

# **Brief notes about the development of rights of traditional people under the jurisprudence of the Inter-American Court of Human Rights**

## **Breves considerações sobre o desenvolvimento dos direitos dos povos tradicionais a partir da jurisprudência da Corte Interamericana de Derechos Humanos**

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### **Abstract**

The main objective of this paperwork is to demonstrate how the safeguarding of human rights in relation to minority groups, especially traditional peoples, is developed in the context of the Inter-American System for the protection of Human Rights. In this sense, it is highlighted the theme of decoloniality in order to reveal the importance of pursuing the development of human rights in an intercultural manner that meets the real desires of traditional populations. Therefore, the specific objective is to analyze how the search for the protection of these people's rights has been based on the jurisprudence of the Inter-American Court of Human Rights. For this, the present work uses the methodology of approaching legal dialectics, accompanied by doctrinal bibliographic research, as well as international legal instruments that allow a better perception on the reality of the evolution of international law in the protection of the rights of traditional peoples.

**Keywords:** Decoloniality. Human Rights. Inter-American Court of Human Rights. Minority Rights. Traditional Peoples.

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## Resumo

O objetivo principal do presente artigo é demonstrar como se desenvolve a salvaguarda dos direitos humanos em relação aos grupos minoritários, especialmente, dos povos tradicionais no contexto do Sistema Interamericano de proteção aos Direitos Humanos. Nesse sentido, destaca-se a temática da decolonialidade a fim de revelar a importância de se buscar o desenvolvimento dos direitos humanos de maneira intercultural que atenda aos verdadeiros anseios das populações tradicionais. Por conseguinte, o objetivo específico é analisar como tem sido a busca pela proteção dos direitos dessas pessoas a partir da jurisprudência da Corte Interamericana de Direitos Humanos. Para isso, o trabalho utiliza a metodologia de abordagem da dialética jurídica, acompanhada de pesquisa bibliográfica doutrinária, bem como instrumentos jurídicos internacionais que permitem melhor percepção sobre a realidade da evolução do direito internacional na proteção dos direitos dos povos tradicionais.

**Palavras-Chave:** Corte Interamericana de Direitos Humanos. Decolonialidade. Direitos das Minorias. Direitos Humanos. Povos Tradicionais.

## Introduction

In the end of the fifteenth century, Christopher Columbus arrived on the new continent, beginning a period of exploration of the new land. However, there is a very important factor to be highlighted: the new land was already populated. The natives were physically similar to their European “discoverers”, but when faced with their completely archaic way of life in their eyes, the mission arose to bring civilization and Christianity to a barbaric and pagan people. The purpose soon became a real extermination, with the death of millions of indigenous people.

The difficulty of dealing with the different, that is, with those who do not fit the Eurocentric standards: white and Christian men persist to the present day. Globalization, by making the borders of States porous, also brings contact with different cultures. Although International Law has come to play an important role in this new global scenario, to what extent has it cut the roots of European Law? That is, is International Law really international?

Diversity, whether cultural, racial, religious or ethical, is today one of the greatest challenges to be overcome by humanity. The creation of the Being, in the modern standard, took place from the exclusion of the stranger and his

demotion as different, under the grounds "we vs. them", because "they" are not equal to "us", being justified the savagery committed for "us" and for "them" not for the simple reason that we do not see "them" as "us".<sup>3</sup>

Human Rights are the consecration of humanity's historic achievements. However, its positivization was under the responsibility of the countries with power, that is, it followed the modern uniform and Eurocentric pattern.

After the atrocities committed during the Second World War, the need for Human Rights to be recognized at the international level came to light, and the 1948 Universal Declaration of Human Rights<sup>4</sup> came about. But what are these rights and what is their applicability for the diversity of people and cultures?

It should be noted that human rights have their complexity in the form of globalized localism or as a globalization against hegemony. According to Santos<sup>5</sup>, human rights can only be considered universal when they are reconceptualized as multicultural. Until then, the application of human rights will not be universal and will operate as a top-down globalization.

Therefore, the purpose of this article is to analyze part of the jurisprudence of the Inter-American Court of Human Rights and its consequences, with respect to minorities. Thus, it seeks to rethink the application of Human Rights under a dialogical and democratic bias, where cultural differences are observed.

This analysis has its character of importance based on the emergence of peoples colonized by their rights, that is, an unveiling of their forces in the search for knowledge of their culture and their concept of human dignity. The construction of these new rights must expand to a permanent space in society, in which the creation and participation of all is encouraged, thus exercising citizenship in its broadest sense.

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<sup>3</sup> MAGALHÃES, José Luiz Quadros de. **Estado Plurinacional e Direito Internacional**. Curitiba: Juruá Editora, 2012.

<sup>4</sup>UNITED NATIONS. **Universal Declaration of Human Rights**. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>. Accessed on: 10 Dec. 2020.

<sup>5</sup> The author emphasizes that the brief analysis of the universal character of Human Rights does not aim to deny this characteristic, however it is necessary that the paradigm of modernity is broken so that Human Rights can give a voice and build mechanisms so that everyone can be heard without losing its culture and history. SANTOS, Boaventura de Souza. Para uma concepção multicultural dos Direitos Humanos. **Contexto Internacional**, Rio de Janeiro, n. 1, v. 23, jan./jun. 2001.

## 1. The rights of indigenous peoples and the international community

The creation of the United Nations in 1945 came with the objective of preserving peace between States, encouraging the solution of conflicts by peaceful means and offering adequate means of collective security. Until its institution, it is not guaranteed to affirm that, in International Law, there was a conscious and organized concern about Human Rights, since until then only a few separate treaties, in an indirect way, took care to protect minorities in the event of State succession.<sup>6</sup>

The first Article of the United Nations Charter<sup>7</sup> establishes the purposes of the organization and informs that the international relations must be guided by the observance of the right of all peoples to self-determination. The inclusion of the principle mentioned hereto is a milestone in the transformation of a custom before the political and moral order for solidification as a legal rule.

