

Justice in fishing territories: Human rights violations in artisanal fisheries analyzed by the Colombian Constitutional Court¹

Isabela Figueroa^{2 a}

Lina M. Saavedra-Díaz^b

Paula Satizábal^c

Gina Noriega-Narváez^a

Yulibeth Velásquez-Mendoza^b

^{a,b} University of Magdalena, Colombia

^c HIFMB, Alfred Wegener Institute for Polar and Marine Research & University of Oldenburg, Germany

Abstract

Seas and inland waters have historically been spaces where social struggles have been overlooked and made invisible. This article offers an interdisciplinary analysis of the Colombian Constitutional Court decisions related to human rights violations in artisanal fishing territories. We used a human rights-based approach to study 79 Constitutional Injunctions (*Acciones de Tutela*) and built a digital database 'Justice in Fishing Territories' (*Justicia en Territorios Pesqueros*). We identify and discuss the most frequently claimed and protected rights. Most Court proceedings are centered on participatory processes, indicating that actors within the artisanal fisheries sector are excluded from the discussion and approval of development projects. We conclude that the Colombian State has historically privileged the interests of industrial economic sectors to the detriment of the ways of living, territories, and rights of artisanal fishing populations.

Keywords: small-scale fisheries; human rights-based approach; participation; constitutional injunction (*acción de tutela*); environmental justice

Résumé

Les mers et les eaux intérieures ont toujours été des espaces où les luttes sociales ont été négligées et rendues invisibles. Cet article propose une analyse interdisciplinaire des décisions de la Cour constitutionnelle colombienne relatives aux violations des droits de l'homme dans les territoires de pêche artisanale. Nous avons étudié 79 injonctions constitutionnelles (*Acciones de Tutela*) en utilisant une approche basée sur les droits de l'homme et avons construit une base de données numérique "Justice dans les territoires de pêche" (*Justicia en Territorios Pesqueros*). Nous identifions et discutons les droits les plus fréquemment revendiqués et protégés. La plupart des procédures judiciaires sont centrées sur des processus participatifs et indiquent que les acteurs du secteur de la pêche artisanale sont exclus de la discussion et de l'approbation des projets de développement. Nous concluons que l'État colombien a historiquement privilégié les intérêts des secteurs économiques industriels au détriment des modes de vie, des territoires et des droits des populations de pêcheurs artisanaux.

Mots-clés: pêche artisanale; approche basée sur les droits de l'homme; participation; injonction constitutionnelle (*acción de tutela*); justice environnementale

Resumen

Los mares y aguas continentales han sido espacios de luchas sociales históricamente invisibilizadas. Este artículo ofrece un análisis interdisciplinario de todas las decisiones de la Corte Constitucional colombiana

¹ This article was translated by Paula Satizábal from the original Spanish version published as: Figueroa, I., Saavedra-Díaz, L. M., Satizábal, P., Noriega-Narváez, G., and Velásquez-Mendoza, Y. (2023). Justicia en territorios pesqueros: Violaciones a derechos humanos en la pesca artesanal analizadas por la Corte Constitucional de Colombia. *Estudios Socio-Jurídicos*, 25(2), 1-38. <https://doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.12518>

² ^a Faculty of Humanities, University of Magdalena. Legal Knowledge Research Group of the University of Magdalena (GRISJUM), Santa Marta, Colombia. ^b Faculty of Basic Sciences of the University of Magdalena. Research Group on Socioecological Systems for Human Well-being (GISSBH), Santa Marta, Colombia. ^c Helmholtz Institute for Functional Marine Biodiversity (HIFMB), Alfred Wegener Institute for Polar and Marine Research, and University of Oldenburg, Oldenburg, Germany. Corresponding author: ifigueroa@unimagdalena.edu.co. We express our gratitude to the artisanal fishing communities in Colombia whose resistance to protect their ways of living and fishing territories have been our source of inspiration. This research was funded by Fonciencias 2018 from the University of Magdalena, research project VIN2018159: "Human rights violation in the coastal-marine artisanal fishing sector in the context of blue justice in Colombia". We thank Kenedith Méndez Gutiérrez for her statistical advice on data analysis and graph generation. Likewise, we thank César Polo Castro and Bryan Carbone, who designed and programmed the project portal: Justice in Fishing Territories. We acknowledge the support offered by Amalia Satizábal who designed the logo of the project. This project was shared and discussed with fishing representatives and key actors in the sector during the "First National Dialogue: Fishing for Justice", held on March 10, 2023. We thank the Vice-Rectorates for Research and Extension & Social Projection at the University of Magdalena for their logistical and financial support.

relacionadas con violaciones de derechos humanos en territorios pesqueros artesanales. Por medio del enfoque basado en derechos humanos estudiamos 79 sentencias y construimos una base de datos digital llamada Justicia en Territorios Pesqueros. Identificamos y analizamos los derechos reivindicados (reclamados) y tutelados (protegidos) con mayor frecuencia. En su mayoría, las decisiones de la Corte indican que el sector de la pesca artesanal no es tenido en cuenta en la aprobación de proyectos de desarrollo. Concluimos que el Estado colombiano privilegia los intereses de los sectores económicos industriales en detrimento de los derechos de las poblaciones pesqueras.

Palabras clave: pesca a pequeña escala; enfoque de derechos humanos; participación; acción de tutela; justicia ambiental

Resumo

Os mares e as águas continentais têm sido espaços de lutas sociais historicamente invisibilizadas. Este artigo oferece uma análise interdisciplinar de todas as decisões do Tribunal Constitucional da Colômbia relacionadas com violações de direitos humanos em territórios de pesca artesanal. Por meio da abordagem baseada em direitos humanos, estudamos 79 sentenças e construímos um banco de dados digital denominado Justiça nos Territórios Pesqueiros (*Justicia en Territorios Pesqueros*). Identificamos e analisamos os direitos reivindicados e protegidos com maior frequência. Em sua maioria, as decisões do Tribunal indicam que o setor da pesca artesanal não é levado em consideração na aprovação de projetos de desenvolvimento. Concluimos que o Estado colombiano favorece os interesses dos setores econômicos industriais em detrimento dos direitos das populações pesqueiras.

Palavras-chave: Pesca em pequena escala; abordagem de direitos humanos; participação; ação de proteção; justiça ambiental

1. Introduction

Bodies of water and coasts around the globe are undergoing profound transformations associated with the expansion of economic development projects, including extractive industries and exclusionary biodiversity conservation (Jouffray *et al.*, 2020). Indeed, dominant development has historically framed the seas, rivers, and coasts as open access and available for capitalist uses (Bennett, 2019; Cohen *et al.*, 2019). Added to this is the lack of coordination between different administrative authorities and the diversity of sectors and actors that have increasing incidence in these spaces (Song & Soliman, 2019). Reports on human rights violations in the industrial fisheries sector have been reported in relation to insecure and unhealthy working conditions, human trafficking, slavery and mistreatment, as well as gender-based and racialized violence (Allison *et al.*, 2012; Marschke & Vandergeest, 2016). These violations have only recently been documented in the small-scale fisheries (SSF) sector (see. e.g., Isaacs & Witbooi, 2019; Song *et al.*, 2020), with social, economic, and environmental implications that hinder the sustainability and fairness of SSF management (Ratner *et al.*, 2014). Past and present processes of ocean and coastal grabbing, dispossession, displacement, and destruction of fishing territories³, are threatening coastal food security and the ways of living of historically marginalized coastal communities (Bennett *et al.*, 2015; Márquez Pérez, 2019).

In this article we use a human rights-based approach (HRBA), a methodological and analytical frame that incorporates human rights into the analysis of public policies, identifying the State's duty to protect individuals and groups against human rights abuses (UN, 2006). In 2015, a HRBA in SSF was promoted by the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (hereafter SSF Guidelines) of the Food and Agriculture Organization of the United Nations (FAO, 2015). The HRBA can be used to analyze the institutional shortcomings that prevent the realization of human rights in the SSF sector. In translating the vulnerabilities, violations, and aspirations of SSF actors into rights, the HRBA uses discursive tools seeking to pursue a fairer participation and negotiation of public policies across different levels of government (UN, 2006).

