



Indigenous Peoples' right to self-

and Tribal





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Right to self-determination for Indigenous and Tribal People

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***"Self-determination is what is born with us, it is immanent and is the expression of what we are in relation to others, within a framework of mutual respect "*¹.**

***"Self-determination does not only involve human beings, it is everything around us...It is part of the nature that is outside, the environment, the ecosystem, the atmosphere, the land, the resources. All those components define what our self-determination is. We have to respect those existences. Everything is perfect. "*²**

***"We will build our autonomy by doing, by sweating, by acting, by solving our problems; inviting the State to contribute to this process "*³.**

¹ National Organization of Indigenous Peoples of the Colombian Amazon and Gaia Amazonas, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

² Intervention by Navajo Human Rights Commission, at IACHR Meeting with indigenous representatives of the United States, May 17, 2021.

³ Intervention of the Autonomous Territorial Government of the Wampis Nation (Peru) in meeting with IACHR on indigenous autonomous governments in Peru and Bolivia, May 21, 2021.

EXECUTIVE SUMMARY

Executive Summary

1. As part of its work to monitor and promote the human rights of indigenous and tribal peoples, the Inter-American Commission on Human Rights (IACHR) has observed that indigenous and tribal peoples throughout the Americas have invoked the right to self-determination or self-determination in defense of their ancestral lands and territories, natural resources, cultures, ways of life and forms of political organization and representation, and other rights.
2. At the international level, there have been important advances in the recognition of the rights of indigenous peoples in recent decades. This includes, for example, the adoption of the American Declaration on the Rights of Indigenous Peoples of the Organization of American States (OAS) and the United Nations (UN) Declaration on the Rights of Indigenous Peoples, which recognize the right of indigenous peoples to self-determination, consisting of the right to freely determine their political status and freely pursue their economic, social and cultural development. Likewise, in more recent decades, the constitutions and legislations of several American States have given varying degrees of recognition to the rights to autonomy and self-determination. In other States, rights to autonomy, self-government and/or self-determination are contained in treaties or agreements signed between indigenous peoples and States from colonial times to the present.
3. Despite the recognition of this right at the international level and in some States, indigenous peoples face challenges in being able to exercise it in practice. The IACHR has observed that the human rights problems they face point to the need for greater recognition and strengthening of their right to self-determination. In recent reports and cases, the IACHR has evolved in its understanding of the link between self-determination and other fundamental rights such as the rights to their lands, territories and natural resources, and in relation to cultural identity, due process and others. However, a consolidation of the understanding of these rights from a specific focus on the right to self-determination is required. Therefore, the IACHR has decided to publish this report on the right to self-determination of indigenous and tribal peoples in order to elucidate the international standards in relation to this right and its application to indigenous and tribal peoples.

4. In Chapter 2 of the Report, the IACHR addresses the discussions on the right to self-determination of indigenous and tribal peoples in international law. The chapter describes how representatives of indigenous and tribal peoples conceptualize and realize the right to self-determination. In this regard, they told the IACHR that self-determination is an inherent and pre-existing right based on their own worldviews, histories and their own laws, and that it does not derive from national laws or international law, but rather is an original right. In international law on the rights of indigenous peoples, the right to self-determination is based on various international instruments. This includes through express recognition, as in the case of the American and UN Declarations on the rights of indigenous peoples. Likewise, important constituent elements of this right are reflected in other international treaties, such as ILO Convention 169, and also in the doctrine and jurisprudence of the Inter-American Human Rights System.
5. The realization of the right to self-determination would give rise to different measures that take into account and harmonize the aspirations of each indigenous and tribal people within a State. Therefore, they must be contextualized to the particular circumstances, characteristics and aspirations of indigenous and tribal peoples. The right to self-determination must be understood as the basis for dialogue for the construction of a new relationship between these peoples and States that can lead to specific arrangements for indigenous and tribal peoples to determine their economic, social and cultural development, and other aspects of self-determination. States have the obligation to bring their domestic law into line with inter-American human rights standards, which implies the revision of laws, procedures and practices to strengthen and ensure the effective and practical enjoyment of the human rights of indigenous and tribal peoples, through respect for their right to self-determination.
6. In Chapter 3, the Commission analyzes the standards and jurisprudence of the Inter-American Human Rights System in relation to the various constituent elements of self-determination. The IACHR emphasizes that there is no single way of exercising the right to self-determination; therefore, the standards to which the IACHR refers should not be understood as predefined, much less standardizing, elements. The content of this right is given in its exercise and is rearranged in relation to changes in historical relations, political conditions and cultural transformations. The constituent elements of self-determination analyzed include: self-identification and recognition of indigenous and tribal peoples; cultural identity and non-discrimination; collective property, lands, territories and natural resources; political and participatory rights; consultation and free, prior and informed consent; and economic, social, cultural and environmental rights.

7. In the same chapter, the IACHR sets out several particular approaches by which self-determination should be understood and implemented. The reparative approach consists of recognizing that the right to self-determination is a central element for collective redress for historical and systematic violations of the human rights of indigenous and tribal peoples. The existence of specific international instruments on these peoples and the explicit affirmation of the right to self-determination implies recognition of their denial, both historical and present, and the need to remedy it. From a justice perspective, it aims to remedy the consequences of the establishment of historically unequal relations between ethno-cultural groups during colonization.
8. The interculturality approach consists of recognizing the coexistence of a diversity of cultures in society, which must coexist on a basis of respect for their different worldviews, human rights and rights as peoples. This approach may include at least two dimensions: (i) distribution of power in decision-making on their own priorities for development and control of their lives, and (ii) the level of recognition of their cultural differences, without this being grounds for exclusion or discrimination.
9. The Commission also emphasizes the cross-cutting approach in the sense that the right to self-determination sets the tone for how the State should guarantee the rest of the human rights of indigenous and tribal peoples. Therefore, States must adopt cross-cutting measures to guarantee the right to self-determination of indigenous and tribal peoples in their legislation and State apparatus, as the starting point for guaranteeing the other rights recognized in favor of these groups in human rights treaties and instruments and in their domestic law.
10. The IACHR has also taken note that indigenous and tribal women have faced and continue to face multiple forms of discrimination based on gender, ethnicity, and poverty that exacerbate their exposure to human rights violations in different contexts. In view of this, the IACHR has pointed out that the gender approach, accompanied by an intercultural approach, makes it possible to recognize the special position of indigenous and tribal women, and to adopt culturally appropriate measures that guarantee the enjoyment of their rights and fundamental freedoms.
11. On the other hand, the IACHR has also highlighted intergenerational solidarity as a necessary approach to addressing the rights of indigenous and tribal peoples, given the special importance that these peoples attribute to ancestors and future descendants. Such an approach is understood as social cohesion between generations, which manifests itself in a strong commitment to the values and experiences transmitted through oral memory, as well as the need to replicate such knowledge. The IACHR takes note of the information received from the representatives of

- indigenous and tribal peoples that show how gender and intergenerational approaches have been incorporated, particularly in relation to the processes of election, composition and work of their leadership and representative organizations.
12. Chapter 4 addresses good practices and obstacles to the exercise of self-determination by indigenous and tribal peoples. The first section presents examples in which self-determination and/or constituent elements of this right, such as autonomy, self-government, territorial rights, their own law, and their own systems of justice and jurisdiction, have been recognized or implemented through treaties, agreements or other constructive arrangements, national constitutions and legislation, and various initiatives and programs developed by judicial entities in different States of the Americas. The second section highlights various practices and experiences of indigenous and tribal peoples in the exercise of self-determination that could serve as references and provide lessons learned for other peoples. These include: representative institutions developed by these peoples; statutes and other regulatory instruments for self-government and territorial management; processes for the creation of territorial, municipal and other political-administrative entities based on indigenous autonomy; justice and jurisdiction systems; their own protection and security systems; autonomous consultation protocols and other consultation and consent instruments; and responses and strategies in the face of the HIV/AIDS pandemic.
 13. The third section of the chapter addresses the challenges and obstacles that indigenous and tribal peoples face in exercising their self-determination. The Commission takes note of challenges presented by limitations in the national legal and political frameworks of some States that affect the right to identification and recognition as distinct peoples, and/or collective aspects of their rights. One problem repeatedly denounced by representatives of indigenous and tribal peoples has to do with challenges in the exercise of their right to elect truly representative authorities and interference in their own systems for electing authorities, all of which undermines the exercise of their self-government and self-determination. Similarly, information was provided on the challenges presented by the procedures for the recognition of indigenous autonomies and indigenous territorial entities in countries with advanced legal frameworks in this regard. Another important challenge has to do with the lack of effective implementation of national legislation to guarantee the recognition, protection and guarantee of the rights to lands, territories and natural resources of indigenous and tribal peoples.
 14. The Commission was also informed of the challenges posed by the non-recognition of indigenous and tribal peoples' own legal systems in some States, the lack of coordination mechanisms between the justice systems of these peoples and those of the States, as well as the diverse

- limits imposed on these systems with respect to material, personal and territorial competencies, or the challenges presented by judicial review of decisions adopted by indigenous or tribal justice authorities. It also addresses the challenges related to food sovereignty and the impacts of climate change on the economic, social, cultural and environmental rights of these peoples, which also affect their ability to exercise self-determination.
15. Finally, the Commission presents a series of conclusions and recommendations addressed to States with the aim of contributing to efforts to recognize and implement the right to self-determination of indigenous and tribal peoples.
 16. In the Americas, significant challenges persist in the recognition and full enjoyment of self-determination and related rights. There are significant gaps in compliance with the normative and political frameworks favorable to the rights of these peoples in various States, as well as with international and inter-American standards on the rights of indigenous and tribal peoples.
 17. Among the main problems repeatedly pointed out, mention should be made of the lack of respect for and recognition of the institutions representing indigenous and tribal peoples and their decision-making processes, particularly when there are economic, commercial, political, military or other interests in the lands and territories of these peoples. The main scenarios of confrontation have revolved around natural resource exploitation projects and divergent interpretations between these peoples and state authorities or other actors on the implementation of consultation and free, prior and informed consent. It is clear that such a situation requires a rethinking of consultation and consent from an approach based on the right to self-determination of indigenous and tribal peoples. Recognition of the self-determination of these peoples should be understood as a reparative measure in the face of historical and contemporary violations of their human rights.
 18. Another considerable obstacle is the situation of violence they face as a result of the presence and invasion of their lands by third parties, whether they are involved in logging, mining, cattle ranching or drug trafficking. Situations of armed conflict and its aftermath continue to be sources of serious risk and threat to the physical and cultural survival of these peoples. Likewise, situations of criminalization, stigmatization, violence, threats and death against the leadership of these peoples, and the differentiated impacts of these situations on the women of these peoples represent another serious obstacle to self-determination.

19. Structural inequalities in access to health, education, water and the precariousness of their food security or sovereignty in many cases have been aggravated by the COVID-19 pandemic, which has had a differentiated and disproportionate impact on these peoples, all of which also affects the exercise of self-determination.
20. The Commission formulates a series of recommendations addressed to the States with the aim of contributing to efforts to recognize and implement this right. These recommendations include the adoption of measures to guarantee the right of indigenous and tribal peoples to exercise self-determination in a practical and effective manner, within the framework of their own procedures, institutions and worldviews, as well as lines of action to strengthen and guarantee the important rights or constituent elements of self-determination identified throughout the report.

CHAPTER 1

INTRODUCTION

INTRODUCTION

21. The indigenous and tribal peoples of the Americas are distinct peoples, each with its own history, culture, identity and social and political organization. They also have their own histories and experiences in relation to the processes of colonization that marked the origin and formation of the current American states.
22. Since before European colonization in the Americas, indigenous peoples have maintained their own languages, cultures, religions, worldviews, systems of government, administration of justice and economic development. Like other peoples throughout human history, they developed their own modalities and structures of representation and social and community political organization in order to develop economically, socially and politically in their own lands and territories. In addition, they have maintained cultural and knowledge systems of their respective natural environments that are based on their profound relationship with their lands and territories, all of which are intertwined with their identity, their stories of their origins as distinct peoples and the relationships among their members, and with members of other peoples and nationalities, as well as other living beings.
23. Since the late 15th century, the process of colonialism has posed a continuous threat to the physical and cultural survival of indigenous peoples which, together with military and extermination campaigns and policies of cultural assimilation over the centuries, produced drastic and profound changes in the lives, cultures and social, political and economic institutions of the indigenous peoples of the Americas. As the preambles to the American Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Indigenous Peoples recognize: "indigenous peoples have suffered historical injustices as a result of, inter alia, colonization and dispossession from their lands, territories and resources, which have prevented them from exercising, in particular, their right to development in accordance with their own needs and interests"⁴.
24. All of the above has inhibited their ability to fully enjoy their human rights as peoples and collectives. For many indigenous peoples in the

⁴ [United Nations Declaration on the Rights of Indigenous Peoples](#), adopted by the General Assembly on September 13, 2007, Preamble; and [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-0/16)(June 15, 2016), preamble.

- continent, were undermined in their ability to determine their own destinies in the social, cultural, political and economic spheres. In short, to be able to determine themselves as peoples, communities, nations and nationalities.
25. The history of the American continent has also been marked by the legacy of the enslavement of people brought from Africa and the consequent discrimination, violence and exclusion of these people. In several countries of the continent, some Afro-descendants remain as ethnically and culturally distinct collectives that share a common identity, origin, history and tradition. This includes, for example, the Maroon people in Suriname, the Quilombola and traditional communities in Brazil or the Afro-descendant communities in Colombia and Ecuador⁵. Other peoples have undergone processes of syncretism with indigenous peoples in the region, giving rise to differentiated ethnic groups, such as the Garífuna that inhabit the Atlantic coast of Honduras, Guatemala and Belize, among others.
 26. As the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", the "Commission" or the "IACHR") has previously noted, these are dynamic, non-static societies that have undergone processes of change over the years and that maintain all or part of their own social, cultural or economic institutions⁶. As these groups also require special attention, the Commission has applied the concept of tribal peoples, under Article 1.a of Convention 169 of the International Labor Organization (ILO), understood as those peoples who are not indigenous or native to the region they inhabit, but who, like indigenous peoples, share conditions that distinguish them from other sectors of the national community⁷. In this sense, they are also differentiated peoples whose rights to determine their social, cultural, political and economic destinies have been affected by historical factors and structural discrimination in the States they inhabit.
 27. The IACHR has observed that the discussion regarding the right to self-determination or self-determination⁸ of the indigenous and tribal peoples of

⁵ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(December 31, 2015), para. 28; IACHR. [Situation of the human rights of indigenous and tribal peoples of Panamazonia](#). OAS/Ser.L/V/II. (September 29, 2019), para. 7.

⁶ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(31 December 2015), para. 28.

⁷ IACHR. [Situation of the human rights of indigenous and tribal peoples of the Pan-Amazon](#). OAS/Ser.L/V/II. (29 September 2019), para. 7.

⁸ In this report, the IACHR will predominantly use the term "self-determination" as it is used in the principal instruments of international human rights law, as will be seen throughout this report. Various sources cited in the report also refer to "self-determination," which is used as the term "self-determination" in this report.

The right of indigenous and tribal peoples in the Americas has taken on particular importance in the current demands of these peoples for respect for their rights. Indigenous and tribal peoples throughout the Americas have invoked this right in different contexts and scenarios related mainly to the defense of their ancestral lands and territories, natural resources, cultures, ways of life and forms of political organization and representation, among other rights. These current demands arise from the structural human rights violations suffered by indigenous and tribal peoples.

28. At the international level, there have been important advances in the recognition of the rights of indigenous peoples in recent decades. Indigenous peoples in the Americas and other regions have affirmed their rights as distinct peoples, emphasizing the value of their cultures and social, political and economic institutions and their attachment to their ancestral lands and territories, as well as their right to self-determination. This has resulted among other achievements in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 ("UN Declaration on Indigenous Peoples") and the American Declaration on the Rights of Indigenous Peoples at the level of the Organization of American States (OAS) in 2016 ("American Declaration on Indigenous Peoples") which recognize the right of indigenous peoples to self-determination, consisting of the right to freely determine their political status and freely pursue their economic, social and cultural development⁹. Both declarations reflect the right to self-determination applicable to all peoples in general in accordance with the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, (see *infra* Ch. 2).
29. Likewise, in more recent decades, the constitutions and legislation of several American States, as will be seen in Chapter 4, have given varying degrees of recognition to the rights to autonomy and self-determination, such as Bolivia, Mexico, Ecuador, Nicaragua and Colombia. Other countries, such as Canada and the United States, have a long history of treaties between indigenous peoples and governments that can be interpreted as the basis for legal recognition of indigenous self-determination.
30. Despite the recognition of this right at the international level and within some States, indigenous and tribal peoples face challenges in being able to exercise it in practice. The Commission notes the existence of tensions and divergences in the understanding of the content and scope of this right.

will be used synonymously in the report, or to autonomy, the latter being an important component of self-determination.

⁹ [United Nations Declaration on the Rights of Indigenous Peoples](#), adopted by the General Assembly on September 13, 2007, Art. 3; and [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-0/16)(June 15, 2016), Article III.

For example, the assertion of this right by indigenous peoples has been erroneously characterized as an attack on the territorial integrity of States. In other situations, the exercise of this right is limited by the lack of resources for the development and functioning of indigenous and tribal peoples' own institutions, or limitations imposed on powers such as indigenous jurisdiction.

31. In addition, one of the main current challenges revolves around the interests of governments and other external actors seeking access to land and natural resources in indigenous and tribal territories for development projects or natural resource exploitation. In other States, they face illegal activities or organized crime affecting their territories. Despite these obstacles, indigenous and tribal peoples maintain their desire to be able to determine their own destinies and pursue their economic, social and cultural development in coexistence with States and national societies.
32. In the framework of its work to monitor and promote the rights of indigenous and tribal peoples, through reports, petitions and cases, hearings and other activities, the IACHR has observed that the human rights problems faced by these peoples point to the need for greater respect for and practical and effective exercise of their right to self-determination. As will be seen below, these peoples consider this to be an inherent and pre-existing right of fundamental importance for the exercise of their other individual and collective rights. The IACHR notes that the assertion of this right "responds to the aspirations of indigenous peoples throughout the world to determine their own destiny on an equal footing and to participate effectively in the decision-making process that affects them. The right to self-determination is a fundamental right, without which the human rights of indigenous peoples, both collective and individual, cannot be fully exercised"¹⁰.
33. The IACHR has noted the efforts of indigenous and tribal peoples to implement in a practical and effective manner¹¹ their right to self-determination and the support they have requested from international human rights bodies to that end. This has included requests to the Inter-American Human Rights System, through its mechanisms, to pronounce itself on the scope and content of the right to self-determination and the right to self-determination.

¹⁰ UN Human Rights Council, [Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya](#), A/HRC/12/34 (15 July 2009), para. 41.

¹¹ European Court of Human Rights. *Kutic v. Croatia* (2002), para. 25.

- to make specific recommendations to the States for their proper implementation¹² .
34. The IACHR also considers that basing the relationship between States and indigenous and tribal peoples on respect for and recognition of their own forms of expression of autonomy and self-determination makes it possible to reverse historical legacies of discrimination, racism, and colonialism. This means overcoming relations based on paradigms of assimilation or domination that have marked the lives of indigenous and tribal peoples on the continent for centuries, in order to enable and strengthen their self-affirmation through dialogue between cultures, based on full equality. In this sense, the IACHR is convinced that respect for and exercise of the right to self-determination of indigenous and tribal peoples presents an opportunity to strengthen the legitimacy of the State from the local level, thus reinforcing fully inclusive democracies.
 35. On the other hand, the Commission also considers that the recognition and strengthening of the self-determination of indigenous and tribal peoples would also help to give prominence to other forms of worldviews and relationships with the natural environment that can provide important lessons in the framework of global efforts to combat the climate crisis. Similarly, as will be seen below, the global crisis of the HIV/AIDS pandemic aggravated the situation of exclusion and structural discrimination that these peoples have faced in access to health and other human rights, so that self-protection measures, promotion of their own medicinal knowledge and other initiatives developed by various indigenous and tribal peoples as an exercise of self-determination were essential for their physical and cultural survival. In this regard, the IACHR considers that the ability of indigenous and tribal peoples to maintain their cultures, traditional knowledge, ancestral lands and territories, their own systems of government and territorial governance, and other elements essential to their self-determination is of particular importance in providing responses to various global problems.
 36. For all of the above reasons, the IACHR has decided to publish this report on the right to self-determination of indigenous and tribal peoples with the aim of

¹² In March 2019, the IACHR together with the UN Special Rapporteur on the Rights of Indigenous Peoples, the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples and the International Work Group for Indigenous Affairs (IWGIA) organized an International Seminar on "*Indigenous Peoples' Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination*" held in Mexico. The indigenous representatives who participated in this seminar exchanged positive experiences and discussed the challenges they face in consolidating their models of autonomy and the worrying implementation gaps that undermine its exercise. They also asked the international human rights bodies to take a more active role in promoting the implementation of this right and to adopt the necessary measures to avoid setbacks in the recognition of this right by the States. IACHR, "[Culmina con éxito el Seminario Internacional sobre Derechos de los Pueblos Indígenas a la autonomía y autogobierno](#)", Press Release (March 15, 2019).

The objective is to elucidate the international standards regarding this right and to establish the definitive position on its application to indigenous and tribal peoples.¹³

A. Background of the work of the IACHR

37. The right to self-determination of indigenous and tribal peoples has figured in the discussion and analysis of other human rights in various reports of the Inter-American Commission that analyze the doctrine and jurisprudence of the Inter-American Human Rights System (hereinafter "Inter-American System" or "IAHRS"). As will be seen below, there has been a positive evolution in the understanding of this right in line with international standards. However, the treatment of the subject has been scattered, which is why a comprehensive approach is required.
38. In its 1983 report on the human rights situation of the Miskito people in Nicaragua, the IACHR investigated and documented allegations of human rights violations resulting from acts of violence by the State against members of the Miskito people, including allegations related to the rights to cultural identity, language, religion and self-determination. Although on that occasion the IACHR concluded that "in the current state of international law, only the claim regarding the preservation of their culture, the practice of their religion and the use of their own language is protected, but this does not extend to the right to self-determination or political autonomy"¹⁴, it takes note of the evolution of the recognition of this right that has been expressly included by the States in the American and United Nations Declarations on indigenous peoples.
39. In its 2009 report on Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, in referring to international normative and jurisprudential developments in the field of indigenous peoples' rights, the Commission recognized the direct relationship between self-determination and the right to self-determination, and the right to self-determination of indigenous peoples.

