirit of pluralism and cultural, political and organizational diversity. The State shall recognize and promote all their forms of expression and organization” (art. 57 (1), (9), (10) and (15)). The Constitution also establishes that “the authorities of indigenous communities, peoples and nationalities shall perform judicial functions, based on their ancestral traditions and their own law, within their own territory” and that the State must ensure that the judicial decisions of indigenous authorities, which are subject to constitutional review, “are respected by public institutions and authorities” (art. 171). The Committee notes that, in addition to the Constitution, the Organic Code of the Judiciary also establishes with regard to the “scope of indigenous jurisdiction” that the “the authorities of indigenous communities, peoples and nationalities shall perform judicial functions, based on their ancestral traditions and distinct or customary laws, within their own territory” (art. 343) and that the actions and decisions of civil servants must adhere to the principles of diversity “taking into account the law, customs and ancestral practices of indigenous persons and peoples”; *non bis in idem*, in other words “the actions of indigenous judicial authorities cannot be judged or reviewed by ... any administrative authority”; “pro indigenous jurisdiction”, according to which “in case of doubt between the ordinary jurisdiction and the indigenous jurisdiction, the latter should take precedence so as to ensure its greatest possible autonomy and the least possible intervention”; and the “intercultural interpretation” of rights, bearing in mind “cultural elements connected to customs, ancestral practices, norms and procedures of the distinct law of indigenous peoples, nationalities, communes and communities” (art. 344).

4.5 In addition, the Committee notes that the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which the State party has ratified, protects the practices and institutions of indigenous peoples (art. 5) and stipulates that, in applying national laws to indigenous peoples, “due regard shall be had to their customs or customary laws” and that indigenous peoples “shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights” (art. 8). Similarly, the United Nations Declaration on the Rights of Indigenous Peoples establishes that indigenous peoples “have the right to self-determination” (art. 3). In exercising this right, they “have the right to autonomy or self-government” (art. 4), “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” (art. 5), “to practise and revitalize their cultural traditions and customs”, including the right to maintain, protect and develop the manifestations of their cultures, such as ceremonies (art. 11), “to determine the structures and to select the membership of their institutions in accordance with their own procedures” (art. 33) and “to promote, develop and maintain their institutional structures and their distinctive ... juridical systems or customs, in accordance with international human rights standards” (art. 34). The American Declaration on the Rights of Indigenous Peoples, meanwhile, establishes that “States shall recognize fully the juridical personality of indigenous peoples, respecting indigenous forms of organization” (art. IX), that “indigenous people have the right to promote, develop and maintain their institutional structures and their distinctive ... juridical systems or customs, in accordance with international human rights standards” and that “indigenous law and legal systems shall be recognized and respected by national, regional and international legal systems” (art. XXII). The Committee also notes that the Declaration establishes that

States shall recognize, respect and protect the various indigenous forms of family “as well as their forms of matrimonial union” (art. XVII (1)).

4.6 The Committee is of the view that the aforementioned norms relating to the recognition of self-determination, autonomy, indigenous jurisdiction and self-government through traditional indigenous authorities who apply customary law reflect legal pluralism. In this connection, the Committee notes the recognition of Ecuador, in article 1 of the Constitution, as an intercultural and plurinational State. This implies the understanding that different systems of government and social regulation, based on cultural, political or historical aspects, coexist through various authorities, such as the ordinary jurisdiction and the indigenous jurisdiction. Furthermore, the Committee is of the view that the main purpose of self-determination for indigenous peoples is to recognize the cultural diversity within a country’s territory and to ensure that this diversity is protected and preserved. In addition to being a form of intangible heritage, self-determination is linked to the effective realization of the rights of indigenous peoples, specifically their right to maintain and develop their own political, judicial, cultural, social and economic institutions.