The principle of self-determination, as emphasized by Dinh, Dallier and Pellet, enshrined in the United Nations Charter<sup>8</sup>, does not have as its main objective the promotion of decolonization. The document legally organizes colonialism, as it does not provide for the independence of non-autonomous territories (Chapter XI), but envisions the possibility. The principle then is not just a “simple rule of political or diplomatic art”, it is a rule of customary International Law, and even *jus cogens*.<sup>9</sup>

Focused on this aim, the Vienna Convention of 1969<sup>10</sup> establishes, in its Article 53, the mandatory rules of *jus cogens*, that is, rules that must be respected and protected by all member States, in addition to being committed to seeking new mechanisms for international protection.

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<sup>6</sup> BRANT, Leonardo Nemer Caldeira. **Comentário a Carta das Nações Unidas**. Belo Horizonte: Editora CEDIN, 2008. On this matter, the author explains that since the adoption of the 1948 Universal Declaration of Human Rights, all subsequent conventions found inspiration by following its principles.

<sup>7</sup> UNITED NATIONS. **United Nations Charter**. Available at: <https://www.un.org/en/about-us/un-charter/full-text>. Accessed on: 10 Dec. 2020.

<sup>8</sup> UNITED NATIONS. **United Nations Charter**.

<sup>9</sup> DINH, Nguyen Quoc; DAILLER, Patrick; PELLET, Alain. **Direito Internacional Público**, 2. ed. Lisboa: Fundação Calouste Gulbenkian, 2003. p. 514.

<sup>10</sup> UNITED NATIONS. **Vienna Convention on the law of treaties**. 1969. Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. Accessed on: 10 Dec. 2020.

Concerning the rights of indigenous peoples, it started be recognized as minority rights by the UN in the 1990s. It corresponds to a defense of the weakest collective rights, since it represses the protection of indigenous people to the minority regime under Article 27 of the International Covenant on Civil and Political Rights<sup>11</sup> and not as holders of the right to self-determination presented on Article 1, of the same document.

In 1994, the United Nations Draft Declaration on the Rights of Indigenous Peoples<sup>12</sup> was launched, where debates on the recognition and breadth of the right to self-determination begin. The main objections presented to the document were: i) indigenous communities are not peoples with the right to self-determination; ii) impossibility of including self-determination in the declaration due to its content being vague; iii) self-determination means secession; iv) the right to self-determination is dispensable, just autonomy is enough; v) possibility of division of the State due to the self-determination of indigenous peoples.<sup>13</sup>

Despite the great resistance in the adoption of the Declaration<sup>14</sup>, the understanding of the right to difference has been further strengthened, mainly to indigenous culture. The statement is confirmed by the establishment, for example, of the following events/documents: i) the International Year of the World's Indigenous Peoples, in 1993; ii) the International Decades for the Indigenous Peoples of the World (1995-2004 and 2005-2014); iii) in 2000, when the Permanent Forum on indigenous issues was held; iv) in 2001, with the release of the Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous People<sup>15</sup>.

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<sup>11</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. **International Covenant on Civil and Political Rights.** Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Accessed on: 10 Dec. 2020.

<sup>12</sup> UNITED NATIONS. **United Nations Declaration on the Rights of Indigenous Peoples.** Available at: [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf). Accessed on: 10 Dec. 2020.

<sup>13</sup> THORNBERRY, Patrick. **Indigenous Peoples and Human Rights.** Manchester: Manchester University Press, 2002. p. 47.

<sup>14</sup> UNITED NATIONS. **United Nations Declaration on the Rights of Indigenous Peoples.**

<sup>15</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. **Special Rapporteur on the rights of indigenous peoples.** Available at: <https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx>. Accessed on: 10 Dec. 2020.

However, despite the great manifestation, only the recognition of the right to cultural diversity did not end discussions on self-determination and indigenous peoples' right to it.

The debates on the Draft Declaration<sup>16</sup> unfolded until 2007, when in September of the same year it was approved by the General Assembly<sup>17</sup>. Despite the non-binding character of the Declaration, the document represents a major political advance at the international level.

Even with the discussions, the Declaration<sup>18</sup> recognizes indigenous peoples' right to self-determination<sup>19</sup>. This recognition is carried out with the intuition of asserting the right to govern their own communities autonomously. Therefore, the right to self-determination is not as provided for in Article 1 of the International Covenant on Civil and Political Rights<sup>20</sup>, but a right to autonomy and self-government under the tutelage of a Sovereign State.

It is worth noting that indigenous peoples, although autonomous, are subject to the system of human rights protection, that is, they are guaranteed all the rights established in international human rights protection agreements. In the event of a minority within an indigenous community, their human rights must be guaranteed.

In this sense, it appears that self-determination for indigenous peoples has two dimensions: while it is a political right, it is a cultural right. These two aspects aim to ensure collective ownership, as they require the State to refrain from violating and also require protective measures to be taken.

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<sup>16</sup> UNITED NATIONS. **United Nations Declaration on the Rights of Indigenous Peoples.**

<sup>17</sup> Through Resolution 6/36 of 2007, the Human Rights Council created the Mechanism of Experts on the Rights of Indigenous Peoples. The Declaration was approved by 144 votes in favor, 4 votes against (Australia, Canada, United States and New Zealand) and 11 abstentions (Russian Federation, Ukraine, Samoa, Nigeria, Kenya, Azerbaijan, Bangladesh, Bhutan, Burundi, Georgia and Colombia).

