



Degree Program in International Relations

Course of International Organizations and Human Rights

**The protection of the rights of Indigenous Peoples in Colombia
between international and national law: a case study of
communities of the Amazon and Northern Colombia.**

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INTRODUCTION

The latter half of the 20th century has brought a significant transformation in the human rights system. The turning point can be traced back to December 10th, 1948, when the United Nations General Assembly adopted the Universal Declaration of Human Rights¹. In fact, before 1948, the protection of human rights belonged to the domestic jurisdiction and the competence of states and was considered a matter of *domaine réservé*². This meant that each state had complete autonomy in deciding whether or not to protect human rights, which rights to protect, and to what degree. Unfortunately, many states did not prioritize human rights at that time. Therefore, citizens were considered as property of the State, implying a relation based on subjugation and not on citizenship.

Thus, after the adoption of the UDHR, “the extent of domestic jurisdiction of states started to be eroded by the growth of the new branch of international human rights law”³. Even following World War II, the development of human rights law continued fluidly, transforming the entire system of international law. Indeed, one of the fundamental aspects of international law today is the presence of obligations for states inscribed in international treaties that they have ratified, thus having binding force⁴. So, states have to provide a safe environment for their citizens, adequate remedies, and reparations for injuries, and ensure effective and proper enjoyment of human rights⁵. Many norms and obligations of international law prohibiting breaches belong to the *jus cogens* and often have *erga omnes* effects⁶.

Throughout this legal framework relating to international law and human rights, indigenous peoples have not had the opportunity to contribute to its creation; however, over time they have come to understand its importance and therefore have made it their fundamental tool for claiming their rights and denouncing centuries of violence. Indigenous peoples, who stand as one of the most vulnerable and underrepresented groups in the world, have formulated their own demand for justice

¹ United Nations, *Universal Declaration of Human Rights*, adopted by General Assembly Resolution 217 A, 1948. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

² The concept of reserved domain indicates the areas of State activity that are internal or domestic affairs of a State. Its content can vary according to the development of international law but generally, it is linked to the concept of the sovereignty of States entailing that certain matters remain under the competence of the State. A fundamental right is non-interference in the reserved domain of the State. Nevertheless, actually, the scope of *domaine réservé* is limited by customary international law.

K. S. Ziegler, *Domaine Réservé*, Oxford Public International Law, Oxford University Press, 2015, p. 2. Max Planck Encyclopedia of Public International Law [MPEPIL].

https://moodle2.units.it/pluginfile.php/383613/mod_resource/content/1/Ziegler%20%20Domaine%20r%C3%A9serv%C3%A9%20%282013%29.pdf

³ F. Lenzerini, *Reparations for Indigenous Peoples in International and Comparative Law: An Introduction*, University of Siena, 2008, p. 3.

⁴ *Ivi*, p. 4.

⁵ *Ibidem*.

⁶ *Ivi*, p. 6.

and are now at the center of interests and priorities in the international agenda⁷. Therefore, this thesis stems from a willingness to give a voice in academia to Indigenous peoples to emphasize the need to respect and protect their fundamental rights that are being violated by both governments and armed groups. Currently, despite the dense network of information circulating the world, there is a lot of misinformation and ignorance among people regarding the situation indigenous peoples are experiencing in different parts of the world - from Australia to Colombia, from Norway to New Zealand. Indeed, civil society is a key point of support to help indigenous communities that are experiencing true ecocide⁸, that is, the elimination of a people's culture through the destruction of their *habitat*⁹. This is what will be happening if action is not taken now through transnational cooperation and support from the entire international community. In addition, it is crucial to make people aware that Indigenous people are the only ones who possess the true knowledge to sustainably conserve the environment and all its ecosystems, given their ancestral connection to the lands for millennia. Therefore, the second objective that moved this research was the desire to make explicit the importance of these peoples and the lands they inhabit. I did gain this great awareness as a result of a direct experience with indigenous tribes in the Colombian Amazon jungle, which was the key that opened up further avenues for me in this area and the reason why I chose Colombia as a case study. Thus, this dissertation emerges as a testament to their enduring spirit and the urgent need for systemic change.

To conclude, I would like to mention the words enshrined in the Vienna Declaration of 1993, adopted during the World Conference on Human Rights, which recognizes:

The inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them... States should ... take concerted positive steps to ensure respect for all human rights and fundamental freedoms of

⁷ M. Rossi, *I popoli indigeni nell'ordinamento internazionale: diritto alla terra e diritti umani*. Università degli studi di Milano, 2009, p. 5.

⁸ The idea of ecocide originated during the Vietnam War when the US used chemical-based incendiary weapons that destroyed entire lands of vegetation. The term was coined by Arthur Galston, a plant biologist, 'who asked the international community to come together against ecocide'.

L. G. Minkova, *The Fifth International Crime: Reflections on the Definition of "Ecocide"*, Journal of Genocide Research, 2023, p. 69. <https://doi.org/10.1080/14623528.2021.1964688>

⁹ Cfr. *op. cit.* Rossi, 2009, p. 7 and L. Westra, *Environmental Justice and the Rights of Indigenous Peoples*, London, 2008, Routledge editor, ISBN: 0415703700.

indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization¹⁰.

¹⁰ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, A/CONF.157/23, 1993, par. 20.

Chapter One

Perspective, Fundamentals, and Framework of the Research

Summary: 1. 1 Literature review, 1. 2 An overview of research methodology, 1.3 Research structure
1.4 Objectives of the research.

“If we must die, we die defending our rights.”¹¹

1. 1 Literature review

In recent years, the impact of indigenous peoples on international law has significantly increased through their dedicated efforts and actions. These Peoples are recognized as a distinct category of non-state actors in the conventional academic setting¹². By *Indigenous People*, Anaya refers to “more or less cohesive groups whose ancestors were the original inhabitants of lands now dominated by others¹³”.

For a long time, scholars were hesitant to acknowledge indigenous peoples as subjects of international law¹⁴. Nevertheless, the efforts made by these Peoples due to centuries of historical inequities led to conceive the issue as an international concern, as exemplified by the ILO Convention No. 169¹⁵ which marked the beginning of the protection and promotion of indigenous peoples' rights¹⁶. Despite recent scholarly attention towards the topic, it has been isolated and thus marginalized within the discourse of international law, when in fact, it has far-reaching implications on the community and international law as a whole¹⁷.

Scholars' perspectives and opinions show that there is an international regime on the indigenous peoples which gave rise to numerous volumes and works on the issue¹⁸. In general, most scholars agree that the issues related to the respect of indigenous rights “are not fully addressed by the existing international law on human rights”¹⁹ and that there is no full application of the minimum standards.

¹¹ Quote by the American indigenous Sitting Bull (1831-1890), Hunkpapa Lakota leader.

¹² S. J. Anaya, *Indigenous peoples and international law issues* in Proceedings of the ASIL Annual Meeting, Vol. 92, Cambridge University Press, 1998, p. 96

<https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/abs/indigenous-peoples-and-international-law-issues/5DFE922AE852993F1FA0A14BD1A4D0E4>

¹³ This definition includes “Indian tribes, communities of the American States and aboriginal peoples in Australia and New Zealand”. *Ibidem*.

¹⁴ C. Oguamanam, *Indigenous peoples and international law: the making of regime*. Queen's Law Journal, 30(1), 2004, p. 350.

¹⁵ The Indigenous and Tribal Peoples Convention (No. 169) was adopted in 1989 by the International Labour Conference, the “general assembly” of the ILO, during its 76th Session held in Geneva on June.

L. Swepston, *A new step in the international law on indigenous and tribal peoples: ILO convention no. 169 of 1989*. Okla. City UL Rev., 1990, p. 677.

¹⁶ *Op. cit.* Anaya, 1998, p. 97.

¹⁷ *Ibidem*.

¹⁸ *Op. cit.* Oguamanam, 2004, p. 387.

¹⁹ *Ibidem*.

In this regard, it will be difficult to advance in the field if many countries do not feel obligated to respect these rights²⁰.

However, at the end of the 1990s, there was an academic debate as to whether the efforts and claims made by the indigenous peoples have obtained the status of *opinio juris*²¹ which implies that states agree on the fact that they must recognize claims made by indigenous people as binding customary law²². From this follows the gap between morality and legality, which is the point of debate and divergence among scholars. Some of them believe that the states decide to respect the norms linked to the indigenous peoples because of their morality and not because of a legal obligation²³. I firmly believe that this conception has created numerous problems regarding the respect of rights because if a state is not bound by a legal obligation, it means that it will decide based on its degree of morality and humanity which is primarily subjective, and secondly does not guarantee regular protection and respect of such peoples over time. This also implies that without legal obligations, it would be impossible to adopt binding treaties, blocking progress concerning human rights, particularly those of indigenous peoples.

From the academic debate on this topic, I formulated the following research questions that this dissertation aims to address:

In the realm of international law, how are treaties and conventions related to indigenous peoples viewed by countries? Despite their binding nature, do states commit to certain obligations?

After addressing the issue at the international level, this dissertation will examine the current situation in Colombia at the national level. From this, then, follows a further research question:

²⁰ *Idem*.

²¹ The concept of *opinion juris*, also known as *opinio juris sive necessitatis*, represents a crucial issue and a classical problem within the framework of international law because it is a subjective element of customary international law requiring that “states follow the practice because they recognize it as a norm of international law”.

See C. Dahlman, *The Function of Opinio Juris in Customary International Law*, Lund, 2012, p. 327, *Nordic Journal of International Law* 81.

The problem stems from the meaning that is attributed to the word "recognize" and the consequences that it entails, issues on which the doctrine of scholars diverges. There are two main theories on the matter: the *Belief-Theory* and the *Acceptance Theory*. The former argues that a state “recognizes the legal right to act following the practice as a matter of fact” (*Ivi*, p. 330-331), considering the *opinion juris* as the belief that the practice is a norm of international law. Instead, the second one affirms that a practice recognized as law implies that “all states have a legal right to act following the practice” (*ibidem*).

Finally, the last argument was launched by Lazare Kopelmanas in 1937 who described *opinio juris* as a superfluous concept that can be removed from the doctrine of customary international law since he states that there is no difference on what states “accept” or “believe”, the only thing that matters is what they do (*Ivi*, p. 335).

²² *Op. cit.* Oguamanam, 2004, p. 388

²³ *Ibidem*.

Does a country like Colombia, which has a rather cutting-edge constitution regarding indigenous peoples, really respect these rights and obligations for safeguarding them? Additionally, will the current government, which is committed to forging a lasting peace, really be able to include indigenous communities in the process?

The first attempt to attribute a special status to indigenous peoples in the international legal regime was made by Raidza Torres in 1991 who failed to create legal obligations in every state²⁴. The author, with her normative thesis of moral obligation, argues that a norm doesn't need "absolute compliance with a given rule, and the international system often lacks compulsory mechanisms for implementation"²⁵. It follows from this declaration that, since there is no binding legal obligation, states are free to decide to what extent to comply with the rules on Indigenous peoples, denying the possibility of creating minimum standards to respect the indigenous rights and completely ignoring the binding nature of the ILO Convention No. 169²⁶. Therefore, the main gap in literature at the end of the 1990s was mainly about the non-recognition of the binding nature of rights and obligations enshrined in the ILO Convention No. 169, preferring morality to legality.

Nevertheless, in the early 2000s, Siegfried Wiessner argued that the indigenous question should have moved from having this normative status to being a 'hardened' norm²⁷. At that time several scholars recognized the existence of customary international law on Indigenous rights, considering *labour* as the starting point to address Indigenous issues at the international level²⁸, stressing that Torres had ignored the importance of the ILO Convention No. 169²⁹. As a result, the literature of the 2000s brought new developments in the field of the rights of indigenous peoples, surpassing the logic of morality which Torres stated. In this way, the gap between morality and legality began to narrow,

²⁴The attempt made by Raidza Torres explained in her book "The Rights of Indigenous Peoples: The Emerging International Norm" (1991), has managed to create only normative consequences based on a "non-binding moral obligation among states to respect the norms that have emerged concerning their dealings with the indigenous population". *Op. cit.* Oguamanam, 2004, p. 350.

²⁵ R. Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 Yale J. Int'l L. 127, 1991, p. 146 in *Ivi*, p. 390.

²⁶ *Ivi*, p. 391.

²⁷ S. Wiessner, *Joining Control to Authority: The Hardened 'Indigenous Norm*, 25 Yale J. Int'l L. 301, 2000, p. 305 in *Ivi*, p. 350.

²⁸ In this context, the ILO was the first main body to address the issue of indigenous peoples as it was born to end the exploitation of indigenous people by colonial industries, embracing the Trusteeship doctrine which was considered the first attempt to internationalize the obligations of colonial powers to indigenous peoples. This doctrine was created by the United Nations in the post-war era, and it showed a paternalistic nature based on the European perception of other non-European races as inferior, and as in need of civilization after European or Christian values. As a result, the first ILO Convention (No. 107) was purely based on this paternalistic approach that implied the principles of integration and assimilation of the indigenous peoples into the dominant culture. This approach did not really respect their rights and sensibilities, so it was canceled with the creation of the next convention, the N0. 169 (*Op. cit.* Oguamanam, 2004, p. 364), which is still the most concrete expression of respect for the rights of indigenous peoples in 2024.

²⁹ *Ivi*, p. 391.

giving greater attention to the importance of instruments of international law such as treaties. In this regard, Wiessner stated that:

Ruling elites have modified their laws throughout the Americas and beyond. They decided that indigenous peoples have a right to their distinct identity and dignity and the governing of their affairs...Treaties of the distant past are being honoured and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites³⁰.

In this way, the legal status of ILO Convention No. 169 is undisputed. Its binding nature obliges the states that have ratified it to respect it and shall represent the starting point for regional and national initiatives of governments, whose international directives shall be incorporated in the national ones of their legal system³¹, as happened in Colombia with the 1991 political Constitution³².

In the following years, the issue of indigenous peoples in academia focused more on the principle of self-determination³³, linked to the right to land and consequently to the domestic laws of states. As Jim Tully argued, “The right of self-determination is, on any plausible account of its contested criteria, the right of a people to govern themselves by their own laws and exercise jurisdiction over their territories”³⁴. Despite numerous writings highlighting the basic features of this principle, there are still several problems with states recognizing this principle for indigenous peoples. For example, Botswana refused to recognize the presence of indigenous communities within its borders and opposed the ratification of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), by affirming that the ratification would only increase ethnic conflicts within the

³⁰ *Op. cit.* Wiessner, 2000 at 304-305 in *Ivi*, p. 392.

³¹ *Ivi*, p. 392-393.

³² The Colombian Constitution is the only one that has left aside the integrationist approach because during the constitution-making process, Within the Constituent Assembly, there were indigenous representatives who fought to impose the principle of peoples' self-determination and expand their representation and political participation within the government. *Op. cit.* Oguamanam, 2004, p. 380.

³³ The concept of self-determination requires that “every culturally and historically distinct people have the right to choose its political status by democratic means, under international supervision, and with international support”. Its scope varies from case to case, based on specific circumstances related to different people, claims, and political contexts. “Self-determination is considered synonymous with self-preservation for indigenous peoples”, it should provide the freedom from state hegemony essential to the survival and transmission of culture, and the freedom to determine their own government. M. E. Turpel, *Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, *Cornell International Law Journal* 25, no. 3, 1992, pp. 592-593.

³⁴ J. Tully, *The Struggles of Indigenous Peoples for and of Freedom*, in Duncan Ivison, Paul Patton, and Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, 2000, p. 57 in J. Cornassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse*, *Alternatives* 33, 2008, p. 118.

African society³⁵. Another restriction to the principle of self-determination is the implementation of the so-called Saltwater Thesis which stipulates that “only territories separated by water or that were geographically separate from the colonizing power could invoke self-determination”³⁶.

Therefore, based on these events, the scholar Corntassel proposed in 2008 a new conception of the principle of self-determination of peoples, stating that for this principle to be effective, it must be closely linked to indigenous relationships to the natural world³⁷. Hence, self-determination has to be sustainable in practice to ensure a future indigenous political mobilization³⁸.

Nevertheless, between 2006 and 2008, in the literature, it is possible to identify a strong resistance from states to recognize the principle of self-determination for Indigenous peoples, along with the failure to establish a legally binding system of human rights standards for Indigenous peoples³⁹. This was especially evident in November 2006 when the member States of the UN General Assembly voted to delay the ratification of the Declaration on the Rights of Indigenous Peoples⁴⁰. Furthermore, as stressed by the legal scholar Patrick Thornberry, different countries led by the United States, Australia, and New Zealand proclaimed five objections to the approval of the UN Declaration⁴¹.

One of the main problems that create this gap in the literature consists of which factors should be considered to define the concept of self-determination. The debate among scholars lies in the fact that some of them consider culture and spirituality superfluous, focusing instead on political/legal recognition of the right⁴². So, the commonwealth, the environment natural resources, sustainability, and the transmission of cultural practices to future generations are left aside⁴³. However, already in earlier years, prominent scholars of the rights of indigenous peoples such as James Anaya stated that

³⁵ *Op. cit.* Corntassel, 2008, p. 107.

³⁶ D. Knight, *People Together, Yet Apart: Rethinking Territory, Sovereignty, and Identities*, in George Demko and William Wood, eds., *Reordering the World: Geopolitical Perspectives on the 21st Century*, Oxford: Westview Press, 1994, pp. 71–86 in *Op. cit.* Corntassel, 2008, p. 108.

³⁷ These relationships are explained in the Special Rapporteur Erica-Irene Daes’s comprehensive United Nations report entitled *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*. Here Daes affirms that the link between self-determination and natural resources must be recognized, otherwise, the principle would be meaningless.

E. A. Daes, *Indigenous Peoples’ Permanent Sovereignty Over Natural Resources: Final Report of the Special Rapporteur*. Commission on Human Rights, E/CN.4/Sub.2/2004/30, 2004, p. 7.

³⁸ *Op. cit.* Corntassel, 2008, p. 108.

³⁹ *Op. cit.* Corntassel, 2008, p. 111.

⁴⁰ This non-binding document was approved by the Human Rights Council in June 2006 after twenty-two years of consultation and development with indigenous peoples and state governments; initially, it was blocked by a Namibian-led coalition of thirty African countries plus Western countries such as Australia, Canada, and New Zealand. Moreover, even if the Declaration was ratified, amendments include one section in the preamble that recognizes “that the situation of indigenous peoples varies from region to region and from country to country”. *Ibidem*.

⁴¹ The first one is that Indigenous groups are not peoples entitled to self-determination, the second is that the content of self-determination is too vague for inscription in the declaration, then the third is that this principle means secession and the fourth is that it is superfluous since already exists autonomy. Finally, the fifth objection is that this principle divides the State.

P. Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses*, in Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Institute for Human Rights, 2000), pp. 47–57 in *Ivi*, p. 115.

⁴² *Ivi*, p. 116.

⁴³ *Idem*.

“any conception of self-determination that does not take into account the multiple patterns of human association and interdependency is at best incomplete or more likely distorted”⁴⁴. However, Anaya had not yet considered the concept of sustainable self-determination, stating only that one of the remedies to this principle was decolonization, which was, however, at the discretion of the sovereignty of each state⁴⁵. Therefore, the sustainability factor is developed by Corntassel, overcoming the notion that the struggle for self-determination is only legal and political. Indeed, he states that at the heart of this battle is the importance of spirituality, the ancestral connection to the land, and the relational responsibilities that are continuously renewed⁴⁶. In this regard, even the concept of health, which goes beyond the absence of illness or disease, assumes a deeper meaning, as pointed out by Arquette:

Health is spiritual. Health is rooted in the heart of the culture. Health is based on peaceful, sustainable relationships with other peoples including family, community, Nation, the natural world, and spiritual beings⁴⁷.

Keeping this notion in mind and still remembering the concept of sustainability, Deskaheh’s formulation of the self-determination principle gets at the heart of indigenous struggles, stating: “We are determined to live the free people that we were born”⁴⁸.

Therefore, to sum up, the theory of sustainable self-determination developed by Corntassel in 2008 calls for the expansion of the scope of the self-determination process and the regeneration of the implementation of indigenous natural laws on indigenous homelands, by refusing the colonial strategies founded on economic dependency and the compartmentalization of standard political/legal definitions of self-determination to adopt a broader view of self-determination that can be sustained over future generations⁴⁹.

The last concept concerning this theory advocates the transition from rights to responsibilities, to give more space to the indigenous communities within a state-centric system. As stated by Oren Lyons, people are responsible for their own lives⁵⁰ and so individual and shared responsibilities to the

⁴⁴ J. Anaya, *Indigenous Peoples in International Law*, 2d ed., Oxford: Oxford University Press, 2004, p. 103 in *idem*.

⁴⁵ *Ibidem*.

⁴⁶ *Ivi*, p. 117.

⁴⁷ M. Arquette et al. *Holistic Risk-Based Environmental Decision Making: A Native Perspective*, 110 *Environmental Health Perspectives*, 2002, pp. 259–264 in *ibidem*.

⁴⁸ C. Deskaheh, *Petition to the League of Nations from the Six Nations of the Grand River*, communicated by the government of the Netherlands, C.500.1923.VII, 1923, p. 3 in *ivi*, p. 118.

⁴⁹ The theory operates at the community level, to ensure the regeneration of family, clan, and individual roles and responsibilities to their homelands. *Ivi*, p. 119.

⁵⁰ *Ivi*, pp. 121-122.

natural world are the formal basis for indigenous governance to identify community self-determination strategies⁵¹.

Therefore, the authors of the 2000s emphasize the shift from the concept of legal/political to that of sustainable and responsible, opening new avenues to the question of indigenous peoples' rights. However, the theory of sustainable self-determination failed to take root in every national system of states, thus not solving the problem of respecting the rights of Indigenous peoples⁵².

In the following years, along with the principle of self-determination, the concept of interdependence and indivisibility of human rights emerged, refusing any type of hierarchy⁵³ among rights and stating that all rights are mutually reinforcing and equally important⁵⁴. This means that all rights are interconnected and that each is necessary to all the others as well as complementary, indivisible, and interdependent, challenging the traditional boundaries between the content of different rights⁵⁵. Thanks to this new concept, Indigenous people can enjoy their rights to participation, which include the right to effective participation in public life, the right to respect for their identity, and the right to self-determination⁵⁶.

Thereafter, the topic has sparked a discussion in academic literature regarding the interpretation and application of civil and political rights by international bodies and in the specific context of indigenous peoples this has led to the dichotomy between “people” and “minority” in international law⁵⁷. This dichotomy leads to several problems at the national and international level for the indigenous people, since according to law only the “people” can enjoy the principle of self-determination, not the minority. Consequently, many states refuse to recognize the indigenous communities as peoples, as they would otherwise enjoy greater independence and autonomy, which for a state would represent a possible threat of secession⁵⁸. This overlap also creates some difficulties for indigenous peoples to access and utilize global mechanisms for rights protection.

In the following years, Morad Elsana introduced in 2019 the concept of legal pluralism, as a special approach that embraces the rights of indigenous peoples⁵⁹. Its meaning was explained by the

⁵¹ Moreover, spirituality is strictly linked to governance, since it can be considered as the highest form of politics. O. Lyons, *Spirituality, Equality, and Natural Law*, in Leroy Little Bear, Menno Boldt, and J. Anthony Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State 5*, University of Toronto Press, 1984, p. 5 in *ibidem*.

⁵² *Ivi*, pp. 121-123.

⁵³ The term “hierarchy” refers to the idea that certain rights are more important than others, a concept typical of the Cold War period where Western countries gave more attention to civil and political rights while developing countries more to economic, social, and cultural rights.

H. Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, Harvard Human Rights Journal 25, 2012, p. 49.

⁵⁴ *Ibidem*.

⁵⁵ *Ivi*, p. 50.

⁵⁶ *Id.*, p. 51.

⁵⁷ *Id.*, p. 52.

⁵⁸ *Id.*, p. 53.

⁵⁹ M. Elsana, *Legal Pluralism and Indigenous Peoples Rights: Challenges in Litigation and Recognition of Indigenous Peoples Rights*, University of Cincinnati Law Review 87, no. 4, 2019, pp. 1043-1076.

scholar John Griffiths who described it as “the presence in a social field of more than one legal order”⁶⁰. Hence, this means that multiple bodies of law aimed at protecting different groups and communities may coexist within the same country. Nevertheless, David S. Clark notes that legal pluralism is only possible in the indigenous context when customary law systems resist and oppose the overriding ‘modern’ national legal norms⁶¹. For example, most Western countries have abandoned legal pluralism in favor of legal monism, which gives more power to the central state and less autonomy to non-dominant ethnic groups, excluding customary law⁶². By doing so, these countries, such as Canada and Australia, have automatically excluded indigenous people from participation in public and political life, from the use of natural resources, and have denied them fundamental rights, such as the right to land. Underlying this was the justification that indigenous law was primitive, unwritten, incompatible with the political/legal order of the country, and inconsistent with the basic principles of human rights law⁶³. The consequences of these actions were negative and disastrous for the Indigenous, especially in the areas of land rights, natural resources, and cultural rights⁶⁴, leading to massive discrimination of cultural differences⁶⁵.

The latest studies on the issue of indigenous rights still point out numerous difficulties and barriers to accessing human rights, goods, and services, making these people increasingly vulnerable. In particular, the COVID-19 pandemic has aggravated their situation, as the crisis has highlighted the limits of international law and the lack of attention paid by national governments to these communities⁶⁶. In this regard, Martha Fineman elaborated on the ‘theory of vulnerability’ which should be addressed by State policy and law to achieve formal equality within society⁶⁷. According to her, vulnerability is a constant for all people but manifests itself to various degrees within society, giving rise to different levels of social dependency. Hence, vulnerability-responsive laws and policies are intended to account for unequal needs across different social contexts⁶⁸. However, the issue is still open because, as Fitzmaurice states, even though the UN Declaration was adopted by the GA in 2007, indigenous peoples still encounter numerous limitations to the recognition by states of their rights⁶⁹.

⁶⁰ J. Griffiths, *What is Legal Pluralism?* 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1, 1986 in *ivi*, p. 1062. Several authors have given multiple definitions of legal pluralism, such as David Pimentel, Jan Goldberg, Keith Richotte, Hallie Ludsin and Sousa Santos. *Ibidem*.

⁶¹ D. S. Clark, *Legal Pluralism in Latin America Dedication*, 1 ARIZ. J. INT'L & COMP. L. 27, 27 (1982) in *ivi*, p. 2019.

⁶² *Id.*, p. 1064.

⁶³ *Id.*, p. 1065.

⁶⁴ J. Gilbert, *Indigenous Peoples' Land Rights Under International Law* 66, 2006, in *id.*, p. 1066.

⁶⁵ R. P. Amry, *Indigenous Peoples Customary Law and the Peace Process in Guatemala*, L. & ANTHROPOLOGY: INT'L YEARBOOK FOR LEGAL ANTHROPOLOGY, 58, 1999, Ren6 Kuppe & Richard Potz eds. In *ibidem*.

⁶⁶ M. Fitzmaurice, *The COVID-19 Crisis, Indigenous Peoples, and International Law: A Vulnerability Perspective*, in *Crisis Narratives in International Law*, Brill, 2022, p. 174.

⁶⁷ See Martha Fineman, *Vulnerability and Inevitable Inequality*, 4(3) Oslo Law Review 133, 2017 in *ibidem*.

⁶⁸ *Id.*

⁶⁹ *Ivi*, p. 179.

The lack of domestic implementation is still a factor of discrimination, exclusion, and abandonment of this part of society, leaving the issue unresolved both on a practical and academic level.

To summarize, despite the tireless efforts of indigenous peoples, binding and non-binding international agreements remain unfulfilled by state parties, leading to the marginalization of human beings who are denied their rightful respect.

The issue of indigenous rights has been explored in literature over time, spanning from legal and normative foundations to social and political considerations. Previous discussions have tackled many aspects of the topic, yet there remain gaps in understanding of how much states are bound by international law and required to consult and involve Indigenous peoples. So, in this regard, this research aims to address the research questions introduced above to investigate the level of compliance with international obligations towards indigenous communities.

1.2 An overview of research methodology

This study adopts a post-positivist approach that blends interpretivism and constructivism, utilizing a critical and emancipatory method. Emphasis is placed on the norms of civil society, with a focus on problem-setting rather than problem-solving, leading to empirical research with an open-ended and exploratory character⁷⁰. Therefore, it is essential to formulate problems correctly to discover them effectively in this case. Moreover, subjectivity is a key element of this approach, which allows the researcher to interpret phenomena and observe them in a 360-degree way. Finally, this approach was chosen enabling the construction of truth and arguments through dialogue between different elements and the comparison of systems. The aim is not to prove the existence of dogma or absolute truth⁷¹ but to demonstrate an idea, a theory that stems from empirical factors.

Advocating this approach, qualitative methodology is employed to examine the status of Indigenous People's rights. This decision is motivated by the desire to present a comprehensive and insightful perspective on the subject, accomplished through textual and visual analysis. Moreover, compared to quantitative methodology, the qualitative approach allows the researcher to subjectively interpret the phenomena analyzed and provide a more detailed understanding of the topic, together with a "thick description" to give a more in-depth picture of the topic⁷². Additionally, this methodology will deal with small numbers and a single case study to isolate a specific phenomenon and interpret it also culturally and historically.

⁷⁰ See A. B. Ryan, *Post-positivist approaches to research. Researching and Writing your thesis: a guide for Postgraduate students*, 2006, pp. 12-26.

⁷¹ *Id.*

⁷² J. G. Ponterotto, *Brief note on the origins, evolution, and meaning of the qualitative research concept thick description*. The qualitative report, 11(3), 2006, 538-549.

Therefore, by doing so, this qualitative research will gather data through open-ended surveys and interviews such as in-depth/unstructured or semi-structured, life stories, group interviews, visual methods such as photographs and physical artifacts, and direct observation to try to illuminate the real-life and conditions experienced by Indigenous Peoples. The reason for this decision is rooted in the fact that this thesis is not just a theoretical dissertation that examines the laws outlined in treaties, yet it aims to transcend it by documenting the personal experiences of individuals who are subjected to human rights abuses by both government and non-government actors daily.

Therefore, primary sources are achieved through interviews with two indigenous Colombian communities and secondary sources will be used in accomplishing this objective. The secondary sources analyzed will be handbooks, academic papers, official documents, international treaties, declarations, international agreements, videos, databases, newspapers, covenants, reports, PhD thesis, national constitutions, legislations, and national rules.

The thesis will be divided into two main sections, based on the methodology and sources used: the first will focus on the theoretical and legal aspects of indigenous rights, analyzing international treaties and laws that govern the issue. This section, structured according to the deductive method, aims to provide a comprehensive international legal framework to then analyze the issue in practice. Therefore, the second section of the research will be based on the case study of Colombia adopting a more practical and experimental approach. This section will rely on direct testimonies and experiences, with data collected by myself and other authors. Inductive methodology will be used to interview representatives of indigenous tribes of the Colombian Amazon and northern Colombia.

1. 3 Research structure

The dissertation is divided into five chapters. The present chapter, i.e., the first, was created to provide a comprehensive structural, methodological, and academic framework on the issue covered by this dissertation. First, there is the literature review to provide a complete chronological overview of the literature material about the topic, then the methodology to explain the path taken before and during the writing of the dissertation. Finally, there is a section devoted to the objectives of the thesis and the reasons for certain content choices.

The second chapter aims to provide a baseline about indigenous peoples, explaining their definition and main characteristics, leveraging the crucial difference between people and minorities, aimed at establishing certain rights. Finally, to introduce the reader to the international legal framework, this section will be devoted to the analysis of two fundamental rights: the right to land and the right to self-determination of peoples.

Next, the third chapter represents the first section of the thesis relating, as outlined above, to the regional and international legal system concerning respect for indigenous peoples. Therefore,

instruments of international law such as conventions, declarations, and covenants will be analyzed to study how international law provides for the protection of the aforementioned Peoples.

Chapter four, on the other hand, will be devoted to the consultation and participation obligations that must be met by states to protect indigenous peoples and include them in their country's political participation. This chapter aims to analyze the issue in general and then apply it in the specific context of the Colombia case study in the following chapter. Therefore, the analysis will start from the international level and then descend to the national level related to individual states.

Finally, the fifth chapter will be specific to the Colombian case, analyzing its national legal system starting with the 1991 political Constitution, which devotes several sections to the indigenous. Next, the legal framework will meet the political and social one, analyzing the current situation in Colombia about the need to achieve lasting and total peace between civil society, government, and illicit armed groups. So precisely in this context, the indigenous communities of Colombia will be inserted to understand if they are included by the state to contribute to the plan of total peace of President Petro. To conclude, the fifth chapter will be followed by conclusions, summary, bibliography, and acknowledgments.

1. 4 Objectives of the research

This thesis aims to demonstrate and affirm first that indigenous people are subjects of international law and therefore entitled to rights and duties like the rest of the citizens of the state in which they live. Therefore, based on this, the states must respect them as the rest of the population and guarantee them the right to take part in the public political sphere of their country. Secondly, the thesis underlines the fundamental and ancestral link between the indigenous and the natural resources of the territory they inhabit, affirming their legitimate presence thanks to international law. As a result, there is a will to highlight and denounce the violence and violations that Indigenous people suffer every day, limiting their right to life and freedom. Giving voice to this vulnerable and marginalized part of the population is the priority of this thesis so that it can contribute indirectly to their peaceful struggle for freedom.

Peace is the key term of this story because the actions carried out by the Colombian Indigenous communities have always been peaceful and never violent, they have always acted in the name of peace and respect, bringing to society only benefits and in return, instead, they have always received violence, usurpation, discrimination, and marginalization. Therefore, this research seeks to draw attention to the fact that these people matter and that they are holders of rights that states and non-state actors must respect.

I selected Colombia as a case study because I had a personal experience with the issue. I lived with a tribe in the Colombian Amazon and later met representatives from a northern community who

were on a global tour to raise awareness about the violation of their fundamental rights. Living among these individuals helped me gain a deeper understanding of their reality, which had previously been distant and abstract to me. After witnessing their struggles and suffering, I felt compelled to contribute to their ongoing fight through academic research. My goal is to provide primary and direct sources, as opposed to biased and manipulated information, to shed light on their daily struggle.

Perhaps these words may sound overly idealistic or utopian, however, I firmly believe that to uphold international legal principles and foster their adherence among nations, it is necessary to start from the bottom, from the earth by monitoring humanitarian concerns and presenting them in academic and diplomatic circles to achieve tangible outcomes.

CHAPTER TWO

Introduction to the Indigenous Peoples and their rights

Summary: 2. 1 Introduction to the Indigenous issue, 2.2 Definition and Characteristics of “Indigenous Peoples”, 2.3 Differences between Indigenous Peoples and Minorities, 2.4 Right to land and the principle of self-determination, 2.5 Concluding observations.

*“My people have been here since time began. I know how the world began, and I know how the world will end.”*⁷³

2. 1 Introduction to the Indigenous issue

Indigenous peoples have existed for half a millennium, and according to many authors, given their presence in every part of the globe, it is rather impossible to qualify them geographically or ethnographically. So more fruitful seems the historical approach, emphasizing the relationship between these peoples and the arrival of European civilization⁷⁴.

As affirmed by Anaya, half a millennium ago, people living on the continents now called North and South America began to have encounters that they had not experienced before⁷⁵. Europeans arrived to invade their lands, claiming their rights and supremacy, imposing their laws and institutions on the native peoples, whose cultural, economic, and political integrity was destroyed. Their invasion was accompanied by the enslavement of children, women, and men and the violation of their human rights. These events marked the beginning of European colonization from the 16th century on those who, oppressed and enslaved, took on the name indigenous, native, or aboriginal people⁷⁶.

Today, therefore, the term ‘indigenous’ refers to the descendants of those who inhabited the lands before colonization and were engulfed by settlers. Also defined as indigenous are the surviving Indian communities, the Aboriginal People of Australia, the Māori of Aotearoa, Native Hawaiians, and many other nondominant tribes of Africa and Asia⁷⁷. They are considered indigenous because

⁷³ Umatilla leader Armand Minthorn, cited in *Tri-City Herald*, 1999, in P. Thornberry, *Indigenous peoples and human rights*. Manchester University Press Oxford Road, Manchester M13 9NR, p. 12, UK, 2002, British Library Cataloguing-in-Publication Data. ISBN 0 7190 3793 X hardback. <http://ndl.ethernet.edu.et/bitstream/123456789/46228/1/151.pdf>

⁷⁴ F. Marcelli, *I diritti dei popoli indigeni*. Aracne, Roma, 2009, p. 21 <https://www.isgi.cnr.it/wp-content/uploads/2018/02/i-diritti-dei-popoli-indigeni.pdf>

⁷⁵ J. Anaya, S. J. *Indigenous peoples in international law*. Second Edition, Oxford University Press, 2004, p. 3, ISBN: 9780195173505.

⁷⁶ *Ivi*, pp. 3-4.

⁷⁷ According to the statistics issued by the Independent Commission on International Humanitarian Issues (ICIHI), there are an estimated 200 million indigenous people in the world representing 4% of the global population. There are some 250,000 Aborigines in Australia, 300,000 Māori in New Zealand, 60,000 Saami, and 100,000 Inuits, and claimed by a global tabulation prepared by the International Work Group for Indigenous Affairs (IWGIA) there are “1 million Russian indigenous, 1.5 million indigenous in North America, 13 Million in Mexico and Central America, 17.5 highland Indians and 1 million lowland Indians in South America, 14 million nomads in Africa, and 350,000 indigenous between

their ancestral roots are embedded in the lands where they live and because of their continuity and link with the ancestral past⁷⁸. Another key characteristic of indigenous people emphasized by Falk is, in addition to their status as victims oppressed by the colonizers, their lack of decolonization benefits⁷⁹. Nowadays, indigenous people live in disadvantaged conditions inside states that have been built around them, deprived of landholdings and access to life-sustaining resources. Faced with this state of oppression and vulnerability, indigenous people over time have appealed to the international community for help and protection, looking to international law as a key tool for their protection⁸⁰. As a result, various processes have developed in the international system to protect these peoples in a normative and legal manner, making them subjects of law as well⁸¹.

2. 2 Definition and Characteristics of Indigenous Peoples

The first step in dealing with a question of law that relates to a set of rules and rights is to define the subject to which they apply. Therefore, it is necessary to focus on the legal-formal meaning of the expression ‘indigenous peoples’⁸². The different terms used in international law to define them (minorities, groups, peoples, communities) have led to the development of different systems of protection within customary and conventional law⁸³.

the San/Basarwa and the Pygmies, 58 million indigenous in South and West Asia, 30 million in Southeast Asia, and 67 million in East Asia”. *Op. cit* Thornberry, 2002, pp. 15-17.

⁷⁸ *Ibidem*.

⁷⁹ *Op. cit*. Marcelli, 2009/2010, pp. 21-22.

⁸⁰ In the last years representatives of indigenous people started to engage with international law and institutions, creating what may be called the international indigenous movement, composed of different indigenous organizations developed in the 20th century. Over time, the first national organizations flourished in the 1960s in Australia, Canada, and the United States. Then, there were the first international initiatives such as The World Council of Indigenous Peoples (1975), the NGO Conference on Discrimination against Indigenous Populations (1977) and others followed. Among them, sixteen organizations achieved consultative status with ECOSOC. Finally, since 1982 indigenous groups of all kinds converged on the WGIP. *Op. cit*. Thornberry, 2002, p. 21.

⁸¹ *Op. cit*. Anaya, 2004, p. 9.

⁸² The term indigenous had a gradual evolution within the framework of the European languages, from the late 19th century until 1982 when the Working Group was established (E. A. Daes, *Standard-setting activities: Evolution of standards concerning the rights of Indigenous people*. 1996, UN, Sub-commission on Prevention of Discrimination and Protection of Minorities. Working Group on Indigenous Populations, Fourteenth Session, para. 10, E/CN.4/Sub.2/AC.4/1996/2. Geneva, Switzerland. <https://digitallibrary.un.org/record/236429>). The term “indigenous” derives from the Latin “*indīgēna, ae*” which means local natives; it was used to contrast “persons who were born in a particular place” with the “*advēnae*”, which means ‘foreigner’, ‘stranger’, ‘migrator’, ‘inexperienced’, ‘newly arrived’ (*ibidem*). The term *indigenus* is often used as a synonym for ‘native,’ ‘innate,’ ‘aborigine’, ‘endemic’, and ‘inborn.’ However, the use of these terms can be offensive to tribal groups, especially when used internationally and universally to define diverse groups. In fact, most indigenous prefer to be named by their specific nation or tribe names. In general, the favored term is “First Nations” (M. A. Peters & C. T. Mika, *Aborigine, Indian, indigenous or first nations?* Educational Philosophy and Theory, volume 49, 2017, p. 13, DOI: 10.1080/00131857.2017.1279879 <https://www.tandfonline.com/doi/full/10.1080/00131857.2017.1279879#:~:text=The%20term%20'indigenous'derives%20from,produce%2C%20give%20birth%2C%20beget>). Finally, the term indigenous ordinarily belongs to the English and Spanish languages, while it has had less resonance in others and carries a span of meanings (*Op. cit*. Thornberry, 2002, p. 35).

⁸³ *Op. cit*. Rossi, 2009/2010, p. 11.

As affirmed in the *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*⁸⁴, the concept of indigenous people cannot be captured in a universal, precise, inclusive definition that can be applied in the same manner to all regions of the world⁸⁵.

Indeed, given the different historical and geographical circumstances, processes of assimilation, and history of colonization, it is difficult to frame a person as a member of an indigenous community⁸⁶; however, it is possible to identify common factors⁸⁷ that allow indigenous peoples to be distinguished from other groups in the United Nations system and regional intergovernmental organizations⁸⁸.

From a chronological point of view⁸⁹, the first international document that mentioned indigenous peoples is the *General Act of the Berlin Conference on West Africa* (1885)⁹⁰ where the colonial powers developed provisions to protect the natives of colonized lands, as expressed in Article 6 of the Act:

All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific, or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization⁹¹.

From the text of the Article, it is possible to deduce the colonizing and paternalistic attitude of the European powers, which aimed to preserve the existence of tribes, but with the purpose of ‘civilizing’

⁸⁴ The author of the working paper was the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of ‘indigenous people’, realized during the Working Group on Indigenous Populations Fourteenth Session, between 29 July - 2 August 1996 (*Op. cit.* Daes, 1996).

⁸⁵ *Ivi*, para. 71.

⁸⁶ E. Saviaara, K. Maatta, S. Uusiautti, *Who is indigenous? Definitions of indigeneity*. European Scientific Journal, Eurasian Multidisciplinary Forum, EMF 2013. Proceedings, Vol.1, Tbilisi, Georgia, 2013, pp. 369-370. <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=28f51fc98b0ab24527ced26b593ce747038b69c9#page=379>

⁸⁷ The Kennewick debates, developed following the discovery of the skeleton of a Kennewick man in 1996, hint at four common factors related to indigenous: the association with a particular place, the prior inhabitation, a sense of original or first inhabitants, and the membership in distinctive societies (*Op. cit.* Thornberry, 2002, p. 36).

⁸⁸ *Op. cit.* Daes, 1996, para. 9.

⁸⁹ *Op. cit.* Rossi, 2009/2010, p. 12.

⁹⁰ The purpose of the Berlin Conference held in 1885 and convened by Otto von Bismarck, marked the climax of the European competition for territory in Africa which attracted them for its natural resources (Britannica, T. Editors of Encyclopaedia. *Berlin West Africa Conference*. Encyclopedia Britannica, 2024. <https://www.britannica.com/event/Berlin-West-Africa-Conference>.) The purpose of the Conference was to manage the process of colonization in Africa, known as “The Scramble”, to avoid armed conflicts among the European powers. The outcome was the conclusion of the General Act (M. Craven, *Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade*, London, 2015, p. 32), whose signatory countries were the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey (Ottoman Empire) (General Act of the Berlin Conference on West Africa, 1885).

⁹¹ General Act of the Berlin Conference on West Africa, 1885, para. 6

them. Therefore, this first document testifies to the allusion to indigenous tribes at the international level for the first time but with a colonizing and assimilationist approach⁹².

After that, the issue concerning indigenous peoples was mentioned in Article 22⁹³ of the *Covenant of the League of Nations* (1920) by which the state parties undertake to ensure the welfare and development of indigenous *populations*⁹⁴ within the territories they occupy⁹⁵. Twenty-five years later, with the *Charter of the United Nations*, there is another reference to indigenous peoples in Article 73⁹⁶ of Chapter XI, devoted to the so-called non-self-governing territories⁹⁷. The article, in referring to natives, leverages the territorial aspect since it mentions them as “territories whose peoples have not yet attained a full measure of self-government”⁹⁸ without considering them as *peoples* yet.

Nevertheless, the international debate around indigenous peoples evolved⁹⁹ because of the intervention made by the Chairperson/Rapporteur Erica-Irene A. Daes in the *Working paper on the concept of “indigenous people”* (1996). Her first step was to emphasize the implicit element of race in the use of the term ‘indigenous’ in the previous legal contexts¹⁰⁰. In fact, in the Berlin Africa Conferences (1884-1885), Article 6 of the *Final Act* shows the distinction made by the European powers between “citizens of nationals of the Great Powers and those persons in Africa who were under the colonial domination of the Great Powers”¹⁰¹. Even in the *Covenant of the League of Nations*, the term is used to distinguish between colonial powers and peoples living under colonial domination, and emphasizing a further element, namely the contrast between these peoples and the more advanced

⁹² *Op. cit.* Daes, 1996, para. 11.

⁹³ Article 22 (1) states that “To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant” (The Covenant of the League of Nations, 1920, para. 22).

⁹⁴ The term “people” was not yet used for this category of people; they were mainly considered communities, groups, or part of the population.

⁹⁵ *Op. cit.* Rossi, 2009/2010, p. 12.

⁹⁶ The article establishes that “Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories [...]” (UN Charter, 1945, Art. 73).

⁹⁷ *Op. cit.* Rossi, 2009/2010, p. 12.

⁹⁸ *Op. cit.* UN, 1945, Art. 73.

⁹⁹ The international debate on the concept of *indigenous* began to evolve from the late 19th century until 1982, when the Working Group was established, within the context of European languages, especially English, French, and German, which shared common roots in the Latin term ‘*indigenae*’. *Op. cit.* Daes, 1996, para. 10.

¹⁰⁰ *Ivi*, para. 11.

¹⁰¹ *Ibidem*.

society¹⁰², adds a second level of qualification: institutional capacity, to determine what level of oversight over these peoples was most appropriate¹⁰³.

Meanwhile, the Pan-American Union – known as the predecessor of the Organization of American States- had started to use the term indigenous differently, as shown in the Resolution XI of 21 December 1938¹⁰⁴:

Indigenous populations, as descendants of the first inhabitants of the lands which today form America, and in order to offset the deficiency in their physical and intellectual development, have a preferential right to the protection of the public authorities¹⁰⁵.

In this case, indigenous people were not identified as inhabitants of a colonized territory, but rather as vulnerable and marginalized people within state borders¹⁰⁶.

Finally, the turning point was in 1960 when the United Nations changed its approach with the *Declaration on the Granting of Independence to Colonial Countries and Peoples* because the General Assembly chose to use no longer the term ‘territories’ but ‘people’, who are entitled to the exercise of the right of self-determination under common Article 1 of the two *International Covenants on Human Rights*. This choice underlines the shift from a geographical to a sociological approach which implies the possibility of applying the principle of self-determination even to non-dominant groups living in the state borders¹⁰⁷.

After that, the first binding instrument¹⁰⁸ for states to address the issue of indigenous peoples was *ILO Convention No. 107*, adopted by the General Conference of the International Labour Organisation in 1957. The Convention describes indigenous peoples in terms reminiscent of the *League Convention*, emphasizing the notion of inferiority towards the dominant society and highlighting their disadvantaged status in comparison with their neighbors¹⁰⁹. Moreover, the

¹⁰² The text of article 22 stresses that: “Peoples not yet able to stand by themselves under the strenuous conditions of the modern world” (Covenant of the League of Nations, 1920, Art. 22).

¹⁰³ *Op. cit.* Daes, 1996, para. 12.

The content choice of Article 22 derives from the case of South Africa when it was not yet an independent state in 1919 and was dependent on the British parliament. Subsequently, the League with Article 22 entrusted South Africa with a mandate over the territory and population of Namibia, whose population was considered indigenous, in contrast to the "advanced" society of South Africa (Daes, 1996: Para. 14).

¹⁰⁴ *Ivi*, para. 15.

¹⁰⁵ Pan American Union, Resolution XI, 1938.

¹⁰⁶ *Op. cit.* Daes, 1996, para. 16.

¹⁰⁷ *Ivi*, para. 18.

¹⁰⁸ The binding nature of the convention is expressed in Article 31(1) of the convention, which states that “This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General”. ILO, *Convention No. 107*, 1957, art. 31(1).

¹⁰⁹ *Op. cit.* Daes, 1996, para. 21.

Convention underlines their status as “regulated wholly or partially by their own customs or traditions or by special laws or regulations”¹¹⁰. The Convention in defining these peoples, does not differentiate between indigenous and tribal and uses the same following criteria for both: economic and social disadvantage relative to the dominant population, status apart regulated by their laws and traditions¹¹¹, descent “from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization”¹¹². The latter is the only thing that can be used to distinguish between tribal and indigenous peoples since they have experienced different histories of colonization, and both groups are entitled to the same rights¹¹³. Hence, the source of these rights is its history of being distinct as a society or nation, and not of being colonized or oppressed. This convention adopted a real paternalistic approach, leveraging the notion of non-dominant people, because it uses concepts of integration and assimilation in the dominant society¹¹⁴ – as stated in Article 2(1): “Governments shall have the primary responsibility for developing co-ordinated and systematic action for the *protection* of the populations concerned and their progressive *integration* into the life of their respective countries”¹¹⁵. Thus, what is absent in Convention No. 107 and will instead be found in the next one, No. 169 (1989), is the presence of the principle of self-determination of peoples, as the fundamental criterion for identifying them¹¹⁶, as affirmed in Article 1(2): “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply”¹¹⁷.

Moreover, the difference in content and notion between the two Conventions is already evident in Article 1 about tribal peoples, who are defined as

Peoples in independent countries whose social, cultural, and economic conditions *distinguish* them from other sections of the national community, and whose status is regulated wholly or partially by their own customs

The Convention does not provide a definition of indigenous and tribal peoples but explains to those to whom it is applied, thus indirectly defining them by Article 1(1): “This Convention applies to:
(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
(b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong” (ILO, 1957: 1).

¹¹⁰ *Op. cit.* ILO, 1957: 1(a).

¹¹¹ *Op. cit.* Daes, 1996: para. 21.

¹¹² *Op. cit.* ILO, 1957:1(b).