We approach the seas and inland waters as spaces of social struggles, places subjected to human rights abuses and violations, as well as processes of resistance and solidarity. We focus on the struggles faced by communities, groups, and individuals that are part of SSF, known in Colombia as 'artisanal fisheries' (used hereafter), and the ways in which they are using legal tools to assert their rights against coastal development projects that are accelerating the expansion of infrastructure, ports, tourism, mining, and the exclusionary management of marine protected areas (MPAs) (Saavedra-Díaz *et al.*, 2020a, 2020b). The struggles faced by artisanal fisheries are historical and have been aggravated by an outdated national fisheries policy that denies the participation of actors within the artisanal fisheries sector as central in the discussion of management and conservation of marine and inland waters, while favoring the economic interests of elites and industrial sectors (Saavedra-Díaz & Jentoft, 2017; Saavedra-Díaz *et al.*, 2015). These struggles are inseparable from colonial and armed conflicts and their historical marginalization of Afro-descendant and Indigenous peoples (Bocarejo & Ojeda, 2016; Satizábal & Batterbury, 2019).

Artisanal fishing takes place on the Atlantic and Pacific Oceans, along the coasts, and throughout the main river basins (including the Magdalena, Sinú, Atrato, Amazonas, and Orinoco rivers) (FAO & MADR, 2015). This spatial and ecosystem complexity sustains a high diversity of aquatic life forms of importance for fishing (Andrade, 2011; Acero & Polanco, 2017). As a way of living, artisanal fishing has produced deep and historical connections between groups of fishers and the fluid dynamics of fishing grounds, being central to the

³ We use the notion of 'fishing territory' due to its use in the jurisprudence of the Constitutional Court of Colombia. However, we acknowledge the rise and use of the terms 'maritorio' and 'acuatorio', which are currently promoted and claimed by civil society groups in Colombia and other countries (Álvarez *et al.* 2019; Gutiérrez Camargo, 2016).

social, economic, and cultural tissue of fishing populations (Gutiérrez Camargo, 2016; Satizábal & Dressler, 2022).

This article is an interdisciplinary effort that aims to analyze the human rights violations faced by the artisanal fisheries sector in Colombia. Our analysis is informed by 79 court proceedings of '*Acciones de Tutela*' (constitutional injunctions, hereafter *tutela*, see the methodology section for more details on this legal tool) examined by the Colombian Constitutional Court (CCC) from 1992 to 2019. We focus on the struggles of communities, groups, and individuals involved in artisanal fishing, divided in Colombia between subsistence and commercial fishing (Resolution 649/2019). To develop this analysis, first, we describe our methodology and introduce the 'Justice in Fishing Territories' (*Justicia en Territorios Pesqueros*) database, which was built as an analytical tool to offer visibility and to study the human rights violations faced by artisanal fisheries in Colombia. Then, we examine the human rights claimed by actors within the artisanal fisheries sector and those that were protected by the CCC, identifying the sectors involved in these violations, the geographical areas, and the impacted communities. We analyze in detail the most frequently claimed rights: participation, life with dignity, due process of law, and cultural identity. We conclude by highlighting the role played by the *tutela* in safeguarding the human rights of artisanal fishing communities, emphasizing the importance of working *for* and in solidarity with the artisanal fishing sector to demand the development of public policies and legal tools that contribute to protect and dignify artisanal fishing ways of living.

2. Methodology

We used a HRBA approach to analyze court judgments that discussed human rights violations suffered by actors in the artisanal fishing sector. These court judgments were identified via a systematic search at the CCC database (see <https://www.corteconstitucional.gov.co>), using the following search terms: '*pesca artesanal marina*' (marine artisanal fishing), '*pesca artesanal costera*' (coastal artisanal fishing), '*pesca marino-costera*' (coastal-marine fishing), '*pesca de subsistencia*' (subsistence fishing), and '*pesca*' (fisher). Initially, 213 judgments were found, which were classified using the typology used by the Court (acronyms in Spanish): SU, decision of unification (of jurisprudence); T, *tutela*; and C, constitutional judgments. Since the constitutional judgments do not refer to individual cases, but rather to national legislation, we only included the decision of unification and *tutela* judgments (n=79, see Appendix 1). The *tutela* is used to protect a right whose delay in being protected endangers the administration of justice (Decree-Law 2591/1991). For this reason this legal tool is only used when other judicial mechanisms are nonexistent or are not effective to protect the invoked rights. The CCC does not examine all the *tutelas* in the country, but rather those that they consider emblematic, be it for unifying the jurisprudence, for discussing a novel issue, or for complying with any other criteria established by the same Court. Therefore, the proceedings we reviewed do not reflect all cases related to human rights violations impacting the artisanal fisheries sector, but only those *tutelas* reviewed by the CCC.

We designed a database of sentences defining 38 variables of socio-ecological and legal importance. The organization of the variables is based on three main components extracted from primary legal sources (judgments) and secondary information (*), encompassing the: i) case general information (date, actors and projects involved, location, ethnic group); ii) legal information (rights claimed and actions requested by the plaintiffs, protected rights and actions ordered by the Court, beneficiary and convicted actors, processing time); and iii) socio-ecological information (type of fishing, fishing gears*, ecosystems*, fishing communities involved, type of fisheries conflict*, socioeconomic* and environmental impacts*, and the economic sector involved). From this database, graphs were created using the R statistical program to facilitate the comparison of main variables, including the year, type of fishing, ethnic identity, sectors, claimed and protected rights. Each graph represents the values per variable, taking into account that each case may include different ethnic groups, types of fishing, and sectors.

For comparative purposes, we unified the language of the judgments following the terms commonly used in International Human Rights Law.⁴ Our analysis led to the construction of the '*Justicia en Territorios Pesquero*' (Justice in Fishing Territories) database (<http://pescayjusticia.unimagdalena.edu.co>), which seeks to expose and promote the analysis of court judgments related to human rights violations impacting the artisanal fisheries sector in Colombia. This tool has an interactive map that allows the retrieval of the information from each variable using filters (see Figure 1). Our objective is to gradually enrich and update this database (currently updated until 2022, with a total of 91 court judgments), and to continue working to expand and deepen the analysis of human rights violations experienced in artisanal fishing territories.

⁴ For example, we refer to the claimed rights to social and cultural integrity, to culture [in the context of tradition], to ethnic and cultural diversity, or to ethnic and cultural identity, as the right to *cultural identity*. When the plaintiffs or the Court mentioned the right to human dignity, we used the right to a *life with dignity*. Consultation for environmental impact assessments and free, prior and informed consent are ways of exercising the right to *participate* in public affairs, being grouped together with other claims related to this same right. Some rights' denomination, such as the right to *due process of law*, were maintained. In other cases, in which the right to food sovereignty, the right to food security or the right to food were discussed, these were all grouped and interpreted as the right to *adequate food* (International Covenant on Economic Rights, Social and Cultural Rights, arts. 2 and 11; Universal Declaration of Human Rights, UDH, art. 25). The right to petition, an administrative procedure established by the Colombian constitution, was understood as a guarantee of the right to *access to information* (UDH, art. 19; American Convention on Human Rights, art. 13). The right to Indigenous autonomy and autonomous jurisdiction were analyzed as part of the right to *self-determination* (Declaration of the United Nations Organization on the Rights of Indigenous Peoples, art. 3). Claims related to the rights to subsistence, survival, or vital minimum were interpreted as the right to an *adequate standard of living* (UDH, art. 25). The right to work and freedom of trade are both contained in the international definition of the *right to work* (UDH, art. 23; Protocol of San Salvador, art. 6). Other rights kept the same name.

3. Human rights violations

We identified 79 (SU and T) CCC's judgments that discussed human rights abuses in the artisanal fisheries sector between 1992 and 2019 (the CCC was founded in 1991). In 60 of these judgments, the CCC decided in favor of the interests of the plaintiffs and in 19 in favor of the defendants. The number of judgments increased over the last decade, particularly since 2009. During this last period the fishing authority moved from the *Instituto Colombiano de Desarrollo Rural* (Colombian Institute for Rural Development, INCODER 2009-2011) to the *Autoridad Nacional de Acuicultura y Pesca* (National Authority of Aquaculture and Fisheries, AUNAP) in 2011. Between 2018 and 2019 the number of cases decreased from a maximum of 12 in 2017 to five in 2019. Court procedures had an average duration of two years, with a minimum duration of 74 days (T-605/1992: on the displacement experienced by the fishing community of Mendihuaca in Magdalena, decided in favor of plaintiffs) and a maximum duration of 25 years (T-080/2015: on the polystyrene plant chemical spill in Bolívar, also decided in favor of plaintiffs).

