

# THE INTERNATIONAL LAW OF INDIGENOUS PEOPLE IN THE 21ST CENTURY

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## Introduction

The set of institutions, norms, principles and rules aimed at the international protection of Indigenous people has made significant progress compared to what existed at the end of the 20th century. This does not mean, however, that the historical structural discrimination faced by these people has disappeared or, even less, that the problems that generate or derive from it have diminished. This context, of good news in terms of what should be and concern about what is, sheds light on the fact that today Indigenous people have more and different legal means, ways and paths at their disposal than previously.

This article presents and illustrates the three pillars of universal legal protection that are most accessible to effectively guarantee the rights of Indigenous people: the International Labor Organization (ILO), the United Nations (UN) human rights treaty body system and the Inter-American Court of Human Rights (I/A Court HR). To this end, a documentary analysis methodology was utilized based on the study of

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primary sources, such as international treaties, decisions of its supervisory bodies, declarations and documents signed by the States. In fact, this is the basis of the international law of Indigenous people in the 21st century.

The International Labor Organization constitutes the first of these pillars. Its Conventions 107, on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations of Independent Countries, and 169, on Indigenous and Tribal People, are the cornerstones of the current international law on Indigenous people.

The United Nations system is the second pillar. By means of its human rights treaty bodies and other UN mechanisms, a powerful set of elements is consolidated that collaborate with each other to affirm the human dignity of Indigenous people in the international community. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13 September 2007 is political proof of the materialization of an international right for Indigenous people within the UN.

The third pillar is the Organization of American States (OAS). The contentious decisions of the Inter-American Court of Human Rights have established a solid regional system for protecting the human rights of Indigenous people. Recently, this legal dimension of the protection of Indigenous people in the Americas has been enhanced by a political decision of extreme relevance and significance for the affirmation of the rights of these peoples in the region: the adoption of the American Declaration on the Rights of Indigenous Peoples (ADRIIP).

The set of institutions, norms, rules and principles stemming from the aforementioned three jurisdictions provide a vigorous legal protection regime for Indigenous people in the international community of the 21st century. The international law of Indigenous people is based on the cultural dimension of

their lands and territories; the free, prior and informed consent of their communities; and the preservation of their customs, languages, and values. States Parties to this regime have the obligation, by virtue of public international law commitments made in good faith, to make this right known, strengthened, affirmed and existentially fulfilled. Finally, Indigenous people form an interactive ring with the environment, fauna and flora.

## 1. Indigenous People and the International Labor Organization (ILO)

The ILO is an international organization within the UN system. It is its only tripartite agency as it brings together representatives of governments, employers and workers from its current 187 Member States. Its purpose is to establish labor standards, formulate policies and draw up programs promoting decent work for human beings.<sup>1</sup> Its origins can be traced back to the 1919 Versailles Peace Treaty, since it was Part XIII of the Treaty that created the League of Nations, although the ILO was afforded full autonomy. Two ideas fostered its emergence: the achievement of peace through respect for social principles and the promotion of a labor regime based on premises that affirm human dignity. These postulates were inspired by the notion of interdependence between States and the necessary cooperation between them, since the ideals of improving the lot of workers could be hindered if one or another country failed to adopt a truly humane labor regime.<sup>2</sup>

Its basic task was to set in motion a mechanism capable, through conventions and recommendations, of establishing minimum standards for working conditions in the different

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1. ILO. About the ILO. Available at [www.ilo.org/global/about-the-ilo/lang-es/index.htm](http://www.ilo.org/global/about-the-ilo/lang-es/index.htm), accessed at 17:20 on 03/01/2024.

2. Pastor Ridruejo, José Antonio. *Curso de Derecho Internacional Público y Organizaciones Internacionales*. Tecnos, 10<sup>a</sup> ed. Madrid, 2006, p. 760.

countries. Later, in 1944, in the city of Philadelphia, at its XXVI General Conference, a resolution was adopted that redefined and updated its objectives. As a result, in 1946, an agreement was signed with the UN that would make the ILO the first specialized agency of the United Nations.<sup>3</sup>

The ILO's tripartite structure means that workers and employers have the same voting rights as governments during the deliberations of its main bodies, thus ensuring that the opinions of its social interlocutors are faithfully reflected in its standards, policies and programs. The ILO's main objectives are to promote labor rights, foster decent work opportunities, improve social protection and strengthen dialogue on labor-related issues.<sup>4</sup>

The ILO adopted its first multilateral act during an international conference specifically dedicated to Indigenous people on June 5, 1957: Convention No. 107, concerning the Protection and Integration of Indigenous People and Other Tribal and Semi-Tribal Peoples of Independent Countries. At that time, it was considered appropriate, both from a human point of view and in the interests of the signatory countries, to seek to improve the living and working conditions of these people by simultaneously addressing all the factors that kept them from enjoying national progress.

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3. The specialized agencies of the United Nations are intergovernmental organizations created by the members of the UN, endowed with broad international powers according to their respective constitutive instruments and linked to the UN by a specific agreement between the Economic and Social Council and the UN. They act autonomously from the UN, exercising their powers according to each of these specific agreements. The legal framework for their creation and operation is Article 57.1, combined with Article 63.2 of the UN Charter (Cretella Neto, p. 301-302, 2007).
  4. ILO. About the ILO. Available at [www.ilo.org/global/about-the-ilo/lang-es/index.htm](https://www.ilo.org/global/about-the-ilo/lang-es/index.htm), accessed at 17:20 on 03/01/2024.

Convention No. 107 is of crucial historical importance in the affirmation of an international right for Indigenous people because it was in that document that the concept of Indigenous people as a collectivity was adopted internationally for the first time, establishing that their members have the right to equality like all other citizens. In addition, the notions of the collective right to land, the right to education in their native languages, among other specifics, were also recognized. It is noteworthy that it was through this recognition that the customary law or customary law of Indigenous people, in other words, the customs and ways in which these individuals resolved their disputes, was internationally recognized. A recognition that, moreover, was advanced for the time.<sup>5</sup>

Convention No. 107 was revised and replaced by Convention No. 169 on Indigenous and Tribal Peoples of June 7, 1989. This is the most comprehensive international legal document on the protection of Indigenous and Tribal peoples ever adopted, as it recognizes their aspirations to take control of their own institutions, way of life and economic development. Its object of protection are those peoples of independent countries who are considered indigenous because they are descended from populations living in the country or in a geographical region belonging to it at the time of conquest, colonization or current border settlement, retaining, whatever their legal status, all their main cultural, economic, political and social institutions. It also applies to tribal peoples in independent countries whose cultural, economic and social conditions set them apart from

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5. Gómez, Magdalena. *Derechos Indígenas. Lectura Comentada del Convenio 169 de la Organización Internacional del Trabajo*. Instituto Nacional Indigenista. México, 1995, p. 12.