¹¹³ *Ivi*: para. 22.

¹¹⁴ *Id.*

¹¹⁵ *Op. cit.* ILO, 1957: 2(1).

¹¹⁶ *Op. cit.* Daes, 1996, para. 29.

¹¹⁷ *Op. cit.* ILO, 1989, Art. 1(2).

or traditions or by special laws or regulations¹¹⁸.

While bringing back the first article of the previous convention instead:

Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a *less advanced stage* than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations¹¹⁹.

As is evident, *Convention No. 169* abolishes the comparison between two different sections of the national community, relying only on the concept of distinctiveness, doing away with any mention of the concept of inferiority and disadvantage¹²⁰. Even indigenous are defined according to the criterion of distinctiveness and descent¹²¹, emphasizing the phrase “descent from the populations which inhabited the country [...] at the time of the *establishment of present state boundaries*”¹²² to underline that both indigenous and tribal groups constitute a distinct society but that indigenous are distinguished from tribals by their historical continuity with their descendants¹²³.

To summarize, the *Working Paper* submitted by the Special Rapporteur Mrs. Erica Daes (1996), has listed the following factors considered relevant to better understanding the concept of ‘indigenous’ according to international law:

1. Priority in time, with respect to the occupation and use of a specific territory.
2. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion, and spiritual values, modes of production, laws, and institutions.
3. Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity.
4. An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not these conditions persist¹²⁴.

¹¹⁸ *Ivi*, art. 1.

¹¹⁹ *Id.*

¹²⁰ *Op. cit.* Daes, 1996, para. 28.

¹²¹ Article 1(b) states that the Convention applies to “peoples in independent countries who are regarded as indigenous on account of their *descent from the populations which inhabited the country, [...] at the time of conquest or colonisation or the establishment of present state boundaries [...]*”. *Op. cit.* ILO, 1989, art. 1(b).

¹²² *Id.* in Daes, 1996, para. 28.

¹²³ *Id.*

¹²⁴ *Ivi*, para. 69.

Then, another attempt to define indigenous peoples was made by Martínez Cobo¹²⁵, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities¹²⁶. The author, in his *Study on the discrimination against indigenous peoples*, in formulating a “working definition” concerning indigenous peoples, leverages the following characteristics as determinants of the aforementioned peoples: the historical continuity, the distinctiveness from other sectors of the societies, their non-dominant nature in respect to the rest of society and the determination to “preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples”¹²⁷.

To conclude, distinctiveness is the objective criterion for which the two groups meet the characteristics listed in Article 1 of the *ILO Convention No. 169* and then there is the subjective criterion according to which it is the group that has the power to choose, through the principle of self-determination, whether to remain distinct from the rest of the national community¹²⁸. Therefore, self-identification as indigenous or tribal is considered a fundamental criterion to ensure indigenous and tribal peoples establish their belonging and identity¹²⁹ and it will also be mentioned later in 2007 in Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples*¹³⁰ which affirms that “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions”¹³¹.

Before concluding, it is needed to report the opinion on the issue expressed directly by representatives of indigenous peoples to provide a complete picture of the matter. Even indigenous representatives have argued that a universal and single definition is not necessary but what is crucial is to include the self-determination principle¹³². In addition, during the thirteenth session of the Working Group, the indigenous representatives noticed additional essential elements such as the

¹²⁵ His contribution to the study of the indigenous people concept was the most notable after the ILO Conventions. In his preliminary working definition, Cobo stresses the cultural collision between colonizers and colonized, winners and losers where the former exploit land, goods, and peoples to its own advantage (*Op. cit.* Thornberry, 2002, p. 47). Nevertheless, in his next definition, he stated that the colonial context is not crucial nor necessary to define and recognize indigenous peoples; rather, he highlights as an essential attribute the historical continuity (*ibid*) which “consists in the continuation for an extended period reaching into the present of one or more factors: ‘(a) occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of those lands; (c) Culture in general, or in specific manifestations. (d) Language. (e) Residence in certain parts of the country, or world.’” (UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379 in *ivi*, p. 49).

¹²⁶ *Op. cit.* Daes, 1996, para. 24.

¹²⁷ *Ibidem*.

¹²⁸ *Ivi*, para. 30.

¹²⁹ United Nations Development Group, *Guidelines on Indigenous Peoples' Issues*. New York and Geneva, 2009. https://unsdg.un.org/sites/default/files/UNDG_guidelines_EN.pdf

¹³⁰ The Declaration was adopted by the General Assembly with Resolution 61/295 during the 107th plenary meeting on 13 September 2007.

¹³¹ UN GA, *Declaration on the Rights of Indigenous Peoples*, 2007, Art. 33.

¹³² *Op. cit.* Daes, 1996, para. 35.

“historical and ancient connection with lands and territories”¹³³. Instead, other representatives referred to Cobo’s study of 1987 to define indigenous peoples as beneficiaries of conventions and declarations, by using the concepts of “historical continuity, self-identification, and group membership *as* cardinal criteria in this regard”¹³⁴. Another question regards the subjective and objective criterion is whether indigenous groups prefer a subjective approach which entitles them with the right to establish that indigenous identity can be determined by both self-identification and community recognition¹³⁵. This approach has been widely supported by the international community; however, it must be accompanied by an objective approach¹³⁶ which complements the concept of indigenous people and better ensures the protection and preservation of their rights¹³⁷.

To conclude, despite the different attempts and suggestions to find a common definition, it is quite unlikely that a single factor can capture all the nuances of “indigenous” and so the international community did not agree on a universal definition of indigenous peoples¹³⁸. This is because it was argued that such a definition is not necessary to ensure their rights and protection. Therefore, there is not a formal definition but a concept, used to articulate the interests that should be protected¹³⁹. Nevertheless, it’s important to keep in mind that not having a written definition for indigenous people may have both advantages and disadvantages in the future. As Thornberry argued, a written definition could help to clear out ersatz claimants, improve the reputation of governments, increase the trust of indigenous and enhance their targeting programs. Both governments and indigenous peoples prefer to avoid an increase in protests and claims over the indigenous issue¹⁴⁰. However, to ensure effective protection and enforcement of rights to this category, it is necessary to emphasize the difference between *minority*, *indigenous*, and *people*, as will be explained in the next section.

¹³³ This notion was added by Mr. M. Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner. In his words: "There must be scope for self-identification as an individual and acceptance as such by the group. Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories [...]". *Id.*

¹³⁴ *Id.*

¹³⁵ Therefore, according to this subjective approach, Indigenous peoples are those who identify as indigenous and are recognized as such by their community and so accepted as members. *Ivi*, para. 36.

¹³⁶ As explained before, this approach takes into consideration characteristics listed in Article 1 of the ILO Convention No. 169 that a group must meet to be defined and considered as indigenous. *Ibidem*.

¹³⁷ *Id.*

¹³⁸ The reasons behind defining terms in local and municipal law may not directly apply to international law. The complexities of the global legal system, its adaptability to diverse national practices, and the fluidity of its principles make it challenging to impose rigid definitions, especially in the context of human rights. Therefore, relying on definitions as a solution for all legal issues in the international arena is not always feasible or appropriate. *Op. cit.* Thornberry, 2002, p. 57.

¹³⁹ *Ibidem*.

¹⁴⁰ *Id.*

2. 3 Differences between Indigenous Peoples and Minorities

The protection of indigenous peoples' rights and all the characteristics agreed upon to them involves a logical and conceptual problem: the importance of distinguishing between indigenous peoples and minorities. This differentiation is crucial since the two groups are entitled to different rights and duties given their distinguishing features¹⁴¹. Often the two terms are confused, and indigenous people are considered a minority within the state since the term is directly associated with a numerical minority compared to the rest of society. From this follows a series of problems because the two concepts are strongly different in that the minority is configured as a group numerically inferior, while indigenous constitute a people. From this, it follows that the concept of indigenous people does not encompass that of minorities, which means that minorities cannot enjoy the same rights accorded to indigenous peoples¹⁴².

To analyze this issue and highlight the major differences between the two groups, it is necessary to start with the conceptual definition of people, which is diriment in international law, and then the related concepts of minorities, indigenous, and peoples. To start, it's important to stress that those definitions have legal consequences¹⁴³ because if a group is defined as people, it is entitled to the right to self-determination, while if a group is considered a minority, this right is not possible¹⁴⁴. So, self-determination is the key principle to define these groups, which at the same time are closely connected, overlapping, or even synonymous¹⁴⁵.

2. 3. 1 People and Peoples

There are two different approaches used to define the concept of *people*. The first is the territorial one which considers all the persons living within a defined territory, usually the state, and calls them *people*¹⁴⁶. On the other hand, the characteristics approach identifies *people* by using the characteristics that its members share. The territorial approach, in defining people, considers three elements: reality, theory, and practice but the problem lies in the fact that reality and practice do not converge¹⁴⁷.

¹⁴¹ *Op. cit.* Daes, 1996, para. 60.

¹⁴² U. Barten, *What's In a Name? Peoples, Minorities, Indigenous Peoples, Tribal Groups and Nations*, Denmark, 2015, p. 2, *Journal on Ethnopolitics and Minority Issues in Europe* Vol 14, No 1.

¹⁴³ Lehman, 2006/2007, p. 515 in *ibidem*.

¹⁴⁴ International law was made by states for states, which have established international organizations and partly accepted to be actors under international law and have certain rights and obligations. In this context, in recent years, even individuals could join international law as actors, while groups as minorities seem to have no place under international law because the system is fragile and needs identifiable actors. Minorities and other groups cannot be considered strong partners in international law because they often tend to dissolve, create, and change again. Nevertheless, the international system provided different definitions and endowed them with rights and duties. *Ibid.*

¹⁴⁵ *Id.*

¹⁴⁶ This approach refers to the decolonization concept and shows some weaknesses since it leads to many uncertainties *Ivi*, p. 3.

¹⁴⁷ *Id.*

A clear example of this divergence is how the concept of self-determination according to the territorial approach was used in Africa before and after colonization. Starting from the theoretical element, it is possible to say that the principle of self-determination is enshrined in the United Nations Charter in Article 1¹⁴⁸ and Paragraph 2 of UN Resolution 1514¹⁴⁹, which states that “All peoples have the right to self-determination”¹⁵⁰ but had been applied, in the wrong way, to the African colonial context. This occurred because, following independence, the colonial borders were preserved, which meant that only one group per colony could exercise their right to self-determination. As per the principle of *uti possidetis*¹⁵¹, colonies would achieve independence based on their colonial borders¹⁵².

African elites imposed this restriction to avoid the redrawing of borders, which would have diminished their power¹⁵³. Consequently, some groups within the newly formed states were denied self-determination under the pretext that they had already exercised this right when they became independent. This highlights the disparity between theory and practice in the territorial approach, as UN General Assembly Resolutions 1541¹⁵⁴ and 1514¹⁵⁵ indicate that multiple groups can coexist within a single territory and that one territory does not necessarily equate to one people¹⁵⁶.

Therefore, the limitation of this approach is that it regards territory as the primary factor in defining people's identity and their right to self-determination¹⁵⁷.

In addressing this discrepancy between theory and practice, the characteristics approach intervenes. Here, the characteristics and the members of a group determine if it can be endowed with

¹⁴⁸ Article 1(2) establishes that “the main purpose of the United Nations, and thus the Security Council, is to develop friendly international relations based on respect for the ‘principle of equal rights and self-determination of peoples’” United Nations, *Charter of the United Nations and statute of the International Court of Justice*. San Francisco, 1945, Art. 1(2).

¹⁴⁹ *Op. cit.* Barten, 2015, p. 3.

¹⁵⁰ UN General Assembly (1960) *Resolution 1514*. A/RES/1514(XV), 943rd plenary meeting, para. 2.

The United Nations took steps to promote the principle of self-determination by incorporating it in the resolutions of the General Assembly and by providing the institutional mechanism through which the principle could be achieved. The General Assembly overwhelmingly adopted a historic Resolution 1514, on 14 December 1960 - which has been called an attempt to revise the Charter in a binding manner - whose purpose was to bring "to a speedy and unconditional end colonization in all its forms and manifestations" S. P. Sharma, *Self-Determination and Current Territorial Disputes*. Law and Policy, 17 JMCL 109, 1990, p. 112.

¹⁵¹ The legal principle of "*uti possidetis, ita possidetis*" originated from Roman law and was enforced by the Roman Praetor to prevent any changes to the existing property ownership between conflicting parties (Raič, 2002 in R. Shrinkhal, *Indigenous sovereignty and right to self-determination in international law: a critical appraisal*. *AlterNative: an international journal of indigenous peoples*, 17(1), pp. 71-82, 2021. <https://journals.sagepub.com/doi/full/10.1177/1177180121994681>).

The burden of proof lay with the party who did not have possession. Over time, this principle expanded beyond Roman law and was applied to decolonization efforts. The goal was to prevent further colonization by European powers by identifying ex-colonial territories as *terrae nullius* subject to *occupatio*. Additionally, it aimed to prevent boundary disputes between newly established states. *Colombia v. Hyde*, 1947; *Venezuela*, 1922 in *ibidem*.

¹⁵² *Op. cit.* Barten, 2015, p. 3.

¹⁵³ *Ivi*, p. 4.

¹⁵⁴ Principle II of Resolution 1541 clearly says, “a territory and its *peoples*”, implying that there may be more than one people in a territory. *Op. cit.* UNGA, 1960, principle II.

¹⁵⁵ The UN GA Resolution 1514 declares that “All peoples have the right to self-determination”. *Op. cit.* UNGA, 1960.

¹⁵⁶ *Op. cit.* Barten, 2015, p. 4.

¹⁵⁷ *Ibidem*.

certain rights and principles¹⁵⁸. In this regard, after the *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples* (1989), UNESCO published in 1990 a final report that listed in Paragraph 22 the main characteristics agreed on to the concept of the *peoples*¹⁵⁹. Even if the Report does not define universally what *peoples* are, it provides an inherent description, stating that a group of human beings that share the following features can be considered a people:

- (a) a common historical tradition;
- (b) racial or ethnic identity;
- (c) cultural homogeneity;
- (d) linguistic unity;
- (e) religious or ideological affinity;
- (f) territorial connection;
- (g) common economic life.¹⁶⁰

Furthermore, the Report established that the members of this group must be not large but, at the same time, more than a mere association of individuals within a State; the group must have the will to be identified as a people and have institutions or other means of expressing its common characteristics and will for identity¹⁶¹.

Nevertheless, this Report remains a document referred to in Academia, without having reached the international governmental level and neither has it been adopted by the General Conference of UNESCO. This means that this document cannot be used universally and with certainty to distinguish a people from a minority, partly because the latter seems to have many characteristics like those listed by the Report in Paragraph 22. Therefore, also the characteristics approach shows some weakness in defining *peoples*¹⁶².

In summary, Barten's two approaches have their respective advantages and disadvantages. The territorial approach has gained more traction and support but is only applicable to a limited number of states. On the other hand, the second approach, which better captures the essence of the concept of the people and applies to a wider range of scenarios, has yet to receive government

¹⁵⁸ *Id.*

¹⁵⁹ The Final Report issued by UNESCO does not provide a definition of *peoples*, it underlines that “the definition of *peoples* is uncertain, and that the notion of peoples’ rights could lead to dangerous proliferation of claims, undermining settled borders, national sovereignty and international peace and sovereignty”. UNESCO, 1990: par. 22 in *ivi*, p. 5.

¹⁶⁰ *Ibidem.*

¹⁶¹ In this regard, the Report concludes by stating that there are some peoples’ rights that are universally accepted, such as the right to existence and the right to *self-determination*. *Ivi*, par. 24 in *id.*

¹⁶² For example, in countries like Canada and the United States, the term “people” is used in a civic sense, not in the ethnic sense that the characteristics approach advocates. T. J. Mabry, *Who are the People? Why Ethnic Politics Matters*. Georgetown Journal of International Affairs, 13, 2008, p. 14 in *id.*

approval and remains largely confined to academic discourse. This ambiguity is wanted mostly by governments because, in the absence of a clear association of indigenous with the concept of *peoples*, it is easier not to grant them the rights they are entitled to under international norms¹⁶³. At the international level, the usage of terms such as *people*, *peoples*, and *populations* has varied depending on the specific context and actors involved. For example, the International Labor Organization previously employed the term ‘population’ to refer to Indigenous groups in 1957, as evidenced by the title of Convention No. 107 on Indigenous and other ‘Tribal and Semi-Tribal Populations’. However, in the subsequent Convention No. 169 (1989), titled *Convention on Indigenous and Tribal Peoples*, the organization used the term ‘peoples’¹⁶⁴. Despite Indigenous individuals expressing their discomfort with being identified as ‘populations’, the term continues to appear in the title of the *Working Group on Indigenous Populations*¹⁶⁵. Regarding the debate between peoples and people, the UNCED defines Indigenous as “people and their communities that have a historical relationship with their lands and are generally descendants of the original inhabitants of such lands”¹⁶⁶. Similarly, the World Conference on Human Rights¹⁶⁷ also decided to refer to Indigenous as ‘people’¹⁶⁸.

While the difference between these two terms may appear minor, it actually carries great significance. The term ‘peoples’ implies a collective dimension, indicating a group with rights and principles such as self-determination. Given the real-world implications of words and concepts, it is not uncommon for governments and institutions to intentionally refer to indigenous groups as simply ‘people’ to avoid granting them the aforementioned rights¹⁶⁹. This reluctance to acknowledge indigenous peoples as such is evident, as highlighted by the indigenous representative Ted Moses during the World Conference on Human Rights:

They have called us populations, ‘communities’ ‘groups’, ‘societies’, ‘persons’, ‘ethnic minorities’; now they have decided to call us ‘people’ in the singular. In short, they will use any name they can think of, as long as it is not peoples with an ‘s’. They are willing to turn universality on its head to avoid recognizing

¹⁶³ *Op. cit.* Barten, 2015, p. 6.

¹⁶⁴ *Op. cit.* Thornberry, 2002.

¹⁶⁵ According to Thornberry, the term can be partially accepted because carries a collective imprint. *Id.*, p. 50.

¹⁶⁶ UNCED, 1992, paragraph 26 in *ivi*.

¹⁶⁷ The Conference took place in Vienna from 14 to 25 June 1993; its main outcome was the *Vienna Declaration and Programme of Action* and additionally implemented new measures to promote and protect the rights of women, children, and indigenous peoples, such as the proclamation of an *International Decade of the World's Indigenous People* (UN, 1993).

¹⁶⁸ *Op. cit.* Thornberry, 2002, p. 41.

¹⁶⁹ *Ivi*, p. 57.

our right to self-determination¹⁷⁰.

In summary, being acknowledged as a distinct group of people entails both rights and responsibilities, which remains a contentious issue for governments worldwide. The classification of indigenous individuals as *peoples* is not universally accepted, and the matter remains unresolved and uncertain. Nonetheless, to arrive at significant insights and a definitive conclusion, the subsequent section of this chapter will delve into a comparative analysis of indigenous people and the concept of minority, highlighting both their similarities and differences.

2.3.2 Minorities and Indigenous

Despite the extensive elaboration of documents on minority rights by international organizations, there is again an inability or unwillingness to settle a binding definition of the term¹⁷¹. The most widely accepted and influential definition was given by Francesco Capotorti, the UN Special Rapporteur, who defined minority as:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language¹⁷².

However, this definition has not been accepted as universal and binding in international law, so the following research will proceed with a characteristics approach, outlining the main features of the minority concept, and then comparing it to that of indigenous peoples¹⁷³.

¹⁷⁰ Statement on behalf of the North American Region by Chief Ted Moses (Grand Council of the Crees) on Agenda Item 8 in *ivi*, pp. 41-42.

Ted Moses, the Grand Chief of the Grand Council of the Crees, uttered these words on behalf of the North American Region to report Canada's position concerning the use of the term "peoples" in the draft declaration. To avoid granting the right of self-determination to Indigenous Peoples, Canada has been insisting on using another term to replace *peoples*, such as "populations", "groups" or "people". In this regard, Moses said, "[Canada has] decided that our rights as peoples will not exist if they simply avoid referring to us as 'peoples'" (Moses 1993, b:3 in Thornberry, 2002).

¹⁷¹ B. de Villiers, *Language, Cultural and Religious Minorities: What and Who are they?*

University of Western Australia Law Review. 36, 2012-2013, pp. 97-101 in *op. cit.* Barten, 2015, p. 6.

¹⁷² F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York: United Nations, 1991, para. 568 in *ibidem*.

The definition was given by Capotorti for the purposes of Article 27 of the International Covenant on Civil and Political Rights (GA, 1966), but it was never endorsed by the UN, which continues to refer to "minority" "without having exhaustively or conclusively defined it". *Op. cit.* de Villiers, 2012-2013.

¹⁷³ *Op. cit.* Barten, 2015, p. 8.

Upon reviewing the initial line of the definition concerning minorities, which characterizes it as a “group numerically inferior to the rest of the population of a State”¹⁷⁴, it becomes clear that this concept cannot fully apply to indigenous peoples. This is because, in certain states, such as Guatemala and Bolivia, indigenous individuals constitute the majority of the population¹⁷⁵. Then, as for the notion of a ‘non-dominant position’, Daes argues that it is a paradox to use this notion as a characteristic of these groups because this would imply that the moment a minority or indigenous people achieved full realization of their rights then they would cease to occupy a non-dominant position and consequently cease to be indigenous or part of a minority¹⁷⁶.

Capotorti’s definition was followed by that of Jules Deschênes who replaced the expression ‘numerical inferiority’ with ‘numerical *minority*’ and added a reference to the aims of the minority “to achieve equality with the majority in fact and law”¹⁷⁷.

According to Alfonso Martinez¹⁷⁸, this criterion could help distinguish minorities from indigenous peoples because it implies that:

Legal equality with the "majority" would be possible only based on the legal institutions of the majority/dominant sector in the multinational society in question, not as a derivative of the legal culture of the "minorities"¹⁷⁹.

To fully outline the descriptive framework of the minority concept and establish its connection to the concept of indigenous peoples, it's important to compare the definitions of Capotorti and Deschênes with the European Formula¹⁸⁰ provided by the Parliamentary Assembly of the Council of Europe in Recommendation No. 1201 (1993) which establishes that:

The expression ‘national minority’ refers to a group of persons in a State who:

¹⁷⁴ *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, UN, 1991, UN Sales No. E.91.XIV.2, para. 568 in *op. cit.* Thornberry, 2002, p. 52.

¹⁷⁵ *Ibidem*.

¹⁷⁶ *Op. cit.* Daes, 1996, para. 54.

¹⁷⁷ *Op. cit.* Thornberry, 2002, p. 53.

The whole definition given by Deschênes can be found in the Proposal concerning a definition of the term "minority" (E/CN.4/Sub.2/1985/31) which describes minority in the following way: “A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law”. Deschênes, 1985, par. 181.

¹⁷⁸ Miguel Alfonso Martinez, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, at the Forty-seventh session (Item 14 of the agenda) submitted the second progress report E/CN.4/Sub.2/1995/27 “Study on treaties, agreements, and other constructive arrangements between States and indigenous populations”. *Op. cit.* ECOSOC, 1995.

¹⁷⁹ Martinez, 1995 in *op. cit.* Thornberry, 2002, p. 53.

¹⁸⁰ *Op. cit.* Thornberry, 2002, p. 53.

- a. reside on the territory of that State and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that State;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language¹⁸¹.

To summarize, given the present definitions, the main elements that define a minority as such are:

1. numerical inferiority to the rest of the population,
2. non-dominant position within the state.
3. Specific ethnic, religious, or linguistic characteristics which are different from most of the population.
4. Sense of solidarity among members and collective identity,
5. Preservation of culture, traditions, religion, or language¹⁸².

As for indigenous peoples, instead, both Thornberry and Daes contributed a list of recurring items¹⁸³ in this category:

1. Precedent habitation;
2. historical continuity;
3. attachment to the land;
4. the communal sense and the community right (including those societies that do not have a strong conception of individual rights);
5. a cultural gap between the dominant groups in a State and the indigenous, and the colonial context¹⁸⁴.

While Daes stated that modern international organizations and legal experts have considered as relevant the following characteristics:

1. Priority in time, concerning the occupation and use of a specific territory.

¹⁸¹ Parliamentary Assembly, 1993 in *Ibidem*.

¹⁸² *Id.*

¹⁸³ Kingsbury (1998) adopts a constructivist approach toward these elements to find a common definition. Through this approach, he denies that an objective truth exists, and his approach uses context to provide answers (Barten, 2015).

¹⁸⁴ *Op. cit.* Thornberry, 2002, p. 55.

2. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion, and spiritual values, modes of production, laws, and institutions.
3. Self-identification, as well as recognition by other groups, or by State authorities, is a distinct collectivity.
4. An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not these conditions persist¹⁸⁵.

Upon looking at both lists and comparing them with the minority list, it is evident how the two categories are different from each other since the indigenous one has specificities that do not belong to all minorities. These specific elements are continuity over time, ancestral attachment to territory, and self-identification. Therefore, although there is not yet a universal and binding definition of indigenous peoples, it is possible to define such a group that possesses these specific requirements¹⁸⁶.

To conclude, it is important to remember what Daes pointed out in her report about the ability to define the concept of indigenous people: she states that the lack of clarity and precision in defining this category has resulted from the unwillingness of governments to recognize a comprehensive and binding definition, striving to interpose a wall between the concept of “indigenous” and “peoples” in order not to recognize their right to self-determination, resulting in a continuous ambiguity¹⁸⁷.

2. 4 Right to land and the principle of self-determination.

The present section will analyze another crucial issue about indigenous peoples: the right to land and its relationship with the principle of self-determination. They are closely connected since compliance with the latter becomes almost impossible when the former is not guaranteed¹⁸⁸. The loss of ownership and control over ancestral lands that had belonged to indigenous peoples for centuries dates to the period of colonization when colonial powers usurped the lands, using three different methods: conquest, cession/purchase, and occupation. Furthermore, some States implemented land reforms to deny any possibility of land reacquisition by indigenous and tribal communities¹⁸⁹.

¹⁸⁵ Concerning these factors, Daes stresses that they do not constitute a definitive, comprehensive, and inclusive definition but rather provide general guidance to make reasonable decisions within a country where such peoples live. *Op. cit.* Daes, 1996, para. 69.

¹⁸⁶ Cfr. *op. cit.* Thornberry, 2002 and *op. cit.* Daes, 1996.

¹⁸⁷ Making a concept ambiguous, limits its application and enforcement in any sphere, just as it was intended by governments to bypass the norms of international law. Keeping in mind the experience of the Working Group on Indigenous Populations, the only possible solution to the problem is procedural: entrust the issue of indigenous peoples' rights to a neutral and impartial body willing to listen to and respect the views of indigenous peoples to ensure the evolution of this category in practice. *Op. cit.* Daes, 1996, para. 73.

¹⁸⁸ Cfr. K. Göcke, *Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level*, Goettingen Journal of International Law 5, 2013.

¹⁸⁹ *Ivi*, p. 91.

States are inclined to deny this right if the latter cuts against its interests. So, they only recognize a right if “it happens to benefit the state”.

According to the norms of international law, it is possible to occupy a territory only in the case where it is considered *terra nullius*, meaning that it did not belong to anyone. In this regard, colonial powers to occupy those ancestral territories undisturbed, applied a legal fiction to extend the *terra nullius* doctrine to regions inhabited by indigenous peoples, defined as ‘savages’ by them¹⁹⁰. Even in the aftermath of decolonization, states continued to deny indigenous peoples the right to their ancestral lands, reluctant to recognize their claims. This situation changed with the emergence of the modern aboriginal title doctrine, introduced by the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*¹⁹¹. By this decision, the Canadian Supreme Court ruled that:

At the time of colonization, the indigenous peoples of British Columbia held aboriginal rights to their lands - i.e. rights based solely on the use and occupation of the land by indigenous peoples since time immemorial irrespective of the recognition of these rights by the Crown. It further declared that these rights were not automatically extinguished with the acquisition of British sovereignty^{192 193}.

Nevertheless, the right to land implies additional problems such as that of ambiguity about beneficiaries. As analyzed in the previous sections, there is no single, universal, and binding definition of indigenous peoples so even in this area it was difficult to determine who were the true beneficiaries of this right; it is a tricky task to define and apply the category ‘indigenous peoples’¹⁹⁴.

M. Holley, *Recognizing the rights of indigenous people to their traditional lands: a case study of an internally displaced community in Guatemala*. Berkeley Journal of International Law, 1997, 15(1), p. 6.

¹⁹⁰ The best example of this practice was Australia, whose ancestral territories were treated as *terra nullius*. The Australian Aboriginal peoples were considered by the British Parliamentary as the rudest forms of civil polity so much so that all their claims to the territory of sovereignty had been completely ignored, attributing to the British crown every right to the land.

British Parliamentary Papers, 1837, Vol. VII (425), p. 82 in *op. cit.* Göcke, 2013, p. 92.

Another example can be found in the Canadian Provinces of British Columbia' and Quebec in the Canadian Maritime Provinces, and the US State of California, which systematically pursued the *terra nullius* concept. *Ibidem*.

Finally, the right to land to Indigenous Peoples was denied also in the northern regions, namely in the US States of Alaska, and Canada north of the 60th parallel due to indifference and neglect by the colonial powers, who did not consider it necessary to deal with indigenous ownership rights. *Ibid*.

¹⁹¹ *Ivi*, p. 97.

¹⁹² Supreme Court of Canada, *Calder v. Attorney-General of British Columbia*, [1973] SCR 313, 328, 375 & 390 in *ivi*, p. 98.

¹⁹³ This is considered a landmark decision because for the first time a Supreme Court recognized that aboriginal titles over lands still existed and not ceded. *Id*.

Subsequently, in 1986, the New Zealand High Court followed suit in its decision *Te Weehi v. Regional Fisheries Officer* by ruling that “the local laws and property rights of indigenous peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty”. High Court of New Zealand, *Te Weehi v. Regional Fisheries Officer*, 1986, 1 NZLR 682, 687 in *ibidem*.

Furthermore, in 1922, the High Court of Australia in its famous decision *Mabo v. Queensland (No. 2)* also recognized “the existence of inherent indigenous land rights by declaring that the concept of *terra nullius* was false in fact and unacceptable in [Australian] society.” High Court of Australia, *Mabo v. Queensland (No. 2)*, 1992, 175 CLR 1, para. 62 in *id*.

¹⁹⁴ Classification in the Americas was hard and controversial after the colonization due to “great differences in the degree of 1) miscegenation between colonizer and colonized, 2) economic dependence on the mainstream capitalist modes of production, and 3) cultural assimilation of the peoples.” There was a wide spectrum of possible indigenous subjects, stretching from the Amazon forest-dwelling tribes to the peasants of El Salvador. *Op. cit.* Holley, 1997, p. 25.

Another issue that spread during the colonization period is the non-recognition of indigenous peoples' right to land is the extensive interpretation made by European settlers of the principle of *uti possidetis*¹⁹⁵. This doctrine considered a tenet of the Roman *Praetor*¹⁹⁶, finds its roots in the *jus civile*¹⁹⁷ in the Roman law system but it was transposed into modern international law and became the cornerstone for the maintenance of the system of sovereign states, thus acquiring a different meaning in the Law of Nations (*jus gentium*) stating that “new States will come to independence with the same boundaries they had when they were administrative units within the territory or territories of colonial power”¹⁹⁸.

Anciently this principle, which means ‘as you possess, so you possess’, was formulated “to protect the existing arrangement of possession without regard to its merits” but the possession needed to be acquired without using force, secrecy, or permission (*nec vi, nec clam, nec precari*), restrictions introduced to make sure that *de facto* possessor of the property had the right to claim it and that each claim could be challenged by anyone else who had an interest in the property¹⁹⁹.

The doctrine considers the matter of the dispute as the *de facto* as well as *de jure* legal possession of the current occupier and this creates problematic consequences regarding the question of indigenous peoples since the doctrine in the modern system does not distinguish between *de facto* and *de jure* possessor²⁰⁰. Therefore, this doctrine began to be used in international disputes as it seemed to quickly resolve territorial conflicts: in the case of belligerent occupation, the aggressor was allowed to occupy the territory gained by conquest and maintain the new *status quo* from that point onwards. This excluded the evaluation of the merits of the parties and other actors, such as indigenous and tribal communities that resided even earlier in that territory²⁰¹.

This doctrine was used for the first time in modern international law for the Spanish withdrawal from Latin America²⁰² and due to its great success, it was used and re-interpreted during

¹⁹⁵ During the decolonization, this principle was extended to the withdrawal of the colonial powers from territories in Africa and Asia.

J. Castellino & S. Allen, *The Doctrine of Uti Possidetis: Crystallization of Modern Post-Colonial Identity*, German Yearbook of International Law 43, 2000, p. 205.

¹⁹⁶ *Supra* note 149.

¹⁹⁷ The purpose of the interdict, as per *jus civile*, was to acknowledge the *status quo* in each scenario that involved immovable property like land. *Op. cit.* Castellino & Allen, 2000, p. 206.

¹⁹⁸ *Ibidem*.

¹⁹⁹ *Ivi*, p. 208.

²⁰⁰ *Ibidem*.

²⁰¹ *Id.*

²⁰² After the Latin American colonies gained independence from Spain during the 19th century, Creole leadership adopted the principle of *uti possidetis* to maintain the existing boundaries of the Spanish colonies as the boundaries of the newly independent states mainly to prevent some land from remaining terra nullius and the new states from coming into conflict over territorial disputes. Scholars distinguished between *uti possidetis de jure* and *de facto*.

S. R. Ratner, *Drawing a Better Line: UTI Possidetis and the Borders of New States*, The American Journal of International Law, Vol. 90, No. 4, 1996, p. 593. The former established that only the legal documents of Spain were decisive for determining borders, whereas effective possession of the territories was considered unimportant. On the other hand, the second argued that the borders should be determined based on the actual lands held by each state at the time of independence. *Ibid.*

the decolonization process, whose aim was the reestablishment of order through the legitimation of the colonial powers' possession, regardless of how it was achieved²⁰³. To do so, the onus to prove in interdict proceedings lies with the party who is not currently in possession, automatically advantaging the *de facto* possessor. However, in the *jus civile*, "rightful title via *de facto* possession could only be acquired by a prescriptive claim of *usucapio* established in good faith"²⁰⁴. Therefore, the modern use of the principle selected from the Roman law only those parts that seemed most convenient to the territorial issues of the decolonization era. Moreover, some scholars believe that there is not a real connection between Roman law and the modern principle of *uti possidetis*. In this regard, Schwarzenberger²⁰⁵ argued that:

Even so 'obvious' a loan from Roman law as the use of *uti possidetis* in the Latin American practice since the early nineteenth century is more indicative of the differences between this remedy in Roman law and its application on the inter-state level than of any supposed likeness between these institutions²⁰⁶.

In conclusion, it is possible to say that the selective adoption of the interdict suggests that the modern interpretation of the *uti possidetis* is no longer based on legal principles but constitutes a powerful political tool²⁰⁷ to legitimize the illegitimate possession of territories usurped from the peoples who had inhabited them for centuries²⁰⁸.

2. 4. 1 The relationship between *uti possidetis* and self-determination

As stated above, the two principles are strictly linked but is important to differentiate them. The principle of self-determination was first mentioned in the UN Charter Articles 1(2) and 55²⁰⁹ where the first purpose of the UN was "to develop friendly relations among nations based on respect for the

²⁰³ *Id.*

²⁰⁴ H. F. Jolowicz & B. Nicholas, *Historical Introduction to the Study of Roman Law*, 1972, p. 259 in *op. cit.* Castellino & Allen, 2000, p. 211.

²⁰⁵ *Op. cit.* Castellino & Allen, 2000, p. 212.

²⁰⁶ G. Schwarzenberger, *Title to Territory: Response to a Challenge*, AJIL, vol. 51, 1957, 308, 309. See also A.C. McEwen, *International Boundaries of East Africa*, 1971, 27-31 in *ibidem*.

²⁰⁷ During times of settlement, drawing boundaries became a politically charged action. To legitimize their actions, settlers would manipulate legal norms to make it seem as though they were acting under universal legal codes. However, the disappearance of Roman law paved the way for a convenient mechanism to justify illicit territorial occupations. *Op. cit.* Castellino & Allen, 2000, p. 223.

²⁰⁸ *Ibidem*.

²⁰⁹ Article 55 establishes that "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development.
b. solutions to international economic, social, health, and related problems; and international cultural and educational cooperation.

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." UN Charter, 1945, Art. 55 in M. N. Shaw, *The heritage of states: The principle of uti possidetis juris today*. The British Yearbook of International Law, 67(1), pp. 119-120, 1997.

principle of equal rights and self-determination of peoples”²¹⁰; the principle is implied also in Chapters XI (declaration regarding non-governing territories) and XII (international trusteeship system)²¹¹. The use of the term “peoples” implies a collective character meaning that human beings, collectively or as individuals are entitled to have control over their destinies²¹². Moreover, the principle is mentioned also in Article 3 of the UN Draft Declaration of the Rights of Indigenous Peoples which states: “Indigenous peoples have the right to self-determination. Under that right, they freely determine their political status and freely pursue their economic, social, and cultural development”²¹³. However, many representatives of member states voted against this motion affirming that indigenous are not peoples and so they do not deserve the right to self-determination²¹⁴. Then, the principle was implemented also in Article 1 of ICCPR and CESCR which confirms that “All peoples have the right to self-determination”²¹⁵. In this regard, the principle confirmed in Article 1 already exists and is possessed by all ‘peoples’. The article doesn't create the principle, it simply affirms it²¹⁶.

In the following years, the principle began to constitute a crucial norm in the decolonization era, “obliging the colonial powers to grant independence and endow the colonial territory with a special status and consequently international legitimation”²¹⁷.

In the *Portugal v. Australia* case²¹⁸, the Court declared that “the right to self-determination is one of the essential principles of contemporary international law”²¹⁹.

Today, the question is whether the principle of self-determination applies beyond the colonial context since it cannot be used as a tool to dismantle the sovereignty of States. Therefore, the relationship between self-determination and *uti possidetis* is fundamental. The former allows groups to gain independence, by offering them the possibility of collective action but it has been restricted as a legal principle for the colonial context. On the other hand, the second provides independence but by

²¹⁰ *Op. cit.* UN Charter, 1945, art. 1(2).

²¹¹ Cirkovic, E. *Self-determination and indigenous peoples in international law*. American Indian Law Review, 31(2), p. 386, 2006.

²¹² *Ibidem*.

²¹³ *Op. cit.* UNDRIP, 2007, Art. 3 in *ivi*, p. 387.

²¹⁴ The term “peoples” implies collective rights for indigenous such as the right to land and resources, which are always managed by state control. *Ibidem*.

²¹⁵ *Op. cit.* UN, 1996, Art. 1 in *ibidem*.

²¹⁶ *Id.*

²¹⁷ *Op. cit.* Shaw, 1997, p. 75.

²¹⁸ The case, known as *East Timor*, goes back to February 1991 when Portugal applied against Australia concerning “certain activities of Australia concerning East Timor”, referring to a treaty concluded between Australia and Indonesia to establish a Zone of Co-operation in a maritime area between “the Indonesian Province of East Timor and Northern Australia”. ICJ Reports, case 84, 1995 in *op. cit.* Shaw, 1997, p. 120.

The Court argued that “Portugal's assertion that the right of peoples to self-determination has *erga omnes* character is irreproachable”. *Ivi*, p. 120.

²¹⁹ *Ivi*, pp. 120-121.

focusing on territoriality rather than on personal attributes, such as ethnicity religion, or historical ties²²⁰.

The Chamber of the International Court in *Burkina Faso v. Mali* case found that the two principles conflicted with each other. The *uti possidetis* is considered an important tool to maintain order and stability within a State, preventing the risk of struggles provoked by the challenging of frontiers²²¹. For this reason, the International Court affirmed in 1986 that African States, to preserve their stability, respected the colonial borders leveraging the *uti possidetis* rather than self-determination. Therefore, if there is a dispute between the two principles, that of *uti possidetis* would have precedence since its primary aim is to ensure the respect of borders when independence is achieved²²². In this regard, another principle that seems to take precedence over self-determination is the territorial integrity. Under the norms of international law, if self-determination would be used to destroy national unity and territorial integrity, it cannot be applied since it would violate paragraph 6 of UN Resolution 1514 (1960) which stated that: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”²²³.

2. 4. 2 The importance of ancestral lands

For indigenous peoples, their ancestral lands and territories have important material, cultural, and spiritual significance. These areas are crucial for their survival and economic well-being and are deeply intertwined with their identity and existence as a people. As such, indigenous groups advocate for collective ownership of their lands and territories that cannot be taken away. Traditionally, indigenous peoples have engaged in activities such as hunting, fishing, and agriculture that have developed in harmony with the local ecosystems. Any encroachment on their lands puts these *peoples* at risk, particularly those who live in voluntary isolation. For these groups, living in isolation is a way to exercise their right to self-determination and to chart their course for the future²²⁴.

Furthermore, another essential component of the ancestral lands is the natural resources which include the whole environment: surface and sub-surface, waters, forests, ice, and air. Indigenous communities have been entrusted with the crucial role of safeguarding and maintaining natural

²²⁰ *Ivi*, p. 123.

²²¹ *Ivi*, pp. 76-79.

²²² *Ibidem*.

²²³ S. P. Sharma, *Self-Determination and Current Territorial Disputes - Law and Policy*, Journal of Malaysian and Comparative Law 17, 1990, p. 121.

²²⁴ According to the Guidelines principles of the United Nations Development Group, “Indigenous peoples’ lands and territories should be legally recognized, demarcated, and protected from outside pressures”. In this regard, States should recognize these lands to them and their traditional management systems. Moreover, indigenous peoples can freely live in isolation in their territories, and States should adopt adequate measures to protect their territories, environment, and cultures. United Nations Development Group, *Guidelines on Indigenous Peoples’ Issues*, 2009, p. 16.

environments. Through their deep-rooted traditions and respectful practices, they have proven to be effective guardians of these habitats, ensuring their preservation for future generations. They have managed and preserved these resources for millennia and still, today continue to contribute to their conservation²²⁵. The last issue concerning the right to land is the environmental one. Environmental degradation such as deforestation represents a huge threat to the survival and way of life of these peoples; it contributes to increased poverty and vulnerability. They always seek harmonious relations with the environment since their traditional lifestyle is based on the conservation and sustainability use of biodiversity²²⁶.

In the words of James Anaya,

Indigenous peoples have repeatedly and consistently advanced plenary conceptions of their rights over lands and resources within their traditional territories. In asserting property rights, indigenous peoples seek the protection of economic, jurisdictional, and cultural interests, all of which are necessary for them to pursue their economic, social, and cultural development²²⁷.

They share a deep spiritual and emotional nexus with the earth and its fruits²²⁸, and to ensure the economic viability and development of their communities, usually, they have to rely on a secure land and natural resource base. Article 26 of the United Nations Draft Declaration on the Rights of Indigenous Peoples exposes such ambitions in the following way:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they traditionally owned or otherwise occupied or used. This

²²⁵ It is imperative to acknowledge and uphold the rights of individuals to the resources required for their livelihood and progress. This includes respecting the rights of indigenous peoples over State-owned sub-surface resources situated on their lands. In such cases, indigenous peoples must be granted the right to provide informed consent before any exploration or exploitation of these resources takes place. Additionally, they are entitled to fair benefit-sharing arrangements. *Ivi*, p. 18.

²²⁶ *Ivi*, p. 19.

²²⁷ J. Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, *Arizona Journal of International and Comparative Law* 22, no. 1, 2005, p. 7.

²²⁸ *Ivi*, p. 8.

The guarantee of land tenure security is crucial for preserving the traditional way of life and progress of these communities. In some instances, particularly for isolated groups with minimal or no outside interaction, demarcating and safeguarding their land territories is indispensable for their physical existence. However, the significance of land transcends its economic value, as it serves as the fundamental foundation for the survival of these individuals as a unique cultural entity.

L. Swepston & R. Plant. *International standards and the protection of the land rights of indigenous and tribal populations*. *International Labour Review*, 124(1), 1985, p. 93.

https://heinonline.org/HOL/Page?handle=hein.journals/intlr124&div=16&g_sent=1&casa_token=2-yRIxyCZIIAAAAA:vjx3B-FyZ4oFck-2wmDD9SBk2jQyC30-UqAi-aHLDO4WIXpFKq_-u-yVWSb40m_f265Bqwwve&collection=journals#

includes the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights²²⁹.

The importance of the right to land for indigenous peoples is mentioned also in the ILO Convention No. 169 by article 14(1)²³⁰, stressing the collective nature of the land and resources rights and the notion of tradition, meaning that these lands had traditionally belonged to indigenous peoples for thousands of years, and they had always cared for, respected, and preserved them²³¹. Then, the Convention which affirms the *sui generis* indigenous land and resource rights, establishes the land right provisions in Article 13(1)²³², and Article 15 requires that States safeguard indigenous peoples' rights to the natural resources²³³. The concept of land developed by the Convention refers to “the total environment of the areas which the peoples concerned occupy or otherwise use”²³⁴.

With regard the respect to the right to the land of indigenous peoples, even the Commission on Human Rights in its Report on the *Mary and Carrie Dann and Maya Indigenous Communities* cases described as general international legal principles²³⁵:

(1) The right of indigenous peoples to legal recognition of their varied and specific forms and modalities of control, ownership, use, and enjoyment of their territories and property.

²²⁹ These provisions are not just aspirations but can be read as part of international law. *Op. cit.* UNDRIP, 2007, art. 26 in *Op. cit.* Anaya, 2005, p. 8.

²³⁰ The article affirms that “The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”. *Op. cit.* ILO, 1989, Art.14(1).

²³¹ *Op. cit.* Anaya, 2005, p. 9.

²³² Article 13(1) states that “In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”. *Op. cit.* ILO, 1989, art. 13(1).

²³³ Article 15 affirms that “(1) The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. *Ivi*, art. 15.

(2) In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities”. *Id.* in *op. cit.* Anaya, 2005, pp. 8-9.

²³⁴ *Ivi*, art. 13(2) in *ivi*, p. 10.

²³⁵ *Id.*

(2) The recognition of their property and ownership rights with respect to lands, territories, and resources they have historically occupied²³⁶.

Finally, the Commission concluded that special measures are required to guarantee the respect of individual and collective rights that Indigenous have on their traditional and ancestral lands; this recognition must be accompanied by consultations and consent of Indigenous peoples, otherwise, it would be a violation of human rights²³⁷.

Furthermore, viewing the right to land as crucial to ensuring the physical and cultural survival of these peoples, at the international level, various actors have been adopting different resolutions, such as the final resolution of the *International NGO Conference on Discrimination against Indigenous Peoples of the Americas*, held in Geneva in 1977²³⁸.

Another crucial issue linked to the right to land is the removal of indigenous from traditional lands by States and other actors. Many governments, to justify this action, used Article 11 of ILO Convention No. 107 which qualifies the right of absolute ownership, and Article 12(3) which states that “persons thus removed shall be fully compensated for any resulting loss or injury” met many critics from organizations of indigenous peoples²³⁹.

Afterward, the issue was addressed by the UNDRIP which mentions the right to land in Article 26 declaring that indigenous communities possess the inherent entitlement to lands, territories, and resources that have been traditionally owned or occupied. Furthermore, it is required that states legally acknowledge and respect these lands, territories, and resources²⁴⁰.

This principle is exemplified in the Inter-American Court of Human Rights ruling on the *Mayagna (Sumo) Awas Tigni Community v. Nicaragua* case²⁴¹. The Court emphasized the vital importance of recognizing the deep connection between indigenous peoples and their land, which serves as the foundation for their culture, spirituality, integrity, and economic stability.

²³⁶ Inter-Am. C.H.R., 2003, para. 130 in *ivi*, p. 14.

²³⁷ *Ivi*, p. 16.

²³⁸ The resolution urged “(a) that the special relationship of indigenous peoples to their land should be understood and recognized as basic to all their beliefs, customs, traditions and culture; (b) that recognition should be given to the right of all indigenous nations or peoples to the return and control at least of sufficient and suitable land to enable them to live an economically viable existence by their own customs and traditions [...] (c) that the ownership of land by indigenous peoples should be unrestricted, and should include the ownership and control of all natural resources [...] (d) that the right of indigenous peoples to own their land communally and to manage it by their own traditions and culture should be recognized internationally and nationally, and fully protected by law; (e) that in appropriate cases aid should be provided to assist indigenous peoples in acquiring the land which they require; (f) that legal services should be made available to indigenous peoples to assist them in establishing and maintaining their land rights; and (g) that all governments should grant recognition to organizations of indigenous peoples” [...]. NGO, *Final resolution of the International NGO Conference on Discrimination against Indigenous Populations in the Americas*, Geneva, 1977, p. 3. in *op. cit.* Swepston & Plant, 1985, p. 94.

²³⁹ The problem lies in the fact that states can easily use the excuse of national security and development to remove indigenous peoples from their territories. *Ivi*, p. 103.

²⁴⁰ G. N. Barrie, *The United Nations Declaration on the Rights of Indigenous People: implications for land rights and self-determination*. Tydskrif vir die Suid-Afrikaanse reg. 2013.2, 2013, p. 298.

²⁴¹ IACrtHR Ser C No. 79, judgment of 2001 8-31 par 379 in *Id.*

Moreover, a landmark decision regarding Aboriginal land rights was issued by the High Court of Australia in *Mabo v. Queensland (No. 2)* case²⁴² where the native right to land was recognized to the Indigenous.

In addition, another international instrument that addressed this right was the *International Covenant on Civil and Political Rights* (1966) in Articles 1²⁴³ and 27²⁴⁴. Here, neither one of these provisions includes the notion of indigenusness but they use the term “minorities” in Article 27²⁴⁵ and “peoples” in Article 1. Based on the section on definitions of the terms indigenous, minority, and people, it is possible to apply these provisions to indigenous people as well since they are primarily peoples and secondarily enjoy the same rights accorded to minorities, but not *vice versa*²⁴⁶.

To conclude, it is important to consider that all these instruments were created years ago, and, in the meantime, different changes occurred; therefore, to be still efficient they should be adapted to the current situation and needs of indigenous peoples²⁴⁷ who still suffer violence and abuse by state actors and armed groups, both wanting to exploit the territories and resources they safeguard for their own personal political and economic interests.

2.5 Concluding observations

In this chapter, the importance of definitions was initially examined to establish the subjects of law of this research. As a result, a comprehensive descriptive legal framework was created to address the matters concerning indigenous peoples’ law and to emphasize the crucial role played by

²⁴² The high court recognized that native title and the rights of indigenous populations to their ancestral lands have been affirmed by the high court. Furthermore, the court has determined that the acquisition of the Australian colony by the British Crown did not nullify customary or native, indigenous title. *Ivi*, p. 299.