<sup>18</sup> UNITED NATIONS. **United Nations Declaration on the Rights of Indigenous Peoples.**

<sup>19</sup> The following achievement stands out: *i)* Article 3, which established the right to freely determine their political condition and freely pursue their economic, social and cultural development. *ii)* Article 4, which provided for the right to autonomy or self-government in matters related to internal affairs; and *iii)* the enshrining of the right to preserve and strengthen their own political, legal, economic, social and cultural institutions, with the right to participate in the political, economic, social and cultural life of the State, as long as they wish. UNITED NATIONS. **United Nations Declaration on the Rights of Indigenous Peoples.**

<sup>20</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. **International Covenant on Civil and Political Rights.**

When the State recognizes pluriculturality, it does not mean that the idea of a unitary State will be undone by the separation of territories or indigenous States, it means that every human being who integrates society can fully live its culture. The Democratic conception of the Rule of Law gains greater legitimacy by accepting the diverse cultures and particular legal systems of each people who live under its protection, considering that when there is a unified and cohesive process by the population's own conscience that generate development and progress for all.

The International Labor Organization, founded in 1919, is the oldest institution in the United Nations system to have the indigenous issue on its agenda<sup>21</sup>. The organization's objective is to protect the living and working conditions of individuals, seeking to abolish social and economic injustices, which are today the main reasons for armed conflicts. To the detriment of these designs, the organization faced the issue of indigenous labor, mainly in Latin countries.

After the 75th and 76th sessions of the International Labor Conference, the Convention 169<sup>22</sup> on indigenous and tribal peoples in independent countries was adopted in 1989. Unlike the Convention 107<sup>23</sup>, the new document incorporates collective rights aimed at respecting cultures, in addition to recognizing the right to exist as different collectivities.

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<sup>21</sup> In 1926, the International Labor Organization (ILO) established a Committee of experts to implement international standards aimed at protecting indigenous labor. Thus, there is the Convention 64 of 1939 that regulates the modalities of employment contracts between indigenous employees and non-indigenous employers. After the 40th International Labor Conference, the Convention 107 was adopted concerning the protection and integration of indigenous peoples or other tribal or semi-tribal populations, based on a report prepared by the ILO jointly with FAO, UNESCO and WHO. However, this convention was criticized for considering that the beneficiaries of its protection were delayed and that needed help to evolve to the point of ceasing to exist as a minority group.

<sup>22</sup>INTERNATIONAL LABOR ORGANIZATION. **Convention 169 on Indigenous and Tribal Peoples**, 1989. Available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169). Accessed on: 7 Dec. 2020.

<sup>23</sup>INTERNATIONAL LABOUR ORGANIZATION. **Indigenous and Tribal Populations Convention** 1957. Available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C107](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107). Accessed on: 10 Dec. 2020.

The Convention presents concepts of tribal peoples<sup>24</sup> and indigenous peoples<sup>25</sup> in a broad way so that its application would be accepted by most countries and excludes the negative mention of civilizational inferiority or backwardness. Another advance that the text of the Convention brings is the explicit recognition of the usurpation of lands since the colonial period and the compulsory expulsion and displacement, in addition to expanding the social agents involved.

In this way, the greatest current challenge faced by indigenous peoples is no longer the search for their legal recognition, but that its application could be fulfilled in their daily lives. It cannot be forgotten that the Convention 169<sup>26</sup> brings the possibility of indigenous peoples to pressure their respective governments to implement their rights and to move new international pressures.

It is in this context that the Convention<sup>27</sup> provides for the right to prior consultation, which constitutes an opportunity for the joint construction of new norms of understanding between indigenous and tribal peoples and the State<sup>28</sup>.

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<sup>24</sup> Article 1(1)(a) of the Convention 169 on Indigenous Peoples and Tribal states that: tribal 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 or traditions or by special laws or regulations. INTERNATIONAL LABOR ORGANIZATION. **Convention 169 on Indigenous and Tribal Peoples**, 1989.

<sup>25</sup> Article 1(1)(b) of the Convention 169 on Indigenous Peoples and Tribal states that: peoples in independent countries who 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 colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. INTERNATIONAL LABOR ORGANIZATION. **Convention 169 on Indigenous and Tribal Peoples**, 1989.

<sup>26</sup> INTERNATIONAL LABOR ORGANIZATION. **Convention 169 on Indigenous and Tribal Peoples**, 1989.

<sup>27</sup> INTERNATIONAL LABOR ORGANIZATION. **Convention 169 on Indigenous and Tribal Peoples**, 1989

<sup>28</sup> Prior consultation is a mechanism provided for in Articles 6, 7 and 15 of the Convention that constitutes the moment when traditional communities are notified of the economic interest in the area that may directly affect them. It should be noted that this procedure must be carried out at all times before the project is authorized, that is, after the realization of the environmental impacts in the region, a prior consultation must also be carried out notifying those directly affected of the consequences of the action. Only after this consultation and with the consent of those affected that a company shall start its activities. INTERNATIONAL LABOR ORGANIZATION. **Convention 169 on Indigenous and Tribal Peoples**, 1989.



## 2. The efforts for intercultural human rights

History of our society is interconnected and in order to understand the scenario experienced nowadays, it is necessary to look to the past. Enrique Dussel<sup>29</sup> makes a historical cut in 1492, considering the beginning of modernity when Europeans had the opportunity to confront and managed to control, overcome and violate each other.

Analyzing the issue from the author's perspective, the "other" was not "discovered", but "uncovered". On this matter, he points out that "1492 will be the moment of the birth of Modernity as a concept, the concrete moment of the 'origin' of a 'myth' of very particular sacrificial violence, and, at the same time, a process of covering the non-European".<sup>30</sup>

In this sense, the "discovery" is just the beginning of a journey. It happens because after recognizing the territory and the domination of the natives, it was necessary to pacify them in a new strategy of political bureaucracy to dominate the other.<sup>31</sup>

The cover-up of Indigenous and Black America is, thus, a creation of the myth of historical linearity, because according to modern European thought, European culture as the most developed, is hierarchically superior to the others and responsible for the hegemonic indoctrination of the original peoples. Quijano make an interesting summary on the topic:

The intersubjective and cultural relations between Europe, or, better saying, Western Europe and the rest of the world, were codified in a whole set of new categories: East-West, primitive-civilized, magical/mythical scientific, irrational-rational, traditional -modern. In short terms, Europe and non-Europe. Even so, the only category with the due honor of being recognized as the Other in Europe or the West, was the East. Not the Indians of America, nor the blacks of Africa. These were simply primitive. Under this codification of relations between European / non-European, race is undoubtedly the basic category (free translation)<sup>32</sup>.