other sectors of the national community, being governed totally or partially by their customs, traditions or special legislation.<sup>6</sup>

For the ILO,<sup>7</sup> the premise for a durable existence of Indigenous and Tribal peoples is centered on the binomial of respect and participation; i.e. respect for culture, religion, social and economic organization, as well as their own identity. Awareness of their Indigenous or Tribal identity is considered a fundamental criterion for determining the groups concerned: no country or social group has the right to deny the identity capable of affirming an Indigenous or Tribal people. This is the principle of self-identification, so dear to minorities in 21st century international human rights law. Thus, the use of the term peoples in Convention No. 169 informs us that these are not populations, but peoples with their own identity and organization; especially because the Convention, in its Article 1, paragraph 3, makes it clear that the use of the term peoples should not be interpreted as implying any rights that may be conferred on this term in international law.<sup>8</sup>

The interpretation of ILO Convention 169 indicates to its States Parties that their governments must take responsibility, with the participation of the peoples concerned, for developing actions to protect the rights of Indigenous and Tribal peoples, guaranteeing respect for their integrity. Specific measures

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6. Adopted during the 76th meeting of the International Labor Conference, held in Geneva, Switzerland, headquarters of the ILO. It came into force on 06/09/1991. As of that date, Convention No. 107 is no longer open for ratification by member states but will remain in force only for those that have ratified it but do not ratify the new Convention No. 169. In Brazil, Convention No. 169 was promulgated by Decree No. 5.051 of April 19, 2004. ILO. Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. ILO. 4th ed. Costa Rica, 2001, p. iii-iv.

7. ILO. Convention No. 169 concerning *Indigenous and Tribal Peoples in Independent Countries*. ILO. 4th ed. Costa Rica, 2001, p. v.

8. ILO. *Convention No. 169 concerning Indigenous...* p. 6.

should also be adopted to safeguard people, institutions, their property, work, culture and the environment. Indigenous and tribal peoples must be able to fully enjoy their human rights and fundamental freedoms without any obstacle or discrimination.<sup>9</sup>

As a result of the affirmation, application, consolidation and development of the above premises, free, prior and informed consent, a cornerstone in the international protection of Indigenous and Tribal peoples, is enshrined in the international law of Indigenous people, under ILO Convention 169. This means consulting the peoples concerned every time there are plans to adopt measures that could directly affect Indigenous and tribal peoples. Countries must establish how these peoples can freely participate in the adoption of decisions in elective institutions and other bodies. Furthermore, it is reiterated that they have the right to decide their own priorities in the development process, if it affects their lives, beliefs, institutions, spiritual well-being, the lands they occupy or otherwise use, and to control, as far as possible, their own economic, social and cultural development. Indigenous and Tribal peoples must be able to participate in the formulation, implementation and evaluation of development plans and programs that directly affect them. Article 6 of the Convention regulates all these key points and concludes, in its second paragraph, by stating that consultations must be conducted in good faith and in a manner appropriate to the circumstances, with the aim of obtaining consent for the proposed measures.<sup>10</sup> The consent provided for by the Convention can be summarized as approval by the assembly of affected individuals on the condition that the works undertaken, or the resources exploited, are for the direct benefit of the community that owns those resources. In this case, consent translates as a principle for democracy, not a power over another; it means that countries

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9. ILO. *Convention No. 169 concerning Indigenous...* p. v.

10. ILO. *Convention No. 169 concerning Indigenous...* p. 10-11.

cannot apply unilateral measures with respect to the rights and freedoms of Indigenous people.<sup>11</sup>

Convention No. 169, in its second part dealing with the lands of Indigenous and Tribal peoples, clarifies in Article 13(2) that the use of the term lands shall include the concept of territories, which covers the entire habitat of the regions that the peoples concerned occupy or otherwise use. Article 15(1) gives Indigenous people the right to participate in the use, administration and conservation of the natural resources of their lands. Article 15(2) regulates consultation with Indigenous peoples if the State has ownership of minerals, subsoil resources or other resources existing on these lands.<sup>12</sup>

For Indigenous people, the land has a profound and highly transcendent meaning: it is “Mother Earth,” the entity that welcomes them and feeds them. As a result, there is an interactive ring between Indigenous people, the environment, fauna and flora. It is only natural, therefore, that this interaction should be included in the process of the normative and institutional consolidation of an international law on Indigenous people.<sup>13</sup> We should remember the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, approved Agenda 21, Chapter 26 of which gives a central position to Indigenous people, who are considered essential agents for the affirmation of environmental programs. This chapter recommends protecting Indigenous lands against activities that pose risks to the environment or that the population considers to be socially and culturally improper. In addition, Indigenous people may require greater control

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11. Gómez, Magdalena. *Derechos Indígenas...* p. 94.

12. ILO. *Convention No. 169 concerning Indigenous...* p. 17.

13. Leão, Renato Zerbini Ribeiro. *Pueblos indígenas, globalización y derechos humanos*. Meridiano 47, No. 6, IBRI. Brasília, 2000.



over their lands and resources. Countries should also establish national laws and policies related to resource management and other development processes that may affect Indigenous people, who should actively participate in the formulation of laws and public policies concerning them.<sup>14</sup>

## **2. The United Nations Human Rights Treaty Body System and Indigenous People**

Human rights are a basis of the UN. Article 1(3) of its Charter states that it exists, among other reasons, to “promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”<sup>15</sup> The literalness of this rule unquestionably includes Indigenous people as full subjects and beneficiaries of these rights.

Although the ILO is a specialized agency of the UN, it has other structures capable of providing Indigenous people with effective protection within the framework of international human rights law in the 21st century.

### **2.1 The International Bill of Human Rights and the protection of Indigenous people**

The International Bill of Human Rights is the name given to the set of documents originally made up of the Universal Declaration of Human Rights (UDHR),<sup>16</sup> the International Covenant on

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14. Leão, Renato Zerbini Ribeiro. *O regime da vanguarda do direito internacional público: ciência, direitos humanos, meio-ambiente, migrações, povos indígenas e trabalho decente*. Trampolim jurídico. Brasília, 2021, p. 161-162.

15. The Charter of the United Nations, also known as the Charter of San Francisco, is the international treaty that created the UN. It came into force on October 24, 1945.