²⁴³ Article 1 establishes that “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All *peoples* may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co- operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”. *Op. cit.* UN, 1966, Art. 1.

²⁴⁴ Article 27 states that “In those States in which ethnic, religious or linguistic *minorities* exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. *Ivi*, art. 27 in M. Scheinin, *Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights*, 2004. Aboriginal Policy Research Consortium International (APRCi), p. 1.

<https://ir.lib.uwo.ca/aprci/195>

²⁴⁵ Regarding Article 27, the case of *Lovelace v. Canada* (Communication No. 24/1977) focuses on the individual dimension expressed by this Article when declares that “the right of the individual not to be denied membership in an indigenous group with which she wishes to identify herself, and into which she belongs according to some objective criteria of, for example, ethnicity”. In this regard, due to the exclusion of Sandra Lovelace from her Aboriginal community after marrying an outsider, the Human Rights Committee found a violation of Article 27. The exclusion derived from a rule enacted by the State Party. *Ivi*, p. 6

²⁴⁶ Cfr. *ivi*, pp. 4-5.

²⁴⁷ *Op. cit.* Swepston & Plant, 1985, p. 91.

international standards in ensuring their protection. The next chapter will continue this analysis by examining the legal instruments of hard and soft law, that aim to safeguard these *peoples*.

Starting from the analysis presented in Sections 2.1 and 2.2, it is clear that a universal and binding definition of these peoples is still lacking due to several factors. However, they can be identified and differentiated from other categories through specific elements within the framework of international law. This creates a divide between indigenous peoples and minorities, with the former enjoying rights that the latter cannot access. The principle of self-determination is a key factor that distinguishes these two categories, as minorities cannot claim this right due to their inability to be defined as people.

This argument then gave rise to the academic and legal debate about the notion of ‘peoples’, as there is no universal *consensus* on considering indigenous as peoples, especially by states that safeguard their interests and benefits at the expense of this category.

Based on this, following a study on the definition of people, minority, and indigenous, it was found that although a final comprehensive definition has not yet been adopted, a people can be defined as indigenous if they possess the following specific characteristics: continuity over time, ancestral attachment to territory, and self-identification.

These initial findings contribute to the understanding of the research object, which, in the second part of the chapter, is configured with the analysis of the right to land and self-determination. The right to land is fundamental to the freedom and self-determination of indigenous peoples as it allows them to live undisturbed on land they have inhabited for millennia and with which they have an ancestral, sacred, and divine connection.

In analyzing the legal framework of the principle of *uti possidetis*, from which derived the right to land, the present research has considered its historical roots that go back to Roman law and its subsequent transposition into the colonial context. As stated in section 2.3, the colonists gave rise to a convenience mechanism by selecting only a part of the *uti possidetis* principle to justify their imperialistic choices. This has aggravated the issue regarding the protection of indigenous rights as states have fallen back on this mechanism to avoid guaranteeing them the right to land. From this inevitably follows the denial of the self-determination of the people as they do not have the power to self-determine themselves within a territory. Therefore, negative consequences ensue politically, legally but also economically and socially.

To conclude, over time, international law has evolved and better addressed the issue of these two rights concerning indigenous peoples, however, not enough has yet been done as many states feel free to choose to recognize these rights or not. In this regard, this chapter has paved the way for the study of legal instruments at the international and regional levels aimed at protecting indigenous peoples.

CHAPTER THREE

International and regional law systems for the protection of Indigenous rights

Summary: 3. 1 Introduction to the International Legal Instruments for the Protection of Indigenous Peoples, 3.2 The ILO Conventions as Instruments of Hard Law, 3.3 Other Hard Law Instruments, 3.4 Instruments of Soft Law, 3.5 Regional Law Systems for the Protection of Indigenous rights, 3. 6 Concluding observations.

“It is one thing for international law to incorporate norms concerning indigenous peoples; it is quite another thing for the norms to take effect in the actual lives of people²⁴⁸.”

3. 1 Introduction to the International Legal Instruments for the Protection of Indigenous Peoples

Over time, indigenous peoples have asserted their rights claims at the international level, achieving remarkable results in redefining their status under international law. However, as Anaya stated in 2004, it is worth keeping in mind the reality of the facts, that is, to what extent all these achievements constituted a concrete and real success for indigenous peoples²⁴⁹. Indeed, although international conventions and norms have been adopted in favour of these peoples, their implementation has often not been enforced at the national level²⁵⁰²⁵¹. This gives rise to two options for indigenous peoples: present their claims before a national tribunal, often hostile to international legal norms, or turn to more sympathetic but largely disenfranchised international bodies. Therefore, it is necessary that the many achievements obtained at the international level can actually be implemented in the lives of indigenous peoples at the domestic level²⁵².

To ensure the enforcement of these rules²⁵³ and give them binding force, indigenous peoples have considered the instruments of customary international law²⁵⁴ that can make an international

²⁴⁸ S. J Anaya, *Indigenous peoples in international law*, Oxford, 2d ed, 2004, 56-58, 61-72 in G. D. Smelcer, *Using international law more effectively to secure and advance indigenous peoples' rights: towards enforcement in US and Australian domestic courts*, 2006, Pacific Rim Law & Policy Journal, 15(1), p. 306.

²⁴⁹ *Op. cit.* Smelcer., 2006, pp. 301-302.

²⁵⁰ *ibidem*.

²⁵¹ This is mainly because the structure of international law, based on state sovereignty and consent (from which the concepts of territorial integrity, exclusive jurisdiction, and non-intervention in internal affairs are then derived) has been an obstacle to the implementation of international norms at the national level. *Ibidem*.

²⁵² *ibidem*.

²⁵³ Indigenous rules have been promulgated through three processes: “(1) interpretation of existing international law in a way favorable to indigenous peoples' aspirations; (2) promulgation of new international instruments specifically focused on indigenous peoples' rights; and (3) successful litigation before international bodies resulting in decisions that have given further favourable content to indigenous peoples' rights”. *Op. cit.* Anaya, 2004 in Smelcer, 2006, p. 306.

²⁵⁴ Customary international law comprises “general practices or rules of behaviour that states follow out of a sense of self-perceived legal obligation”. A. Bayefsky & J. Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective 1992 in Smelcer*, 2006, p. 304.

norm binding upon nations²⁵⁵. From the concept of ‘binding’ comes the difference between the category of international instruments belonging to *hard law* and those belonging to *soft law*. To define them, many legal scholars use only the binary binding/nonbinding divide to distinguish them²⁵⁶; for instance, positivists deny the existence of soft law since they believe that the law, for definition, must be binding, while rationalists consider the term binding as a ‘misleading hyperbole’²⁵⁷. Instead, constructivist scholars focus more on the gap between ‘the law-in-the-books’ and ‘the law-in-action’²⁵⁸, noting the extent to which the law is then implemented, such that the difference between ‘binding’ and ‘non-binding’ is illusory²⁵⁹. Finally, realist scholars argue that “most international law is ‘soft’ in distinctive ways²⁶⁰” since at the international level centralized institutions are typically missing²⁶¹.

In this regard, to define the concepts of hard and soft law, in 2000, Abbott and Snidal began by defining the concept of *legalization*²⁶² in international relations along three dimensions: “precision of rules; obligation; and delegation to a third-party decision maker”²⁶³. These three dimensions, considered together, give laws a ‘harder’ or ‘softer’ legal character²⁶⁴. Therefore, considering this definition, hard law refers to that set of legally binding obligations that mandate authority in interpreting and implementing the law²⁶⁵. On the other hand, soft law is defined according to the three dimensions listed above as a residual category: if a law is not formally binding then the agreement belongs to soft law according to the first dimension; if, on the contrary, its content is too vague, it is soft law according to the second dimension; and finally, if it does not delegate any authority to monitor the implementation of said law, it is soft law along the third dimension²⁶⁶.

It is not necessarily written down; therefore, states can be bound by a treaty or convention even if they did not sign them but their content has reached customary international law status. J. L. Dunoff et al. eds. *International law: norms, actors, process—a problem-oriented approach* 70, 2002, in Smelcer, 2006, p. 304.

These rules are binding against states and other subjects of international law both at the domestic and international levels. F. S. Cohen, *Handbook of federal Indian law*, 2005 in Smelcer, 2006, p. 305.

Nevertheless, customary law is binding only when it has fully *crystallized* “a hard-to-define status achieved only when a majority of states recognize it as law”. *Op. cit.* Dunoff, 2002 in Smelcer, 2006, p. 305.

²⁵⁵ *Op. cit.* Smelcer, 2006, p. 304.

²⁵⁶ G. C. Shaffer & M. A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, Minnesota Law Review 94, no. 3, 2010, p. 712.

²⁵⁷ C. Lipson, *Why Are Some International Agreements Informal?* 45 INT’L ORG, 1991, pp. 495, 508 in Shaffer & Pollack, 2010, p. 713.

²⁵⁸ *Op. cit.* Shaffer & Pollack, 2010, p. 713.

²⁵⁹ *ibidem.*

²⁶⁰ K. W. Abbott & D. Snidal, *Hard and Soft Law in International Governance*, 2000, 54 INT’L ORG. 421 in Shaffer & Pollack, 2010, p. 714.

²⁶¹ *ibidem.*

²⁶² Shaffer and Pollack (2010) explain that international and national actors make choices, *ex ante*, to use a hard law or soft law instrument according to their objectives, and this produces *ex post* effects. To understand such decisions, the definition of ‘legalization’ is a useful tool in this regard. *Ibidem.*

²⁶³ K. W. Abbott et al., *The Concept of Legalization*, 2000, 54 INT’L ORG. 401, 401 in Shaffer and Pollack, 2010, p. 714.

²⁶⁴ *ibidem.*

²⁶⁵ *ivi*, p. 715.

²⁶⁶ *ibidem.*

At this point, having defined both categories, it is necessary to list the advantages of each to grasp on what basis most state and private actors decide to use hard law or soft law²⁶⁷. Consequently, it is possible to better understand which instruments are chosen to protect indigenous rights and why.

As for hard law instruments, they make the states' commitment more credible because they increase the costs of *reneging*²⁶⁸, and, given their self-executing nature, they have direct legal effect at the domestic level²⁶⁹. Furthermore, hard law instruments can create mechanisms to interpret legal commitments over time and allow states to monitor and enforce their commitments better²⁷⁰. Therefore, hard law is usually chosen by states when the “benefits of cooperation are great” and the “potential for opportunism and its costs are high.”²⁷¹

By contrast, instruments of soft law are considered easier to apply and have lower “sovereignty costs” on states, they provide more flexibility and engagement for states to cooperate and are directly available to nonstate actors²⁷².

To summarize, both hard and soft law offer many advantages to state and private actors, hence often the choice of one over the other depends especially on the circumstance and the specific case²⁷³.

Regarding the protection of indigenous peoples' rights, both soft law and hard law instruments have been adopted at the international and national levels. This chapter will subdivide international instruments not by the chronological criterion but by the nature of the treaty: that is, binding and non-binding. Therefore, the next paragraphs will be devoted to the analysis of ILO Conventions No. 107 and No. 169 and the remaining international instruments with binding force, i.e.: the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Rights of the Child (UNCRC). Next, there will be a section devoted to soft law instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the American Declaration on the Rights of Indigenous Peoples. Finally, the last section will examine the regional systems for the protection of human rights, namely: European, African, and Inter-American law systems.

Before concluding this section, it is important to mention a crucial *forum* for the protection of indigenous rights that does not fall under the instruments of hard or soft law. It is the Working Group on Indigenous Populations, established by ECOSOC Resolution 1982/34 of 7 May 1982 to analyse

²⁶⁷ *ivi*, p. 717.

²⁶⁸ An agreement or treaty that has binding force often implies the presence of economic sanctions if the state fails to comply with its provisions, and as a result, a state in default would aggravate its reputation at the international level concerning other states. *Ibidem*.

²⁶⁹ *Op. cit.* Abbott & Snidal at 428 in Shaffer and Pollack, 2010, p. 718.

²⁷⁰ *ibidem*.

²⁷¹ *Id.* at 429 in Shaffer and Pollack, 2010, p. 718.

²⁷² *Op. cit.* Shaffer and Pollack, 2010, p. 719.

²⁷³ *ibidem*.

situations that affected Indigenous Peoples and elaborate standards for the protection of their rights²⁷⁴. It became an important source of information concerning the issue of indigenous rights, publishing different studies and reports such as that of the Special Rapporteurs Miguel Alfonso Martinez²⁷⁵ and Erica-Irene Daes²⁷⁶ and organizing many international meetings on the issue²⁷⁷. Over time, the *forum* organized numerous sessions where the number of participants increased more and more, becoming the largest international *forum* for the rights of indigenous people²⁷⁸.

3. 2 The ILO Conventions as Instruments of Hard Law

Labour constitutes a fundamental right for indigenous peoples to enter the international legal system²⁷⁹. As a result of colonization, indigenous people were made slaves of settlers and denied basic freedoms and rights, forced to work in the service of the occupier. Therefore, being able to exercise the right to work freely and equally with the rest of the population is an important element of redemption for indigenous peoples. And so, the first international body to address their fundamental rights was the International Labour Organization²⁸⁰, opposing the exploitation of indigenous peoples by colonies²⁸¹.

Therefore, thanks to the intervention of ILO, indigenous rights began to enter the international human rights regime and international law system. The first action was the creation of the *ILO Convention No. 107* in 1957²⁸² concerning the *Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries*²⁸³.

²⁷⁴ J. Burger & P. Hurt, *Towards the International Protection of Indigenous Peoples' Rights*, Netherlands Quarterly of Human Rights 12, no. 4, 1994, p. 409.

²⁷⁵ Miguel Alfonso Martinez, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, at the Forty-seventh session (Item 14 of the agenda) submitted the second progress report E/CN.4/Sub.2/1995/27 "Study on treaties, agreements, and other constructive arrangements between States and indigenous populations" (1995). See Chapter II.

²⁷⁶ E. Daes submitted on 10 June 1996 the working paper on indigenous people *Standard-setting activities: evolution of standards concerning the rights of indigenous people*. UN, Sub-commission on Prevention of Discrimination and Protection of Minorities. Working Group on Indigenous Populations, Fourteenth Session. E/CN.4/Sub.2/AC.4/1996/2. Geneva, Switzerland. See Chapter II.

²⁷⁷ *Op. cit.* Burger & Hurt, 1994, p. 409.

²⁷⁸ *Ibidem*.

²⁷⁹ C. Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, Queen's Law Journal 30, no. 1, 2004, p. 363.

²⁸⁰ The International Labour Organization (ILO) was established in 1919 as a part of the Treaty of Versailles at the end of World War I. It resulted in a tripartite organization composed of representatives of governments, employers, and workers in its executive bodies. The organization focuses primarily on social justice, security, economy, and humanitarian issues. ILO, *History of the ILO*. 2023 <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>

²⁸¹ *Op. cit.* Oguamanam, 2004, p. 364

²⁸² The Convention No. 107 was signed by 28 countries; the People's Republic of China could not sign it since it was not part of the United Nations in 1957; Canada signed but did not ratify it.

S. Simon, *Indigenous Peoples and Hunting Rights* in "Confronting Discrimination and Inequality in China. Chinese and Canadian Perspectives", University of Ottawa Press, 2009, chapter sixteen, p. 407.

²⁸³ *Ibidem*.

3. 2. 1 The ILO Convention No. 107

This convention represents the turning point in the issue of indigenous peoples' rights because, for the first time in history, a legal instrument of binding nature²⁸⁴ has been adopted at the international level and obliged state parties to respect its provisions. Furthermore, the importance of protecting indigenous peoples has reached national governments, who have decided to commit themselves by ratifying a convention. The latter can be defined as modern and innovative firstly because of its binding nature²⁸⁵, and secondly because of its contents as they consider a wide range of rights never before addressed. The Convention consists of 37 Articles, preceded by a preamble and divided into 8 parts²⁸⁶: Part I is about the General Policy and includes Articles 1 through 10, the second addresses the crucial right to land for indigenous peoples from Articles 11 to 14; then Part III is that of Recruitment and Conditions of Employment (Art. 15) and is followed by Part IV called Vocational Training, Handicrafts and Rural Industries (Articles 16-18). Part V is about Social Security and Health (Articles 19 and 20) and Part VI addresses Education and Means of Communication (Articles 21-16). Finally, Part VII is about the Administration (Art. 27) and Part VIII contains General Provisions from Article 28 to 37²⁸⁷.

One of the most important parts of the Convention is the third, the one devoted to the right to land: Articles 11 and 12 establish that the right of ownership²⁸⁸ on territories occupied by indigenous peoples should be recognized and that these cannot be removed without their consent²⁸⁹. However, Article 12(2, 3) can be considered a double-edged sword as governments were using it to remove indigenous peoples²⁹⁰ since it is stipulated that if indigenous people are removed without their consent, the one who committed the action should compensate them for the injury and any loss²⁹¹. This implicitly means that they can be removed without any prohibition²⁹².

²⁸⁴ *Ibidem*.

²⁸⁵ Although some states preferred to give it a non-binding nature during the preparatory work, the majority in favor of hard law won out.

M. Rossi, *I popoli indigeni nell'ordinamento internazionale: diritto alla terra e diritti umani*. Milano, 2009/2010, p.131.

ILO, *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*. 1957, General Conference, Report VI (1), fortieth session, p. 43.

²⁸⁶ OIL, *C107 - Indigenous and Tribal Populations Convention (No. 107)*, 1957, Fortieth Session, Geneva https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107

²⁸⁷ *Ibidem*.

²⁸⁸ During the drafting of the Convention, the right of ownership encountered conflicting ideologies. Western countries, advocates of the individual right of ownership, disagreed with the idea of defining the right of ownership as collective since in their view indigenous peoples would leverage it to advance their sectoral and group interests within society (ILO, *General Conference*, 1957, Report VI (2), p. 20 in *Op. cit.* Rossi, 2009/2010, p. 137). On the other hand, the eastern states were in favor of a collective right to redistribute land more equitably in favor of indigenous peoples (*Ivi*, p. 19 in *ibidem*).

²⁸⁹ *Op. cit.* ILO, 1957, artt. 11, 12.

²⁹⁰ See Chapter II, paragraph 2.3.2 *The importance of ancestral lands*.

²⁹¹ *Cfr.* ILO, 1957, art. 12(2, 3).

²⁹² *Ibidem*.

Another ‘defect’ of the Convention No. 107 can be found in Article 1, which describes the two categories of beneficiaries:

(a) *members of tribal or semi-tribal populations* in independent countries whose social and economic conditions are at a *less advanced stage than the stage reached by the other sections* of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations²⁹³;

(b) *members of tribal or semi-tribal populations* in independent countries *which are regarded as indigenous on account of their descent* from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong²⁹⁴.

The second category is distinguished from the first by its descent from people who already inhabited the lands they occupy, and this is what defines them as indigenous, unlike the first category which is defined as tribal or semi-tribal. Moreover, regarding the first category, the concept of “less advantaged than the rest of the population” has been criticized numerous times in later years, such as by the Special Rapporteur Erica-Irene Daes²⁹⁵ in 1996 who stated that Convention No. 107, in describing its beneficiaries, did not depart much from the footsteps of the Covenant of the League of Nations (1920), which emphasized the concept of distinction between tribal peoples and the rest of society several times²⁹⁶.

Furthermore, another aspect of the Convention that has been the subject of much criticism is its *assimilationist* approach²⁹⁷, adopted and shared by governments at the time, as they believed that the best way to ensure the welfare and protection of indigenous peoples was to integrate them into society through a process of integration and assimilation, excluding any assumption of subsistence through natural resources.²⁹⁸ Article 2(1) first mentions the concept of integration, affirming that:

²⁹³ *Op. cit.* ILO, 1957, Art. 1(a).

²⁹⁴ *Ivi*, Art. 1(b).

²⁹⁵ See Chapter II, paragraph 2.1 *Definition and Characteristics of “Indigenous Peoples”*.

²⁹⁶ E. Daes, *Standard-setting activities: evolution of standards concerning the rights of indigenous people*. 1996, UN, Sub-commission on Prevention of Discrimination and Protection of Minorities. Working Group on Indigenous Populations, Fourteenth Session. E/CN.4/Sub.2/AC.4/1996/2, pp. 8-9.

²⁹⁷ *Op. cit.* Oguamanam, 2004, p. 364 and see Chapter II, paragraph 2.1 *Definition and Characteristics of “Indigenous Peoples”*.

²⁹⁸ *Op. cit.* Simon, 2009, p. 407.

Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive *integration* into the life of their respective countries²⁹⁹.

In my opinion, with this Article, it is clear that the life of the indigenous people within society must in some way depend on the action of the government, which must be committed to integrating the community with the rest of the population. Hence the paternalistic approach that makes indigenous people dependent on the state³⁰⁰.

Another remarkable reference to integration can be read in Article 7(2), which states:

These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes³⁰¹.

I claim that here again it is evident how states somehow have the upper hand over indigenous peoples who must adapt their customs to national programs, proposed precisely by the state. This goes against the freedom of expression of such people since it denies them the freedom to manifest their culture and tradition through ancestral customs. This therefore means that indigenous peoples must be integrated into society but that this integration would entail the exclusion of any element that does not fit the country's national model³⁰².

To conclude, as already stated and explained in Chapter Two, Convention No. 107 lacks a very important element that distinguishes indigenous peoples from minorities: the principle of self-determination, a fundamental criterion for identifying them³⁰³. This is one of the main reasons why the Convention was rejected by indigenous peoples and was later revised, adopting *Convention No. 169*³⁰⁴.

²⁹⁹ *Op. cit.* OIL, 1957, Art. 2(1).

³⁰⁰ In the following clauses of Article 2 there are further mentions of integration, which is to be promoted through government action by “creating possibilities of *national integration* to the exclusion of measures tending towards the *artificial assimilation* of these populations” and to ensure integration “recourse to force or coercion as a means shall be excluded”. *Op. cit.* OIL, 1957, Art 2(2c, 4).

³⁰¹ *Ivi*, Art. 7(2).

³⁰² The concept of integration is also mentioned in Articles 4, 5, and 17.

³⁰³ *Op. cit.* Daes, 1996, para. 29.

³⁰⁴ *Op. cit.* Simon, 2009, p. 407.

3. 2. 2 The ILO Convention No. 169

The exclusion of indigenous representatives from the drafting of the first ILO Convention and the subsequent criticism and rejection of it³⁰⁵ led the ILO to revise and replace C-107 with another convention that would leave the assimilationist and paternalist approach, instead inserting the principle of self-determination³⁰⁶. Therefore, the next *Convention No. 169* of 1989³⁰⁷ focuses on the preservation of indigenous cultural identity and represents the “most concrete manifestation of the growing responsiveness of indigenous peoples' demands”³⁰⁸. The Convention turns all claims made by indigenous people internationally into norms, making them independent of states and making governments responsible for their protection and preservation³⁰⁹.

The ILO initiative was considered innovative for six reasons³¹⁰. First, because has rejected officially the policy of assimilation, and secondly, has reversed this policy at the international and national levels. Third, it established an agenda concerning the indigenous issue, and fourth it depicted a “part of a larger body of developments that can be understood as giving rise to new customary international law with the same normative thrust.”³¹¹ Another innovation is that the ILO has treated the indigenous issue separately from other human rights issues, and finally has analyzed the controversial issue of the term peoples and inserted the principle of self-determination³¹². The latter is used as the “fundamental criterion for determining the groups to which the provisions of this Convention apply”³¹³. Additionally, another difference with the Convention No. 107, is the use of the term “peoples” instead of “population”, as indicated in Article 1(3)³¹⁴.

The incorporation of the rights considered by ILO C-169 into the domestic constitutional and legal orders of different states has been one of the most notable effects³¹⁵. The guiding principle of the Convention is that indigenous and tribal peoples are recognized by the ILO Convention as having the right to maintain their cultural heritage and identity, as well as to determine their own path and speed of progress, affirming their inherent right to exist and flourish on their own terms³¹⁶. The main aspect of *Convention No. 169* lies in the fact that the well-being and economic development of

³⁰⁵ Much pressure was also placed on the World Bank because it has contributed, through lending policies, to violating indigenous rights with the damage of their lands. *Op. cit.* Burger & Hurt, 1994, p. 406.

³⁰⁶ *Ibidem.*

³⁰⁷ Convention (No. 169) concerning *Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 I.L.M. 1392 [Convention No. 169]. Entered into force 5 September 1991. *Ibidem.*

³⁰⁸ *Op. cit.* Anaya, 2004, p. 47 in *op. cit.* Oguamanam, 2004, p. 364.

³⁰⁹ *Op. cit.* Oguamanam, 2004, p. 364.

³¹⁰ *Ibidem.*

³¹¹ *Op. cit.* Anaya, 2004, p. 49-50 in *op. cit.* Oguamanam, 2004, p. 365.

³¹² *Op. cit.* Oguamanam, 2004, p. 365.

³¹³ *Op. cit.* ILO, 1989, Art. 1(2).

³¹⁴ Art. 1(3) establishes that “The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”. *Ivi*, Art. 1(3).

³¹⁵ J. Aylwin & P. Policzer, *No Going Back: The Impact of ILO Convention 169 on Latin America in Comparative Perspective*, University of Calgary, 2020, vol. 13, p. 2, the School of Public Policy Publications, SPP Research Paper.

³¹⁶ *Op. cit.* Simon, 2009, p. 407-408.

indigenous people no longer depend on the paternalistic actions of the state, but rather on the promotion of the traditional economy, the protection of ancestral lands, and the responsibility of governments to give financial assistance to promote sustainable policies³¹⁷. As Article 23 establishes:

1. [...] Governments shall, with the participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development³¹⁸.

Furthermore, is important to stress the initial difference between the two Conventions already noticeable in the different preambles: in Convention No. 107 it is pointed out that one of the major aspects taken into consideration is “that the adoption of general international standards on the subject will facilitate action to assure the protection of the populations concerned, *their progressive integration into their respective national communities*, and the improvement of their living and working conditions”³¹⁹. On the other hand, the Preamble of Convention No. 169 no longer mentions the need to facilitate the integration of indigenous people into the national community but completely changes its approach and objective, highlighting a crucial element, namely that:

In many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs, and perspectives have often been eroded.³²⁰

And the same preamble acknowledges these peoples’ aspirations:

To exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live³²¹.

³¹⁷ *Ibidem*.

³¹⁸ *Op. cit.* ILO, 1989, Art. 23 in *op. cit.* Simon, 2004, p. 408.

³¹⁹ *Op. cit.* ILO, 1957, Preamble.

³²⁰ *Op. cit.* ILO, 1989, Preamble in *op. cit.* Aylwin & Policzer, 2009, p. 1.

³²¹ *Ibidem*.

In this Preamble, there is a heightened awareness of the needs, claims, and aspirations of indigenous peoples. These must be guaranteed alongside political rights, such as consultation and participation in decision-making processes.³²² Furthermore, the Convention recognizes “the right to decide their own priorities for the process of development as it affects their lives, and the right to retain their own customs and traditional institutions”³²³. The Convention then emphasizes the fundamental right to land and resources traditionally occupied or used by indigenous peoples and their collective relationship with these territories³²⁴. In addition, it addresses critical areas such as education, health, social security, languages, religious beliefs, and cross-border cooperation³²⁵.

Finally, a key aspect of the Convention is its supervision mechanism to ensure its correct application after the ratification by States. The latter are obliged to respect a regular supervision mechanism which consists of submitting reports every six years of the steps they have taken in law and practice to apply the Convention that they have ratified³²⁶. In this regard, one of the supervisory bodies, that can request more frequent reports when needed³²⁷, is the Committee of Experts on the Application of Conventions and Recommendations (CEACR). It can also address observations and direct requests from workers and employers. The Committee, composed of 20 experts, has the role of making impartial evaluations of the application of the ILO standards by member states by issuing a public document³²⁸. In reviewing the application, the Committee may issue observations³²⁹ and direct requests that are not published in the report but are communicated directly to the governments concerned³³⁰. After that, the Committee issues the annual report consisting of three parts: a General Report, Observations on the application of international labour standards, and a General Survey on a specific subject selected by the ILO Governing Body³³¹. The Report, adopted in December, is submitted to the International Labour Conference the following June, which is examined by the Conference Committee on the Application of Standards (CAS). It comprises government, employer,

³²² *Op. cit.* Aylwin & Policzer, 2009, p. 1.

³²³ *Op. cit.* ILO, 1989, artt. 6, 7, 8 in *op. cit.* Aylwin & Policzer, 2009, p. 1.

³²⁴ *Ivi*, artt. 13-15.

³²⁵ Convention No. 169, containing 44 articles, is divided into 10 parts: general policy, land, recruitment and conditions of employment, vocational training, handicrafts and rural industries, social security and health, education and means of communication, contacts and co-operation across borders, administration, general provisions, final provisions. *Op. cit.* ILO, 1989.

³²⁶ ILO, *Committee of Experts on the Application of Conventions and Recommendations*, N/A, Reports of the Committee of Experts: Reports from 1932 to 2017 and Reports since 2018. <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>

³²⁷ P. B. Larsen & J. Gilbert, *Indigenous rights and ILO Convention 169: learning from the past and challenging the future*, 2020, *The International Journal of Human Rights*, 24, p. 88, DOI: 10.1080/13642987.2019.1677615.

³²⁸ *Op. cit.* ILO, N/A.

³²⁹ Observations containing comments on fundamental questions raised by a state’s application of a particular Convention are published annually in the report of the Committee of Experts. *Ibidem*.

³³⁰ *Ibidem*.

³³¹ *Idem*.

and worker delegates, organized in a tripartite setting³³². Usually, the Conference Committee recommends governments take specific steps to remedy a problem or to invite ILO missions or technical assistance³³³.

Furthermore, there are two special procedures: the first one is the representations, described by articles 24 and 25 of the ILO Convention “under which an industrial association of employers or workers has the right to present to the ILO Governing Body a representation against any member State which”³³⁴, in its view, “has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party”³³⁵. In addition, if the necessary actions are not taken by the government, it could prompt the Committee of Experts to investigate the matter further. In more severe cases, this could result in a complaint being filed, and the Governing Body may ultimately decide to establish a Commission of Inquiry³³⁶.

Finally, the second special procedure is appeal before the national courts which shall be based on the provisions of ratified international treaties when a country's national law gives them the force of law³³⁷.

To conclude, fifteen of the twenty-three states that have ratified the Convention are in Latin America³³⁸, and this is not a casual coincidence because in this region there is a high rate of multiculturalism, many countries are multilingual and multicultural, and in some states, most of the population is represented by indigenous peoples³³⁹. Thus, there have been important developments and advances in indigenous rights in Latin America, thanks mainly to some common factors that point to a regional trend³⁴⁰. The first one is the “relationship between constitutional reform processes and transitional or democratic consolidation processes”³⁴¹ since many countries, after years of authoritarian regimes, have made a transition to democracy that was accompanied by the adoption of constitutional reforms. The latter represented a set of new rights and institutional innovations³⁴². Another important factor is the expansion of constitutional justice³⁴³, followed by the “ratification of

³³² *Ivi*, Conference Committee on the Application of Standards, <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm>

³³³ *Ibidem*.

³³⁴ *Ivi*, Representations. <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>

³³⁵ *Ibidem*.

³³⁶ *Id.*

³³⁷ *Op. cit.* Rossi, 2009/2010, p. 130.

³³⁸ *Op. cit.* Aylwin & Policzer, 2020, p. 2.

³³⁹ ILO, *Application of Convention No. 169 by domestic and international courts in Latin America*, A case book, Ginevra, 2009, p. 6.

³⁴⁰ *Ibidem*.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ After adopting constitutional reforms, in the last decade of the 20th century, many constitutional and supreme courts were created to reinforce constitutional control. *Ivi*, p. 7

and granting privileged legal status to international human rights treaties”³⁴⁴. The last two common factors are the consolidation of the regional human rights system especially through the expansion of the Inter-American system of human rights and the constitutional recognition of new rights, with the tendency to include a comprehensive range of rights such as “civil, political, economic, social, and cultural rights, collective rights, minority rights, and environmental rights”³⁴⁵.

3. 3 Other *hard law* instruments

The ILO Convention No. 169 is not the only binding legal instrument to protect indigenous rights; at the international level, there are other instruments of hard law having a binding nature such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *Convention on the Rights of the Child* (UNCRC).

3. 3. 1 The International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights*³⁴⁶ addresses the indigenous issue with Article 27, which represents one of the most important universal legally binding norms for the safeguarding of minority and indigenous cultures³⁴⁷. Article 27 presents an unusual negative formulation by affirming that “persons belonging to such minorities shall not be denied the right [...] to enjoy their own culture, to profess and practice their own religion, or to use their own language”³⁴⁸. This provision represents an example of ‘restrictive toleration’³⁴⁹ of minorities and does not call on states to take affirmative action to protect their rights³⁵⁰. Therefore, the Article is expressed in negative terms, but it recognizes the existence of a right that should not be denied to minorities³⁵¹.

³⁴⁴ The ratification of human rights treaties implies the acceptance of the rule of law and the enforceability of fundamental human rights, opposing the authoritarian regimes that violated rights in the past. The ratification was considered a commitment by states at the international level to respect human rights. *Ibidem*.

³⁴⁵ *Ivi*, p. 8.

³⁴⁶ The ICCPR was adopted by the UN General Assembly with the resolution 2200A (XXI) on 16 December 1966 and it entered into force on 23 March 1976, under Article 49.

General Assembly, *International Covenant on Civil and Political Rights*, New York, 1966.

<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

³⁴⁷ A. Yupsanis, *Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority /Indigenous Participatory Claims in the Case Law of the Human Rights Committee* in Hague Yearbook of International Law / Annuaire de La Haye de Droit International, Vol. 26, 2013, p. 1. DOI:

https://doi.org/10.1163/9789004287365_013

³⁴⁸ *Op. cit.* GA, 1966, Art. 27.

³⁴⁹ J. Robinson, *International protection of minorities: a global view* in P. Thornberry, *Indigenous peoples and human rights*. Manchester University Press, Oxford Road, Manchester M13 9NR, UK, 2002, p. 160. British Library Cataloguing-in-Publication Data. ISBN 0 7190 3793 X.

³⁵⁰ *Op. cit.* Thornberry, 2002, p. 160.

³⁵¹ CCPR, *General Comment No. 23: Article 27 (Rights of Minorities)*, 1994, para. 6.1, Fiftieth Session of the Human Rights Committee, CCPR/C/21/Rev.1/Add.5

Consequently, since this provision has a binding nature, states parties to the Covenant are under the obligation to respect this right and protect it from outsider violations by adopting positive measures³⁵²: this is called *horizontal protection*³⁵³. Additionally, as stressed by *General Comment No. 23*, positive measures taken by States are necessary also to protect the right of indigenous and minorities to enjoy and develop their culture, and language and to practice their religion, in the community with the other members of group³⁵⁴. In this regard, culture³⁵⁵ is a crucial element that manifests itself in many forms, such as a lifestyle associated with territory and the use of land resources³⁵⁶. This is particularly true for indigenous peoples³⁵⁷.

The organ of control of the Covenant is the Human Rights Committee³⁵⁸, a quasi-judicial body composed of 18 independent experts³⁵⁹ that monitor the correct implementation of the ICCPR by States parties³⁶⁰. The organ has no binding power, but it issues documents that have effects at the level of public opinion and civil society³⁶¹. The reports must be regularly submitted by States to the Committee on how civil and political rights are being implemented; then the Committee examines the report and addresses its concerns and recommendations to the State party in the form of Concluding Observations³⁶². Some submissions made to the Committee through the Optional Protocol have mistakenly confused the right protected under Article 27 with the right to self-determination enshrined in Article 1³⁶³ of the Covenant³⁶⁴. The latter made a distinction between the two articles stating that the right to self-determination dealt with peoples, is addressed by Part I of the

³⁵² Positive measures are needed also to “protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group”. *Ivi*, para. 6.2

³⁵³ This protection creates a horizontal element to the obligation which requests States to protect minorities from external and private actors.

Op. cit. Thornberry, 2002, p. 161.

³⁵⁴ *Op. cit.* CCPR, 1994, para. 6.2.

³⁵⁵ The Committee recognized the complexity of culture and stressed again the importance of taking positive actions to ensure the right to culture for all members of minorities and indigenous groups, one of these actions can be for example the effective participation in decisions that directly affect them. *Ivi*, para. 7.

³⁵⁶ *Ibidem*.

³⁵⁷ *Ivi*, para. 3.2.

³⁵⁸ It was established under Article 28 of the Covenant. UN, *Fact Sheet No. 15 (Rev. 1): Civil and Political Rights: The Human Rights Committee*, 2005, p. 15, ISSN: 1014-5567.

<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1.en.pdf>

³⁵⁹ According to Article 28, members must be “persons of high moral character and recognized competence in the field of human rights”, with “consideration given to the usefulness of the participation of some persons having legal experience”. Each of them is a national of the State party. *ibidem*.

³⁶⁰ The Committee was created to supervise and monitor the implementation of Covenant obligations by States parties, so its main activities are the promotional task that consists of visiting countries with low human rights standards, studying and researching the correct interpretation of the Articles, and finally, the protection activity of human rights, which is developed in 3 different levels: examination of periodical states’ reports, reception of interstate petitions or communications and reception of individual petitions or communications. *Ivi*, pp. 14-25.

³⁶¹ UN, Introduction to the Committee, N/A. <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee>

³⁶² *Ibidem*.

³⁶³ Article 1(1) establishes that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development”.

Op. cit. GA, 1966, Art. 1(1).

³⁶⁴ *Op. cit.* CCPR, 1994, para. 2.

Covenant and it is not cognizable under the Optional Protocol³⁶⁵. By contrast, the right declared in Article 27 “relates to rights conferred on individuals as such” and, included in Part III, is cognizable under the Optional Protocol³⁶⁶.

On the other hand, in reports submitted by States, the obligations established by Article 27 have been confused with the duty covered by Article 2(1) which affirms that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status³⁶⁷

Finally, it is important to take in mind that the rights protected by Article 27 are individual and non-collective rights, they depend on the ability of the minority group to maintain its culture, language, or religion to belong to the group³⁶⁸. In this regard, the membership of a minority or indigenous group has often been sanctioned by governments as in the *Lovelace v. Canada* case³⁶⁹. The applicant, Sandra Lovelace, had lost, in 1970, her status and rights as an Indian under section 12(1)(b) of the *Indian Act of Canada*³⁷⁰ because of marrying a non-Indian man. Nevertheless, had it been the reverse situation, i.e., a man marrying a non-indigenous woman, he would not have lost his status; therefore, the applicant claimed that the *Act* was discriminatory and contrary to Articles 2(1), 3, 23(1), 23(4), 26 and 27 of the Covenant³⁷¹. Nevertheless, Canada replied by stating that the *Act* was necessary to protect the Indian minority, but this led to a loss of rights for Indians who ceased to be members of an Indian band, such as the impossibility of residing by right in a reserve³⁷². Furthermore, the marriage with a non-Indian man implied the loss of cultural benefits to which Article 27 was directly applicable, regarding which the Human Rights Committee expressed itself as follows³⁷³:

Whatever may be the merits of the Indian Act in other respects, it does not seem [...] that to deny Sandra Lovelace the right to reside on a reserve is reasonable, or necessary to preserve

³⁶⁵ *Ivi*, para. 3.1.

³⁶⁶ *Ibidem*.

³⁶⁷ *Op. cit.* GA, 1966, Art 2(1).

³⁶⁸ *Op. cit.* CCPR, 1994, para. 6.2

³⁶⁹ *Op. cit.* Thornberry, 2002, p.154.

³⁷⁰ The section explicitly declared that “a woman who married a person who is not an Indian... [is] not entitled to be registered.” Indigenous Foundations, *The Indian Act*, The University of British Columbia, 2009.

https://indigenousfoundations.arts.ubc.ca/the_indian_act/#:~:text=The%20Indian%20Act%20legally%20distinguishes,and%20obligation%20to%2C%20First%20Nations.

³⁷¹ *Op. cit.* Thornberry, 2002, p. 155.

³⁷² Sandra Lovelace ceased to be a member of *Tobique Band* and even after her divorce, she could not live by right with her parents in the Indian reserve. *Ibidem*.

³⁷³ *Ivi*, p. 156.

the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under Article 27 [...] read in the context of the other provisions referred to³⁷⁴.

In conclusion, the case established some parameters to apply Article 27 of the Covenant (ICCPR), creating important developments in the matter. From this derived the decision to let international standards prevail over national standards in the matter of the ‘existence’ of minorities³⁷⁵. Another question raised by the *Lovelace v. Canada* case was that, despite the individualistic formulation of Article 27, the rights protected upon it are for ‘persons belonging to minorities and not minorities as such’³⁷⁶. The problem stems from the fact that these individual rights depended on collectivity and from the capacity of a group to maintain its culture and identity: sometimes these provisions can be in contrast with the aspirations of individuals. However, the most important contribution of the *Lovelace v. Canada* case was to include Article 27 into the canon of Human Rights³⁷⁷.

There are other Articles of ICCPR useful for the protection of indigenous rights, such as the 14, 19, 20, 25, and 26³⁷⁸. The former establishes equality before the law, declaring that “All persons shall be equal before the courts and tribunals”³⁷⁹, a key right for indigenous peoples to ensure the respect of their claims before the law. Then, Article 19 expresses the important right “to hold opinions without interference” and the right to freedom of expression; “this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”³⁸⁰. Article 20 prohibits propaganda and any type of “discrimination, hostility, or violence”³⁸¹. The last two articles, 25 and 26, concern the democratic participation in public life and the prohibition of any form of discrimination, stating that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as

³⁷⁴ UN, *Communication No. 24/1977*, 1981, para. 17 in *Op. cit.* Thornberry, 2002, pp. 156-157.

³⁷⁵ *Op. cit.* Thornberry, 2002, p. 157.

³⁷⁶ *Ibidem.*

³⁷⁷ *Id.*

³⁷⁸ *Op. cit.* Rossi, 2009/2010, p. 55-56.

³⁷⁹ *Op. cit.* GA, 1966, Art. 14(1).

³⁸⁰ *Ivi*, art. 19(1,2).

³⁸¹ Article 20 declares that: “(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” *Op. cit.* GA, 1966, Art. 20.

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status³⁸².

All these articles constitute the general base to protect human rights. Then, is the responsibility of the states to take positive and appropriate measures to implement the relevant provisions³⁸³; indeed, the Human Rights Committee outlined that the Covenant sometimes expressly “requires them to take measures³⁸⁴ to guarantee the equality of rights of the persons concerned”³⁸⁵.

3.3.2 The International Covenant on Economic Social and Cultural Rights

The ICESCR was adopted by the General Assembly on 16 December 1966 by *consensus*, with no abstentions, through the General Assembly Resolution 2200A (XXI)³⁸⁶. It is divided into five parts³⁸⁷ of which Preamble, Part I, and V are in common with the ICCPR.³⁸⁸ The organ of control for this Covenant is the Committee on Economic, Social and Cultural Rights (CESCR)³⁸⁹ created in 1985 by Resolution 1985/17 of the Economic and Social Council (ECOSOC) and modeled based on the Human Rights Committee³⁹⁰.

Unlike the ICCPR, the *Covenant on Economic Social and Cultural Rights* does not provide specific Articles on indigenous peoples or minorities, nevertheless, all the rights contained in the Covenant are potentially relevant to indigenous peoples³⁹¹. The Covenant is structured as a programmatic or promotional human rights treaty that must be respected by States Parties³⁹² that are under the basic

³⁸² *Ivi*, art. 26.

³⁸³ CCPR, *General Comment No. 18: Non-discrimination*, 1989, Thirty-seventh Session of the Human Rights Committee, para. 4.

³⁸⁴ For example, Article 24 establishes that all children “have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State”. *Ivi*, para. 5.

³⁸⁵ *Ibidem*.

³⁸⁶ UN General Assembly, *Resolution 2200A (XXI)*, 1966.

<https://documents.un.org/doc/resolution/gen/nr0/005/03/pdf/nr000503.pdf?token=C1cPtk91RbivLRMRe8&fe=true>

³⁸⁷ Part I embodies the right of all peoples to self-determination, including the permanent sovereignty over natural resources and the duty of States administering Non-Self Governing and Trust Territories to promote self-determination. Part II concerns the main principles regarding ESCR and their implementation, Part III deals with protected rights such as the right to work, social security, protection of the family, etc. Then, Part IV provides for the submission of periodical reports by States Parties to the ECOSOC regarding the measures which they have adopted and finally Part V is about the ratification procedure.

M. Pinto, *International Covenant on Economic, Social and Cultural Rights*, Buenos Aires, 2021, United Nations Audiovisual Library of International Law, pp. 2-4.

³⁸⁸ *Ivi*, p. 1.

³⁸⁹ The Committee has the task to examine the reports submitted by states parties on how economic, social, and cultural rights are being implemented. The Committee addresses its concerns and recommendations to the State party in the form of “concluding observations”. Additionally, the Optional Protocol entered into force on 5th May 2013 “gives the Committee competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated”. UN, *Introduction to the Committee*, N/A. <https://www.ohchr.org/en/treaty-bodies/cescr/introduction-committee>

³⁹⁰ UN, *Committee on Economic, Social and Cultural Rights*, n/a, Treaty bodies section.

<https://www.ohchr.org/en/treaty-bodies/cescr>

³⁹¹ *Op. cit.* Thornberry, 2002, p. 184.

³⁹² *Ivi*, p. 182.

obligation “to take steps [...] to the maximum of its available resources”³⁹³ to fully realize the rights enshrined in the Covenant.

The first article to consider is related to self-determination³⁹⁴ which is essential not only to ensure civil and political rights but also to “freely pursue [...] economic, social and cultural development”³⁹⁵. Then, Article 2, which is analogous to that of ICCPR, deals with the discrimination issue:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status³⁹⁶.

Concerning the discrimination against indigenous peoples, the CESCR in its Initial Report of Peru, E/1990/5/add.29³⁹⁷, stressed the existence of “acute forms of discrimination” against indigenous peoples³⁹⁸ and the presence of “pyramidal society where at the bottom there are the indigenous Indians of the Alto Plano or the mountains or the Amazon jungle”³⁹⁹.

The next important Article is number 6 dedicated to the right to work and it requires State responses on groups that are vulnerable or disadvantaged concerning employment⁴⁰⁰. Then there is Article 11 which declares “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”⁴⁰¹. In this regard, State Parties should take appropriate measures and promote international cooperation to ensure these rights⁴⁰².

Moreover, another important provision concerns health rights, covered by Article 12 whose implications have been spelled out by the Committee in General Comment⁴⁰³ No. 14⁴⁰⁴. The right is considered by the Committee as inclusive which also extends to the need to:

³⁹³ UN, *International Covenant on Economic, Social and Cultural Rights*, 1966, art. 2(1).

³⁹⁴ *Ivi*, Art. 1.

³⁹⁵ *Op. cit.* Thornberry, 2002, p. 185.

³⁹⁶ *Op. cit.* UN, 1966, Art. 2(2).

³⁹⁷ Initial Report of Peru, E/1990/5/add.29, discussed at the 16th and 17th Sessions of the ESC Committee, E/1998/22; E/C.12/1997/10, paras. 130–69 in *Op. cit.* Thornberry, 2002, p. 186.

³⁹⁸ *Ivi*, para. 141(f).

³⁹⁹ *Ivi*, para. 140.

⁴⁰⁰ *Op. cit.* Thornberry, 2002, p. 187.

⁴⁰¹ *Op. cit.* UN, 1966, Art. 11(1).

⁴⁰² Article 11(2) invites States parties to implement specific programs “to improve methods of production, conservation, and distribution of food” and to consider “the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need”. *Ivi*, Art. 11(2).

⁴⁰³ *Op. cit.* Thornberry, 2002, p. 190.

⁴⁰⁴ UN Economic and Social Council, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4, UN Committee on Economic, Social and Cultural Rights (CESCR), 2000, <https://www.refworld.org/legal/general/cescr/2000/en/36991>

Access to safe and potable water adequate sanitation, an adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health⁴⁰⁵.

Additionally, the Committee mentions the importance of the participation of indigenous peoples in health-related decision-making at the national and international levels⁴⁰⁶. Furthermore, General Comment No. 14 outlines the presence of further elements related to the full realization of the right to health, they depend on the specific conditions of each State, and they are availability, accessibility, acceptability, and quality⁴⁰⁷.

Another right that impacts the life of indigenous peoples is the right to education, covered by Article 13⁴⁰⁸. In this regard, *Guidelines*⁴⁰⁹ make specific references to indigenous peoples concerning the right to education, affirming that “children of indigenous people enjoy the right to literacy and education’ spelled out in Article 13”⁴¹⁰. Moreover, the Guidelines require states to teach in the native language, a request very appreciated by the Committee because implies the preservation of indigenous languages⁴¹¹ and the strengthening of the cultural identity of peoples speaking those languages⁴¹². Following the right to education is the right to culture, guaranteed by Article 15 of the Covenant which recognizes everyone the right “to take part in cultural life; to enjoy the benefits of scientific progress and its applications; to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”⁴¹³. As stated in the previous section with General Comment No. 23⁴¹⁴, culture is an extremely complex concept that can have several meanings; in the context of indigenous the matter was broadly discussed and there was a general agreement on the fact that⁴¹⁵:

⁴⁰⁵ *Ivi*, para. 11.

⁴⁰⁶ *Ibidem*.

⁴⁰⁷ *Ivi*, para. 12.

⁴⁰⁸ Article 13(1) declares that “The States Parties to the present Covenant recognize the right of everyone to education”. *Op. cit.* UN, 1966, Art. 13(1).

⁴⁰⁹ Manual on Human Rights Reporting, pp. 142–4 in *Op. cit.* Thornberry, 2002, p. 192.

⁴¹⁰ *Ibidem*.

⁴¹¹ In this regard, the Committee in the “Concluding observations on the fourth periodic report of Paraguay” recommends that Paraguay take the measures needed to effectively foster the use of Guaraní as an official language, since the measures adopted before were limited and not sufficient. UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the fourth periodic report of Paraguay*, E/C.12/PRY/CO/4, 2015, para. 31.

⁴¹² *Op. cit.* Manual on Human Rights Reporting, para. 139.

⁴¹³ *Op. cit.* UN, 1966, Art. 15(1).

⁴¹⁴ See paragraph 3.3.1. The International Covenant on Civil and Political Rights.

⁴¹⁵ *Op. cit.* Thornberry, 2002, pp. 195-196.

The concept of participation in cultural life has two components. The first was the right to create cultural, literary, artistic, and scientific – in a word, spiritual – values. The second [...] was the right to benefit from cultural values created by the individual or the community⁴¹⁶.