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<sup>29</sup>DUSSEL, Enrique. **1492: O Encobrimento do outro. A origem do "mito da modernidade"**. Petrópolis: Vozes, 1993.

<sup>30</sup>DUSSEL, Enrique. **1492: O Encobrimento do outro. A origem do "mito da modernidade"**. p. 8.

<sup>31</sup>DUSSEL, Enrique. **1492: O Encobrimento do outro. A origem do "mito da modernidade"**. p. 51.

<sup>32</sup> The original quote says: "*As relações intersubjetivas e culturais entre a Europa, ou, melhor dizendo, a Europa Ocidental e o restante do mundo, foram codificadas num jogo inteiro de novas categorias: Oriente-Occidente, primitivo-civilizado, mágico/mítico científico, irracional-racional,*

However, it should be noted that Latin America is just one example of a Continent that has seen its cultural diversity, its roots, and its way of life being completely suppressed by modernity. According to Dusse<sup>33</sup> it presents a miscegenation, with a syncretic and hybrid culture, a Colonial State, as well as, a dependent and peripheral capitalist economy.

International Law is not out of this European and uniform reality, but it is possible to notice important changes in institutions, where attempts are made to break with modernity, such as, the International Labor Organization Conventions on indigenous law. It is in this scenario that the International Courts play an important role in affirming the rights to diversity.

Based on this panorama, what are Human Rights? Why, even though it is considered a protection mechanism, is it not applied by all countries, living up to its “universal” characteristic?

Human Rights bring to light the essential needs of mankind, building a society structure making coexistence possible. As a result of this ideal, in the first instance, individual guarantees and political freedoms are born. As time goes by and paradigms change, there is an expansion of rights, in view of new actors who have expanded threats to man, however it is observed that the history of these conquests belongs to Western peoples.

According to Magalhães<sup>34</sup> Human Rights, as historical, also bring with them political characteristics. Thus, the naturalization of Human Rights is a danger, as it expresses the power of those who can say that it is natural, which is human nature. Thus, if human rights are not historical, but natural rights, one wonders who is capable and who can determine what is natural for the human in

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*tradicional-moderno. Em suma, Europa e não-Europa. Mesmo assim, a única categoria com a devida honra de ser reconhecida como o Outro da Europa ou Ocidente, foi o Oriente. Não os índios da América, tampouco os negros da África. Estes eram simplesmente primitivos. Sob essa codificação das relações entre europeu/não-europeu, raça é, sem dúvida, a categoria básica” QUIJANO, Aníbal. Colonialidade do poder, eurocentrismo e América Latina. In: LANDER, Eduardo (coord). **A colonialidade do saber: eurocentrismo e ciências sociais**. Buenos Aires: CLACSO, Consejo Latinoamericano de Ciencias Sociales, 2005. Available at: [http://biblioteca.clacso.edu.ar/clacso/sur-sur/20100624103322/12\\_QUIJANO.pdf](http://biblioteca.clacso.edu.ar/clacso/sur-sur/20100624103322/12_QUIJANO.pdf). Accessed on: 8 Dec. 2020. p. 111.*

<sup>33</sup> DUSSEL, Enrique. **1492 – O Encobrimento do outro – A origem do “mito da modernidade”**. Petrópolis: Vozes, 1993. p. 51.

<sup>34</sup> MAGALHÃES, José Luiz Quadros de. **Estado Plurinacional e Direito Internacional**. p. 49.

the right question. However, when Human Rights are stated as historical, it is admitted that we are the authors of history, where the content of these rights must be built by open dialogue, without hegemony.

Therefore, it must be borne in mind that human rights as cultural processes cannot be seen as neutral situations, arbitrarily defined by a dominant power, but as a necessary path for the discovery of the different, that is, with the objective of rescuing diversity and transform the uniform and homogenizing rationality present in Western modernity.

In a quotation endowed with clarity and depth Douzinas<sup>35</sup> affirms that Human Rights are the merit of a worthless world as its ideology aims to include all individuals within a culture unifying, unaware of their individuality and values. The author complements his speech by stating that rights are neither universal nor absolute; they do not belong to a theoretical human being, but to people in existing societies with their boundless modification of conditions, tradition and legal prerogative.<sup>36</sup>

In this sense, Piovesan<sup>37</sup> also stresses that dialogue is extremely important as a mechanism for the reconstruction of Human Rights. In this sense, the author points out that it is necessary to understand that there is a myriad of cultures and, therefore, the dialogue between them is fundamental to achieve a multicultural conception of Human Rights.

In line with the discourse, the development of Human Rights is sought with the participation and view of the countries from the South, in which a rethinking of the concealment of these peoples and the precision of the unveiling of their cultures, traditions and roots is presented. Only in this way our society will be able to have effective Human Rights applicable to all peoples. In other words, new perspectives and a new point of view need to rise in the struggle for effectiveness of rights. In this sense, it is important to highlight Santos thoughts:

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<sup>35</sup> DOUZINAS, Costas. **O fim dos Direitos Humanos**. Tradução: Luzia Araújo, São Leopoldo: Unisinos, 2009. p. 223.

<sup>36</sup> DOUZINAS, Costas. **O fim dos Direitos Humanos**. p. 113.

<sup>37</sup> PIOVESAN, Flávia. **Direitos Humanos e Direito Constitucional Internacional**. São Paulo: Saraiva, 2008.

Paradoxically - and contrary to the hegemonic discourse - it is precisely in the field of human rights that Western culture has to learn from the south so that the false universality attributed to human rights in the imperial context is converted, in the translocality of cosmopolitanism, into an intercultural dialogue (free translation)<sup>38</sup>.