¹³ While this report will analyze international normative developments that have focused on the collective rights of indigenous peoples, the Commission reiterates the relevance of these standards and their application to the Afro-descendant tribal peoples and communities of the Americas. IACHR. [Situation of the human rights of the indigenous and tribal peoples of Panamazonia](#). OEA/Ser.L/V/II. (September 29, 2019), para. 7; IACHR. [Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System](#). OEA/Ser.L/V/II.Doc.56/09, December 30, 2009. para. 34.

¹⁴ IACHR. *Report on the human rights situation of a sector of the Nicaraguan population of Miskito origin*, OEA/Ser.L/V/II.62. November 29, 1983, Part Three, Conclusions A.1.

and land and natural resource rights¹⁵. In that framework, it took note of the judgment of the Inter-American Court of Human Rights (hereinafter "Inter-American Court", "IACHR Court", or just "Court") in the 2007 case of the Saramaka People v. Suriname which established that the right to property under Article 21 of the American Convention on Human Rights also encompasses the right of indigenous and tribal peoples to freely determine and enjoy their own social, cultural and economic development¹⁶. In the same report, the IACHR developed the rationale for the right to prior consultation and consent, linking it to the rights to participation, collective property and cultural identity¹⁷. Although, in relation to this last point, the Commission did not expressly refer to self-determination, the aforementioned rights are important constituent elements of self-determination.

40. In turn, in the Report on Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas, the Commission noted that one of the fundamental premises of the rights of these peoples is respect for non-contact and their choice to remain in isolation, which is a manifestation of the right to self-determination. It also reiterated that inter-American jurisprudence recognizes the right of indigenous peoples to have States guarantee their right to live in their ancestral territories in order to preserve their right to identity¹⁸.
41. In addressing the right to collective property of indigenous and tribal peoples, the 2015 IACHR report on Indigenous Peoples, Afro-descendant Communities and Extractive Industries highlighted the fundamental premise that these peoples are holders of the collective right to self-determination. The IACHR noted that indigenous peoples "are original societies, preexisting colonization and the establishment of current state borders, and that they have been subjected to conditions of marginalization and discrimination over centuries" and added that for this reason, the international community has recognized that indigenous peoples "possess the right to freely determine their economic, social and cultural development in a manner that allows them to ensure their existence and

¹⁵ IACHR, Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 165.

¹⁶ IACHR, Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 166, citing I/A Court H.R., Case of the Saramaka People v. Suriname. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 93.

¹⁷ IACHR, Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009. 274-6.

¹⁸ IACHR, Indigenous peoples in voluntary isolation and initial contact in the Americas: Recommendations for full respect for their human rights, OEA/Ser.L/V/II/ (30 December 2013), paras. 21-22.

- well-being as distinct peoples"¹⁹ . It also reaffirmed the close relationship of the exercise of self-determination with other rights, such as cultural integrity and identity and to their lands, territories and natural resources .²⁰
42. In the 2017 report *Indigenous Women and Their Human Rights in the Americas*, respect for self-determination is listed as one of the guiding principles that should guide the action of States to implement comprehensive measures to prevent and address all human rights violations against indigenous women. In this regard, the Inter-American Commission emphasized that violations of the right of indigenous peoples to self-determination and control over their lands and resources have an accentuated impact on indigenous women. In this regard, it observed that "respect for the right of indigenous peoples to self-determination, to the integrity of their territories and natural resources and to a life free of racism is inseparable from the guarantee of the right of indigenous women to a life free of any form of discrimination and violence"²¹ . It also referred to self-determination and cultural identity when addressing the right of indigenous women to access to justice to indigenous justice systems, in addition to traditional state institutions²² .
43. In its 2019 Report on the Human Rights Situation of Indigenous and Tribal Peoples of the Pan-Amazon, the IACHR reiterated that indigenous peoples, as societies that pre-existed the establishment of state borders, are holders of the collective right to self-determination, and that this right constitutes a fundamental premise for the exercise of the individual and collective rights of indigenous peoples, including rights over their ancestral territories and natural resources. The report states that this implies that the imposition of extractive activities and megaprojects without prior, free and informed consultation may entail the violation of this right²³ .
44. With respect to specific cases evaluated by the Commission, it should be noted that in the framework of the Merits Report in Case No. 152/19, concerning the Tagaeri and Taromenane indigenous peoples in voluntary isolation, the facts were analyzed under the Inter-American standards on the rights of indigenous peoples in voluntary isolation, as well as in the case of the Tagaeri and Taromenane indigenous peoples in voluntary isolation, the facts were analyzed under the Inter-American standards on the rights of indigenous peoples in voluntary isolation.

¹⁹ IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities*. OEA/Ser.L/V/II. (December 31, 2015), para. 237.

²⁰ IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities*. OEA/Ser.L/V/II.(31 December 2015), para. 237.

²¹ IACHR. *Indigenous women and their human rights in the Americas*, OEA/Ser.L/V/II (17 April 2017), para. 42.

²² IACHR, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II (17 April 2017), para. 73.

²³ IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. (29 September 2019), paras. 23, 24).

indigenous peoples in a manner consistent with the principles of self-determination and no contact²⁴. In the document, the IACHR recognized that the application of the right to self-determination to the realities of indigenous peoples "contains an element relating to the establishment and free enjoyment, without pressure or interference, of their political organization and the development of their economy, society and culture"²⁵. Furthermore, it found "that the principle and right to self-determination in the case of indigenous peoples in voluntary isolation takes on special relevance for the respect of their way of existence traditionally outside the majority society or even their right to isolate themselves again if contact or assimilation had been initiated at some point over time"²⁶.

45. In a 2020 case concerning the United States and the application of the death penalty to a member of the Navajo indigenous people, the IACHR concluded that there was a violation of the Navajo Nation's autonomy and cultural identity in relation to the right to a fair trial and due process of law under the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"). The death sentence was handed down in a proceeding without guarantees of a fair trial and due process and against the sovereign decision of the Navajo Nation against the use of the death penalty with respect to its members, which should have been respected according to provisions of domestic law²⁷.
46. It can be seen from the above that, following the guidelines defined by the States in the American and UN Declarations on the rights of indigenous peoples, the ISHR has evolved in its understanding of the link between self-determination and other fundamental rights such as the rights to their lands, territories and natural resources, and in relation to cultural identity, due process and others, which is also reflected in the doctrine and jurisprudence.

²⁴ IACHR. Report No. 152/19. Case 12.979. Merits. Tagaeri and Taromenane Indigenous Peoples (in voluntary isolation). Ecuador. September 28, 2019, para. 95.

²⁵ IACHR. Report No. 152/19. Case 12.979. Merits. Tagaeri and Taromenane Indigenous Peoples (in voluntary isolation). Ecuador. September 28, 2019, paras. 90, 91.

²⁶ IACHR. Report No. 152/19. Case 12.979. Merits. Tagaeri and Taromenane Indigenous Peoples (in voluntary isolation). Ecuador. September 28, 2019, para. 91.

²⁷ IACHR. Report No. 211/20. Case 13.570. Admissibility and merits (publication). Lezmond C. Mitchell. United States of America. August 24, 2020, paras. 85-106.

B. Objectives and scope

47. In this report, the IACHR will analyze the international standards relating to the right to self-determination of indigenous and tribal peoples, as well as the discussions on the characteristics and content of this right. Through this analysis, it is demonstrated that the self-determination of indigenous and tribal peoples is not a new or recently created right, but rather forms part of contemporary international human rights law, including sources such as the American and UN Declarations on indigenous peoples. Furthermore, various rights that constitute key elements for the exercise of self-determination of indigenous and tribal peoples have already been recognized in international instruments such as ILO Convention 169 on Indigenous and Tribal Peoples and the doctrine and jurisprudence of the Inter-American Commission and Court of Human Rights.
48. Likewise, bearing in mind that for indigenous and tribal peoples self-determination is an inherent, pre-existing and historical right, this report also incorporates an intercultural perspective on self-determination, its foundations and origins, based on the different ways in which indigenous and tribal peoples conceptualize and materialize it in accordance with their own cultures, traditions, worldviews and normative systems.
49. The report addresses different dimensions or expressions that can be understood within the framework of the right to self-determination of indigenous and tribal peoples that may include, among others: the development of systems of autonomy, self-government and administration of indigenous and tribal justice; respect for the appointment and election of their own authorities; rights to their lands, territories and natural resources; their own initiatives and protocols to make effective the rights of consultation and free, prior and informed consent; the right to promote and control their own systems or programs of education, health, security or food sovereignty, and other rights of an economic, social and environmental nature. In its analysis, the particular situation of transboundary indigenous and tribal peoples and indigenous peoples in isolation and initial contact is highlighted in a cross-cutting manner. In addition, the IACHR addresses the reparative nature of this right, as well as an understanding of this right from a cross-cutting, gender, intergenerational solidarity, and intercultural approach.
50. It also includes practices and experiences of these peoples that are relevant to discussions on the right to self-determination and the obstacles and challenges to its exercise. In this sense, the report seeks to make visible practices and experiences that could serve as references and lessons learned for indigenous and tribal peoples. Finally, the Commission formulates

a series of recommendations addressed to the States with the objective of contributing to the efforts in the recognition and implementation of this right.

C. Methodology and acknowledgments

51. The information for this report was gathered through relevant legal research, virtual meetings and workshops, and requests for information. To this end, the IACHR circulated a questionnaire in which it invited States, indigenous and tribal peoples and their representative organizations, and civil society organizations, academic institutions and experts to provide information on the experiences, challenges, practices, legislation and jurisprudence of the different States of the Americas in relation to the recognition and effective exercise of the self-determination of indigenous and tribal peoples.
52. Given the current context of the COVID-19 pandemic, the Commission conducted a series of virtual events that included forums, meetings with international experts, regional and thematic meetings and workshops with representatives of indigenous and tribal peoples, jurists, judicial officials and academic institutions from different countries and regions of the Americas. This included meetings to gather information on experiences, challenges, initiatives and proposals regarding self-determination in North, Central and South America and the English-speaking Caribbean. The IACHR also held meetings with justice operators and experts in the areas of legal pluralism, the situation of indigenous peoples in isolation and initial contact, and with representatives of indigenous autonomous governments.
53. The IACHR thanks the International Work Group for Indigenous Affairs (IWGIA) for the technical, logistical, and financial support provided for the preparation of this report and for its support in organizing various regional meetings and focus groups. It also extends its thanks to the Due Process of Law Foundation (DPLF) for organizing the meeting with indigenous representatives from Mexico and focus group meetings related to legal pluralism; to First Peoples Worldwide of the University of Colorado - Boulder for organizing meetings with indigenous representatives and professionals from the United States and for systematizing information received from the United States and Canada; and to the Centro de Investigaciones y Estudios de Antropología Social de México (CIESA-Sede Sureste) and the Colectivo de

Coordination of the book *Autonomías y Autogobierno en la América Diversa*²⁸ for the organization of the meeting with indigenous and Afro-descendant representatives from Central America.

54. The IACHR would like to highlight the high level of interest and participation by representatives of the indigenous and tribal peoples of the continent in the regional workshops and in the responses to the questionnaire for the report. In this regard, it thanks them for sharing their testimonies, stories, visions and proposals on the self-determination of their peoples. The Commission would also like to thank the various contributions made by the States, academic institutions, non-governmental organizations, professionals and other sectors of civil society in the region that submitted their responses to the questionnaire.

²⁸ See, Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021); and [Web page](#) of the publication.

CHAPTER 2

DISCUSSIONS ON THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS AND TRIBAL PEOPLES IN INTERNATIONAL LAW

DISCUSSIONS ON THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS AND TRIBAL PEOPLES IN INTERNATIONAL LAW

"The indigenous peoples have been originally autonomous, free. Our autonomy is millenary..."²⁹.

"But my spirit and my voice will not be silenced, will not be extinguished... However, you must know that I was here before all that. I was here before - before."³⁰

A. The origin of self-determination from the perspective of indigenous and tribal peoples.

55. On various occasions, representatives of indigenous and tribal peoples told the IACHR that self-determination is an inherent and pre-existing right based on their own worldviews, histories and their own laws. According to an indigenous representative of the Wampís people of Peru, it is a right that does not derive from national or international law, but rather is a native right³¹. In this regard, indigenous representatives from the Colombian Amazon explained:

We do not depend on a normative law, but on a law of origin, which was bequeathed to us from before; [...] Self-determination, from our conception, cannot be limited only to a written document imposed from non-indigenous understandings and law [...] "[W]e are and inhabited the territories before the creation of the 'States'; we are governed by different laws and codes, our

²⁹ Intervention of the Autonomous Territorial Government of the Wampís Nation (Peru) in meeting with IACHR on indigenous autonomous governments in Peru and Bolivia, May 21, 2021.

³⁰ Excerpt from the poem "Drums of My Fathers", by the poet Garinagu/Garifuna E. Roy Cayetano, shared by representative of National Garífuna Council - Belize, at regional meeting on the right to self-determination (Caribbean), May 27, 2021. Own translation.

³¹ Intervention of the Autonomous Territorial Government of the Wampís Nation (Peru) in meeting with IACHR on indigenous autonomous governments in Peru and Bolivia, May 21, 2021.

mandates come from the origin of the world, which guide our behavior in the territories where the Creator Father left us, as well as establish the forms of interrelation with all the existing beings in the world [...] We are governed by the word, by dreams, by signs, by other ways of being and being in the world. All this state of things that strengthen our spirituality and culture, are supported by the use of sacred plants such as coca, tobacco and sweet yucca³².

56. Similarly, the Protocol for Prior Consultation and Relationship of the Nasa people of Colombia establishes their Law of Origin as the fundamental basis for life, their relationship with nature and self-determination, which, in turn, is based on their own law, their unique identity defined by their language, uses, customs and way of thinking³³. The notion of an original law, or higher law, is also understood as the fundamental basis for the exercise of different aspects of self-determination, such as the administration of justice. In the case of the Navajo people's judicial system, the sources of law that apply include the fundamental laws that come from their origin stories, philosophy and spirituality that have been transmitted orally and that establish the norms necessary to maintain correct relationships between people and desirable outcomes in Navajo society³⁴.
57. In turn, a report of the Royal Commission on Aboriginal Peoples of Canada includes various views and comments from indigenous authorities on sovereignty, self-government and self-determination that reflect the understanding that it is "the original freedom bestowed on our people by the Creator and not by a temporal power". In that sense, being a gift from the Creator, it cannot be given or taken away, nor can its basic terms be negotiated. From the traditional perspective that there is an interconnectedness between all things, concepts such as sovereignty, self-government and land retain a spiritual dimension in contemporary indigenous thought³⁵.
58. As noted by an Inuit indigenous jurist, the inherent or pre-existing character of indigenous peoples' rights, including the

³² National Organization of Indigenous Peoples of the Colombian Amazon and Gaia Amazonas, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021) (emphasis in original).

³³ Protocol for the relationship of and with the Nasa People of the Cerro Tijeras Resguardo, Municipality of Suarez, Department of Cauca: Basis for Internal Prior Consultation - External and Prior, Free and Informed Consent (2017), p. 37.

³⁴ Raymond D. Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, Minneapolis: University of Arizona Press, 2009, pp. 40-43.

³⁵ Report of the Royal Commission on Aboriginal Peoples, *Vol. 2 - Restructuring the Relationship*, Ottawa: Canada Communications Group (1996), Pt. 1, p. 106.

right to self-determination, means that the individual and collective human rights of indigenous peoples should not be conceived of as rights created or granted by States or other entities³⁶. Likewise, with respect to the pre-existence of the right to self-determination, it should be recalled that indigenous peoples "have had and continue to maintain highly developed and sophisticated concepts of governance and social control not only internally but also in their external relations with others, including other nations and indigenous peoples"³⁷.

59. Similar visions of autonomy and self-determination are also found among the various Afro-descendant tribal peoples in the Americas, as part of an "ancestral" right and the shared history of its members. According to an authority of the Palenke Alto Cauca in northern Cauca, Colombia.

*"This natural right should not only be reflected in the right that the individual has as a person, but also in all that has been developing and forming and preserving the community in its territory without being regulated. All those things that are part of the community ...that the community has done it by instinct, by its own, by its own cosmovision, by its own action... to sustain itself over time in its territory, for me that is the natural ancestral right"*³⁸.

60. Members of the Quilombola Community of Mercês Island, Brazil, shared that self-determination comes from a process of recognition of their own history and that of their ancestors, their distinct identity and the struggle for their rights. Self-determination is the strong connection of its members with the territory, which is the space for the construction of family and social ties, work, birth, upbringing and death of people. Awareness of the struggle for land is fundamental, and self-determination means having the possibility of remaining in their territory with dignity and respect³⁹.

³⁶ Dalee Sambo Dorough "El derecho a la libre determinación y los pueblos indígenas: la continua búsqueda de la igualdad", in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), p. 41.

³⁷ Dalee Sambo Dorough "El derecho a la libre determinación y los pueblos indígenas: la continua búsqueda de la igualdad", in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Editorial Universitaria Abya-Yala (2021), p. 41.

³⁸ See, Vivinane Weitzner, "'Guardia, Guardia': autonomías y defensa territorial en el contexto de pos-Acuerdo colombiano", in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), p. 600, citing interview with leader of the Asociación de Consejo Comunitarios del Norte del Cauca, 2015.

³⁹ Suape Social and Environmental Space Forum and Quilombola Mercês Island Association, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

61. In addition to sharing their own perspectives on the origin and basis of the right to self-determination, representatives of indigenous and tribal peoples informed the IACHR about what they consider to be the exercise and realization of self-determination and their aspirations in this regard. The IACHR takes into account what was stated, for example, by a representative of the Xinka people of Guatemala, to the effect that self-determination is

"The right to decide on the way in which our development should be carried out, based on our culture, spirituality and to decide on our natural assets and their use "40.

62. Likewise, a representative of the Nahua people of Honduras explained that

"As Nahua indigenous people we define the right to self-determination as our own ways of exercising governance within our territories and organizations, third parties will have to respect our own indigenous self-government practices [such as] the implementation of chieftaincy, the demarcation of our territories... our culture and traditions, our own ways of exercising and applying traditional law [...]"41.

63. For her part, a representative of the Creole people of Bluefields, Caribbean Coast of Nicaragua stated that

The right to self-determination of Afro-descendant peoples in Nicaragua is materialized through the organization of their communal and territorial assemblies to make decisions, to discuss issues that concern them, to elect their communal and territorial authorities, to identify their representatives before the national government and state institutions, as well as to decide on the development of their community, to be consulted in a free, prior and informed manner in their own language and without political party interference.

Afro-descendant peoples must be free to make their own decisions taking into account their customs and traditions, which is taken up in the constitution.

⁴⁰ Xinka People - Guatemala, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021.

⁴¹ Nahua Indigenous Federation of Honduras, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, June 2021.

Nicaragua's political system and specific laws that must be respected by the state and the country's governments⁴².

64. According to representatives of the Federación Nativa del Río Madre de Dios y Afluentes de Perú (Native Federation of the Madre de Dios River and its Affluents of Peru)

"self-determination organizes the relationship between Indigenous Peoples and the State, always recognizing that Indigenous Peoples were here before States, and therefore their historical continuity must be protected [...] Without the right to decide, we cannot project our historical continuity into the future, and guarantee the realization and continued exercise of all our essential rights. The right to self-determination, the right to decide, allows us to maintain, protect and extend our projects as Indigenous Peoples through time "⁴³.

65. Likewise, an Afro-Colombian representative stated that:

"self-determination is to be able to decide in freedom and to be able to put into practice what we have decided... and to have the means to put into practice what we have decided. [Self-determination has to do with the right related to ethnic and cultural diversity, with equality and non-discrimination. And therefore with the equality of the diverse cultures that make up Colombian society. With all the diversity of America "⁴⁴.

66. The above demonstrates the rich discussion on the different ways of understanding self-determination from the perspective and worldview of indigenous and tribal peoples within the framework of respect for intercultural human rights. This takes into account the recognition of cultural identities, customary law, cosmovisions and other rights reflected in international and inter-American human rights standards on indigenous and tribal peoples.

⁴² Creole Communal Government of Bluefields - Nicaragua, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (May 2021).

⁴³ Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD) and Earth Rights International, Joint Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, April 26, 2020, p. 25.

⁴⁴ Presentation by Proceso de Comunidades Negras (PCN) - Colombia at Regional Meeting on the Right to Self-Determination (South America), May 11, 2021

B. Self-determination of indigenous and tribal peoples in international law

67. In the context of discussions of the sources of the right to self-determination, the Commission emphasizes that given its express absence in the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration") and the American Convention on Human Rights (hereinafter "American Convention" or "ACHR"), the rights of indigenous and tribal peoples in this sense can be interpreted in light of the norms of other international treaties and instruments. By way of example, considering that collective property is one of the expressions of the right to self-determination of these peoples, the IACHR and the Court have taken into account ILO Convention 169 (hereinafter "Convention 169") and other international treaties to interpret the scope of Article 21 of the ACHR, based on the rules of interpretation of its Article 29 that take into account the evolution of the inter-American system⁴⁵.
68. The Commission and the Court have also relied on interpretations made by universal treaty monitoring bodies, particularly in relation to the application of provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Racial Discrimination to indigenous peoples⁴⁶.
69. Another important source of interpretation has been the 2007 UN Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples.

⁴⁵ See in this regard, IACHR. [Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System](#). OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, paras. 5-22.

⁴⁶ IACHR. [Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System](#). OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 16 and corresponding footnotes.

on the Rights of Indigenous Peoples of 2016⁴⁷. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 marks an important milestone in the international recognition of these peoples. In its Article 3, the Declaration incorporates verbatim the content of common Article 1 of the ICCPR and ICESCR by affirming the right of indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development. In the same vein, the American Declaration on the Rights of Indigenous Peoples adopted by the Organization of American States in 2016 also incorporates the same language of these instruments in its Article III regarding the self-determination of indigenous peoples.

70. The Commission notes the particular importance of the United Nations Declaration on Indigenous Peoples and its normative weight as reflecting a significant degree of consensus at the global level on the issue of indigenous peoples' rights. The Declaration was adopted by an overwhelming majority of Member States, including the majority of OAS Member States, and its elaboration and adoption process involved the participation and support of indigenous peoples from around the world⁴⁸.
71. For its part, the American Declaration on Indigenous Peoples also reflects the inter-American consensus on the rights of indigenous peoples, and its drafting and negotiation process, which lasted more than two decades, involved the significant participation of both indigenous peoples and the States of the continent⁴⁹. It should be recalled that, in the initial stages of the elaboration of the American Declaration on Indigenous Peoples, the IACHR contributed to this process by compiling the various sources in international and domestic law that underpinned the various rights recognized therein, including the rights to self-government, indigenous law and others⁵⁰. Furthermore, the American Declaration on Indigenous Peoples itself affirms that both declarations "constitute the minimum standards for the protection of the rights of indigenous peoples".

⁴⁷ IACHR, Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, paras. 19-22.