To conclude, the Committee on Economic, Social and Cultural Rights in the *Concluding Observations* concerning the *Paraguay* case⁴¹⁷, expressed the important connection between the right to culture and the right to land, as a crucial aspect to guarantee the free exercise of cultural identity for indigenous peoples, by urging Paraguay “to take all the necessary measures to guarantee that indigenous people hold legal title to their indigenous lands”⁴¹⁸.

3.3.3 The International Convention on the Elimination of All Forms of Racial Discrimination

As stated in the previous sections, racial discrimination is a very complex problem to address that also largely affects indigenous peoples. In this regard, the major international binding instrument devoted to this issue is the *International Convention on the Elimination⁴¹⁹ of All Forms of Racial Discrimination* (ICEARD), adopted by the GA on 21 December 1965 with the General Assembly resolution 2106 (XX)⁴²⁰. The Convention is introduced with a preamble, followed by Part I composed of seven substantive articles, then Part II contains nine articles about the implementation, and finally Part III addresses in nine articles the entry into force, denunciation, revision, reservations, etc.⁴²¹ The organ for the control and supervision of the correct implementation of Convention is the Committee on the Elimination of Racial Discrimination (CERD), established in 1970 and it has the faculty to examine the periodic States reports, considerate communications from groups and individuals, and examine inter-State complaints⁴²².

The broad range of humans mentioned in the Convention clearly includes indigenous peoples as well. Since they are not explicitly mentioned, many States parties, such as Venezuela, have denied the existence of indigenous groups as separate entities and the presence of racial discrimination against them⁴²³. To resolve this issue the Committee actively intervened many times through *Concluding Observations* on different cases, such as those of Argentina, Bolivia, Colombia, Brazil,

⁴¹⁶ Report on the Seventh Session, E/1993/22; E/C.12/1999/2, para. 217 in *ibidem*.

⁴¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant* [on Economic, Social and Cultural Rights]: concluding observations of the Committee on Economic, Social and Cultural Rights: Paraguay, E/C.12/PRY/CO/3, 2008.

⁴¹⁸ *Ivi*, para. 29.

⁴¹⁹ M. Banton, in *International Action against Racial Discrimination* (Oxford, 1996), states that the word “elimination” expresses a noble lie since it impossible to eliminate racial discrimination at the international level. So, he says he finds the term ‘reduction’ more appropriate to address this complex matter. *Op. cit.* Thornberry, 2002, p. 201.

⁴²⁰ *Ivi*, p. 199.

⁴²¹ *Ibidem*.

⁴²² *Ivi*, p. 200.

⁴²³ *Ivi*, p. 210.

and Guatemala⁴²⁴. Furthermore, the ICEARD recognized the collective element by prohibiting discrimination against “the right to own property alone as well as in association with others”⁴²⁵, and a UN Special Rapporteur found it discriminatory if a government does not protect the collective rights to the heritage of indigenous peoples⁴²⁶. Despite many efforts made by the ICEARD, most governments keep discriminating against indigenous peoples and/or denying their existence within territory⁴²⁷.

Thereafter, concerning the right to self-determination, governments often associate it with secession and are reluctant to guarantee it; in this regard, General Recommendation XXI (48)⁴²⁸ found an important link between self-determination and human rights and, mentioning the rights of ethnic groups, declaring that:

Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens. Also, governments should consider...vesting persons belonging to ethnic or linguistic groups...with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups⁴²⁹.

To conclude, the Committee urges States parties to recognize the existence of indigenous people and consequently to respect their rights without any form of discrimination; they are also called to “ensure freedom from discrimination, to provide conditions allowing for a sustainable economic and social development compatible with the indigenous peoples’ cultural characteristics.”⁴³⁰ These guarantees are crucial to allow indigenous peoples to participate in public life and express their consensus about decisions concerning their rights and interests⁴³¹. The concepts of consensus and participation scare governments as they fear that indigenous people may get veto rights⁴³²; in this regard, the consensus formula distinguishes between the general right to participation in public life and the narrow case

⁴²⁴ *Ibidem*.

⁴²⁵ *Ivi*, p. 211.

⁴²⁶ *Id*.

⁴²⁷ *Ivi*, p. 213.

⁴²⁸ A/51/18, 125–6; CERD/C/365, 15–17 in *ivi*, p. 216.

⁴²⁹ *Ivi*, para. 10.

⁴³⁰ *Op. cit.* Thornberry, 2002, p. 217.

⁴³¹ In General Recommendations XXIII (51) (HRI/GEN/1/Rev. 5, 1997), the Committee affirmed that protecting indigenous peoples from racial discrimination belongs to the scope of the Convention. CERD explained that indigenous peoples lost their lands and historical identity due to colonization and state enterprises, therefore the Committee insists that governments first and foremost must help these discriminated peoples recover their historical and cultural roots in the land. *Ivi*, pp. 216-217.

⁴³² *Ibidem*.

related to indigenous rights. According to the deliberations of the Committee, as far as the second case is concerned, peoples may have a right of veto⁴³³.

Finally, in the *Concluding Observations*⁴³⁴ concerning the country of Guatemala, the Committee expresses its concern “at the still insufficient number and range of government posts occupied by indigenous persons in particular indigenous women (art. 5 (c))”. Therefore, CERD recommends the State Party act and redouble its efforts to ensure full participation in the decision-making bodies, to ensure that “all indigenous peoples participate in all levels of public service”⁴³⁵.

3.3.4 The Convention on the Rights of the Child

CRC is the most ratified human rights treaty in the world, 191 countries apart from the US and Somalia are parties to it. It was adopted by the General Assembly in 1989⁴³⁶ with Resolution 44/25 and entered into force in 1990⁴³⁷. The Convention, composed of 54 articles, contains both general human rights and humanitarian law principles⁴³⁸ adapted specifically to children who, under Article 1, are “every human being below the age of 18, unless, under the law applicable to the child, the majority is attained earlier”⁴³⁹. Additionally, to monitor and examine the progress made by States Parties in correctly applying the Convention and respecting its provision, the Committee on the Rights of the Child was established to fulfill this purpose⁴⁴⁰. The Committee is composed of eighteen experts elected by States Parties from among their nationals⁴⁴¹.

The basic obligation for states parties is to recognize the children’s rights without any form of discrimination⁴⁴² and “to make the principles and provisions of the Convention widely known”⁴⁴³.

As in the case of previous international instruments, the rights and provisions found in the Convention also apply to indigenous children even though it is not specified in each article. In particular, three articles contain specific references to indigenous children; Article 17 establishes that:

⁴³³ *Id.*

⁴³⁴ CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, Guatemala, CERD/C/GTM/CO/12-13, 2010, para. 10.

⁴³⁵ *Ibidem.*

⁴³⁶ *Op. cit.* Thornberry, 2002, p. 225.

⁴³⁷ Article 49 states that the Convention would enter into force “on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession”. UN, *Convention on the Rights of the Child*, 1989, Art. 49(1).

⁴³⁸ For example, article 13 is devoted to freedom of expression, Art. 14 to freedom of thought, conscience and religion, and Art. 28 to education. *Op. cit.* Thornberry, 2002, p. 225.

⁴³⁹ *Op. cit.* UN, 1989, Art. 1.

⁴⁴⁰ *Ivi*, Art. 43(1).

⁴⁴¹ *Id.*, 43(2). The implementation, procedure, organization, and functions of the Committee are listed between Articles 42 to 45 of the Covenant.

⁴⁴² *Ivi*, Art. 2 in *Op. cit.* Thornberry, 2002, p. 226.

⁴⁴³ *Id.*, art. 4.

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual, and moral well-being and physical and mental health. To this end, States Parties shall [...]: Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.⁴⁴⁴

Then, Article 29 in declaring the right to education, stresses the importance of respecting the cultural identity of the child⁴⁴⁵, implicitly referring to the indigenous issue related to historical and cultural identity. Finally, Article 30 contains specific provisions about indigenous children:

In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.⁴⁴⁶

In this case, the child is mentioned within the collective context, whether it is the family or the community to which it belongs⁴⁴⁷ but does not cease to be subject of rights, as outlined by the Committee in its *Concluding observations* concerning the Holy See⁴⁴⁸. In this regard, the Committee expresses its great concern about the lack of full recognition of the child as a subject of rights⁴⁴⁹ by the Holy See, who in its *Reservations* tries to safeguard the “primary and inalienable rights of parents”⁴⁵⁰ by stating that social authorities usually must not intervene against parents and some of them fear that certain Articles of the Convention, such as 13 and 28, do not protect them from the State control⁴⁵¹. Therefore, the Committee suggests Holy See withdraw its *Reservations* to the Convention, underlying other issues such as the likelihood of gender discrimination that may be established in Catholic schools and the “insufficient attention paid to the promotion of education of children on health matters and the development of preventive health care”⁴⁵².

⁴⁴⁴ *Op. cit.* UN, 1989, Art. 17(d).

⁴⁴⁵ *Ivi*, art. 29(c).

⁴⁴⁶ *Ivi*, Art. 30.

⁴⁴⁷ In this regard, the Committee points out that there are different family structures derived from different cultural patterns. *Op. cit.* Thornberry, 2002, p. 228.

⁴⁴⁸ CRC, *Concluding observations of the Committee on the Rights of the Child: Holy See*, CRC/C/15/Add.46, 1995, Tenth Session.

⁴⁴⁹ *Ivi*, para. 7.

⁴⁵⁰ CRC, *Consideration of Reports Submitted by States Parties Under Article 44 of The Convention*, CRC/C/3/Add.27, 1994, para. 16(b).

⁴⁵¹ *Ivi*, para. 16(b, i).

⁴⁵² *Op. cit.* CRC, 1995, para. 8, 9.

Going back to Article 30 of the Convention, many States parties have submitted statements and reservations concerning it⁴⁵³, and only Canada made a specific reservation referring to indigenous peoples about the system of adoption covered by Article 21(a) of the Convention, declaring that:

With a view to ensuring full respect for the purposes and intent of article 20(3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among Aboriginal peoples in Canada⁴⁵⁴.

Ms. Whitaker, a member of the Canadian delegation, explained that Canadian authorities found it appropriate to make a reservation to Article 21 concerning Article 30 because custom adoption among indigenous communities was considered an uncommon practice since it should be authorized only by the competent authorities⁴⁵⁵. Nevertheless, the members of the Committee found this reservation not so necessary⁴⁵⁶.

Article 30, according to the Working Group, was created to embrace all ‘minority’ children and not only Indigenous peoples; nevertheless, this has led several states to omit the presence of Indigenous children in the territory or to disregard the difference between indigenous and other minorities⁴⁵⁷. For instance, China, by not differentiating between “Indigenous nationalities and recent arrivals”, affirms that the question of indigenous children does not arise⁴⁵⁸. Even Jamaica denied the presence of indigenous children in its territory⁴⁵⁹ and Tunisia claimed that its national homogeneity makes Article 30 irrelevant⁴⁶⁰. Additionally, South Africa tried to use the issue of apartheid to affirm that the government must focus on the majority group of South Africa and not on the minorities⁴⁶¹.

⁴⁵³ France made a statement that adapts the French reservation on Article 27 of the ICCPR and Venezuela stated that rights of Art. 30 should be brought back to Art. 2. *Op. cit.* Thornberry, 2002, p. 235.

The Committee expressed its concern regarding the French reservation, emphasizing that the Convention “seeks to protect and guarantee the individual rights of children, including the rights of children belonging to minorities”. CRC, *Concluding observations of the Committee on the Rights of the Child: France*, CRC/C/15/Add.20, 1994, para. 11.

⁴⁵⁴ The Canadian Bar Association, *UN Convention on The Rights of The Child*, N/A. <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/overarchingFramework/UN-Convention-on-the-Rights-of-the-Child>

⁴⁵⁵ CRC, *Summary Record of the 214th meeting*, CRC/C/SR.214, Geneva, 1995, para. 59.

⁴⁵⁶ *Op. cit.* Thornberry, 2002, p. 236.

⁴⁵⁷ *Ibidem*.

⁴⁵⁸ *Id.*

Moreover, regarding China, the Committee also commented on the issue of teaching only in the Chinese language even in the Tibet Autonomous Region: this makes the quality of education inferior and does not guarantee Tibetan children full opportunities to know their native language. “These shortcomings may disadvantage Tibetan and other minority pupils applying to secondary and higher-level schools”. CRC, *Observations on China*, CRC/C/15/Add.56, 1996, para. 19 in *Op. cit.* Thornberry, 2002, p. 233.

⁴⁵⁹ The State declared that “there is no group that can really be described as indigenous”. CRC, *Initial reports of States parties due in 1993*, Jamaica, CRC/C/8/Add.12, 1994, para. 94.

⁴⁶⁰ CRC/C/11/Add.2, para. 289 in *Op. cit.* Thornberry, 2002, p. 237.

⁴⁶¹ CRC/C/51/Add.2, para. 592 in *Ibidem*.

Nevertheless, the Committee in its *Concluding Observations* remarked on the crucial importance of Article 30 during its 34th Session of the Day of General Discussion, “recalling that Article 30 and Articles 17 (d) and 29.1 (c) and (d) of the Convention are the only provisions of an international human rights instrument to explicitly recognize indigenous children as rights-holders”⁴⁶², recalls the obligation for State Parties “to promote and protect the human rights of all indigenous children”⁴⁶³.

3. 4 Instruments of soft law

As stated earlier in the previous sections, the concept of soft law contains within itself legal instruments of a non-binding nature, where therefore signature is not followed by ratification by the parties. Two international instruments aimed at protecting the rights of indigenous peoples will be analyzed from this category: the *United Nations Declaration on the Rights of Indigenous Peoples* and the *American Declaration on the Rights of Indigenous Peoples*.

3. 4. 1 The United Nations Declaration on the Rights of Indigenous Peoples

At the international level, the most important instrument that protects the rights of indigenous peoples is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted by the General Assembly on 13 September 2007⁴⁶⁴ with Resolution 61/295⁴⁶⁵. It is considered both unusually long and explicit due to its unique conditions of drafting. For the first time in the history of international law, there was a lengthy consultation with the direct beneficiaries of the declaration, namely indigenous peoples through their representatives. This was through the efforts of the Working Group, which ensured that future users of the Declaration could contribute to the drafting of it⁴⁶⁶. The

⁴⁶² CRC, *Day of General Discussion on The Rights of Indigenous Children*, Recommendations, 2003, Preamble, p. 1.

⁴⁶³ *Ivi*, para. 1.

⁴⁶⁴ Works on the draft declaration began in 1985 with the WGIP starting to think about producing an official international document for the protection of indigenous rights to be adopted by the General Assembly. The first step was the elaboration of seven principles which were then transformed into draft operational paragraphs.

J. Burger & P. Hurt, *Towards the International Protection of Indigenous Peoples' Rights*, *Netherlands Quarterly of Human Rights* 12, no. 4, 1994, p. 410.

The seven principles were: “the right to full and effective enjoyment of universally recognized human rights, the right to equality and freedom from discrimination, the collective right to exist and to be protected against genocide as well as the individual right to life, rights to religious ceremonies and access to sacred sites, the right to all forms of education, the right to preserve cultural identity and traditions and to pursue their own cultural development and the right ‘to promote intercultural information and education, recognizing the dignity and diversity of their cultures’”.

Op. cit. Thornberry, 2002, p. 371.

Thereafter, in 1988 during the sixth session, the Chairperson produced a working paper on a draft of the Universal Declaration on Indigenous Rights (E/CN.4/Sub.2/1988/25) but without including the right to self-determination. So, the draft was revised in the following years. In 1994, the GA Resolution 49/214 (A/RES/49/214) suggested the Human Rights Commission “to consider the draft Declaration on the Rights of Indigenous Peoples with the participation of representatives of indigenous peoples”. *Ivi*, p. 373.

⁴⁶⁵ UN, *Declaration on the Rights of Indigenous Peoples*, 2007, 107th plenary meeting adopted with the A/RES/61/295, Sixty-first session, Agenda item 68.

⁴⁶⁶ *Op. cit.* Burger & Hurt, 1994, p. 410.

result was the longest Declaration on Human Rights⁴⁶⁷ which is divided into eight parts and covers the following themes: “general principles, right to life and existence, culture and traditions, education and language, social and economic matters, lands and resources, political institutions and legal systems, ways in which indigenous rights may be advanced, and further general principles”⁴⁶⁸.

As a declaration, it has no binding force, but it is charged with strength and moral value that can strongly influence state parties⁴⁶⁹. Even if the Declaration does not define indigenous peoples, it is the most comprehensive document to protect a specific and vulnerable group ignored by the international community: the Indigenous⁴⁷⁰.

The Preamble of the Declaration describes the beneficiaries as people entitled to rights equal to all other peoples, which are distinguished by their cultural identity and “contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind”⁴⁷¹. Moreover, the Preamble recalls the importance of non-discrimination and takes in mind the long and suffered history of indigenous peoples, colonized, and removed from their ancestral lands⁴⁷².

To guarantee the correct implementation of UNDRIP, the UN Development Group (UNDG) created the system-wide *Guidelines on Indigenous Peoples’ Issues* (2009) to assist the UN system in addressing indigenous peoples’ issues and in integrating them into operational activities and programs at the country level⁴⁷³. The Guidelines establish a comprehensive framework for implementing a culturally sensitive and human rights-based approach to development. They also provide actionable steps for planning, implementing, and evaluating programs that involve indigenous peoples⁴⁷⁴. Additionally, several UN agencies and funds have developed institutional policies that support the rights of indigenous peoples, “including the UN Food and Agriculture Organization (FAO, 2010), the International Fund for Agricultural Development (IFAD, 2009), the UN Development Programme (UNDP, 2001), and UN-REDD (2012; 2013)”⁴⁷⁵.

⁴⁶⁷ Of course, there are longer human rights conventions but not declarations, i.e., non-binding instruments. The UNDRIP is the longest of all. *Ibidem*.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

The language of the Declaration uses that of the UN’s iconic documents such as the UN Charter and the International Covenants on Human Rights. *Op. cit.* Thornberry, 2002, p. 374.

⁴⁷⁰ *Op. cit.* Burger & Hurt, 1994, p. 411.

⁴⁷¹ *Op. cit.* UN, 2007, Preamble, p. 2.

The language of the preamble seems to be influenced by that of the UNESCO Declaration on Race and Racial Prejudice. *Op. cit.* Thornberry, 2002, p. 376

⁴⁷² *Op. cit.* UN, 2007, Preamble, p 4.

It emphasizes also the “contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world”. *Ibidem*.

⁴⁷³ B. Feiring, *Indigenous peoples’ rights to lands, territories, and resources*, Rome, 2013, International Land Coalition, p. 30.

⁴⁷⁴ *Ibidem*.

⁴⁷⁵ *Id.*

Unlike other international instruments that aim to protect individual human rights, UNDRIP seeks to safeguard collective rights⁴⁷⁶ and the central idea of this collectivity is expressed in Article 3 of the Declaration:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development⁴⁷⁷.

Indigenous peoples⁴⁷⁸ consider self-determination as the most powerful and important principle to ensure and guarantee the preservation and respect of their collectivity in the future⁴⁷⁹. The Declaration itself confirms that this principle, enshrined in the two previous Covenants, clearly applies to all indigenous peoples⁴⁸⁰. However, continuing with the analysis of the Declaration, the next Articles do not really allow for the full and free exercise of the right to self-determination of peoples since they are limited to exercise their “autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”⁴⁸¹. This provision seems to leave the political initiative to the colonial states, which means that Indigenous peoples can exercise the right to self-determination only if it complies with the policies and the will of the State, which created a long impasse over time due to its refusal to negotiate on this matter⁴⁸².

Finally, the last provision established by Article 32 establishes that “States shall consult and cooperate in good faith with the indigenous peoples [...] to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources [...]” and that “States shall provide effective mechanisms for just and fair redress for any such activities [...]”⁴⁸³. This clause means that the prior consensus is necessary not so much for the deep respect for the indigenous people

⁴⁷⁶ Another international instrument that addresses collective rights rather than individual is the African Charter but the first important difference with UNDRIP is that it is a binding document with implementation procedure. *Id.*

⁴⁷⁷ *Op. cit.* UN, 2007, Art. 3.

⁴⁷⁸ Since they are colonized peoples, they are entitled to the same right to self-determination as the other colonized peoples as established years earlier by Article 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted on 14 December 1960 by the GA with the resolution 1514 (XV). Then, the same Declaration (1960) affirms that they can “freely determine their political status and freely pursue their economic, social and cultural development” (GA, 1960, Art. 2) and this means that the right to independent statehood -the political standing- equivalents “to any other state in the international community”.

M. Asch, *UNDRIP, Treaty Federalism, and Self-Determination*, Review of Constitutional Studies 24, no. 1, 2019, p. 2.

⁴⁷⁹ The principle is mentioned firstly in the Preamble of UNDRIP, which states that: “Nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”. *Op. cit.* UN, 2007, Preamble.

⁴⁸⁰ Over time, analyzing international instruments, one can see a growth in academia of the principle of self-determination for indigenous peoples. Now numerous books, such as “Contemporary Definition of the International Norm of Self-determination” (J. Anaya, 1993) affirm and demonstrate this growth. *Op. cit.* Burger & Hurt, 1994, p. 412.

⁴⁸¹ *Op. cit.* UN, 2007, Art. 4

⁴⁸² *Op. cit.* Asch, 2019, pp. 2, 3.

⁴⁸³ *Op. cit.* UN, 2007, Art. 32(2, 3).

and their ancestral lands⁴⁸⁴ but rather to prevent the states from running into some negative or unpleasant action that would ruin their reputation. So, this Article also camouflages the issue: instead of proclaiming freedom for Indigenous people to exercise their rights, it warns states about how to behave to exploit ancestral territories. Therefore, in this case, I assume that the Declaration failed to truly enshrine rights for its beneficiaries; rather, it used a linguistic and logical ploy to postpone the issue once again.

The next crucial issue connected to self-determination is the respect for the lands and natural resources, addressed by Articles 25 to 30 of UNDRIP. The main theme is declared by the Preamble⁴⁸⁵ which explains that “convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions and traditions, and to promote their development in accordance with their aspirations and needs”⁴⁸⁶. According to this provision, lands are indispensable for the effective exercise of human rights but even here there are ambiguities or unclear language structures that do not fully promote the realization of the right to land.

The first inconsistency can be seen in Article 10, which states that “No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”⁴⁸⁷. From the analysis of this Article, the removal of indigenous people from their lands is not prohibited but is allowed under certain conditions that again depend on the state, its degree of morality, civility, and respect for this category of human beings. So once again indigenous peoples are not the active subjects, but rather the passive ones since their fate depends on the moral and political choices of the state in which they live.

Another issue concerns Article 25, queried for its potential historical sweep⁴⁸⁸ when states that: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their *traditionally owned or otherwise occupied*”⁴⁸⁹. This affirmation was criticized by the Australian delegation as ‘very broad’ since “Native title in Australia is recognized in relation to land ‘currently’ owned”⁴⁹⁰. Another comment was made by the delegation of Canada regarding the non-terminological difference between the terms ‘lands’, ‘territories’, and ‘resources’ and it is not clear,

⁴⁸⁴ *Op. cit.* Asch, 2019, p. 4.

⁴⁸⁵ *Op. cit.* Thornberry, 2002, p. 392.

⁴⁸⁶ *Op. cit.* UN, 2007, Preamble.

⁴⁸⁷ *Ivi*, art. 10

⁴⁸⁸ *Op. cit.* Thornberry, 2002, p. 393.

⁴⁸⁹ *Op. cit.* UN, 2007, Art. 25.

⁴⁹⁰ The delegation of Australia commented on the purpose of Article 25 of UNDRIP during the first session of the Commission Drafting Group. *Op. cit.* Thornberry, 2002, p. 393.

specifically, which of them are or are not due to Indigenous peoples⁴⁹¹. While the lack of specific references and information makes the statement flexible and adaptable to different circumstances, on the other hand, it takes on too general a character that may not help if there are new conflicts. Finally, even concerning compensation and restitution⁴⁹², there are no details or specific information that can concretely determine how much compensation for the harm suffered will amount to.

To conclude this section, the last important issue is cultural and intellectual property, which has taken on growing importance and urgency⁴⁹³. In fact, after the colonization, Indigenous peoples were spoiled not only of their lands but also of their ideas, arts, and cultures⁴⁹⁴; European empires acquired knowledge about tribal art, medicines, and new food plants, used “to feed the growing urban concentrations of labourers needed to launch Europe’s industrial revolution”⁴⁹⁵. This process is still ongoing and goes against the right of Indigenous peoples to preserve and develop their own cultures and diverse cultural heritage⁴⁹⁶. The respect and safeguarding of cultural and intellectual property are directly connected to the right to land and self-determination and fall under the category of collective rights due to Indigenous communities. Therefore, being able to conserve, protect, and preserve the collective heritage⁴⁹⁷ is a great challenge that needs to be addressed and, in this regard, the Declaration elaborated several articles. Article 11 establishes that indigenous peoples have the right “to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the *past, present and future* manifestations of their cultures”⁴⁹⁸. The reference to the time – past, present, and future- reflects the concept of property, “not usually associated with existing international instruments”⁴⁹⁹. Then, Article 24 underlines the intellectual property of Indigenous peoples, by mentioning their ‘traditional medicines and health practices’⁵⁰⁰; but the most important provision is elaborated by Article 29 which has a broader application:

⁴⁹¹ Delegation of Canada, preliminary comments on Part VI of the draft Declaration to the Commission Drafting Group in *ivi*, pp. 393, 304.

⁴⁹² *Op. cit.* UN, 2007, Art. 28

⁴⁹³ E. Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*, E/CN.4/Sub.2/1993/28, 1993, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fifth session, para. 1.

⁴⁹⁴ *Ivi*, para. 18.

⁴⁹⁵ *Ibidem*. The free expression of cultural identity is crucial to maintain and develop indigenous societies. *Ivi*, para. 4.

⁴⁹⁶ During a conference held by UNESCO in San José (1981) to discuss ethnocide with a particular focus on the indigenous peoples of the Americas, all the participants agreed on the fact that indigenous peoples are entitled of the right to preserve and develop their culture. This right was recognized in the Declaration of San José, which first acknowledged the continuing danger of ethnocide and the role of Governments in preventing the indigenous heritage. *Op. cit.* Daes, 1993, para. 2.

⁴⁹⁷ This term is preferred by the Special Rapporteur E. Daes, instead of cultural and intellectual property. *Op. cit.* Burger & Hurt, 1994, p. 417. “‘Heritage’ is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples”. *Op. cit.* Daes, 1993, para. 24.

⁴⁹⁸ *Op. cit.* UN, 2007, Art. 11.

⁴⁹⁹ *Op. cit.* Burger & Hurt, 1994, p. 419.

⁵⁰⁰ *Op. cit.* UN, 2007, Art. 24.

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.⁵⁰¹

The reference to ‘human and genetic resources’ refers to the scientific research on indigenous peoples which must be protected with ‘special measures’ in the present and for the future generations⁵⁰². To summarize, these provisions were thus drawn up in order to prohibit Indigenous heritage, which includes a wide range of natural medical knowledge, from being stolen and exploited by others without giving them their due rights.

To conclude, following the analysis of the articles, contents, and objectives of the Declaration, it is possible to argue that it is a rich and detailed document with a strong moral charge and that, although it does not have binding force, it can positively influence the decisions of governments. So, it can be considered a remarkable and useful international soft law tool for addressing the indigenous issue. However, it is good to remember that several sections of the Declaration are still unclear and rather ambiguous and do not resolve diriment issues, such as the right to land and self-determination. Therefore, there is still much work to be done to truly recognize, without narrative gimmicks, the rights of indigenous peoples at the international and national levels.

3. 4. 2 The American Declaration on the Rights of Indigenous Peoples

Indigenous peoples were considered by the Inter-American Commission on Human Rights “vulnerable as regards to [the] physical, psychological, spiritual, economic, legal, and institutional aspects of life⁵⁰³” that the Commission in 1989 manifested its willingness to formulate a new instrument to protect Indigenous rights at international level.⁵⁰⁴ The proposal to create an Inter-American instrument was submitted to the OAS General Assembly in 1989⁵⁰⁵ and the preparatory works began in 1991 with a meeting in Mexico City, in which participated many indigenous leaders and jurists who made different suggestions and guidelines⁵⁰⁶. The latter were used in the following

⁵⁰¹ *Ivi*, art. 29.

⁵⁰² *Op. cit.* Burger & Hurt, 1994, p. 419.

⁵⁰³ IACHR, *Reports of the Inter-American Commission on Human Rights*, doe. 2518/89, 1989, Nineteenth Regular Session, at 1, OEA/ser. P. in O. Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, St. Thomas Law Review 9, no. 1, 1996, p. 272.

⁵⁰⁴ The decision was expressed by the Commission in its Reports (1989) at p. 250. *Ibidem*.

⁵⁰⁵ In the same year the General Assembly issued Resolution 1022 to solicit IACHR to start the preparation for a juridical instrument to protect indigenous rights. Indian Law Resource Center, *OAS General Assembly*, N/A. <https://indianlaw.org/projects/ihr/oas/draft/GA>

⁵⁰⁶ *Op. cit.* Kreimer, 1996, p. 272.

years to prepare the methodology to draft the Declaration and it consists of two consultations; the first started in 1992 with a *questionnaire* on human and collective rights sent to all member country governments and several hundred indigenous organizations and their replies were used for the draft Declaration, which was initially prepared in 1994 by the Executive Secretariat of the Commission.⁵⁰⁷ At that point, for the second consultation, the Draft was sent to governments and institutions, and in 1997 the Commission, after a revision, presented its Declaration to the OAS General Assembly in 1997 in Lima, Peru⁵⁰⁸. Later, in February 1999, the Committee on Juridical and Political Affairs convened a meeting of government experts at OAS headquarters in which participated also indigenous groups, an innovative initiative within the context of OAS. Consequently, in the same year, the OAS General Assembly with the AG/RES 1610 (XXIX-0/99) established the Working Group of the Permanent Council to make additional considerations on Draft⁵⁰⁹. Finally, after years of meetings and negotiations, in 2016 the OAS General Assembly, recalled the Resolution AG/RES. 2867 (XLIV-O/14), *Draft American Declaration on the Rights of Indigenous Peoples*, has adopted the *American Declaration on the Rights of Indigenous Peoples* at the third plenary session⁵¹⁰.

Before the adoption of the current American Declaration (2016), there was the Draft that differed in significant respects from the UNDRIP: firstly, because it sought to promote and defend individual rights rather than the collective, which do not appear in the American text. To explain this lack it is worth bearing in mind the basic principles in the Charter of the Organization of American States⁵¹¹ which declares the “respect for the fundamental rights of the *individual*, without distinction as to race, nationality, creed, or sex”⁵¹². Hence a different view and conception of rights as collective, here the focus is on the individual right and the importance of the role of the state to guarantee and protect it, thus nurturing a paternalistic approach⁵¹³. The second difference with the UNDRIP was the total lack of reference to the right of self-determination since “the fundamental premise of the American draft is that Indigenous peoples are “entitled to be part of the identity of the American States, an inclusive, less separationist notion than in the UN text”⁵¹⁴. This gap was immediately evident already in the Preamble which focused more on the cultural, social, and economic aspects,

⁵⁰⁷ The Draft was subsequently revised and approved by the IACHR in 1995. IACHR, *Annual Report of the Commission 1995*, OEA/ser. LIV.II.91, doc. 7, 1996, p. 205 in *ivi*, p. 273.

⁵⁰⁸ *Ibidem*.

⁵⁰⁹ *Op. cit.* Thornberry, 2002, p. 398.

⁵¹⁰ OAS GA, *American Declaration on the Rights of Indigenous Peoples*, AG/RES.2888 (XLVI-O/16), Santo Domingo, 2016, third plenary session, ISBN 978-0-8270-6710-3.

⁵¹¹ *Op. cit.* Kreimer, 1996, p. 272.

⁵¹² *Op. cit.* IACHR, 1989, p. 1.

⁵¹³ *Op. cit.* Thornberry, 2002, p. 399.

⁵¹⁴ *Ivi*, p. 398.

leveraging the importance of reducing poverty and enhancing the (not sustainable) development through the intervention of the State⁵¹⁵.

The Preamble was followed by Section One which described the scope of the application, devoted to the Indigenous peoples of the Americas; here there was an adaptation of the ILO Convention No. 169 concerning the mention of the right to self-identification⁵¹⁶ in Article 1(2) which states that:

Self-identification as indigenous peoples will be a fundamental criterion for determining to whom this Declaration applies. States shall respect the right to such self-identification as indigenous, whether individually or collectively, in keeping with the practices and institutions of each indigenous people.⁵¹⁷

Instead, in the current Declaration (2016), the reference to self-identification is still present but is followed immediately by that to self-determination, enshrined in Article 3:

Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development⁵¹⁸.

The inclusion of this right, previously absent in the Draft American text, represents a major step forward in the OAS system and is followed by the addition of the reference to collective rights in Section Two, called 'Human rights and collective rights'. Here, Article 6 establishes that:

Indigenous peoples have *collective rights* that are *indispensable* for their existence, well-being, and integral development as peoples. In that regard, *States recognize and respect the right of indigenous peoples to their collective action*; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories, and resources. States shall promote, with the *full and effective participation of indigenous peoples*, the harmonious coexistence of the rights and systems of different population groups and cultures.

⁵¹⁵ *Ivi*, p. 399.

⁵¹⁶ Article 1(2) of the ILO Convention No. 169 also refers to self-identification by declaring that it "shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply". *Op. cit.* ILO, 1989, Art. 1(2).

⁵¹⁷ OAS GA, Draft Declaration, 1995, Art. 1(2).

⁵¹⁸ *Ivi*, Art. 3.

This provision demonstrates the progress made over time in the American international context: before, only individual rights were worthy of protection, and the collective dimension that best represents the concept of the Indigenous people was totally absent and absorbed by the paternalist conception of the state.

Even if the Declaration has no binding power, it sets the rules for the treatment and obligations of states toward indigenous peoples and individuals⁵¹⁹. In the same section, is possible to also find the protection of gender equality⁵²⁰, nationality⁵²¹, juridical personality⁵²², assimilation and non-discrimination⁵²³. Then, Section Three addresses the important issue of cultural identity, where the equivalent of Article 13⁵²⁴ are Articles 11 and 8 of UNDRIP. The following section is the fourth and it refers to the Organizational and Political Rights, which are: Fundamental freedoms (Art. 20), Autonomy and self-government (Art. 21), Indigenous legal systems (Artt. 22, 23), and Treaties (Art. 24).⁵²⁵ Section Five addresses social, economic, and property rights from Articles 25 to 30. For example, Article 28 concerning the Protection of cultural heritage and intellectual property finds its equivalent in Article 31 of the UN Declaration⁵²⁶, analyzed in the previous section.

Finally, the last section contains general provisions for the implementation and interpretation of the Declaration.⁵²⁷

To conclude, the American Declaration has made many steps forward from the previous American Draft, protecting, and promoting the rights of some 50 million Indigenous Peoples across the continent⁵²⁸. Its first aim was to guarantee the right to self-determination and their ancestral lands,

⁵¹⁹ Indian Law Research Centre, *The American Declaration on The Rights of Indigenous Peoples: Background materials and strategy for implementation*, Montana, N/A.

[https://indianlaw.org/sites/default/files/ADRIP%20Booklet%20\(web%20version\).pdf](https://indianlaw.org/sites/default/files/ADRIP%20Booklet%20(web%20version).pdf)

⁵²⁰ Article VII states that “Recognizing that violence against indigenous peoples, individuals, and women hinders realization of all other rights, states must take measures to eradicate and prevent all forms of violence and discrimination.” *Op. cit.* OAS GA, 2016, Art. 7.

⁵²¹ “Indigenous individuals and communities have the right to belong to one or more indigenous peoples without discrimination”. *Ivi*, Art. 8.

⁵²² According to Article 9, “States must recognize and respect indigenous laws and institutions”. *Ivi*, Art. 9.

⁵²³ The issue is addressed from Article 10 to 12, which affirm that “Indigenous peoples have the right to their cultural identity, and to be free of assimilation or destruction of their cultures. States must adopt preventative and corrective measures to fulfill this right.” *Ivi*, art. 10.

⁵²⁴ “(1) Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, whether tangible or intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations. (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs. (3) Indigenous people have the right to recognition and respect for all their ways of life, cosmovisions, spirituality, uses, customs, norms, traditions, forms of social, economic, and political organization; forms of transmission of knowledge, institutions, practices, beliefs, values, dress, and languages, recognizing their inter-relationship as established in this Declaration”. *Ivi*, art. 13.

⁵²⁵ *Ivi*, artt. 20-24.

⁵²⁶ *Op. Cit.* Indian Law Research Centre, N/A, p. 17

⁵²⁷ Articles 31-41 of the American Declaration, 2016.

⁵²⁸ Right to Education Initiative, *American Declaration on the Rights of Indigenous People adopted*, 2017. <https://www.right-to-education.org/news/american-declaration-rights-indigenous-people-adopted>

safeguard indigenous cultures, languages, and traditions, and encourage their development and strengthening⁵²⁹. Such an important improvement and achievement was mainly the result of the efforts led by indigenous groups who have been fighting for years to protect their rights and make peaceful proposals to end the violence they face every day.

3. 5 Regional law systems for the protection of Indigenous rights

This section will examine the three regional human rights systems: European, Inter-American, and African, highlighting their similarities and differences. From each system, the main body and legal instruments used to protect human rights specifically indigenous peoples will be analyzed.

3. 5. 1 The European system

The European system for the protection of human rights finds its roots in the Council of Europe⁵³⁰ and in the Organization for Security and Cooperation in Europe (OSCE)⁵³¹. Additionally, there are sub-regional organizations such as the Central European Initiative and the Commonwealth of Independent States that address minority and indigenous rights issues, but they do not possess the same power and reputation as the first two⁵³².

In the *Final Act*, adopted in 1975 by the OSCE⁵³³, there is a reference to national minorities in the third section of “Co-operation and Exchanges in the Field of Culture” and in the fourth section called “Co-operation and Exchanges in the Field of Education” which establishes that:

⁵²⁹ *Ibidem*.

⁵³⁰ The Council must be differentiated from the European Union and the European Council for the following reasons. First, for the membership: the Council of Europe is made up of all the European states that geographically belong to the European continent; so today 47 states are parties to the Council, except for Russia after the War in Ukraine because the Government of the Russian Federation announced its withdrawal on 15 March 2022, under the Statute of the Council of Europe. (Council of Europe, *The Russian Federation is excluded from the Council of Europe*, Strasbourg, 2022, <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>). On the other hand, the members of the European Union are 27 because the membership requirement is not only geographic. Then, there is the European Council, which comprises heads of state of the European Union and is an organ of the EU, not an International Organization such as the Council of Europe. The other difference is the aim: that of the Council of Europe is to promote the rule of law, democracy, and protection of human rights by promoting European values. By contrast, the European Union is an economic organization, even if after the adoption of the Lisbon Treaty it started to pay attention to values and fundamental rights. The last difference lies in the organs: the European Union has its Court in Luxemburg while the Council of Europe created the European Court of Human Rights based in Strasbourg. (M. J. Gabel, *European Union*. *Encyclopedia Britannica*, March 27, 2024. <https://www.britannica.com/topic/European-Union>, The Council of Europe, *Human Rights*, Strasbourg, 2024. <https://www.coe.int/en/web/portal/the-council-of-europe-at-a-glance>)

⁵³¹ P. Kovacs, *Indigenous Issues under the European Convention of Human Rights, Reflected in an Inter-American Mirror*, *George Washington International Law Review* 48, no. 4 (2016), p. 783.

⁵³² *Ibidem*.

⁵³³ “The Organization for Security and Cooperation in Europe (OSCE) has its origins in the early 1950s when the Soviet Union first proposed the creation of an all-European security conference. In May 1969, the Government of Finland sent a memorandum to all European countries, the United States, and Canada, offering Helsinki as a conference venue. Beginning in November 1972, representatives met for nearly three years to work out the arrangements and the framework for the conference, concluding their work in July 1975. On August 1, the leaders of the 35 participating States signed the Final Act of the Conference on Security and Cooperation in Europe. Over time, the Conference was

The participating States, recognizing the contribution that national *minorities* or regional cultures can make to co-operation among them in various fields of education, intend, when such *minorities* or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.⁵³⁴

After that, in 1990 the *Final Act* adopted an additional chapter concerning the respect of national minorities to ensure their right to participate in public affairs, the protection of cultural identity, and non-discrimination. As all other human beings, “national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law.”⁵³⁵ Although the *Final Act* and the added chapter do not explicitly mention the term indigenous or indigenous peoples, they fall under the category of national minority, which means that they can enjoy the same rights as them⁵³⁶. Within the framework of comprehensive security, the High Commissioner on National Minorities was established by the OSCE participating States at the Helsinki Summit Meeting of 1992 “as an instrument of conflict prevention at the earliest possible stage”.⁵³⁷ The HCNM is not a political instrument, and its scope is not to monitor the States’ compliance with their OSCE commitments or international obligations, but it is a commissioner on national minorities and therefore addresses issues of human rights⁵³⁸. The HCNM was followed by the establishment of many useful documents issued by the OSCE with a legal nature belonging to soft law, such as the *Ljubljana Guidelines on Integration of Diverse Societies* and the *Bolzano Recommendations on National Minorities in Inter-State Relations*.⁵³⁹

However, the most important role in the European system concerning the protection of human rights is played by the Council of Europe which stipulated and adopted many documents to ensure

institutionalized, and in 1990 it was transformed into an international organization”. Commission on Security and Cooperation in Europe, The Helsinki Process and the OSCE, 2024. <https://www.osce.org/helsinki-process-and-osce/>

⁵³⁴ Conference on Security and Co-Operation in Europe, *Final Act*, Helsinki, 1975, p. 56.

⁵³⁵ Conference on Security and Co-operation in Europe (CSCE), *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 1990, pp. 18-20.

⁵³⁶ As explained in Chapter II of the study of the definitions of indigenous and minority, the latter does not fall under the definition of indigenous people which means that a minority cannot enjoy the same rights as an indigenous people. While instead the definition of indigenous is incorporated into the definition of minority.

⁵³⁷ UN, Pamphlet No. 9 of the UN Guide for Minorities, N/A, p. 2.

<https://www.ohchr.org/sites/default/files/Documents/Publications/GuideMinorities9en.pdf>

⁵³⁸ *Ibidem*.

⁵³⁹ Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM), *The Ljubljana Guidelines on Integration of Diverse Societies*, 2012; OSCE HCNM, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations*, 2008.

See also: OSCE & Council of Europe, *The National Minority standards: a compilation of OSCE and Council of Europe texts*, 2007; OSCE HCNM, *The Recommendations on Policing in Multi-Ethnic Societies*, 2006; OSCE HCNM, *The Guidelines on the Use of Minority Languages in the Broadcast Media*, 2003, OSCE HCNM, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, 1999; OSCE HCNM, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note*, 1998. OSCE HCNM, *The Hague Recommendations Regarding the Education Rights of National Minorities*, 1996. *Op. cit.* Kovacs, 2016, p. 784.

the protection of minorities. The most important is the *European Convention of Human Rights*, adopted in Rome on 4 November 1950; after this, there are the *European Charter for Regional or Minority Languages*, the *Framework Convention for the Protection of National Minorities*, and non-treaty soft law instruments which include standard-setting and monitoring documents adopted by the Committee of Ministers, the Parliamentary Assembly, and the Commissioner for Human Rights.⁵⁴⁰ Among these documents, the *European Convention of Human Rights* is the most important to address indigenous issues even if it does not distill definitions of ethnic groups⁵⁴¹. The Convention deals with issues of belonging and membership such as in the *Ahmet Sadiq v Greece* case where the applicant was arrested because, during an election campaign, he published communiqués that referred to the “Turkish minority” instead of “the Greek minority of Muslim faith” and the issue stem from the fact according to the Greek Court of Cassation “there was no Turkish minority in Western Thrace”⁵⁴². The case was lost before the European Court on the ground of non-exhaustion of domestic remedies⁵⁴³; nevertheless, after the dissenting opinion of Judge Martens, who affirmed that such a case concerning minorities cannot be entrusted to the national tribunal, the ECHR stated that the recognition of a minority or an indigenous group cannot be a ‘gift’ of the State⁵⁴⁴. Afterward, it can be noted that the Convention does not mention the right to self-determination of peoples, and looking at previous cases brought before the European Court⁵⁴⁵, it can be said that the latter prefers to protect and promote the advancement of democracy, considered the only political model contemplated by the Convention. On the other hand, a right enshrined in the Convention is that of non-discrimination, covered by Article 14 which established that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status⁵⁴⁶.

In this regard, the Court in the *Belgian Linguistics* case⁵⁴⁷, affirmed that language maintenance and development constitute legitimate aims within the Convention when “Article 14 is likewise violated

⁵⁴⁰ *Ibidem*.

⁵⁴¹ *Op. cit.* Thornberry, 2002, p. 291.

⁵⁴² No. 18877/91, Judgment of 15 November 1996, para. 18 in *Ibidem*.

⁵⁴³ *Ibidem*.

⁵⁴⁴ *Id.*

⁵⁴⁵ See *Freedom and Democracy Party (OZDEP) v Turkey* (No. 23885/94, Judgment of 8 December 1999), *United Communist Party of Turkey and Others v Turkey* (No. 19392/92, Judgment of 30 January 1998), *Öztürk v Turkey* (No. 22479/93, Judgment of 28 September 1999).

⁵⁴⁶ Council of Europe, *European Convention on Human Rights*, 1950, Art. 14.

⁵⁴⁷ Judgment of 23 July 1968 in *Op. cit.* Thornberry, 2002, p. 293.

when it is clearly established that there is no reasonable relationship between the means employed and the aim sought to be realized”⁵⁴⁸.

The prohibition of discrimination is further explored with the additional Protocol No. 12 which contains a general provision against discrimination, covered by Article 1⁵⁴⁹. Legal rights covered by Article 1 encompass situations where discrimination occurs concerning specific rights set forth by national law. They also include situations where rights can be inferred from a clear obligation of a public authority under national law, where a public authority exercises discretion, or where there is an act or omission by a public authority⁵⁵⁰. The *Explanatory Report* clarifies that ‘law’ may incorporate international law, but it does not imply that the European Court of Human Rights has jurisdiction to review compliance with legal rules in other international instruments⁵⁵¹.

Then, as general human rights, the Convention protects linguistic freedom (Art. 6), the right to education (Art. 2), the freedom of religion (Art. 9), the property right (Art. 1 of the Protocol)⁵⁵², and it also protects ‘national minorities’, whose nomenclature has not inhibited the inclusion of Indigenous groups. Many States reports mention the existence of indigenous communities in their territories, such as Finland about Saami⁵⁵³ or the Russian Federation specifying that “the number of small indigenous peoples in Russia is 65”⁵⁵⁴. In general, the Convention is open to the freedom of choice of every person belonging to a national minority, and Section I lists a series of fundamental rights that belong to all human beings, without differentiating between minorities, indigenous, and populations⁵⁵⁵. In addition, concerning the definition of minority groups, the Explanatory Report states that “no collective rights of minorities are envisaged”⁵⁵⁶, and that “choice of belonging does not imply a right for an individual to choose arbitrarily to belong to any national minority”⁵⁵⁷. Concerning this issue, many States did not recognize the presence of minority groups and gave restrictive definitions of the matter, some of them stated that the territorial element is crucial to define

⁵⁴⁸ Judgment, section I B, para. 10. The Court concluded that the means employed by the Belgian legislation pursuant to its linguistic policy objectives were not disproportionate. *Ivi*, p. 294.

⁵⁴⁹ “1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.” *Op. cit.* Council of Europe, 1950, Art. 1, Protocol No. 12.

⁵⁵⁰ *Op. cit.* Thornberry, 2002, p. 296.

⁵⁵¹ *Ibidem*.

⁵⁵² *Ivi*, pp. 301-306.

⁵⁵³ Initial Report, 16 February 1999 in *Ivi*, p. 307.

⁵⁵⁴ Initial Report, 15 March 2000, p. 3 in *ibidem*.

⁵⁵⁵ Obligation to respect Human Rights (Art. 1), Right to life (Art. 2), Prohibition of torture (Art. 3), Prohibition of slavery and forced labour (Art. 4), Right to liberty and security (Art. 5), etc. *Op. cit.* Council of Europe, 1950, artt. 1-5.

⁵⁵⁶ Initial Report, 15 March 2000, para. 31.

⁵⁵⁷ This means that the subjective choice to belong to a group must follow objective criteria relevant to the person’s identity. *Ivi*, para. 35.

a national minority⁵⁵⁸, and even some states, like Romania, affirmed that their domestic law attempts neither to determine nor ‘recognize’ national minorities⁵⁵⁹.

Section II of the Convention⁵⁶⁰ addresses the establishment of the European Court of Human Rights, a jurisdictional organ that can issue binding judgments as a proper international tribunal. Concerning the composition of judges, Article 20 states that “The Court shall consist of a number of judges equal to that of the High Contracting Parties”⁵⁶¹, so this means that there is a judge for each state party of the European Convention, i. e. of the Council of Europe because the first condition to be a member of the Council is to ratify the ECHR⁵⁶².

The competencies of the Court are listed in Article 28 and according to Articles 33-34, it can receive applications both from States and individuals⁵⁶³. Nonetheless, concerning indigenous cases, if compared to the Inter-American Court of Human Rights, the European Court has received and addressed very few cases. Perhaps, the main reason for this disparity in jurisprudential quantity is just a smaller presence of indigenous communities in Europe, such as the Sami of Scandinavia⁵⁶⁴ and the indigenous communities in the Northern and Siberian regions of Russia⁵⁶⁵. If one analyzes the various cases on indigenous issues⁵⁶⁶ brought before the Court, there is a frequent problem: the lack of real

⁵⁵⁸ Germany, for example, made a distinction between national minority and ‘ethnic groups traditionally resident in Germany’ including Roma and Sinti, while Slovenia between the national autochthonous minorities and the Roma community. *Op. cit.* Thornberry, 2002, p. 308

⁵⁵⁹ Romania, Initial Report, p. 15 in *ivi*, p. 309.

⁵⁶⁰ From Article 19 to 51.

⁵⁶¹ *Op. cit.* Council of Europe, 1950, Art. 20.

⁵⁶² Over time there was an evolution of the control mechanism through the adoption of additional Protocol No. 11 ‘to restructure the control machinery and improve the efficiency of its protection of human rights and fundamental freedoms’ (Council of Europe, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, Strasbourg, 11.V. 1994. <https://rm.coe.int/168007cda9>). The point was that before the 1998 (adoption of the aforementioned Protocol) there were two organs: the European Court and the European Commission and the main problem was that individuals could apply and resort only to the Commission which could not issue binding judgments, but only non-binding reports. While States could resort to the Court and achieve binding judgments against individuals, defendant states were free to accept or reject the application from the other state by previously accepting the competence of the Court. So now, with Protocol No. 11, even individuals can resort to the European Court, and each defendant state is obliged to go before the Court. (European Court of Human Rights, *The Situation before 1 November 1998 in The Conscience of Europe*, Chapter 2, https://www.echr.coe.int/documents/d/echr/anni_book_chapter02_eng).