16. It was proclaimed on 10/12/1948 by the UN General Assembly (UNGA).

Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>17</sup> and their protocols and additional documents.<sup>18</sup>

The Covenants identify three responsibilities that fall on States because of the necessary protection of the rights contained therein. The first is that of respect, i.e. States must refrain from interfering directly or indirectly with these rights. The second is that of protection, i.e. States must take measures to ensure that other actors, such as business people, political groups, religious groups or anyone else, do not interfere with these rights. Finally, the third is that of enjoyment, i.e. States must take measures to make effective these rights.<sup>19</sup>

Both Covenants are legally binding on their States Parties. As of January 10, 2024, 173 countries are party to the ICCPR and 171 to the ICESCR. Each is overseen by a committee of independent experts, which assesses the countries' compliance and progress by reviewing their periodic reports. After a constructive and interactive dialogue with the States Parties, the Committees publish their concluding observations, which can promote changes in national legislation, public policies and local practices in favor of affirming human dignity. The Committees also receive individual complaints from citizens of

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17. The ICESCR and the ICCPR were adopted by the UNGA on December 16, 1966 (Resolution 2200 A XXI) and entered into force on January 3 and March 23, 1976, respectively.

18. The ICCPR was joined by an Optional Protocol on Individual Communications in 1966 and a Protocol to abolish the death penalty in 1988. On May 5, 2013, the Optional Protocol to the ICESCR on Individual Communications entered into force.

19. Leão, Renato Zerbini Ribeiro. "Os 50 anos dos dois pactos internacionais da ONU: um olhar especial sobre o Comitê de Direitos Econômicos, Sociais e Culturais." In: Cançado Trindade, Antônio Augusto; Leal, César Barros e Leão, Renato Zerbini Ribeiro (Coord.). *O cinquentenário dos dois pactos de direitos humanos da ONU*. IBDH, vol. 1. Fortaleza, 2016, p. 260.

States that have also ratified the Covenants and their Protocols, assessing whether they should remedy a situation where rights are violated or, if not, justify the actions of States Parties when rights are not violated.<sup>20</sup>

The Committees prepare general observations which are an interpretative analysis of the normative content of the different articles of both Covenants. These help States Parties and the community in general to understand the scope and meaning of each of the articles set out in the Covenants and the freedoms and rights that everyone can enjoy. The Committee on Economic, Social and Cultural Rights (CESCR) oversees the ICESCR and the Human Rights Committee monitors the ICCPR. Since the proclamation of the Universal Declaration of Human Rights on December 10, 1948, every country in the world has had an international code on how to behave and how to judge others. It is a code that not only applies universally, but also contains precepts that are valuable in areas previously not considered by constitutions. With the consolidation of the International Bill of Human Rights, this code has materialized into fundamental human rights.<sup>21</sup>

Human rights are complementary, indivisible and universal. The mere existence of the human being signals that they are a harmonious whole, are mutually dependent in such a way that they complement each other and must be protected by States under all circumstances. Therefore, civil and political rights, as well as economic, social and cultural rights, impose three distinct classes of obligations on States: to respect, to guarantee and to satisfy. The first requires States to refrain from interfering

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20. Leão, Renato Zerbini Ribeiro. "Os 50 anos dos dois pactos internacionais"... p. 260-261.

21. Leão, Renato Zerbini Ribeiro. "Os 50 anos dos dois pactos internacionais"... p. 261.

in the enjoyment of these rights; the second requires States to oppose violations of these rights by third parties and the third requires States to adopt legislative, administrative, budgetary, judicial and other provisions that are capable of promoting the full exercise of these rights. In the light of the principle of equality and non-discrimination, every human being is entitled to enjoy these rights without any kind of ethnic, national, political, racial, religious or other restriction. This obviously includes Indigenous people.<sup>22</sup>

The contributions of both Committees to the consolidation of Indigenous people's human rights have been remarkable throughout their existence. The Human Rights Committee, for example, in its General Comment No. 23, which deals with the rights of minorities, stated that the right to culture of minorities includes the protection of the way of life of Indigenous people, which is especially connected to the enjoyment of their traditional activities and their lands. Therefore, the exercise of Indigenous people's rights requires the adoption of positive legal protection measures, as well as other effective measures to guarantee the participation of members of their communities in decisions that may affect them.<sup>23</sup>

In the context of individual communications, the Human Rights Committee has adopted decisions that have influenced the affirmation of the international rights of Indigenous people.

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22. Leão, Renato Zerbini Ribeiro. "O meio ambiente e o Pacto Internacional de Direitos Econômicos, Sociais e Culturais." In: Cançado Trindade, Antônio Augusto e Leal, César Barros. *Direitos Humanos e Meio Ambiente*. IDH. Fortaleza, 2017, p. 254.

23. UN. Document HRI/GEN/1/ver.9 (Vol.1). General Comment No. 23-Rights of minorities (article 27 of the International Covenant on Civil and Political Rights). Fiftieth session. 1994, p. 251, §§6.2 and 6.3.

In its Communication No. 549,<sup>24</sup> which involved an attempt to build a hotel complex on a traditional indigenous cemetery, the Committee interpreted that the term “family” for these people, in line with Articles 17 and 23 of the ICCPR, is broad and must be viewed from the perspective of the society in question. Therefore, the definition of the term “family” in a concrete situation must be considered in the light of the cultural traditions pertinent to this group of individuals who live of their own free will and are governed by common norms. Thus, the term “family” included the relationship between the Indigenous plaintiffs and their traditional cemetery, since the relationship with their ancestors constituted an essential element of their identity, fulfilling an important function in their family lives.

Furthermore, in its decision on Communication No. 1457,<sup>25</sup> the Human Rights Committee, in dealing with a complaint of the diversion of water from indigenous lands by the State Party to the ICCPR that allegedly constituted a violation of the life, family and culture of the Indigenous people affected, considered that participation in a decision-making process by indigenous people about their lands must be effective, which is why mere consultation is not enough, but requires the free, prior and informed consent of the members of the community. Furthermore, all the measures taken in this case should respect the principle of proportionality, so that the very livelihood of the community and its members is not endangered.

However, it is undoubtedly within the framework of the CDESCR that Indigenous people find a broad and varied environment of protective attention from the perspective of international human

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24. UN. HRC. *Case of Francis Hopu vs. France*. Communication No. 549/1993. Decision of 29/07/1997, §10.3.

25. UN. HRC. *Case of Poma Poma vs. Peru*. Communication No. 1457/2006. Decision of 27/03/2009, §7.6.

rights law. There is a clear connection between Indigenous people and economic, social and cultural rights, which includes the environment, sustainable development, fauna and flora.