⁴⁸ UN General Assembly, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/68/317 (August 14, 2013), para. 77.

⁴⁹ For more information on the process of drafting and negotiating the American Declaration on the Rights of Indigenous Peoples, see Department of International Law, Draft American Declaration on the Rights of Indigenous Peoples; and Luis Toro Utrillano, La Negociación en torno al Proyecto de Declaración Americana sobre los Derechos de los Pueblos Indígenas: Proceso y Aspectos Sustantivos, in Inter-American Juridical Committee, Curso de Derecho Internacional 2015 (XLII), Rio de Janeiro, Brazil, published in 2016, pp. 551-632.

⁵⁰ IACHR, Sources in International and National Law of the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II.110 Doc 22, 1 March 2001. It is evident, for example, how an earlier proposal on the right to indigenous self-government, with language similar to the right of self-determination in the current Article III of the Declaration, was based on international normative sources such as Article 3 of what is now the United Nations Declaration on Indigenous Peoples and various sources of national law and international instruments that recognize this right or important constitutive elements of self-determination.

for the survival, dignity and well-being of the indigenous peoples of the Americas"⁵¹ .

72. In addition, given the long history of the issue within the Universal System, the inter-American bodies have also resorted to the interpretations of the content and scope of the rights of indigenous peoples made by the UN Special Rapporteur on the rights of indigenous peoples. Similarly, it has taken into account the work carried out by other mechanisms with a specific mandate in relation to the rights of indigenous peoples, such as the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples⁵² .
73. Therefore, the Commission notes that in international human rights law, the right to self-determination of indigenous and tribal peoples is grounded in various international instruments. This includes the American and UN Declarations on the rights of indigenous peoples, which in turn reflect fundamental principles and rights contained in human rights treaties of general application. Likewise, important constituent elements of this right are reflected in other international treaties, such as ILO Convention 169 and in the doctrine and jurisprudence of the ISHR.
74. However, the IACHR notes that the right to self-determination of indigenous peoples has been the subject of concern on the part of some States. This is due to interpretations that it is a right that leads to the creation of independent States and, therefore, threatens their territorial integrity. In this regard, Convention 169 adopted in 1989 by the International Labor Organization (ILO) did not include the right to self-determination⁵³ . However, the ILO subsequently took note of the importance of the recognition of the right to self-determination of indigenous peoples by the international community following the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 and the recognition that several UN member states have given with respect to the application of this right to indigenous peoples⁵⁴ . Along these lines, the Organization has pointed out that:

⁵¹ [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-0/16)(June 15, 2016), art. XLI.

⁵² See, IACHR. [Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System](#). OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, paras. 20-21.

⁵³ ILO, [Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169](#), Geneva: ILO, 2009 1 v., p. 25.

⁵⁴ ILO, [Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169](#), Geneva: ILO, 2009 1 v., pp. 25, 26.

75. While Convention No. 169 does not mention the issue of self-determination, it does establish participation, consultation and self-management and the right of indigenous peoples to decide their own priorities, which are important mechanisms for the realization of the right to self-determination as reflected in the [UN Declaration on Indigenous Peoples]⁵⁵ .
76. Likewise, the ILO specified that "Convention No. 169 does not establish any limitation on the right of self-determination or on the obligations that States have under the broad body of international law with respect to indigenous peoples and this right"⁵⁶ . In this sense, Article 35 of the same Convention establishes that its application "shall not prejudice the rights and benefits guaranteed to the peoples concerned by virtue of other conventions and recommendations, international instruments, treaties, or national laws, awards, customs or agreements"⁵⁷ . It has therefore affirmed that the provisions of Convention 169 and the UN Declaration on Indigenous Peoples are compatible and mutually reinforcing⁵⁸ .
77. Likewise, in response to this concern, both the UN and OAS Declarations on Indigenous Peoples contain provisions warning that nothing contained therein may be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent States⁵⁹ .
78. The Commission agrees that the creation of independent States should not be understood as the solution for indigenous and tribal peoples who demand self-determination⁶⁰ , and reiterates that the exercise of this right gives rise to different measures in different contexts⁶¹ , for which reason, in the case of these peoples, their current aspirations should be taken as a starting point, while also taking into account the reparative nature of this right⁶² . Thus, the exercise of self-determination may give rise to arrangements at the domestic level of a State.

⁵⁵ ILO, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169, Geneva: ILO, 2009 1 v., p. 26.

⁵⁶ ILO, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169, Geneva: ILO, 2009 1 v., p. 26.

⁵⁷ ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (Convention No. 169), art. 35.

⁵⁸ ILO, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169, Geneva: ILO, 2009 1 v., p. 26.

⁶⁰ S. James Anaya, "The Right of Indigenous Peoples to Self-Determination after the Adoption of the Declaration," in Claire Charters and Rodolfo Stavenhagen (ed.), The Challenge of the Declaration: History and Future of the UN Declaration on Indigenous Peoples, Copenhagen: IWGIA (2009), pp.195-6.

⁶¹ UN General Assembly, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/68/317 (August 14, 2013), paras. 75, 76.

⁶² Anaya, James (2005). Indigenous Peoples in International Law. Madrid: Editorial Trotta, p. 151. The reparative aspect of self-determination will be developed in *infra* chapter III.B.1.

to enable indigenous and tribal peoples to determine their economic, social and cultural development, and other aspects of self-determination.

79. The IACHR notes the need for the right to self-determination to be seen as the "basis for dialogue, a catalyst for effective participation in the process of state building and as a basis for the construction of a new relationship between indigenous peoples and the State in terms of mutual respect, which fosters peace, development, coexistence and common values"⁶³. It should be noted that the Statute of the Autonomous Territorial Government of the Wampís Nation in the Peruvian Amazon contains provisions affirming respect for the territorial unity of Peru and that respect for the Peruvian State and its representatives, and mutual correspondence with the Wampís' own authorities, "are recognized as the basis for peaceful and productive coexistence with Peruvian society"⁶⁴.
80. Therefore, attention should be paid to the efforts that indigenous and tribal peoples are currently making within the framework of the legal, political and institutional systems of the States to obtain recognition and protection of their rights, which include self-determination and its various constituent elements.

C. Responsibilities of States in relation to the right to self-determination of indigenous and tribal peoples

81. The Commission recalls that the OAS Charter established the obligation of member states with respect to the defense and promotion of human rights, which is one of the pillars of the OAS along with the promotion of democracy, peace, and development. IACHR recalls that the duty of OAS member states to promote and protect human rights emanates from the human rights obligations contained in the OAS Charter. The

⁶³ Adelfo Regino Montes and Gustavo Torres Cisneros, "The United Nations Declaration on the Rights of Indigenous Peoples: Basis for the New Relationship between Indigenous Peoples, States and Societies," in Claire Charters and Rodolfo Stavenhagen (ed.), *The Challenge of the Declaration: History and Future of the UN Declaration on Indigenous Peoples*, Copenhagen: IWGIA (2009), p. 165.

⁶⁴ Statute of the Autonomous Territorial Government of the Wampís Nation: In memory of our ancestors and for our right to self-determination as a people and nation, November 29, 2015, arts. 10, 27.

The American Convention and the American Declaration reflect the spirit of this pillar and affirm the obligations of States to promote and guarantee the effective exercise of human rights. Under Articles 1(1) and 2 of the Convention, States have the obligation to "respect" and "ensure" the "free and full exercise" of the rights recognized therein, including by adopting "such legislative or other measures as may be necessary to give effect to those rights"⁶⁵. The Commission considers that these are principles that States should take into account when adopting measures to give effect to the right to self-determination of indigenous and tribal peoples.

82. This implies the revision of laws, procedures and practices to strengthen and ensure the effective and practical enjoyment of the human rights of indigenous and tribal peoples and individuals through respect for the right to self-determination. The realization of this right gives rise to different measures that take into account and harmonize the aspirations of each particular people within a State.
83. At the same time, the Commission recalls the important principles of consultation and cooperation between States and indigenous and tribal peoples reflected in the American and UN Declarations on indigenous peoples, and considers it necessary for States to apply these principles to the development of measures to guarantee and protect the rights of these peoples, including self-determination and other rights essential to their enjoyment and exercise⁶⁶. The IACHR considers that, through special and differentiated mechanisms of consultation and cooperation, indigenous and tribal peoples themselves should participate in the search for solutions to the problems they face in the exercise of their rights, which in itself would respect their right to self-determination.
84. Likewise, taking into account important constitutive elements for the exercise of self-determination, such as the right to their lands, territories and territories and the right to self-determination.

⁶⁵ American Convention on Human Rights (Pact of San José), 1969. Obligation to Respect Rights:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other social condition.

Article 2: Duty to Adopt Provisions of Domestic Law

If the exercise of the rights and freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms.

⁶⁶ Consultation and cooperation for the realization of the rights of indigenous peoples are express principles in the UN Declaration and the American Declaration on Indigenous Peoples. See, [United Nations Declaration on the Rights of Indigenous Peoples](#), Preamble and arts. 15, 17, 36, 38; and [American Declaration on the Rights of Indigenous Peoples](#), Preamble and art. XX.

natural resources, and others that will be addressed in the following Chapter, the responsibilities of States to guarantee such rights in accordance with the principles of equality and non-discrimination must be taken into account. The principle of non-discrimination is one of the pillars of any democratic system and is one of the fundamental bases of the human rights protection system established by the OAS⁶⁷. According to Article 1.1 of the American Convention, the principle of equality and non-discrimination is a protection that underlies the guarantee of all other rights and freedoms, since every person is a holder of the human rights enshrined in such instruments and is entitled to have the State respect and guarantee their free and full exercise, without any type of discrimination⁶⁸. As the Inter-American Court has established "[w]hatever the origin or form it assumes, any treatment that may be considered discriminatory with respect to the exercise of any of the rights guaranteed in the Convention is per se incompatible with the Convention"⁶⁹.

85. In accordance with their obligation to ensure equality before the law, equal treatment and non-discrimination, States must establish the necessary legal mechanisms to protect the rights of indigenous and tribal peoples. This includes, for example, guaranteeing the communal property of indigenous and tribal peoples just as property rights in general are protected under the domestic legal system⁷⁰. The rights to equality before the law, to the protection of the law, and to non-discrimination are violated when indigenous and tribal peoples are not afforded the same protections to exercise their rights fully and equally with other members of the population⁷¹. Therefore, access to justice without discrimination constitutes an essential element of the rights of indigenous and tribal peoples.

⁶⁷ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(31 December 2015), para. 241.

⁶⁸ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(31 December 2015), para. 242.

⁶⁹ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(December 31, 2015), para. 242, citing, IACHR. Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012 Series C No. 251, para. 224; I/A Court HR. Case of Atala Riffo and Girls v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 78; and I/A Court H.R., Case of Atala Riffo and Girls v. Chile. Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53.

⁷⁰ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(December 31, 2015), para. 244, citing, IACHR, Report No. 40/04, Case 12.053, Mayan Indigenous Communities of the Toledo District (Belize), October 12, 2004, para. 155. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 61.

⁷¹ IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(December 31, 2015), para. 244, citing, IACHR, Report No. 40/04, Case 12.053, Mayan Indigenous Communities of the District of.

necessary to guarantee the rights of indigenous and tribal peoples over their lands, territories, natural resources and other aspects important for the exercise of self-determination. Along the same lines, as the Inter-American Court has pointed out, with respect to indigenous and tribal peoples "it is indispensable that the States grant effective protection that takes into account their own particularities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, uses and customs"⁷² .

86. The duty of States to respect and protect the rights of indigenous and tribal peoples also entails preventing and avoiding actions that could hinder the effective enjoyment of their right to self-determination and other rights, which would include the improper use of criminal law or the criminalization of members of these peoples dedicated to the defense of their rights, as well as preventing acts of violence and harassment against them. The IACHR has observed several cases of criminalization, harassment and violence against leaders of various indigenous and tribal peoples as a result of carrying out acts of social protest or other actions in defense of the rights of their peoples, particularly in the context of extractive, exploitation and development projects⁷³ .
87. The IACHR emphasizes that these acts of criminalization, aggression and violence have a differentiated and disproportionate impact on indigenous and tribal peoples. In addition to the stigmatization that usually accompanies these acts, they also cause irreparable damage to the social fabric of these peoples. Particularly serious are the actions of criminalization, violence and aggression against authorities, leaders of indigenous and tribal peoples who play a fundamental role in maintaining the traditions of their peoples and their social, political and cultural institutions. Likewise, they have a differentiated impact on indigenous women due to their gender, while taking into account the important roles they play in their communities and peoples⁷⁴ . All of these factors undermine the exercise of indigenous and tribal peoples' self-determination.
88. Therefore, the Commission reiterates the importance of States taking measures to prevent, investigate and punish these acts of criminalization and aggression,

Toledo (Belize), October 12, 2004, para. 171. IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 61.

⁷² I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, para. 64.

⁷³ See in this regard, IACHR, *Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities*. OEA/Ser.L/V/II.(December 31, 2015), para. 297- 303.

⁷⁴ See in this regard, IACHR, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II (Apr. 17, 2017), paras. 87-132. UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, Victoria Tauli-Corpuz, A/HRC/39/17 (Aug. 10, 2018), paras. 71-78.

harassment and violence against members of indigenous and tribal peoples who defend the rights of their peoples⁷⁵ .

89. On the other hand, the Commission emphasizes that different constituent elements of self-determination, for example, in relation to the rights of indigenous and tribal peoples to self-identification, cultural identity, autonomy, self-determination, lands and territories and natural resources, political participation, and free, prior and informed consultation and consent, among others, are also part of the commitments and obligations of the States of the Americas under international and inter-American instruments, as well as the jurisprudence of the Inter-American system, as explained in the following chapter.

⁷⁵ IACHR. Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities. OEA/Ser.L/V/II.(December 31, 2015), p. 186.

CHAPTER 3

INTER-AMERICAN STANDARDS APPLICABLE TO THE RIGHT TO SELF- DETERMINATION OF INDIGENOUS AND TRIBAL PEOPLES

INTER-AMERICAN STANDARDS APPLICABLE TO THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS AND TRIBAL PEOPLES

A. Elements of the right to self-determination in the instruments and jurisprudence of the ISHR

90. In this chapter, the Commission develops the standards and jurisprudence of the Inter-American system in relation to the various constituent elements of self-determination. To this end, it incorporates the perspectives and experiences gathered from dialogues and meetings with representatives of indigenous and tribal peoples, as well as from other international instruments and sources. The testimonies and statements received show that there is no single way of exercising the right to self-determination. Therefore, the IACHR emphasizes that the standards, based on international instruments, referred to below should not be understood as predefined elements, much less uniform, which could even have a counterproductive effect on the exercise of self-determination. On the contrary, the Commission considers it essential to understand that "the very content of this right is given in its exercise and this is rearranged in relation to changes in historical relations, political conditions and cultural transformations"⁷⁶.
76 It is with this understanding that it addresses the standards and approaches to self-determination in this Chapter.

⁷⁶ González, Miguel; Burguete Cal y Mayor, Araceli; Marimán, José; Ortiz-T, Pablo; Funaki, Ritsuko (2021). "Introduction." In González, Miguel; Burguete Cal y Mayor, Araceli; Marimán, José; Ortiz-T, Pablo; Funaki, Ritsuko. *Autonomías y autogobierno en la América diversa*. Quito: Universidad Politécnica Salesiana, p. 31.

1. Self-identification and recognition of indigenous peoples and tribes

91. A central element of the self-determination of peoples is their right to self-identification, understood as the people's awareness of their identity. In the understanding of the IACHR, self-identification is closely linked to the ability to recognize themselves as a people and to identify the members of the collective. As a Colombian indigenous leader stated:

"For indigenous peoples, their self-determination is of origin. The right to be, the possibility of being ourselves. It has to do with something very essential, it links territory, social and political structure. [It is] to be ourselves, for ourselves"⁷⁷ .

92. Their self-identification implies that they exist per se, and have existed permanently, independently of official recognition or the will of the State. There is, therefore, an inseparable relationship between self-determination and self-identification as a people. This relationship is historically rooted and has broad social, political and economic implications, which are ultimately based on the right to self-determination of peoples. For this very reason, self-determination should not be understood as a concession or a matter of concession.
93. Recognition as indigenous and tribal peoples by third parties is not a condition for their existence, nor is it a prerequisite for exercising their rights. However, in practice, this recognition by the State facilitates the effective achievement of their autonomy. The lack of official recognition may mean that they are not taken into account by the State in public norms and policies, or that they are left legally unprotected, for example, in the face of private projects or initiatives. It can also lead to a situation of legal invisibility. This is why, in accordance with the right to self-determination, it is clearly established in international human rights law that they have the right to be recognized as a distinct people, and to act legally under the denomination they determine⁷⁸. Respect for their self-determination implies

⁷⁷ Meeting with OPIAC and Gaia Foundation on Colombian Amazonia, held on April 19, 2021.

⁷⁸ In the same sense, UN. Permanent Forum on Indigenous Issues. *Report on the 15th session (9-20 May 2016)*. E/2016/43. E/C.19/2016/11, para. 25.

the recognition of their existence as original societies that existed prior to colonization or the establishment of the current state borders⁷⁹.

94. As the Commission has repeatedly pointed out, self-identification is the main criterion for the recognition of a human group as a people⁸⁰. This position is widely recognized in international instruments, as reflected in ILO Convention 169 (Article 1.2), the United Nations Declaration on the Rights of Indigenous Peoples (Article 33.1) and the American Declaration on the Rights of Indigenous Peoples (Article 1.2). It has also been assumed by the IACHR Court, which held that "the identification of the people, from its name to its composition, is a social historical fact that is part of its autonomy"⁸¹.⁸¹ This implies that it is not up to external actors to determine the ethnicity or denomination of the people in question. In this sense, it is not up to the States to decide who are and who are not indigenous, nor to vertically establish the criteria under which identity is determined⁸². It is the peoples or communities themselves who define such membership in accordance with their awareness of their identity.
95. In line with the above, it is fundamental for the IACHR that the existence and identity of a people, community or its members should not depend on a registry or any other form of state recognition. This implies, in particular, not conditioning the exercise of rights to their recognition, registration or inclusion in a database. Collective identity belongs to the exercise of the right to self-recognition as an essential element of ethnic and cultural diversity. The autonomy of the peoples must allow them to decide on their political, legal and administrative affairs without interference from the norms imposed by the majority society⁸³.
96. The IACHR considers that it is contrary to the right to self-identification and recognition that the legislation does not contemplate or allow demanding their formal legal recognition and juridical personality as "peoples" or "nations". Treating peoples only as "ethnic groups" or "ethnic groups" when they self-identify as "peoples" implies disregarding the right to self-determination linked to this concept⁸⁴. Nor is it appropriate for them to be

⁷⁹ IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: Protection of human rights in the context of extractive, exploitative and development activities*. OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 149.

⁸⁰ IACHR. *Access to Justice and Social Inclusion: The Road to Strengthening Democracy in Bolivia*. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, para. 216.

⁸¹ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010, para. 37.

⁸² Office of the Public Defender of the Union of Brazil. *Response to the questionnaire on the right to self-determination of indigenous and tribal peoples*, May-April 2021.

⁸³ Constitutional Court of Colombia. Judgment T-072-2021, in case T-7.910.068. March 24, 2021, p. 129.

⁸⁴ Regional meeting with representatives of indigenous, tribal and Afro-descendant peoples of South America (Brazil, Colombia, Chile, Ecuador, Suriname), held on May 11, 2021.

assimilated to figures such as "civil association", either implicitly or explicitly, since such categories may deny their status as peoples and be openly alien to their worldview and history⁸⁵. The Commission welcomes the pronouncements of high courts in the region that reflect this approach⁸⁶.

97. Likewise, the IACHR was informed of cases in which, although there is recognition - even constitutional - of indigenous peoples, they continue to be treated as "mere owners of land in community property"⁸⁷.⁸⁷ This vision denies the cultural and political perspective to govern themselves as indigenous peoples with their own autonomy, in accordance with their nature as a people. In some domestic laws, they are still classified as "entities of public interest". This, as reported to the IACHR, "condemns them to a minority status in which they require the permanent tutelage of the State for the exercise and guarantee of their rights, without being able to fully exercise them on their own, as 'subjects of public law' with effective legal capacity to carry out their legal acts"⁸⁸.⁸⁸ The IACHR considers that this form of relationship with the native peoples of the region is not compatible with international instruments and jurisprudence on the subject, based on their right to self-determination.
98. Autonomously forming their forms of organization implies being able to constitute themselves as "peoples" or "nations" and not only through "communities". Indeed, Article 9 of the UN Declaration on Indigenous Peoples enshrines the right of indigenous peoples and individuals "to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may result from the exercise of this right". The American Declaration on Indigenous Peoples, likewise, establishes in its Article IX that "[t]he States shall fully recognize the juridical personality of indigenous peoples, respecting the forms of indigenous organization and promoting the full exercise of the rights recognized in this Declaration"⁸⁹.⁸⁹ Disregarding these forms of organization is contrary to the aforementioned articles and implies the denial of their self-determination.

⁸⁵ I/A Court H.R., Case of the Río Negro Massacres v. Guatemala. Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 4, 2012, para. 168.

⁸⁶ For example, the Constitutional Tribunal of Peru held that "[...] the recognition of such indigenous peoples, with their own customs, their ways of creating law and applying it, goes beyond the dimension of a mere civil association. Its vision is based on a political dimension, ultimately established in the right to self-determination of indigenous peoples". Judgment of the Constitutional Tribunal of Peru - Case No. 01126-2011-HC/TC - Juana Griselda Payaba Cachiue. See: <https://www.tc.gob.pe/jurisprudencia/2012/01126-2011-HC.html>. para. 23.

⁸⁷ CEJUDHCAN - Nicaragua. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

⁸⁸ Alliance for Self-Determination and Autonomy - ALDEA. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

⁸⁹ OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016.