Thus, the present paper presents the beginning of that struggle. According to Cançado Trindade<sup>39</sup>, International Law by recognizing the human being as a subject of Law represents a true legal revolution, where the individual himself can struggle against oppression, manifestations of arbitrary power and become able to seek a better world. Hence, it is important to give people tools to make them be heard, especially minorities, as indigenous peoples.

### **3. The Inter-American Court of Human Rights and the protection of indigenous peoples**

Although some international instruments for the protection of indigenous peoples' rights have been developed in recent years, cases of violations with regard to this group are not uncommon. At the regional level, the Inter-American Court of Human Rights (IACHR) has already had the opportunity to express its understanding on several occasions, which is why we will analyze its jurisprudence in this review.

The Inter-American Court of Human Rights has as its base the American Convention on Human Rights<sup>40</sup> (hereinafter referred to as Convention), adopted on November 22, 1969, coming into force on July 18, 1978, after delivery of the eleventh instrument of ratification. Its main purpose is to judge cases of human

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<sup>38</sup> The original quotation is: "*Paradoxalmente – e contrariando o discurso hegemônico – é precisamente no campo dos direitos humanos que a cultura ocidental tem de aprender com o sul para que a falsa universalidade atribuída aos direitos humanos no contexto imperial seja convertida, na translocalidade do cosmopolitismo, num diálogo intercultural*". SANTOS, Boaventura de Souza. Por uma concepção multicultural dos Direitos Humanos. **Revista Crítica de Ciências Sociais**, n. 48, p. 11-32, jun. 1997.

<sup>39</sup>TRINDADE, Antonio Augusto Cançado. **A visão humanista do Direito Internacional**. Belo Horizonte: Editora Del Rey, 2013. p. 21.

<sup>40</sup>ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights**. Available at: [https://www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights.pdf](https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf). Accessed on: 10 Dec. 2020.

rights violations that have occurred in the Member States of the Organization of American States (OAS), which recognize its jurisdiction.<sup>41</sup>

One of the Court's main cases on indigenous rights is the *Yatama v. Nicaragua*, in which members of the Yatama party were prevented from running in local elections for mayors, vice mayors and city councilors, since the Supreme Electoral Council of Nicaragua decided that the party did not meet basic requirements established to constitute itself, such as, the minimum percentage of valid signatures.<sup>42</sup>

In considering the case, the IACHR found that there was a violation of Articles 23 and 24 of the American Convention on Human Rights<sup>43</sup> and, therefore, condemned Nicaragua to reform its Electoral Law in order to amend articles contrary to the Convention, as well as established a compensation for material and moral damages. In its respectful decision, it was also decided that:

195. It is essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination. The facts of the instant case refer principally to political participation through freely-elected representatives, the exercise of which is also protected in Article 50 of the Nicaraguan Constitution.

(...)

202. When examining the enjoyment of these rights by the alleged victims in this case, it must be recalled that they are members of indigenous and ethnic communities of the Atlantic Coast of Nicaragua, who differ from most of the population, *inter alia*, owing to their languages, customs and forms of organization, and they face serious difficulties that place them in a situation of vulnerability and marginalization.

(...)

206. Instituting and applying requirements for exercising political rights is not, *per se*, an undue restriction of political rights. These rights are not absolute and may be subject to limitations. Their regulation should respect the principles of legality, necessity and proportionality in a democratic society. Observance of the principle of legality requires the State to define precisely, by law, the requirements for voters to be able to take part in the elections, and to stipulate clearly the electoral

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<sup>41</sup>Article 44 of the American Convention on Human Rights provides that any person, group of persons or non-governmental entities legally recognized in one or more of the OAS Member States is able to file notifications to the Commission alleging violation of the Convention by the State party. After the Commission's analysis and further recommendation, the case might be referred to the Court. ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

<sup>42</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of Yatama v. Nicaragua, Judgment of June 23, 2005.** Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_127\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf). Accessed on: 7 Dec. 2020.

<sup>43</sup> ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

procedures prior to the elections. According to Article 23(2) of the Convention, the law may regulate the exercise of the rights and opportunities referred to in the first paragraph of this Article, only for the reasons established in this second paragraph. The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose. When there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.<sup>44</sup>

In the case *Chitay Nech et al. v. Guatemala*, whose indigenous Mayan political leader Kaqchikel Florencio Chitay Nech was kidnapped and reported missing, the Court considered the fact to be "enforced disappearance" and, which is often linked to political crimes, through the history of dictatorial regimes suffered in America Latin.<sup>45</sup>

The State of Guatemala has been condemned for the forced disappearance, stressing that Member States must promote means to ensure that traditional communities participate effectively in political life. According to the IACHR:

104. The Commission and the representatives coincide in expressing that the State is responsible for the violation to Article 23 of the Convention, in relation with Article 1(1) of that treaty, against Florencio Chitay Nech, given that the purpose of his forced disappearance was the direct damage, and even more, the absolute suppression of the exercise of his political rights. In this sense, the repression unleashed against him had the purpose of depriving him from all political participation and, in general, participation in the social and political structures of which he formed a part, as well as the complete annihilation of the leadership and structure of the municipality.

105. The representatives, in their written brief of final arguments, added that such violation was carried out in two levels: a) the right to directly participate in the leadership of political affairs in conditions of equality, given that his character as indigenous and cooperative leader constituted the motive for his disappearance and there exists a general pattern of harassment against the Mayans, and b) the right of the indigenous community of Quimal de San Martín Jilotepeque to participate through their freely elected representatives since the violation to the rights of the elected indigenous also affected the rights of the electors. In turn, the State acknowledged its responsibility for the violation of this right (supra para. 13).

(...)

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<sup>44</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of Yatama v. Nicaragua, Judgment of June 23, 2005.**

<sup>45</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of Chitay Nech et al. v. Guatemala, Judgment of May 25, 2010.** Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_212\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_212_ing.pdf). Accessed on: 7 Dec. 2020.