The CESCER is aware that Indigenous people and the environment form an indissoluble interactive ring. Consequently, the issue of land deserves special attention. Concerned about the increase in mining concessions in indigenous territories, the lack of protection of indigenous people's lands and territories, as well as the relaxation of rules regulating extractivism in these lands, the Committee recommended that a State Party adopt all the necessary measures for the legal security of the lands, territories and natural resources occupied and traditionally used by indigenous peoples. It also recommended that the country ensure that consultations are held with Indigenous people based on their free, prior and informed consent for the management of their lands and territories.<sup>26</sup>

In fact, the last time Brazil dealt with the CESCER,<sup>27</sup> after a thorough study of the second official report sent by the State Party, the CESCER welcomed the country's ratification of ILO Convention 169 and recommended that the State quickly complete the process of demarcating and granting indigenous lands; include in its next official report information on the measures taken for access to employment for indigenous people living outside the reserves and take the necessary measures to curb deforestation so that indigenous people can fully enjoy their economic, social and cultural rights.<sup>28</sup>

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26. UN. ECOSOC. Document E/C.12/ECU/CO/4. *Concluding observations on the fourth periodic report of Ecuador*. 14/11/2019, §§. 15-16, p. 3.

27. The last constructive dialogue between Brazil and the CESCER took place on May 6 and 7, 2009 in Geneva, Switzerland, the Committee's headquarters.

28. UN. ECOSOC. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: BRAZIL*. 12/06/2009, p. 2, §5. a; p. 4, §9; p. 6, §16; p. 9, §26.

In the light of current international law and practice, as well as the measures recently adopted by countries regarding Indigenous people, the Committee considered it appropriate to identify elements that contribute to defining the right to health of Indigenous people and for the States Parties to make use of the provisions contained in Article 12 of the Covenant. The CESCR considers that Indigenous people have the right to specific measures to improve their access to health services and care.<sup>29</sup> These include making health services culturally appropriate; i.e. considering preventive care, curative practices and traditional medicines. Resources should also be provided for Indigenous people to establish, organize and control these services so that they can enjoy the highest possible level of physical and mental health. Medicinal plants, animals and minerals necessary for the full enjoyment of Indigenous people's health should also be protected. According to the Committee, in Indigenous communities, the health of the individual is linked to the health of society, thus presenting a collective dimension. In this regard, the CESCR considers that activities related to development that can induce the displacement of Indigenous people, against their will, from their territories and traditional lands, with the consequent loss of their food resources and the

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29. In this sense, it is worth highlighting the unanimous decision of the Brazilian Superior Federal Court (STF) which, on August 5, 2020, in the case of the Argument for Non-Compliance with Fundamental Precept (ADPF) 709, ordered the Federal Government to adopt urgent measures to protect indigenous people during the pandemic of the new coronavirus by containing it. These measures include the creation of sanitary barriers and a situation room, the removal of invaders and the presentation of a plan to deal with Covid-19 on the lands and territories of Indigenous people, as well as their access to the health system. ADPF 709 was filed by the Articulation of the Indigenous People of Brazil, together with six political parties (PSB, PSOL, PCdoB, Rede, PT, and PDT). They argue that the federal government has failed to combat the coronavirus in indigenous villages.

disruption of their symbiotic relationship with the land, have a detrimental effect on their health.<sup>30</sup>

It should be noted that the CESCR developed and applies its doctrine on Indigenous people, highlighting the existence of collective cultural rights that can only exist if practiced by the community itself. Therefore, the collective dimension of a right would not be the same as a collective right, such as the rights of Indigenous people. In this sense, the Committee took a significant step by establishing that the right of everyone to participate in cultural life includes both the right of minorities as such, a collective right, and that of those belonging to them, an individual right.<sup>31</sup> It also stated that this right obliges States to recognize, respect and protect the culture of minorities as an essential constituent element of their own identity.<sup>32</sup>

In its concluding observations, the CESCR did not shy away from recommending concrete actions to protect the cultural rights of Indigenous people. In expressing concern at the persistent limitation of the measures adopted by States Parties with regard to respect for cultural diversity and to the promotion of the use of indigenous languages, the Committee recommended the adoption of the necessary measures to strengthen the protection of cultural rights and the respect for cultural diversity, as well as

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30. UN. ECOSOC. Document E/C.12/2000/4. *General Comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*. 11/05/2000, §27.

31. UN. ECOSOC. Document E/C.12/GC/21/Rev.1. *General Comment no. 21 (2009) on the right of everyone to take part in cultural life (article 15, paragraph 1(a), of the International Covenant on Economic, Social and Cultural Rights)*. 19/11/2009, §35, p. 9.

32. Marchán, Jaime. "El Pacto Internacional de Derechos Económicos, Sociales y Culturales: breve reseña de los primeros años del Comité DESC y de su aporte a la cultura." In: Cançado Trindade, Antônio Augusto; Leal, César Barros e Leão, Renato Zerbini Ribeiro (Coord.). *O cinquentenário dos dois pactos de direitos humanos da ONU*. IBDH, vol. 1. Fortaleza, 2016, p. 165.



the creation of the necessary conditions for indigenous people to conserve, develop, express and disseminate their identity, history, culture, languages, traditions and customs.<sup>33</sup>

The CESCR has also not shied away from informing States Parties of the special attention that they must pay to Indigenous people during this pandemic. In its statement on the pandemic, the Committee highlights the vulnerability of Indigenous people to Covid-19. This is a group that lacks adequate access to water, disinfectants and soap, as well as having limited access to hospital or health infrastructures for coronavirus testing. What is more, Indigenous communities have higher percentages of chronic diseases and various health disorders, making them a high-risk group for Covid-19 infection, since there is little or no access to health services and information.<sup>34</sup> Therefore, measures of all kinds, by all available means and to the maximum of available resources should be adopted by States Parties to the ICESCR, such as Brazil, to protect Indigenous people in the context of the Covid-19 pandemic.

As a result, special and specific measures of an urgent nature must be taken to protect and mitigate the effects of the pandemic on Indigenous people. These could be, for example, the provision of water and soap; the implementation of specific programs to protect the jobs, salaries and pensions of all workers, including indigenous workers; the imposition of a moratorium on forced evictions or foreclosures of housing during the pandemic; the adoption of specially adapted measures to protect their health, livelihoods and ways of life, among others. All of these are

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33. UN. ECOSOC. Document E/C.12/COL/CO/6. *Concluding observations on the sixth periodic report of Colombia*. 19/10/2017, §§65-66, p. 11-12.