Then, the last evolution was made in 2013 by Protocol No. 16 which gave advisory competence to the ECtHR to pass advisory opinions which can be requested only by domestic supreme judges, such as *Corte di Cassazione* in Italy. (Council of Europe, *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, Strasbourg, 2.X.2013. https://www.echr.coe.int/documents/d/echr/protocol_16_eng).

Today few advisory opinions have been asked to the UE Court, the main were those requested by the *Cour de Cassation de France*, concerning a case of surrogated motherhood and that of the Supreme Court of Armenia concerning the principle *nulla poena sine lege*. (ECtHR, *Advisory opinions under Protocol No. 16*, <https://www.echr.coe.int/advisory-opinions>).

⁵⁶³ *Op. cit.* Council of Europe, 1950, Artt. 28, 33, 34.

⁵⁶⁴ “The Lapp community in Norway brought the first case by an indigenous European population before the European Commission on Human Rights”. See *G. & E. v. Norway*, App. No. 9278/81, 35 Eur. Comm’n H.R. Dec. & Rep. 30 (1983). *Op. cit.* Kovacs, 2016, p.785.

⁵⁶⁵ *Ibidem*.

⁵⁶⁶ Such as *O.B. and Others Against Norway* (App. No. 15997/90, Eur. Comm’n H.R. Dec. & Rep. 1 (1993), *Konkima and 38 Other Saami Villages Against Sweden* (App. No. 27033/95, Eur. Comm’n H.R. Dec. & Rep. (1996), *Halvar FROM Against Sweden* (App. No. 34776/97, Eur. Comm’n H.R. Dec. & Rep. (1998), *Johtti Sappmelacat RY and Others*

judgment rendered by the tribunals⁵⁶⁷. This derived from the fact that the willingness of some courts to resolve their issues was not followed by real efforts; the approach of the Court was criticized by some scholars since it was not so progressive and adopted a more conservative position to preserve European values. An example is the *HINGITAG 53* case where the Court did not recognize “the crucial significance of lands for the physical and cultural integrity of Indigenous peoples”.⁵⁶⁸

3. 5. 2 The Inter-American System

In the Inter-American system⁵⁶⁹, the matter concerning the protection of indigenous rights is more developed compared to the European system⁵⁷⁰. As stated in the previous paragraph, the number of indigenous communities in the Americas is far greater than that in Europe, and they are in the jurisdiction of the Organization of American States (OAS), which was established with the Charter of Bogotá at the Ninth International Conference of American States in 1948 and today counts with the membership of thirty-five states⁵⁷¹. One of the first documents issued by the OAS was the *American Declaration of the Rights and Duties of Man*⁵⁷² eight months before the adoption of the *Universal Declaration of Human Rights* in 1948, a turning point year for the Human Rights Law. Already from the title of the Declaration, it is possible to see how the American conception differs from the European conception of rights: it proclaims not only rights but also duties, this means that in American society when you are entitled to a right, at the same time you have also an obligation to be able to enjoy that right. This difference mainly arises from the fact that American society views individuals in relation to the community, leading to a more collective conception of human rights. In contrast, the European approach is more individualistic and anthropocentric, influenced by a Christian perspective. So, the role of collectivity and respect for the other is crucial in the American system of human rights⁵⁷³. The Declaration, a non-binding instrument, does not carry a specific Indigenous

Against Finland (App. No. 42969/98, Eur. Ct. H.R. (2005), *The Muonio Saami Village Against Sweden* (App. No. 28222/95, Eur. Ct. H.R. (2000), *HINGITAG 53 Against Denmark* (App. No. 18584/04, Eur. Ct. H.R. (2006), *Handi Isdalen Sami Village and Others Against Sweden* (App. No. 39013/04, 49 Eur. Ct. H.R. 15 (2010), *Chagos Islanders Against United Kingdom* (App. No. 35622/04, 56 Eur. Ct. H.R. (2012). *Ivi*, pp. 787-794.

⁵⁶⁷ *Id.*, p. 795.

⁵⁶⁸ *Id.*, p. 796.

⁵⁶⁹ The term “inter” means that the system concerns both south, north, and central America.

⁵⁷⁰ *Op. cit.* Kovacs, 2016, p. 798.

⁵⁷¹ *Op. cit.* Thornberry, 2002, p. 265. The OAS realizes its objectives through the GA which meets annually and in special sessions; the Meeting of Consultation of Ministers of Foreign Affairs; the Councils (the Permanent Council, the Inter-American Economic and Social Council, and the Inter-American Council for Education, Science and Culture); the Inter-American Juridical Committee; the inter-American Commission on Human Rights; the General Secretariat; the Specialised Conferences; the Specialised Organisations and other entities established by the GA. *Ivi*, pp. 265-266.

⁵⁷² It was adopted by the Ninth International Conference of American States, Bogotá, Colombia, in 1948.

<https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf>

⁵⁷³ This analysis regarding the differences in the two regional systems comes from a seminar given by Professor Giuseppe Pascale at LUISS Guido Carli University in November 2022. See also: L. Lixinski, *The ‘collective guarantee’ of international human rights: Creating, reinforcing, and undoing legitimacies*, UNSW Sydney, QIL, Zoom-in 80, 2021. http://www.qil-qdi.org/wp-content/uploads/2021/04/02_IACHR-OC-26_LIXINSKI_FIN.pdf

imprint⁵⁷⁴ but lists a series of rights devoted to all persons: civil, political, economic, social, and cultural⁵⁷⁵. On the other hand, the duties covered by the Declaration seem to exercise some pressure on indigenous peoples, such as the duties to render civil and military service (Art. 34) and “to obey the law and other legitimate commands of the authorities”⁵⁷⁶ (Art. 33) which can lead to the establishment of an authoritative and oppressive regime⁵⁷⁷. However, according to the Inter-American Court, the reference document is the *Inter-American Convention*, while the Declaration applies only to those states that did not ratify the Convention. The latter was the first binding instrument adopted by the OAS in 1969 in San José, Costa Rica, and entered into force on 18 July 1978⁵⁷⁸. Today, the American states parties to the Convention are twenty-five, and only three out of twenty-eight are not bound by the Convention⁵⁷⁹. The latter presents a list of civil and political rights similar to the ECHR, without holding economic, social, and cultural rights⁵⁸⁰. To fill this gap, both regional systems adopted additional protocols⁵⁸¹: the American Convention adopted in 1998 the *San Salvador Protocol*, ratified by 17 States out of 28, to address the social and economic area, and in 1990 the *Asunción Protocol* to abolish the death penalty⁵⁸².

Convention rights according to Article 33 are protected by the Inter-American Commission and the Inter-American Court. The former has a non-binding nature, indeed, it is a quasi-judicial organ and can issue only non-binding reports; it was created ten years before the establishment of the

⁵⁷⁴ *Op. cit.* Thornberry, 2002, p. 268.

⁵⁷⁵ According to the Declaration, all human beings are equal before the law, and ‘have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor’ (OAS, *American Declaration of The Rights and Duties of Man*, Bogotá, 1948, Art. II). Other provisions include rights to life, liberty, and personal security (Art. 1), religious freedom and worship (Art. 3), freedom of expression and opinion (Art. 4), assembly and association (Artt. 21, 22), protection of honour and privacy (Artt. 5, 9, 10); participation in government (Art. 20), family and protection for mothers and children (Artt. 6, 7) residence and movement (Art. 7), health and well-being and education (Artt. 11, 12) to take part in the cultural life of the community (Art. 13) work, leisure and social security; property (Artt. 23, 24). *Ivi*, in *Op. cit.* Thornberry, 2002, p. 268.

⁵⁷⁶ Art. 33 of the Declaration in *ibidem*.

⁵⁷⁷ *Ivi*, p. 269.

⁵⁷⁸ OAS, *American Convention on Human Rights*, San José, Costa Rica, 22 November 1969.

⁵⁷⁹ These three States are Canada and the United States which signed the Convention but did not ratify it. (UNTC, *American Convention on Human Rights*, N/A.

<https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1>).

The third State is Venezuela which was party to the Convention till 2012, when it was expelled from the OAS and as a consequence was expelled from the Convention (OAS, *OAS Secretary General Regrets Venezuela’s Withdrawal from the American Convention on Human Rights*, 2013. https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-338/13) – such as the Russian Federation with the Council of Europe (See the previous paragraph about the European system).

⁵⁸⁰ The American Convention includes freedoms in the fields of life and liberty, association, family, religion, nationality, and property. *Op. cit.* Thornberry, 2002, p. 269.

⁵⁸¹ ECHR was amended by Protocols Nos. 11, 14, 15 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. *Op. cit.* Council of Europe, 1948.

⁵⁸² OAS, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, San Salvador, 1988.

[https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20\(Protocol%20of%20San%20Salvador\).pdf](https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf); OAS, *Protocol to The American Convention on Human Rights to Abolish the Death Penalty*, 1990, Asunción. <https://www.oas.org/en/iachr/mandate/Basics/american-convention-abolish-death-penalty.pdf>

Court with an amendment of the Bogotá Charter in 1959 in order to create an organ to protect the American Declaration (1948)⁵⁸³ and help states to implement it⁵⁸⁴. Then, in 1970 the IACHR was transformed into an organ of OAS and integrated into the American Convention; today, it has a dual status: an organ of the OAS, which allows it to deal with any OAS member State and carries out the task of assisting them in the implementation of the Declaration⁵⁸⁵; and a creature of the Convention through which it can deal with States' parties to the Convention⁵⁸⁶.

With regard the individual petitions, there is no specific standard-setting instrument that deals with indigenous peoples: their questions arise “in the context of the regular procedures for reporting and handling individual complaints”⁵⁸⁷. However, the Commission through its Resolution in 1972, argued that the protection of indigenous populations was a ‘sacred commitment’ of OAS member States⁵⁸⁸. There were many complaints against governments, including genocide, but few cases have led to written conclusions by the Commission. A well-known example is the 1802 *Ache Indians v. Paraguay* case, where the IACHR examined the complaints about the persecution of the Indian tribe by the government of Paraguay, which was accused of “genocide, murder, torture, inhuman conditions of work, the sale of children and other violations of human rights”⁵⁸⁹. Since Paraguay did not respond nor give information, the Commission assumed that the allegations were true and denounced the breach of rights covered by Articles I, VI, XI, XIV, and XV of the American Declaration⁵⁹⁰. Nevertheless, after an *anodyne* observation, the Commission discovered that the elimination of the Ache Tribe did not belong to the policy of the government and questioned whether it had placed too much responsibility on Paraguay. Further comments and critics argued that the IACHR failed to address the core issue: the claims to land between indigenous and others, due to a lack of expertise

⁵⁸³ For this reason, the Commission has non-binding power: it was created to assist a non-binding document, the American Declaration.

⁵⁸⁴ OAS, *What is IACHR?* Washington, D.C., U.S.A, 1889.

<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>

⁵⁸⁵ In a case of a breach of human rights covered by the Declaration, a member state can resort to the Commission against the defendant State after having exhausted all the domestic remedies offered by the national tribunal.

Op. cit. Thornberry, 2002, p. 272.

⁵⁸⁶ Its second task derived from the American Convention: the Commission can receive according to Art. 44 individual petitions (from “any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization” *Op. cit.* OAS, 1969, Art. 44) and according to Article 45 interstate petitions (ECtHR can examine the complaint of the applicant state only if the defendant state had previously accepted the competence of Commission with an *ad hoc* declaration, in contrast to the European system where this procedure was changed by Protocol 11 -previous paragraph-) *Ivi*, art. 45.

⁵⁸⁷ *Op. cit.* Thornberry, 2002, p. 273.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Ivi*, p. 274.

⁵⁹⁰ *Id.*

on indigenous questions⁵⁹¹. Other discussions and critics concerning the indigenous issue arise in reports on Nicaragua, Colombia⁵⁹², Paraguay, Guatemala, Bolivia, and Suriname⁵⁹³.

The second organ of the control mechanism is the Inter-American Court of Human Rights⁵⁹⁴, established in 1979 by the American Convention in San José, Costa Rica, to monitor the correct implementation of the Convention. It is a jurisdictional organ⁵⁹⁵ so it can pass binding judgments and they shall not be subject to appeal⁵⁹⁶; its main jurisdictional function, in contrast to the European system, is to monitor the implementation of the judgment in the domestic legal order, and if the Court discovers that it is not correctly implemented, can make a referral to the assembly of OAS which can decide to suspend or expel the State⁵⁹⁷. This happens because “the effectiveness of the judgments depends on their execution and, for this, the Court itself supervises daily that the States are complying with the reparations ordered in their judgments through various forms (written process, hearings, visits and notes of the Secretariat of the Court)”⁵⁹⁸.

Contrary to the European system, in the Inter-American system, individuals can only resort to the Commission and not the Court, which can receive claims only from the IACHR and member States⁵⁹⁹; they can submit a claim only after three months since the Commission has issued a non-binding report⁶⁰⁰. So, after exhausting domestic remedies, the appellant must first rise before the Commission⁶⁰¹, and if it fails to resolve the issue then the applicant can go to the Court. This explains why the European Court has a huge workload in comparison to the American Court: it is very difficult to access it.

The Court has also the advisory jurisdiction under Article 64, which states that:

⁵⁹¹ *Ibidem*.

⁵⁹² With the 1999 *Report on the Situation of Human Rights in Colombia*, the Commission noted many positive developments concerning indigenous rights in Colombia since the government wanted to include in its legal regime “the right to an identity as an indigenous people; the right to territory ‘understood as sufficient habitat and space to reproduce culturally as a people; the right to autonomy in the various spheres of life as a people, the right to participation in national life and the right to development.” To implement these principles, the Government of Colombia adopted a variety of legal instruments such as Decree 1396/1996 which created the Commission on Human Rights of the Indigenous Peoples. IACHR, *Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, 1999, Chapter X, para. 9, 10.

⁵⁹³ *Op. cit.* Thornberry, 2002, p. 274.

⁵⁹⁴ Chapters VIII and IX of the Convention are devoted to describing functions, competencies, and procedures of the IACtHR, from Article 52 to 73.

⁵⁹⁵ According to Article 52, “The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights”. *Op. cit.* OAS, 1969, Art. 52

⁵⁹⁶ *Ivi*, Art. 67.

⁵⁹⁷ Inter-American Court of Human Rights, *What is the I/A Court H.R.?*, 2024.

https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en#:~:text=It%20is%20an%20autonomous%20legal,it%20can%20order%20provisional%20measures.

⁵⁹⁸ *Ibidem*.

⁵⁹⁹ *Op. cit.* OAS, 1969, Art. 61(1).

⁶⁰⁰ *Ivi*, Art. 51(1).

⁶⁰¹ *Ivi*, Art. 46(a).

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments⁶⁰².

Thus, according to the provision, the advisory opinion can be requested by the OAS concerning issues like its functions and activities, and by member states if they need a proper interpretation of an article of the Convention or to verify the consistency and compatibility of domestic law with the American Convention⁶⁰³, according to the doctrine of *Control de Convencionalidad*⁶⁰⁴. For example, an advisory opinion was requested by Peru in 1982 concerning the jurisdiction of Article 64, asking “how should the phrase ‘or of other treaties concerning the protection of human rights in the American states’ be interpreted?”⁶⁰⁵.

The American Court has addressed several cases concerning indigenous questions and issued *in merito* many judgments. *Prima facie*, some articles such as the 21 protecting the right to property are not so different from that in the European Convention⁶⁰⁶, however, the American Convention seems more generous in addressing also right to dignity⁶⁰⁷ and an autonomous prohibition on discrimination⁶⁰⁸. Nevertheless, some decisions of the Court were criticized by scholars and professors, such as in the *Saramaka People* case, where Dinah Shelton argued that the decision of the Court failed to adhere to the Inter-American Commission's guidelines of being more receptive to the concerns of indigenous communities. Additionally, it also neglected to consider the interests of tribal peoples⁶⁰⁹. Secondly, the IACtHR was criticized for failing to balance “uniformity and diversity, as it extends some benefits to those not commonly treated as successors while rejecting the interests of

⁶⁰² *Op. cit.* OAS, 1969, Art. 64.

⁶⁰³ *Ibidem*.

⁶⁰⁴ See Corte Interamericana de Derechos Humanos, *Cuadernillo De Jurisprudencia de La Corte Interamericana De Derechos Humanos N° 7: Control de Convencionalidad*, N/A.

<https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7.pdf>

⁶⁰⁵ IACtHR, *ADVISORY OPINION OC-1/82*, Peru, 1982, para. 8.

https://www.corteidh.or.cr/docs/opiniones/serica_01_ingl.pdf

⁶⁰⁶ *Op. cit.* Kovacs, 2016, p. 798.

⁶⁰⁷ *Op. cit.* OAS, 1969, Art. 11.

⁶⁰⁸ *Ivi*, Art. 24.

⁶⁰⁹ *Op. cit.* Kovacs, 2016, p. 799.

the tribe as a whole. The latter position conservatively fails to acknowledge the uniqueness of tribal societies”.⁶¹⁰

However, even though the IACtHR seems to have failed in the previous case, it instead succeeded in recognizing Indigenous people's right to property, as shown in the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case⁶¹¹. Here the Court stated that the ownership of land is not an individual right but rather is centered on the group and its community:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival⁶¹².

Through this declaration, the Court also argued that the property right “arises from the contemporary treaty and customary law” and it does not exist only according to the Inter-American Convention. Furthermore, the Court established that States have the important task of “providing special protection, which aims at shielding a community from outside interference with their cultural and social development, which is inextricably linked to their relationship with their lands”⁶¹³.

Finally, in the *Kichwa Indigenous People of Sarayaku v. Ecuador* case⁶¹⁴, the Court confirmed that Indigenous peoples have the right to consultation, which should be “active and effective and not scenic”⁶¹⁵. However, this innovation of the Court was not too appreciated by the states and some scholars argued that the consultation is a manipulable tool to be used against the indigenous communities⁶¹⁶.

To conclude, it seems that the Inter-American system needs new strategies to address the current challenges and its ‘deficiencies’; one proposal could be the promotion of the friendly settlement procedure, imported from the Council of Europe⁶¹⁷: it is a common feature in the field of human rights which allows States “to calculate the probable loss from a case and settle with the

⁶¹⁰ *Ibidem*.

⁶¹¹ *Ivi*, p. 800.

⁶¹² *Mayagna Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. c) No. 79 - 149.

⁶¹³ D. Contreras-Garduño, Diana & Sebastian Rombouts, *Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights*, 27 MERKOURIOS- UTRECHTJ. INrL &EUR. L. 1, 13 (2010) in *Op. cit.* Kovacs, 2016, p. 800.

⁶¹⁴ See *Kichwa Indigenous People of Sarayaku v. Ecuador*, *Merits and Reparations*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 12,465, 157-65 (2012).

⁶¹⁵ See Aniko Raisz, *Indigenous Communities before the Inter-American Court of Human Rights-New Century*, New Era? 5 MISKOLCJ. INT'L L. No. 2., 45 (2008) in *Op. cit.* Kovacs, 2016, p. 801.

⁶¹⁶ *Op. cit.* Kovacs, 2016, p. 802.

⁶¹⁷ S. Burke, *Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights*, Minnesota Journal of International Law, 2011, p. 124.

applicant before the Court can impose steeper damages”⁶¹⁸. This mechanism aims to get all parties to agree on a common solution and represents a potentially efficient tool to improve the “effectiveness of all regional human rights bodies”⁶¹⁹.

3. 5. 3 The African System

The African System is the youngest of the three regional human rights systems and finds its roots in the Organization of African Unity (OAU), which was established in 1963 with the *Addis Ababa Charter*⁶²⁰ but then it was replaced by the African Union under the *Lomé Act* (2000)⁶²¹.

African indigenous peoples suffer huge human rights violations, related above all to the right of “self-determination, the ownership of land and natural resources, as part of their right to life; the existence of distinct political and economic institutions; discrimination; and lack of access to justice”⁶²². To fight the violation of human rights, the first instrument concluded by the African system was the *African Charter*⁶²³ on Human and Peoples’ Rights, a binding treaty⁶²⁴ adopted in Nairobi in 1981⁶²⁵. This document differs strongly from the European and Inter-American Conventions as it primarily covers not only civil and political rights but also economic, social, and cultural rights⁶²⁶; besides, it established human duties because, as explained earlier in the section regarding the question of collectivity in the Inter-American system, African society views individuals only in the context of the group and community in which they reside.⁶²⁷ So also in this system, to an even greater extent, I assume that the individualistic Christian Western approach is absent. This perspective implies that everyone is part of the community and to respect it, everyone has duties toward others; in fact, the

⁶¹⁸ *Op. cit.* Kovacs, 2016, p. 802.

⁶¹⁹ *Op. cit.* Burke, 2011, p. 124.

⁶²⁰ H. Selassie I, *Towards African Unity*, The Journal of Modern African Studies, 1963, Vol. 1, No. 3, p. 281.

⁶²¹ This is also known as the Constitutive Act of the African Union, adopted by the 37th Ordinary Session of the Assembly of the Heads of State and Government on 11 July 2000 in Lomé, Togo.

SAHO, *Constitutive Act of the African Union*, 2019. <https://www.sahistory.org.za/archive/constitutive-act-african-union-adopted-37th-ordinary-session-assembly-heads-state-and>

⁶²² W. van Genugten, *Protection of Indigenous Peoples on The African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, The American Journal of International Law, Vol. 104, No. 1, 2010, p. 29.

⁶²³ The term ‘Charter’ was preferred to ‘Convention’ precisely to highlight and enhance the sacrality of the document in question.

⁶²⁴ Geographically speaking, the only African state that did not ratify the African Charter is Morocco, even if rejoined the African Union in 2017. This stems from the fact that during the negotiations for the Charter, even the Western Sahara had a role and Morocco did not accept this decision, so as a protest it left the AU and did not become part of the Charter. International Justice Resource Center, *Country Factsheet Series: Morocco*, 2017. <https://ijrcenter.org/wp-content/uploads/2017/11/Morocco.pdf>

⁶²⁵ Organization of African Unity, *African Charter on Human and Peoples’ rights*, 1981. The treaty is also called the Banjul Charter because it was negotiated there from 1979 to 1981, adopted in Nairobi in 1981, and entered into force in 1986. https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

⁶²⁶ G. Pascale, *An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies in Africa*, Bologna, 2018, ISSN 1971-7105, p. 149. Doi: 10.12829/89686

⁶²⁷ In this context, the community prevails over the individual and from this conception derives that individuals can enjoy human rights only if f peoples’ rights are respected. *Ibidem*.

Charter pays more attention to the community⁶²⁸ and not to the individual, as can be seen already in the title⁶²⁹.

While lengthy and intricate, the African Charter emphasizes the ‘culturalization’ of human rights⁶³⁰, which is closely tied to regionalism⁶³¹. This approach involves adapting human rights to the traditional values and culture of each state, prioritizing regional practices and traditions over the promotion of universal human rights.⁶³² For example, the African Charter includes the protection of the right to life without prohibiting the death penalty, the right to religion without permitting changes in religion, and a form of protection for women without specific provisions for gender equality⁶³³. Consequently, human rights protection is tailored to traditional values rather than universal standards, stemming from the desire of each African state to safeguard its traditions during the negotiations in Banjul. This resulted in a political compromise that led to a lower standard of human rights protection⁶³⁴.

The African Charter is the reference point for human rights monitoring bodies in Africa since it lists the fundamental human rights to be guaranteed at a regional level⁶³⁵. The existing monitoring mechanism in Africa draws inspiration from European and Inter-American systems: it is made up of an international quasi-judicial organ, the African Commission, and an international judicial organ, the African Court⁶³⁶. The African Commission (ACHPR) was inaugurated by the African Charter in 1987 and can be found in the Second Part of the Charter⁶³⁷ in Chapters I, II, III, and IV, from Article 30 to 63⁶³⁸. Its main tasks are the examination of interstate communications and periodical reports submitted by the States Parties concerning the domestic implementation of the Charter, it can also receive communications from individuals and NGOs that can denounce any alleged violation of the African Charter⁶³⁹. Nevertheless, the Commission is described as “a toothless

⁶²⁸ The Charter does not define ‘peoples’ and the African States take advantage of this omission. *Ibidem*.

⁶²⁹ Articles 19 through 25 of the Charter focus on peoples' rights.

For example, Art. 19 declares that: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.” *Ivi*, Art. 19.

⁶³⁰ *Op. cit.* Pascale, 2018, p. 149.

⁶³¹ Regionalism in Africa has been adopted for two reasons: firstly, ‘to enhance political unity or the pan-African agenda’ and secondly, ‘to foster economic growth and development’. M. Lee, *Regionalism in Africa: A Part of Problem or A Part of Solution*, 2002, p. 8, Polis / R.C.S.P. / C.P.S.R. Vol. 9, Numéro Spécial.

⁶³² The universality of human rights derives from the concept of ‘foundational universalism’ which means that all human beings are *per se* entitled to human rights. Then, according to ‘structural universalism’, each human rights standard is universally applicable. F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014, pp. 31-32.

⁶³³ Cfr. Pascale, 2018.

⁶³⁴ See Charles T. Hunt, "African Regionalism & Human Protection Norms: An Overview," *Global Responsibility to Protect* 8, no. Issues 2-3 (2016), pp. 201-226 and *Op. cit.* Lenzerini, 2014.

⁶³⁵ *Op. cit.* Pascale, 2018, p. 147.

⁶³⁶ *Ivi*, p. 152.

⁶³⁷ This part is devoted to the ‘measures of safeguard’. *Op. cit.* Organization of African Unity, 1981, Part II.

⁶³⁸ Chapter I addresses the establishment and the organization of the Commission, Chapter II explains the mandate of the Commission, Chapter III its procedure, and Chapter IV the applicable principles. *Ibidem*.

⁶³⁹ *Op. cit.* Pascale, 2018, p. 152.

bulldog that barks but cannot bite”⁶⁴⁰ because since it is a quasi-jurisdictional organ it cannot pass binding judgments and, after receiving a communication from an individual or NGO, it can issue only non-binding reports addressing recommendations to the responsible State⁶⁴¹. This mechanism does not really allow individuals to enjoy human rights⁶⁴² since the African States have a lot of freedom in deciding whether or not to implement the reports issued by the Commission; in general, the more intrusive the acts are, the less likely states will enforce them⁶⁴³. So, the “scarce effectiveness of the action of the African Commission depends on the African States” since they do not encourage the actions of the Commission nor enforce its acts.⁶⁴⁴

The second control mechanism is the African Court, a jurisdictional organ created with the Protocol adopted in Ouagadougou in 1998 and entered into force in 2004; it is recognized by 31 states that ratified Protocol⁶⁴⁵. Contrary to the Commission⁶⁴⁶, the Court issues binding judgments and decisions⁶⁴⁷, it can judge not only violations of the African Charter but even violations of any human rights treaties that have been ratified by the African states⁶⁴⁸. Then, the *ratione personae* competence of the Court is established by Article 5 of the Protocol which provides a list of direct claimants who can resort to the Court:

- a) The Commission;
- b) The State Party which has lodged a complaint to the Commission;
- c) The State Party against which the complaint has been lodged at the Commission;
- d) The State Party whose citizen is a victim of human rights violation;
- e) African Intergovernmental Organizations⁶⁴⁹.

⁶⁴⁰ See N.J. Udombana, *Towards the African Court on Human and Peoples' Rights: Better Late Than Never*, in Yale Human Rights & Development Law Journal 2000, p. 45 ff., p. 64 in *Ivi*, p. 153.

⁶⁴¹ Moreover, these reports are confidential which means that the AU Conference must authorize their publication and the main problem is that the Conference is made up of all African States, including the one responsible. *Ibidem*.

⁶⁴² *Id.*

⁶⁴³ Firstly, African States do not follow Article 62 of the Charter which establishes that States every two years must submit the report to the Commission, and secondly, ‘the African States do not approve the practice of the African Commission to deliver country-specific resolutions on its own initiative’. *Ivi*, p. 154.

⁶⁴⁴ *Ivi*, p. 155.

⁶⁴⁵ *Id.*, p. 152.

⁶⁴⁶ The relation between the Court and the Commission is addressed by Article 2 of the Ouagadougou Protocol, which provides that “The Court shall [...] complement the protective mandate of the African Commission [...] conferred upon it by the African Charter on Human and Peoples' Rights [...]”. OAU, *Ouagadougou Protocol*, 1998, Art. 2.

https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf

⁶⁴⁷ The African Court can also provide advisory opinions according to Art. 4 of the Protocol.

⁶⁴⁸ This is established by Article 3(1) of the Protocol, which says that “The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and *any other relevant Human Rights instrument ratified by the States concerned*.” *Ivi*, Art. 3(1).

⁶⁴⁹ *Id.*, Art. 5(1).

Afterward, there are the non-direct claimants who are NGOs and individuals, and they can resort only against those States that have already accepted the competence of the Court with a special declaration⁶⁵⁰. This practice limits the workload of the Court, otherwise, individuals and NGOs would be the most active claimants⁶⁵¹. The African Court has issued a restricted number of judgments as well as decisions on reparations and orders for provisional measures; according to Article 29(2) of the Protocol, the AU Executive Council is the organ responsible for monitoring the domestic implementation of the acts⁶⁵². The Council is made up of States' representatives who decide by consensus, which means that they are unlikely to act against a responsible state and easily will not implement Court verdicts⁶⁵³. So, in contrast to the European or Inter-American regional system, the African system can easily circumvent the control mechanisms that have been composed by the states themselves to disregard human rights and the instruments established to protect them.

Finally, the African system created also sub-regional jurisdictional organs, placed under the general frame of the African Economic Community (AEC) established in 1991 with the *Abuja Treaty*⁶⁵⁴. The main task of the AEC is the institution of the Regional Economic Communities (RECs)⁶⁵⁵ which are "areas of economic and commercial integration at a sub-regional level" and create tribunals in the African States⁶⁵⁶. The prior aim of the RECs was economic integration but since they should take into consideration the African Charter, in 2001 they began to address also human rights issues⁶⁵⁷.

African indigenous peoples suffer human rights violations both on the macro level and on the micro level:⁶⁵⁸the situation is critical and the Working Group of Experts on Indigenous Populations /

⁶⁵⁰ Only the following States have currently accepted the competence of the Court to receive claimants from individuals and NGOs: Burkina Faso, Ghana, Malawi, Mali, and Tunisia. While Rwanda, Côte d'Ivoire, Benin, and Tanzania (where the Court has its premises) have recently withdrawn their previous declaration. *Op. cit.* Pascale, 2018, p. 156.

⁶⁵¹ *Ibidem*.

⁶⁵² *Ivi*, p. 157.

⁶⁵³ With this mechanism, the African system is political and not legal because national judges control the correct implementation of the judgment at the domestic level. *Ibidem*.

⁶⁵⁴ *Id.*, p. 159.

⁶⁵⁵ There are currently eight RECs, like the number of African states. *Id.*

⁶⁵⁶ *Id.*

⁶⁵⁷ Many States abolished the tribunals created by the RECs and reformulated without mentioning the African Charter; nevertheless, in West Africa, the situation is different because some courts have developed important human rights competencies. An example is the ECOWAS Court of Justice which 'extended its competence to the field of human rights' and required its Member States 'to realize the objectives of the African Charter'. *Ivi*, p. 163. Two other examples of tribunals that have expanded their jurisdiction in human rights were the SADC Tribunal in Zimbabwe, but it was suspended by the government which did not appreciate its activism and the other is the EAC Court of Justice, whose Treaty required Member States to make a Protocol to officially attribute a human rights mandate to the Court. *Ivi*, pp. 160-162.

⁶⁵⁸ These violations are usually related to the right to self-determination, the ownership of land and natural resources, discrimination, and lack of access to justice. W. van Genugten, *Protection of Indigenous Peoples on The African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, Cambridge University Press, 2010, The American Journal of International Law, Vol. 104, No. 1, p. 29.

Communities of the African Commission, through an extensive report⁶⁵⁹, showed the urgency of the issue⁶⁶⁰. Concerning the problem of discrimination, for example, in the report is explained that the Batwa in Rwanda and Burundi “suffer from marginalization, discrimination and extreme poverty, and [...] are neglected in all areas of development”⁶⁶¹. Still today, there is a high rate of discriminatory acts against African indigenous, especially by the Western colonial powers that described the people who inhabited unknown territories as ‘animals’ or ‘backward’, and seized their lands through simple occupation because they considered them to be *terra nullius*⁶⁶². According to the Working Group, another frequent violation is the denial of access to justice which consists mainly of “arbitrary arrests and unjust imprisonment, inadequate food in jail, collective punishment, the withholding of liberty of association, and many similar violations of basic human rights”⁶⁶³. Even the denial of freedom movement is a common violation committed by African governments which “use the principle of the sanctity of borders to deny nomads the right to associate with their kin in different states”⁶⁶⁴. An example in the report of the Working Group is the nomads living in Kidal who cannot get valid identity cards or travel documents to cross the borders and their rights are continuously violated by the State⁶⁶⁵. In addition, another considerable breach is the denial of the right to political recognition, representation, and participation: for example, in Botswana, Indigenous people do not have political representation in parliament nor in the House of Chiefs, an advisory body to the government on customary law and practices⁶⁶⁶.

The Working Group also noted that African Indigenous undergo marginalization from social services, “such as schools and health facilities”: this lack raises illiteracy⁶⁶⁷ and mortality rates, and consequently lowers the per capita incomes and life expectancy, raising instead the level of domestic violence, crime, and depression⁶⁶⁸.

Finally, the main issue related to the violation of Indigenous people’s rights concerns the land and denied access to natural resources for survival: pastoral and hunter-gatherer communities “have traditionally occupied areas well-endowed with natural resources”⁶⁶⁹ and over the years lost their lands to settlers who used the assumption of *terra nullius*:

⁶⁵⁹ Report of the African Commission on Human and Peoples’ Rights Working Group of Experts on Indigenous Populations/Communities, UN Doc. E/CN.4/Sub.2/AC.5/2005/WP.3 (Apr. 22, 2005) [hereinafter Working Group Report].

⁶⁶⁰ *Op. cit.* Genugten, 2010, p. 30.

⁶⁶¹ *Op. cit.* Report, 2005, p. 23 in *Ibidem*.

⁶⁶² *Ivi*, p. 30.

⁶⁶³ *Ibidem*.

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.*

⁶⁶⁶ *Op. cit.* Report, 2005, p. 33.

⁶⁶⁷ Hence the contradictory nature of the African Charter, which dedicates Article 17(1) to the right to education but then provides no mechanism to monitor states’ compliance with it. According to the Working Group, the school attendance of indigenous children is less than 50% of the national level. *Op. cit.* Genugten, 2010, p. 32.

⁶⁶⁸ *Op. cit.* Report, 2005, p. 37.

⁶⁶⁹ *Id.* p. 13.

The assumption that [such] land . . . is empty or not used productively has stimulated land alienation at all levels. The targeted pastoralist and hunter-gatherer communities have only, to a very limited extent, legal titles to their land as their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land. Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure⁶⁷⁰.

To summarize, the right to land is crucial for the survival of several African indigenous communities and the African legal system does not help to guarantee this right through the regional instruments at its disposal; moreover, governments themselves go to great lengths to deny indigenous people said rights. Indeed, “land rights are seen as an issue on which states’ governments are ultimately the core and decisive decision makers, not indigenous peoples”⁶⁷¹. In this regard, the Commission’s advisory opinion recalled Article 21(1) of the African Charter which states that “All peoples shall freely dispose of their wealth and natural resources,” and this right “shall be exercised in the exclusive interest of the people,” and that “in no case shall a people be deprived of it”⁶⁷². The issue at hand also brings up the discussion of individual and collective rights: in this instance, the right to land is recognized to the indigenous as a collectivity, a community. Consequently, the question of defining peoples, which is not explicitly addressed in the African Charter, resurfaces.⁶⁷³ For that reason, as stated earlier, the African system and its society are based exclusively on the collective dimension but when it comes to rights, as far as I am concerned, that ambiguity arises voluntarily about the definition of peoples and collectivities precisely to avoid guaranteeing certain rights to groups such as Indigenous peoples.

Even the 2007 Declaration on the Rights of Indigenous Peoples contains numerous collective rights, but African States were often hesitant to fully recognize them⁶⁷⁴ and their concerns expressed in the November 2006 draft *aide-memoire* regarding the Declaration were transformed into numerous amendments to the UN Draft⁶⁷⁵. Through these amendments, African states have sought to achieve the following three aims:

⁶⁷⁰ *Id.*

⁶⁷¹ *Op. cit.* Genugten, 2010, p. 43.

⁶⁷² Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 41st Ordinary Session, 2007, para. 34 in *Ibidem*.

⁶⁷³ *Op. cit.* Genugten, 2010, p. 43.

⁶⁷⁴ *Ivi*, p. 44.

⁶⁷⁵ The first amendment is to Article 3 where the reference to self-determination is deleted, and we go directly to the right of participation: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely participate in the political affairs of the State and to pursue their economic,

- (1) to limit the risk that the Declaration would be used in a way that conflicts with national laws and national procedures of decision-making.
- (2) To underline that traditional ways of dealing with indigenous issues can never lead to more protection than is offered to other citizens of the states concerned.
- (3) To emphasize that the right to self-determination relates only to internal self-determination and in no way should be seen as an avenue toward secession.⁶⁷⁶

Finally, after many debates between June and September 2007, nine amendments were accepted by the African States through consensus, and the UN Declaration was adopted. However, it is worth mentioning that in the preamble of the Declaration, there is a reference to the concept of regionalism which recalls the language used in the document of the Vienna World Conference on Human Rights of 1993 which affirms “the universality of human rights while acknowledging that national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.”⁶⁷⁷ The UN General Assembly finally adopted the Declaration with 144 votes in favor to 4 against, with 11 abstentions including Burundi, Kenya, and Nigeria⁶⁷⁸.

To wind up, even if most of the African States have adopted the UN Declaration and many Courts have handled cases related to Indigenous Rights⁶⁷⁹, I firmly believe that African States must keep in mind that certain restrictions made on Indigenous peoples are illegal and go against both the declaration and the norms of international law; therefore even if regionalism can be accepted in part, it is still necessary to embrace the universality of human rights in order to guarantee them to all human beings.

3. 6 Concluding Observations

After the extensive analysis of international and regional human rights protection systems and, specifically, indigenous peoples’ rights, the following conclusions can be drawn. First, it is worth acknowledging the importance and efficacy of *Convention No. 169*, the first binding instrument

social and cultural development on an equal basis with others.” Then, the second amendment is to Art. 4 where the reference to self-determination is again deleted, the third is to Art. 8(2) and the last one is to Art. 9, where reference to national borders is inserted: “[...] This right shall be exercised in accordance with the rule of law, respect for *national boundaries* and the principle of national and *territorial integrity*”. Proposed Amendments by the African Group to the United Nations Declaration on the Rights of Indigenous Peoples, 2007, Arts. 4, 8(2), 9.

<http://www.converge.org.nz/pma/AGDraft0507.pdf>

⁶⁷⁶ *Op. cit.* Genugten, 2010, p. 48.

⁶⁷⁷ Vienna Declaration and Programme of Action, pmb. & para. 5, UN Doc.A/CONF.157/23, 1993 in *ibidem*.

⁶⁷⁸ UN Doc. A/61/PV.107, at 19, 2007 in *ibidem*.

⁶⁷⁹ After the adoption of the Declaration, the first Court that used it was the Supreme Court of Belize in the *Cal v. Attorney General* case, which concerned the alleged violation of Mayan land rights by the government of Belize. *Op. cit.* Genugten, 2010, p. 52.

created for the protection of Indigenous people in the labor field. This instrument continues to be the best in dealing with indigenous cases, given its binding nature and its true commitment to protecting and proclaiming the right to self-determination.

Additionally, subsequent binding instruments were introduced that, while not exclusively tailored to indigenous peoples, promoted rights that all individuals can enjoy and are therefore applicable to Indigenous peoples as well. Among them, I would like to mention especially the *Convention on the Rights of the Child* since it also pays attention in more detail to Indigenous children and the protection of their rights, considering them independent and thus subjects of law. I would also like to mention the *International Covenant on Civil and Political Rights* as it calls attention to the protection of minority rights in Article 27, reminding states of their fundamental role in safeguarding these minorities.

Instead, I am committed to highlighting a paradoxical situation arising from the analysis of UNDRIP. It is surprising that a declaration intended exclusively for Indigenous people fails to fully embrace their claims and needs. As analyzed in the previous sections, the main problem is the ambiguous language of the text: the choice not to define certain concepts stems from an implicit willingness not to recognize the protection of the same; moreover, in several provisions, the recognition of a right is immediately followed by a reference to the government or the state to protect them and indirectly grant them supremacy over Indigenous communities. What we read from many Articles is not so much the proclamation of freedom in a pure and disinterested manner, but rather a gentle concession by the States and the international community.

There is another concern that deserves attention: the inadequate performance of the African regional system, which was designed to cater to the needs of individuals and indigenous African communities but falls short in doing so. Despite the efforts and developments in recent years thanks to RECs and other African courts, there remains much more work to be done.

However, it is also worth noting the positive aspects such as the progress that has been made over the years in the other two regional systems: in general, the adoption of additional protocols makes it clear how the law has evolved and how attention to certain issues has grown.

Despite the existence of various challenges, there is a strong belief that continuous efforts in the academic and legal fields can lead to better protection of human rights for disadvantaged and vulnerable communities.

To conclude, the present chapter on the study of international instruments and regional systems will be followed by a chapter that will delve into the protection of indigenous peoples at the national level, thus on the states and their domestic orders.

Chapter Four

The duties and obligations of States to protect Indigenous Peoples

Summary: 4.1 What are the obligations of consultation and participation: main questions and common challenges, 4. 2 State Duty and National Legislation, 4. 3 The right to participate in decisions concerning the exploitation of the natural resources, 4. 4 The right of political participation of Indigenous Peoples, 4.5 Normative analysis of four Latin American countries, 4. 6 Follow-up and Concluding observations.

*Few areas of international practice illustrate the tensions between business and human rights better than the implementation of the duty to consult with indigenous peoples*⁶⁸⁰.

4. 1 What are the obligations of consultation and participation: main questions and common challenges.

In international law, it is now widely recognized that Indigenous communities should be consulted before any decision could impact them. This principle is enshrined in Articles 6 and 7 of *ILO Convention No. 169* and has been reiterated by United Nations treaty supervision bodies in their reviews of countries and cases involving resource extraction on indigenous lands⁶⁸¹. States have also acknowledged their obligation to consult with Indigenous communities in discussions surrounding the development of declarations on Indigenous peoples' rights, both at the United Nations and in the Inter-American system⁶⁸².

Notwithstanding, much ambiguity about the extent of the consultation duty remains since according to many state and non-state actors such an obligation would extend veto rights to indigenous peoples as well⁶⁸³. In addition, another unclear issue is whether the consultation obligation should stop at the natural resource sphere or extend to the political sphere as well, thus creating an obligation for Indigenous participation in political and public issues.

Even if there is no definition of consultation, it generally means that there must be a “two-way communication”⁶⁸⁴, rather than simply providing information about what a state or a private actor is

⁶⁸⁰ J. Anaya and S. Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*. 67 University of Toronto Law Journal 435, 2017, Arizona Legal Studies Discussion Paper No. 16-42, U of Colorado Law Legal Studies Research Paper No. 17-1, SSRN: <https://ssrn.com/abstract=2876760>

⁶⁸¹ J. Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, Arizona Journal of International and Comparative Law 22, no. 1, 2005, p. 7.

⁶⁸² *Ibidem*.

⁶⁸³ *Id.*

⁶⁸⁴ National Environmental Justice Advisory Council Indigenous Peoples Subcommittee, *Guide on Consultation and Collaboration with Indian Tribal Governments and The Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*, Washington, 2000, p. 13.

planning to do concerning indigenous people⁶⁸⁵. The goal of any consultation with indigenous people should be achieving consensus to reach an agreement between all the parties involved⁶⁸⁶.

As mentioned earlier, the cornerstone of the ILO Convention No. 169 is the “State's duty to consult indigenous peoples”⁶⁸⁷ and, given its binding nature, it generated profound changes in many domestic legal orders of the ratifying countries, where some of them have recognized the State's duty to consult as a constitutional right⁶⁸⁸. The genesis of these obligations for states established in C-169 dates back to the time when the ILO decided to revise the previous Convention No. 107 and replace the integration approach with the principle of consultation and participation of indigenous peoples⁶⁸⁹ in the new Convention⁶⁹⁰. In the new Draft, ILO constituents decided to include the obligation for Member States to ensure explicitly the participation of indigenous peoples since many members of the Meeting of Experts⁶⁹¹ found that the term ‘collaboration’ used in Art. 5 of the C-107 was too weak to guarantee the consultation of indigenous peoples⁶⁹². To include a provision concerning the obligation of consultation, the Office made the following question in the *questionnaire* administered to states⁶⁹³:

Do you consider that Article 5 [of ILO Convention No. 107] should be replaced by a provision which requires that governments should, whenever possible, undertake consultations with the peoples concerned, or with their representatives where they exist, whenever consideration is being given to legislative or administrative measures which may affect them?⁶⁹⁴

⁶⁸⁵ The National Park Service provided the following definition of consultation: “Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information”. 63 Fed. Reg. 20,504 (April 24, 1998) in *id.*

⁶⁸⁶ *Ivi*, p. 14.

⁶⁸⁷ M. V. Cabrera Ormaza & M. Oelz, *The State's Duty to Consult Indigenous Peoples: Where Do We Stand 30 Years after the Adoption of the ILO Indigenous and Tribal Peoples Convention No. 169?* Max Planck Yearbook of United Nations Law 23, 2019, p. 71.

⁶⁸⁸ *Ivi*, p. 73.

⁶⁸⁹ *Id.* p. 77. See also: *International Labour Office 'Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Geneva, 1986, para. 49.*

⁶⁹⁰ In order to draft the conclusions and recommendations of C-169, the International Labour Office sent a questionnaire to member states concerning the content and the scope of the new convention, and among the replies it also received the opinion of indigenous organizations. From that time, many indigenous representatives began to participate in debates during conferences by holding the right to speak. *Record of Proceedings of the 7 6th Session of the ILC (1989), Provisional Record No. 25, in particular 25/2, in op. cit. Cabrera Ormaza & Oelz, 2019, p. 78.*

⁶⁹¹ See International Labour Office, *Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Geneva, 1986, Recommendation (d).*

⁶⁹² *Op. cit. Cabrera Ormaza & Oelz, 2019, p. 78.*

⁶⁹³ *Op. cit. National Environmental Justice Advisory Council Indigenous Peoples Subcommittee, 2000, p. 14.*

⁶⁹⁴ International Labour Office, *Report VI (i): Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Sixth Item on the Agenda (1988); at 28 in ivi, pp. 79-80.*

The majority of the governments agreed⁶⁹⁵ and some of them emphasized the importance of ensuring good faith, genuine, and effective⁶⁹⁶ consultations with Indigenous peoples; however, in the end, in the final text of the Convention the term ‘effective’ was omitted, inserting only the reference to ‘good faith’:

The consultations carried out in application of this Convention shall be undertaken, in *good faith* and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁶⁹⁷

Furthermore, regarding Article 6, the major concern was whether to also include a reference to the concept of ‘consent’ in connection with consultation⁶⁹⁸ since governments had different opinions about the matter and the inclusion of this term would have triggered many of them since it seemed to imply the right to veto for indigenous peoples⁶⁹⁹. Some countries, such as Argentina and Bolivia, proposed an amendment to “avoid the use of the term to prevent problems for the ratification of the Convention”⁷⁰⁰ but finally, the term was included in the last part of the provision as an objective of the consultation along with the importance of reaching an agreement between the parties⁷⁰¹. After including the obligation to consult in Article 6, the constituents devoted additional provisions to the obligation to consult and participate in more specific contexts and situations, such as the exploitation of natural resources in Article 15⁷⁰².

4. 1. 2 Whom to consult and on what?

The Convention sets a framework and standards to be followed and adhered to in order to implement the consultation obligation, however, each state possesses its autonomy and flexibility in how to carry out this duty⁷⁰³. This has resulted in several challenges for governments on how to interpret the Convention’s provisions; the first two questions that arise are: “1) Who are the Indigenous peoples that need to be consulted?; and 2) who shall be considered representative of Indigenous peoples for the purpose of consultation?”⁷⁰⁴. Indeed, some countries claimed the failure of the procedures of consultation in helping member states recognize the legitimate representatives of Indigenous

⁶⁹⁵ The Office received 30 replies of which 20 were affirmative. *Ibidem*.

⁶⁹⁶ The Office specified that the term ‘effective’ meant that consultation should go beyond mere formality and appearance, more than *pro forma*. *Ivi*, p. 80.

⁶⁹⁷ *Op. cit.* ILO, 1989, Art. 6(2).

⁶⁹⁸ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 80.

⁶⁹⁹ Record of Proceedings of the 75th Session of the ILC (1988), *Provisional Record No. 25*, para. 74.

⁷⁰⁰ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 80.

⁷⁰¹ *Id.*

⁷⁰² *Id.* p. 81.

⁷⁰³ *Id.* p. 101.

⁷⁰⁴ *Ibidem*.

peoples⁷⁰⁵. For instance, Peru and Colombia implemented administrative mechanisms to identify the holders of the right to consultation: in the former, the Ministry of Culture adopted the Directive o3 - 2o12-MC⁷⁰⁶, and the government of Colombia deployed a procedure “to certify the presence of ethnic communities in project-affected areas”⁷⁰⁷. In addition, concerning the people to be consulted, gender considerations were also made given the numerical inferiority of the indigenous female gender in government participation and consultation. In this regard, some states⁷⁰⁸ have created regulations to include Indigenous women in this process.

Furthermore, countries to better understand what legislative and administrative measures must take to consult indigenous people tried to figure out which ones ‘may affect them directly’⁷⁰⁹, and many states gave their own interpretation on the matter⁷¹⁰. For instance, the Chilean regulation defined them as those that “may directly cause a significant and specific impact on Indigenous peoples in their capacity as peoples and affecting the exercise of their traditions, customs, religious, cultural and spiritual practices, as well as their relationship with the territories”⁷¹¹. On the other hand, the Constitutional Court of Colombia argued that “not every legislative measure with the possibility of affecting Indigenous communities is subject to consultation, but only those that could affect them directly”⁷¹². According to the Court, a legislative measure impacts Indigenous directly only when it changes their status, “either by imposing restrictions or burdens or by conferring on them benefits”⁷¹³; thus, those measures that apply to all citizens are not subject to consultation.