99. In turn, in the American hemisphere, a diversity of autonomous processes of indigenous peoples have developed that present forms of organization constituted under the categories of indigenous "peoples", "nations" or "nationalities". These different indigenous collectives are entitled to recognition of their legal personality as such by the State. The absence of legislation in this regard represents a breach of the international obligation to adapt the state apparatus and cannot be used, therefore, as an excuse for not complying with this duty. Nor is it compatible with international human rights law for States, far from focusing their efforts on bringing their legislation into line with international human rights standards, to take actions that affect them, including administrative or judicial challenges to such recognition. It is the duty of the authorities and officials in charge of the administration of justice to ensure the full effectiveness of inter-American norms and standards, in accordance with the control of conventionality.
100. As long as mechanisms are not guaranteed for these forms of organizations, indigenous peoples generally face greater difficulties in exercising their related rights. The lack of recognition as a people or their recognition in ways that do not allow for the full affirmation of their rights can lead to the non-validation, in various state instances, of the acts of their decision-making bodies (such as minutes of community assemblies, for example) or to the imposition of bureaucratic and legal obstacles that prevent them from exercising public budgets, which are necessary for the reproduction of community life and their own forms of development.⁹⁰ They may, for example, be prevented from requesting recognition of their ancestral territories, which is necessary for the reproduction of community life and their own forms of development. They may be prevented, for example, from requesting recognition of their ancestral territories through a collective title, which is a fundamental right to guarantee their physical and cultural survival, widely recognized in international human rights law (*infra* 3.3).
101. Based on the experiences gathered for this report, the Commission considers it essential to recall that it is openly incompatible with international human rights law for States to demand formalistic or excessive requirements for granting legal personality to a given people or community. It is also incompatible to take the granting of legal personality as a condition for the exercise of their rights. This is because it is a merely declarative and not constitutive act, given that the people or community is pre-existent to the State, i.e., it exists independently of the State's recognition⁹¹. Linked to

⁹⁰ Alliance for Self-Determination and Autonomy - ALDEA. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021. This phenomenon has been systematically pointed out before international UN Rapporteurs on the matter, by communities, indigenous and civil society organizations in the visits they have made to the country. In the most recent one in 2018, the then Rapporteur Victoria Tauli, pointed out that, "Indigenous peoples continue to demand that they be recognized in the Constitution as subjects of public law, and not as entities of public interest." UN. Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico. A/HRC/39/17/Add.2. 28 June 2018, para. 10.

⁹¹ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 375.

It should be noted that collective legal personality is a right and, as such, a people may decide not to exercise it, as an expression of its self-determination⁹².

102. Likewise, the denial of recognition of legal personality constitutes a serious affectation of their self-determination. The consolidation of indigenous territories can also be hindered by the imposition of formalities to obtain legal personality⁹³. The recognition of juridical personality must take into account the collective way in which the people use and enjoy the property in accordance with their ancestral traditions⁹⁴. The IACHR reiterates that indigenous communities may be composed of individuals and families belonging to more than one ethnic group, but who consider and identify themselves as a single community. This multi-ethnic composition of some indigenous communities, which responds to their position as historical subjects, is compatible with the protection and exercise of the full catalog of their rights under international human rights law⁹⁵.
103. In this regard, the IACHR Court has indicated in various cases on indigenous and tribal peoples that "States have the duty to ensure the legal means and conditions generally necessary for the right to recognition of juridical personality to be exercised by its holders"⁹⁶. The IACHR recalls that "the official mechanisms for recognizing the personality of the peoples and tribes of the region are not the same as the official mechanisms for recognizing the personality of the peoples and tribes of the region."

⁹² For example, the IACHR was informed that, in Honduras, the Nahua people have not obtained legal status for the purpose of asserting their self-determination and their own form of self-government. As representatives of the Nahua people pointed out to the IACHR: "The Nahua people are exercising their own governance and self-determination by being the only people of the 9 that do not have legal status, we rely on the ancestral titles granted by the crown of Spain in the 1800s, ILO Convention 169 and the declaration on the rights of indigenous peoples. Although the fact that we do not have such accreditation from the Ministry of the Interior and Justice limits us to make some kind of state negotiations, but it is when we make our rights and our governance prevail". Nahua people of Honduras. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

⁹³ Regional meeting with representatives of indigenous, tribal and Afro-descendant peoples of South America (Brazil, Colombia, Chile, Ecuador, Suriname), held on May 11, 2021; IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 374; I/A Court H.R., para. 374. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, paras. 173-175; I/A Court H.R., I/A Court H.R., Case of the Saramaka People v. Suriname. Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, para. 155.

⁹⁴ I/A Court H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay. Case of Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006, para. 120.

⁹⁵ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 38.

⁹⁶ I/A Court H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay. Case of Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006, para. 189; I/A Court H.R., Case of the Saramaka People v. Suriname. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, 167.

indigenous communities necessarily imply the recognition of their forms of social and political organization "⁹⁷.

104. Accordingly, it is not the peoples or communities that must adjust their internal functioning to the norms of the rest of the national society. It is the latter that must respect the right of the peoples to self-identify as a collective and identify its members, that is to say, recognize the existence and legal validity of the indigenous system of their own ^{law}⁹⁸. Likewise, their official recognition through the registration of their legal personality must not imply a de facto barrier for them to enjoy their collective ^{rights}⁹⁹. The State must establish the necessary judicial and administrative conditions to guarantee the recognition of the legal personality of indigenous and tribal peoples, in consultation with them and in full respect of their cultural ^{identity}¹⁰⁰.

2. Cultural identity and no discrimination

a. Identity cultural

105. The Commission emphasizes that cultural identity is the essential component that defines a human group as a distinct ethno-cultural collective, with a particular way of being, seeing and acting in the world. Cultural identity has an evolving and dynamic character. It can be modified over time, based on historical, social and political processes of ^{relationship}¹⁰¹. In the case of indigenous and tribal peoples, one of the most important components that determine their identity is their close relationship with their ancestral territory and the resources found ^{therein}¹⁰².

⁹⁷ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 375.

⁹⁸ Constitutional Court of Colombia. Judgment T-072-2021, in case T-7.910.068. March 24, 2021, p. 61.

⁹⁹ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 375.

¹⁰⁰ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 374.

¹⁰¹ IACHR Court. Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, para. 284.

¹⁰² I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, para. 135.

106. Cultural identity is a fundamental right of both an individual and collective nature¹⁰³. In its collective dimension, which is of particular relevance for this report, it is the cross-cutting interpretation for the conception, respect and guarantee of the other rights of indigenous and tribal peoples protected by the inter-American instruments, as well as by domestic legal systems. In other words, any measure adopted by the State to protect the rights of these peoples must be based on respect for their unique ways of life and particularities¹⁰⁴. This right allows them to fully exercise their right to self-determination¹⁰⁵.
107. The full recognition and guarantee of the right to cultural identity is fundamental in contemporary international human rights law and implies overcoming historical legacies of discrimination, racism and colonialism. This right is expressly recognized in ILO Convention 169 (article 5)¹⁰⁶ and the UN Declaration on Indigenous Peoples (articles 9, 11, 12, 13 and 34)¹⁰⁷. In the Inter-American system, it was explicitly included in Article XIII of the American Declaration on Indigenous Peoples. In its paragraph 1, it establishes that indigenous peoples have "the right to their own identity and cultural integrity and to their cultural heritage, tangible and intangible, including their historical and ancestral heritage, as well as to the protection, preservation, maintenance and development of such cultural heritage for their collective continuity and that of their members, and to transmit it to future generations".
108. The above provisions are complemented by express provisions prohibiting assimilationist practices. The American Declaration on Indigenous Peoples, in its Article X, recognizes that indigenous peoples "have the right freely to maintain, express and develop their cultural identity in all its aspects, free from external attempts at assimilation"¹⁰⁸. The UN Declaration on

¹⁰³ I/A Court H.R., Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012, para. 217.

¹⁰⁴ I/A Court H.R., Case of Chitay Nech et al. v. Guatemala. Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010, para. 147; IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 152.

¹⁰⁵ As Lãm points out, "while the right to self-determination recognizes and secures agency for indigenous peoples, it is the norm of cultural identity that safeguards their ability to consciously and meaningfully exercise that agency in common in the future." Lãm, Maivãn Clech. "Rooting Change: Indigeneity and Development." In Currie-Alder, Bruce et al (eds.). *International Development: Ideas, Experience, and Prospects*. Oxford: Oxford University Press, 2014, p. 13.

¹⁰⁶ For decades, assimilationist and integrationist positions on indigenous and tribal peoples predominated in international human rights law, which was reflected in ILO Convention 107. The adoption of ILO Convention 169 represented a paradigm shift.

¹⁰⁷ The UN Declaration on Indigenous Peoples develops this right throughout the text, with emphasis on rights such as relevance to an indigenous people, to tradition and customs, to spirituality, and to religion. Lãm, Maivãn Clech. "Rooting Change: Indigeneity and Development." In Currie-Alder, Bruce et al (eds.). *International Development: Ideas, Experience, and Prospects*. Oxford: Oxford University Press, 2014, p. 13.

¹⁰⁸ OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016.

In order to guarantee the cultural existence of indigenous peoples as distinct peoples, States must prevent any act, policy or practice of assimilation. This is understood as "any act which has the aim or effect of depriving them of their integrity as distinct peoples or of their cultural values or ethnic identity, any act which has the aim or effect of dispossessing them of their lands, territories or resources, and any form of forced assimilation or integration"¹⁰⁹.

109. This obligation takes on special importance in circumstances in which indigenous peoples face serious risks of disappearance.¹¹⁰ Another circumstance of special concern to the IACHR are those of indigenous peoples in isolation and initial contact. The preservation of their culture depends to a great extent on the States guaranteeing the principle of no contact as an expression of their right to self-determination.¹¹¹ Likewise, the IACHR has warned that there are situations in which certain norms or policies seek to deny the existence of indigenous peoples for the purpose of implementing investment or extractive projects, which would aim at the disintegration or assimilation of these groups for the purpose of carrying out such activities.¹¹²
110. The traditional knowledge and wisdom of indigenous and tribal peoples, as well as the diverse manifestations of their sciences, technologies and cultures, are key elements of their identity and the basis for their own internationally protected expressions of autonomy. Article XXVIII of the American Declaration on Indigenous Peoples recognizes that indigenous peoples have "the right to full recognition and respect for the ownership, control, possession, control, development and protection of their tangible and intangible cultural heritage and intellectual property, including their collective nature, transmitted through the millennia from generation to generation. Similarly, the UN Declaration on Indigenous Peoples, in Article 31, provides that these groups have the right to "maintain, control, protect and develop their cultural heritage, their

¹⁰⁹ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007; IACHR. *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights*. OEA/Ser.L/V/II. Doc. 47/13. December 30, 2013, para. 48.

¹¹⁰ This is the case of 65 indigenous peoples in Colombia. The IACHR has held on several occasions that this serious situation requires the Colombian State to adopt "urgent, decisive and comprehensive measures to ensure their physical and cultural survival, which [...] is affected by a series of complex processes linked to violence, poverty and exclusion, which are based on the interest of non-indigenous actors in their ancestral territories". IACHR. *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*. OEA/Ser.L/V/II. Doc. 49/13. December 31, 2013, paras. 859.

¹¹¹ IACHR. *Indigenous Peoples in voluntary isolation and initial contact in the Americas: Recommendations for the full respect of their human rights*. OEA/Ser.L/V/II. Doc. 47/13. December 30, 2013. IACHR. Report No. 152/19. Case 12.979. Merits. Tagaeri and Taromenane indigenous peoples (in voluntary isolation). Ecuador. September 28, 2019, para. 89.

¹¹² IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: Protection of human rights in the context of extraction, exploitation and development activities*. OEA/Ser.L/V/II. Doc. 47/15. December 31, 2015, para. 245.

traditional knowledge, their traditional cultural expressions and the manifestations of their sciences, technologies and cultures "¹¹³.

111. As noted by the Permanent Forum on Indigenous Issues, indigenous traditional knowledge reflects their vision of the world, contributes to cultural biological diversity and is a source of cultural wealth for peoples and humanity in general¹¹⁴. The disappearance of an indigenous people means an irreparable loss of cultural heritage¹¹⁵. The Commission notes that the recent uprooting of young people and the progressive rupture of intergenerational ties bring about a loss of knowledge for life in the territories. This, in turn, prevents new generations from adequately enjoying and valuing territorial resources¹¹⁶.
112. Territory constitutes an integral element of their worldview, religiosity and, consequently, of their cultural identity.¹¹⁷ Both the IACHR and the Court have emphasized that States must consider that territorial rights protect their "collective right to survival as an organized people, with control of their habitat as a necessary condition for the reproduction of their culture, for their own development and for carrying out their life plans. Likewise, collective property guarantees indigenous and tribal peoples the conservation of their cultural heritage¹¹⁹. The lack of guarantee of the right to collective property is detrimental to the preservation of their particular ways of life and implies a risk of irreparable ethnic and cultural loss.¹²⁰ Non-consensual interference by non-indigenous settlers in their territories can generate serious alterations to their cultural heritage.

¹¹³ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007.

¹¹⁴ UN. Permanent Forum on Indigenous Issues. [Report on the fifth session \(15-26 May 2006\)](#). E/2006/43. E/C.19/2006/11, para. 33.

¹¹⁵ IACHR. *Situation of the human rights of the indigenous and tribal peoples of Panamazonia*. OAS/Ser.Lxak/V/II. Doc. 176. 29 September 2019, para. 285.

¹¹⁶ García Hierro, Pedro. Gobernanza territorial y pueblos indígenas. In Alberto CHIRIF (ed.). *Por la conquista de la autodeterminación en el cincuentenario de la Declaración de Barbados*. Lima: IWGIA. p. 204.

¹¹⁷ I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, para. 135.

¹¹⁸ I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, para. 146; IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 3.

¹¹⁹ IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 295; IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, footnote 117; IACHR. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, para. 146.

¹²⁰ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 160.

their traditional ways of life and imply real damage to their identity¹²¹. This is aggravated when considering that the disappearance of certain cultural and spiritual practices may compromise the very existence of the collective as a distinct group¹²².

113. Closely linked to cultural identity is the right to freely exercise their own religion, spirituality and beliefs, recognized by the American States in Article XVI of the American Declaration on Indigenous Peoples. Ancestral territories have a profound spiritual value for indigenous and tribal peoples¹²³. Intrinsic elements of their cultural identity are "ancestral burial grounds, places of religious significance and importance, and ceremonial or ritual sites associated with the occupation and use of their physical territories."¹²⁴ This includes the development of burial practices¹²⁵. Consequently, the IACHR and the Inter-American Court have considered that any limitation to collective property or destruction of the resources found therein has great repercussions on the exercise of their own religion, and on the social and spiritual relations of its members¹²⁶. The Commission notes with particular concern the cases in which sacred sites have been affected by overlapping with areas in which extractive activities are sought to be developed, ranging from interference in the free performance of religious ceremonies to the destruction of these spaces¹²⁷.
114. Likewise, an important component of a people's cultural identity is its own language, since it guarantees the expression, dissemination and transmission of its culture. States must adopt measures so that indigenous and tribal peoples may freely use their own languages. The imposition of restrictions on this freedom is discriminatory¹²⁸. Similarly, the UN Declaration on Indigenous Peoples, in Article 16, recognizes that indigenous peoples have the right to

¹²¹ IACHR Court. Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, para. 284.

¹²² IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 142.

¹²³ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 150.

¹²⁴ IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 160; IACHR, Report No. 40/04, Case 12.053, Mayan Indigenous Communities of the Toledo District (Belize), October 12, 2004, para. 155.

¹²⁵ I/A Court H.R., Case of Bámaca Velásquez v. Guatemala. Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000, para. 82.

¹²⁶ I/A Court H.R., Case of the Kichwa People of Sarayaku v. Ecuador. Case of the Kichwa People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012, para. 219; IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, para. 161.

¹²⁷ IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: Protection of human rights in the context of extraction, exploitation and development activities*. OEA/Ser.L/V/II.Doc. 47/15. December 31, 2015, para. 266.

¹²⁸ I/A Court H.R., Case of López Álvarez v. Honduras. Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006, para. 71.

"to establish their own information media in their own languages and to have access to all other non-indigenous information media without discrimination"¹²⁹. The IACHR considers that these mechanisms allow the peoples to effectively enjoy and exercise their cultural rights, and therefore the State must remove any obstacle that prevents or limits the peoples' access to them, including radio frequencies¹³⁰.

b. No discrimination

115. In the Commission's understanding, the structural cause that often underlies human rights violations against indigenous peoples is the existence of a profound situation of racial discrimination, rooted throughout centuries of history¹³¹. The weakening of the autonomy and self-government structures of indigenous peoples is closely related to historical processes of colonization and extermination, first, and colonialism and assimilation, later¹³².
116. Linked to this, the right to self-determination has been massively and systematically denied to the continent's indigenous peoples. These peoples have suffered the loss of large tracts of territory and the impediment of access to resources necessary for their lives, have experienced historical pressures to suppress their political and cultural institutions, and have faced constant threats to their cohesion as communities and to the integrity of their cultures, among other serious circumstances¹³³. Today, they live in States whose legal and political configuration is often built in conditions of exclusion, racism and, above all, without the participation of indigenous peoples¹³⁴. An expression of this is the imposition of forms of political-administrative organization of the territory that still respond to the logic of a monocultural model and deny the existence of other cultures. Overcoming these violations requires the transformation of state structures towards a fully intercultural state. Thus, the

¹²⁹ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007.

¹³⁰ IACHR. Report No. 164/19. Case 13.608. Maya Kaqchikel Indigenous Peoples of Sumpango et al. Guatemala. November 9, 2019, paras. 99 and 113.

¹³¹ IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: Protection of human rights in the context of extraction, exploitation and development activities*. OEA/Ser.L/V/II.Doc. 47/15. December 31, 2015, para. 240.

¹³² In a similar vein, Tauli-Corpuz, Victoria. "The right of indigenous peoples to self-determination through autonomy or self-government". In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 14.

¹³³ Anaya, James (2010). "The right of indigenous peoples to self-determination after the adoption of the Declaration". In Claire CHARTERS and Rodolfo STAVENHAGEN (ed.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, p. 202. See also Anaya, James (2004). *Indigenous peoples in international law*. New York: Oxford University Press.

¹³⁴ Calí Tzay, Francisco. "Prologue." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 7.

IACHR considers that hindering the exercise of self-determination may represent a form of discrimination.

117. At the same time, there are still national legislations in the region that -totally or partially- maintain a vision that leaves aside its pluricultural, multilingual or plurinational character.¹³⁵ This is a cultural difference that continues to be hierarchized in various ways. As a result, most indigenous and tribal sectors are located at the bottom rung of the socioeconomic ladder and exist on the margins of power.¹³⁶ Therefore, as the former UN Rapporteur on the rights of indigenous peoples pointed out, "historical phenomena, rooted in attitudes of racial discrimination, are not only sins of the past, but are translated into present-day inequalities.
118. The IACHR reiterates that the principle of non-discrimination is one of the pillars of any democratic system and that it is one of the fundamental bases of the human rights protection system established by the OAS.¹³⁸ Both the American Declaration and the American Convention were inspired by the ideal that all persons "are born free and equal in dignity and rights", which is why Articles II, 1.1 and 24, respectively, enshrine the principle of non-discrimination and equality before the law.¹³⁹ In addition, the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance, as well as the Inter-American Convention against All Forms of Discrimination and Intolerance, and the Inter-American Convention against All Forms of Discrimination and Related Intolerance, are also part of this principle. In addition, the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance, as well as the Inter-American Convention against all Forms of Discrimination and Intolerance.
119. In view of this shared history of oppression and exclusion, the common denominator of the instruments protecting the rights of indigenous peoples is the recognition of their right to non-discrimination, as evidenced in ILO Convention 169 (Article 3), the UN Declaration on Indigenous Peoples (Article 2) and the American Declaration on Indigenous Peoples (Articles VII, VIII and XII). It should be recalled that the ACHR imposes a general obligation on States not to discriminate in respecting and guaranteeing the rights recognized in this instrument. This includes the prohibition of differential treatment, based on prohibited grounds, that impairs the enjoyment or exercise of rights. In this sense, according to the IACHR Court, "if a State discriminates in the respect or guarantee of a conventional right, it would violate Article I(1) and the substantive law of the Convention".

¹³⁵ Calí Tzay, Francisco. "Prologue." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 7.

¹³⁶ IACHR. *Indigenous Peoples, Afro-descendant Communities and Natural Resources: Protection of Human Rights in the Context of Extraction, Exploitation and Development Activities*. OEA/Ser.L/V/II.Doc. 47/15. December 31, 2015, para. 240.

¹³⁷ Anaya, James (2010). "The right of indigenous peoples to self-determination after the adoption of the Declaration". In Claire CHARTERS and Rodolfo STAVENHAGEN (ed.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, p. 202.

¹³⁸ IACHR. *The Situation of Afro-descendants in the Americas*. OEA/Ser.L/V/II.Doc.62, December 5, 2011, para. 1; IACHR. "Considerations on the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination," *Annual Report of the Inter-American Commission on Human Rights*, 1999, Chapter VI.

¹³⁹ IACHR. *Indigenous Peoples, Afro-descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*. OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 241.

In relation to indigenous peoples, the Court has held that, in order to guarantee, under conditions of equality, the effective protection of their rights, it is necessary to take into account "their own particularities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, uses and customs"¹⁴¹.

120. The protection of this right also requires States to eradicate practices such as racism, racial discrimination, xenophobia and other related forms of intolerance, through the adoption of the necessary preventive and corrective measures¹⁴². In this sense, States must eliminate all forms of discrimination and intolerance, as well as adopt actions to promote and protect the rights of indigenous and tribal peoples and respect ethnic and cultural diversity, which contributes to strengthening democracy and citizen participation¹⁴³.
121. According to the UN Rapporteurship on the Rights of Indigenous Peoples, it can be understood that the norms that recognize indigenous rights have a twofold objective. On the one hand, they aim to remedy "discrimination against these groups, so that they may fully benefit from development activities and achieve an adequate standard of living"¹⁴⁴. In this regard, the IACHR emphasizes that States have the obligation to adopt structural measures aimed at combating discrimination against indigenous peoples, which implies, among others, the implementation of educational measures.¹⁴⁵ In this regard, the IACHR has ordered guarantees of the right of indigenous peoples to be protected from discrimination, including the implementation of educational measures. Along these lines, the IACHR Court has ordered guarantees of non-repetition that included incorporating in the curriculum

¹⁴⁰ I/A Court H.R., Case of Apitz Barbera et al. Case of Apitz Barbera et al. ("Corte Primera de lo Contencioso Administrativo") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 209.

¹⁴¹ I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, para. 63.

¹⁴² The term "racial discrimination" has been defined by Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

¹⁴³ IACHR. Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion. OEA/Ser.L/V/II. Doc. 43/15. 31 December 2015, para. 104.

¹⁴⁴ UN. General Assembly. The rights of indigenous peoples, including their economic, social and cultural rights in the post-2015 development framework. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples. A/69/267. 6 August 2014, para. 16.

¹⁴⁵ In particular, ILO Convention 169, in Article 31, contains this obligation that "educational measures shall be taken in all sectors of the national community, and especially in those which are in most direct contact with the peoples concerned, with a view to eliminating prejudices which they may hold in respect of these peoples". ILO. *Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries*. 1989.

The State's national programs aimed at eradicating racial and ethnic discrimination, racial and ethnic stereotypes, and violence against indigenous peoples¹⁴⁶.