34. UN. ECOSOC. Document E/C.12/2020/1. *Declaration on the pandemic of coronavirus disease (COVID-19) and economic, social and cultural rights. Statement of the Committee on Economic, Social and Cultural Rights*. 17/04/2020, §9, p. 3.

strictly in line with the economic, social and cultural rights set out in the ICESCR.<sup>35</sup>

The CESCR pays special attention to Indigenous people. In its General Comment on science and economic, social and cultural rights, it emphasized that local, traditional and Indigenous knowledge, especially concerning nature, species (flora, fauna and seeds) and their properties, is precious and has an important role to play in the global scientific dialogue. States Parties to the ICESCR should therefore adopt measures to protect this knowledge through diverse means, including special intellectual property regimes that ensure that Indigenous people have ownership and control of this traditional knowledge.<sup>36</sup>

Furthermore, with a view to a worldwide intercultural dialogue in favor of scientific progress, Indigenous people must share their scientific contributions because science must not be used as an instrument of cultural imposition. Countries must provide Indigenous people, respecting their inherent free will, with the educational and technological means necessary to participate in this dialogue. Also, all necessary measures must be adopted to respect and protect the rights of Indigenous people, particularly land, identity, the protection of moral and material interests derived from their knowledge, of which they are individual or collective authors. The CESCR reaffirms the need for genuine consultations to obtain free, prior and informed consent whenever States Parties or non-State actors conduct research, take decisions or create

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35. UN. ECOSOC. Document E/C.12/2020/1. *Declaration on the pandemic of coronavirus disease (COVID-19) and economic, social and cultural rights. Statement of the Committee on Economic, Social and Cultural Rights.* 17/04/2020, §15, p. 4.

36. UN. ECOSOC. Document E/C.12/GC/25. General Comment No. 25 (2020), on science and economic, social and cultural rights (Article 15, paragraphs 1(b), 2, 3 and 4 of the International Covenant on Economic, Social and Cultural Rights). 30/04/2020, §39, p. 9.

policies relating to science that are likely to have repercussions on Indigenous people or make use of their knowledge.<sup>37</sup>

## **2.2 Other human rights treaties of the UN system and Indigenous people**

The Convention on the Rights of the Child explicitly mentions Indigenous people. Within the United Nations human rights treaty body system, it is the only one to date to do so. Article 17 expressly states that States Parties “shall encourage the media to take particular account of the linguistic needs of the Indigenous child.” Article 29(1) states that the education of the child shall be directed towards assuming a responsible life in a spirit of “friendship among all peoples, ethnic, national and religious groups and persons of Indigenous origin.” In turn, Article 30 states that in States Parties where there are children of indigenous origin, they shall not be denied “the right which corresponds to them, in common with the other members of their group, to have their own cultural life, to profess and practice their own religion, or to use their own language.”<sup>38</sup> According to the Committee on the Rights of the Child, the Convention’s international supervisory body, all of these explicit mentions of Indigenous children are a recognition that they need special measures to fully enjoy their rights.<sup>39</sup>

The Committee on the Rights of the Child pays special attention to Indigenous children. This is evidenced by the existence of

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37. UN. ECOSOC. Document E/C.12/GC/25. *General Comment No. 25 (2020), on science and economic, social and cultural rights (Article 15, paragraphs 1(b), 2, 3 and 4 of the International Covenant on Economic, Social and Cultural Rights)*. 30/04/2020, §39, p. 9.

38. In Brazil, it has been in force since 21/11/1990, with the promulgation of Decree No. 99.710.

39. UN. CRC. Document CRC/C/GC/11. *General Comment No. 11 (2009) - Indigenous children and their rights under the Convention*. 12/02/2009, p. 2, §5.

its General Comment on Indigenous children and their rights under the Convention. It highlights special protective measures for Indigenous children in situations of armed conflict or who are refugees; economic exploitation; sexual exploitation and harassment; and juvenile justice. Through its General Comment No. 11, the Committee reminds States Parties of their obligations to ensure the rights enshrined in the Convention with respect to all children subject to their jurisdiction. The obligations to respect and protect require every State Party to ensure that the exercise of the rights of Indigenous children is fully protected against any act conducted by the State party by its legislative, judicial or administrative authorities, or by any other entity or person located within the State Party.<sup>40</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination<sup>41</sup> has the Committee on the Elimination of Racial Discrimination (CERD) as its international supervisory body. It deals with Indigenous issues through an approach that is reflected in its General Recommendation No. XXIII on the rights of Indigenous people, which urges States Parties to ensure that Indigenous people enjoy equal rights regarding their effective participation in public life and that no decision related to their rights and interests is adopted without their informed consent and that they recognize and protect the rights of Indigenous people to own, explore, control and use their lands, territories and communal resources. Moreover, the States Parties are to adopt measures to return their lands and territories, which they traditionally owned, have occupied or used without the free and informed consent of these peoples, that they have been deprived of. Only when, for specific reasons this is not possible, shall the

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40. UN. CRC. Document CRC/C/GC/11. *General Comment No. 11 (2009) - Indigenous children and their rights under the Convention*. 12/02/2009, p. 15-19, §§64-78.

41. Promulgated in Brazil on 08/12/1969, by Decree No. 65.810.

right to restitution be replaced by the right to prompt and fair compensation, which, as far as possible, should be in the form of lands and territories. Finally, States Parties must guarantee Indigenous communities the exercise of their right to practice and revive their cultural traditions and customs, preserving and practicing their languages.<sup>42</sup>

The Convention Against Torture (CAT)<sup>43</sup> has charged its supervisory Committee with protecting people, minority or marginalized populations that are at substantial risk of being tortured and ill-treated. States Parties must, therefore, ensure that, within the framework of their obligations under the CAT, their laws apply in practice to all persons under their jurisdiction, including Indigenous people.<sup>44</sup>

### **2.3 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**

The UNDRIP was adopted by the United Nations General Assembly on September 13, 2007. The vote was highly favorable, as 144 UN Member States voted in favor, 11 abstained and only four (Australia, Canada, New Zealand and the United States) voted against.<sup>45</sup> Nonetheless, the latter four, despite initially voting against, have now joined it. In public international law (PIL), declarations are not formally binding. They are solemn instruments used only on special occasions, dealing with major issues and aimed at obtaining the maximum

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42. UN. CERD. Document CERD/C/GC/XXIII/1997. *General Recommendation XXIII on the rights of Indigenous people*. Fifty-seventh session, 1997, p. 1, §4.

43. Promulgated in Brazil on January 15, 1991, by Decree No. 40.

44. UN. CAT. Document CAT/C/GC/2. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2 - Implementation of Article 2 by States Parties*. 24/01/2008, p. 7, §21.

45. UN. CHRGA. Document E/3616/Rev.11. *Report of the Commission on Human Rights on its 18th session*. 30/09/2011, §105.

attention of the international community for the issue in question. The UNDRIP follows a worldwide consensus on the rights of Indigenous people, bringing freedoms and rights already recognized by various sources of IPL such as customs and international treaties, as well as norms and principles that affirm the free determination and non-discrimination of Indigenous people. UNDRIP is therefore an important instrument of PIL and human rights.