114. In this sense, the Court has acknowledged that the State shall guarantee that “the members of the indigenous and ethnic communities [...] are able to participate in the making of decisions regarding matters and policies that affect or may affect their rights and the development of such communities, in a manner that they can integrate themselves into the State institutions and organs and participate in a direct manner proportional to their population in the leadership of public affairs [...] and in accordance with their values, traditions, customs and forms of organization.” The contrary affects the lack of representation in the institutions charged with adopting policies and programs that could affect their development.<sup>46</sup>

For these rights recognized by the IACHR, it is important to mention that the right of recognition of the legal personality of the communities, because despite receiving a theoretical support from public institutions in carrying out bureaucratic procedures, they often find it very difficult to regularize their condition before the State. Therefore, when the community starts to plead the protection of their rights, in most of the cases they find it hard since the State denies its existence due to the lack of registration.

In the case of the Sawhoyamaxa Indigenous Community v. Paraguay the Court expressed the State's bad faith in taking advantage of this lack of institutionalization:

192. The above mentioned members of the Community have remained in a legal limbo in which, though they have been born and have died in Paraguay, their existence and identity were never legally recognized, that is to say, they did not have personality before the law. Indeed, the State, in the instant proceeding before the Court, has intended to use this situation for its own benefit.<sup>47</sup>

In this regard, it urges mentioning Article 3 of the Convention<sup>48</sup> that provides the guarantee of the recognition of legal personality, considered as a human right, raising the assurance beyond a formal State bureaucracy. However,

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<sup>46</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of Chitay Nech et al. v. Guatemala, Judgment of May 25, 2010.** Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_212\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_212_ing.pdf). Accessed on: 7 Dec. 2020.

<sup>47</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006.** Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf). Accessed on: 7 Dec. 2020.

<sup>48</sup> ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

when observing that this right had to be analyzed by the IACHR, it was evident the communities' difficulty in proving its existence to assert their minimum rights.

Still regarding the recognition of the legal personality of indigenous communities, the Court's understanding was ratified in the case of the *Xákmok Kásek Indigenous Community v. Paraguay*, when its notable decision pointed out:

248. The Court has considered that the content of the right to recognition of juridical personality is that it recognizes to the individual: anywhere, as a subject of rights and obligations, able to enjoy the basic civil rights [which] implies the capacity to be the holder of rights (capacity and enjoyment) and of obligations; the violation of this recognition supposes the denial in absolute terms of the possibility of being a holder of [these basic civil] rights and obligations.

249. This right represents a parameter for determining whether an individual is the holder of the rights in question and whether he or she can exercise them; consequently, the denial of this recognition makes the individual vulnerable before the State or private individuals. Thus, the content of the right to recognition of juridical personality refers to the correlative general duty of the State to ensure the legal conditions and means for this right to be freely and fully exercised by its holders.<sup>49</sup>

Further, for the third time, the right to recognition of the legal personality of indigenous communities was highlighted in a previous trial when the IACHR dealt with the case of the *Yakye Axa Indigenous Community v. Paraguay*:

82. The Court deems that granting legal status makes operative the previously existing rights of the indigenous communities, who have exercised them historically and not since they acquired legal status. Their systems of political, social, economic, cultural and religious organization, and the rights associated with them, such as appointment of their own leaders and the right to claim their traditional lands, are recognized not to the legal entity that must be registered to comply with a legal formality, but to the Community itself, which the Paraguayan Constitution itself recognizes existed before the State.<sup>50</sup>

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<sup>49</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgment of August 24, 2010.** Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_214\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf). Accessed on: 8 Dec. 2020.

<sup>50</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005.** Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf). Accessed on: 8 Dec. 2020.



Another relevant fundamental right analyzed by the IACHR is the right of property to be guaranteed also to indigenous communities, as provided for in article 21 of the Convention<sup>51</sup>. The cases considered by the Court refer to violations of ancestral property and the State's failure to demarcate land.

In one of the main cases analyzed by the Court, the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the State has authorized the concession on community lands to a private company without the assent of the Community. At the time, Article 21 of the Convention<sup>52</sup> was interpreted as meaning that the protection of consecrated property must be extended to all community property.

*In verbis*:

146. The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.

147. Article 29(b) of the Convention, in turn, establishes that no provision may be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.<sup>53</sup>

Thus, the IACHR demonstrates that there is an extension of the guarantee of private property, which happens not only to refer to individual property, but also to collective/community property.

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<sup>51</sup> ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

<sup>52</sup> ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

<sup>53</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001.** Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf). Accessed on: 8 Dec. 2020.

149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather 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 survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>54</sup>

In observing the aforementioned cases, it is possible to assume that the absence of land demarcation or excessive delay by the State also has negative consequences in guaranteeing other basic rights, as highlighted in the case of the *Yakye Axa Indigenous Community v. Paraguay*, whose inefficiency of the State in the delimitation of lands also led to a situation of sanitary and food vulnerability.

However, it is important to point out that the IACHR does not consider that the right to judicial protection is guaranteed only by the existence of resources and procedures established in the domestic legal system of the States. In the case of the *Yakye Axa Indigenous Community v. Paraguay* it was clear that legal means existing in the Paraguayan laws were not sufficient and adequate to make the community fulfill its right.

102. Pursuant to Article 2 of the Convention it is necessary to establish appropriate procedures in the framework of the domestic legal system to process the land claims of the indigenous peoples involved. The States must establish said procedures to resolve those claims in such a manner that these peoples have a real opportunity to recover their lands. For this, the general obligation to respect rights set forth in Article 1(1) of said treaty places the States under the obligation to ensure that said procedures are accessible and simple and that the bodies in charge of them have the necessary technical and material conditions to provide a timely response to the requests made in the framework of said procedures.

103. In the instant case, Paraguay has not taken appropriate domestic legal steps necessary to ensure an effective procedure to offer a definitive solution to the claim made by the members of the *Yakye Axa Community*, under the terms set forth in the previous paragraph.