122. On the other hand, international standards on the rights of indigenous peoples "seek to ensure respect for their right to define and follow their own freely determined development models, in order to protect their cultural integrity and strengthen their potential for sustainable development."¹⁴⁷ In this regard, the IACHR emphasizes that the effective recognition of their right to self-determination requires changes in the structures that have a transformative impact to ensure respect for human rights, the fight against racism, discrimination and inequality, the construction of more democratic and inclusive societies, and greater legitimacy of the State¹⁴⁸.

3. Property collective, lands, territories y resources

123. For indigenous and tribal peoples, the territory they occupy is theirs by ancestral inheritance. The way they use their territory and the way they control their territorial spaces is often very different from that of Western culture. Despite impositions, it has been occupied and defended by past generations, and it is hoped that future generations will continue to do so. It is thus the territorial basis for the exercise of self-determination.
124. International instruments and jurisprudence on the rights of indigenous peoples have recognized that the right to territory of indigenous peoples is a right that pre-exists the State, as reflected in ILO Convention 169 (Articles 13, 14, 16, 17 and 18), the UN Declaration on Indigenous Peoples (Articles 13, 14, 16, 17 and 18), the UN Declaration on the Rights of Indigenous Peoples (Article 10, 25, 26, 27, 28, 29, 30, 31 and 32), and the American Declaration on Indigenous Peoples (Article XXV). In the ISHR, the IACHR and the Inter-American Court have jointly developed the content of the right to collective property of indigenous and tribal peoples, based on Article 21 of the ACHR and Article XXIII of the American Declaration. The Commission reiterates the standards issued on the

¹⁴⁶ IACHR Court. Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016, para. 318.

¹⁴⁷ UN. General Assembly. The rights of indigenous peoples, including their economic, social and cultural rights in the post-2015 development framework. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples. A/69/267. 6 August 2014, para. 16.

¹⁴⁸ UN. "Report of the Special Rapporteur on the rights of indigenous peoples." A/74/149, July 17, 2019, para. 36; Calí Tzay, Francisco. "Foreword." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 9.

matter¹⁴⁹. Taking into account the scope of this report, this section refers to those aspects that are most relevant in light of the right to self-determination.

a. **Land guarantees and territories**

125. In international human rights law, it has been understood that the materialization of the right to self-determination can occur through the recognition, titling, delimitation and demarcation of indigenous territories¹⁵⁰. The IACHR notes with concern that, although there has been significant progress, several States in the region still have a historical debt in terms of recognition of indigenous and tribal collectives and their territorial rights. After centuries of independent life and decades of assuming international commitments in relation to indigenous and tribal peoples, there are still numerous peoples and communities in the continent whose territorial rights based on their historical use and occupation have not been recognized.
126. The IACHR notes that some few States have comprehensive legislation in terms of the rights of indigenous and tribal peoples that recognizes their autonomy in the management of their lands and natural resources and establishes a specific demarcation and titling process. However, even in these countries, in practice there is a significant gap between the implementation of the norms and the reality of the problems faced by indigenous and tribal peoples due to the failure of the State to effectively comply with these norms¹⁵¹.
127. This is despite the fact that guarantees regarding lands and territories are often, in practice, a necessary condition for the effective exercise of the rights inherent to indigenous and tribal peoples. The greater the gap of

¹⁴⁹ See mainly reports on "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System" (2009), "Indigenous Peoples, Afro-descendant Communities and Extractive Industries" (2015) and "Human Rights Situation of Indigenous and Tribal Peoples of the Pan-Amazon" (2019).

¹⁵⁰ I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community vs. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001, para. 148; I/A Court H.R., Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra). Case of Indigenous Communities Members of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, p. 92-98; IACHR. *Rights of indigenous and tribal peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09. December 30, 2009, paras. 77-152; IACHR. *Indigenous Peoples, Afro-descendant Communities and Natural Resources: Protection of Human Rights in the Context of Extraction, Exploitation and Development Activities*. OEA/Ser.L/V/II.Doc. 47/15. December 31, 2015, paras. 155-246; IACHR. *Situation of the human rights of indigenous and tribal peoples of Panamazonia*. OAS/Ser.Lxak/V/II. Doc. 176. 29 September 2019, para. 229-238. UN. Economic and Social Council. Permanent Forum on Indigenous Issues. Study on indigenous peoples' autonomies: experiences and perspectives. Nineteenth session New York, 13-24 April 2020. Future work of the Permanent Forum, including issues considered by the Economic and Social Council and emerging issues.

¹⁵¹ CEJUDHCAN - Nicaragua. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

implementation, there are fewer possibilities for the realization of other legally recognized rights, such as the right to life, much less the right to self-determination¹⁵². The lack of recognition and other guarantees regarding territory can bring into question the identification as a collective and/or the legal personality of peoples and communities, thus denying their very existence¹⁵³. The IACHR considers, therefore, that this is a historical injustice that cannot be postponed and is a priority.

b. Autonomy or territorial self-government based on its own law

128. The right to self-determination not only implies the recognition of collective ownership, but also the right to self-govern their territories through their own authorities. The right to autonomy or self-government was expressly recognized by the American States in Article XXI of the American Declaration on Indigenous Peoples and by the international community in general, in Article 4 of the UN Declaration on Indigenous Peoples¹⁵⁴. The exercise of territorial governance is one of the most relevant expressions of indigenous and tribal self-determination. This implies the recognition of self-government systems that assume control, management and administration of the ancestral or traditional territory.
129. In addition to the collective property title to the territory, a key aspect for the indigenous and tribal peoples of the region is related to how the territorial structure is configured. It is on the basis of their own systems of regulation and knowledge that they conceive of and interact with the geographic space and determine territorial organization. Along these lines, the Inter-American Commission considers it essential to begin by recognizing that the legal systems of indigenous and tribal peoples are absolutely valid. It is incumbent upon States to recognize and respect the law and legal systems of these peoples, as established in international human rights instruments¹⁵⁵. The Declarations

¹⁵² Funaki, Ritsuko. "The implementation gap of indigenous peoples' rights over lands and territories in Latin America (1991-2019)." In González, Miguel; Burguete Cal y Mayor, Araceli; Marimán, José; Ortiz-T, Pablo; Funaki, Ritsuko. *Autonomías y autogobierno en la América diversa*. Quito: Universidad Politécnica Salesiana, 2021, pp. 67-110.

¹⁵³ Alianza Sierra Madre A.C., Tierra Nativa A.C., and Consultoría Técnica Comunitaria A.C. *Report: Territorial Rights of the Indigenous Peoples of the Sierra Tarahumara*. Chihuahua, 2016.

¹⁵⁴ Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. Indigenous peoples have the right to maintain and develop their own indigenous decision-making institutions. They also have the right to participate in decision-making in matters affecting their rights. They may do so directly or through their representatives, in accordance with their own rules, procedures and traditions. They also have the right to equal opportunity to access and participate fully and effectively as peoples in all national institutions and forums, including deliberative bodies".

¹⁵⁵ American Declaration on the Rights of Indigenous Peoples, Article XXII, and UN Declaration on Indigenous Peoples, Article 34. Judgment T-072-2021, in case T-7.910.068. March 24, 2021.

The American and UN Conventions on indigenous peoples and Convention 169 jointly establish the right to recognition and respect for their own institutions, practices and customs linked to their customary law, their legal systems, administration of justice and jurisdiction¹⁵⁶.

130. This is fundamental in light of the right to self-determination, as it is the basis for cultural, political, social and other dimensions of peoples' lives. It includes, for example, the right to self-determine the institutions, mechanisms and administrative models for the enjoyment of land and resources without external interference. In turn, it implies the right to choose and define their own mechanisms of representation in consultations, consent processes or other acts carried out as a result of their external relations with other peoples and nations or with the State¹⁵⁷.
131. The Commission reaffirms that an essential component of indigenous and tribal autonomy is the control of ancestral territories and the natural resources found therein. The recognition and effective implementation of land and natural resource rights are necessary conditions for effective autonomy, and is the basis for their existence as collective subjects. Land, territory and its natural resources are not, in general, conceived by indigenous peoples as a commodity, but as the source of life itself. They are not only the basis of their economic subsistence, but of their cultural identity and spiritual well-being. The loss of their ancestral lands and territories can, therefore, threaten their very survival as a collective¹⁵⁸.
132. In this regard, it notes that, to date, very few States have established legal and/or administrative mechanisms that guarantee the right to autonomy of indigenous and tribal peoples, especially over their natural resources and means of subsistence. On the contrary, domestic legal systems generally prevent indigenous peoples from holding property rights over the natural resources that make up the habitat of their territories¹⁵⁹.

¹⁵⁶ [United Nations Declaration on the Rights of Indigenous Peoples](#), adopted by the General Assembly on September 13, 2007, art. 34; [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-0/16)(June 15, 2016), art. XXII; and ILO, [Indigenous and Tribal Peoples in Independent Countries Convention, 1989](#) (Convention No. 169), art. 8.

¹⁵⁷ Autonomous Territorial Government of the Wampís Nation, Legal Report on the Right to Territory of the Wampís Nation. 2017.

¹⁵⁸ Alliance for Self-Determination and Autonomy - ALDEA. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

¹⁵⁹ International Institute of Law and Society. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

c. Fragmentation of the indigenous territory and tribal

133. The territoriality of the communities and of the indigenous and tribal peoples of which they form part, corresponds to a spatiality determined and self-defined as an attribute inherent to the subject of law that makes up the community and the respective indigenous or tribal people. Territorial governance encompasses the determination of the type of ownership with which they will exercise their territorial rights, based on their own law. Despite this, one of the main problems in the region is that there are multiple cases in which the titling does not reflect the proper conception of the territory. As an indigenous authority pointed out to the IACHR: "we do not speak of territorial tenure at the community level but at the socio-historical territorial level, that is why we speak of integral territories that do not mean border lines but how nature functions in its balance, water, land, space, including human beings, that is what we call integral territories"¹⁶⁰.
134. When the State grants property titles by communities, fundamental areas for the life of the peoples may be excluded. Communities are thus reduced to territorial fractions or islands that disassociate indigenous peoples from their integral relationship with the traditional territory, and seriously hinder the exercise of autonomy¹⁶¹. Their observance is atomized, which, according to the UN Special Rapporteur on the Rights of Indigenous Peoples, constitutes the exercise of "fragmented self-determination"¹⁶².
135. According to the IACHR and the Inter-American Court of Human Rights, the territorial right of indigenous and tribal peoples derives from the continued possession of the territory and not from its legalization through the titling procedure.¹⁶³ This is why this right is not subject to prior state recognition, since it is a right already consecrated and fully exercised, which the State is obliged to consolidate through a legal recognition procedure. This is why this right is not subject to prior State recognition, since it is a right already consecrated and in full exercise that the State is obliged to consolidate through a legal recognition procedure. Both the communal property that the State has legalized, as well as the ancestral possession acquired due to their traditional ownership and current use, comprise a single territorial space that has belonged to them since time immemorial. Indigenous and tribal peoples with the organizational form of "pueblos" have the right to the titling of their ancestral territories through a single collective title.

¹⁶⁰ Meeting with representatives of the autonomous indigenous governments of the Wampis Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

¹⁶¹ Lenca Indigenous Movement of Honduras. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021. Autonomous Territorial Government of the Wampis Nation. Legal report on the right to territory of the Wampis Nation. 2017.

¹⁶² Tauli-Corpus, Victoria. "The right of indigenous peoples to self-determination through autonomy or self-government". In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 14.

¹⁶³ IACHR Court. Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, p. 327; IACHR. Report No. 2/12. Case 12.094. Merits. Indigenous communities members of the Lhaka Honhat Association (Our Land). Argentina. January 26, 2012, para. 171.

d. Territorial structuring from the local

136. In the dialogue with the IACHR, different peoples and communities indicated that, in some regions, the forms of territorial structuring - through, for example, districts or municipalities - may represent a territorial organization at the local level that corresponds to the colonial order and ignores the indigenous cultural political organization. They perceive these figures as bearers of colonial forms of authority, resource management, decision-making bodies, and electoral dynamics, which result in discriminatory acts and hinder the exercise of their rights with cultural identity.
137. The Commission notes that this way of structuring local territories is perceived by the indigenous peoples as a way of seriously limiting their right to determine themselves freely and to have control over their institutions, political organization, and ways of life.¹⁶⁴ According to them, this pressures them to build territories "in the image and likeness of municipalities, which is a colonial order. According to what they reported, this pressures them to build territories "in the image and likeness of municipalities that is a colonial order".¹⁶⁵ Such forms are in constant confrontation with their own forms, since for the peoples and communities the use of their territory is an essential part of their own existence, while the majority society usually conceives of it as an object of appropriation and exploitable resources¹⁶⁶.
138. The IACHR indicates that overcoming these schemes requires opening space for territorial management processes developed from the local level, by the indigenous and tribal peoples themselves and their authorities. This can be seen as part of the ethnic and cultural relevance as a fundamental condition to guarantee the efficiency required in the administration and cultural and environmental conservation of these territories. These scenarios can invite to put in intercultural dialogue the state structures with the indigenous and tribal ones in order to better configure the States, from the local level. In this sense, a good practice could be to promote mechanisms so that these indigenous and tribal systems can be expressed in the configuration of the State itself and thus favor the understanding of this territorial order that has been ignored. It is a matter of constructing, in an intercultural dialogue, ways of managing territories so that indigenous and tribal peoples can play a more effective role in the exercise and safeguarding of their rights.

¹⁶⁴ OPIAC and Gaia Amazonas Foundation. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

¹⁶⁵ Meeting with OPIAC and Gaia Foundation on Colombian Amazonia, held on April 19, 2021.

¹⁶⁶ For example, the IACHR was informed that, in some cases, States extend community titles, but municipal mayors do not allow the recognition of these titles and apply the law of municipalities. This leads to internal conflicts over water, forest and extractive megaprojects. Alianza Sierra Madre A.C., Tierra Nativa A.C., and Consultoría Técnica Comunitaria A.C. *Report: Territorial Rights of the Indigenous Peoples of the Sierra Tarahumara*. Chihuahua, 2016. Meeting with OPIAC and Gaia Foundation on Colombian Amazonia, held on April 19, 2021. Law, Environment and Natural Resources - DAR. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

e. Development models and climate crisis

139. Linked to the above, a fundamental aspect of territorial governance is the development model adopted by indigenous and tribal peoples, as a manifestation of their right to self-determination. In addition to other ^{international} instruments¹⁶⁷, Article XXIX of the American Declaration on Indigenous Peoples recognizes the right to development of indigenous peoples, which implies "to maintain and determine their own priorities regarding their political, economic, social and cultural development, in accordance with their own worldview"¹⁶⁸.¹⁶⁸ This right gives indigenous peoples control over their own pace of change, based on their own understanding of development, which also encompasses their right to refuse certain measures that are not in accordance with their priorities and ^{aspirations}¹⁶⁹. This implies that indigenous peoples undertake initiatives to extract natural resources in their territories, depending on whether they wish to do so or ^{not}.¹⁷⁰ One mechanism that indigenous peoples have been using are the "Life Plans", which are territorial management instruments detailing the different uses of the ^{territory}¹⁷¹. The main purpose is for indigenous peoples to consolidate their community self-management processes and to be considered by the State in their land use ^{plans}¹⁷² (see also infra Ch. 4.B).
140. The Inter-American Commission believes that this is key in the context of the current climate crisis. According to the latest report of the Intergovernmental Panel on Climate Change, if greenhouse gas emissions are not reduced immediately, rapidly and on a large scale, limiting warming to around 1.5°C or even 2°C will become an unattainable goal. The report also reiterates the scientific confirmation that it is human activities that are responsible for the

¹⁶⁷ The UN Declaration on Indigenous Peoples, in Article 32, recognizes the right of peoples to "determine and develop priorities and strategies for the development or use of their lands or territories and other resources". UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007. Article 32.

¹⁶⁸ OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016. Art. XXIX.

¹⁶⁹ IACHR. *Situación de los derechos humanos de los pueblos indígenas y tribales de la Panamazonía*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 26. UN. "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2002/65*." E/CN.4/2003/90, January 21, 2003, para. 70.

¹⁷⁰ UN. Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. Extractive industries and indigenous peoples. A/HRC/24/41. July 1, 2013, para. 71; UN. "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya." A/HRC/21/47. 6 July 2012, para. 50.

¹⁷¹ Aguilar Castro, Vladimir *et al.* Plurinational State and Life Plans for the Management of Indigenous Territories as an Alternative to Extractivism. American Anthropology, volume number 6, (2018), p. 20.

¹⁷² Aguilar Castro, Vladimir *et al.* Plurinational State and Life Plans for the Management of Indigenous Territories as an Alternative to Extractivism. American Anthropology, volume number 6, (2018), p. 20.

global warming¹⁷³. This scenario poses new challenges for the exercise of the rights of indigenous peoples. On the one hand, "the impacts caused by climate change are a reality in the Americas and disproportionately affect indigenous peoples, by impacting both the life cycles of ecosystems and the factors that allow them to enjoy a dignified life", in addition to the fact that their "territories are located in areas with a high incidence of extractive or infrastructure projects"¹⁷⁴. On the other hand, it is more urgent and necessary than ever to make their right to development a reality, based on their own worldview. As the IACHR has already pointed out, "indigenous peoples are a source of hope for humanity, as they are the best protectors of nature and forests, thanks to their millenary knowledge and their special relationship with their ancestral territories"¹⁷⁵.

f. Experiences

141. The American continent presents numerous exercises of indigenous and tribal self-government that go in the direction of deepening the right to self-determination¹⁷⁶. The experiences are widely diverse, as they depend on how each people self-determines¹⁷⁷. The Commission is aware that these exercises in self-determination can lead to a fundamental debate on the relationship between States and indigenous and tribal peoples. The emergence and growth of autonomous territorial governments of different indigenous peoples may highlight the need for an intercultural dialogue on the forms of representation, the affirmation of ancestral territory, and the need to increase their participation.

¹⁷³ Intergovernmental Panel on Climate Change. Climate Change 2021: The Physical Science Basis. Sixth Assessment Report of the Intergovernmental Panel on Climate Change. August 7, 2021; Intergovernmental Panel on Climate Change. IPCC Press Release. Climate change is widespread, rapid and intensifying. August 9, 2021.

¹⁷⁴ IACHR. On the World Day of Indigenous Peoples, the IACHR and REDESCA urge States to redouble their efforts to protect the territories of indigenous peoples as an essential measure to protect nature and biodiversity, as well as to guarantee their rights during the COVID-19 pandemic. [Press Release 207/2021](#). August 9, 2021.

¹⁷⁵ IACHR. On the World Day of Indigenous Peoples, the IACHR and REDESCA urge States to redouble their efforts to protect the territories of indigenous peoples as an essential measure to protect nature and biodiversity, as well as to guarantee their rights during the COVID-19 pandemic. [Press Release 207/2021](#). August 9, 2021.

¹⁷⁶ It has been possible to identify the organizational advances of the Autonomous Government of the Wampís Nation, the Autonomous Government of the Awajún Nation, the Ashuar Nation, the Harambut Nation, the Shipiba Nation, the Kukama - Kukamiria Nation, among others throughout the Peruvian Amazon. Similarly, in Nicaragua, there is a law initiative to recognize the Mayangna Indigenous Nation. In Canada, an emblematic case is the Nunavut Territorial Government, formed by Inuit Indians since the 1990s.

¹⁷⁷ For example, Afro-descendant communities in Colombia informed the IACHR that the exercise of territorial control takes the form of community monitoring or territory reconnaissance walks. COCOMASUR of Colombia and EarthRights International. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

in their national organizations, and to recover and protect indigenous peoples threatened with extinction¹⁷⁸.

142. There are multiple ways in which territorial planning can reflect high cultural diversity, the existence of diverse cosmovisions, linguistic and cultural diversity, and diverse environmental values. Some States in the region have opted for the recognition of indigenous territories as particular entities. Indigenous territories can be conceived as special political-administrative organizations for the exercise of public functions through their own authorities. Intercultural agreements can also be established for the implementation of the indigenous territory, establishing, among other things, the administration of the sources of financing. A good practice in this sense is to accept the regulations promoted by the indigenous territories and organizations to advance towards the formal configuration of indigenous territories as territorial entities¹⁷⁹. Indigenous and tribal communities should be allowed to design and execute their own economic and social policies, being able to opt for political-administrative figures on an equal footing with others¹⁸⁰. Some examples of practices in this regard and the challenges faced will be addressed in chapters 4.

g. Fragmentation of the territory by state borders

143. The IACHR recalls that there are different conceptions of territorial space, and not only a binary spatial conception (State-nation)¹⁸¹. The nation-states constituted in the Americas were founded on the basis of monocultural conceptions, which marked national boundaries, thus fragmenting the territories of indigenous peoples¹⁸². Indigenous ancestral territoriality often escapes such territorial limits and the definitions of the jurisdictional divisions of the States. In other words, for some of the continent's native peoples, state borders represent significant limitations to their right to self-determination¹⁸³.

¹⁷⁸ Law, Environment and Natural Resources - DAR. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

¹⁷⁹ See, for example, State of Colombia. Decree 632. 2018.

¹⁸⁰ Constitutional Court of Colombia. Judgment T-072-2021, in case T-7.910.068. March 24, 2021, p. 63.

¹⁸¹ Alliance for Human Rights; Amazon Watch and Amazon Frontlines. IACHR Report Update on the Situation of Human Rights in Panamazonia in 2019. June 7, 2021; Also see, IACHR. *Situation of the human rights of indigenous and tribal peoples of the Panamazonia*. OAS/Ser.L/V/II. (September 29, 2019), para. 419.1.

¹⁸² Meeting with OPIAC and Gaia Foundation on Colombian Amazonia, held on April 19, 2021.

¹⁸³ Meeting with OPIAC and Gaia Foundation on Colombian Amazonia, held on April 19, 2021.