All the rights set out in the UNDRIP are indivisible and interrelated. Therefore, the effects of self-determination extend to other rights, such as the right to culture, which also encompasses the autonomy of Indigenous people in the cultural sphere. The right to self-determination gives Indigenous people the right to autonomy or self-government in matters relating to their internal and local affairs, as well as to having the means to finance their autonomous functions. Similarly, because of their autonomy, Indigenous people have the right to promote, develop and maintain their institutional structures, their own customs, spirituality, traditions, procedures, practices and legal systems. Furthermore, these peoples have the right to participate in the adoption of decisions on matters affecting their rights and the countries have the obligation to hold consultations, cooperating to obtain free, prior and informed consent.<sup>46</sup>

The UNDRIP also recognizes the right of Indigenous people to their lands, territories and resources. It also affirms the close relationship between the rights of Indigenous people and economic, social and cultural rights, recalling that these rights are conferred on indigenous individuals who organize themselves into peoples, which indicates a dimension of collective rights.

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46. UN. *United Nations Declaration on the Rights of Indigenous Peoples*. Rio de Janeiro: UNIC, 2008, articles 4, 18 and 34.

All this institutionality and normativity must be viewed in the light of the principle of equality and non-discrimination.

### **3. The Right of Indigenous People in the Jurisdiction of the Interamerican Court of Human Rights (I/A Court HR)**

The Inter-American Court of Human Rights is the international body for the judicial supervision of the American Convention on Human Rights (ACHR), also known as the Pact of San José. The Court has three priority functions. One is to give an opinion or express a view, at the request of a Member State or an OAS body, on any point or interpretation of the ACHR, the so-called advisory function (Art. 64). Another is to adopt provisional measures of protection in cases of extreme gravity and urgency, whenever it is necessary to avoid irreparable harm to individuals (Art. 63(2)). Finally, it has the function of deciding cases, handing down judgments involving States Parties to the ACHR (Art. 62).<sup>47</sup> The Court has provided a historic and relevant service for the affirmation of an international right for Indigenous people in the region. Its decisions reverberate throughout the world. In this regard, it has already acted under the mandate of its three functions. However, the main global legal influence of the Court in favor of affirming the human dignity of Indigenous people in the Americas and elsewhere is derived especially from its contentious function; i.e. the cases it decides.

Within the jurisdictional framework of the Inter-American Court, there are many and varied cases in which it has been able to express its views on the significance of lands for Indigenous

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47. In Brazil, the ACHR was promulgated by Decree No. 678 of November 6, 1992. Brazil denounced the reservation made regarding the recognition of the contentious jurisdiction of the Court on December 10, 1998.

communities, their communal properties and their cultural dimension. In short, for the Court, the culture of indigenous people corresponds to a particular way of life of being, seeing and acting in the world, materializing from their close relationship with their traditional territories and the resources found therein, not only because these are their main means of subsistence, but also because they constitute an integral element of their worldview and religiosity and, therefore, of their cultural identity. Thus, countries must effectively protect the rights of these peoples by taking into account their particularities, economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, uses and customs; see, for example, the judgments in the *Sawhoyamaxa Indigenous Community*<sup>48</sup> and the *Yakye Axa Indigenous Community*<sup>49</sup> cases.

The I/A Court has found that Indigenous people have an inseparably comprehensive and umbilical relationship with their traditional lands. The concept of ownership in relation to this territory is not centered on the individual, but on the community. The Court's case law demonstrates that States Parties to the ACHR must provide effective protection for the rights of Indigenous people and act in such a way as to consolidate well-defined lines of decision-making on the matter; which include judicial guarantees and judicial protection, establishing that Article 14(3) of ILO Convention 169 (adequate legal procedures), in conjunction with Articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention, obliges the States to offer an effective remedy with due process guarantees to members of indigenous communities that allow them to request ancestral land claims,

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48. I/A Court HR. *Case of the Sawhoyamaxa Indigenous Community*. Series C, No. 146. Judgment of March 29, 2006, para. 83.

49. I/A Court HR. *Case of the Yakye Axa Indigenous Community*. Series C, No. 125. Judgment of June 17, 2005, para. 63.



as a guarantee of their communal property, as it ruled in the *Yakye Axa Indigenous Community* case.<sup>50</sup> In fact, the Court has reiterated that, in accordance with Articles 1 (obligation to respect rights) and 2 (duty to adopt provisions in domestic law) of the ACHR, States must establish in their domestic legal systems the appropriate procedures for processing Indigenous people's land claims, ensuring that such procedures are accessible and timely. This is clear, for example, from the decisions regarding the *Sawhoyamaxa*<sup>51</sup> and *Yakye Axa*<sup>52</sup> Indigenous communities.

Another important line of decision-making in relation to Indigenous people rests on reparations. In its ruling on the *Plan de Sánchez Massacre* case, the Court took into account the damage caused by the lack of proper burial rituals for the loved ones of an indigenous Mayan people, the replacement of their leaders by State agents, the discrimination in access to justice for these people and the impact on the traditional way of transmitting their culture. Consequently, it stated that in such cases individual reparations should have as a key component reparation granted to the members of the communities. To facilitate the dissemination of the human rights of the Indigenous people subject to its jurisdiction, it ordered, *inter alia*, that Guatemala translate the American Convention and all the judgments handed down in this case into the Achí Mayan language. In addition, the Court gave special consideration to the suffering of the community, ordering the State to make available, through the Academy of Mayan Languages of

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50. I/A Court HR. *Case of the Yakye Axa Indigenous Community*. Series C, No. 125. Judgment of June 17, 2005, paras. 95-96, 125 and 162.

51. I/A Court HR. *Case of the Sawhoyamaxa Indigenous Community*. Series C, No. 146. Judgment of March 29, 2006, para. 109.

52. I/A Court HR. *Case of the Yakye Axa Indigenous Community*. Series C, No. 125. Judgment of June 17, 2005, para. 102.

Guatemala or another organization, an educational program for the study and dissemination of the Achí Mayan culture.<sup>53</sup>

The recognition of Indigenous people's right to collective ownership of their ancestral and traditional lands and territories has been the subject of consistent progress by the Court. This can be seen in its jurisprudence in the cases of *Mayagna (Sumo) Awas Tingni Community*,<sup>54</sup> *Yakye Axa Community*,<sup>55</sup> *Sawhoyamaxa Community*<sup>56</sup> and *Xucuru Indigenous People and its members*.<sup>57</sup> Furthermore, the Court has protected the right to personal integrity of the members of a community in the face of the impossibility of holding funeral ceremonies, of returning peacefully and with dignity to their land and territory, as happens in the cases of indigenous communities that are victims of forced internal displacement or that are forced to seek refuge, for example in the case of the *Moiwana Community*.<sup>58</sup> The Court also recognizes the right to use the Indigenous language as a way of exercising freedom of expression and thought. Likewise, the Court protects the right of indigenous people to their own forms of political organization, in accordance with their traditions, as an exercise of their political rights, establishing that, in accordance with the principle of equality before the law, States have an obligation to guarantee people in

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53. I/A Court HR. *Case of the Plan de Sánchez Massacre*. Series C, No. 105. Judgment of April 29, 2004, paras. 86-87 and 110.