More than half of the judgments (47) are related to the use of fishing resources in inland water ecosystems, 34 in coastal-marine ecosystems, two cases involve the concurrent use of the two. Most judgments also discussed the rights of three ethnic identities: Indigenous (42 judgments), Afrocolombian (24) and *Raizales* (1) (Figure 2). In two of these cases, the rights of Indigenous and Afrocolombian communities were concomitantly studied (T-766/2015 and T-733/2017). In only 14 judgments the plaintiffs are not associated with any ethnic group. This pattern of violations based on ethnicity should not be understood as representative of the artisanal fisheries sector, but rather an indication of the cases that are of interest to the CCC. Importantly, there is no official data regarding the ethnic identity of artisanal fishing communities in Colombia (Figueroa, 2021), however, most of the cases examined involve communities that self-identified as particular ethnic groups.

The cases are geographically distributed in 26 of the 32 Colombian Departments (administrative division), centered mainly in Bolívar (16 judgments), La Guajira (8), Magdalena (7), Chocó, Putumayo, Valle del Cauca, and Meta (five judgments each). We highlight that there are judgments in each of the 11 coastal Departments. In the remaining 15 Departments (associated with inland waters) there are fewer cases per Department (from one to five). Importantly, most cases in Bolívar are associated with Afrocolombian communities; in La Guajira, with Indigenous communities; and in Magdalena, with communities that do not identify as an ethnic group or whose ethnicity has not yet been recognized by the State.

The economic sectors involved in these judgments are: energy-mining (27 judgments), public administration (20), infrastructure (13), ports (8), tourism (7), other industries (4), agriculture (4), illegal economies and armed conflict (2) and forestry, fishing, and aquaculture (1) (Figure 3). Eight judgments are associated with two or three sectors at the same time. It is evident that the mining-energy, public administration, and infrastructure sectors are the most often associated with human rights violations experienced by inland artisanal fisheries, while the infrastructure, tourism, and public administration sectors are often related to human rights abuses faced by coastal-marine artisanal fisheries.

The sectors and their differentiated impacts per fishery and ethnic group are also those sectors that the Colombian State has historically prioritized as central axes of national economic development (see Mejía *et al.*, 2020). Similarly, we evidence the failure of the public administration in its duty to safeguard the protection of the rights of artisanal fishing communities.

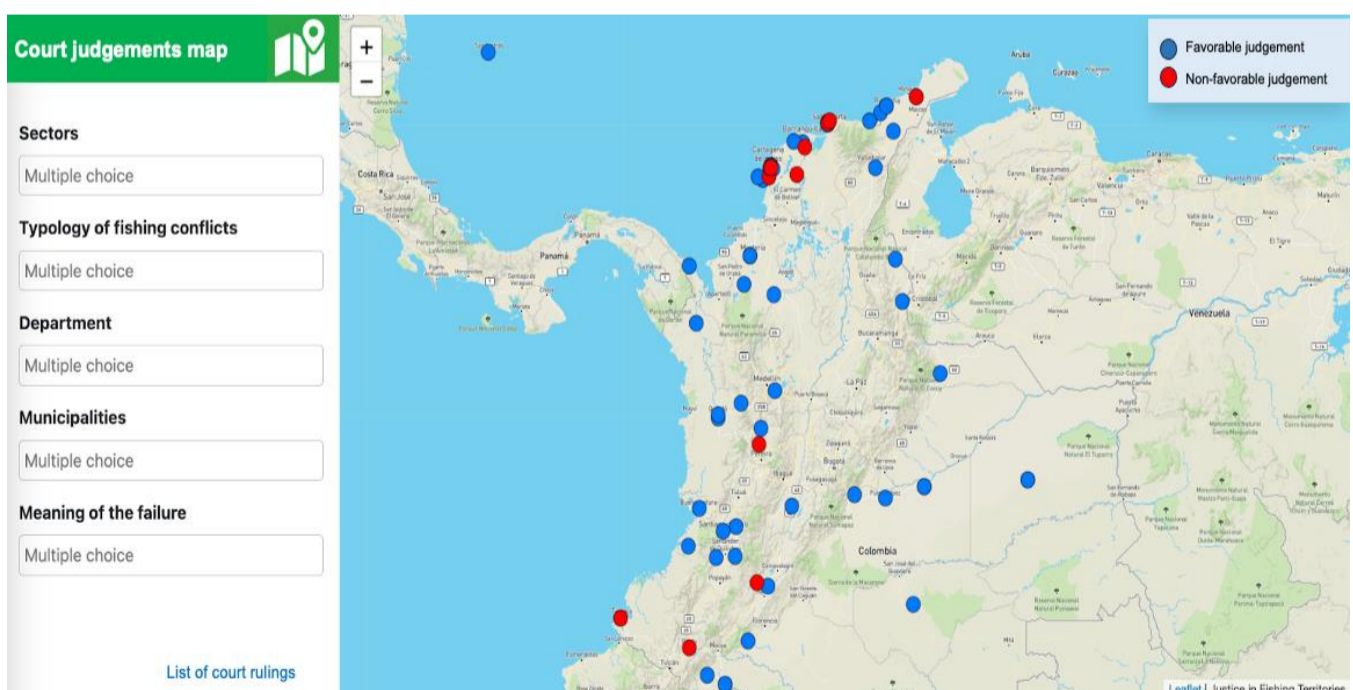


Figure 1: Screenshot (manually translated to English) of the *Justice in Fishing Territories* database interactive map.

Figure 2: Timeline of the 79 judgments associated with human rights violations in coastal-marine and inland water ecosystems between 1992 and 2019.