144. In particular, the Commission notes the situation of transboundary peoples and those recognized as binational¹⁸⁴. In the Pan-Amazonian context, the border corridor between Colombia, Ecuador and Peru is the ancestral territory of more than 18 indigenous peoples, including a large part of the territory of peoples in isolation¹⁸⁵. These peoples have historically exercised territorial mobility, interconnected by social, political, spiritual, cultural and environmental ties. State borders hinder or affect in various ways the comprehensive understanding of their relational dynamics, cultural and kinship constructions, and the recognition and guarantee of their rights.
145. Accordingly, the States of the continent recognized in Article XX of the American Declaration on Indigenous Peoples specific rights to peoples divided by international borders and established related obligations. Indeed, the IACHR recalls that the UN Declaration on Indigenous Peoples expressly recognizes the right of transboundary peoples to "maintain and develop contacts, relations and cooperation, including activities of a spiritual, cultural, political, economic and social nature, with their own members, as well as with other peoples, across frontiers"¹⁸⁶. Likewise, the American Declaration on Indigenous Peoples includes their right to "transit, maintain, develop contacts, relations and direct cooperation, including activities of a spiritual, cultural, political, economic and social nature, with their own members and with other peoples"¹⁸⁷.
146. The Commission emphasizes, in turn, that States must adopt measures to facilitate these rights, in consultation and cooperation with the peoples¹⁸⁸. In addition, Article 32 of ILO Convention 169 provides for the obligation to adopt measures, "including through international agreements, to facilitate contacts and cooperation among indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

¹⁸⁴ The IACHR notes that the term "transboundary" may have an undesirable connotation, in that it may lead to the idea that it is "the peoples who cross. On the contrary, these are indigenous peoples who were divided by state borders. In this sense, the terminology used in the Constitution of Ecuador, "peoples divided by international borders" (Article 57, paragraph 18), stands out. Alliance for Human Rights; Amazon Watch and Amazon Frontlines. Update on the IACHR Report on the Situation of Human Rights in Panamazonia in 2019. June 7, 2021.

¹⁸⁵ The number of Amazonian indigenous peoples in Colombia is 64, in Ecuador 12, and in Peru 75. Of these peoples, 18 are recognized in territorial dynamics of life that go beyond the countries' borders. Alliance for Human Rights; Amazon Watch and Amazon Frontlines. IACHR Report Update on the Situation of Human Rights in the Panamazonia in 2019. June 7, 2021.

¹⁸⁶ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 13, 2007, art. 36.

¹⁸⁷ American Declaration on the Rights of Indigenous Peoples, AG/RES. 2888 (XLVI-O/16)(June 15, 2016), art. XX.3.

¹⁸⁸ OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016. Art. XX.4.

environment"¹⁸⁹. Thus, under international human rights law, States have the obligation to recognize, represent and guarantee the lives of transboundary, transnational and binational indigenous peoples and large indigenous families on the basis of their own territorial identities¹⁹⁰. Within these measures, the adoption of regional, subregional and/or bilateral policies on the matter should be considered.

147. However, the information received by the Inter-American Commission indicates that the States have not yet adopted measures to effectively comply with these international obligations. Particularly problematic is the exercise of rights such as nationality, as the members of these peoples are not recognized as nationals of both countries¹⁹¹. Likewise, the IACHR was informed of prohibitions on cross-border transfers and other travel restrictions that have a significant cultural impact on indigenous communities that have strong family ties in different towns and a strong sense of collectivity. State borders are not considered customary borders, under their own law, as for example peoples and communities have traditionally occupied both sides of the rivers that now represent the international border demarcation in several areas of the Amazon¹⁹².
148. These forms of territoriality are also threatened by militarization, imposition of controls, and transnational criminal dynamics linked to drug trafficking. Likewise, these peoples are exposed to systematic situations of abandonment and neglect by the state, pressure from regular and irregular armed actors, and the imposition of extractive or forestry activities¹⁹³. In short, there are significant challenges and inaction in the protection of their rights as peoples who inhabit territorial spaces where threats are potentiated and ethnocide is encouraged, thus impeding the reconstitution of their ancestral territories¹⁹⁴. The

¹⁸⁹ ILO. *Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries*. 1989.

¹⁹⁰ Alliance for Human Rights; Amazon Watch and Amazon Frontlines. Update on the IACHR Report on the Situation of Human Rights in Panamazonia in 2019. June 7, 2021.

¹⁹¹ For example, in the case of Ecuador, according to the Constitution, indigenous persons enjoy two nationalities: that of their own culture and Ecuadorian nationality. This is complicated when a person of an indigenous nationality is born outside of Ecuador. An Achuar person born in Peru, for example, is a foreigner to Ecuador even though his Achuar nationality is recognized and he participates in Ecuadorian citizenship. Meeting on transboundary and pan-Amazonian peoples with representatives of indigenous peoples from Colombia, Ecuador, Peru and Brazil, organized by REPAM and Amazon Frontlines, held on May 26, 2021.

¹⁹² This is the case of the Amazonian Siona, Shuar, and Achuar peoples and the isolated peoples; and, on the coast, the Épera and Awá. As a representative of the Siona people explained to the IACHR: "If autonomy means having governance over our territories, if the territory is affected by an international border, there is already a problem.

How do Ecuador and Peru understand the Siona people?" Meeting on transboundary and pan-Amazonian peoples with representatives of indigenous peoples from Colombia, Ecuador, Peru and Brazil, organized by REPAM and Amazon Frontlines, held on May 26, 2021.

¹⁹³ Alliance for Human Rights. Contribution of the Alianza de Organizaciones de Derechos Humanos Ecuador1 and the Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana to the thematic report on the recovery of COVID-19 and the rights of indigenous peoples, to be presented to the Human Rights Council at its 48th session in September 2021.

¹⁹⁴ Alliance for Human Rights; Amazon Watch and Amazon Frontlines. Update on the IACHR Report on the Situation of Human Rights in Panamazonia in 2019. June 7, 2021.

The Commission stresses that all of this impedes the effective exercise of their right to self-determination.

4. Political rights and participation

149. The continent's indigenous and tribal peoples are as diverse as their particular histories, the processes of colonization and assimilation, and their struggles for their existence as distinct peoples and the enforcement of their rights. Their forms of relating to nation states and the societies in which they find themselves, as well as the legal and political contexts, also vary enormously among the countries of the region. These elements determine that no single way of exercising their right to autonomy or self-government can be thought of or proposed. On the contrary, it is the indigenous and tribal peoples who determine how to materialize the exercise of such rights, while it is up to the State to comply with the obligations that this entails.
150. Autonomy may be, for example, independent of the national administrative and political structure. In such cases, indigenous and tribal peoples may choose to maintain, in whole or in part, the traditional decision-making structure¹⁹⁵. As noted by the former UN Rapporteur on indigenous peoples, indigenous peoples may exercise their right to autonomy or self-government through their own authorities and institutions, which may be traditional, but may also be newly created. The articulation between such indigenous institutions and the State may take place within the framework of intercultural agreements of a different nature that are established jointly by States and indigenous peoples for the exercise of the right to self-determination¹⁹⁶. Respect for the right to autonomy or indigenous self-government allows States to guarantee stability and the harmonious and democratic coexistence of all the inhabitants of their territories¹⁹⁷.
151. The right of indigenous and tribal peoples to autonomy and self-government is expressly recognized in international human rights law and jurisprudence. Article 4 of the UN Declaration on Indigenous Peoples states that they have "the right to autonomy or self-government in matters relating to their internal and local affairs"¹⁹⁸,

¹⁹⁵ UN. Permanent Forum on Indigenous Issues. Study on indigenous peoples' autonomies: experiences and perspectives. E/C.19/2020/5. 30 January 2020, para. 68.

¹⁹⁶ UN. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples. A/73/176. 17 July 2019, para. 26.

¹⁹⁷ Gonzáles, Miguel; Burguete Cal y Mayor, Araceli; Marimán, José; Ortiz-T, Pablo; Funaki, Ritsuko (2021). "Introduction." In Gonzáles, Miguel; Burguete Cal y Mayor, Araceli; Marimán, José; Ortiz-T, Pablo; Funaki, Ritsuko. *Autonomías y autogobierno en la América diversa*. Quito: Universidad Politécnica Salesiana, p. 17.

¹⁹⁸ Article 4 of the United Nations Declaration on Indigenous Peoples is complemented by Articles 5, 18, 20 and 34 of the same instrument, which establish the right to maintain, strengthen and promote the rights of indigenous peoples.

as well as to have the means to finance their autonomous functions"¹⁹⁹.²⁰⁰ This includes, on the one hand, the recognition of indigenous institutions, which implies their right to maintain their own decision-making institutions; and on the other, the right to participate in the decision-making processes of the State and other actors, particularly in matters that affect them.²⁰¹ According to the UN Expert Mechanism on the Rights of Indigenous Peoples, this right goes beyond participation in the electoral processes in which they are involved. According to the UN Expert Mechanism on the Rights of Indigenous Peoples, this right goes beyond participation in electoral processes under the same conditions as members of the majority population²⁰². Instead, it presupposes that decision-making institutions are designed to enable "indigenous peoples to decide on their internal and local affairs, and to participate collectively in external decision-making processes in accordance with relevant human rights standards

152. As for the inter-American system, the American Declaration on Indigenous Peoples contains a fourth section on "organizational and political rights" of indigenous peoples. This includes Article XXI, paragraph 1 of which expressly recognizes the right to autonomy or self-government in similar terms to the UN Declaration on Indigenous Peoples. Likewise, paragraph 2 of the aforementioned article includes the "right to equality of opportunity to access and participate fully in the development of indigenous peoples".

develop indigenous decision-making institutions and legal, economic, cultural and social systems. In particular, Article 18 recognizes that indigenous peoples have "the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures". This latter right is closely related to the obligation of States to consult and seek free, prior and informed consent. UN. Office of the United Nations High Commissioner for Human Rights. "Indigenous Peoples and the United Nations Human Rights System." Fact Sheet No. 9/Rev.2. New York and Geneva, 2013, p. 5; UN. General Assembly. Rights of Indigenous Peoples. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples. A/73/176. 17 July 2018, para. 10; UN. Human Rights Committee. *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006, para. 7.6.

¹⁹⁹ The former UN Special Rapporteur on the rights of indigenous peoples has interpreted the reference to their "internal and local affairs" as referring to decision-making within a given territory. UN. General Assembly. Rights of Indigenous Peoples. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples. A/73/176. 17 July 2018, para. 44.

²⁰⁰ UN. General Assembly. Rights of indigenous peoples. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples. A/73/176. 17 July 2018, para. 35.

²⁰¹ UN. General Assembly. Progress report on the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples. A/HRC/15/35. August 23, 2010, para. 40 et seq.

²⁰² UN. General Assembly. Progress report on the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples. A/HRC/15/35. 23 August 2010, para. 33.

²⁰³ UN. General Assembly. Progress report on the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples. A/HRC/15/35. 23 August 2010, para. 31.

and effectively as peoples in all national institutions and forums, including deliberative bodies "²⁰⁴.

153. The IACHR considers that an interpretation in accordance with the principles, norms and jurisprudence on the matter requires understanding that Article 23 of the American Convention and Article XX of the American Declaration protect a collective dimension of political participation. In the case of indigenous and tribal peoples, this is manifested in their right to autonomy or self-government, recognized internationally in the aforementioned terms. In light of Article 29 of the American Convention, to disregard these peoples' own systems of socio-political organization would be tantamount to disregarding fundamental principles of current international law, such as the self-determination of peoples, and the right to equality and non-discrimination.
154. These are forms of political-social organization whose origin is found in customary systems, linked to historical continuity and closely linked to their own identity and ethno-cultural integrity²⁰⁵. The right to autonomy or self-government of indigenous and tribal peoples is realized through their own political and legal institutions, structured and managed in accordance with their own laws²⁰⁶. The main proposals for the realization of the right to self-determination through self-government are those that have emerged and are emerging from the indigenous and tribal peoples and communities themselves. They are forms of resistance that each people is developing in order to confront historical processes that threaten to make them disappear. They represent, in this way, ways of surviving and developing as distinct peoples²⁰⁷.

²⁰⁴ OAS. DADPI. AG/RES. 2888 (XLVI-O/16). 2016. Article XXI paragraph 2.

²⁰⁵ The IACHR recalls that, as stated in its 1983 *Report on the human rights situation of a sector of the Nicaraguan population of Miskito origin*, "for an ethnic group to be able to subsist while preserving its cultural values, it is essential that its members enjoy all the rights recognized in the American Convention [...], since this guarantees its effective functioning as a group, which includes the preservation of its own cultural identity. In this particular way, the right to elect their authorities is linked to this situation [...] [among others]. IACHR, Report on the Human Rights Situation of a Sector of the Nicaraguan Population of Miskito Origin, OEA/Ser. L/V/II.62, November 29, 1983.

²⁰⁶ (Own translation). International Law Association. Rights of Indigenous Peoples. Interim Report of the International Law Association on a Commentary on the Declaration on the Rights of Indigenous Peoples. The Hague Conference, 2010, p. 16.

²⁰⁷ For example, in Peru there are various Amazonian indigenous self-government initiatives that are moving in the direction of deepening the right to self-determination as peoples. Organizational advances have been made by the Autonomous Government of the Wampis Nation, the Awajún Nation, the Ashuar Nation, the Harambut Nation, the Shipiba Nation, the Kukama-Kukamiria Nation, among others throughout the Peruvian Amazon. These experiences represent a fundamental debate on the future relationship between Nation States and Indigenous Peoples. It is not proposed that the Autonomous Governments break or ignore the States, but rather that they build an interculturally dialogued way of managing their territories and play a more effective role in the exercise and safeguarding of their rights. Law, Environment and Natural Resources - DAR. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

155. The IACHR shares the understanding of a dual dimension that has been given to the exercise of this right: on the one hand, it implies that indigenous and tribal peoples have a self-government and, on the other, it implies their right to participate in broader social and political structures, including, for example, indigenous federations, the States in which they live, and international society itself²⁰⁸. Each is referred to below.

a. Dimension internal

156. The internal dimension of the right to political participation implies the recognition and maintenance of their own decision-making institutions, including the free election of their traditional authorities. This must be carried out without external interference²⁰⁹, which implies that States have a general duty not to interfere in the functioning of these institutions²¹⁰. Thus, arbitrary interference in the free exercise of their right to self-government may be contrary to Article 23 of the American Convention, Article XX of the American Declaration, and Article XXI of the American Declaration on Indigenous Peoples²¹¹. The effectiveness of this right is conditioned, in turn, on the ability of indigenous and tribal peoples to use their lands, territories and natural resources²¹².
157. The IACHR notes that some legal systems establish that a state authority must certify the election of the indigenous authority. In accordance with the principle of self-determination, the Commission considers that such certification constitutes a declaratory record and does not constitute the will of the people, as expressed in the respective territorial or community assembly. However, it in no way replaces, substitutes or can be superimposed on the decision taken at the collective level in the exercise of such rights. Analogously to the patterns of territorial use and occupation, as the Inter-American Court has pointed out, the election of communal and territorial authorities is based on traditional patterns and their own law that determine the ways in which the people or community organizes itself in different spheres of their

²⁰⁸ Anaya, James (2010). "The right of indigenous peoples to self-determination after the adoption of the Declaration". In Claire CHARTERS and Rodolfo STAVENHAGEN (ed.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, p. 203.

²⁰⁹ DAES, Erica-Irene. "The Contribution of the Working Group on Indigenous Populations to the genesis and evolution of the UN Declaration on the Rights of Indigenous Peoples." In: CHARTERS, Claire and STAVENHAGEN, Rodolfo (eds.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, 2010, p. 53.

²¹⁰ (Own translation). International Law Association. Rights of Indigenous Peoples. Interim Report of the International Law Association on a Commentary on the Declaration on the Rights of Indigenous Peoples. The Hague Conference, 2010, p. 14.

²¹¹ OAS. ADRDM. 1948. Article XX; OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016. Article XXI.

²¹² UN. General Assembly. Report of the Special Rapporteur on the rights of indigenous peoples. A/74/149, July 17, 2019, para. 26.

- collective life, and that do not depend, therefore, on state recognition or concession²¹³.
158. The lack of constitutional or legal legislation that does not directly address the right to autonomy and self-government of indigenous and tribal peoples cannot be used as an impediment to the exercise of this right. It is consubstantial to their very existence as a people, to their right to live in accordance with their cultural system, their social systems, their belief systems, their economic systems, as well as their legal systems. The role of legislation should be to facilitate and not to hinder or delay the exercise of self-government²¹⁴.
159. States must set up mechanisms that strengthen and guarantee the rights to autonomy and self-government of peoples, whether through institutional procedures or mechanisms, or norms. The implementation of the right to self-determination implies developing or improving the autonomous political structures of indigenous and tribal peoples. Legal or administrative arrangements should be designed to strengthen or amplify guarantees of the right to self-government and organizational autonomy.
160. The communal, territorial or other forms of self-organization assemblies, in exercise of their right to self-determination and self-government, express their will by electing, in accordance with their own law, their authorities and representatives. This is the exercise of an area of their autonomy, which the State has the obligation to respect and guarantee, without discrimination. In this sense, the state authority must respect the decisions made by the community or territorial assembly, refraining from arbitrarily interfering in the exercise of this right. The right to self-government implies that the decisions made by an indigenous or tribal people be respected by the state authorities²¹⁵. It also implies the right to self-determine the institutions, mechanisms and administrative models for the enjoyment of land and resources without external interference. They have the right to choose and define their own mechanisms of representation in consultations, consent processes or other acts carried out by the indigenous people as a result of their external relations with other peoples and nations or with the State²¹⁶.
161. In line with the above, it is incumbent upon the State to make efforts to ensure that in practice there is harmonious coexistence between the state and indigenous justice and administration systems. It must promote coordination between them in order to avoid

²¹³ I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. See pleadings of the Commission, para. 140 and Considerations of the Court, para. 142 et seq.

²¹⁴ International Experts Meeting, held on March 30, 2021.

²¹⁵ Constitutional Court of Colombia. Judgment T-188/15, relapsed in case file T-4.615.074. April 17, 2015, para. 5.5.

²¹⁶ Autonomous Territorial Government of the Wampís Nation. Legal report on the right to territory of the Wampís Nation. 2017.

disagreements in the resolution of conflicts and in the administration of projects and economic resources. In this task, consideration should be given to the impact on indigenous territories of national regulation of resource use and access and the disaggregated way in which functions are exercised, given that this can lead to different sectoral bodies having jurisdiction over the same territory. Such instances do not always exercise their functions in coordination with the authorities and organizations representing the peoples or comply with the obligation to guarantee consultation processes and free, prior and informed consent in accordance with international standards²¹⁷.

162. In order to guarantee the functioning of indigenous institutions of self-government, the State must provide financial and technical assistance. This obligation arises from articles 4 and 39 of the UN Declaration on Indigenous Peoples and its main purpose is to strengthen indigenous peoples' autonomous management systems and the provision of social services, which has a positive impact on the guarantee of their economic, social, cultural and environmental rights (see *infra* 3.6).²¹⁸ The resistance of some States to transferring economic resources for this purpose has been interpreted by indigenous peoples as an expression of colonial bias. The resistance of some States to transferring economic resources for this purpose has been interpreted by indigenous peoples as the expression of colonial biases regarding certain parameters of what is "development" or "well-being", without taking into account the intercultural approach²¹⁹.
163. The Commission considers that violations of the right to self-government of these peoples are constituted when, either by action or omission, the creation of governments "parallel" to those legitimately elected is promoted. It notes with concern that this seriously undermines the self-determination of indigenous and tribal peoples. Once traditional structures are weakened, public officials and members of the governing party create structures that weaken traditional communal leadership, and facilitate the dispossession and usurpation of peoples' lands and other natural resources. It is of great concern to the Commission to note scenarios in which members of indigenous and tribal communities, due to acts of interference by the state authority, carry out actions denounced as contrary to historical claims and collective rights.
164. In turn, it is observed that this generates a profound weakening of traditional institutions, as well as a serious dispossession of their lands, territories and natural resources. Interference in the election of traditional, communal and territorial authorities can lead to a significant weakening of traditional forms of organization and territorial defense. In addition, it has been reported that the determination or discretionary selection of authorities by the States has generated scenarios of social conflict. In the Commission's understanding, such practices are

²¹⁷ Surrallés, Alexandre; Riol Gala, Raúl; and Garra, Simone. Estudio Complementario para la Fundamentación del derecho al territorio de la nación Wampís. Anthropological report on the continued existence of the Wampís nation and its territory. Presented by the Autonomous Territorial Government of the Wampís Nation. 2017, p. 91.

²¹⁸ UN. "Second International Decade of the World's Indigenous People. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people." A/64/338. 4 September 2009, para.

contrary to the traditional forms and structures of decision making of the peoples in the exercise of their self-government and has even triggered violent episodes and division within the peoples and communities, due to the duplicity of authorities and the use of public resources²²⁰.

b. Dimension external

165. In its external dimension, the right to political participation implies the participation of indigenous and tribal peoples, through their authorities and institutions, in decision-making processes on matters affecting their rights²²¹. This dimension is recognized transversally in international instruments such as ILO Convention 169 (articles 2, 7, 15, 18, 22, 23 and 27) and the UN Declaration on Indigenous Peoples (Articles 5, 18 and 23)²²². Likewise, Article XXI of the American Declaration on Indigenous Peoples provides that peoples have the right to participate in decision-making in matters that may affect their rights, either directly or through their representatives, in light of their own norms, procedures and traditions.
166. The relationship between the right to self-determination and the participation of indigenous and tribal peoples in decision-making is an ongoing process, as this ensures that indigenous peoples continue to participate in decision-making and retain control over their destinies. This means that institutions must be designed to enable indigenous and tribal peoples to make decisions regarding their internal and local affairs, as well as to participate collectively in external decision-making processes, in accordance with human rights standards.

²²⁰ Alliance for Self-Determination and Autonomy - ALDEA. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²²¹ UN. General Assembly. Report of the Special Rapporteur on the rights of indigenous peoples. A/74/149, July 17, 2019, para. 26.

²²² "39. The rights of indigenous peoples to self-government and participation in decision-making are further recognized in other human rights instruments and through the jurisprudence of the human rights treaty bodies. The right to public participation is set out in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and in more detail in the Committee on the Elimination of Racial Discrimination's general recommendation No. 23 (1997) on the rights of indigenous peoples, which urges States parties to ensure the effective participation of indigenous peoples in decisions affecting them. Other relevant provisions exist in the International Covenant on Civil and Political Rights (Article 1 on self-determination, Article 25 on participation in public affairs, and Article 27 on the rights of communities to culture, religion and language), the International Covenant on Economic, Social and Cultural Rights (Article 1 on self-determination, and Article 15 on cultural rights), and article 15 on cultural rights), the Convention on the Elimination of All Forms of Discrimination against Women (articles 7 and 8 on women's participation) and the Convention on the Rights of the Child (article 12 on the rights of the child to participate in decision-making and article 30 on the rights of indigenous children)⁸". UN. "Rights of Indigenous Peoples. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples." A/73/176. 17 July 2018, para. 39.