54. I/A Court HR. *Case of the Mayagna (Sumo) Awas Tingni Community*. Series C, No. 79. Judgment of August 31, 2001, paras. 144-149.

55. I/A Court HR. *Case of the Yakye Axa Indigenous Community*. Series C, No. 125. Judgment of June 17, 2005, paras. 140-148.

56. I/A Court HR. *Case of the Sawhoyamaxa Indigenous Community*. Series C, No. 146. Judgment of March 29, 2006, paras. 135-141.

57. I/A Court HR. *Case of the Xucuru Indigenous People and its members*. Series C, No. 346. Judgment of 05/02/2018, para. 124.

58. I/A Court HR. *Case of the Moiwana Community*. Series C, No. 124. Judgment of June 15, 2005, paras. 98-102.

conditions of vulnerability, marginalization and discrimination the legal and administrative conditions that ensure them this right, as in the *Yatama* case.<sup>59</sup>

In its judgment on the *Saramaka* case,<sup>60</sup> the Court expressly recognized the State's duty to consult the community, in accordance with its traditions and customs, on any project that may affect it, including informing it of environmental risks, as a safeguard measure to preserve, protect and guarantee the special relationship between Indigenous people, their land and their territory. At the same time, the Court has considered that the free, prior and informed consent of Indigenous people is especially necessary when large-scale development or investment projects are involved that may have a major impact on the lands of Indigenous, Original or Tribal peoples. This position was reiterated in the case of *Kichwa de Sarayaku vs. Ecuador*,<sup>61</sup> in which the I/A Court once again stressed the importance of conducting prior environmental impact studies, with the participation of the affected Indigenous communities, before any project is developed in their territories. Therefore, States must ensure that projects are not granted in Indigenous territories unless and until independent and technically capable entities carry out, in cooperation with the indigenous people affected and under the supervision of the State – with the aim of assessing the social, spiritual, cultural and environmental impact of the work in question on the indigenous communities – analyses and impact studies in the light of the free, prior and informed consent of the Indigenous people affected.

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59. I/A Court HR. *Case of Yatama v. Nicaragua*. Series C, No. 127. Judgment of June 23, 2005, paras. 240-248.

60. I/A Court HR. *Case of the Saramaka People*. Series C, No. 172. Judgment of 11/28/2007, paras. 133-134.

61. I/A Court HR. *Case of Kichwa de Sarayaku vs. Ecuador*. Series C, No. 125. Judgment of June 27, 2012, paras. 313-317.

In its advisory opinion on the environment and human rights, the I/A Court highlighted the intrinsic connection between Indigenous people, their lands and territories, which means that these and the natural resources they use must be protected as a guarantee of the continuity of the traditional way of life to which they are accustomed in the light of their cultural identity, social structure, economic system, customs, beliefs and distinct traditions. This entire environment and set of features must be guaranteed and protected by States Parties to the American Convention.<sup>62</sup>

For the first time in litigation, in the case of *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association*, the Court autonomously analyzed the rights to a healthy environment, adequate food, water and cultural identity based on Article 26 of the ACHR (progressive development of economic, social and cultural rights). The Court examined these four rights with respect to their interdependence and according to the specificities of Indigenous people. As such, it considered that illegal deforestation, as well as the activities conducted in Indigenous territory by the mestizo population, notably cattle breeding and the installation of fences, had an impact on environmental goods, affecting the Indigenous communities' traditional way of eating and their access to water, which has altered the Indigenous people's way of life, damaging their cultural identity. Furthermore, these activities did not have the consent of the Indigenous people and although the State was aware of these harmful activities and took various actions, these were not effective in stopping them nor did they guarantee

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62, I/A Court HR. *Environment and Human Rights (State obligations in relation to the environment in the framework of the protection and guarantee of the rights to life and personal integrity - interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Series A, No. 23. Advisory Opinion OC-23/17 of 15 November 2017, para. 169.

Indigenous communities the possibility of determining which activities could be conducted in their territories. As a result, the Court held that the State violated Article 26 of the Convention in relation to its Article 1(1) (obligation to respect rights without discrimination of any kind).<sup>63</sup>

It is worth highlighting the Court's action of July 1, 2022 when it issued a provisional measure against Brazil demanding measures to "protect the life, personal integrity and health of the members of the Yanomami, Ye'kwana and Munduruku Indigenous people." The Court acted after the Inter-American Commission on Human Rights considered that the situation of the individuals of these three peoples was "extremely serious and urgent." Consequently, the I/A Court, exercising the powers conferred on it by Article 63(2) of the American Convention and Articles 27 and 31 of its Rules of Procedure, unanimously decided to request the State of Brazil:

1. to adopt the necessary measures to effectively protect the life, personal integrity, health and access to food and drinking water of the members of the Yanomami, Ye'kwana and Munduruku Indigenous people,<sup>64</sup> from a culturally appropriate perspective, with a gender and age focus
2. to request the State to adopt the necessary measures to effectively protect the life, personal integrity, health and access to food and drinking water of the members of the Yanomami, Ye'kwana and Munduruku Indigenous

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63. I/A Court HR. *Case of Indigenous Communities Members of the Lhaka Honhat (Our Land) Association*. Series C, No. 400. Judgment of February 6, 2020, paras. 331-369.

64. Identified Indigenous people from the following ethnic groups: Yanomami, Munduruku, Sai Cinza, Kayabi, Praia do Índio and Praia do Mangue Reserves, Sawré Muybu and Sawré Bapin.

people. Request the State to adopt the necessary measures to prevent sexual exploitation and violence against the women and children of the beneficiary Indigenous People;

3. Request the State to adopt culturally appropriate measures to prevent the spread and mitigate the contagion of diseases, especially Covid-19, offering the beneficiary people adequate medical care, in accordance with applicable international standards;
4. Request the State to adopt the necessary measures to protect the life and personal integrity of the Indigenous leaders of the beneficiary Indigenous Peoples who are under threat;
5. Request the State to immediately coordinate the planning and implementation of these measures with the representatives of the beneficiary people and to keep them informed of the progress of their execution;
6. Request the State to submit to the Court, no later than September 20, 2022, updated information on the measures that have been adopted;
7. Request the representatives of the beneficiaries to submit their observations within three weeks of notification of the States Party's report requested in the sixth operative paragraph, and the Inter-American Commission on Human Rights to submit its observations on the States Parties' report and the representatives' observations within two weeks of receipt of the latter;

8. Request the States Party to continue informing the Court every three months, as of the submission of its last report, of the provisional measures adopted.<sup>65</sup>

### **3.1 The American Declaration on the Rights of Indigenous Peoples (ADRIP)**

At the inter-American level, since the first Inter-American Indigenous Congress in 1940, what has come to be called the “indigenous problem or question” has been part of the hemispheric agenda. At the beginning of the 1990s, the Organization of American States asked the Inter-American Commission on Human Rights to prepare a draft Inter-American Declaration on the Rights of Indigenous Peoples. In 2008, the OAS Permanent Council reiterated that it remained a priority for the Organization to draw up this Declaration in close partnership with Indigenous people.