After that, it is important to establish when and how long for to consult: Art. 6 of C-169 requires that consultations are to be done as soon as possible in order to give the Indigenous people the possibility to really influence the process and the outcome⁷¹⁴. Given the complexity and the costs

⁷⁰⁵ See the Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Art. 24 of the ILO Constitution by the Education Workers Union of Rio Negro (UNT-ER), local section affiliated to the Confederation of Education Workers of Argentina (CTERA) (2008) ILO Doc. GB.303/i 9 / 7, at para. 20; Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Art. 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association (2001) ILO Doc. GB.282/1 4 / 4, at para. 28. *Ivi*, p. 102.

⁷⁰⁶ This Directive created a database that offers information about official denominations, geographical locations, and representative institutions of indigenous groups. *Ibidem*.

⁷⁰⁷ CEACR, Convention No. 169, 2019 *Observation Colombia* in *id*. This information is collected by the Ministry of the Interior, in charge of indigenous matters in Colombia, and then it is compared to that provided by the indigenous community interested. When there is uncertainty, the Minister is authorized to visit the community *in loco* to verify the situation. *Id*.

⁷⁰⁸ Such as Peru with the Supreme Decree oo-2o12-MC, Art. 17, and Costa Rica with the Executive Decree 40932-MP-MJP (2018), Art. 3 (h). *Id*.

⁷⁰⁹ *Op. cit.* ILO, 1989, Art. 6(1).

⁷¹⁰ The regulation of Costa Rica states for example that measures affect indigenous people when contain items that could cause changes in their legal situation and collective rights. In other countries, such as Peru, regulations on consultation take measures that do not require consultation with indigenous peoples. *Op. cit.* Cabrera Ormazá & Oelz, 2019, p. 103.

⁷¹¹ Chile, Supreme Decree 66 (2013), Art. 7 in *ibidem*.

⁷¹² Constitutional Court of Colombia, Judgment C-30/2008 in *id*.

⁷¹³ *Id*.

⁷¹⁴ See CEACR, Convention No.169, 2009 *Observation Norway*. *Id*, p. 104.

of the consultation process, it could be a good idea to establish a timeframe to agree on the deadlines and objectives. Moreover, the effectiveness of consultation also depends on the ability of the agency in charge to address the main difficulties associated with the community, including technical language barriers.⁷¹⁵ Finally, in order to maintain a trustworthy atmosphere following a consultation, it is paramount for all parties involved to uphold the agreements that were established throughout the process. This can be viewed as a demonstration of the principle of good faith, which should serve as a guiding force in every consultation⁷¹⁶.

4.2 State Duty and National Legislation

The State is the primary duty bearer concerning human rights⁷¹⁷ and of course, indigenous people: according to the norms of international law, which establish that “governments have such a duty within their jurisdiction”⁷¹⁸, its first task is to protect them from third-party abuses of rights through the aid of international treaties⁷¹⁹. The Human Rights Committee, in its General Comment No. 31, argued that under ICCPR:

The positive obligations on states parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities⁷²⁰.

Furthermore, according to the HRC, the state could breach the Covenant when it fails to take appropriate measures and prevent the violence and abuse of indigenous rights, especially concerning discrimination, labor, and exploitation of natural resources⁷²¹. However, the Committee does not specify the content of the action but generally recommends including compensation and judicial remedies when appropriate. Moreover, the Committee, as stated in the previous section, encourages

⁷¹⁵ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 104.

⁷¹⁶ *Id.* at 105.

⁷¹⁷ Permanent Forum on Indigenous Issues, *An Analysis on the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises*, Eleventh session, New York, 2012, UN doc. E/C.19/2012/3, para. 34.

⁷¹⁸ ‘States also have duties to respect, promote and fulfill rights, but the most business-relevant is the duty to protect because it is directed at third-party abuse. Beyond the national territory, the scope of the duty will vary depending on the state’s degree of control.’

See G.A. Res. 162, U.N. Doc. A/RES/56/83 (2002) (taking note of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts). *Id.*

⁷¹⁹ For example, ICERD, ICESCR, and ICCPR do not directly address State duties regarding business but impose generalized obligations to ensure the enjoyment of rights and prevent non-state abuse. Instead, CEDAW and CRC address business by requiring governments to take all appropriate measures to eliminate discrimination against women by any “enterprise” (CEDAW, Art. 2(e)). *Ivi*, para. 34-35.

⁷²⁰ Human Rights Committee, *General Comment 31*, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. HRI/GEN/1/Rev.8 at 233, 2004, para. 8.

⁷²¹ *Op. cit.* Permanent Forum on Indigenous Issues, para. 36.

states to take appropriate legislative or administrative measures and asks them to submit a report with information on measures taken⁷²².

Domestic legal orders and state laws differ from country to country; for example, in the American continent, constitutional reforms have been implemented to acknowledge the political, economic, social, and cultural rights of indigenous peoples⁷²³. Countries like Bolivia and Ecuador have taken the lead in promoting new constitutional frameworks that recognize and protect these rights. For instance, Bolivia's Constitution guarantees indigenous peoples' self-determination, autonomy, self-government, and cultural rights. It also recognizes its institutions and territories⁷²⁴. Similarly, Ecuador's new Constitution protects indigenous peoples' collective rights to their identity and ownership of their communal lands⁷²⁵. Additionally, it grants them the right to participate in the use, exploitation, and conservation of renewable natural resources found in their lands, also being entitled to free, prior, and informed consultation. Moreover, according to the same Constitution, the Indigenous have the right to have a share in the profits generated by these projects, as well as a compensation for damages incurred concerning social, cultural, and environmental issues⁷²⁶.

Other states, including Argentina, Brazil, Colombia, Guatemala, Mexico, Panama, Paraguay, Peru, and Venezuela, adopted constitutional reforms and legislations that recognize the individual and collective rights of indigenous people; they address many issues such as "property rights, autonomy, self-government, and the recognition of their common law in the regulation of internal relations"⁷²⁷. Additionally, Nicaragua, after the constitutional changes of 1987, has established an autonomous regime for the indigenous peoples of the Caribbean coast through the implementation of the Autonomy Statute for the Atlantic Coastal Regions of Nicaragua, Law No. 28⁷²⁸. On the other hand, in the African continent, only a small number of States have recognized the importance of consulting and involving indigenous people in the decision-making process. Among those States, Ethiopia has a constitution that protects the right to self-determination, and Cameroon, the Republic of Congo, and Uganda have specific laws that recognize indigenous people's rights⁷²⁹.

⁷²² Concluding Observations for Canada, UN Doc. CERD/C/CAN/CO/18, 25 May 2007, at para. 17 in *id.* para. 37.

⁷²³ *Op. cit.* Permanent Forum on Indigenous Issues, para. 41.

⁷²⁴ *Ibidem*

⁷²⁵ *Id.*

⁷²⁶ *Id.*

⁷²⁷ *Ivi*, para. 43.

⁷²⁸ *Ivi*, para. 42.

Over time, the process of autonomy has been reinforced and additional legislations have emerged to supplement specific elements of the Statute. For instance, Law No. 445, which was sanctioned in December 2002, aims to support the communal property regime of the indigenous peoples and ethnic communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and the Coco, Bocay, Indio and Maíz Rivers. This act mandates the establishment of indigenous authorities in their respective territories and empowers them to oversee the territorial administration and management of natural resources. *Ibidem*.

⁷²⁹ *Ivi*, para. 44.

In the United States of America, Native Americans were recognized as tribes by the United States Federal Government where 561 tribal governments are federally recognized⁷³⁰.

The Australian legal framework recognized “Indigenous peoples’ rights to land based on traditional occupancy”⁷³¹ and in 1992 the High Court took the landmark *Mabo* decision⁷³² that rejected the discriminatory doctrine of *terra nullius*; in response to this, the Australian Government enacted the Native Title Act in 1993 that provides the right to negotiate in certain circumstances, such as in mineral exploration⁷³³.

Finally, in Norway, Sweden, Finland, and the Russian Kola Peninsula, the Sami people are divided by the formal boundaries of the four States⁷³⁴ but continue to exist as one people bound by the same culture and language. The Sami have permanent participation in the Sami Parliamentary Council, formed in 2000, which is authorized to deal with issues of “cross-border, language, education, research and economic development”⁷³⁵.

Of course, problems of natural resources, right to land and territories generate conflicting positions concerning the participation of indigenous people, who are conscious of their disadvantaged position when dealing with the interests of States. Often their ambitions, interests, and claims are ignored because they cannot truly exercise their right to participate in the political, social, and economic spheres within the civil society of a state⁷³⁶.

4.3 The right to participate in decisions concerning the exploitation of the natural resources.

As stated by James Anaya, “natural resource extraction and other major development projects in or near indigenous territories are one of the most significant sources of abuse of the rights of indigenous peoples worldwide”⁷³⁷. Having already addressed the importance of the right to land in previous chapters, this section will instead look into the right of Indigenous people to be consulted by government and private entities before exploiting natural resources found in territories in which Indigenous have had a spiritual and ancestral connection for millennia. They must be consulted and involved in the operation of natural resource extraction projects that affect them, confirming this

⁷³⁰ The US recognizes the right of these tribes to self-government and supports their tribal sovereignty and self-determination. *Id.*, para. 45.

⁷³¹ *Id.*, para. 46.

⁷³² *Mabo and Others and The State of Queensland* [No. 2], (“Mabo case”) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html>

⁷³³ *Op. cit.* Permanent Forum on Indigenous Issues, para. 46.

⁷³⁴ *Ivi*, para. 50.

⁷³⁵ *Id.*

⁷³⁶ *Ivi*, para. 51.

⁷³⁷ J. Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, A/HRC/18/35, 2011, Eighteenth session, Human Rights Council. https://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-35_en.pdf

necessity both at the international and domestic level⁷³⁸. Nevertheless, many representatives of business enterprises have complained about the lack of domestic regulatory frameworks that would have helped conduct operations while respecting indigenous interests⁷³⁹; this lack only increases conflicts of interest between the parties and the misuse of land.

The ILO has stated that, in applying Convention No. 169, consultations must be held when a variety of indigenous interests are involved, adding legislative measures and constitutional provisions.⁷⁴⁰ Moreover, since the interests of indigenous communities are different among them, also the nature and extent of consultations would differ as reflected in the following cases.

The first one concerns the *Embera Katio* people of Colombia⁷⁴¹ where the ILO Committee established that the duty of the state to consult these people for the flooding of their lands for a hydroelectric project had not been fully met⁷⁴². The Committee argued that further consultations did not take place after modifications to the project in order to obtain consent to the changes. In this regard, the Committee, in its report, recalled the “government's attention to Article 6 of the Convention which establishes the obligation for States to consult the peoples concerned beforehand” and that “consultations shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”⁷⁴³.

In addition, the emphasis on the ‘good faith’ consultation is highlighted by ILO Committees in the other two cases concerning oil exploration concessions in Ecuador and Colombia⁷⁴⁴. They outline the necessity of culturally appropriate procedures in order to reach an agreement with indigenous communities involved in the two cases⁷⁴⁵. Indeed, the Committee stated that even if the oil is considered the property of the state, it is, however, the latter's obligation to first consult the indigenous people who live on the resources at stake⁷⁴⁶.

⁷³⁸ Office of the High Commissioner for Human Rights, *Extraction of natural resources a key cause of abuse of indigenous peoples' rights – UN expert*, 2011, <https://www.ohchr.org/en/press-releases/2011/09/extraction-natural-resources-key-cause-abuse-indigenous-peoples-rights-un>

⁷³⁹ *Ibidem*.

⁷⁴⁰ J. Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, *Arizona Journal of International and Comparative Law* 22, no. 1, 2005, pp. 10-11.

⁷⁴¹ ILO, *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention*, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, 2001. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507239,en

⁷⁴² *Op. cit.* Anaya, 2001, p. 11.

⁷⁴³ *Op. cit.* ILO, 2001, para. 57 and Art. 6 of C-169 (1989).

⁷⁴⁴ *Op. cit.* Anaya, 2001, p. 11.

⁷⁴⁵ ILO, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples Convention*, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), ILO Doc. GB.282/14/2 (Nov. 14, 2001).

⁷⁴⁶ *Op. cit.* Anaya, 2001, p. 11.

The duty of consultation has been addressed also by the United Nations Human Rights Committee in the case of Sămi concerning resource extraction in their herding areas⁷⁴⁷ where the government of Finland allowed “logging and quarrying activities by private companies”⁷⁴⁸. Nevertheless, the ILO Committee established that in both cases the Convention has not been violated.

In 1995, the *Committee on the Elimination of Racial Discrimination* also addressed the duty to consult and accommodate the Indigenous. It expressed its concern in the Report concerning Nicaragua's compliance with the ICERD since the participation of the indigenous groups in decisions affecting their land and the allocation of natural resources was insufficient⁷⁴⁹.

Finally, it is worth mentioning the *Tratado de cooperación Amazônica* (TCA), signed on July 3, 1978, and ratified by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela⁷⁵⁰ to carry out joint actions and cooperate to preserve the environment and rationally use the natural resources⁷⁵¹. Indeed, the main objective of the TCA is to promote the harmonious development of the Amazon region and the incorporation of its territories into the respective national economies, which is fundamental for maintaining a balance between economic growth and environmental preservation⁷⁵². To accomplish these purposes, a Special Commission on Indigenous Affairs was also established to ensure the participation of the indigenous peoples of the Amazon in all phases of dealing with issues relating to them⁷⁵³. Moreover, the *Andina* community created the *Consejo Consultivo de los Pueblos Indígenas* in 2007 with the Decision No. 674⁷⁵⁴ “*para promover la participación activa de los pueblos indígenas en los asuntos vinculados con la integración subregional, en sus ámbitos económico, social, cultural y político*”⁷⁵⁵.

To summarize, it is evident that the duty to consult concerning natural resources is a general norm recognized in every domestic order. Moreover, consultations must always meet minimum procedural requirements, such as ensuring Indigenous peoples to have adequate and appropriate

⁷⁴⁷ See *Ilmari Lansman et al. v. Finland*, Comm. No. 511/1992, Hum. Rts. Committee, 52d Sess., U.N. Doc. CCPR/C/33/D/511/1992 (1994); *Jouni E. Lainsmann et al. v. Finland*, Comm. No. 671/1995, Hum. Rts. Committee, 58th Sess., U.N. Doc. CCPR/C/58/D/671/1995 (1996).

⁷⁴⁸ *Op. cit.* Anaya, 2001, p. 12.

⁷⁴⁹ Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 50th Sess., Agenda Item 103, para. 536, U.N. Doc. A/50/18 (1995).

⁷⁵⁰ *Op. cit.* Marcelli, 2009, p. 124.

⁷⁵¹ As stated by Art. 1 of the treaty: “Las Partes Contratantes convienen en realizar esfuerzos y acciones conjuntas para promover el desarrollo armónico de sus respectivos territorios amazónicos, de manera que esas acciones conjuntas produzcan resultados equitativos y mutuamente provechosos, así como para la preservación del medio ambiente y la conservación y utilización racional de los recursos naturales de esos territorios.” OTCA, 1978, Art. 1.

<https://otca.org/wp-content/uploads/2020/01/TRATADO-DE-COOPERACION-AMAZONICA.pdf>

⁷⁵² Gov.Co, *Organización del Tratado de Cooperación Amazónica (OTCA)*, 2024.

<https://www.cancilleria.gov.co/organizacion-del-tratado-cooperacion-amazonica-otca>

⁷⁵³ *Op. cit.* Marcelli, 2009, p. 124.

⁷⁵⁴ Consejo Andino de ministros de Relaciones Exteriores, *Decisión 674*, Nueva York - Estados Unidos De América, 2007, XI Reunión Extraordinaria. <https://www.comunidadandina.org/StaticFiles/DocOf/DEC674.pdf>

⁷⁵⁵ ‘To promote the active participation of indigenous peoples in matters related to subregional integration in the economic, social, cultural and political spheres.’ *Ivi*, Art. 1.

information on measures and processes to meaningfully participate. Generally, state consultations shall have as the first objective to achieve the consent of affected Indigenous, otherwise, the project should not go forward⁷⁵⁶.

4.4 The right of political participation of Indigenous Peoples

Political participation can be considered a fundamental right in contemporary representative democracy on both dogmatic-normative and theoretical-academic grounds, where different groups put forward their proposals in public spheres and try to influence some political outcomes⁷⁵⁷. This right can be found in Article 21 of the Universal Declaration of Human Rights, which establishes that:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures⁷⁵⁸.

The same right is also proclaimed by Article 25 of the *International Covenant on Civil and Political Rights*⁷⁵⁹ which states that every citizen should have the right and the possibility to “participate in the conduct of public affairs, directly or through representatives freely”⁷⁶⁰.

Therefore, considering these two provisions, the right to political participation can be framed in a comprehensive dimension⁷⁶¹ and can be understood as indivisible and interdependent, with the scope to realize human dignity⁷⁶². This right was highly debated in the UN context as a “principle of great

⁷⁵⁶ *Op. cit.* Anaya, 2001, p. 17.

⁷⁵⁷ L. A. Ferreira, A. C. Santano, V. F. Dos Santos, *Political Participation of the Brazilian Indigenous Movement and the Effectiveness of Fundamental Human Rights*, Beijing Law Review, 2021, p. 92, ISSN: 2159-4635.

⁷⁵⁸ *Op. cit.* UN, 1948, Art. 21.

⁷⁵⁹ This Covenant connects human rights with human dignity by stating that the rights enumerated ‘derive from the inherent dignity of the human person’, which is commonly cited in international laws and literature.

J. Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, The American Political Science Review, 76, 303-316, 1982, in *op. cit.* Ferreira et al., 2021, p. 93.

⁷⁶⁰ *Op. cit.* UN, 1966, Art. 25(a).

⁷⁶¹ Political participation nowadays is developed through interactions between groups with different interests on multiple levels; therefore, it is essential to understand how multiple identities and interests shape public agendas in order to build the Democratic Rule of Law.

Op. cit. Ferreira et al., 2021, p. 96.

⁷⁶² By simultaneously advocating for both freedom and equality, we can take an important first step towards overcoming the challenges posed by cultural and traditional differences within society and among various legal systems. This paves the way for the protection of fundamental human rights.

Ivi, p. 93.

relevance to human rights” enabling the increase of empowerment and the decrease of the ingrained hierarchies, through the promotion of equality⁷⁶³.

In the specific case of Indigenous, as people dominated by a consumer culture that threatens their way of life, political participation is a crucial and fundamental right to emerge from this subjugation and advance their own ideas and proposals to effectively contribute to the decision-making process of the country⁷⁶⁴. Until now, indigenous peoples have scarcely participated in national political affairs, as demonstrated by the Canadian experience⁷⁶⁵, especially due to their political agenda orientated toward autonomy and self-determination⁷⁶⁶.

In this regard, it is important to distinguish self-determination from political participation in the context of indigenous people: here the latter could be considered a consequence of the former. The issue is addressed by the Human Rights Committee in the *Mikmaq Tribal Society v. Canada* case⁷⁶⁷ where the Mikmaq Tribal Society denounced the violations made by the government of Canada of the right to self-determination enshrined in Art. I of the Covenant (ICCPR)⁷⁶⁸. The claim was that Canada's Aboriginal constitutional reform process excluded Mikmaq people from the discussion concerning the future relationship between the Crown and Indigenous people⁷⁶⁹. The admissibility decision, in this *case*, focused on Art. 25 of the Covenant which declares the political participation right “without unreasonable restrictions”⁷⁷⁰. In this regard, the authors of the Mikmaq Tribal Society communication argued that:

It is likewise important to distinguish self-determination from the right to popular participation found in Article 25 of the Covenant. Self-determination is a people's choice of a state and a

⁷⁶³ *Ibidem*.

⁷⁶⁴ M. E. Turpel, *Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, Cornell International Law Journal 25, no. 3, 1992, p. 580.

⁷⁶⁵ Indigenous peoples, due to the unwillingness of the Canadian government, did not have the opportunity to participate in the Canadian constitutional renovation or national policy formulation. They have always been seen as inferior and *sauvage*. *Ivi*, p. 581.

⁷⁶⁶ *Ivi*, p. 582.

⁷⁶⁷ *Mikmaq Tribal Society v. Canada*, (No. 205/1986), U.N. Doc. CCPR/C/39/D/205/1986 (1990) (Human Rights Committee admissibility decision released July 20, 1990) [hereinafter Mikmaq Admissibility Decision]; *Mikmaq Tribal Society v. Canada*, U.N. Doc. CCPR/C/43/D/205/1986 (1991) (Human Rights Committee final decision released Dec. 3, 1991) [hereinafter 1Mikmaq Tribal Society v. Canada] in *ibidem*.

⁷⁶⁸ *Ivi*, p. 584.

⁷⁶⁹ The Mikmaq Tribal Society underlined section 37(1) of the Constitution Act (1982) which establishes that: “A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of these peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.”

Constitution Act, 1982, § 37(1) (Can.) in *ivi*, p. 585.

⁷⁷⁰ *Op. cit.* UN, 1966, Art. 25. This provision is very similar to Art. 21 of the Universal Declaration of Human Rights in *ivi*, p. 590.

framework of government, and for this reason has been described as an essential condition or prerequisite, although not necessarily excluding other conditions, for the genuine existence of the other human rights and freedoms enumerated in the Covenant. Popular participation is the right of individuals, subsequent to the exercise of self-determination, to participate freely and effectively in the state and form of government chosen⁷⁷¹.

It is thus clear from this aside that the right to political participation is exercised by an individual only after the people to which he or she belongs to have been able to exercise their right to self-determination. So political participation is a consequence and is aimed at achieving autonomy in the long term since it requires the education of both state and civil society about indigenous peoples' human rights problems and political goals.⁷⁷² Moreover, without political participation in national decision-making, self-determination⁷⁷³, and self-government are not meaningful because governments cannot pretend to know "what is best" for indigenous peoples⁷⁷⁴. For this reason, it is important that the latter can participate in public affairs with the same status as the other citizens and its effectiveness requires "greater elaboration and structural changes to national political institutions"⁷⁷⁵.

To conclude, the two rights are connected and interdependent as one needs the other to be truly useful and effective; however, monitoring systems have not always been so effective in securing both rights and defending the interests of Indigenous peoples. For instance, in the aforementioned case of the Mikmaq Tribal Society, the Committee established that Canada had not violated Article 25 of the Covenant by excluding the Mikmaq from the constitutional discussions in the 1980s because it found that these constitutional discussions were usually "attended only by elected representatives such as the elected leaders of the federal and provincial governments"⁷⁷⁶.

In conclusion, the struggle of indigenous peoples to achieve the right to political participation continues in many countries though there has been progress in some Latin American countries in the past two years.

4. 5 Normative analyses of four Latin American countries

This section will analyze four different situations of countries and how they have implemented the duty to consult in their domestic orders.

⁷⁷¹ Mikmaq Tribal Society Communication submitted January 1986, at 14 in *ivi*, pp. 591-592.

⁷⁷² *Ivi*, p. 593.

⁷⁷³ Its genuine recognition requires 'domestic public support as well as international debate and, ideally, international supervision'. *Id.*

⁷⁷⁴ *Id.*

⁷⁷⁵ *Ivi*, p. 594.

⁷⁷⁶ *Ivi*, p. 596.

The first country to examine is Bolivia, which legally recognized the right of consultation of indigenous people in its Political Constitution of 2009 by incorporating international law into domestic order⁷⁷⁷. The first action implemented by Bolivia to respect the right to consultation is the recognition of territorial organizations that represent Indigenous communities at the political level⁷⁷⁸. The second factor is the adoption of a ‘cross-cutting approach’ that includes indigenous people in the agenda at all levels of government, as happened with the Guaraní indigenous people in the territory of Charagua Norte and Isoso⁷⁷⁹.

Despite the efforts and the positive actions taken by the government, several obstacles impede the full enjoyment of the right to prior consultation. The first one is the poverty and the social exclusion of most of the population; then, the other issue is linked to the recognition as indigenous for those individuals who are nomads or do not live in the *Tierras Comunitarias de Origen*⁷⁸⁰: thus, they cannot enjoy the right. The third obstacle is the huge concentration of property in few hands: “7 percent of the population owns 70 percent of the land”, even if over time land reforms have regularized land titles on almost a third of the national territory⁷⁸¹. Then, another issue is the conception in some states that the prior consultation is a “waste of time”, so agreements are usually concluded without prior consultation with Indigenous people⁷⁸². Finally, a recent ruling by the Constitutional Court has determined that the obligation to obtain the consent of indigenous communities as prescribed in the *Hydrocarbons Law* is unconstitutional. The Court also stated that the consultation process's primary objective is to assess the extent of damage caused, rather than to seek community consent⁷⁸³.

All these negative factors led to the failure to consult indigenous people and conduct preliminary studies on natural resource extraction⁷⁸⁴. Hence, the main challenge for Bolivia is the adoption of a legal procedure to really exercise the right of prior consultation in order to end inequalities and current procedural fragmentation⁷⁸⁵.

The second country to analyze is Colombia, which presents a paradoxical situation because a developed legal and jurisprudential system coexists with the lack of the real implementation of the

⁷⁷⁷ The government of Bolivia adopted many regulations, decrees, and enforcement standards, “especially for hydrocarbon exploration and extraction”. DPLF, *The Right of Indigenous Peoples to Prior Consultation*, Washington, N/A, p. 7.

⁷⁷⁸ The most important organizations are the Confederation of Indigenous Peoples of Bolivia (CIDOB), the National Council of Ayllus and Markas of Qullasuyu (CONAMAQ), the Unique Confederation of Rural Laborers of Bolivia (CSUTCB), and the Bartolina Sisa National Federation of Peasant Women. The first three have also acted as ‘agents in prior consultation processes relating to indigenous territories’. *Ibidem*.

⁷⁷⁹ *Id.*

⁷⁸⁰ The TCO is a specific form of territorial ownership that is linked to the registration of indigenous lands. *Id.*

⁷⁸¹ *Id.*

⁷⁸² *Id.*

⁷⁸³ *Ivi*, pp. 7-8.

⁷⁸⁴ Moreover, many activities in Bolivia are carried out illegally without licenses, mining operations, and particularly open-pit mining that cause environmental contamination. *Ivi*, p. 8.

⁷⁸⁵ *Id.*

duty to consult⁷⁸⁶. In Colombia, the legal framework strongly supports the right to cultural identity, collective ownership of traditional lands, and self-governance for indigenous peoples and Afro-descendent communities. The Political Constitution of 1991 is particularly progressive in its approach, not only incorporating international law into domestic law but also offering strong protections for these marginalized groups⁷⁸⁷. Moreover, the constitutional jurisprudence has proclaimed that “prior consultation is a fundamental right with constitutional rank”⁷⁸⁸. The Court has established that “consultation must precede the granting of an environmental license” and it must include mutual respect and good faith in every communication. Nevertheless, as stated before in the case of Bolivia, there are many factors that obstacle the real consultation of Indigenous people, starting from political unwillingness and the lack of an “adequate, consensus-based regulatory framework”; additionally, other barriers according to the Executive Summary of the DPLF⁷⁸⁹ are the following:

(c) Lack of genuine participation by ethnic groups in the regulation of prior consultation; (d) lack of a specific law on prior consultation; (e) difficulties reaching agreements in consultation processes; (f) consultations held with parties that are not the legitimate representatives of the affected peoples; and (g) the design and implementation of infrastructure, development, and mining megaprojects without a free, prior, and informed consultation process aimed at obtaining the consent of the affected ethnic groups⁷⁹⁰.

In addition to these factors, there is the constant problem of the forced removal, murders, and massacres of Indigenous leaders by illicit armed groups, who also exploit ancestral lands for illegal activities such as drug trafficking, confirming the precarious land titling situation, worsened by armed conflicts⁷⁹¹.

To address these challenges, the Colombian government established some mechanisms to foster dialogue among the parties, such as the Prior Consultation Group of the Ministry of Interior and Justice, the Permanent Roundtable for Consensus with Indigenous Peoples and Organizations established in 1996, and the Amazonia Indigenous Regional Roundtable. However, all these initiatives are not sufficient to fully resolve the conflicts between government, civil society, and armed groups. Therefore, the full enjoyment of the right to prior consultation remained unfinished business

⁷⁸⁶ *Ivi*, p. 9.

⁷⁸⁷ *Id.*

⁷⁸⁸ The Constitutional Court has issued many rulings that declared the unconstitutionality of norms such as the General Forestry Law and the Rural Development Statute based on lack of prior consultation. *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.*

⁷⁹¹ *Ivi*, pp. 9-10.

in Colombia and to put an end to this situation, it is necessary to initiate a legislative process that guarantees a truly multicultural and participatory approach⁷⁹².

The next country is Ecuador which also reflects a disconnection between jurisprudence and reality, even if according to the new Political Constitution of 1998 it was described as an intercultural and plurinational State that recognized the primacy of international treaties over domestic law⁷⁹³. The Constitution provides a specific section concerning the protection of the collective rights of Indigenous people and nationalities, establishing the right to “free, prior, and informed consultation on administrative and legislative measures and government decisions that could affect the environment”⁷⁹⁴. Yet, as it happens in Colombia, despite several provisions in support of this right, it has never been consistently applied and respected. This is primarily due to the absence of clear consultation procedures established by the legislature and the lack of appropriate government structures. Additionally, the absence of public allocations has led to the initiation of explorations and exploitations of natural resources without the consent of the Indigenous people residing in those areas⁷⁹⁵.

The Constitutional Court in Ecuador issued a contradictory decision regarding the role of the constitutional justice system in safeguarding the rights of indigenous peoples and nationalities. The Court initially deemed Mining Law⁷⁹⁶ unconstitutional due to its enactment without prior consultation, a necessary step in the legislative process. Consequently, the decision prohibited the application of certain articles of the Mining Law in the territories of indigenous, Afro-Ecuadorian, Montubio peoples, and nationalities⁷⁹⁷.

The failure to consult and seek consent has led to significant exploitation and degradation of natural resources in Ecuador, as well as a disregard for indigenous culture, resulting in “conflicts between the Ecuadorian State, private corporations, and local communities”⁷⁹⁸. Moreover, the lack of consent generated harm to human health and the environment, giving rise to conflicts in the mining industry in these sectors:

⁷⁹² *Id.*, p. 10.

⁷⁹³ *Id.*

⁷⁹⁴ *Id.*

⁷⁹⁵ In addition, governmental bodies have implemented various laws affecting areas and countries such, as the Mining Law of 2009 without involving or discussing with these communities beforehand. Because there is a lack of communication and dialogue, between leaders and the government disagreements emerge regarding government decisions that affect these communities. For instance, disagreements have arisen over the approval of a water law and the distribution of mining company permits resulting in protests, disruptions, road closures, and uprisings.

Ivi, pp. 10-11.

⁷⁹⁶ *Supra* note 794.

⁷⁹⁷ *Id.*, p. 11.

⁷⁹⁸ *Ivi*, p. 12.

- (a) large-scale gold and copper exploration and exploitation by Canadian companies in territories of the Shuar indigenous people in the Cordillera del Cóndor.
- (b) open-pit copper mining by the Bishimetals company, a subsidiary of Mitsubishi, in territory belonging to Junín communities in the Cordillera de Toisán, which has affected the Cotacachi-Cayapas Ecological Reserve and pre-Incan archeological sites⁷⁹⁹.

Oil exploitation caused many disputes in the territory belonging to the Shuar people since the government of Ecuador and the Atlantic Richfield Company concluded a contract without prior consulting the indigenous community, as happened in the case of the Sarayaku people in 1996⁸⁰⁰. In 2008, the Constituent Assembly adopted the Mining Mandate which revoked the concessions of mining companies that did not submit environmental impact studies or conduct operations that destroyed natural resources, such as protected forests and vulnerable water resources. Nevertheless, these concessions continued to be implemented without achieving great results in consulting indigenous people.

The only way to guarantee the right of consultation is the actuation of the Ecuadorian principle of *plurinationality*, currently replaced by an economic model incompatible with the environment and property rights of indigenous peoples⁸⁰¹. In addition, the State should establish a dialogue between the different parties in order to prevent the escalation of conflicts and, finally, it should enact a comprehensive law to regulate prior consultation and make national authorities more responsible to enforce this right⁸⁰².

The last case to examine is Peru, characterized by a clash between indigenous people and police in Bagua that has worsened over time, causing 33 deaths in 2009. This event demonstrates the consequences of making decisions that affect indigenous peoples without prior consultation⁸⁰³. In fact, in Peru, 44% of conflicts derive from the lack of consent and agreements. Compared to the countries mentioned above, Peru does not have very advanced laws; however, it presents some normative resources that confer “constitutional rank on international human rights treaties and the judgments of international tribunals, and the rank of statutory law to ILO Convention 169”⁸⁰⁴.

⁷⁹⁹ *Id.*

⁸⁰⁰ This case is under consideration by the Inter-American Court of Human Rights due to allegations of endangerment to the well-being and security of the Sarayaku community, the occupation of their land by military forces, the placement of hazardous explosives by the involved company, involuntary displacement, and the erosion of their social structure. Another issue pertains to the extraction of oil within the territory of the remote Tagaeri and Taromenane indigenous groups, and the destruction of their ancestral lands, which have been designated as a global biosphere reserve. *Id.*

⁸⁰¹ *Id.*

⁸⁰² *Id.*

⁸⁰³ *Ivi*, p. 13.

⁸⁰⁴ The government has also developed a jurisprudence on the content of the right to prior consultation and tried to adapt its domestic laws to international standards. *Id.*

Nonetheless, legal and regulatory provisions in the country are not well integrated and do not meet the above requirements. Also, the country has not put in place regulations for all activities that could have an impact on Indigenous communities. For example, in some instances such as mining laws, prior consultation is often confused with processes that are just informative and participatory⁸⁰⁵. The main obstacles to the prior consultation of Indigenous people are the following:

(a) the poverty and illiteracy of indigenous and peasant communities; (b) lack of legal recognition of indigenous communities ... (c) lack of demarcation of indigenous and peasant lands; (d) lack of political will on the part of the executive branch to ensure the right to prior consultation; (e) the government policy of vigorously promoting private investment; (f) the passage of legislative decrees regulating issues that affect peasant and indigenous communities without prior consultation; (g) the arrest and criminal prosecution of indigenous leaders; (h) the failure to enforce ILO Convention 169... (i) the absence of a uniform official definition of the concept of indigenous peoples, ... (j) the disconnect between the government's domestic discourse and its statements before international bodies; and (k) confusion over powers and duties and overlapping jurisdictions among different State entities when it comes to matters concerning indigenous peoples⁸⁰⁶.

In Peru, certain factors positively influence the application of prior consultation and the encouragement of consensus, including the platforms for State-community dialogue. Additionally, it is worth to mention the ambivalent and complex role played by the Constitutional Court. It rejected the government's argument for not consulting indigenous people due to the absence of consultation law⁸⁰⁷ and it also halted the exploration of the *Cordillera Escalera* region, a prominent water reserve for native communities. Conversely, the same Court ruled that the right to prior consultation only became legally binding in Peru in June 2010, establishing the guidelines for consultation processes⁸⁰⁸. In order to address these issues concerning the right to consult, Peru must prevent further escalation of violence among the parties involved and stop it by fostering the dialogue; additionally, a new

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.*

⁸⁰⁷ *Ivi*, p. 14.

⁸⁰⁸ Examples demonstrating the absence of prior consultation involve mining activities conducted within the *Ichigkat Muja* National Reserve located in the *Cordillera del Cóndor*, a region recognized as a traditional land of the *Awajún* and *Wampis* communities. Additionally, there have been instances of illegal logging within the territories of the *Mashco Piro*, *Yora*, and *Amahuaca* indigenous peoples who have voluntarily chosen to live in isolation within the Madre de Dios Department, thereby posing a significant threat to their survival.

Id.

regulation is needed to apply the consultation for all activities concerning indigenous people and avoid further natural exploitation and armed conflicts⁸⁰⁹.

4.6 Follow-up and Concluding Observations.

The last crucial action to be implemented in the post-consultation phase is to ensure that the parties involved in the decision-making process abide by the agreements made⁸¹⁰. This recalls the ‘good faith’ principle mentioned before since it should be the guide of every consultation process.

Certain countries' laws dictate that agreements made during the consultation process are legally binding⁸¹¹. For instance, in Peru, the *Consultation Act* requires that agreements between the State and indigenous or original peoples, achieved through consultation, must be upheld, and enforced through administrative and judicial measures⁸¹². Costa Rica's regulation concerning consultations includes a similar clause⁸¹³. In Chile, the Decree on Consultation mandates a monitoring system to ensure compliance with these agreements⁸¹⁴. The CEACR also conducts regular supervision to ensure adherence to consultation agreements with indigenous peoples⁸¹⁵.

Convention No. 169 embodies the State's responsibility to engage in meaningful consultation with indigenous communities, which has been a longstanding focus of the ILO's efforts to promote indigenous peoples' rights.⁸¹⁶ This approach acknowledges the challenges these communities face and aims to empower them through involvement in decision-making processes. During the drafting of the Convention⁸¹⁷, a clear distinction was made between participation as a guiding principle⁸¹⁸, consultation as a specific mechanism subject to procedural requirements (Art. 6), and the principle of free and informed consent (Art. 16), which is particularly relevant to issues of relocation⁸¹⁹.

While Article 6 includes the requirement of consent in the State's obligation to consult, it does not grant communities veto power. To fulfill this obligation, countries must establish consultation

⁸⁰⁹ *Id.*

⁸¹⁰ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 104.

⁸¹¹ *Ivi*, p. 105.

⁸¹² Peru, Act No. 29785 (2on), Art. 15 in *id.*

⁸¹³ Costa Rica, Executive Decree No. 4 09 3 2-MP-MJP (2018), Art. 7. *Id.*

⁸¹⁴ Chile, Supreme Decree 66 (2013), Art. 16 (d). *Id.*

⁸¹⁵ CEACR 2019 Observation Mexico, 2018 Observation Chile. *Id.*

⁸¹⁶ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 105.

⁸¹⁷ The negotiation of *Convention No. 169* reflects a commitment to ensuring that Indigenous peoples have a voice in matters that affect their lives.

⁸¹⁸ Art. 2(1) of the ILO Convention No. 169 states that: “Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.” *Op. cit.* ILO, 1989, Art. 2(1).

⁸¹⁹ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 105.

Art. 16 of C-169 declares that “where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned”.

Op. cit. ILO, 1989, Art. 16(2).

mechanisms, as emphasized by ILO oversight bodies⁸²⁰. The CEACR has underscored the importance of considering the views of indigenous peoples and ensuring legal certainty. For instance, representations have proven to be a valuable tool for the ILO in clarifying the duty to consult and have been considered by other human rights organizations⁸²¹.

The inclusion of the State's duty to consult in the ILO, UN, and Inter-American systems is evidence of the interconnectedness of human rights protection mechanisms. Specifically, the consultation provisions for indigenous peoples in Convention No. 169 have had a significant and long-lasting impact on both the UN and Inter-American human rights systems. This duty, first established in Convention No. 169, has now been integrated into UNDRIP and ADRIP⁸²². As a result, bodies such as the IACtHR and UN human rights treaty groups have been increasingly addressing this duty. These groups have specifically called for the establishment of legislative and institutional frameworks for prior consultations, as have the ILO supervisory bodies. Therefore, the duty to consult is a consistent theme throughout the ILO, UN, and Inter-American systems. However, while these systems complement each other, there are limitations to their 'cross-fertilization' systems⁸²³. These limitations stem from differences in the mandate and characteristics of monitoring and enforcement bodies, as well as the legal nature and scope of each system's international instruments, nuances in interpretation methods, and the horizontal relationship between different systems. As such, no system has authority over any other system⁸²⁴.

The International Court of Justice for Human Rights has established a comprehensive practice that relies on both the International Labor Organization and United Nations instruments, as well as the work of their respective bodies, to develop integrative and evolutionary interpretations. The Court has utilized Convention No. 169 and the ILO supervisory bodies in innovative ways to interpret the American Convention and establish the State's duty to consult.⁸²⁵

Finally, the landmark *Sarayaku* case marked a new era as the Court concluded that the duty to consult represents a "general principle of international law", reinforcing the Court's emphasis on this duty for countries that had not ratified Convention No. 169⁸²⁶.

To summarize, this chapter addressed the crucial issue of consultation and participation of indigenous people in public affairs at the national level, stressing that, despite some developments and progress, there is still work to do in many countries. Consultation and participation are the basis

⁸²⁰ *Op. cit.* Cabrera Ormaza & Oelz, 2019, p. 105.

⁸²¹ *Ivi*, pp. 105-106.

⁸²² *Ivi*, p. 106.

⁸²³ *Ivi*, p. 107.

⁸²⁴ *Id.*

⁸²⁵ *Ivi*, p. 107.

⁸²⁶ *Ivi*, p. 106.

of society, and the moment they are lacking they leave the upper hand to armed groups, violence, and abuses, degrading the human rights system and the lives of human beings.

In this regard, the next chapter will examine the case study of Colombia and its indigenous communities to study the situation in detail and bring to light all the negative consequences of not complying with international agreements, norms, and rights inscribed in national constitutions and international documents.

Chapter Five

Colombia case study

Summary: 5.1 A brief introduction to Indigenous communities in Colombia, 5.2 The Colombian Constitution and the compliance with international standards for the protection of Indigenous rights, 5.3 The direct testimony of Indigenous communities, 5.4 Key findings and Concluding remarks.

*No participar en la Guerra, pero si en la paz*⁸²⁷.

5.1 A brief introduction to Indigenous communities in Colombia.

In Colombia, the indigenous population comprises 1,500,000 individuals, accounting for 3.4% of the country's total population.⁸²⁸ According to the 2018 census released by DANE the indigenous population has grown by an impressive 36.8% since 2005, now representing 4.4% of the nation's total population, with a total of 1,905,617 individuals from all indigenous groups.⁸²⁹ This growth is attributed to both high fertility rates and an enhanced level of inclusion and participation of Indigenous people in the country⁸³⁰. The graphs below illustrate this growth from 2005 to 2018 and the percentage of Indigenous men and women across various districts.

⁸²⁷ V. Laurent, *Pueblos indígenas, guerra y ¿paz? Cinco años después del Acuerdo del Teatro Colon*. Chapter four, p. 58 in L. Betancur Restrepo & A. Rettberg, *Después del acuerdo: ¿Cómo va la paz en Colombia?* Universidad de los Andes, 2023.

https://books.google.it/books?id=9oPIEAAAQBAJ&dq=pueblos+ind%C3%ADgenas+de+colombia+por+paz&lr=&hl=it&source=gbs_navlinks_s

⁸²⁸ Sadly, many members of this community, along with Afro-descendants and peasants, face forced displacement and territorial dispossession due to the long-standing armed conflict that violates their rights on a daily basis. IWGIA, *El Mundo Indígena 2020: Colombia*, Colombia, 2020. <https://www.iwgia.org/es/colombia/3739-mi-2020-colombia.html#:~:text=As%C3%AD mismo%2C%20las%20etnias%20con,de%20la%20poblaci%C3%B3n%20ind%C3%ADgena%20colombiana>

⁸²⁹ *Op. cit.* IWGIA, 2020.

⁸³⁰ DANE, *Población Indígena de Colombia*, p. 8, 2019.

<https://www.dane.gov.co/files/investigaciones/boletines/grupos-etnicos/presentacion-grupos-etnicos-2019.pdf>

Porcentaje total de hombres y mujeres indígenas, CG 2005 - CNPV 2018

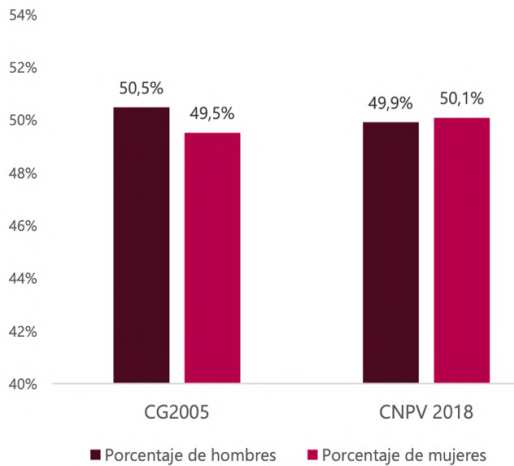


Figure 1: Total percentage of Indigenous men and women. ⁸³¹

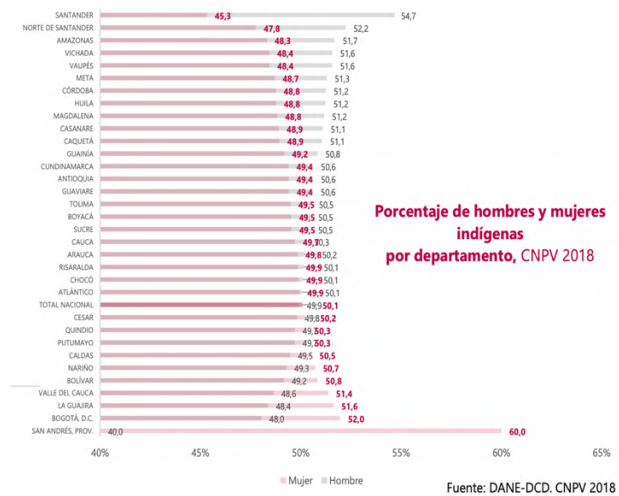
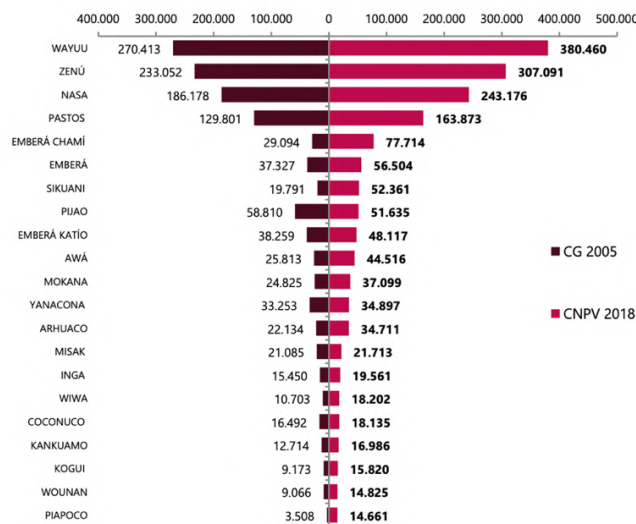


Figure 2: Total percentage of indigenous men and women by department. ⁸³²

The geographical areas with a greater presence of indigenous tribes are La Guajira, Cauca, Nariño, Córdoba, and Sucre⁸³². At the same time, the ethnic groups with the largest number of members are the *Wayuu* (380,460), the *Zenú* (307,091), the *Nasa* (243,176), and *Pastos* (163,873). These people account for 58.1% of Colombia's indigenous population⁸³³ as shown in the following graph.



Fuente: DANE-DCD. CNPV 2018

Figure 3: Population by indigenous people, GC 2005 - CNPV 2018⁸³⁴.

⁸³¹ Source of figures 1 and 2: *ivi*, p. 14.

⁸³² Respectively each area counts with the following inhabitants: 394.683, 308.455, 206.455, 202.621, and 104.890. *Op. cit.* IWGIA, 2020.

⁸³³ *Ibidem.*

⁸³⁴ Source: *op. cit.* DANE, 2019, p. 19.

Throughout Latin America's history of wars and denial of human rights, the indigenous peoples of Colombia have always been one of the most violated by both the government and illegal armed groups in the country. The main causes of this violence have always been land⁸³⁵, politics, and economics, three strongly interconnected aspects. Firstly, the trajectory of the armed conflict that has been raging through Colombia for years began in 1964 with the creation of the FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*), and despite peace agreements concluded in 2016⁸³⁶, violence continues today⁸³⁷. One of the major forms of violence suffered by Colombia's Indigenous communities is epistemic violence, which Perez defines as:

*Una forma de relación social caracterizada por la negación situada histórica y socialmente de la subjetividad, la legitimidad o la existencia de otro individuo o comunidad en tanto sujetos epistémicos*⁸³⁸.

This form of violence, fuelled by capitalism and the state's thirst for power, affects indigenous traditions and their ancestral relationship with territories considered sacred that are usurped and exploited for economic purposes. Hence a clash between two epistemological systems: the Andean and the Western capitalist one, on which neoliberal economic extractivism is based⁸³⁹. The major differences between these two systems lie in the fact that the first is placed on an ontological understanding of reality as 'relationality', where the human and the 'non-human' are not sharply separated, nor the living from the 'dead', while the second is built on two major dualisms: culture-nature separation and epistemic north-south separation⁸⁴⁰. These differences have sensitive effects on the axiological commitments that are assumed to be valid in both systems and, above all, on how the elements that make up the world are conceptualized, which significantly affects how knowledge is structured⁸⁴¹.

⁸³⁵ Most conflicts linked to the lands fall into a broad category known as '*despojo de tierras y territorios*' (dispossession of lands and territories), the roots of which extend back to the colonial era, as "all forms of property in New Granada, until the end of the 16th century, arose from the dispossession of the lands of the Indians".

J. D. F. Daza, *Violencia e injusticia epistémica contra las comunidades indígenas en Colombia: agencia epistémica, participación y territorio*, Medellín, 2022, Artículos de Investigación, pp. 197-198.
<https://doi.org/10.17533/udea.ef.347697>

⁸³⁶ In December 2016, during the *Mesa de Negociaciones* in La Habana, the Colombian government of Juan Manuel Santos compromised with the FARC-EP by concluding the Peace Accord stipulated to end the conflict between the two parties.

Op. cit. Laurent, 2023, p. 58.

⁸³⁷ *Ivi*, p. 57.

⁸³⁸ "A form of social relation characterized by the historically and socially situated denial of the subjectivity, legitimacy or existence of another individual or community as epistemic subjects".

M. Pérez, *¿Es posible descolonizar la academia más allá de la metáfora?*, 2021.

<https://www.youtube.com/watch?v=DhIEQ1YG5qA> in *op. cit.* Daza, 2022, p. 195.

⁸³⁹ *Op. cit.* Daza, 2022, p. 201.

⁸⁴⁰ *Ivi*, pp. 201-202.

⁸⁴¹ *Ivi*, p. 202.

In 2019, a wave of violence brutally swept through the ancestral lands inhabited by the indigenous people, resulting in a veritable plan of extermination. One of the hardest hit areas was Cauca⁸⁴², where 57 indigenous leaders were murdered. One of the main causes of the massacre was drug trafficking: the different illegal groups clashed to own a certain territory on which to produce and trade drugs at the expense of the indigenous communities⁸⁴³. Furthermore, in the same year, former FARC members issued a statement affirming the return to arms. Sadly, the first victims of the *guerrillas* are always the indigenous people as they are more peaceful and vulnerable and have few means to defend themselves⁸⁴⁴.