167. In this regard, the Commission emphasizes that the participation of indigenous and tribal authorities in these spaces is also related to the legitimacy of the decisions adopted. It is not enough to assign a local or regional government authority for this purpose because it does not necessarily know what their priorities and main problems are. This is because one of the substantial elements for this participation to be considered effective is the capacity to influence the results of these processes²²³: "If that representative does not care about the indigenous peoples, they will not feel motivated to make a solid representation on our behalf. Therefore, to achieve our objectives, it has to be one of ours"²²⁴.
168. The IACHR has also been informed that in certain countries of the region there are processes of partisan co-optation that have made this right a pending issue that requires rethinking. Indigenous and tribal peoples have lost political autonomy as a result of the partisanization of their rights. Although in many countries of the region indigenous peoples have relations with political parties for issues of different kinds, other means must be sought to promote autonomy. On the basis of self-determination, they should be able to elect their authorities without interference from political parties or other structures that do not respond to indigenous and tribal peoples' own forms of organization and representation.
169. For indigenous and tribal peoples, the right to political participation is an extremely important right because they are groups that have historically suffered the consequences of social and structural inequalities. This requires the adoption of affirmative actions that effectively and practically ensure the participation of peoples in popularly elected institutions, through, for example, the reservation of seats or special electoral districts for the peoples. One alternative is the creation of indigenous electoral constituencies.
170. In some jurisdictions, mechanisms for participation and representation have been established through quotas in political representation candidacies. However, it was reported that mainly political parties have generated a context of uncertainty and simulation of people aspiring to a position of popular election. Consequently, this mechanism has not been able to establish a political representation of the indigenous peoples, but rather, the interests of the political parties continue to be placed and in most cases do not respond to the demands for the exercise of the rights of the indigenous peoples²²⁵.
171. Likewise, the information received by the Commission indicates that in some ordinances that have quotas, the minimum percentage for representatives

²²³ (Own translation). International Law Association. Rights of Indigenous Peoples. Interim Report of the International Law Association on a Commentary on the Declaration on the Rights of Indigenous Peoples. The Hague Conference, 2010, p. 14.

²²⁴ Santa Rosa First Peoples Community, Trinidad and Tobago. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²²⁵ Centro Profesional Indígena de Asesoría, Defensa y Traducción, AC. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

of indigenous peoples in certain electoral processes is not enough to guarantee their participation. This is due to the fact that political parties, in order to comply with the quota system, usually give them the last places on the lists, so the chances of them being elected are remote. Often, the first numbers on the lists in practice are acquired by people who have higher economic incomes. Therefore, these quotas do not guarantee either the right to political participation or indigenous representation²²⁶.

172. Thus, in the Commission's understanding, the State must ensure a legal apparatus that promotes the representation of indigenous and tribal peoples and their political participation in the different government entities at the various levels. It must establish mechanisms that guarantee indigenous and tribal political participation in political decision-making spaces, both at the executive and legislative levels. The authorities elected at the different levels where there is an important presence of indigenous peoples do not belong to them or are not authorities elected by them, much less do they respond to a political party structure of indigenous cosmovision.
173. Along with its collective scope, this right also has an individual dimension. Like all persons, indigenous and tribal authorities and representatives have the right to exercise their political rights ^{effectively}²²⁷, which implies that States must refrain from interfering with this ^{right}²²⁸, as well as generate optimal mechanisms to guarantee its exercise under conditions of ^{equality}²²⁹. The State must protect indigenous and tribal authorities by providing protection for their life and integrity in contexts where they are at risk.
174. The IACHR recalls that in cases involving indigenous authorities and/or leaders, the Inter-American Court has affirmed that the scope of Article 23 of the American Convention implies that they may participate in decision-making on those matters that may affect their rights and their development, "so that they may be integrated into state institutions and bodies and participate directly and in proportion to their population in the conduct of public affairs, as well as to do so.

²²⁶ Autonomous Territorial Government of the Wampís Nation. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²²⁷ I/A Court H.R., Case of *Castañeda Gutman v. Mexico*. *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008, para. 145.

²²⁸ International Law Association. Rights of Indigenous Peoples. Interim Report of the International Law Association on a Commentary on the Declaration on the Rights of Indigenous Peoples. The Hague Conference, 2010, p. 14.

²²⁹ I/A Court H.R., Case of *Castañeda Gutman v. Mexico*. *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008, para. 145.

²³⁰ I/A Court H.R., Case of *Chocrón Chocrón v. Venezuela*. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011, para. 135.

from their own institutions and according to their values, uses, customs and forms of organization "²³¹.

175. The deprivation of the exercise of this right in the case of indigenous and tribal leaders not only has an individual impact, but also affects the community as a whole. The direct participation of an indigenous and tribal leader in the structures of the State guarantees the representation of his or her people in these spaces, which is a prerequisite to achieve their inclusion, self-determination and development within the framework of a plural and democratic State²³². The public function performed by these persons with leadership allows for the promotion, coordination and execution of actions aimed at the development and protection of the communities they represent, so that preventing them from doing so constitutes a violation of the rights protected in Article 23 of the ACHR²³³.

5. Free, prior and informed consultation and consent

176. The right of indigenous and tribal peoples to consultation and prior consent to measures that affect them occupies a central place in the agenda of relations between the State and these peoples. It has also been, for several years, a predominant right in the issues raised by indigenous peoples before the inter-American system.
177. The right to self-determination is the fundamental premise of the right to consultation and consent²³⁴. The obligation of States to guarantee indigenous peoples the right to prior, free, informed and bona fide consultation and consent whenever it decides on measures of any kind that affect them is established in ILO Convention 169 (Articles 6.1.a., 6.2. and 15.2), the UN Declaration on Indigenous Peoples (Articles 2, 17, 19, 32, 36, 38) and the American Declaration on Indigenous Peoples (Articles XX, XXIII, XXIX and XXVIII). In the Inter-American system, the IACHR and the Inter-American Court have advanced standards on the content and specific guarantees regarding the right to consultation and free, prior and informed consent, based on the provisions of the Inter-American instruments, both the ACHR (Article 21) and the American Declaration (Article XXIII). The Inter-American Court has even recognized that the obligation of

²³¹ I/A Court H.R., Case of *Yatama v. Nicaragua*. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005, para. 225; I/A Court H.R., Case of *Chitay Nech et al. v. Guatemala*. *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010, para. 114.

²³² I/A Court H.R., Case of *Chitay Nech et al. v. Guatemala*. *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010, paras. 113-117.

²³³ I/A Court H.R., Case of *Norín Catrimán et al. Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgment of May 29, 2014, para. 384.

²³⁴ In the words of former UN Special Rapporteur Tauli-Corpuz, both consultation and free, prior and informed consent are an extension of the right to self-determination of indigenous peoples. UN. Report of the Special Rapporteur on the rights of indigenous peoples. A/HRC/45/34. June 18, 2020, para. 71.

- Consultation is a general principle of international law.²³⁵ Guaranteeing this right is one of the most basic corollaries of cultural diversity and the right to self-determination.²³⁶ The right to consultation constitutes a general principle of international law.²³⁵ Guaranteeing this right is one of the most elementary corollaries of cultural diversity and the right to self-determination.
178. The Commission still notes that there is no way to exercise this right. Consultation and consent have been redefined by indigenous and tribal peoples themselves, based on their self-determination. Indigenous and tribal peoples carry out, in the exercise of their autonomy, different practices, processes and mechanisms. There are numerous experiences in the region that have generated their own consultation processes, through life plans, self-consultation protocols, mandates, and their own knowledge systems, among others²³⁷. These exercises are based on the right to define how they wish to exercise the ownership of their rights, within the framework of their self-determination.
179. One of the mechanisms commonly employed is the development of self-consultation protocols or autonomous community protocols for consultation and consent. These are generally documents drawn up by the indigenous peoples themselves, detailing rules and procedures related to the implementation of prior consultation. These instruments make it possible to contemplate a diversity of collective identities, insofar as they are aimed at explaining the internal government of each people, and at establishing their decision-making rules and political representation²³⁸. The protocols seek to inform the States on the manner in which they should dialogue with them regarding decisions that affect their rights²³⁹.
180. In this context, the IACHR emphasizes that it is the duty of States to respect and guarantee, without discrimination, the consultation and consent exercised by indigenous and tribal peoples, based on their self-determination. Otherwise, consultation with indigenous and tribal peoples may result in a homogenizing mechanism that does not reflect the cultural diversity of each reality. The aim should not be to generate standardized processes, whether based on legislative measures or not, because they may tend to standardize all peoples on a pattern. Instead, it is a matter of a constant intercultural dialogue among the peoples of the world.

²³⁵ I/A Court H.R., Case of the Kichwa Indigenous People of Sarayaku vs. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012, para. 164.

²³⁶ According to former UN Rapporteur on the rights of indigenous peoples, Tauli-Corpus, consultation and consent are important safeguards to protect the substantive rights of indigenous peoples, including their right to self-determination. UN. Report of the Special Rapporteur on the rights of indigenous peoples. A/HRC/45/34. June 18, 2020, para. 49.

²³⁷ See, *infra*, Chap. 4.

²³⁸ Grupo de Pesquisa CNPq Direitos Humanos na Amazônia. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²³⁹ Juruna (Yudjá) of the Paquiçaba Indigenous Land. *Protocol of Juruna (Yudjá) Consultation of the Paquiçaba Indigenous Land of the Volta Grande of the Xingu River*. Vitória do Xingu, 2017.

Indigenous and tribal law and normative systems, national law and international human rights^{law240}.

181. On the other hand, the Inter-American Commission warns that, in some contexts, the very recognition of the right to consultation in national legislation has had counterproductive effects on the self-determination of indigenous and tribal peoples. In view of this, the IACHR considers that the necessary measures should be adopted to fully guarantee the exercise of self-determination and autonomy of the peoples with their broad participation, whether or not through a law on this matter. Likewise, it must be recognized by state institutions and ensure its application for any action within indigenous territories. This implies that States should refrain from using concepts such as "public utility", "social interest" or similar to favor the private sector over the common good and the rights of indigenous and tribal communities and peoples. In plurinational States, these practices reflect approaches that exclude peoples and communities, thus replicating discriminatory practices and obstructing their right to self-determination over their lands and territories. Likewise, the Judiciary and the High Courts play a fundamental role in ensuring the validity of this right. Judges must enforce the principle of conventionality and meet the demands of peoples based on international human rights standards.
182. The Commission recalls that the States are responsible for guaranteeing the right to consultation and consent²⁴¹, and therefore the public officials who participate in any way in these processes must be fully impartial. The Commission notes with concern circumstances in which the public entity in charge of carrying out the consultation is the same one that promotes the extractive or energy projects, which makes them biased state actors that may favor the interests of private parties²⁴². Another concern transmitted to the IACHR are cases in which States transfer to interested companies obligations in relation to consultation processes.²⁴³ Often it is the companies directly interested in the progress of these projects that will carry out these procedures.²⁴⁴ The Inter-American Commission on Human Rights, in particular the IACHR, has been concerned about cases in which States transfer obligations in relation to consultation processes to interested companies. The Inter-American Commission on Human Rights emphasizes that, in light of the responsibility of companies to respect human rights, contained in the Guiding Principles on Business and Human Rights, they must

²⁴⁰ In a similar vein, former UN Special Rapporteur Tauli-Corpuz noted that self-consultation protocols and other consultation procedures "should be considered as alternatives to the general model of consultation laws promoted so far in the Latin American region." UN. Report of the Special Rapporteur on the rights of indigenous peoples. A/HRC/45/34. June 18, 2020, para. 65.

²⁴¹ I/A Court H.R., Case of the Kichwa Indigenous People of Sarayaku vs. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012, para. 187.

²⁴² Alliance for Self-Determination and Autonomy - ALDEA. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁴³ Regional meeting with representatives of indigenous, tribal and Afro-descendant peoples of South America (Brazil, Colombia, Chile, Ecuador, Suriname), held on May 11, 2021.

²⁴⁴ Alliance for Self-Determination and Autonomy - ALDEA. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

generate adequate safeguards to respect the rights of indigenous and tribal peoples²⁴⁵.

183. In turn, as has been noted for several years, indigenous and tribal peoples and their traditional territories are often heavily impacted by unconsulted projects. Such projects result in the dispossession of numerous indigenous and tribal communities from their lands, putting at risk not only their right to self-determination, but also their traditional livelihoods, their way of living in harmony with nature, and their culture and ethnic identity forged in these territories over thousands of years²⁴⁶.
184. The information received by the IACHR indicates that consultations, in cases where the State agrees to carry them out, remain largely formalities without implications for the rights of indigenous and tribal peoples.²⁴⁷ In many cases, the consultation processes are seen as an opportunity that is limited to participation or negotiation of compensation.²⁴⁸ In many cases, the consultation processes are seen as an opportunity that is limited to participation or negotiation of compensation. In many cases, consultation processes are seen as an opportunity that is limited to participation or negotiation of compensation.²⁴⁸ The IACHR was informed that in consultation processes, certain correlations of interests adverse to their own systems tend to prevail, which generates strong pressures.²⁴⁹ Cases have even been identified in which these processes have weakened the organizational structures of these collectives, generating divisions and confrontation among them.²⁵⁰ In others, the consultation is carried out as a mere formality, due to the continued imposition of development models that privilege extractive activities over the interests of these collectives and their own vision of their own development.

²⁴⁵ IACHR. Report on Business and Human Rights: Inter-American Standards. Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights REDESCA. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para. 416. Recommendation 1.

²⁴⁶ Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro (MODETEAB), Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe, and the Center for International Environmental Law (CIEL). Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁴⁷ Doyle, Cathal. "Indigenous Peoples' experiences of resistance, participation, and autonomy Consultation and free, prior and informed consent in Peru." In Claire WRIGHT and Alexandra TOMASELLI (eds.). *The Prior Consultation of Indigenous Peoples in Latin America. Inside the Implementation Gap*. New York: Routledge, 2019, p. 66.

²⁴⁸ Wright, Claire and Tomaselli, Alexandra. "From the implementation gap to Indigenous empowerment. Prior consultation in Latin America." In Claire WRIGHT and Alexandra TOMASELLI (eds.). *The Prior Consultation of Indigenous Peoples in Latin America. Inside the Implementation Gap*. New York: Routledge, 2019, p. 284.

²⁴⁹ International Experts Meeting, held on March 30, 2021.

- development²⁵¹. This situation has led some indigenous peoples to declare this type of process "useless and unfeasible"²⁵².
185. Other obstacles identified are the exclusion of specific matters (such as consultation on legislative measures, infrastructure projects, mining concessions) or specific zones considered "strategic areas" or similar²⁵³. The identification of peoples is also of concern, since only a segment of the people is consulted, recognition of indigenous peoples is conditioned to their registration in a database or official registry, or recognition as indigenous peoples is required as a condition for consultation. The lack of adequate processes for consultation and consent implies privileging investment and development projects over their right to self-determination.
186. On the other hand, the Commission recalls that international human rights law has expressly recognized cases in which it is mandatory to obtain consent, namely: (i) forced relocation of indigenous peoples from their lands and territories²⁵⁴; (ii) storage and disposal of hazardous waste in the territory of a community²⁵⁵; and (iii) military activities²⁵⁶. Additionally, in the Inter-American system, the IACHR and the Inter-American Court have previously referred to the assumptions of mandatory consent when the project is on a large scale. In this regard, the Court has determined that "in the case of large-scale development or investment plans that would have a major impact within the [indigenous or tribal] territory, the State has the obligation not only to consult [the people], but also to obtain their free, prior and informed consent, in accordance with their customs and traditions"²⁵⁷. Thus, indigenous peoples have the right to consent as a requirement for the development of activities that put their physical and cultural survival at risk. Following this line, the Commission has indicated that "large-scale development or investment plans" encompasses both characteristics of the project that determine its magnitude or dimension; and the

²⁵¹ This is reflected in the government's decision to have mining and energy exploitation as its main economic activity and policies to combat drug trafficking, such as the spraying of glyphosate on coca crops, activities that seriously affect the survival of the peoples and their territories. Indigenous Technical Secretariat of the National Commission of Indigenous Territories. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁵² Autonomous Territorial Government of the Wampís Nation. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁵³ International Institute of Law and Society. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁵⁴ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007. Article 10.

²⁵⁵ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007. Article 29, paragraph 2.

²⁵⁶ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007. Article 30 clause.

²⁵⁷ I/A Court H.R., Case of the Saramaka People. Case of the Saramaka People. Vs. Suriname. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2007, para. 134.

human and social impact of the activity in accordance with the particular circumstances of the indigenous or tribal people^{affected258}.

187. However, beyond these assumptions, the substantive dimension of this right refers to the requirement to obtain consent to the rights of indigenous peoples, based on self-determination, which is recognized in the provisions of the American Declaration on Indigenous Peoples and the UN Declaration on Indigenous Peoples referred to above. Since the adoption of ILO Convention 169, which overcame an assimilationist paradigm in international law, there are at least two perspectives from which the right to consultation and consent has been understood. On the one hand, an approach that places participation, materialized through prior consultation, as the guiding principle. On the other, there is an approach whose central principle is self-determination and the modality of participation is consent²⁵⁹. The Commission notes that today there is a growing body of international human rights jurisprudence and pronouncements that have interpreted the right and obligations of States to respect consent. Increasingly, prior and informed consent is being accepted by judicial and quasi-judicial bodies as a framework for any action that may be taken in relation to indigenous peoples and tribal communities and their human rights.
188. The former Special Rapporteur on indigenous peoples, James Anaya, observed that "the Declaration and various other international sources of authority, together with practical considerations, lead to a general rule that extractive activities should not take place within indigenous peoples' territories without their free, prior and informed consent."²⁶⁰ He also argued that the importance of obtaining consent varies according to the particular circumstances of indigenous peoples, so that if the proposed measure is likely to have a direct and significant impact on both their lives and territories, such consent may be required.²⁶¹ Similarly, Tauli-Corpuz, a former Special Rapporteur, argued that the starting point for analyzing the consent requirement is to assess the substantive rights of indigenous peoples that would be at stake.²⁶² The Special Rapporteur also noted that the starting point for analyzing the consent requirement is to assess the substantive rights of indigenous peoples that would be at stake.²⁶³ The Special Rapporteur also noted that "the importance of obtaining consent varies according to the particular circumstances of indigenous peoples. In a similar vein, Tauli-Corpuz, former Special Rapporteur, argued that the starting point for analyzing the requirement of consent is to assess the substantive rights of indigenous peoples that would be at stake²⁶². Therefore, "any restriction of those rights, such as a decision to proceed without the free, prior and informed consent of a people, is a violation of their substantive rights.

²⁵⁸ IACHR. Indigenous peoples, Afro-descendant communities and natural resources: Human rights protection in the context of extractive, exploitative and development activities. OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 186-188; IACHR. *Situation of the human rights of the indigenous and tribal peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 35.

²⁵⁹ Rodríguez-Garavito, César. "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields." *Indiana Journal of Global Legal Studies*, volume 18, number 1 (Winter 2010), p. 27.

²⁶⁰ UN. Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. Extractive industries and indigenous peoples. A/HRC/24/41. July 1, 2013, para. 27.

²⁶¹ UN. "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya." A/HRC/12/34, 15 July 2009, para. 46.

²⁶² UN. Report of the Special Rapporteur on the rights of indigenous peoples. A/HRC/45/34. June 18, 2020, para. 49.

The State bears the burden of demonstrating the permissibility of such restrictions in accordance with the international criteria of legality, necessity and proportionality in relation to a valid public purpose ²⁶³.

189. Similarly, the Committee on the Elimination of Racial Discrimination (CERD Committee) has urged States Parties to obtain the free, prior and informed consent of indigenous and tribal peoples before approving any project affecting their lands²⁶⁴. Likewise, in its General Recommendation No. 23 (1997) on the rights of indigenous peoples, it recommended that States Parties ensure that no legislation or decision directly affecting the rights and interests of indigenous and tribal peoples be adopted without their free, prior and informed consent²⁶⁵.
190. The IACHR considers that framing this as "consultation does not imply a right of veto" reflects a reductionist view, simplifies the matter, and ignores the self-determination of indigenous and tribal peoples.²⁶⁶ The term "veto" also creates the impression that it is an arbitrary decision that does not take into account other points of view. The term "veto" also creates the impression that it is an arbitrary decision that does not take into account other points of view, and is therefore not compatible with the values of dialogue and mutual understanding that inspire a consultation process²⁶⁷. The Commission notes with concern a certain jurisprudential trend, negative for indigenous peoples, according to which the right to consent is qualified as a "right to veto"²⁶⁸. To the contrary would imply assuming that the State's decision-making process has the capacity to forcefully impose a given activity or initiative, which is not appropriate for an inclusive democracy. This violates the

²⁶³ To this end, the former Special Rapporteur emphasizes that it is necessary to implement review mechanisms through a judicial or other impartial and competent body to verify that State decisions that do not have the consent of the affected indigenous peoples meet these criteria and do not affect their physical and cultural survival. If this is not the case, "it must be concluded that the measure or activity should not be implemented without the consent of the indigenous peoples".

UN. Report of the Special Rapporteur on the rights of indigenous peoples. A/HRC/45/34. June 18, 2020, paras. 61-62.

²⁶⁴ UN. CERD. Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname. CERD/C/SUR/CO/13-15. Burger, Julian. 'Indigenous Peoples, Extractive Industries and Human Rights', Directorate-General for External Policies of the Union: European Parliament, 2014, p. 17.

²⁶⁵ UN. CERD. General Recommendation XXIII on the rights of indigenous peoples. Fifty-first session (1997). A/52/18.

²⁶⁶ Meeting of International Experts, held on March 30, 2021; UN. "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya." A/HRC/12/34, 15 July 2009, para. 48; UN. Report of the Special Rapporteur on the rights of indigenous peoples. A/HRC/45/34. June 18, 2020, para. 59.

²⁶⁷ The Constitutional Court of Colombia states that "the expression "veto" generates the impression of an arbitrary barrier, which does not require reasons to impose itself against other points of view and courses of action and, therefore, does not seem to adequately respond to the meaning that inspires consultation, conceived as a dialogue in good faith, between equals, and aimed at reaching agreements that take into consideration the environmental, social and economic impacts of a measure, in an attempt to reconcile diverse conceptions of development". Constitutional Court of Colombia. Judgment C-389/16, relapsed in file D-11172. July 27, 2016.

²⁶⁸ Constitutional Court of Colombia. Judgment T-129/11, Case T-2451120. March 3, 2011; Judgment of the Constitutional Court of Peru - Case No. 0022-2009-PI/TC - Gonzalo Tuanama Tuanama, para. 37. See: <https://www.tc.gob.pe/jurisprudencia/2010/00022-2009-AI.html>.

self-determination, as the capacity to use, benefit from, and make decisions about traditional territories²⁶⁹. Opposing a decision that indigenous and tribal peoples consider seriously prejudicial to their rights is not a "veto", it is the exercise of their self-determination.