Obligations under the Convention in light of indigenous customary law

4.7 The Committee recalls that the prohibition of racial discrimination set out in the Convention requires that States parties guarantee to everyone under their jurisdiction the enjoyment of equal rights de jure and de facto. According to article 2 (1) (c), all States parties must take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists. Thus, the Committee has already established that States must take positive measures to enable the realization of human rights for indigenous peoples, either by removing remaining obstacles or by adopting specific legislative and administrative measures to fulfil their obligations under the Convention.¹¹ It has stated, for example, that recognition of indigenous peoples’ rights over their traditional territories, based on immemorial usage and indigenous customary law, entails the obligation to respect and protect these rights in practice, including through the adoption of special measures.¹² That is because, as the Committee has stated previously, to ignore the inherent right of indigenous peoples to their traditional territories – which is grounded in indigenous customary law – constitutes a form of discrimination as it results in nullifying or impairing the recognition, enjoyment or exercise by indigenous peoples, on an equal footing, of the property rights tied to their identity.¹³

Non-discrimination in the enjoyment of marriage rights

4.8 In the present case, the Committee notes that the entry in the ancestral marriage register of the Escaleras ancestral community states that:

Before the indigenous authority of this community, stand freely, consciously and voluntarily brother Carlos Pérez Guartambel and sister Manuela Lavinás Picq, accompanied by witnesses Mirian Chuchuca Pugo and Ruth Noemi Pugo Pérez, to enter in the family certificates register of this community the following certificate of ancestral marriage: Identity of the groom: Carlos Pérez Guartambel (identification card No. 0102475449). Place and date of birth: Kachipucara/Escaleras, Tarqui parish, 26 February 1969. Civil status: widower, his wife María Verónica Cevallos Uguña, with whom he had two descendants ..., having departed for a higher dimension of life on 16 October 2012. Identity of the bride: Residence of the bride and groom:

¹¹ *Lars-Anders Ågren et al. v. Sweden* (CERD/C/102/D/54/2013), para. 6.13.

¹² *Ibid.*, para. 6.15. See also jurisprudence from the Inter-American system, which, basing itself on the customary law of indigenous peoples, has reinterpreted the right to property in their favour. It has established, inter alia, that traditional ownership of land confers on indigenous peoples the right to obtain official recognition and registration of that ownership: Inter-American Court of Human Rights, *Mayagna (Sumo) Awá Tingni Community v. Nicaragua*, judgment of 31 August 2001, Series C No. 79, para. 151; and Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, (OEA/Ser.L/V/II) (2010), para. 68.

¹³ *Lars-Anders Ågren et al. v. Sweden*, para. 6.7.

Place and date of the ceremony: Lagunas de Kimsakocha during the full moon (Junda Killa) of 21 August of the Western year 2013. This certificate is also signed by Rosa Inés Guartambel Guinansaca who, in her capacity as grandmother and godmother to the minor children, ... undertakes to lend her utmost support to ensure the children have the best comprehensive upbringing, inspired by the Allí Sumak Kawsay, in cooperation with and complement to the children's father, in accordance with the law of the original peoples. This certificate is issued by the good community government on the basis of articles 1, 10, 11, 56, 57, 68 and 171 of the Constitution, articles 1–3, 5 and 8 of ILO Convention No. 169, articles 1–5, 9, 11, 33 and 34 of the United Nations Declaration on the Rights of Indigenous Peoples, articles 343 and 344 of the Organic Code of the Judiciary and the law of the ancient peoples. We proceed to the registration of this certificate of ancestral marriage in the Escaleras community register ... and to its transmission to the Federación de Organizaciones Indígenas y Campesinas del Azuay and the Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador.¹⁴

4.9 The Committee also notes that the ancestral marriage registers of both the Federación de Organizaciones Indígenas y Campesinas del Azuay and the Confederación de Pueblos de la Nacionalidad Kichwa del Ecuador certify in similar terms the ancestral marriage of the petitioner to Ms. Lavinás Picq, officiated by the Kichwa Kañari indigenous authorities of the Escaleras indigenous community.

4.10 The Committee notes that the traditional authorities of the Escaleras ancestral community who drew up the marriage certificate in accordance with their ancient customs verified the identity of the spouses, their age, their prior civil status, their address, the voluntary nature of their union and the date and place of the marriage – all in the presence of two witnesses.