To protect themselves from years of violence and usurpation, Colombia's Indigenous communities acted with the creation of peaceful representative organizations such as the *Consejo Regional Indígena del Cauca* (CRIC)⁸⁴⁵, *Organización Nacional Indígena de Colombia* (ONIC)⁸⁴⁶ and *Organización Indígena de Antioquia* (OIA)⁸⁴⁷. Moreover, during the years of resistance, the *Guardia Indígena* and the *Minga*, defined as '*protesta en busca de la reivindicación de derechos*'⁸⁴⁸, has been created. This counts on the participation of all the organizations that are part of the National Indigenous Organisation of Colombia⁸⁴⁹ formed by ancestral caretakers and defenders of the communities that support the *Minga*. The latter is a collective of Indigenous organizations that seek the defence of human rights through social mobilization to achieve a common aim: fight against inequality and discrimination⁸⁵⁰. Many were the initiatives and actions of the *Minga* from the early

⁸⁴² 9 indigenous were murdered in Toribío, 7 in Caloto, 6 in Páez, 3 in Suárez, 2 in Santander de Quilichao, 2 in Corinto, 1 in Miranda, 1 in Cajibío y 1 in Silvia.

Op. cit. IWGIA, 2020.

⁸⁴³ *Ibidem*.

⁸⁴⁴ *Id.*

⁸⁴⁵ Founded in 1971, CRIC was the first indigenous organization in Colombia. It represents most of the indigenous peoples and communities in the Department of Cauca, working directly with 139 local authorities. Over the decades, the organization has become an important national actor, coordinating with other organizations and social movements to combat the inequalities and violence that have affected the country for decades.

V. Laurent & B. Gustafson, *Movimiento indígena en Colombia: entre altas expectativas y firmes demandas frente al actual gobierno*, Nacla Report, 2023. <https://nacla.org/movimiento-indigena-en-colombia-entre-altas-expectativas-y-firmes-demandas-frente-al>

⁸⁴⁶ The Organisation was founded in 1982, during the First Congress of Indigenous Peoples, an event that took place in Santafé de Bogotá and represents 90% of Colombia's indigenous peoples.

ONIC is an authority of government, justice, legislation, and representation of the indigenous peoples of Colombia. Currently, the National Indigenous Organisation of Colombia has fifty zonal and regional organizations, which are located in 29 of the 32 departments of the country.

ONIC, *Quiénes somos*, 2024. <https://www.onic.org.co/onic/quienes-somos>

⁸⁴⁷ Founded in 1980, it represents the center of self-government and representation of the *Embera Eyábida*, *Chamí*, *Dóbida*, *Senú*, and *GunaDule* peoples in the Department of Antioquia.

Organización Indígena de Antioquia, *Carta abierta a los pueblos indígenas de Antioquia*. Medellín, 2023.

<https://organizacionindigenadeantioquia.blogspot.com/2023/06/carta-abierta-los-pueblos-indigenas-de.html>

⁸⁴⁸ 'A protest in search of the vindication of rights'.

BBC News Mundo, *Protestas en Colombia: qué es la minga indígena y qué papel juega en las manifestaciones*, 2023.

<https://www.bbc.com/mundo/noticias-america-latina-54625586#:~:text=La%20marcha%20se%20conoce%20como,de%20la%20reivindicaci%C3%B3n%20de%20derechos>

⁸⁴⁹ *Op. cit.* IWGIA, 2020.

⁸⁵⁰ V. P. Bolívar, *La influencia del vestuario de los movimientos indígenas antioqueños en la sociedad colombiana*. Institución Universitario Pascual Bravo, Medellín, 2023, p. 20.

2000s until today, such as the social mobilization in October 2013⁸⁵¹, which called the attention of the national and international community to territorial issues, by declaring themselves “*protectores y cuidadores de la madre tierra que caminan juntos para defender el espacio de vida de nuestros Pueblos*”⁸⁵², since the National Development Plan has not been fulfilled. The 2013 *Minga* also focused on the issue of human and trade rights and the incorporation of the UN Declaration on the Rights of Indigenous Peoples into domestic law⁸⁵³.

Another relevant example was the *Minga* 2020 to oppose colonial violence in contemporary Colombia⁸⁵⁴: a mobilization organized during the Pandemic occupying *Plaza de Bolívar*, the most significant colonial space in Bogotá, to demand solutions to the murders and abuses against indigenous communities⁸⁵⁵. Finally, another action carried out by the *Minga* was the national strike in May 2021 in the city of Medellín, demonstrating against the violence carried out by the state and the illegal self-defense groups⁸⁵⁶. Communities continue to organize *mingas*, since, still in 2023 according to data from the Institute for Development and Peace Studies, one hundred twenty-four human rights defenders have been killed and the violence continues⁸⁵⁷.

To conclude, the most recent event took place on 27 September 2023 with the march in Bogotá, supported by President Petro, denouncing the threats faced by the *guerrillas* and reclaiming the territories and their resources⁸⁵⁸.

Now, after having given a general overview of the situation in Colombia concerning the violation of Indigenous rights, the next section will concretely analyse the legal and juridical measures taken by the Colombian government to address the aforementioned problems.

https://abcd.pascualbravo.edu.co/bitstream/pascualbravo/2056/1/Rep_IUPB_Tec_Ges_Dis_Tex_Mod_Movimientos_Indigenas.pdf

⁸⁵¹ Formed by all the Indigenous Peoples and the forty-four indigenous organizations of the ONIC.

⁸⁵² “Protectors and caretakers of Mother Earth who walk together to defend the living space of our Peoples”. Consejo Regional Indígena del Cauca CRIC, *Movilización Indígena y Social*, 2013. YouTube.

<https://www.youtube.com/watch?v=gncBkWA0fQE>

⁸⁵³ *Ibidem*.

⁸⁵⁴ The willingness to organize a further *minga* arose from the fact that the agreements with the Colombian National Government to put an end to the numerous events of violence in those years were not sufficient. Although 1396 agreements were made during the *Mesa Permanente de Concertación* with Indigenous People, 95% of them were not fulfilled.

Moreover, the situation of the indigenous peoples during 2019, the year in which the existence of native languages was commemorated, did not have institutional guarantees for the physical and cultural survival of the peoples; however, the principles of unity, culture, territory, and autonomy were evident within the communities.

Op. cit. IWGIA, 2020.

⁸⁵⁵ M. Torres Molano, *La Minga 2020: Una zona de contacto histórica y descolonizadora en la Colombia contemporánea*, Dearq No. 3, 2023, pp. 54-55. <https://revistas.uniandes.edu.co/index.php/dearq/article/view/807/8692>

⁸⁵⁶ *Op. cit.* Bolívar, 2023.

⁸⁵⁷ D. E. R. Espinosa, *Minga Indígena anunció que volverá a Bogotá: habrá movilizaciones el 25 de septiembre*. Infobae, 2023. <https://www.infobae.com/colombia/2023/09/19/minga-indigena-anuncia-movilizaciones-el-25-de-septiembre/>

⁸⁵⁸ M. G. Agudelo, *Marchas del 27 de septiembre: minga indígena llega a Bogotá tras llamado presidencial*. El Tiempo, 2023. <https://www.eltiempo.com/politica/partidos-politicos/marchas-27-de-septiembre-minga-indigena-llega-a-bogota-tras-llamado-de-petro-809292>

5. 2 The Colombian Constitution and the compliance with international standards for the protection of Indigenous rights

In the 1990s, Latin America was swept by a wave of constitutional reforms that had a strong impact on the Andean countries⁸⁵⁹, giving more autonomy to the different ethnic communities. In the specific case of Colombia, the Political Constitution of 1991⁸⁶⁰ brought numerous changes and developments to the country in the economic, social, and political spheres, improving the quality of life of its citizens⁸⁶¹. In the 19th century, Indigenous people were still excluded from political participation because, together with women and slaves, they were not considered citizens⁸⁶². Later, in the 20th century, access to political rights was extended to all men of the age, while discrimination against women remained until 1957, the year in which they obtained the right to vote⁸⁶³. For Colombia's indigenous peoples, the 1991 constitutional reform represented a substantial step forward in the recognition of their rights. From the very Preamble of the Constitution, the delegates to the National Constituent Assembly established equality and freedom among the guiding principles of coexistence among Colombians, in a context where the change of conception from a monocultural state to a multicultural one was also made explicit⁸⁶⁴. The Colombian Constitution of 1991 is called *Constitución de los Derechos* because it recognizes the equality of all Colombians before the law and in political participation, emphasizing respect for human dignity⁸⁶⁵, ethnic and cultural diversity⁸⁶⁶. In the Colombian legal system, generally, only national laws are inscribed whereas indigenous laws are not, but a combination of national and international norms dedicated exclusively to protecting Colombian indigenous rights has been formulated⁸⁶⁷.

⁸⁵⁹ Notably Bolivia, Colombia, Ecuador, Peru, and Venezuela.

S. Brunnegger, *Legal Imaginaries: Recognizing Indigenous Law in Colombia*, Studies in Law, Politics, and Society 55, 2011, p. 78.

⁸⁶⁰ Constitución Política De Colombia 1991, <https://pdba.georgetown.edu/Constitutions/Colombia/colombia91.pdf>

⁸⁶¹ *Op. cit.* Brunnegger, 2011, pp. 78, 84.

⁸⁶² Traditionally, the indigenous person was considered a minor, a savage subjected to paternalistic tutelage. Within this perspective, norms were enacted such as Law 11 of 1821, which exempted them from the costs of a trial, assimilating them 'to the other citizens considered in the class of wretches'; or Law 153 of 1887, which established, among other provisions, that 'barbarians' who had been sentenced to corporal punishment and during their sentence were catechized and baptized, could request a reduction in their sentence.

Observatorio del Programa Presidencial de Derechos Humanos, *Los Indígenas Colombianos: la constancia de los Pueblos por mantener sus costumbres*, Boletín Temático No. 11, 2008, p. 10.

⁸⁶³ *Ivi*, p. 9.

⁸⁶⁴ *Ivi*, p. 11.

⁸⁶⁵ Art. 1 of the Constitution states that: "Colombia es un Estado social de derecho, organizado en forma de República unitaria, descentralizada, con autonomía de sus entidades territoriales, democrática, participativa y pluralista, fundada en el respeto de la *dignidad humana*, en el trabajo y la solidaridad de las personas que la integran y en la prevalencia del interés general".

Op. cit. Constitución Política De Colombia, 1991, Art. 1.

⁸⁶⁶ *Conversatorio sobre Legislación Indígena*, Cuaderno de trabajo, 2011, p. 8. <https://manguare.red/wp-content/uploads/2020/08/Legislacion-descargar.pdf>

Art. 7 of the Constitution affirms that: "El Estado reconoce y protege la diversidad étnica y cultural de la Nación colombiana". *Op. cit.* Constitución Política De Colombia, 1991, Art. 7.

⁸⁶⁷ *Ivi*, p. 9.

Firstly, the Colombian Constitution provides a series of fundamental rights dedicated to all human beings ranging from Article 11 to 41, such as the right to life (Art. 11), the right to freedom and equality before the law (Art. 13), the right to peace (Art. 22) where the peace is also conceived as a duty⁸⁶⁸, and the *habeas corpus* (Art. 30) according to which “whoever is deprived of his/her liberty, and believes himself/herself to be unlawfully deprived of his/her liberty, has the right to invoke before any judicial authority”⁸⁶⁹. Furthermore, the Colombian Constitution recognizes particular rights for indigenous and other ethnic minorities, in order to protect them, avoiding discrimination before the law. It also accepts Indigenous communities as ‘subjects’ of collective rights⁸⁷⁰. The first one is the recognition of the principle of equality and identity, covered by Article 96 of the Political Constitution 1991 which protects many ethnic groups, such as indigenous people because of the multilateral nature of the State⁸⁷¹. Additionally, the Article establishes the requirements to have Colombian nationality, by stating that:

Son nacionales colombianos:

1. Por Nacimiento ...

2. Por adopción:

a) Los extranjeros que soliciten y obtengan carta de naturalización...

b) Los Latinoamericanos y del Caribe por nacimiento domiciliados en Colombia...

c) Los miembros de los pueblos indígenas que comparten territorios fronterizos, con aplicación del principio de reciprocidad según tratados públicos.

*Ningún colombiano por nacimiento podrá ser privado de su nacionalidad*⁸⁷²...

This means that indigenous that were not born in Colombia but have family in the Colombian territory can obtain Colombian nationality and live legally in the country. In this regard, the Colombian Constitution also recognizes the Indigenous collective property of *resguardos*, ancestral common territories occupied for centuries by Indigenous people.

Moreover, the right to land and property for Indigenous is established by Article 63 which declares that:

⁸⁶⁸ Art. 22 establishes that “*La paz es un derecho y un deber de obligatorio cumplimiento*”. *Op. cit.* Constitución Política De Colombia, 1991, Art. 22.

⁸⁶⁹ *Ivi*, Art. 30: “*Quien estuviere privado de su libertad, y creyere estarlo ilegalmente, tiene derecho a invocar ante cualquier autoridad judicial, en todo tiempo, por sí o por interpuesta persona, el Habeas Corpus, el cual debe resolverse en el término de treinta y seis horas*”.

⁸⁷⁰ *Op. cit.* Conversatorio sobre Legislación Indígena, 2011, p. 32.

⁸⁷¹ *Ibidem*.

⁸⁷² *Op. cit.* Constitución Política De Colombia, 1991, Art. 96.

*Los bienes de uso público, los parques naturales, las tierras comunales de grupos étnicos, las tierras de resguardo, el patrimonio arqueológico de la Nación y los demás bienes que determine la ley, son inalienables, imprescriptibles e inembargables*⁸⁷³.

According to the decision No. T188/93 of the Colombian Constitutional Court, the selling of the indigenous lands is forbidden, given their sacral and spiritual nature that belongs to the indigenous culture and religion⁸⁷⁴. These conditions are imprescriptible and do not end over time⁸⁷⁵. Then, as far as the natural resources are concerned, according to the Art. 332, indigenous people can use them but non-renewable resources, such as oil, minerals, metals, and natural gas, are property of the State⁸⁷⁶. Finally, the Colombian Constitution recognizes the importance of participation in the norms and decisions taken by the government. To fulfill this objective, two seats in the senate – called *Circunscripción nacional especial*⁸⁷⁷ - are dedicated to indigenous.

The Colombian Constitution provides a control mechanism called *Acción de Tutela* covered by Art. 86, through which any person can claim before a judge the immediate protection of his/her fundamental constitutional rights when the latter have been violated or threatened by the action or omission of any public authority or other persons, in the cases established by law⁸⁷⁸. Furthermore, according to Art. 23, each Colombian citizen can require information on situations from authorities of general and/or particular interest through the *Derecho de Petición*⁸⁷⁹. The second control mechanism is the *Acción popular* used to restore or prevent harm that a state institution or private person has done or intends to do against the rights and interests of a community⁸⁸⁰ and the third one is the *Habeas Corpus*, covered by Art. 30, which is a constitutional mechanism implemented to protect a citizen deprived of his or her freedom unlawfully or arbitrarily⁸⁸¹.

⁸⁷³ *Ivi*, Art. 63. Moreover, Art. 329[2] states that: “Los resguardos son de propiedad colectiva y no enajenable”.

⁸⁷⁴ The decision of the Court establishes that: “El reconocimiento constitucional de la propiedad colectiva resguardo, sirve para la preservación de las culturas indígenas y de sus valores espirituales. La tierra indígena no solo hace parte fundamental de su subsistencia, sino que hace parte fundamental de su cosmovisión cultura y religiosidad”. Sentencia de la Corte Constitucional No T188/93 in *op. cit.* Conversatorio sobre Legislación Indígena, 2011, p. 35.

⁸⁷⁵ *Id.*

⁸⁷⁶ *Ivi*, p. 39.

Art. 332 states that: “El Estado es propietario del subsuelo y de los recursos naturales no renovables, sin perjuicio de los derechos adquiridos y perfeccionados con las leyes preexistentes.” Moreover, according to the Art. 11 of the Constitution, the exploitation of natural resources could trigger the life of indigenous people, for this reason the law system requires that indigenous communities must be consulted about future measures. To this regard, Art. 330 establishes that “La explotación de los recursos naturales en los territorios indígenas se hará sin desmedro de la identidad cultural, social y económica de las comunidades indígenas...”. *Ivi*, p. 40.

⁸⁷⁷ Artt. 171 and 176 of the Colombian Political Constitution. *Ivi*, p. 42.

⁸⁷⁸ *Ivi*, p. 60.

⁸⁷⁹ Art. 23 of the Constitution provides that: “Toda persona tiene derecho a presentar peticiones respetuosas a las autoridades por motivos de interés general o particular y a obtener pronta resolución ...” *Ivi*, p. 64.

⁸⁸⁰ *Id.* at 67.

⁸⁸¹ *Id.* at 69.

Finally, the Colombian Constitution also addresses the right to prior consultation as a fundamental right of all indigenous communities and minority groups in order to protect their ancestral lands and interests⁸⁸². The prior consultation is also considered a collective right that must be exercised to involve Indigenous people and minorities in the decision-making process before any decision is taken that jeopardizes or affects their livelihoods⁸⁸³. In Colombia, the right to Prior Consultation was proclaimed by Law 21 of 1991. In addition, the Constitutional Court has issued several rulings that help regulate Prior Consultation with indigenous communities, Afro-Colombians, and other ethnic minorities⁸⁸⁴. The consultation must embody the following principles: *buena fe, información suficiente y adecuada*⁸⁸⁵, *debido proceso* and *legitimidad*.

Now, concerning the application of international norms in the Colombian national legal system, Colombia follows the constitutional block doctrine, which means that selected international human rights obligations can be integrated into the Constitution of 1991. While the validity of human rights treaties is domestically subject to Congressional approval and Constitutional Court control, orders issued by the Inter-American Court of Human Rights are automatically incorporated⁸⁸⁶. In the Constitution, the principle of integrating international norms into the national legal system is mainly enshrined in Chapter 4 under Article 93 which states that:

*Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno*⁸⁸⁷.

This provision establishes that the international legal system prevails over the national legal order, so the Colombian government is obliged to follow and implement the international standards enshrined in international treaties signed and ratified by the country, such as the ILO Convention No. 169⁸⁸⁸

⁸⁸² The Constitutional Court with Decision 461 (2008) established that “The right to Prior Consultation is a necessary and indispensable mechanism to ensure that the implementation of these projects does not irreversibly affect the traditional forms of subsistence of ethnic groups within their territories, which form an integral part of their own cultural structure and provide the basis for the preservation and development over time of their cosmogonies, ancestral knowledge, and cultural forms”. *Ivi*, p. 74.

⁸⁸³ *Id.* at 75.

⁸⁸⁴ *Id.* at 77.

⁸⁸⁵ Through the Sentence C-461 of 2008, the Court established that “La finalidad principal del proceso de Consulta Previa [...] exige que los pueblos consultados conozcan todos los aspectos de la propuesta y sus implicaciones, y que a su vez puedan recibirla, analizarla, difundirla, discutirla y responderla utilizando canales apropiados de persuasión, con miras a que sus intereses, prevenciones y recomendaciones sean considerados y valorados por sus interlocutores.” *Ivi*, p. 95.

⁸⁸⁶ J. Acosta-López & G. Vega-Barbosa, *Chapter 15: Compliance with international human rights obligations in Colombia: assessing the normative evolution and practical challenges* in “Research Handbook on Compliance in International Human Rights Law”, ed. R. Grote, M. Morales Antoniazzi, D. Paris, 2021, eISBN: 9781788971126, DOI: <https://doi.org/10.4337/9781788971126.00023>

⁸⁸⁷ *Op. cit.* Colombian Political Constitution, 1991, Art. 96.

⁸⁸⁸ Colombia ratified Convention No. 169 on 7 August 1991, and the Convention is actually in force.

and the United Nations Declaration on the Rights of Indigenous Peoples⁸⁸⁹. Therefore, rights and duties listed in the Colombian Constitution shall be interpreted following international human rights treaties ratified by Colombia⁸⁹⁰. In 2001, Art. 93 was integrated with Art. 1 of the Legislative Act No. 02 which established that, according to the United Nations Conference of Plenipotentiaries, the Colombian State has the option to acknowledge the International Criminal Court's jurisdiction as outlined in the Rome Statute ratified on July 17, 1998. The Constitution provides a procedure for ratifying the treaty if so chosen. Any differentiation in treatment between guarantees of the Constitution and the substantive matters of the Rome Statute will only apply to the specific matter regulated under the Statute⁸⁹¹.

Notably, Colombia has made significant progress in developing administrative procedures and instruments to facilitate compliance, including a designated budget for the payment of international human rights orders. Furthermore, Law 288/96⁸⁹² empowers Colombia to provide positive pronouncements on the *ex-ante* non-binding recommendations of the Inter-American Commission of Human Rights and the Human Rights Committee⁸⁹³. The IACHR firstly issues decisions concerning cases examined by a procedure described by Art. 44 of the Inter-American Convention⁸⁹⁴ and its Statute, such as complaints about alleged violations of the Convention or the American Declaration presented by individuals or NGOs⁸⁹⁵. Likewise, the Commission is a protection body that can pass reports about human rights cases in specific countries, presenting observations and conclusions relevant to the interpretation of inter-American law. In this regard, the measures and decisions taken by the IACHR are automatically incorporated into the Colombian legal system without the need for a transforming norm. Moreover, these measures must be examined in good faith by public authorities

Central Unitaria de Trabajadores (CUT), *Reclamación (artículo 24)*, 2001.

https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507143,es#:~:text=Colombia%20ratific%C3%B3%20el%20Convenio%20n%C3%B3%20vigor%20en%20dicho%20pa%C3%ADs.

⁸⁸⁹ Colombia acceded to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on 19 September 2007.

https://www.cancilleria.gov.co/sites/default/files/colombia_frente_a_los_instrumentos_internacionales_de_derechos_humanos_y_dih-feb2014_3.pdf

⁸⁹⁰ *Op. cit.* Colombian Political Constitution, 1991, Art. 96.

⁸⁹¹ Acto legislativo 02 de 2001, artículo 1.

⁸⁹² Law 288/1996 is an instrument that empowers the Colombian state to process compensation for damages declared in express decisions of the Committee or the Inter-American Commission on Human Rights, in which it is concluded that the Colombian state is involved in a human rights violation, as long as the factual and legal requirements established in the Political Constitution and in the applicable international treaties are met.

Ministerio de Relaciones Exteriores, *Consideraciones Jurídicas en torno a la aplicación por parte del Estado Colombiano de la Ley 288 de 1996*, Bogotá, 2018.

https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/concepto_minrelaciones_0002013_2018.htm#:~:text=La%20Ley%20288%2F1996%20es,de%20derechos%20humanos%2C%20siempre%20y

⁸⁹³ *Op. cit.* Acosta-López & Vega-Barbosa, 2021.

⁸⁹⁴ Art. 44 establishes that: “Cualquier persona o grupo de personas, o entidad no gubernamental legalmente reconocida en uno o más Estados Miembros de la Organización, puede presentar a la Comisión peticiones que contengan denuncias o quejas de violación de esta Convención por un Estado Parte”.

Op. Cit. Ministerio de Relaciones Exteriores, 2018, p. 14.

⁸⁹⁵ *Ivi*, p. 6.

since Colombia is a state party of the *Pacto de San José de Costa Rica*, and “the binding force of the *Pacto* in the domestic legal system would thus entail a correlative duty on the part of the State authorities to make effective the duties of respect and protection of the fundamental rights assigned to the various Colombian public authorities under the Political Constitution”.⁸⁹⁶ The interim measures taken by the Commission are binding in the Colombian domestic legal order for the following reasons:

(i) *Colombia hace parte de la Organización de Estados Americanos y es Estado Parte en la Convención Americana sobre Derechos Humanos (aprobada por la Ley 16 de 1972 y ratificada el 31 de julio de 1973).*

(ii) *La Convención, en tanto tratado de derechos humanos, está incorporada al ordenamiento interno y hace parte del bloque de constitucionalidad, de conformidad con el artículo 93 Superior, inciso primero.*

(iii) *En virtud de los principios generales del Derecho Internacional Público, las medidas cautelares se incorporan de manera automática al ordenamiento jurídico interno.*

(iv) *Según lo estipulado por los artículos 1o y 2o de la Convención Americana, los Estados Partes asumen el compromiso de “respetar los derechos y libertades reconocidos en ella y a garantizar su libre y pleno ejercicio” a toda persona sujeta a su jurisdicción, así como a adoptar las medidas legislativas o de otro carácter necesarias para hacer efectivos tales derechos*⁸⁹⁷.

After analyzing the role of the Commission in the Colombian domestic legal system, the importance of Law 288 of 1996 can be recalled by mentioning its first scope: “establish instruments for the compensation of damages to victims of human rights violations in accordance with the provisions of certain international human rights bodies”⁸⁹⁸. Therefore, Law 288/96 provides a procedure for the

⁸⁹⁶ *Ibidem.*

⁸⁹⁷ *Ivi*, p. 7.

“(i) Colombia is a member of the Organisation of American States and a State Party to the American Convention on Human Rights (approved by Law 16 of 1972 and ratified on 31 July 1973).

(ii) The Convention, as a human rights treaty, is incorporated into the domestic legal system and forms part of the constitutional bloc, in accordance with Article 93(1) of the Constitution.

(iii) By virtue of the general principles of international public law, precautionary measures are automatically incorporated into the domestic legal system.

(iv) According to the provisions of Articles 1 and 2 of the American Convention, the States Parties undertake to ‘respect the rights and freedoms recognized therein and to ensure the free and full exercise thereof’ to all persons subject to their jurisdiction, as well as to adopt such legislative or other measures as may be necessary to give effect to those rights and freedoms, and to adopt such legislative or other measures as may be necessary to give effect to those rights and freedoms. other measures necessary to give effect to those rights”.

⁸⁹⁸ *Ibidem.*

implementation of the HRC's Views⁸⁹⁹ covered by Article 2 which establishes that there must be a prior opinion from a committee (hereinafter the 'Committee of Ministers') made up of the following officials: *Ministro del Interior; Ministro de Relaciones Exteriores; Ministro de Justicia y del Derecho* and *Ministro de Defensa Nacional*⁹⁰⁰. When the Committee of Ministers examines a violation of human rights, it has three options: issue a favorable opinion⁹⁰¹, issue an unfavorable opinion⁹⁰², or refrain from giving an opinion⁹⁰³. "If the HRC has concluded that Colombia has acted in contravention of its obligations under the ICCPR and has ordered payment of compensation", the Committee of Ministers "shall render an opinion favorable to compliance with the decision of the international human rights body in all cases that meet the factual and legal requirements provided in the Constitution and the applicable international treaties"⁹⁰⁴. To issue an opinion, the Committee of Minister shall consider "the evidence gathered and the rulings issued in the domestic judicial and administrative disciplinary proceedings, and in the proceedings before the relevant international body"⁹⁰⁵. If the Committee establishes that these requirements are not met, it shall communicate this to the government of Colombia and the latter should appeal against "the decision before the competent international body, if available"⁹⁰⁶. In case the treaty doesn't allow an appeal or if the deadline to file it has passed, the Committee will issue a favorable opinion concerning complying with the decision made by the international body⁹⁰⁷.

Furthermore, it is important to consider that not convening is not optional, as it would ignore the fact that paragraph 3 of Article 2 stipulates that the Committee of Ministers must "issue the corresponding opinion" within 45 days of the official notification of the international body's pronouncement⁹⁰⁸.

The comparison between two cases, one that preceded the Law and the other that postdated it, can demonstrate the significance of this enabling legislation. The first and previous case is *Bautista*

⁸⁹⁹ A. Nollkaemper & R. van Alebeek, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, University of Amsterdam, 2011, p. 12.

⁹⁰⁰ *Op. Cit.* Ministerio de Relaciones Exteriores, 2018, p. 8.

⁹⁰¹ In this scenario, a conciliation procedure must be carried out before the Public Prosecutor's Office. In case of agreement, the conciliation must be admitted by a Magistrate of the Administrative Court. *Ivi*, p. 10.

⁹⁰² Here, the National Government must be informed of the decision, to defend the Colombian State in the corresponding instances. *Id.*

⁹⁰³ This occurs only when there is agreement at a given session of the Committee of Ministers, following Article 6 of Agreement 1 of 1996. In any case, the aforementioned body must give its opinion within 45 days, as provided for in paragraph 3 of Article 2 of Law 288 of 1996. *Id.*

⁹⁰⁴ *Op. cit.* Nollkaemper & van Alebeek, 2011, p. 12.

⁹⁰⁵ El Congreso de Colombia, *La Ley 288 de 1996*, Diario Oficial No. 42.826, 1996, Art. 2 para. 1 in *ibidem*.

⁹⁰⁶ *Ivi*, p. 13.

⁹⁰⁷ *Id.*

If the Committee of Ministers has adopted a favorable opinion, Law 288/1996 outlines a settlement process to determine the damages owed. This settlement must undergo a summary proceeding and be approved by a single Justice of the Administrative Court. The judge will approve unless it would harm the state's financial interest or is deemed invalid (*Op. cit.* La Ley 288 de 1996, art. 7). If the settlement is not accepted, the parties have two options: a new agreement can be drafted, or they may choose to present their case before the appropriate administrative tribunal to request the calculation of injuries. If an agreement cannot be reached, this latter option remains available (*Ivi*, art. 11). *Op. cit.* Nollkaemper & van Alebeek, 2011, p. 13.

⁹⁰⁸ *Op. Cit.* Ministerio de Relaciones Exteriores, 2018, p. 11.

*de Arellana v. Colombia*⁹⁰⁹ where the HRC found a violation of articles 6⁹¹⁰ and 7⁹¹¹ of ICCPR and urged compensation for the family. Nevertheless, the decision of the Court could not be enforced since at that time Law 288/96 did not pass⁹¹²; on the other hand, in 1996 when Law 288 was adopted, the Court could play a crucial role in the *Arhuaco v. Colombia* case⁹¹³ when stated that Colombia was responsible for the disappearance and death of Luis Napoleón Torres Crespo, Ángel María Torres Arroyo and Antonio Hugues Chaparro Torres⁹¹⁴. In addition, it found that there was a violation of torture and arbitrary detention in the actions taken against José Vicente and Amado Villafañe⁹¹⁵. After applying the standards outlined in Law 288/96, the Committee of Ministers determined that the Villafañe brothers' case met the established requirements and issued a favorable opinion on compliance. Despite efforts to reach a settlement, the case was ultimately referred to the courts under Article 11 of the same law⁹¹⁶. If the Committee of Ministers adopts a non-favorable View, “the case of the individual may still proceed to the administrative courts that will entertain the claim without prejudice”⁹¹⁷.

To conclude, according to the *theory*, the Colombian government is obliged to include the international standards in its internal legislation and to respect them to guarantee the protection of the human rights of the Colombian population and especially of the indigenous communities to whom, as stated above, a specific section was dedicated in the Political Constitution of 1991. However, what is reported on *paper* does not always reflect the reality of events; in this regard, the next section will examine the same topic but from the point of view of the Indigenous people through interviews conducted by myself in order to demonstrate whether theory coincides with practice or not.

5.3 The direct testimony of Indigenous communities

The next sections will analyze the issue studied so far through the direct testimony of individuals who have experienced first-hand the violence and violation of human rights in their own country. In this case, I conducted four interviews with members of Colombian indigenous communities and activists who provided their perspectives on the issue. Each interview will be introduced by the context and

⁹⁰⁹ HRC, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, 27 October 1995, UN Doc. CCPR/C/55/D/199 in *op. cit.* Nollkaemper & van Alebeek, 2011, p. 13.

⁹¹⁰ Art. 6 of the Covenant declares the right to life, which should be protected by law and denied to no one.

Op. cit. UN, 1966, Art. 6.

⁹¹¹ Art. 7 establishes that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

Ivi, art. 7.

⁹¹² *Op. cit.* Nollkaemper & van Alebeek, 2011, p. 13.

⁹¹³ HRC, *Arhuaco v. Colombia*, Communication No. 612/1995, 14 March 1996, UN Doc. CCPR/C/56/D/612/1995.

⁹¹⁴ *Op. cit.* Nollkaemper & van Alebeek, 2011, p. 14.

⁹¹⁵ *Id.*

⁹¹⁶ *Id.*

⁹¹⁷ *Id.*

history of the community and its members, framing it within both national and international legal frameworks.

I chose the interview as a method of study and analysis to add to my research because, in my opinion, the concrete experience of someone who has lived through an event first-hand is the key to understanding it in depth, after having analyzed it from a legal and academic point of view: this method allowed me to explore complex and nuanced aspects that might not emerge through other research methods. For this reason, I chose to actively involve the protagonists of the issue I decided to analyze so that each theory expounded here could find an explanation and application in practice. The first interviews to be reported are those with the members of the *Comunidad de Paz de San José Apartadó* conducted in Paris at Amnesty International headquarters, the second one is with two other members of the same community, then the third is with a Colombian indigenous activist met at the LATAM conference in Berlin, and the last one is with Andrés Fajardo, from the Colombian Amazon. As already mentioned, the following interview will be preceded by an introductory paragraph on the history and the problems that hinder the peaceful existence of Indigenous in the north of Colombia.

5. 3. 1 *Comunidad de Paz*, a story of resistance and fight for freedom

The *Comunidad de Paz* of San José de Apartadó was founded on 23 March 1997, when the urban center of the San José village remained empty due to massacres perpetrated by the illegal armed groups in September 1996 and February 1997, when the leaders of the village had been wiped out⁹¹⁸. At that time, the Indigenous people of the Community lived in peace with a declaration that affirmed they would be neutral and peaceful in the face of the armed groups, hoping to be respected and to be able to live on their ancestral lands. But this was not the case, because as a member of the Community affirmed:

*Tropas del ejército en conjunto con los paramilitares realizaron operativos en las veredas, asesinaron gente de nuestra comunidad y a muchos de ellos les colocaron camuflados para decir que habían sido asesinados en combate. A las veredas nos dieron plazo de tres días para abandonar nuestras tierras y el que no cumpliera la orden sería asesinado*⁹¹⁹.

In three days, the armed group killed everyone they found on the road; those who managed to escape hid in the hamlet of San José, and from there the *resistencia* began. Another member said that:

⁹¹⁸ CDP San José, *La historia vivida*, Colombia, N/A. <https://cdpsanjose.org/la-historia-vivida/>

⁹¹⁹ “Army troops together with the paramilitaries carried out operations in the villages, assassinated people from our community and many of them wore camouflage to say that they had been killed in combat. They gave us three days to leave our lands and whoever did not comply with the order would be killed”.

Ibidem.

“Cuando bajamos al caserío de San José todo era tristeza, hambre y desolación, sin embargo nuestros hijos y el querer permanecer en nuestra tierra nos daba la fuerza para seguir adelante”⁹²⁰. From that moment, a long resistance began against the terror and violence of the armed forces that violated and still violate the rights of indigenous communities, especially the right to life and land. However, it is also worth mentioning the state entity that allows these actions daily without ever actually intervening in the territory, allowing the violation of human rights⁹²¹.

Three months after the formation of the Community, the *Consejo Interno* was created by three indigenous women who began to think about how to represent the Community at a political level and how to organize the education of its members⁹²². Despite not having a primary school education, due to their exclusion by the Colombian government from official studies, a group of women began to study to be able to start the community radio station⁹²³. In this regard, one of them declared that:

*Lamentablemente por falta de voluntad política del gobierno no hemos recibido la licencia para funcionar, pero la labor de aprendizaje, las grabaciones las realizamos con gran empeño y entusiasmo, dando de nuevo esperanzas de vida a la comunidad.*⁹²⁴

In 2003, the first University was created by the community, where resistance against violence is nourished and the pedagogical and academic aspect is valued as “*un saber al servicio de la resistencia*”⁹²⁵. According to the members of the *Comunidad de Paz*:

El estar en la Universidad es una concepción de nueva realidad, un mundo alternativo que busca generar un nuevo Estado, una sociedad no de consumo ni de capitalismo; una sociedad basada en la solidaridad y en el derecho de los pueblos. Es por ello que, al contrario del sistema educativo oficial, que busca etiquetas y formar profesionales encajonados para su servicio, donde la ciencia y el conocimiento son mercancías que

⁹²⁰ “When we went down to the hamlet of San José everything was sadness, hunger, and desolation, but our children and the desire to stay in our land gave us the strength to move forward”.

Ibidem.

⁹²¹ The Community affirmed that from that moment the presence of military groups has hindered the community's access to food and transport, placing them in a situation of hunger and isolation. *Ibidem.*

⁹²² They organized working groups and began to coordinate meetings, committees, and teams to continue their resistance autonomously since the State did not collaborate with them.

⁹²³ *Id.*

⁹²⁴ “Unfortunately, due to a lack of political will on the part of the government, we have not received a license to operate, but we are doing the work of learning and recording with great commitment and enthusiasm, giving new hope of life to the community”. *Id.*

⁹²⁵ “A knowledge at the service of resistance”. *Id.*

*generan clase y exclusividad, surge esta universidad donde el conocimiento no es mercancía sino un saber compartido para impulsar la vida y la dignidad*⁹²⁶.

It follows from this that this community seeks peace, truth, and legitimacy from the state. They want an alternative system that is not based on lies and that does not even think about the communities but about their exploitation, destruction, and death⁹²⁷.



Figure 4: some members of the *Comunidad de Paz*.⁹²⁸

*“Por ello pensamos en la tierra, en la humanidad, en la historia que han construido las víctimas; es desde allí desde donde parte esta alternativa de universidad”*⁹²⁹.

⁹²⁶ “Being at the university is a conception of a new reality, an alternative world that seeks to generate a new state, a society that is neither consumerist nor capitalist; a society based on solidarity and the rights of peoples. That is why, contrary to the official education system, which seeks to label and train professionals boxed in for its service, where science and knowledge are commodities that generate class and exclusivity, this university arises where knowledge is not a commodity but a shared knowledge to promote life and dignity.” *Ibidem*.

⁹²⁷ *Ibidem*.

⁹²⁸ *Id.*

⁹²⁹ “That is why we think of the land, of humanity, of the history that the victims have built; it is from there that this university alternative starts”. *Ibidem*.



Figure 5: *Comunidad de paz* celebrating the resistance.⁹³⁰

Despite numerous efforts over time, violence against the community continues and one example is the murder that occurred on 19 March 2024 when two members of the community, Nallely Sepúlveda and Edison David, were found dead by Nallely's son on his way home from school. The perpetrators belong to the illegal armed groups that attack the civilian population of the region with the acquiescence or negligence of the state. The day before the murder, government officials had visited the region to control the situation but failed to stop or reduce the violence⁹³¹. This crime also increases the number of extrajudicial executions in the Community, already denounced by several hundred, as well as the number of acts classified in international law as Crimes against Humanity, which exceed one and a half thousand, denounced before various international tribunals⁹³².

According to an IACHR Report, Colombia is one of the most dangerous countries for human rights and environmental defenders: at least 34 murders of human rights defenders have been confirmed in different parts of the country in the last year⁹³³. The new left-wing president Gustavo Petro is leading a *peaceful battle* against violence and human rights abuses through his *Paz Total* project, which is, however, challenging to realize. Despite the ratification of the *Escazú Accord* in

⁹³⁰ The pictures represent the community celebrating 24 years of resistance to armed groups and their violence in March 2021. *Ivi*, <https://cdpsanjose.org/galeria-de-la-memoria/>

⁹³¹ ACAT, *Deux membres de la Communauté de Paix san José de Apartadó assassinés*, Colombie, 2024. <https://www.acatfrance.fr/appel-a-mobilisation/deux-membres-de-la-communaute-de-paix-san-jose-de-apartado-assassines>

⁹³² CDP de San José, *La Paz de Colombia, un lema que se sigue vendiendo al mundo mientras los territorios se siguen desangrando*, Colombia, 2024. <https://cdpsanjose.org/2024/03/30/la-paz-de-colombia-un-lema-que-se-sigue-vendiendo-al-mundo-mientras-los-territorios-se-siguen-desangrando/>

⁹³³ OAS, *IACHR: 2023 Ends with High Rates of Violence Against Human Rights Defenders in the Americas*, 2024. https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2024/045.asp

October 2022, a regional treaty that obliges the government to prevent and investigate these attacks, most of the perpetrators remain unpunished⁹³⁴.



Figure 6: Number of activists and indigenous leaders murdered in South America in 2023⁹³⁵.

Suffice it to say that on 16 April 2024, a meeting was held by paramilitary leaders in which they again announced their intention to organize new murders against the community to completely exterminate it. One of them repeated the slogan: “*unirse para ir contra la comunidad de paz*”⁹³⁶. Furthermore, in the last month, paramilitary groups spread falsehoods accusing the community itself of killing its own members and blaming the illegal armed groups, one of them stated that: “*esa comunidad de paz es gente muy jodida, se están matando entre ellos*”⁹³⁷, by spreading the false criminal version, according to which Nalleli and Edinson were killed by the same community⁹³⁸.

Despite numerous obstacles, the *Comunidad de Paz* has taken important steps at the international level, gaining the international community's support, which is essential to shed light on what is happening in Colombia. In 2017, the *Red Europea de Apoyo* was founded in Rivas through the initiative of several associations, including *XXI Solidario*, channeling the support of many European cities such as Paris, Fidenza, Westerlo, Valencia and Tarragona. The *Red Europea* has operated in recent years by sending communiqués to the Colombian authorities requesting protection for the community in the case of attacks on its leaders and members. They are also demanding effective access to justice in the process of obtaining communal ownership of the agricultural lands

⁹³⁴ *Op. cit.* ACAT, 2024.

⁹³⁵ *Op. cit.* OAS, 2024, https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2024/045.asp

⁹³⁶ *Op. cit.* CDP, 2024.

⁹³⁷ “That peace community is a very messed up people, they're killing each other”. *Ibidem*.

⁹³⁸ CDP de San José, *Daltonismo ideológico impuesto: recurso extremo del paramilitarismo*, Colombia, 2024. <https://cdpsanjose.org/2024/04/21/daltonismo-ideologico-impuesto-recurso-extremo-del-paramilitarismo/>

that they have been working peacefully for more than 25 years. The Inter-American Court of Human Rights has also requested the protection of the community in ten resolutions⁹³⁹.

5.3.2 The interviews with the *Comunidad de Paz*

In the last three years, several members of the community began a world tour to tell the world what is happening to their people and to ask the international community for help through communiqués, dialogues, and cultural and awareness-raising events.

During my studies in France at Sciences Po University in Paris, I had the opportunity to take part in a meeting as a member of the *Abya Yala* Latin American Student Association. The event was held on 16 October 2023 at the headquarters of Amnesty International, where I had the opportunity to interview the two representatives of the Community, who were on their European tour. The event included the screening of the documentary *Chocolate de Paz* made by the Community itself on their experience of resistance against illegal armed groups in Colombia, told through the production of organic chocolate:

*Desde la semilla hasta el producto, el cacao es el hilo narrativo que nos lleva a través de historias de violencia y resiliencia en las que la Comunidad lucha por mantenerse neutral frente al conflicto armado colombiano.*⁹⁴⁰

After the projection of the documentary, there was a debate on the same where the audience was able to interact with the two community members and address the issue of violence in the round. The first issue emphasized by the two representatives was the gap between theory and practice, between words and the reality of facts: despite President Petro's commitment to building total peace in Colombia, conflicts persist at the territorial level in indigenous communities, giving rise to another reality of facts. In this regard, I have chosen to report in my research the interview I conducted with the two representatives to openly demonstrate what is happening in Colombia in the sacred and ancestral territories occupied by the indigenous tribes and communities.

Before reporting the interview, I would like to mention the interviewees' willingness, education, and determination: for them, giving an interview was not an act of vanity, but a necessity, a call for help to make even more people aware of the tragedy they are experiencing⁹⁴¹. The following dialogue

⁹³⁹ Rivas Ciudad, *San José de Apartadó: 25.000 kilómetros por Europa en busca de la paz*, Spain, 2023. <https://www.rivasciudad.es/noticias/participacion-ciudadana/2023/12/15/san-jose-de-apartado-25-000-kilometros-por-europa-buscando-la-paz/862600219262/>

⁹⁴⁰ Chocolate de Paz, N/A. <https://chocolatedepaz.com/espanol>

⁹⁴¹ I emphasize this aspect because during my research, I also came across individuals who saw the interview for the sake of profit and fame, when in fact it is an essential tool to give a voice to individuals who need it.

offers an overview of the opinions, experiences, and perspectives of the two members on behalf of the whole *Comunidad de Paz* on the current context in Colombia.



Figure 7: Event organized by CDP in Paris.

Figure 8: Scene taken from the documentary “Chocolate de Paz”.

Paris, France, 16 October 2023, Amnesty International Headquarters.

Flavia: Bienvenidos en Paris, estamos acá en la sede central de Amnesty International con los dos representantes de la Comunidad de Paz de San José Apartadó - Colombia. Muchas gracias por su disponibilidad, para nosotros es un honor hablar con ustedes.

En primer lugar, quisiera preguntarle sus nombres, su papel en la comunidad y cuáles son sus objetivos en medio y largo plazo.

Arley: Buenos días, Flavia, gracias a ti por entrevistarnos y dedicarnos este espacio para poder contar nuestra historia porque por nosotros es algo de indispensable. Lo que corresponde a mí, soy miembro del Consejo Interno de la Comunidad de Paz que es el órgano directivo que se encarga de la representación jurídica en Colombia, pero internamente en nuestra comunidad para nosotros no existe personal superior, todos estamos en la misma línea, todos tenemos mismas obligaciones y deberes internos. Es más, el contexto colombiano que nos pide tener una directiva. Luego me encargo del grupo de trabajo en el campo por la producción de cacao y estoy también trabajando en el área de la educación que es interna a la comunidad, no es del estado ni oficial.

⁹⁴² TEJE France, *CDP en Europa*, 2023. https://twitter.com/TEJE_France/status/1712389786374181179

⁹⁴³ *Op. cit.* Chocolate de Paz.

Juan Carlos: Buenos días, Flavia, mi nombre es Juan Carlos Guerra, soy miembro integrante del Comité educativo de la comunidad y también soy coordinador de un espacio de trabajo de la comunidad y apoyo la educación como maestro.

F: Bueno, bienvenidos Arley y Juan Carlos. En primer lugar, me gustaría preguntarles ¿cuál es la primera cosa que le sale si piensan al futuro de la Comunidad en mediano y largo plazo?

A: Uno de los objetivos a mediano plazo es poder garantizar la supervivencia de cada miembro de la comunidad sobre todo en termino de autonomía alimentaria, mientras a largo plazo es poder crearse un espacio de vida que garantiza la permanencia en el territorio de San José Apartadó en la reserva en la cual vivimos hace milenios y en fin poder garantizar que nuestros hijos, nuestros nietos y toda nuestra descendencia pueda estar ahí permaneciendo en el territorio.

F: Bien, con respeto a estos objetivos, quisiera también preguntarle cual ha sido el impacto de la CDP durante el proceso de la construcción de paz en Colombia empezado por el presidente Gustavo Petro.

A: Yo creo que el impacto en Colombia de la Paz total es positivo y la política del gobierno de Petro es apostarle a la Paz y al cuidado del medio ambiente. Pero una cosa es lo de que se está hablando a nivel del presidente y otra cosa es lo que está ocurriendo en los territorios que son dos cosas distintas, dos realidades. Una realidad es el discurso del gobierno, y otra realidad es lo que de verdad estamos viviendo en el territorio que es totalmente distinto. O sea, en el territorio no llega la paz total, en el territorio llegan las balas asesinas que matan a campesinos, a jóvenes, que destruyen la sociedad a través de la imposición de las ordenes de los paramilitares que son consecuentes y sistemáticas en el nuestro territorio.

F: Entonces, dada la presencia constante de estos grupos armados, ¿según ustedes como sería posible llegar a un acuerdo a través de la negociación?

A: Nosotros vemos la negociación positiva, ya que es una forma de parar la muerte y el conflicto tramite el dialogo que es la única ruta para establecer condiciones que garanticen una tranquilidad por la población civil. El problema es que el narcotráfico es el factor número uno que alimenta la guerra y la violencia en el país y en el mundo, entonces sí pueden llegar a un acuerdo con los grupos armados militares en Colombia, pero si se para este grupo se crea pronto otro grupo porque va a seguir el narcotráfico hasta que no pare la raíz de la dificultad en Colombia. Esto es lo que paso

con los Acuerdos de Paz del 2016 entre el gobierno colombiano y las FARC, antes se decía que ellos eran el único problema principal, la guerrilla, pero después que se desmovilizó la FARC las muertes y la violencia en el país siguen. Entonces el problema no es el tema de los guerrilleros o de los grupos ilegales, el problema principal es la grande condición de desigualdad que hay en el país y hasta que no se toque este tema junto con la raíz del narcotráfico esto no para.

F: ¿Entonces está afirmando que la razón principal de toda esta violencia es probablemente el narcotráfico y el poder y la influencia que tiene?

A: Exactamente. En Colombia hemos visto caer capos como Pablo Escobar en el '92 e inmediatamente vino otro; cayeron los hermanos Ochoa y vinieron otros, cayeron los Castéanos y luego Aliado Mario y Juan de Dios. Ahora capturaron Alias Antony y lo tienen en Estados Unidos, pero mañana ya vendrá otro, y otro y otro. Este círculo no tiene fin.

F: ¿Ustedes están trabajando en Europa para obtener un proceso de paz, como está yendo el proceso?

A: En relación en nuestra presencia acá, vemos mucho apoyo y solidaridad, empezando por las instituciones: diputados, alcaldes, un compromiso por la paz. Pero también hemos visto un respaldo muy fuerte con las organizaciones sociales, de derechos humanos y también mucha gente del común que está comprometido para acompañarnos en la complejidad que estamos viviendo en nuestra tierra en Colombia. Que no se olviden que en el otra parte del mundo está un grupo de campesino que está apostándole a la vida, al cuidado del medio ambiente.

F: ¿Hay un mensaje que quieren dejar a la gente que irá a escuchar esta entrevista para que puedan de alguna forma contribuir, ayudar a la construcción de paz en el país y por la comunidad?

A: El mensaje es invitarlos a tomar un minuto de conciencia y reflexión de que es más importante: ¿apostarle a la vida, a generar un mundo distinto o apostarle a la guerra y a la violencia? Creemos que los conflictos no se resuelven con balas ni con muertes, creemos que los conflictos se resuelven con el dialogo de tú a tú.

F: Coincido perfectamente contigo. Muchísimas gracias, chicos, por su importante testimonio.



Figures 9 and 10: Interview with community members, 16 October 2023, Amnesty International Headquarters, Paris, France.