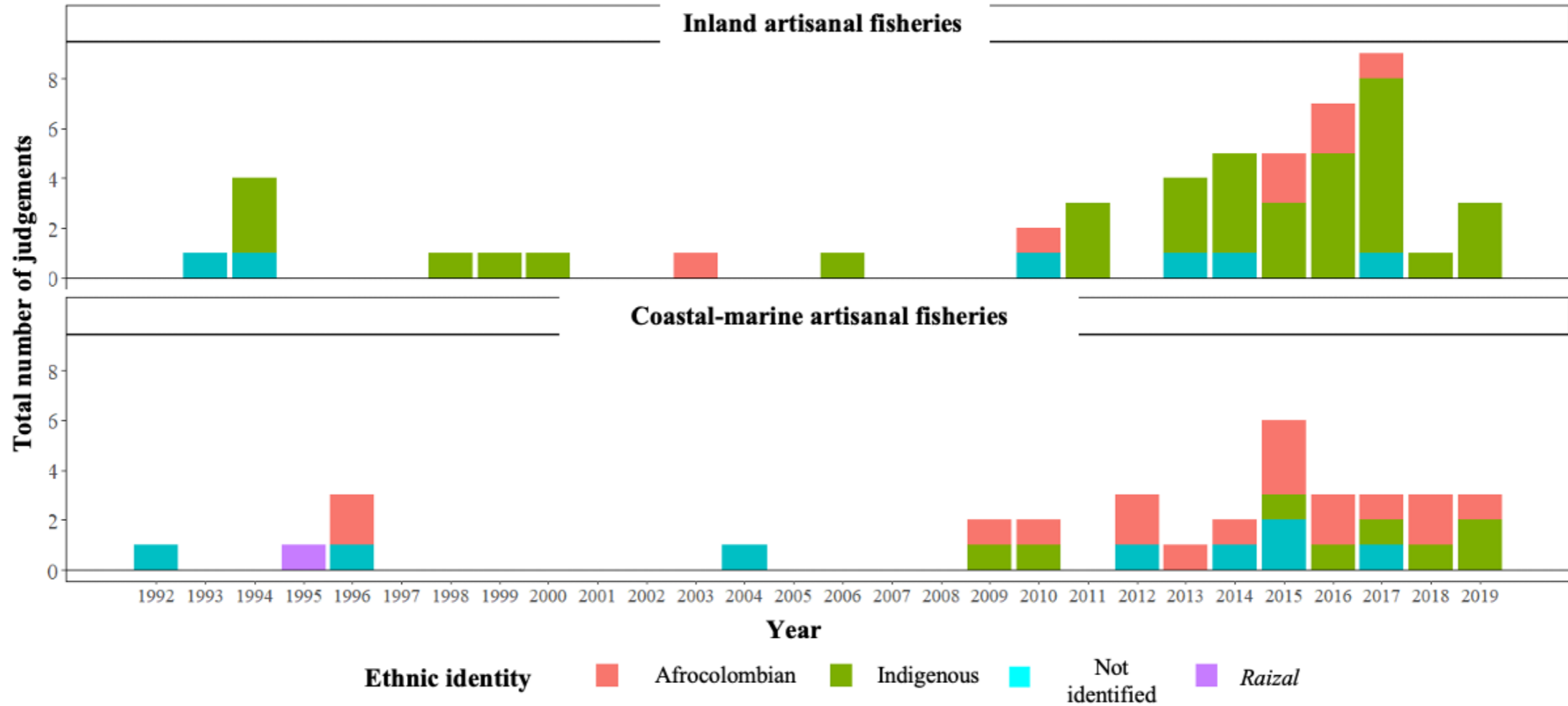
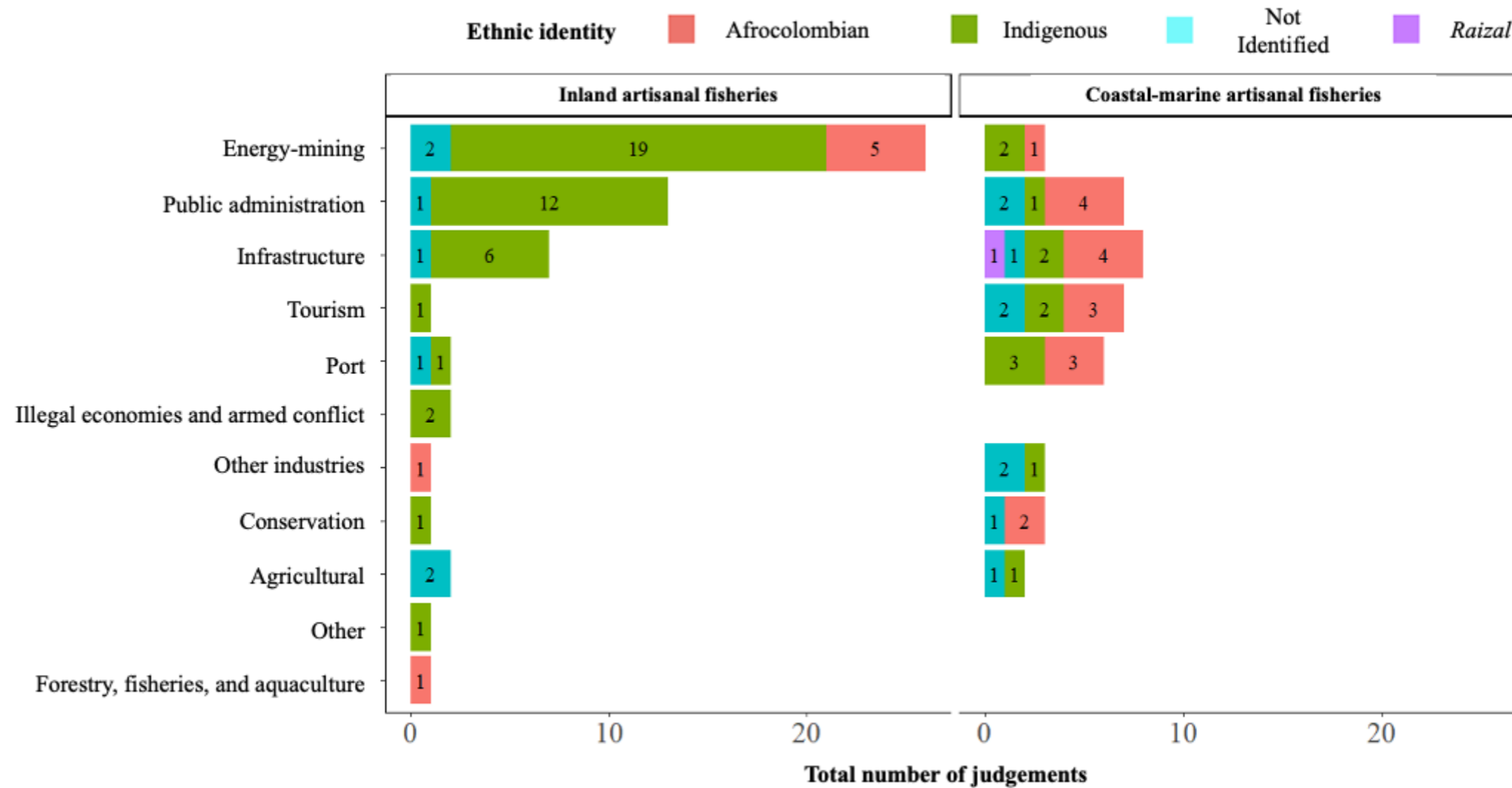


Figure 3: Court judgments by economic sectors, differentiating ethnic identity and type of fishery.



Claimed and protected rights

The *tutela* can be filed by any person, group or legal representative that considers that any rights have been violated (República de Colombia, 1991). As such, plaintiffs do not necessarily use legal terms to describe the violations suffered and the rights claimed. For example, in one of the cases the CCC noted that the plaintiffs requested "'any diligence' in their favor, 'due to the great concern that is depressing us due to the damage [sic] that the oil spill has brought us.'; since they are fishers and their job 'has been strongly affected'" (T-574/1996). In those situations, it is up to the CCC to interpret which rights were violated. The identification of the most commonly claimed rights encompasses: 1) the possibilities that the legal system offers for the protection of artisanal fishing ways of living; and 2) the perception that people and groups dedicated to artisanal fishing or their representatives have regarding how their way of living is being threatened. The list of rights protected by the CCC, in turn, reveals the judges' perspective on the rights of artisanal fishing communities and their ways of living. The judgments, despite coming from the same legal body, have not been uniform in the protection of the rights of artisanal fisheries. The CCC rarely discussed the notion of a fishing territory (T-348/2012, T-704/2016, T-479/2018), which has not been effectively protected in the country (also evidenced in Márquez-Pérez, 2019; Satizábal and Batterbury, 2019; Figueroa, 2021; Gutiérrez Campo and Escobar Jiménez, 2021).

From the 79 judgments analyzed, we identified 26 different human rights claimed by the plaintiffs.⁵ Those that were considered in ten or more cases are the right to participation (especially free, prior, and informed consent, FPIC), life with dignity, cultural identity, due process of law, equality, adequate standard of living, work, self-determination, health, territory, healthy environment, and access to information. On the other hand, the rights that the CCC protected in ten or more judgments are the rights to participation (including participation in environmental decisions and FPIC), due process of law, cultural identity, a life with dignity, an adequate standard of living, a healthy environment, and self-determination (Figure 4). The CCC protected fewer rights compared to those claimed, focusing largely on rights related to participation and consultation processes. The *tutela* is used as a legal tool to stop the development of projects, since it is easier to prove that FPIC processes did not take place than to prove the causal link between an activity and the environmental, economic, and social damages suffered.

4. Claims from artisanal fisheries

Our analysis of the rights claimed by fishing representatives revealed a pattern of violations caused by both development projects and public policies related to biodiversity conservation and land distribution. The most claimed rights are associated with the right to participate in public policies, which includes the FPIC (45 judgments) and participation in environmental decisions (43); the right to due process (37); the right to a life with dignity (37); and the right to cultural identity (35). Next, we examine each of these rights and their relevance for artisanal fisheries.