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<sup>54</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001.**

104. Based on all the above, the Court deems that the legal procedure for the land claim made by the members of the Yakye Axa Community disregarded the principle of reasonable term and was clearly ineffective, all this in violation of Articles 8 and 25 of the American Convention, in combination with Articles 1(1) and 2 of that same Convention.<sup>55</sup>

In the recent case, the Xucuru Indigenous Community v. Brazil, the IACHR condemned the State in the sense of the conclusion of the community's land demarcation process, which recognizes its right to a collective property. When analyzing a field involving the demarcation of indigenous lands, it might be noted that in most of the cases there is a lack of political interest from the States and, therefore, pressure at the international level for the measures become necessary. Still regarding this case, it is important to mention what had been outlined on Report No. 44 by the Inter-American Commission on Human Rights about the importance of the ancestral lands:

The right of indigenous communal property is also based on indigenous legal cultures and their ancestral property systems, regardless of the state recognition; the origin of the property rights of indigenous and tribal peoples is therefore in the customary system of land tenure, which has traditionally existed between the communities. As a result, the Court has stated that "traditional possession of indigenous over their land is equivalent to the title of full domain granted by the State". In the same sense, the Inter-American Court has noted that "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community". In addition to this collective conception of property, indigenous peoples have a special, unique and internationally protected relationship with their ancestral lands, which is absent in the case of nonindigenous. This special and unique relationship between indigenous people and their traditional territories has international legal protection. As stated by the IACHR and the Inter-American Court, the preservation of the particular connection between the indigenous communities and their lands and resources is linked to the very existence of these peoples, and therefore "deserves special protection measures". The property rights of indigenous and tribal peoples protect this close link they have with their territories and natural resources associated with their culture found there.<sup>56</sup>

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<sup>55</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005.**

<sup>56</sup> ORGANIZATION OF AMERICAN STATES. **Report No. 44/15, Case 12.728, Merits, Case of the Xucuru Indigenous People v. Brazil, July 28, 2015.** Available at: <https://www.oas.org/en/iachr/decisions/court/2016/12728FondoEn.pdf>. Accessed on: 8 Dec. 2020. p.17-18.

At the point, another aspect analyzed is that the economic interest of private companies can also contribute to the difficulty of enjoying the right to property. In the case of the Kichwa Indigenous People of Sarayaku v. Ecuador, the State authorized, through a concession contract, oil exploitation within the territory of the community by a private company without prior consultation. On this occasion, the IACHR expressed its understanding that the restriction on the protection of tenure violates other basic rights.

146. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.<sup>57</sup>

It is worth remembering that in this case, the IACHR enshrined the right to prior consultation, as well as the obligation to study environmental and social impacts before any type of potentially destructive economic activity on lands belonging to indigenous communities. The decision informs that:

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<sup>57</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012.** Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf). Accessed on: 8 Dec. 2020.

217. The Court considers that the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society. This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization. Similarly, ILO Convention No. 169 recognizes the aspirations of indigenous peoples 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 live”.

218. In this case, it has not been contested that the company damaged areas of great environmental, cultural and subsistence food value for the Sarayaku. Thus, in July 2003, the CGC destroyed at least one site of special importance in the spiritual life of the members of the Sarayaku People, on the land of the Yachak Cesar Vargas, namely the place known as “Pingullu” (supra para. 104). For the Sarayaku, the destruction of sacred trees, such as the Lispungu tree, by the company entailed a violation of their worldview and cultural beliefs. Furthermore, it was not disputed that the arrival of helicopters destroyed part of the so-called Wichu kachi Mountain, or “place of the parrots” (supra para. 105) causing, according to the beliefs of the People, the spirit owners of that sacred place to leave the site, thereby bringing sterility to the place, which, in turn, is associated by the Sarayaku with the material sterility of the place and the permanent disappearance of the animals from that area until the spirituality of the place is restored. The oil company’s activities caused the suspension, during some periods, of cultural ancestral events and ceremonies of the Sarayaku such as Uyantsa, the most important festival held every year in February, affecting the harmony and spirituality of the community. It was also argued that the seismic line passed near sacred sites used during ceremonies to initiate young people into adulthood (supra para. 105). Thus, the interruption of the community’s daily activities and the dedication of the adults to the defense of their territory have had an impact on teaching children and young people about their traditions and cultural rituals, and on perpetuating the spiritual knowledge of the sages.<sup>58</sup>

Furthermore, the Court also highlighted the importance of active participation by members of the community in order to ensure respect for the principle of good faith in the preparatory and planning stages of any project that will intervene in the territory where the indigenous community is located:

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<sup>58</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012.**

300. In this regard, the Court recalls that the processes of participation and prior consultation must be conducted in good faith at all the preparation and planning stages of any project of this nature. Moreover, in keeping with the international standards applicable in such cases, the State must truly ensure that any plan or project that involves, or could potentially affect the ancestral territory, includes prior comprehensive studies on the environmental or social impact, prepared by independent, technically qualified entities, with the active participation of the indigenous communities concerned.<sup>59</sup>

Therefore, it is noted that the right to prior consultation that has been guaranteed since the IACHR's judgments raises the right to property established in the Convention<sup>60</sup>. In other words, it is not just the right to own the ancestral land, it is also recognizes that the group is able to decide what to do with their land. It is therefore necessary to analyze the economic interests of the State and indigenous peoples, as well as who holds, in fact, the power to take the final decision on how to use the land.

When dealing with the matter of land exploitation, it is relevant to mention the case of the *Saramaka People v. Suriname*, which involved the use of land for the construction of a hydroelectric dam that would result in the flooding of part of the community's territory, as well as, the occurrence of mining concessions in the area. On this occasion, the Court stressed the need for each event to be analyzed in a unique way.