This first interview provides a general overview of the tense issue in Colombia between war and peace that has been going on for years. It shows that the primary source of human rights violations of indigenous peoples stems from the constant presence of armed groups on the territory where the state does not actively intervene and does not take measures to convict the perpetrators. This therefore demonstrates a failure of the state to fulfill its duties towards indigenous Colombian citizens who find themselves fighting alone in a war that they did not start. Indeed, the peace community from the date of its foundation declared itself immediately against war and in favor of peace, affirming its firm will

not to be involved in armed territorial conflicts. The rights of these people to land and self-determination are not being respected by either the state or non-state actors. Their territories are being usurped, and members of their community are being killed, violating their right to life and existence on a daily basis.

The second interview, on the other hand, focuses on more specific legal and regulatory issues related to certain articles and provisions of the Colombian constitution to demonstrate whether the government is really fulfilling its constitutional obligations and respecting the human rights enshrined in the constitution and international treaties. In this case, I again interviewed two members of the same community but via video call, since they were in Colombia. The interview took place on Google Meet on April 29, 2024, at 5 p.m. (CET), directed to the two members Arley and Morelis who provided their perspectives based on past and recent experiences.

Terni, Italy – San José Apartadó, Colombia, 29 April 2024.

Flavia: Hola buenos días, que placer tener ustedes acá, ¡bienvenidos! ¿Como están?

Arley: ¡Buenos días! Pues estamos con preocupaciones, pero bien.

F: Muchísimas gracias por su disponibilidad, por haber aceptado mi propuesta porque para mí es muy importante su testimonio en mi análisis. ¿Bueno, hay preguntas antes de empezar?

A: ¡No, tranquila!

F: Bueno, bienvenidos otra vez. Como ya le comenté, estoy escribiendo mi tesis magistral sobre los derechos de los pueblos indígenas y estoy averiguando si el estado colombiano respeta el derecho internacional y las normas constitucionales, si cumple con sus obligaciones o no con respeto a ustedes. Por lo tanto, he decidido de entrevistar personas que están viviendo en primera persona todo esto. Antes que todo, les pregunto cómo se llaman y que se presenten.

Morelis: Buenos días, mi nombre es Morelis.

A: Yo soy Arley, no sé si te acuerdas en Amnesty International.

F: ¡Si obvio, un placer! Entonces ustedes son miembros de la Comunidad de Paz de San José Apartadó; primero que todo me gustaría preguntarle como es la situación ahora en su comunidad. Yo estoy siguiendo cada día las noticias y se por ejemplo del asesinato que hubo hace un mes.

M: Si, ahorita la situación está bastante compleja, prácticamente ya son dos meses que estamos en una situación bastante fuerte porque hubo muchos ataques a la comunidad y hechos de violencia contra nosotros, en toda la zona de Esperanza y claramente acá en San José. Han sido dos largos meses bastante difíciles y fuertes para poder continuar en este proceso porque hubo muchísimos ataques a los campesinos del territorio, muchas amenazas, desplazamientos y violencia. Nos tocó estar en constante gaste físico y emocional por todo lo que se ha vivido y planeado adentro de este proceso. Entonces nosotros estamos haciendo todo lo posible para estar juntos y seguir construyendo paz, pero hasta ahora ha sido bastante fuerte y difícil con la situación que estamos viviendo.

F: Si entiendo perfectamente... por esto pienso que si se habla mucho del proyecto de paz en Colombia de Gustavo Petro y además yo estudié que en la Constitución Colombiana del 1991 hay muchas normas y secciones específicas por la protección de indígenas y sus derechos, pero mi pregunta es: ¿en concreto el Estado sigue lo que está inscrito en la constitución – y en los tratados- o no? ¿O pasan cosas diferentes?

M: Pues para nosotros como grupo de indígenas campesinos hemos visto que en el territorio la paz es muy mencionada, se habla mucho de paz, de que estamos en un proceso ya del post conflicto donde supuestamente viene un país en paz. Pero personalmente nosotros a nivel concreto no estamos viviendo esta paz ideal, estamos viviendo muchos ataques violentos contra nuestros derechos que son muy vulnerables; a nivel político, en el gobierno, se dice que están haciendo un óptimo trabajo, que están defendiendo los derechos de toda la población colombiana y les están asegurando paz. Pero nosotros seguimos siendo violentado por los grupos armados entonces si por una vez el gobierno nos diera la razón, si por un momento nos escuchara y actuara de verdad y concretamente, los ataques serian menos y nuestros derechos serían más respetados. Hemos estado en búsqueda de todo este dialogo pacifico para que se vea concretamente la paz en los territorios y el problema es que en todos los encuentros internacionales se habla de una Colombia en paz, pero así no es. Nosotros no la estamos viviendo ni mirando, no ha mejorado. Hubo muchos hechos de violencia que han acabado con la vida de nuestros compañeros. Entonces cuando el gobierno dice que los indígenas en los territorios ancestrales ya están bien y en paz, esta no es verdad. En las

reuniones se habla de una paz que se vende, no verdadera. La verdad es que los territorios indígenas están viviendo mucha violencia, soledad y vulneración de nuestros derechos.

A: Yo quería un poco adicionar a lo que decía mi compañera Morelis que claro es una situación muy compleja que estamos viviendo comunidad, muy difícil a pesar de que hay tres órdenes de la Corte Constitucional y dos resoluciones de la Comisión Interamericana y de la Corte Interamericana de los Derechos Humanos. Estas órdenes emitidas son concretas y en favor de la protección de los derechos humanos de los miembros de nuestra comunidad y también proteger y garantizar la vida a todos los que prestan servicios a nuestros miembros, a quien nos ayuda, transporta en vehículos, a los que venden productos, a campesinos cercanos de la comunidad. Pues, luego hay la Corte Constitucional donde con su primera orden reconoció la presencia ilegal de grupos armados en los territorios, después la segunda era la decisión de conciencia que está en el artículo 19 de la Constitución Colombiana y luego en un tercer momento hubo otra sentencia en el 2007 que le ordena al estado proteger la comunidad de paz y que la Corte Constitucional revise el caso y encuentre que hay una violación sistemática contra nuestros derechos y que se sigan todas las leyes vigentes para evitar los desplazamientos y evitar el masacre, pero nada. En el auto 164 del 2012, un auto seguimiento a la sentencia del 2007, la Corte Constitucional dio cinco ordenes concretas: 1. Que el presidente y el gobierno nacional hicieran una ceremonia de retractación por las calumnias que hizo el entonces presidente Álvaro Uribe contra la comunidad. 2. Que se sentara con la comunidad para revisar en una comisión por la justicia porque tantos crimines contra la comunidad. 3. Revisar el tema de los puestos de los policías y militares que hay en San José y reubicarlos. 4. Estudiar en compañía de la comunidad el caso de las zonas humanitarias. 5. Construir una casa por la justicia en colaboración con la comunidad de paz. Pero ninguna de estas órdenes se ha cumplido, esto es claro en el paso de los años.

F: Si exactamente, de hecho, hay muchas ordenes constitucionales y normas, pero me parece que al final no se siguen ni realizan. Hay mucha charla y pocos hechos concretos para realizar una paz duradera y sobre todo total, o sea para todos los ciudadanos colombianos. Otro tema que quería mencionar es la obligación de consulta previa que tiene el Estado colombiano, o sea consultar ustedes los indígenas antes de tomar decisiones sobre sus territorios y vidas. ¿Según su perspectiva y experiencia personal, el Estado cumple con esta obligación inscrita en la carta constitucional del 1991?

A: No, absolutamente no. Nunca nos consulta.

F: Entonces, en la base de todo esto, si yo le pregunto en una escala del 1 al 10, ¿su comunidad cuanto se siente representada por el gobierno colombiano?

A: Cero. Pues es mas así: los recientes hechos de violencia que ocurrieron en los últimos meses son conocido perfectamente por el gobierno colombiano, ellos saben lo que estamos sufriendo porque siempre les enseñamos los riesgos y amenazas que vivíamos pidiendo ayuda, pero no valió. Mucha gente de afuera, de la comunidad internacional, se pronunció sobre el incumplimiento del estado con la orden constitucional, pero nada. Siguen los asesinados. ¡Además, vienen los militares que nos matan acusándonos que los responsables de los homicidios son los miembros internos de la comunidad! Es literalmente una locura. Dicen que los asesinos están acá adentro de la comunidad, es algo de monstruoso.

F: ¡Si, literalmente! Leí el artículo que afirmaba esto contra de ustedes, echándole la culpa. Es una locura.

A: Sí. Esto es literalmente lo más absurdo que hemos escuchado.

F: Yo solo me pregunto cómo es posible, con cual coraje afirmar una cosa de este tipo después que sus hermanos siguen siendo matados y violentados. Lo que más me sorprende es que el gobierno no hace absolutamente nada en frente de esta realidad, no cumple con sus compromisos. Además, por ejemplo, el derecho a la tierra y a la autodeterminación de los pueblos inscritos en la Constitución Colombiana del 1991, ¿son respetados? Porque por lo que me están contando no me parece. ¿Por ejemplo, su derecho a poseer y utilizar su tierra donde vive hace años es protegido y respetado? ¿Porque el gobierno no actúa? ¿Le conviene dejar las cosas así?

M: Si, exactamente. ¡Nosotros como comunidad de campesinos indígenas tenemos el derecho natural a la tierra, pero tampoco pedimos más tierras! Simplemente estamos pidiendo que por lo menos nos dejen la tierra que ya tenemos, que nos permiten de trabajarla para sobrevivir y mantener nuestro espacio de comunidad, ¡pero no! Desde siempre que hay violación de nuestro derecho a la tierra. La seguimos defendiendo, pero los entes del gobierno no nos ayudan y disfrutan de esta situación para utilizarla por sus intereses. No nos permiten trabajarla libremente, nos quieren imponer sus órdenes. De hecho, amenazas y desplazamientos por grupos ilegales armados siguen. La masacre es muy fuerte. Muchos compañeros murieron por la tierra.

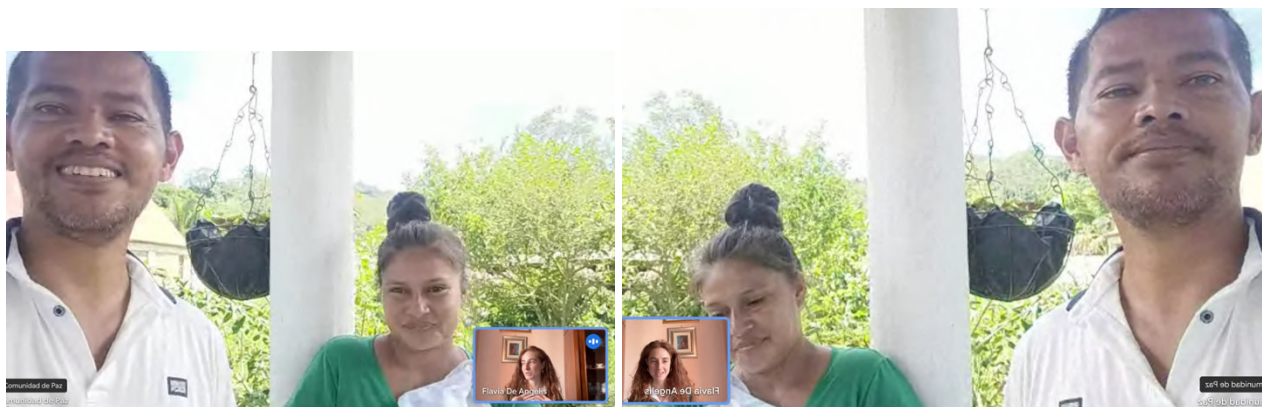
F: Entonces, yo veo que este proceso de paz de que tanto se habla a nivel internacional, al final, no involucra a ustedes, no participan. La paz no llega a los territorios. Por ejemplo, las noticias que llegan acá en Europa sobre el proyecto de paz son todas positivas, hay imágenes de gente en paz que logra solo resultados positivos por toda la población. Pero una cosa son las noticias de las medias y otra son los hechos que ustedes me cuentan. A nivel concreto no se cumple la paz y el respeto de los derechos humanos de grupos más vulnerables.

A: Sí, yo creo que una de las mayores dificultades que hubo en el Consejo del gobierno fue la implementación de los acuerdos de paz porque no hay voluntad política pero tampoco de los actores principales del territorio, si este gobierno ha hablado de la voluntad de conocer el campesinado, de proteger la vida y sus derechos, pero no pasó. El problema es que el gobierno central tiene voluntad y está haciendo el esfuerzo pero en los territorios siguen estando los mismos comandantes del gobierno previo de ultraderecha y militar; ellos son los mismos coordinadores de estado que han estado todo el tiempo contra los indígenas y sus derechos, por ejemplo están en las oficinas los mismos oficiales de antes, puede ser que cambian un director pero sigue estando el mismo secretario, asesor y entonces si los mismos comandantes violentos de policías siguen ahí, pues no van a haber cambios porque es la misma estructura que está ligada a los paramilitares que no respetan la política más reformista del gobierno central de Gustavo Petro.

F: Claro, si no cambia la estructura desde adentro no podemos lograr cambios afuera. Ni tampoco le voy a preguntar como es el contexto actual, o sea como están viviendo estos días.

M: pues la verdad con muchísima incertidumbre, ansiedad, terror y miedo. Nosotros como comunidad, como hermanos unidos luchamos juntos protegiéndonos y acompañándonos cada día en esta batalla para continuar, porque ha sido muy difícil como única familia vivir en este terror y con nuestros medios de sobrevivencia, intentamos de hacer este dolor más liviano. Ha sido demasiado fuerte los atropellos que hemos vivido. Hubo mucha tristeza y dolor, pero nosotros seguimos resistiendo, apoyando y desarrollando los espacios que tenemos, hacemos todo lo posible para no dejar los territorios solos. Claro que con la ayuda de la comunidad internacional hemos podido enfrentar mejor las amenazas de los grupos armados contra nosotros. Entonces estamos en grupos fuertes de familias apoyándonos el trabajo en el campo, el uno con el otro. Porque estamos viviendo un ataque demasiado fuerte, como lo que hubo en el 1997. Tratamos de evitar los desplazamientos como podemos, coordinándonos para no dejar solas las familias. Es bastante difícil.

F: ¿Muchas gracias, Morelia... Arley quieres añadir algo? ¿Que podría hacer la comunidad internacional para ayudar, solucionar todo esto?



Figures 11 and 12: Interview with community members, 29 April 2024, Italy-Colombia.

A: Yo creo que lo que decía la compañera es muy fundamental en esta situación tan difícil, tenemos acompañantes y gente que nos sigue hasta aquí, y otros países como observadores internacionales, juntos con más grupos y estudiantes como usted que hacen trabajos tan importantes como el suyo. Y también otros compañeros que van difundiendo nuestra realidad y como es nuestra situación actual en Colombia, es muy difícil decir que existe una fórmula concreta para solucionar todo esto. No hay, el único que sabemos que sí existe es que tenemos ganas de seguir adelante como comunidad y convertir en esperanza el dolor de los compañeros, así siempre habrá comunidad. La misma gente no baja la guardia para que niños como este pequeñito acá tenga un futuro, una esperanza que él y sus hermanos puedan seguir siendo comunidad en paz cuando crezcan. Su gesto de afuera es muy importante para nosotros porque difunde y comparte nuestra historia. Creo que un punto importante para dejarle a la humanidad en la historia es que más grupos se unan para decirle al estado “Mire lo que estamos viviendo, sufriendo, este grupo de campesinos que han decidido vivir una vida no violenta, que han decidido vivir en paz, y exigimos a las autoridades colombianas que protegen el derecho a existir, a la vida. Que nos dejen ser comunidad de paz.

F: Coincido perfectamente con ustedes, sobre todo porque ustedes se declararon en paz y contra la violencia. Muchísimas gracias por sus palabras, por su testimonio, espero que pueda contribuir con mi proyecto a su resistencia y lucha para lograr una paz duradera. Su causa me llegó al corazón y quiero seguir su lucha desde acá con ustedes.

5.3.3 Indigenous communities of the Colombian Amazonia

Colombia boasts some of the world's most biologically diverse ecosystems, many of which are situated within the boundaries of indigenous territories. Despite making up just 2% of the nation's population, these territories span a whopping 30 million hectares and comprise over 510 indigenous territories, accounting for nearly one-third of the country's total land area. Despite their vast landholdings, the indigenous peoples of Colombia have often lacked legal rights to their territories for much of the past century⁹⁴⁴. Nevertheless, between 1980 and 1990, the government acknowledged the rightful ownership of an additional 15 million hectares of land to indigenous peoples. Following the establishment of a new constitution in 1991, the nation's multicultural identity was recognized, and cultural diversity was deemed one of its most valuable assets⁹⁴⁵.

Today, 52% of the Amazon region was legally handed back to their protectors, and 121 *resguardos*⁹⁴⁶, representing areas with the highest rate of biodiversity in Colombia, were recognized⁹⁴⁷. Consequently, preserving the Amazon tropical forest is crucial not just for its ecological diversity, but also for the rich cultural heritage of its indigenous communities. For over 10,000 years, these communities have honed sustainable ways of living within the rainforest, striking a delicate balance between the needs of their communities and the needs of the local ecosystem. By managing their environment with care, they have helped to maintain the integrity of this precious natural resource, ensuring that it remains largely unspoiled to this day⁹⁴⁸.

Nevertheless, the Colombian Amazonian, unfortunately, represents one of the most concrete examples of environmental devastation linked to the rapid deculturation of “indigenous forest dwellers, affecting traditional indigenous lifestyles and practices and their way of relating to their natural surroundings”⁹⁴⁹. In many situations, Indigenous people have been forced to give up their sacred territories with which they have a spiritual relationship, consequently having to cancel their ancient traditions and lifestyles, which are crucial for the proper sustainable management of the environment. Their primary objective is in fact to ensure the future sustainable development of the environment, so that it can be preserved over time and ensure life for the next generations. For them,

⁹⁴⁴ WWF, *Indigenous people in the Colombian Amazon*, 2005, p. 1.

<https://wwf-eu.awsassets.panda.org/downloads/colombiaamzindigenous.pdf>

⁹⁴⁵ *Ibidem*.

⁹⁴⁶ *Resguardos* are ancestral territories considered to have always belonged to indigenous peoples. As stipulated by the Political Constitution, *resguardos* are to be held indefinitely by indigenous peoples and cannot be transferred through sale. Once legally recognized, these territories are acknowledged as containing collective indigenous rights to the land and forest resources within their boundaries (see Article 330 of the Political Constitution). Following Article 357 of the same constitution, these indigenous territories possess the same status as municipalities and are thus entitled to receive state payments, or *transferencias*, for health, education, and social programs. They may also fulfill their local governance duties through the *Sistema General de Participaciones*. *Ivi*, p. 3.

⁹⁴⁷ *Ivi*, p. 1.

⁹⁴⁸ *Ibidem*.

⁹⁴⁹ *Ivi*, p. 2.

the environment is not separate from life but an integral part of it, so having to give up its preservation means having to give up their culture and traditions⁹⁵⁰.

In January 2023 I had a unique opportunity to spend ten days living among the *Wayruru* indigenous tribe in the Amazon, located in km 7 of Leticia. The challenges they face are significant, and the main ones are securing their land rights and sustainably preserving the environment. These challenges are not just theirs to face but are critical for the benefit of all humanity.



Figure 13: Tabatinga, Rio Amazonas, 8 January 2023.

Therefore, when mentioning the Indigenous communities of the Amazon, the first issue is the environment and related rights that are directly linked to government, state, and non-state actors that endanger the lives of indigenous peoples and violate their fundamental rights daily.

⁹⁵⁰ *Ibidem.*



Figures 14, 15, 16: Reserva Wayruru, Amazonas, Colombia, 12-15 January 2023.

As stated in the previous section on *Comunidad de Paz*, I preferred the method of interviews to give voice to the protagonists of the issue; therefore, I first went to the LATAM Conference held in Berlin at the *Hertie School of Governance* University on 4 and 5 May 2024 to report current information in

my research and to be able to interview several people directly. The conference provided a comprehensive platform for knowledge exchange, idea generation, and collaborative problem-solving concerning the following themes:

1. Global Trends and the Future of Latin America: Insights from Ambassadors in Germany⁹⁵¹.
2. International Security and Peace in Latin America⁹⁵².
3. Digital Governance in Latin America⁹⁵³.
4. Sustainable Development, Biodiversity and Climate Justice in Latin America⁹⁵⁴.
5. The Challenges of Democracy and Human Rights in Latin America⁹⁵⁵.
6. Gender Perspectives in Latin America: Challenges, Achievements and Commitments⁹⁵⁶.

Concerning the content of my dissertation, I have decided to primarily address the insights and debates presented in the second, fourth, and fifth panels. These panels offered a comprehensive examination of the significant obstacles facing Latin America, with a particular emphasis on Amazon Colombia and the indigenous population residing within it.

Colombia represents one of the countries with the highest level of biodiversity in the world but at the same time with one of the highest rates of criminality and insecurity. These two elements, environment, and criminality, unfortunately, are strictly linked and trigger the lives of civil society and Indigenous people, who every day try to ‘figure out how to live’⁹⁵⁷. During the discussion, Ati Vivian, the Colombian indigenous activist for the environment and indigenous rights, outlined primarily the necessity to bring indigenous issues and claims to international conversations to make people aware of the violations suffered by local communities. As Ati stated, their work starts at the local level by addressing environmental issues through nature-based solutions and dialogue, avoiding violence:

⁹⁵¹ The speakers were H.E. Roberto Jaguaribe Gomes de Mattos (Ambassador of Brazil), H.E. Augusto Arzubigi Scheuch (Ambassador of Peru), H.E. Fernando Brun (Ambassador of Argentinian), H.E. Francisco Quiroga (Ambassador of Mexico).

⁹⁵² The panelists were Mariana Roa (Permanent Mission of Mexico to the United Nations, Geneva), PhD. Alejandra del Pilar Ortiz Ayala, Head of conflict and conflict management specialization at Willy Brant School of Public Policy, Ana Collado Jimenez (Member of the European Parliament).

⁹⁵³ The speakers were Mr. Reinaldo G. Gonzáles (CEO and Chairman, Siemens S.A.), Mr. Carlos Scartascini (Head of Development Research Group, IDB), Mr. José Díaz Mendoza (Founder and CEO Futuro Público), Mr. Ivan Durán (former Vice Minister of Technologies of Information and Communication, Colombia).

⁹⁵⁴ Mr. Klaus Köhnlein (Senior Project Management, KfW), Ms. Hanny Cueva Beteta (Head of Environment Team, Border Management Branch, UNODC), Ms. Ati Viviam Villafaña (Colombian Indigenous activist), María Mejía (founder of The nature of the Cities, Colombia).

⁹⁵⁵ The speakers were Dr. Marie-Christine Fuchs (Press Spokeswoman, Federal Ministry of Justice), Prof. Dr. Sérgio Costa (Professor of Sociology, FU Berlin), Ms. Aurelia Streit, Migration Researcher, German Centre for Integration), Ms. Luciana-Tellez Chavez (Senior Researcher in the Environment and Human Rights Division, Human Rights Watch).

⁹⁵⁶ Ms. Suki Capobiando (Leader of Women in Politics, Apolitical Foundation), Ms. Alejandra Cordero (Gender and Economic Inclusion, European Bank for Reconstruction and Development).

⁹⁵⁷ Recording of Ati Viviam Villafaña’s speech concerning her indigenous community in Amazonia.

To protect our territory, we recover specific sacred lands which are a crucial part of our ecosystem, and we try to improve them with spiritual work, to make people understand how important they are for our culture, traditions, and life⁹⁵⁸.

I had the opportunity to interview Ati whom I asked if she felt that the obligation to consult indigenous peoples before making decisions about the lands where they live, for example, was respected in Colombia. She affirmed that:

“Hay un estudio que sacó la orden en 2018 en Peru, Colombia, Mexico y Brasil, hay evidencia de que en esto momento hay más espacio de consulta pública, o sea si esto es verdad, hay más actores que están en el proceso. Sin embargo, hay dos retos super importantes. Uno es que estos nuevos abordajes o las comunidades locales si tienen comentarios lo pueden hacer; el segundo reto es reconstruir confianza porque así muchas veces hay consulta previa sobre *environmental assessments*, pero lo que ocurre al final no refleja las recomendaciones de estos *assessments*. Esto pasa porque muchas veces lo que hacen algunas compañías o fuerzas externas es romper el tejido social de las comunidades y dividir los votos: si tienes la consulta previa, se hace el checklist, pero el consenso entre ellos ya está roto por dinámicas muy oscuras. Entonces la ley está ahí, Colombia es un estado pluriétnico, pero en práctica es muy difícil garantizar que la consulta previa ocurra en iguales condiciones porque hay siempre *imbalances of power* y dos que las conclusiones de los *environmental assessments* realmente sean realizadas, efectivas. En el papel si, en la práctica no mucho todavía”.

Thus, Ati's testimony also confirms that in theory there is a law to consult indigenous people but in practice, it is seldom respected by the government, mainly due to power imbalances between the parties.

In the last months, Indigenous people and local communities of Amazonian have been involved in an international project led by the German bank KfW⁹⁵⁹ whose primary objective is to finance climate action by collaborating with indigenous people and the government to develop advanced projects. As stated by Mr. Klaus Köhnlein, the Senior Project Management of the KfW bank, most indigenous people don't have the opportunity to be financed because it is a huge privilege in Latin American countries and therefore, the lack of funds and international help, contribute to increasing climate crisis, deforestation, and illegal activities on the land⁹⁶⁰. The participation and

⁹⁵⁸ *Ibidem*.

⁹⁵⁹ More information concerning the bank is available at: <https://www.kfw.de/About-KfW/>

⁹⁶⁰ Recording of Klaus Köhnlein during his speech in the panel concerning sustainable development in Colombia.

involvement of indigenous people in these projects is fundamental because they “are the only ones that really know how to protect the environment and mitigate the adversities. In fact, they have the knowledge and the techniques to protect and conserve the ecosystem. Therefore, we foster dialogue and communication among indigenous, European banks, and local governments, since the best way to find common solutions is to listen to each other.”⁹⁶¹ Thus, several non-state actors contribute daily to the resistance and peaceful struggle they have been waging for years.

Analyzing the current situation in the Colombian Amazon, the main issues that affect the region are the illegal presence of armed groups, criminal activities⁹⁶², corruption, illegal deforestation, the high rate of money laundering, a selective government⁹⁶³, the weakness of the state and therefore the lack of law enforcement⁹⁶⁴, even if Latin American countries have really good environmental laws, even better than those in Europe. Nevertheless, without law enforcement illegal and criminal activities proliferate in the territory, leaving indigenous communities of Amazonia alone. In addition, the main issue is that there is no real international definition of *climate crime* and there are no international declarations that confirm that biodiversity is affected by crimes⁹⁶⁵. Therefore, Colombia is in a very tricky situation actually because on the one side, there is the government of Gustavo Petro with his project of Total Peace and all his good intentions to promote dialogue and negotiation with the different actors, but on the other side there is the strong presence of illicit armed groups and, above all, the pressure of United States that incentives a punitive approach against criminal activities⁹⁶⁶. Another crucial issue is the huge presence of landmines that creates an unsafe environment for everyone living in the rainforest, especially for children⁹⁶⁷ who freely play on the fields. The Colombian government has taken steps to address the country's critical situation by introducing a peace agenda and measures to promote safety. Unfortunately, implementing these measures has proven challenging, resulting in a lack of effectiveness in peace agreements. This has left citizens feeling insecure and doubtful of the government's ability to provide security. Due to the inefficiency of security institutions, individuals are hesitant to place their trust in the state. Consequently, many feel safer carrying firearms rather than relying on the police, who are often viewed as corrupt⁹⁶⁸.

⁹⁶¹ Interview made by me to Klaus Köhnlein during the LATAM Conference (4 May 2024).

⁹⁶² Such as traffics of drugs, people, metals, wildlife, species, protected wildlife, species, timber.

⁹⁶³ It selects and decides who protect. This creates a high level of inequality and power imbalance within the society.

⁹⁶⁴ This generates lack of confidence in political institutions.

⁹⁶⁵ Recordings of the three panels.

⁹⁶⁶ For example, one of the main objectives of the Colombian government is to substitute illegal coca crops with legal crops but the US orders to substitute the illegal ones with products that make people sick in order to punish them. Assessment made by Alejandra del Pilar Ortiz Ayala during the panel on International Security and Peace in Latin America (2024).

⁹⁶⁷ The 70% of mines' victims are indigenous children. *Ibidem*.

⁹⁶⁸ Alejandra del Pilar Ortiz Ayala, record, *cit*.



Figure 17: LATAM Conference, Hertie School of Governance, Berlin, Germany. 3 of May 2024.

After the Conference, I had the opportunity to speak with Colombian political scientist Alejandra del Pilar Ortiz Ayala about the current state of national crime and illegal armed groups in Colombia. I started the conversation by stating that: “I believe that Indigenous people living in their ancestral lands are among the most impacted by current events. With Gustavo Petro's government actively promoting dialogue and peace, I am curious about how they plan to include indigenous individuals in this process. Specifically, how can they ensure that this peace extends from the top down to the grassroots level? During a recent interview with representatives from the indigenous community in San José Apartadó, they expressed concerns that while the president speaks of peace, its implementation on the ground remains uncertain”.

Her answer was the following:

“Nice to meet you, Flavia. First of all, you're right. Indigenous and Afro-Colombians are overrepresented in the population of victims. In the Peace Agreements of 2016 with FARC, we had entire chapters dedicated to these communities and we also have provisions in the Colombian Constitution 1991, which I'm sure that you're familiar with, which also emphasize the importance of taking care of these communities. Now, with Petro and total peace: it is

something that is going on. So, I will say this is a very kind of political intention, but as I said in my previous intervention, in practice we still need to work on a lot of it. I mean think about it, we are trying to target dissidents of FARC and also, he wants to include all these other criminal actors. So, in terms of civil society consultation and especially these indigenous communities, I think that a lot is going on with thanks to the Vice President. She's making a lot of effort to raise their voices and to include their kind of like vision about security and peace, which probably is different from the traditional historical security and peace as well. However, I'm sure that if you go to Apartadó and talk with that everyday person there, they will say our voices are still unknown as a main concern, but it's because I actually believe that this is a very ambitious project which this guy want to deal with a lot of actors at the same time and a lot of people need to be going on at the same time in different levels. So that is actually the big failure, unfortunately, of the actual government: it is being so ambitious that our expectations are so huge that people are getting disappointed because nothing is happening in practice concretely. So, for example, we don't have a security sector reform yet and we have a debt after 2019 and 2020 in Colombia, so young people for example are probably super frustrated because they went to the street and they didn't have the changes that they were aiming, for example in terms of like reforming the security sector. So, I totally agree that people should be disappointed with the current government itself in terms of democracy, legitimacy, and elections. I will probably just say that this is something that is going on even beyond Latin America. People do not necessarily trust the traditional democratic channels anymore. We distrust the power of our vote and what is increasing, for me, it's a concern that civil societies are more likely to prefer authoritarian leadership, which means that we don't want democracy anymore, and we probably prefer strong powers. So, my personal opinion is that we may need to look into how we can revive democracy again”.

Therefore, as Alejandra stated, Colombia, thanks to Petro, is on the right track toward change. However, it will be a long road ahead, and its impact will not be immediate due to the critical situation in the territories.

Finally, to conclude this section dedicated to the Indigenous people of the Amazon through the collection of testimonies, I would like to quote the interview given to me by Andres, my guide in the jungle, the first person who introduced me to the complex world of the Indigenous people of Colombia. Jesús Andrés Fajardo Ramírez is a *mestizo* living in Leticia, Amazonia.

I interviewed online mode in connection from Colombia to Italy on 5 May 2024, after a long series of complications due to the time difference and their daily routines in the forest.



Figures 18 and 19: Malocas Wayruru, km 7 Leticia, Amazonia, Colombia. 16 January 2023.

Berlin, Germany – Leticia, Colombia, 5 May 2024.

Flavia: Buenos días, Andrés, gracias por recibirme, es un placer hablar con usted.

Andrés: Buenos días, Flavia, gracias a ti por la oportunidad. Es un placer para mí y nuestra comunidad en Leticia tomar parte a tu proyecto.

F: Pues, muchísimas gracias. ¿En primer lugar, nos podrías contar que tribu o comunidades indígenas están en su territorio?

A: Pues mira, en el departamento del Amazonas existen Pueblos originarios Tikunas, Cocamas, Yaguas, Huitotos, Murui, Muinanes, Matapis, Yucunas y Macunas. En todo el territorio amazónico colombiano existen 26 etnias.

F: Muy bien, y ahora me gustaría preguntarte algo de más específico sobre el derecho colombiano. He analizado la Constitución Política Colombiana del 1991 y he encontrado muchas partes dedicadas a la protección de los derechos de los indígenas en Colombia (por ejemplo, el art. 96 reconoce la identidad y la igualdad de los pueblos indígenas como todos los otros ciudadanos colombianos, el art. 63 reconoce el derecho a la tierra, el art. 329 reconoce los resguardos como propiedad colectiva, etc.).

¿Según su perspectiva y experiencia personal, estos derechos inscritos en la carta son respetados de verdad por el Estado Colombiano y otros actores privados?

A: Realmente en muchos casos en nuestras amazonas no son respetados estos territorios, debido a actores armados que muchas veces se toman los espacios que son para los pueblos originarios, sobre todo en las zonas no municipalizadas o corregimientos como Tarapacá, Pedrera, Puerto Arica, El Encanto, Puerto Alegría, Miriti Paraná.

De la misma manera los Pueblos Indígenas amazónicos son los principales afectados de una situación marcada por la más absoluta indiferencia, intolerancia e irrespeto hacia la población civil, víctima directa de los actores armados que participan en las hostilidades. El incremento de las masacres contra poblaciones indefensas, en particular cometidas por los grupos paramilitares; las repudiables tomas de rehenes y ataques indiscriminados, especialmente cometidos por los grupos guerrilleros; la falta de acciones eficaces por parte del estado para proteger a tantas personas y comunidades amenazadas y desplazadas y para combatir a los responsables de las mismas son solo algunas muestras de la delicada y acuciante situación de los derechos humanos que viven los territorios indígenas.

F: Ok, entiendo perfectamente. Entonces, mi próxima pregunta es sobre el deber de consultar los indígenas antes de tomar decisiones sobre su vida y territorios ancestrales que ocupan, así como dice la Constitución colombiana 1991. En la práctica, usted, ¿cree que son consultados por el gobierno como establece la Constitución?

A: Para esto existe el derecho a la consulta previa encuentra anclaje directo en el carácter democrático, participativo y pluralista de la Constitución Política (artículo 1); en el reconocimiento de la diversidad étnica y cultural de la nación colombiana (artículos 7, 8, 9 y 70); y en los principios de autodeterminación (artículos 9 y 286), propiedad colectiva de los territorios ancestrales (artículo 63), reconocimiento del derecho propio (artículos 246 y 330) y participación de los grupos indígenas y tribales en los asuntos públicos que les conciernen (artículos 40, 171, 176, 329 y 330).

Pero en muchos casos en Colombia, estas consultas no se tienen en cuenta sobre todo en casos donde se interviene el territorio para explotaciones mineras y explotación agrícola a gran escala. En el caso del territorio Amazónico Colombiano más exactamente en el departamento del Amazonas los pueblos originarios han mantenido su postura ante la inminente llegada de multinacionales que quieren explotar oro, petróleo y minerales como el coltán, esto debido a que los ríos Chaqueta, Putumayo, Miriti Paraná y la mayoría de los tributarios del gran río Amazonas son poseedores de gran riqueza mineral.

F: En una escala del 1 al 10, ¿en qué medida piensa que los indígenas son representados por el gobierno colombiano? ¿Cree que los intereses, necesidades y reclamos son escuchados por el estado y sus funcionarios?

A: En una escala estaría en un 4, los derechos de los indígenas han sido vulnerados históricamente con injusticias, producto del colonialismo, la esclavización, la exclusión y el haber sido desposeídos de sus tierras, territorios y recursos; que además han sido afectados gravemente por el conflicto armado interno en Colombia.

En la actualidad, algunos pueblos indígenas se encuentran en situación de pauperización. Otros soportan los efectos de la tensión y violencia generada por la presencia de grupos armados cerca o dentro de sus territorios. De todas formas, se ha avanzado en el reconocimiento de derechos particulares. Este reconocimiento se caracteriza (frente a otros históricamente ya sancionados como la legalización colonial) por la aceptación de la existencia de formas específicas socioculturales, si bien se supone su articulación y sumisión a un conjunto nacional. Actualmente el gobierno nacional de presidente Gustavo Petro ha tenido nombramientos de tres líderes indígenas para estar al mando de la representación de Colombia ante la ONU en Nueva York, la Unidad de Víctimas y la Unidad de Restitución de Tierras. Leonor Zalabata Torres, Patricia Tobón y Giovanni Yule. Esto ha sido un gran paso para la Colombia Humana, porque se incluyen las voces de los pueblos indígenas, sus Derechos colectivos en el marco de sus propias aspiraciones, intereses y cosmovisiones. Es una deuda histórica porque han sido marginados en nuestro país.

F: La Colombia es un país parte de la ILO Convención No. 169, una convención creada para proteger los derechos de los indígenas en el contexto del trabajo. ¿Según usted, el gobierno colombiano respeta las normas internacionales de esta Convención?

A: Se dan unas garantías a los pueblos y se les proporciona independencia en cuestiones administrativas, legales y decisiones territoriales por medio de transferencias (Asignación de presupuesto nacional a las asociaciones indígenas), pero es muy complicado en Colombia y en nuestra región garantizar todos los considerandos del convenio sobre todo en cuanto a tierras y condiciones y contrataciones de empleo.

F: En mis estudios de la situación legal y política en Colombia, he analizado un derecho crucial por los pueblos indígenas: derecho a la autodeterminación, un principio fundamental que reconoce el derecho de los pueblos a determinar libremente su estatus político, su desarrollo económico, social y cultural, sin interferencia externa. ¿Usted cree que este derecho es respetado por el Estado colombiano y por la comunidad internacional?

A: Desde mi punto de vista el estado colombiano ha vulnerado históricamente este derecho, considero que no existe una verdadera regulación que garantice y establezca el funcionamiento eficaz de la autodeterminación de los pueblos indígenas en Colombia. Vale reiterar que resulta cuestionable la existencia de un verdadero pluralismo jurídico dentro de este Estado, por lo menos no en los términos a los que parece referirse el Art. 1 de la Constitución. “Colombia es un Estado social de derecho, organizado en forma de República unitaria, descentralizada, con autonomía de sus entidades territoriales, democrática, participativa y pluralista, fundada en el respeto de la dignidad humana, en el trabajo y la solidaridad de las personas que la integran y en la prevalencia del interés general. “Así pues, para las comunidades indígenas existen limitantes constitucionales y legales para el ejercicio de sus potestades de autogobierno y autonomía, conceptos diferenciados que integran el derecho de autodeterminación.

F: Analizando el contexto actual en Colombia sobre el Proyecto de Paz Total del presidente Gustavo Petro, ¿cuál es su opinión? ¿Usted se siente parte de este proceso? ¿Según su perspectiva, podrá el Gobierno actual, que se ha comprometido a forjar una paz duradera, incluir realmente a las comunidades indígenas en el proceso de paz?

A: Para poder responder a esta pregunta debemos remontarnos a inicio del conflicto armado en Colombia que lleva más de 60 años, en sus inicios, la desigual repartición de la tierra y la falta de espacios para participación política dieron cabida al uso de la violencia y la lucha armada. Un método que en los años siguientes se fue reforzando con la irrupción del narcotráfico, el narcoterrorismo, la presencia de nuevos actores políticos y armados en un contexto de lucha revolucionaria, Guerra Fría y guerra contra el terrorismo que han ido transformando el conflicto en su razón de ser y métodos de subsistencia. En este contexto, los grupos armados han justificado el uso de la violencia por considerarla el único método para poder transformar la sociedad y con la intención de no permitir cambios considerados como ilegítimos.

Hoy Colombia abre un nuevo capítulo en su historia con los actuales procesos de paz y las reformas agrarias , pensionales y de salud, reformas que en su conjunto con la restitución de tierras pueden garantizar tranquilidad y paz a los pueblos indígenas; que como lo expuse anteriormente son los más afectados en este conflicto; ahora en este momento el gobierno del presidente Petro ha tomado a bien liderar los procesos de protección del Amazonas ,por medio de la presentación de la Agenda de recuperación de la selva amazónica , con la participación de los presidentes de los países de la cuenca amazónica incluido Brasil. Todos estos encuentros representan el punto de partida para la creación de una nueva agenda para el Bioma Amazónico basada en la ciencia, el conocimiento ancestral, la inclusión social y por supuesto con la participación de todos los pueblos indígenas, los cuales

aportarán al diseño e implementación de políticas públicas innovadoras de protección para este importante territorio. Entonces una paz total en el Amazonas y para sus pueblos originarios debe incluir garantías de preservación del espacio sagrado, lo cual pienso yo, se han tenido en cuenta a las organizaciones indígenas como asociación de autoridades indígenas de la pedrera Amazonas – AIPEA, asociación de cabildos indígenas del trapezio amazónico – ACITAM, asociación ticuna, cocama y yagua – ATICOYA - Puerto Nariño, asociación zonal de consejo de autoridades indígenas del trapezio amazónico – AZCAITA y todo esto va por un buen camino - en mi opinión.

Paz total en el Amazonas no solo es parar el conflicto armado, es también garantizar, preservación del territorio, respeto, seguridad alimentaria, salud y educación.



Figure 20: “La yuca de los dioses”, Leticia, Amazonas, Colombia.

Photo taken by Daniel Padilla.



Figure 21: a typical meal on the Wayruru Indigenous Reserve.



Figure 22: “El Pacto por Amazonas”, Leticia, Amazonas, Colombia.
Photo taken by the indigenous Maria Gitoma.



Figure 23: Maloca Wayruru, the mambear ritual to heal the land and connect with the spirituality of the earth.
Resguardo Wayruru, Leticia km 7, Amazonas, Colombia. Photo taken by @amazonasparaviajeros.

5.4 Key findings and Concluding remarks

This section aims to collect and present the results gathered during the interviews, the conference, and the theoretical study of the indigenous peoples issue, in order to subsequently draw conclusions and answer the two initial research questions. Following the order of the paragraphs in this chapter, the first topic refers to the analysis of the Colombian Constitution of 1991 and the Colombian government's compliance with international standards for the protection of Indigenous rights. Analyzing the aforementioned section, it is possible to state firstly that in the 1990s Colombia underwent significant constitutional reforms made to grant more autonomy and rights to indigenous people and minorities; this reformist period led to the adoption of the 1991 Colombian Political Constitution, the turning point for the Colombian people as it resulted in numerous changes and improvements in human, economic, social, and political rights. In particular, the Colombian Constitution recognized indigenous communities as subjects of collective rights, which was revolutionary since rights were only considered individual before then. Among them, I would like to mention again the recognition of the right to lands and the protection of their natural resources, the inclusion of provisions regarding the duty to consult, and the participation in political decision-making through dedicated representation in Senate⁹⁶⁹. Furthermore, there is Law 288/96 that provides a procedure for implementing human rights decisions, including compensation for victims of human rights violations⁹⁷⁰. These elements make Colombia a state that respects indigenous rights in all aspects but, as is often the case, theory does not reflect reality. Thus, the testimonies of the direct subjects make possible to find discrepancies between the right inscribed on paper and what actually happens on the ground.

First of all, I would like to emphasize the consistent pattern of violence, threats, and attacks against Indigenous communities revealed by the member of *Comunidad de Paz*: this high rate of daily violence is the first evidence of the usual breach of human rights by non-state actors and the negligence, absence, or unwillingness of the state to intervene. Furthermore, it is possible to emphasize the failure to uphold legal obligations enshrined in the Constitution of 1991, together with the lack of consultation and representation. Moreover, as stressed by interviewees, although Petro's current government has a different and more progressive political slant than the far-right governments of the past, there are structural challenges and problems within the system due to strong ties to politicians and officials of the past who are still entangled in the political apparatus.

⁹⁶⁹ Moreover, it's worth to remember the implementation of legal mechanisms to control and monitor the concrete protection of indigenous rights, such as *Acción de Tutela*, *Derecho de Petición*, and *Acción Popular*. Additionally, Colombia has made progress in developing administrative procedures and instruments to facilitate compliance with international recommendations from international bodies like the Human Rights Committee. See paragraph 5.2.

⁹⁷⁰ It establishes a committee to examine violations and issue opinions on compliance, ensuring that decisions of international human rights bodies are enforced domestically.

Then, concerning the other interviews about the indigenous of Amazonia, is possible to underline that indigenous peoples have historically lacked legal rights to their territories, a fact that increased the environmental devastation leading to the loss of traditional indigenous lifestyles, spiritual territories, and practices. Therefore, indigenous tribes face challenges in securing land rights, sustainable preservation of the environment, and protection of their own lives, due to criminal activities, such as money laundering, drug trafficking, and corruption⁹⁷¹. Therefore, despite constitutional provisions inscribed in the Constitution, indigenous territories face challenges due to armed actors occupying their spaces, particularly in non-municipalized areas, leading to violations of their rights and safety. Furthermore, I would like to point out that the obligation of prior consultation is hardly ever respected, especially in territorial interventions for mining and large-scale agriculture, as stated by the two interviewees indigenous Ati and Andrés. Consequently, the representation of indigenous peoples by the Colombian government is rated a 4 out of 10 by Andrés and 0 out of 10 by Arley, with historical injustices, colonialism, exclusion, and armed conflict contributing to their vulnerability and pauperization. Moreover, concerning compliance with international standards such as provisions enshrined in the ILO Convention No. 169, it was outlined by Andrés that it is very complicated in Colombia to guarantee all the provisions of the international agreement, especially in terms of land and employment conditions and contracts.

Finally, interviewees question the effective implementation of the right to self-determination for indigenous peoples by stating that for indigenous communities there are constitutional and legal limitations to the exercise of their powers of self-government and autonomy. Until there is a real guarantee of the right to self-determination, land, and consultation, Indigenous will never be a free people.

⁹⁷¹ In fact, involving indigenous peoples in projects promoting climate action and environmental conservation is essential, as they possess vital knowledge and techniques for protecting and sustaining ecosystems.

CONCLUSIONS

I began the writing of this thesis by observing the facts surrounding the particular relationship between the Colombian state, its government, civil society, paramilitarism, and indigenous people. Having experienced firsthand only a tenth of all that Colombia's Indigenous communities suffer and are subjected to, the first question that arose was: in the face of so much violence, how does the complex system of international law and the states that are part of it act? This then led to the two initial research questions set out in the first chapter of the research:

In the realm of international law, how are treaties and conventions related to indigenous peoples viewed by countries?

Does a country like Colombia, which has a rather cutting-edge constitution regarding indigenous peoples, really respect these rights and obligations for safeguarding them? Additionally, will the current government, which is committed to forging a lasting peace, really be able to include indigenous communities in the process?

After carefully examining various perspectives, international treaties, and documents, and conducting a case study, I have been able to address my research questions.

Firstly, reflecting on the initial part of my research, including the analysis of the definition of Indigenous at the international level and the multitude of treaties adopted and ratified by the majority of countries worldwide, it is apparent that governments theoretically recognize the significance of participating in international agreements to safeguard Indigenous rights. By ratifying these agreements, they commit themselves to the obligations outlined within them. So theoretically, excluding countries not party to the treaties and conventions I mentioned in Chapter Three, most states recognize the importance of international law in protecting indigenous people from the violation of their fundamental rights. Nevertheless, the actual adherence to these agreements' norms and provisions still does not exist. I, unfortunately, believe that this lack raises profound questions regarding the efficacy of international law in protecting the rights and interests of indigenous communities worldwide. In this legal framework, the main problem seems to be the absence of enforcement mechanisms such as monitoring systems capable of ensuring compliance with international obligations by states.

Regarding the second question, as mentioned in the key findings section, it is clear that Colombia is not fully meeting its prior consultation obligations due to the complex social situation characterized by a high level of insecurity, crime, and violence perpetuated by deeply entrenched

groups. Nevertheless, with the new president at the helm, Colombia has the potential to navigate out of this precarious and intricate situation. This will undoubtedly be a lengthy journey, and the outcomes will only materialize in the future. Significant change and transition invariably require time, dedication, and resources. Colombia is on the right track. Considering the reality of the situation, it is conceivable to assert that the initial actions required to bolster this process and effectively involve Indigenous communities, who constitute a significant asset for the country, include enhancing international cooperation and multilateral agreements between nations, advancing technologies for detecting and monitoring territorial activities, disseminating accurate information, and fostering a bio-based economy in urban areas to promote sustainable development. Additionally, the involvement and backing of international organizations, as well as a judiciary that operates independently, are essential to guarantee equitable and just trials for Indigenous peoples. It is also important to actively engage the civil society in the process, along with the participation of private sectors, and ultimately to foster interdependence among nations and cultivate new alliances with local governments.

The international recognition of indigenous rights in the law system is only the first step to ensuring their protection by States and fighting criminal groups to stop the exploitation and usurpation from ancestral territories, the constant killings in villages, and the ongoing violation of human rights. Over the years, from 1957 - when ILO C-107 was adopted - to the present, the international community and civil society have become increasingly aware of the cause of indigenous people, fostering the development of international law through new conventions and binding treaties. However, it is still not enough. It is crucial to mobilize individuals and make changes from within the system, particularly at the local level, by fostering close collaboration between government and citizens. Each state should recognize the significance of ensuring Indigenous peoples' rights to self-determination, land, prior consultation, and involvement in the political process for their continued existence and the sustainable development of our planet. If nature perishes, so will we.

Finally, I would like to emphasize that international law is a dynamic field that requires constant reinterpretation. The evolving times and needs of humankind necessitate staying abreast of global developments. Thus, theory must be complemented by practical application. While the impact may not be immediate, these measures are essential for effecting tangible changes. To dismantle a criminal network, Colombia requires a strong network and must recognize the valuable assistance that indigenous communities can offer in the ongoing peace process. To conclude, as established by the Colombian people in 1991 in the Constitutional Charter, we should remember that:

“La paz es un derecho y un deber de obligatorio cumplimiento”⁹⁷².



Figures 24, 25, 26 and 27. ⁹⁷³

“Somos la generación con la responsabilidad de salvaguardar el conocimiento ancestral”⁹⁷⁴.

⁹⁷² *Op. cit.* Constitución Política De Colombia 1991, Art. 22.

⁹⁷³ Photos taken by Daniel Padilla, Leticia, Amazonas, Colombia.

⁹⁷⁴ Statement by the Indigenous Murui Muina.

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