The right to participate in public policies

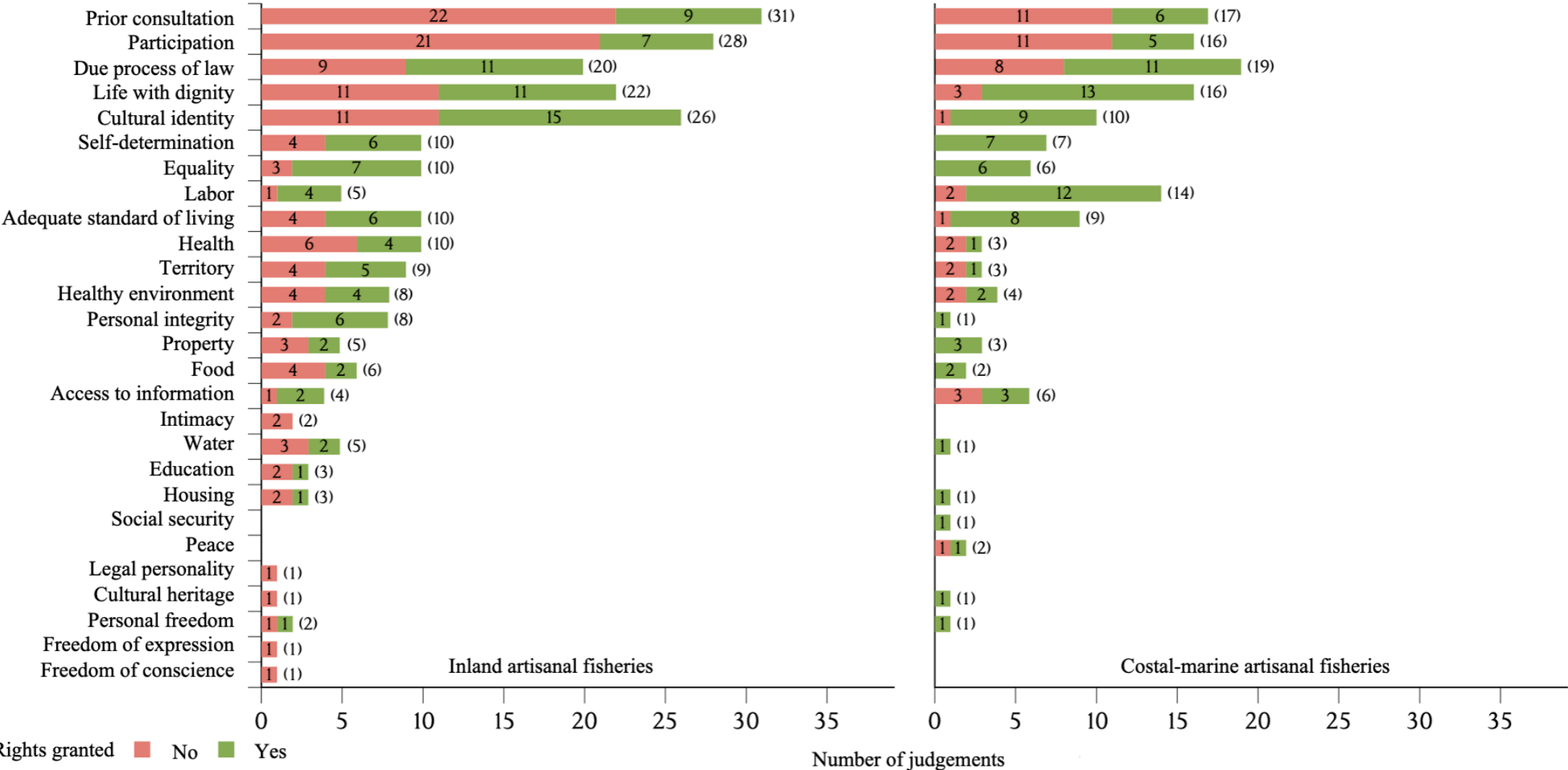
The right to participate in public policies was claimed in 45 cases, distributed in 21 Departments. In one of these cases (T-348/2012), the plaintiffs requested the right to participate in environmental decisions, which was protected by the CCC. In another case (T-135/2013), the CCC protected the right "ex officio" (without being requested). The CCC also highlighted the importance of consultation spaces with vulnerable communities (T-606/2015). Overall, the plaintiffs claimed the right of FPIC in 45 cases, and it was protected in 31 judgments.

Free, prior, and informed consent — FPIC

The FPIC is a mechanism for the participation of ethnic groups in public policies protected by the Colombian Political Constitution (art. 330), the Convention 169 of the International Labor Organization (ILO) (C169), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, art. 19). In the field of international law, the FPIC was conceived as a mechanism for permanent and dynamic dialogue that must guide relations between States and Indigenous peoples or other groups of peoples (ILO, 2016). For the CCC, the FPIC "*establishes a model of governance, in which participation is an indispensable presupposition to guarantee the other rights and interests of the communities*" (SU-123/2018, para 5.1). The FPIC does not *per se* cover the possibility of a community to veto a project, but there are some circumstances established by the jurisprudence of the Inter-American Court of Human Rights (IACourtHR, 2007) and by the CCC itself that require the consent of the affected communities for its implementation.

⁵ These rights are: access to information, access to justice, water, adequate food, association, due process of law, education, cultural identity, equality, privacy, freedom of conscience, freedom of expression, personal freedom, self-determination, environment healthy, adequate standard of living, participation in public policies (participation in environmental decisions and free, prior and informed consultation), cultural heritage, peace, legal personality, property, health, social security, work, life with dignity, housing.

Figure 4: Judgements related to the claimed and protected rights, separated by the type of artisanal fishery: inland or coastal-marine.



For instance, in 2003, several Afrocolombian communities living in a Forest Reserve in the Pacific (Chocó) filed an action for protection against the State, requesting the suspension of the logging operations of Maderas del Darién, which had been operating for more than 50 years (T-955/2003). The communities argued that the impacts on the territory include the death of fish in rivers and freshwater zones due to the use of chemical immunizers and the change in land use resulting from the construction of canals and the draining of canals and rivers to extract timber. In this case, although the plaintiffs did not originally demand the protection of their FPIC rights, the CCC decided, among other measures, to order the suspension of logging until the affected communities were consulted. However, the CCC has not always protected the collective rights of Afrocolombian communities. A member of these communities living in the shore of the Cascajal Island in Buenaventura (Valle del Cauca) demanded the protection of his community's right to FPIC in relation to the implementation of the waterfront boardwalk and public space project "*Malecón perimetral del mar*", foreseen in Buenaventura's 2001 Land Use Plan. This project would evict more than 3,400 families, relocating them to the "Ciudadela de San Antonio National Social and Interest Housing Macro-project", which would completely transform and impact the ways of living of the communities living in stilt houses, including artisanal fishers, collectors, wood loggers and traders whose livelihoods are deeply connected to the sea (T-550/2015). These families, as highlighted by the plaintiff, "*share cultural characteristics, kinship ties and a particular way of relating to their environment*" (T-550/2015, para. 55). In addition, he added that the community to which he belongs "*has an important relation to the sea, which has enabled them to develop traditional production practices for self-sufficiency*" (T-550/2015, para. 55). The houses from which they would be evicted "*were built using ancestral construction techniques that were used by their ancestors, who reclaimed land from the sea to settle permanently in this area*" (T-550/2015, para. 55). The CCC dismissed the request for protection on the grounds that the FPIC should have been claimed collectively and not individually. Instead, the CCC ordered the Buenaventura Mayor's Office to prepare a report on the status of the relocation process and then to summon individuals, families, and communities living in the low-tide areas of the southern area of Cascajal Island, as well as other state authorities, to a public hearing to present the report. This decision prevented the communities from participating effectively in the decisions that affected them, particularly considering that the public hearing was used to socialize a decision that had already been made. In 2018, the perspective from the CCC changed, issuing a unification judgment (SU-123/2018), where the Court recognises that the relocation and resettlement of a community "*implies a high social, cultural and environmental impact that puts their subsistence at risk*" (SU-123/2018). When resettlement is related to the deposit of hazardous materials, the consent of the community is a requirement (SU-123/2018, para. 11.5).

All the *tutelas* where which fishing communities claimed the right to FPIC, they also requested the suspension of projects or administrative acts that authorized their implementation, overall discussing issues related to the granting of environmental licenses (see, e.g., T-479/2018, T-704/2016, T-376/2012, T-444/2019). In 23 of the 31 judgments the CCC recognized the plaintiffs' right to be consulted, ordering the suspension of activities that violated this right. For example, in 2016 the CCC ordered the suspension of the resolution that authorized Carbones del Cerrejón to expand the Bolívar Port in the municipality of Uribia in Guajira until the FPIC process was completed (T-704/2016). In 2018, the CCC ordered the Compañía de Puertos Asociados (Compas S.A.) to stop the expansion works of the Cartagena Container Terminal until the FPIC was pursued (T-479/2018). Likewise, the CCC annulled the resolution granted by the Directorate General Maritime (DIMAR, maritime authority) to Inversiones Talamare (a hotel company), which enabled them to control the access and use of 8,195 meters of beach until the State fulfilled its duty to consult the Afro-Colombian fishing community from the Boquilla in Cartagena (T-376/2012).