However, the IACHR made it clear that the right to property is not absolute, since the socio-environmental function of the land must be analyzed, as established by the American Convention on Human Rights<sup>61</sup>. In this sense, it also emphasizes that community members must be guaranteed: i) their right of participation in the development or investment project; ii) that the project must revert to a reasonable benefit for the group; and, lastly, iii) that States “must ensure that no concession will be issued within Saramaka territory unless and

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<sup>59</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012.**

<sup>60</sup> ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

<sup>61</sup> ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights.**

until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment".<sup>62</sup>

In another case involving the construction of a hydroelectric plant, Brazil, when the Belo Monte Hydroelectric Plant was being built in the Xingu Basin indigenous communities' area, had its licensing process suspended as a result of a precautionary measure granted by IACHR. It is emphasized that the suspension decision aimed precisely at the participation of the indigenous communities that would be affected in the sense of:

The State must (1) conduct consultation processes, in fulfillment of its international obligations—meaning prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement—in relation to each of the affected indigenous communities that are beneficiaries of these precautionary measures; (2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to the project's Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics among the indigenous communities being granted the precautionary measures as a consequence of the construction of the Belo Monte hydropower plant.<sup>63</sup>

In this regard, it is observed that despite the internal laws of the States often provide rights and guarantees to members of indigenous communities, there is still a lot of failure on effectiveness. Therefore, it would not be correct to understand that the constitution of a country or a local law would, in itself, guarantee the rights of that group. Thus, Herrera Flores believes that rights can only be effective and achieved based on a process of struggle, which must be constant, since:

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<sup>62</sup> ORGANIZATION OF AMERICAN STATES. **Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of November 28, 2007**. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf). Accessed on: 8 Dec. 2020.

<sup>63</sup> ORGANIZATION OF AMERICAN STATES. **PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil**. Available at: <https://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>. Accessed on: 8 Dec. 2020.

(...) a legal instrument, and this must be recognized from the beginning, is only a means, a mechanism from which channels, procedures and times are established to satisfy, in a "normative" way, the needs and demands of a society. Legal instruments can do nothing by itself, since it always depends on the set of values that prevails in a specific society (free translation)<sup>64</sup>.

Human Rights, based on a critical, resistant and multicultural rationality, presents itself as a way to break the separations and cover ups concluded by Western modernity.

Therefore, the jurisprudence analyzed in this paperwork makes clear the objective of presenting the rights of indigenous peoples in their essence. The members of this group are not pre-modern or backward, but a people strong in their values and experiences, which gave them the ability to face colonial modernity. They present to us, white and modern men, the concept of *Buen Vivir*, where we surpass the traditional concept of development, introducing a vision based on diversity. According to Alberto Acosta:

*Buen Vivir* reveals the errors and limitations of the different theories of so-called development. It criticizes the very idea of development, transformed into an entelechy that rules the life of a large part of Humanity that, perversely, will never be able to reach it. On the other hand, countries that consider themselves developed are increasingly showing signs of their poor development. And this in a world where the gaps between rich and poor, including industrialized countries, are widening permanently (free translation)<sup>65</sup>.

Thus, it is essential to overcome the existing inequalities between peoples. In other words, for effective Human Rights it is necessary to decolonize and deconstruct the patriarchy. *Buen Vivir* is a liberating and tolerant project, without

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<sup>64</sup> The original quotation is: "(...) *una norma, y esto hay que reconocerlo desde un principio, no es más que un medio, un instrumento a partir del cual se establecen cauces, pro-cedimientos y tiempos para satisfacer, de un modo "normativo", las necesidades y demandas de la sociedad. Una norma nada puede hacer por sí sola, ya que siempre de-pende del conjunto de valores que impera en una sociedad concreta*" HERRERA FLORES, Joaquin. **La Reinención de los Derechos Humanos**. Sevilla: Ensayando. Atrapasueños, 2008. p. 34-35.

<sup>65</sup> The quote extracted is: "*O Bem Viver revela os erros e as limitações das diversas teorias do chamado desenvolvimento. Critica a própria ideia de desenvolvimento, transformada em uma entelúquia que rege a vida de grande parte da Humanidade que, perversamente, jamais conseguirá alcançá-lo. Por outro lado, os países que se assumem como desenvolvidos mostram cada vez mais os sinais de seu mau desenvolvimento. E isso em um mundo em que as brechas que separam ricos e pobres, inclusive em países industrializados, se alargam permanentemente*" ACOSTA, Alberto. **O Bem Viver: uma oportunidade para imaginar outros mundos**. São Paulo: Autonomia, 2016. p. 24.



prejudices and dogmas. A project aimed at dialogue between cultures, based on the right to diversity.

### **Final Considerations**

The development of the Modern State occurred from a hegemonic project, where a culture is imposed on the other so-called subservient. After America was “discovered”, the European has the challenge of dealing with the original populations and, for that, used to impose methods to “domesticate” and “civilize” them.

Thus, one of the greatest challenges facing by American States is in relation to the respect diversity of traditional peoples. In this sense, it is possible to conclude that:

1. As part of a minority, indigenous communities suffer discrimination and a lot of pressure to assimilate with the culture of the societies that surround them, compromising the continuity of their own ancestral culture;
2. Nowadays, although formally supported, indigenous communities still seek to have recognized their most basic rights, such as: access to health, education, legal protection and guarantee of communal property;
3. States must adopt public policies that allow indigenous communities to be consulted in advance and have access to information on projects and investments that may affect their territory, as the IACHR decided in the case of the Saramaka People v. Suriname.

In any case, there is no claim to exhaust the topic in such brief considerations or the prospect that the adoption of a specific action will be the lasting solution to assure human rights to indigenous peoples. However, States must be more sensitive to the issues of minority groups, as there is a risk of permanently losing representatives of a culture so rich that it is part of the very existence of Latin America.

Finally, what can be noted is that the difficulties in advancing efficient means of guaranteeing indigenous peoples their basic rights have more to do with political resistance based on economic aspects and less with regional and international resources and legal instruments.

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