Finally, after almost 30 years of hard work, consultations and negotiations, in 2016 the OAS approved the American Declaration on the Rights of Indigenous Peoples (ADRIP)<sup>66</sup> by General Assembly Resolution 2888 (XLVI-0/16). In its preamble, the Member States of the OAS recognize Indigenous people as a fundamental and historically significant entity for the present and future of the Americas: their presence has forged current American societies, making a decisive contribution to their development, plurality and cultural diversity. Consequently, these States reaffirm their commitments to economic and social

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65. I/A Court HR. *Case of Members of the Yanomami, Ye'kwana and Mundurucu Indigenous Peoples with respect to Brazil*. Adoption of Provisional Measures. Resolution of the Inter-American Court of Human Rights of July 1, 2022, p. 17.

66. Approved at the third plenary session of the OAS General Assembly, held on June 15, 2016. Document *AG/RES. 2888 (XLVI-O/16)*.

well-being, as well as respect for the rights and cultural identity of the continent's Indigenous people.

The Declaration understands Indigenous people as original, diverse societies with their own identity that make up the whole of the Americas. In the wake of suffering historical injustices, such as the deprivation of their lands, territories and resources, among others, Indigenous people have been particularly prevented from exercising their right to development according to their own needs and interests. For this reason, the OAS Member States have recognized the urgent need to respect and promote the intrinsic rights of Indigenous people, derived from their political, economic, social and cultural structures, their spiritual traditions, history and philosophy, especially the rights to their lands, territories and resources. Furthermore, respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development.<sup>67</sup> Indigenous people and the environment form an unbreakable interactive ring.

For all these reasons, self-identification as Indigenous people is not only a right, but also a fundamental criterion for determining the application of the Declaration. By adopting the ADRIP, States pledge to respect this right, either individually or collectively, in accordance with the practices and institutions of each Indigenous people.<sup>68</sup>

In addition to self-identification, the Declaration recognizes the collective organization and multicultural and multilingual character of Indigenous people. Furthermore, special protection is given to peoples who are voluntarily isolated or in initial

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67. OAS. Document AG/RES. 2888 (XLVI-O/16). *American Declaration on the Rights of Indigenous Peoples*. 15/06/2016, p. 3-5.

68. OAS. Document AG/RES. 2888 (XLVI-O/16). *American Declaration on the Rights of Indigenous Peoples*. 15/06/2016, art. 1, §2, p. 7.



contact, such as some Amazonian peoples: they have the right to remain in this condition, living freely and in accordance with their cultures. This institutionalizes the certainty that progress in the promotion and protection of the Indigenous people of the Americas is a priority for the OAS.<sup>69</sup>

Therefore, the basic core of the ADRIP for the purposes of its application is: self-identification as an indigenous people; the right to free determination; gender equality, in the sense that indigenous women have collective rights that are indispensable for their existence, well-being and integral development as peoples; Indigenous people and communities have the right to belong to one or more Indigenous peoples, in the light of the identity, traditions and customs of belonging to each people; full recognition by States of their legal personality, respecting the forms of organization and promoting the full exercise of the rights contained in the Declaration; the right to freely maintain, express and develop their cultural identity; the right not to be the object of any form of genocide; the right not to be the target of racism, racial discrimination, xenophobia or other related forms of intolerance; the right to their own identity and cultural integrity, as well as their cultural heritage; the right to autonomy or self-government in matters relating to internal affairs; the rights and guarantees recognized by national and international labor law and the right to the lands, territories and resources they have traditionally owned, occupied, used or acquired.<sup>70</sup>

Being the first document in the history of the OAS to promote and protect the rights of Indigenous people in the Americas, the ADRIP fulfills a historic debt owed by this international

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69. OAS. Document AG/RES. 2888 (XLVI-O/16). *American Declaration on the Rights of Indigenous Peoples*. 15/06/2016, p. 7-10.

70. OAS. Document AG/RES. 2888 (XLVI-O/16). *American Declaration on the Rights of Indigenous Peoples*. 15/06/2016, p. 10-45.

organization to these peoples who have always lived and inhabited the American continent from Alaska to Tierra del Fuego.

## Conclusions

The international law of Indigenous people is an institutionalized reality. The jurisdictional exercise of the International Labor Organization, the United Nations human rights treaty body system and the Inter-American Court of Human Rights attest to the existence of a true legal regime for the universal protection of Indigenous people.

There are many standards (ILO Convention 169; International Covenant on Economic, Social and Cultural Rights; American Convention on Human Rights; among others), principles (good faith; pro persona; equality and non-discrimination; among others), rules (free, prior and informed consent, for example); resolutions signed between States (Universal Declaration of Human Rights; Universal Declaration on the Rights of Indigenous Peoples; American Declaration on the Rights of Indigenous Peoples; among others); and institutions (ILO; UN; CESC; OAS; IACHR; and many more) that are capable of influencing, by creating a standard of conduct, States, international organizations, individuals and the international community as a whole, in order to affirm the human dignity and human rights of Indigenous people.

Overcoming discriminatory inertia on the part of States towards Indigenous people is not an easy task. In fact, it never has been. One of the strategies for consolidating this regime of universal protection for Indigenous people is to make use of it, strengthening its institutions and ensuring that States comply with their international obligations in this area, which they have undertaken in good faith. To this end, knowledge of its existence

and its different channels of access is also vital for affirming the human dignity of Indigenous people in international society. Therefore, education at all levels also plays a crucial role in this process.

Brazil is a party, even accepting the contentious jurisdiction of the international bodies that supervise it, to the main international treaties on the matter. However, this does not mean that Brazil's Indigenous people are free from discrimination and from violations of their customary and historical rights. The powers of the State need to be very vigilant regarding the Indigenous people's guarantees. If not, public policies must be developed to educate present and future generations about the affirmation of Indigenous people's human rights. Especially in the wake of the Covid-19 pandemic, under the international law of Indigenous people Brazil must take all available and necessary measures for the effective and safe protection of its Indigenous people, in the light of all available resources and through the action of all the constituent powers of the State. Finally, the relationship of these peoples with the environment, fauna and flora will bequeath a healthy and sustainable planet to future generations.