The judgments from the CCC are varied and also include orders to hold "pre-consultation" meetings (T-376/2012 and T-704/2016) or that the "respective procedures" be started (T-021/2019, T-541/2019 and T-444/2019) within specified periods of time. The deadlines assigned for the FPIC process have not been consistent, including 48-hour deadlines (T-129/2011, T-376/2012, T-172/2013, T-704/2016 and T-021/2019), 15 days (T-730/2016), 30 days (T-485/2015 and T-256/2015), 2 months (T-359/2015) and up to 3 months (SU-123/2018). These timeframes to a large extent only allow for consultation processes to take place superficially, while ignoring the need to discuss the complexity of projects and their potential impacts.

The CCC has also not been uniform in determining procedures for the implementation of FPIC. In 2018, it ordered a consultation process "*in the event of evidence of direct affectation to the plaintiff communities*" and in compliance with the Presidential Directive 10 of 2013, which presents a "Guide for the prior consultations with ethnic communities". Importantly, Presidential Directive 10 of 2013 was rejected as a valid standard on other occasions by the same Court (see, e.g., T-479/2018). In the unified decision, SU-123 of 2018, the CCC detailed the parameters established by international human rights law for the process of obtaining FPIC, specifying that prior consultation procedures were much broader than what is established in Presidential Directive 10 of 2013. This includes an "ample" understanding of territory that is not limited to geographical boundaries encompassing "*the areas occupied by the indigenous community, as well as the places where the aforementioned sectors of society have traditionally developed their social, economic, spiritual or cultural activities*" (SU-123/2018).

Although on several occasions the CCC has reiterated that the FPIC must take place before the start of activities of projects or interventions (SU-123/2018), this has frequently been disrespected by the State or its concessionaires. An example of this type of irregularity is evidenced in the judgment T-298 of 2017, where the CCC considered the suspension of the oil project Campo Ocelote-Guarrojo as unfeasible, which was not subject to consultation for more than a decade while threatening the ways of living (including ancestral fishing) of the Sikuni communities in the Awalibá Indigenous *Resguardo* (reserve) (see Ruiz Vanegas and Pineda Cubides, 2022). According to the CCC judges, the suspension of the project would generate greater impacts for the same people who live in this area. Therefore, the Court established that the State should determine the degree of

contamination of the Guarrojo River and, then, consult with the plaintiffs in order to "*mitigate the effects caused by the project*" (T-298/2017). For the CCC, the only thing that the plaintiffs could hope for, after more than ten years of impacts, would be compensation for the proven damages suffered, in addition to limiting those damages that could have been prevented.

Participation in environmental decisions

The principle of community participation in public environmental decision-making is embodied in the Stockholm (1972) and Rio de Janeiro (1992) declarations, as well as in the World Charter for Nature (1982). The Inter-American Court of Human Rights (IACourtHR) indicated that the right to participate in public affairs implies the State's obligation to guarantee the participation of people in decision-making and in the elaboration of policies that may affect the environment. This participation must take place "without discrimination and in a fair, significant and transparent manner, [...] and, to this end, States must have previously ensured access to the necessary information" (IACourtHR, 2017, para. 231). The Colombian Political Constitution also protects this form of participation (art. 72).

In 2012, the CCC judged on a *tutela* filed by the Association of Fishers of the Beaches of Comfenalco (Bolívar) who were demanding judicial measures to prevent the Vía al Mar Consortium (for the construction of a motorway) from closing access to a site where fishers traditionally have parked their wooden boats and carried out fishing related activities. The CCC ordered the Consortium and state agencies to hold meetings with these communities to mediate the compensation for damages caused by the Anillo Vial Malecón de Crespo project (T-348/2012). All the State agencies called by the CCC to declare in the legal process argued lack of liability. The CCC, nevertheless, recalled the State's duty to guarantee the participation of the community in the decisions that will affect their environments, as well as to conduct risk impact assessments. According to the CCC, "*artisanal fishing communities [...] are populations that must be especially listened to by infrastructure projects that intervene in the space where they exercise their labor*" (T-348/2012, para. 2.6.3.2). The CCC ordered the Vía al Mar Consortium, the National Institute of Concessions (today the National Infrastructure Agency) and the Ministry of Environment and Sustainable Development to promote spaces for participation with the communities and the negotiation of compensation measures.

In the *tutela* filed by "*people dedicated to different activities — artisanal fishers, drainers, cargo transporters and construction workers —*" (T-135/2013, I.1) against the execution of the El Quimbo hydroelectric plant (Huila) by the company Emgesa S.A. ESP, the plaintiffs alleged violations of their "*fundamental rights, especially to the basic minimum and a life with dignity*" (T-135/2013, I.1). Even though the plaintiffs did not allege violations of their right to participation, the CCC recognized the need to "*enforce the participation of marginalized or vulnerable communities or those that maintain a special relationship with the territory, in the design of compensation measures for the impacts that State decisions may have on their human dignity*" (Dejusticia, 2019, p. 36). Moreover, several artisanal fishers in Magdalena filed a *tutela* against the Ministry of Environment and Sustainable Development and the Administrative Unit of National Parks for the confiscation of their fishing gear. The CCC recognized the lack of spaces for the participation and consultation of artisanal fishers, ordering the national authorities to initiate participatory spaces. The Court explained that the right to participation should not be reduced to the delivery of information in meetings by authorities, but rather that the State must coordinate with the affected community to guarantee their participation in decision-making and safeguard "*the protection of people in vulnerable situations who will be negatively affected by adopted administrative decisions*" (T-606/2015, para. 7.3).

Right to due process of law

The right to due process of law was claimed in 37 cases, distributed among 19 Departments. The CCC protected this right in 16 cases and found State liability in all of them. The right to due process of law is one of the bases of the Rule of Law, and it is about legality, application of the laws and principles of the democratic State. The necessary procedural guarantees are part of due process of law so that people can defend themselves against any type of action or public policy that may affect their rights (IACourtHR, 2001), by limiting State actions and procedures (IACourtHR, 2017). The reviewed CCC judgments established that in order to guarantee due process of law the State must follow all processes and actions determined by the law (T-909/2009 and T-376/2012), granting legal certainty to citizens regarding the issuance of administrative decisions within a reasonable time (T-011/2019). The CCC also indicated that the decisions issued in the different administrative processes cannot be arbitrary or contrary to the law (T-680/2012). Due process of law also guarantees other fundamental rights (T-376/2012 and T-444/2019), especially in the cases where human vulnerabilities are increased due to the lack of protection over the means of subsistence (T-909/2009 and T-011/2019).

The violation of the right to due process of law occurs in conjunction with other claims: the lack of spaces for participation (T-376/2012, T-384A/2014 and T-384A/2014 -550/2015); late or no application of FPIC processes (T-288A/2016 and T-052/2017); inadequate protection and irregularities surrounding the recognition of communities' ethnicity and correlate special rights (T-444/2019), including unjustified delays within collective titling procedures (T-601/2016), e.g. titling processes have reached up to 10 (T-909/2009) and 14 years (T-379/2014). Regarding titling processes, the CCC has determined that when state entities refrain from taking effective measures to protect the rights of ethnic communities affected by a state-led decision, and the violation persists, the right to due process of law is violated (T-909/2009). In the cases where the FPIC has taken place without guaranteeing the due process of law as established by the parameters of human rights and constitutional jurisprudence, the CCC has ordered the suspension of activities related to the project to protect the human rights of the communities (T-769/2009 and T-764/2015). In relation to the granting of environmental licenses to projects that violate artisanal fishing ways of living, the CCC established that it was not necessary

to nullify the environmental license of a project whose impacts have already been caused. In this case, it ordered an FPIC to mitigate the damages and to compensate and indemnify the community (T-444/2019).