4.11 The Committee also notes that the State party did not recognize the petitioner's marriage because it was not officiated by State authorities established pursuant to the Civil Code and the Organic Act on Identity and Civil Data Management. It further notes that the State party requests the petitioner to hold another wedding before civil registry officials. The Committee is of the view that the above could contribute to jeopardizing cultural practices, which are a part of cultural heritage. In the present case, the State party's refusal to recognize the petitioner's marriage has meant that the petitioner was not able to enjoy a civil right that is associated with marriage, namely, the issuance a family reunification visa, thus undermining his right to respect of his family life.

4.12 The Committee recalls article XVII (1) of the American Declaration on the Rights of Indigenous Peoples, which establishes that States must recognize, respect and protect the various indigenous forms of matrimonial union. It also recalls that, under articles 57 and 171 of the Constitution, indigenous peoples exercise judicial functions and their own forms of government based on their ancestral traditions and their distinct or customary laws. The Committee further recalls that, in accordance with the State party's Organic Code of the Judiciary, rights must be interpreted from an intercultural perspective, taking into account cultural elements related to the customs, ancestral practices and norms or procedures of the distinct law of indigenous peoples (para 4.4). Accordingly, the Committee is of the view that, far from depriving the State party of its jurisdiction over civil law, the registration and recognition of the legal effects of marriages officiated by traditional indigenous authorities in keeping with their ancient customs actually serve to create the necessary cooperation and coordination that should be at the heart of the relationship between the ordinary system and the indigenous system – a system 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 (para 4.6).¹⁵

¹⁴ Escaleras ancestral community, ancestral marriage register, Victoria del Portete parish, Tarqui, 21 August 2013.

¹⁵ The Committee points out, by means of comparison, that traditional marriages officiated by the ancestral authorities of indigenous peoples are recognized in the laws of other countries, including Australia, Canada and Papua New Guinea.

4.13 Therefore, the Committee is of the view that, in order to comply with its obligations under article 5 (d) (iv) of the Convention, not only must the State party refrain from prohibiting the celebration of indigenous marriages (para 2.3) and the issuance by traditional indigenous authorities of registration certificates for marriages officiated in their territories, but it must also take all necessary steps, in cooperation with the traditional indigenous authorities, to record such marriages in the civil register where they are not contrary to other international human rights obligations or to requirements under national law for the celebration of marriages. If this had happened in the present case, the petitioner and Ms. Lavinias Picq would have enjoyed the same civil rights as individuals whose marriage is recognized by the civil registry. In light of the foregoing, the Committee finds that the facts before it disclose a violation of the petitioner's rights under article 5 (d) (iv) of the Convention.

5. In the circumstances of the case, the Committee, acting under article 14 (7) (a) of the Convention, considers that the facts before it disclose a violation by the State party of article 5 (d) (iv).

6. The Committee recalls that, in keeping with a customary norm that constitutes one of the fundamental principles of contemporary international law on the responsibility of States, any violation of an international obligation that has resulted in harm entails a duty to comprehensively repair that harm.¹⁶ Therefore, the State party should, inter alia, (a) record the petitioner's marriage to Ms. Lavinias Picq in the civil register so that they may apply for a family reunification visa; (b) provide appropriate compensation to the petitioner for the harm caused; (c) apologize to the petitioner for the violation of his rights; (d) amend its legislation in keeping with the present opinion to provide for the recognition and registration of marriages officiated by traditional indigenous authorities in accordance with their customs and customary law that are not contrary to other international human rights obligations or to requirements under national law for the celebration of marriages; (e) establish a training programme for civil registry officials and the judiciary and other court personnel regarding the validity and recognition of indigenous marriages officiated by traditional authorities; and (f) disseminate this opinion widely and translate it into the Kichwa language.

7. The Committee requests the State party to provide, within 90 days, information on the steps taken to give effect to the present opinion.

¹⁶ International Court of Justice, *The Factory at Chorzów*, judgment on the merits, 13 September 1928, p. 47.