Right to a life with dignity

The right to a life with dignity was claimed in 37 cases presented in 18 Departments. The CCC protected this right in 14 cases, and in 13 of them found human rights violations by the State. The right to enjoy conditions for a dignified existence derives from the right to life and the right to physical integrity, which is violated when the State fails to take appropriate measures to offer vulnerable individuals and groups a dignified life (IACourtHR, 1999). Insufficient conditions for a life with dignity must be evaluated on a case-by-case basis as it is related with the protection of a series of social rights, such as right to food, adequate housing, work, education, cultural identity, among others applicable to specific contexts (Beloff and Cleric, 2016).

The Fisher Committee of la Poza and other residents of the Mendihuaca area (Magdalena) filed a *tutela* to remedy the access to a coastal area restriction by the private owners of the Playa Rica property (T-605/1992). The CCC argued that artisanal fisheries are one of the most marginalized economic activities in the country, stating that fishers are usually one of the poorest and most vulnerable groups, and that fishing is often the only source of protein in their diet (T 605/1992). Moreover, the CCC has insisted on the importance of the environment for the wellbeing of the population (T-129/2011). In 2011, when studying a *tutela* for the environmental degradation of the Ciénaga Grande de Santa Marta, the CCC established that the environmental contamination of the ecosystem affected the lives of the inhabitants of the area due to the impossibility of carrying out their traditional activities, especially fishing (T-596/2017). In 2015, when reviewing a relocation process for Afrocolombian communities that practiced subsistence fishing in the townships of Patilla and Chancleta, in La Guajira, to a site with limited access to water, the CCC considered that it constituted a flagrant violation of the right to life arguing that: "*What could be more unworthy than not having water to drink, quench thirst, wash, wash clothes and prepare food?*" (T-256/2015, para. 177).

The right to a life with dignity in the context of communities that depend on the resources of their territory was discussed in the judgment T-622 of 2016 (para. 4.8), in which the CCC granted juridical personality to the Atrato River. In this judgment, the CCC recalled that the Colombian State is ruled by the law and thus must seek to "*achieve social justice, human dignity and general wellbeing by subjecting public authorities to the principles, rights and duties of constitutional order*" (T-622/2016, para. 4.4). The conditions of wellbeing must obey the specific circumstances of each community, including in certain situations the exercise of biocultural rights. This perspective was confirmed in a case involving the living conditions and development of Wayúu children in La Guajira, with artisanal fishing being one of the main sources of protein in local diets. The CCC stressed that drinking water constitutes a fundamental right that "*is part of the essential core of the right to life in dignified conditions when it is intended for human consumption*" (T-302/2017, para. 6.3.1.6).

Most of the violations alleged in the cases we studied were caused in the context of the development of projects that were justified by the notion of "general interest", whose prevalence over other interests is considered a constitutional principle (Political Constitution, art. 1). However, in the judgment T-135 of 2013, where the CCC analyzed the violations of the rights of a group that included artisanal fishers caused by the construction of El Quimbo dam (Huila, Magdalena River), it argued that the State cannot prioritize a general interest from infrastructure projects that incurred in human right violations.

The right to cultural identity

The right to cultural identity was claimed in 35 cases, distributed in 19 Departments. The CCC protected this right in 12 of those cases and found that State liability in all of them. The right to cultural identity is widely protected by C169 (arts. 5 and 13.1), the International Convention for the Elimination of All Forms of Racial Discrimination (CERD, art. 5), the UNDRIP (arts. 8, 9, 11, 12) and the Freiburg Declaration (art. 3). Conceptually, cultural identity is understood as "*the set of references by means of which a person, individually or collectively, defines and constitutes themselves/themselves, communicates and understands that their dignity is recognized*" (T-599/2016). This implies the right to maintain and develop their own modes of existence and relationship with the Earth, their peers and other non-human entities.

The recognition of ethnic identity is one of the obstacles faced by fishing communities that claimed the right to participate through the FPIC, which is a procedure guaranteed specifically for ethnic peoples. The Ministry of the Interior is the state entity in charge of certifying the presence of ethnic groups within the area of influence of a project, work or activity (T-485/2015, T-704/2016, T-730/2016), but there is no regulation that provides clarity and legal certainty for the issuance of such certifications. For instance, In a case related to the verification of an area used for the exploration of an oil well by Ecopetrol, after a process full of delays and a missing folder with official documents, the Ministry of the Interior flew over —through the coordinates offered by Ecopetrol and in a helicopter from Ecopetrol —an area that encompasses the lands of the Motilón Barí people (Santander) and reported that "*no town or hamlet was identified near the well, visual and certain proof that allowed clear judgments for the certification of the no presence of Indigenous communities in the place*" (T-880/2006, para. 1.2.4.9). The CCC recognized the oil activity's effects on the Motilón Barí people and ordered the Ministry of the Interior to carry out the FPIC. Similarly, during the construction of a tourism and hotel project by the company Playa Blanca Barú SAS in Cartagena de Indias, the Ministry of the Interior certified the absence of ethnic groups due to the lack of official documentation indicating otherwise (T-485/2015). According to the plaintiffs, members of the Association of Tourism Workers of Playa Blanca and the Community Council of Blacks of Playa Blanca, Playa Blanca is located "*on land that the Spanish Crown handed over to their predecessors to compensate them for the acts of colonization that took place on their*

lands" (T-485/2015, para. 2.2). The Ministry of the Interior, in turn, refuted the ethnic identity of the plaintiffs, alleging that "*the fact that the petitioners were affiliated with an association did not make them collective entities of special protection*" and thus had no right to FPIC. In this case, the CCC understood that the plaintiffs did characterize an ethnic community and ordered the Mayor of Cartagena and the Ministry of the Interior to recognize the Community Council of the village of Playa Blanca under the terms of the Colombian law for Black communities (Law 70, 1993).

In a case associated with the oil industry (T-730/2016), the *Resguardo Nasa Kiwnas Cxhab* Alto Lorenzo of Puerto Asís and the Association of the Regional Council of the Nasa People of Putumayo claimed that several Colombian state entities violated their right to FPIC due to the approval of seismic activities by the Colombia Energy S.A. Consortium. The Ministry of the Interior responded that these communities did not exist in their database, therefore the Court understood that "*such certifications in many cases do not obey a verification in situ, nor do they incorporate a conception of territory that corresponds to that held in the worldview of Indigenous peoples and that demands respect from the legal system in all its manifestations*" (T-730/2016, para. 8).

In relation to a state concession granted to expand the Cartagena Maritime Terminal by *Compañía de Puertos Asociados, Compas S.A.*, the Ministry of the Interior erroneously certified the non-existence of Afro-Colombian communities that practice artisanal fishing in the area of influence of the project (T-479/2018). The CCC emphasized the "*flippancy of the Ministry of the Interior in certifying the non-existence of ethnic groups in the project's area of influence [...] undoubtedly demonstrates the violation of the rights to prior consultation and due process*" (T 479/2018, para. 129). The CCC demanded that in order for the Ministry of the Interior to certify the absence of ethnic communities in an area of influence of a project, the entity must not only rely on the information within its database, but rather "*carry out a field visit to the place of influence of the project to verify whether or not there is a presence of said groups in the area*" (T-479/2018, para. 130).

The Ministry of the Interior did not act with due diligence either, according to the CCC (T-541/2019, para. 93), by not certifying the existence of the *Huitoto Jatani Dtona* community in the area of influence of the Villagarzón road project by the Andean Consortium 49, in Caquetá, which violated their rights to cultural identity and due process of law. In the Unification Sentence 123 of 2018, the CCC ordered the national government and the Congress of the Republic to adopt the necessary measures to regulate the recognition of ethnic communities to effectively protect the FPIC. However, as of the writing of this article, no effective measures have been implemented.

5. Discussion: state failures in the safeguarding the human rights of artisanal fisheries

The right to participation, especially through the FPIC, was the right most claimed by fishing communities in the reviewed CCC's judgments. There is extensive jurisprudence on prior consultation within this Court, in which the burden of proof rests on the State, who generally failed to justify the violation of the rights of the populations whose duty it is to protect. Rights such as health, an adequate standard of living or a healthy environment require that communities prove and convince the CCC of a causal relationship between the project or administrative measure being sued and the adverse impacts. Beyond the difficulties faced by fishing communities in accessing the justice system (Márquez-Pérez, 2022; Saavedra-Díaz *et al.* 2020a, 2020b), the generation of evidence that demonstrates this causal relationship is not always feasible for rural and coastal communities, living with little or no tenure security over their territories (Ertör, 2021; Kerezi *et al.* 2021).

Ethnic communities generally allege that unconsented projects or measures threaten their territorial relations, either by the contamination of vital spaces, the change in the use of fishing areas, and/or the transformation of ecosystems. In most of the judgments discussing this matter, the State was not able to verify that a legitimate consultation process was undertaken, thus, the CCC ordered the suspension of the project and the execution of the consultation process. However, before the issuance of the Unified Judgment on prior consultation (SU-123/2018) in 2018, there were no clear parameters for the CCC to order measures to protect the right to FPIC. It is to be seen whether the State, through the Ministry of the Interior, was able to achieve any agreements with these communities. The CCC protected the right to participate of non-ethnic fishing communities in two judgments (T-348/2012, T-135/2013), and, although in a third judgment the CCC has not expressly mentioned the protection of this right (T-606/2015), it condemned the lack of spaces for participation and agreement with non-ethnic artisanal fishers when measures are taken that affect their rights, such as the right to work. In these cases, the CCC highlighted the vulnerability of the fishing population vis-à-vis a project or public policy. The protection granted to the participation rights of the fishing communities of Cartagena in relation to the construction of the Crespo Road Ring has been central to the protection of vulnerable communities within this territory. It is vital to continue demanding effective measures from the State that allow artisanal fishing communities to participate in public decision-making that affects their ways of living.

In 1992, the CCC argued that "*the social rule of law requires efforts to build the essential conditions to ensure a dignified life for all the country's inhabitants*" (T-426/1992). The claim for the right to decent living conditions acquires special importance in rural and coastal areas in Latin American countries, since the lack of these conditions constitutes poverty – understood from a human rights perspective as "*a human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights*" (IACHR, 2017, para. 77).

The right to cultural identity of fishing communities is systematically violated in Colombia (see also Ortíz Quiroga, 2013). For instance, in most cases discussing participation rights, the Ministry of the Interior dismissed the collective self-identification of the plaintiff groups. On different occasions, the CCC noted the lack of due diligence in the actions of the Ministry of Interior whose mission includes to "*formulate and follow*

up on the policy of ethnic groups for the materialization of their rights" (Decree 2893/2011, art. 2.10). None of the judgments analyzed discussed the right to FPIC of the *Raizales* from the San Andrés, Providencia and Santa Catalina Archipelago (this right was analyzed and protected by the CCC in judgment T-333/2022, which discussed the participation of *Raizales* in climate change adaptation, rebuilding, and recovery efforts in the context of Hurricane Iota). However, *Raizal* communities have repeatedly claimed their exclusion from participating in administrative decisions designed within the continent, which ignore their specific needs, history, and geographical contexts, while severely affecting their lives (Márquez Pérez, 2019).

The struggles of the artisanal fishers have been exacerbated by fisheries and environmental policies that have not considered or safeguarded the protection of the artisanal fishing sector, denying its participation in the discussion of the management and conservation of riverine and marine areas (Saavedra-Díaz and Jentoft, 2017; Saavedra-Díaz *et al.* 2015). These struggles are inseparable from the history of the armed conflict and the colonial processes of marginalization of Indigenous and Black communities (Bocarejo & Ojeda, 2016; Satizábal & Batterbury, 2019).

The search for justice in the artisanal fishing sector requires an approach that recognizes that there are multiple sectors involved in human rights violations, mainly those that have historically been central axes for economic development in the country. The former National Development Plan 2018-2022 promoted *investments in these sectors as "a pact for equity"*, which *"intends to achieve social and productive inclusion"* (DNP, 2018, p. 230). Considering the negligence of the State in the protection of the human rights of artisanal fisheries, for example, supporting superficial FPIC processes with absurd deadlines ranging from 48 hours to 3 months of processes that must be arranged with the communities. In this context it is worth asking, development and equity for whom?

Colombia has historically been governed in ways that reinforce asymmetries of power between economic sectors and coastal communities. The dominant extractive and exclusionary economic development model is incompatible with the ways of living and territories of the fishing communities. Similar violations and challenges have been claimed by artisanal fishing communities in other geographies, including those that gathered at the Conference of the Ocean People, which was held in parallel and in resistance to the exclusion and marginalization of artisanal fishers within the framework of the United Nations Oceans Conference (see Spartegus, 2022). It is in this historical context of exclusion and lack of public participation mechanisms that in 2020 the Colombian State launched the maritime policy "*Colombia Sustainable Bioceanic Power 2030*", also known as CONPES 3990 (2020). This policy adopts the discourse of sustainable development for coastal-marine areas, strengthening the economic view of the oceans by prioritizing the growth of extractive industries and expansion of capitalist interventions. CONPES 3990 refers to artisanal fishing only four times in the entire document, drawing on them in terms of the problems that prevent using the potential of oceans in Colombia. Likewise, it highlights the impacts of unsustainable fishing practices, the informality and organizational weakness of the artisanal fishing sector, failing to provide specific measures to respond to these challenges (2020, pp. 15, 45, 50-51). Similarly, coastal communities are mentioned in terms of risk and the importance of social ownership of management plans (2020, pp. 47, 66). Considering the exclusion of the artisanal fishing sector and coastal communities within the framework of the global expansion of extractive industries in the sea, we raise alarms about the potential increase in human rights violations in coastal-marine spaces in Colombia (Kerezi *et al.* 2021).⁶

6. Conclusions

In this article we present an interdisciplinary and systematic analysis of human rights violations in the Colombian artisanal fishing sector. With 60 sentences ruling in favor of the rights of artisanal fishing, a superficial read of these judgments would argue that the Colombian State is complying with the protection of their rights. However, using a HRBA we reveal serious and repeated human rights violations. Most of the judgments highlight a lack of participation of the artisanal fishing sector in the discussion and approval of projects of economic interest. Not surprisingly, the judgments reveal that the State has historically favored the interests of industrial sectors and exclusive conservation to the detriment of the rights of rural populations.

We recognize the multiple efforts of actors, groups and communities that are part of the artisanal fishing sector in demanding their rights and protecting their fishing practices using legal tools in a context of institutional vacuum (see also Gutiérrez Camargo, 2016; Márquez -Pérez, 2022; Saavedra-Díaz *et al.* 2020a, 2020b). We highlight the role of the *tutela* as a tool for the protection of the human rights of artisanal fishing communities. However, our study reveals serious flaws in access to justice and the existence of legal mechanisms and instruments to effectively protect artisanal fishing as a way of living and, in particular, the rights of access over and use of fishing territories (see Márquez-Pérez, 2022). The lack of interest of the CCC in studying human rights violations experienced by fishing communities, when these violations are not related to the territorial rights of ethnic groups, is problematic as it protects artisanal fishing as an accessory to ethnic rights, excluding a large part of the sector. Within the framework of a global and national capitalist expansion of extractive and exclusionary ocean economic development and in the facing the precariousness of the health and social support for artisanal fishing communities, we highlight the importance of this study and all the efforts seeking to make visible the struggles of artisanal fisheries (see, e.g., Environmental Justice Atlas, Ertör, 2021).

⁶ It is worth noting the political turn given by the victory of President Gustavo Petro and Vice President Francia Márquez in 2022, and the expectations of a political agenda with alternatives to development that dignify and seek to protect the ways of life and the rights of fishing communities. However, after two years of government, the fishing authority (AUNAP) still has no stable director, revealing a lack of political commitment and leadership to deal with the many historical challenges faced by the sector (Saavedra-Díaz *et al.* 2015).

We also acknowledge the invaluable efforts from the global fisher movement, in particular the World Forum of Fisher People (WFFP), in documenting the impacts and human right violations from the growing and intensifying global ocean economy (see, e.g., Blue Economy Peoples' Tribunals in India, Sri Lanka, Bangladesh, Thailand, Indonesia, Brazil, and soon to be held in South Africa). As researchers, we must take an active role and stand in solidarity with the artisanal fishing sector in Colombia and beyond. We demand real political commitments to listen and work with the sector to protect their rights, and foreground a political agenda that is centered on halting the expansion of a politics of death and plunder.

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