191. The IACHR considers that the State's duty to consult in order to obtain consent plays a fundamental role in the establishment and development of respectful, rights-based relations between States and indigenous and tribal peoples, and in facilitating the self-determined development of indigenous and tribal peoples²⁷⁰. As pointed out by representatives of indigenous peoples in the dialogues with the IACHR, the decision to grant consent or not to a given measure depends on whether it responds to their collective rights, strengthens their culture and forms of organization, is ecologically sustainable, or whether it consolidates the good living of their population²⁷¹. The decisions made by the authorities of the peoples with respect to their territories, based on their own rights, should not be subject to any type of interference or pressure from State bodies or private entities²⁷². Thus, the requirement to obtain such consent is necessary for the realization of their fundamental rights, including the right to self-determination.

6. Rights economic, social, cultural and environmental

192. As indigenous authorities pointed out to the IACHR, "autonomy is millenary, and includes the way of living, the way of deciding, [...] the way of educating their children, the way of using and conserving their forests, as when they were free in times before contact with the West"²⁷³. The right to self-determination implies deciding, in autonomy and without impositions, the economic activities to which they wish to dedicate themselves, the type of education they seek to implement for future generations.

²⁶⁹ As the Kokonuko people point out, "self-determination has to reach a point where the communities [...] can say if a project in a given consultation, regardless of the approach it has, we do it or we don't do it and if it is harmful to the community and the territory, then that decision should be respected". Kokonuko People of Colombia and EarthRights International. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁷⁰ Doyle, Cathal. "Indigenous Peoples' experiences of resistance, participation, and autonomy Consultation and free, prior and informed consent in Peru." In Claire WRIGHT and Alexandra TOMASELLI (eds.). *The Prior Consultation of Indigenous Peoples in Latin America. Inside the Implementation Gap*. New York: Routledge, 2019, p. 58.

²⁷¹ Nahua Indigenous Federation of Honduras. Protocol for Free, Prior and Informed Consent. 2018.

²⁷² Alliance for Human Rights; Amazon Watch and Amazon Frontlines. Update on the IACHR Report on the Situation of Human Rights in Panamazonia in 2019. June 7, 2021.

²⁷³ Meeting with representatives of the autonomous indigenous governments of the Wampís Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

and the quality of health they wish to ensure, among others²⁷⁴. As recognized in Article XXIX of the American Declaration on Indigenous Peoples, it also implies the right of indigenous peoples to self-determine their own patterns of development or conceptions of well-being, in general. The Commission emphasizes that this also requires that indigenous and tribal peoples be able to "securely enjoy their own means of subsistence and development, and to engage freely in all their traditional and other economic activities-

193. This conception of autonomy linked to their economic, social, cultural and environmental rights is supported by international human rights instruments. Indeed, the right to self-determination encompasses the right of indigenous and tribal peoples to freely pursue "their economic, social and cultural development. 276 This includes the right of indigenous and tribal peoples to decide their own priorities for development, and the right to "participate actively in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions-²⁷⁷ In other words, they have autonomy to decide on their health, education, environment, among others, based on their own worldview, customs and traditions. This encompasses two dimensions: one internal and the other external, to which the IACHR refers below.
194. For its part, the IACHR Court has analyzed the rights to a healthy environment, to adequate food, to water and to cultural identity, autonomously from Article 26 of the American Convention and has determined violations of these rights, pointing out the interdependence between these rights. At the same time, it has linked these rights to the enjoyment and enjoyment of collective territory and the observance and respect for their autonomy and self-determination²⁷⁸.

a. **Internal dimension of autonomy linked to economic, social, cultural and environmental rights.**

195. The internal dimension relates to their territorial autonomy. When indigenous and tribal peoples can access and control their lands and territories without external interference, they can also develop self-sufficiency and self-sustainability practices aimed at satisfying their basic needs and practices.

²⁷⁴ National Organization of Andean and Amazonian Indigenous Women of Peru. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁷⁵ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 13, 2007, art. 20.1.

²⁷⁶ American Declaration on Indigenous Peoples, Article III, and UN Declaration on Indigenous Peoples, Article 3.

²⁷⁷ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 13, 2007, art. 23.

²⁷⁸ I/A Court H.R., Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Judgment of February 6, 2020, Series C No. 400, paras. 154, 243-254.

food²⁷⁹. Through their own institutions, they have the right to administer their own health, education, and housing programs, among others, as expressly recognized in both the American Declaration on Indigenous Peoples and the UN Declaration on Indigenous Peoples²⁸⁰. In the case of health, the IACHR has emphasized that States are obliged to provide resources for indigenous peoples to "establish, organize and control such services with the objective of enjoying the highest level of physical and mental health"²⁸¹.

196. This right also covers health strategies undertaken by indigenous peoples for their physical and cultural survival, without requiring State intervention in some cases. For example, indigenous peoples in isolation and initial contact have chosen to remain isolated or maintain selective contact with people outside their group. In general, these are peoples who, for this reason, lack sufficient immunological defenses to combat common diseases. This survival strategy is supported by the principle of no contact, implicitly recognized in Article XXVI of the American Declaration on Indigenous Peoples²⁸². The IACHR also recalls that the instruments for the protection of the rights of peoples in isolation must be understood through two interrelated and mutually determining principles: the principle of self-determination and the principle of no contact. For the IACHR, the principle of no contact is the manifestation of the right of indigenous peoples in voluntary isolation to self-determination²⁸³. Likewise, the IACHR notes that the COVID-19 pandemic also demonstrated the need to recognize and support the strategies developed by indigenous and tribal peoples to cope with the pandemic and to protect their health, physical and cultural survival.
197. The Commission emphasizes that the way in which indigenous and tribal peoples give content to certain rights does not always coincide with the Western view. For example, the right to education is not always necessarily synonymous with learning to read or write, nor with attending school. Indigenous and tribal peoples may have particular conceptions of educational spaces that involve knowledge such as learning about nature, phenomena, and the environment.

²⁷⁹ I/A Court H.R., Case of the Xákmok Kásek Indigenous Community vs. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010, para. 215.

²⁸⁰ OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016. Article XXIX; UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007. Article 23.

²⁸¹ IACHR. *Situation of the human rights of the indigenous and tribal peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 310.

²⁸² IACHR. *Indigenous Peoples in voluntary isolation and initial contact in the Americas: Recommendations for the full respect of their human rights*. OEA/Ser.L/V/II. Doc. 47/13. December 30, 2013. IACHR. Report No. 152/19. Case 12.979. Merits. Tagaeri and Taromenane indigenous peoples (in voluntary isolation). Ecuador. September 28, 2019, para. 89.

²⁸³ IACHR. *Indigenous peoples in voluntary isolation and initial contact in the Americas*. OEA/Ser.L/V/II. Doc. 47/13, December 30, 2013, para. 22. IACHR. Report No. 152/19. Case 12.979. Merits. Tagaeri and Taromenane indigenous peoples (in voluntary isolation). Ecuador. September 28, 2019. Para. 89.

The Nasa indigenous leader said: "While for us it is not reading letters as such, what is important is reading nature, reading the clouds, the wind, the sound of a river, the sound of a river, the sound of the clouds, the sound of the clouds. In the words of a Nasa indigenous leader: "While for us it is not reading letters as such, which is important, it is reading nature, reading the clouds, the wind, the sound of a river, the sound of birds, the fauna, the flora, everything that means to us for our daily life and life plans, for us all this is education"²⁸⁴. Therefore, this right needs to be reread with attention to their cosmovisions, as well as including their own knowledge²⁸⁵.

198. The manifestations of self-determination of indigenous and tribal peoples in the exercise of their economic, social, cultural and environmental rights are also protected from illegitimate interference by the State, through the prohibition of certain practices or the imposition of others contrary to their collective identity. The IACHR notes with concern that some States have chosen to prohibit and criminalize the work of indigenous midwives, who assist during childbirth²⁸⁶. As noted by the Permanent Forum on Indigenous Issues, the right to self-determination also applies to the reproductive health of indigenous peoples, so States must not only allow midwives to perform their duties as health providers, but must also support the training of new traditional indigenous midwives through multiple avenues, such as internships and oral transmission of knowledge²⁸⁷.
199. In turn, the control of their own systems is closely linked to the key role played by these collectives in environmental conservation, through their traditional knowledge and know-how, which translates into sustainability practices²⁸⁸. Through their self-government, they determine their own systems of health, food sovereignty, education, among others, which guarantees that their territory conserves its water resources without contamination and contributes to climate balance, the conservation of medicinal plants and forests²⁸⁹. The Inter-American Commission notes that there are indigenous and tribal peoples in the region who, through their organizational structures, have decided to delimit areas of their territory to protect their forests and biodiversity, in which they also develop community monitoring activities²⁹⁰. They have also maintained and developed

²⁸⁴ Nasa People of Colombia and EarthRights International. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁸⁵ "Education without including the knowledge of the people, does not make a mark". Meeting on transboundary and pan-Amazonian peoples with representatives of indigenous peoples from Colombia, Ecuador, Peru and Brazil, organized by REPAM and Amazon Frontlines, held on May 26, 2021.

²⁸⁶ Lenca Indigenous Movement of Honduras. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁸⁷ UN. Permanent Forum on Indigenous Issues. *Report on the seventeenth session (16-27 April 2018)*. E/2018/43. E/C.19/2018/11, para. 50.

²⁸⁸ IACHR Court. Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020.

²⁸⁹ OPIAC and Gaia Amazonas Foundation. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁹⁰ FAO. *Indigenous and Afro-descendant peoples and climate change in Latin America. Ten experiences of scalable intercultural collaboration*. Santiago de Chile: FAO, 2021, p. 26-30.

own systems of management and administration of water sources for traditional activities²⁹¹.

200. Regarding the right to the environment, the IACHR recalls that indigenous peoples are disproportionately affected by the effects of climate change, even though they do not contribute significantly to global warming²⁹². It is important to emphasize that, in order for indigenous peoples to be able to contribute to the necessary solutions, they need to be able to control their own lives and their future, which depends on guaranteeing their rights to self-determination, autonomy and self-government²⁹³.

b. External dimension of autonomy linked to economic, social, cultural and environmental rights.

201. The external dimension, on the other hand, is related to the right to access public services provided in a culturally appropriate manner, which includes intercultural bilingual education and intercultural health programs, among others. This requires the participation of these groups in their design and implementation, as reflected in international human rights instruments²⁹⁴. It is contrary to this right that these services have guidelines on intercultural approach, but do not guarantee the participation of the representative organizations of peoples to incorporate their own priorities and visions regarding these services, based on their cultural identity, customs and traditions, and their institutions.
202. As a good practice, the Commission has learned that certain States have been developing curricula exclusively for indigenous communities, which, in order to be implemented, will require that each State, from

²⁹¹ Intervention by COPUDA, Valles Centrales, Oaxaca, Meeting of the IACHR with indigenous organizations, authorities and members of government institutions in Mexico for the Report on the right to self-determination, May 5, 2021.

²⁹² IACHR. Press Release 206/21. "On the World Day of Indigenous Peoples, the IACHR and REDESCA urge States to redouble their efforts to protect the territories of indigenous peoples as an essential measure to protect nature and biodiversity, as well as to guarantee their rights during the COVID-19 pandemic." August 9, 2021. The former UN Special Rapporteur on the rights of indigenous peoples has indicated that the right to self-determination of indigenous peoples constitutes a key right in the areas of climate change, because it is closely linked to their territorial rights and their right to participate in the processes and decisions that affect them. UN. "Report of the Special Rapporteur on the rights of indigenous peoples." A/HRC/36/46. November 1, 2017, para. 40.

²⁹³ Tauli-Corpuz, Victoria. "The right of indigenous peoples to self-determination through autonomy or self-government." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 15.

²⁹⁴ The participation of indigenous peoples in decision-making related to their economic, social and cultural rights is recognized in ILO Convention 169 (Articles 2, 7, 18, 23 and 27), the UN Declaration on Indigenous Peoples (Articles 5, 18 and 23) and the American Declaration on Indigenous Peoples (Article XXI).

According to their sociocultural characteristics and their own rights, they should develop their educational model, in accordance with the differential approach.²⁹⁵ Intercultural solutions have also been observed when there have been conflicts between the formal educational space and that of the community²⁹⁶.

203. However, the IACHR also notes with concern that several States in the region do not have institutional mechanisms that enable indigenous peoples or their organizations to promote and control their own programs for education, health, housing, food security or sovereignty, access to water, among others²⁹⁷. Only local, regional and national authorities are in charge of these programs, which seek to incorporate the intercultural approach but do not encourage the participation of indigenous peoples through their organizations²⁹⁸. Likewise, there are no reports of institutional positions held by indigenous authorities, which would make it possible to adapt attention to the needs of the peoples in these areas²⁹⁹.

B. Approaches applied by the IACHR in relation to indigenous and tribal peoples' right to self-determination

1. Remedial nature of self determination

204. In the preamble to the American Declaration on Indigenous Peoples, the OAS member states recognized the restorative nature of this instrument. Specifically, they expressed their concern "at the fact that the indigenous peoples of the Americas are

²⁹⁵ EarthRights International. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁹⁶ For example, it was reported in relation to Chile, that if a Mapuche boy or girl felt called to be a "machi", he or she had to abandon formal studies so that the wise adults of the community could train him or her as a machi. For this reason, a "protocol of exception for indigenous boys and girls called to be "machis" was elaborated, which reflects the State's recognition of the autonomous experience of indigenous peoples in the formation of their leaders, and the Chilean Ministry of Social Development and Family. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁹⁷ International Institute of Law and Society. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁹⁸ International Institute of Law and Society. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

²⁹⁹ International Institute of Law and Society. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May-April 2021.

Indigenous peoples have suffered historical injustices as a result of, inter alia, colonization and dispossession of their lands, territories and resources, which has prevented them from exercising, in particular, their right to development in accordance with their own needs and interests.³⁰⁰ In 2007, the United Nations General Assembly recognized, in similar terms, the restorative nature of the UN Declaration on Indigenous Peoples.³⁰¹ The UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly in 2007.

205. This dimension of the instruments on the rights of indigenous and tribal peoples is based on the recognition that these groups have suffered historical and systematic violations of their human rights, including their right to self-determination. This instrument represents a corrective response that recognizes the "rights they should always have enjoyed as part of the human family, contextualizes those rights in the light of their particular characteristics and circumstances, and promotes measures to remedy the historical and systematic violation of those rights"³⁰².³⁰² As the former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, argues:

[The Declaration is necessary precisely because Indigenous groups have been denied human rights in disregard of their particular characteristics. In other words, the Declaration exists because indigenous peoples have been deprived of equality, self-determination and related human rights, not to grant them privileges to the detriment of other groups. This remedy should not have to exist, nor should the history of oppression that gave rise to it. However, it did exist and its persistent consequences make necessary a corrective response appropriate to the particular circumstances and characteristics of indigenous peoples, which is what the Declaration represents³⁰³.

206. In this process, the full exercise of the right to self-determination constitutes the central element for the collective reparation of indigenous peoples for the violations they have suffered³⁰⁴. For this reason, the very existence of the UN Declaration on Indigenous Peoples and the explicit affirmation that indigenous peoples are holders of this right in its Article 3 implies recognition of its denial, both in terms of the right to self-determination and in terms of the right to self-determination.

³⁰⁰ OAS. American Declaration on the Rights of Indigenous Peoples. AG/RES. 2888 (XLVI-O/16). 2016. Preamble.

³⁰¹ UN. United Nations Declaration on the Rights of Indigenous Peoples. 2007. Preamble.

³⁰² Anaya, James (2010). "The right of indigenous peoples to self-determination after the adoption of the Declaration". In Claire CHARTERS and Rodolfo STAVENHAGEN (ed.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, p. 204.

³⁰³ UN. "Rights of Indigenous Peoples. Report of the Special Rapporteur on the rights of indigenous peoples." A/68/317. 14 August 2013, para. 72. Anaya, James. (2004). *Indigenous peoples in international law*. New York: Oxford University Press. pp. 106-10.

³⁰⁴ Tauli-Corpuz, Victoria. "The right of indigenous peoples to self-determination through autonomy or self-government." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 13; Meeting of International Experts, held March 30, 2021.

All the provisions of this instrument "develop the elements of self-determination for indigenous peoples in light of their common characteristics and, in a sui generis manner, set the parameters for measures to be applied in a future in which self-determination has been guaranteed to them"³⁰⁶.³⁰⁶ The IACHR considers that this same logic applies to the American Declaration on Indigenous Peoples.

207. The reparative nature of self-determination has a transformative potential for States.³⁰⁷ From a justice perspective, it aims to remedy the consequences of the establishment of historically unequal relations between ethnic and cultural groups during colonization. From a justice perspective, it is aimed at remedying the consequences of the establishment of historically unequal relations between ethno-cultural groups during colonization, which includes the adoption of measures that allow groups that are victims of structural discrimination to gain access to goods and services from which they have been excluded³⁰⁸. Likewise, in view of this reparation dimension, the Commission has recommended that States ensure that measures to make the collective property of indigenous peoples effective and practical are also aimed at giving effect to their right to self-determination³⁰⁹.

2. Approach of interculturality

208. With the recognition of self-determination established in the American and UN Declarations on indigenous peoples, which at the same time affirm the common Article 1 of the ICCPR and ICESCR, a paradigm shift has occurred with respect to the relationship that States maintain with their cultural diversity: the transition from assimilation to interculturality. As pointed out by the former UN Special Rapporteur on the rights of indigenous peoples, full recognition of this right requires a new conceptualization of the State³¹⁰. At the regional level, this has taken shape in some States through a new generation of

³⁰⁵ Anaya, James (2010). "The right of indigenous peoples to self-determination after the adoption of the Declaration". In Claire CHARTERS and Rodolfo STAVENHAGEN (ed.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, p. 207.

³⁰⁶ Anaya, James (2010). "The right of indigenous peoples to self-determination after the adoption of the Declaration". In Claire CHARTERS and Rodolfo STAVENHAGEN (ed.). *The Challenge of the Declaration. History and future of the UN declaration on indigenous peoples*. Copenhagen: IWGIA, p. 202.

³⁰⁷ Tauli-Corpuz, Victoria. "The right of indigenous peoples to self-determination through autonomy or self-government." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 13.

³⁰⁸ Rodríguez Garavito, César and LAM, Yukyan. *Etnorreparaciones: la justicia colectiva étnica y la reparación a pueblos indígenas y comunidades afrodescendientes en Colombia*. Bogotá: De justicia, 2011, pp. 17-18.

³⁰⁹ IACHR, Report No. 146/19, Case 11.754, Merits. U'wa Indigenous People and its Members. Colombia. September 28, 2019, recommendation 1; IACHR. Report No. 11/20, Case 13,082. Maya Q'eqchi' Agua Caliente Indigenous Community. Guatemala. March 3, 2020, recommendation 1.

³¹⁰ This implies that all measures adopted by States to guarantee the basic human rights of indigenous peoples must be evaluated and, if necessary, modified on the basis of the following two questions: "whether they reinforce the self-determination of indigenous peoples or, on the contrary, force them to adopt systems conducive to integration or assimilation, and whether the measures have been developed and are being implemented in the framework of a true partnership with indigenous peoples." UN. "Report of the Special Rapporteur on the rights of indigenous peoples." Victoria Tauli-Corpuz. A/74/149, July 17, 2019, para. 68.

- A.2, as well as recognizing that it is necessary to renew the processes of national construction so that they adequately include indigenous peoples³¹¹.
209. Recognition of the right of indigenous and tribal peoples to self-determination is a fundamental premise for the exercise of their other rights, both individual and collective³¹². The IACHR has held that, for these peoples, self-determination implies "freely defining their economic, social and cultural development in order to ensure their existence and well-being as distinct groups"³¹³ This includes defining their own destiny under conditions of equality and being able to participate effectively in the decision-making processes that affect them. Likewise, the IACHR Court has recognized that the right to self-determination is also included in Article 21 of the ACHR³¹⁵.
210. Similarly, the former UN Special Rapporteur on the rights of indigenous peoples has argued that this right is the cornerstone of the UN Declaration on Indigenous Peoples. It is a right in itself and, in turn, a precondition for the fulfillment of other rights³¹⁶. Some of the multiple elements necessary for its realization are control over lands, territories and natural resources; recognition of self-determined sustainable development; respect for indigenous authorities and justice systems or the guarantee of linguistic rights, their religions and traditional knowledge, among others³¹⁷.
211. The Commission indicates that the basis of this approach rests mainly on the respect, guarantee and protection of their ethnic diversity, as well as their survival.

³¹¹ UN. "Report of the Special Rapporteur on the rights of indigenous peoples." Victoria Tauli-Corpuz. A/74/149, July 17, 2019, para. 68.

³¹² IACHR. *Situation of the Human Rights of the Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 24; UN. "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people," James Anaya. A/HRC/12/34, July 15, 2009, para. 41.

³¹³ IACHR. *Indigenous Peoples, Afro-descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*. OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 237; IACHR. *Indigenous Peoples in voluntary isolation and initial contact in the Americas: Recommendations for full respect for their human rights*. OEA/Ser.L/V/II. Doc. 47/13, 2013, para. 70; IACHR. *Indigenous women and their human rights in the Americas*. OEA/Ser.L/V/II. Doc.44/17, 2017, para. 43; IACHR. *Situation of the human rights of indigenous and tribal peoples of the Pan-Amazon*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 23.

³¹⁴ UN. Human Rights Council. "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya." UN Doc. A/HRC/12/34, July 15, 2009, para. 41.

³¹⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname*. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, para. 166.

³¹⁶ UN. "Report of the Special Rapporteur on the rights of indigenous peoples." Victoria Tauli-Corpuz. A/HRC/30/41. August 6, 2015, para. 11.

³¹⁷ Tauli-Corpuz, Victoria. "The right of indigenous peoples to self-determination through autonomy or self-government." In Jeans DAHL et al. *Construyendo autonomías*. Lima: IWGIA, 2020, p. 13.

physical and cultural³¹⁸. Thus, the intercultural approach is aimed at recognizing the coexistence of a diversity of cultures in society, which must coexist on a basis of respect for their different worldviews, human rights and rights as peoples. This approach may include at least two dimensions: (i) distribution of power in decision-making on their own priorities for development and control of their lives, and (ii) the level of recognition of their cultural differences, without this being grounds for exclusion or discrimination³¹⁹. In this sense, States must incorporate in their public norms and policies an intercultural approach "that entails the recognition and incorporation of economic and social development plans adopted by indigenous peoples within their respective ancestral territories"³²⁰.

3. Approach of transversality

212. The Commission considers that the right to self-determination sets the standard for how the State should guarantee the rest of the human rights of indigenous and tribal peoples. In this sense, the actions of the State must implement, in a cross-cutting manner, the right to self-determination and, consequently, the other rights of these peoples. Under this logic, in the opinion of the IACHR, States must adopt cross-cutting measures to guarantee the right to self-determination of indigenous peoples in their legislation and State apparatus, as the starting point for guaranteeing the other rights recognized in human rights treaties and instruments and in their political constitutions in favor of these groups. At the same time, they have the obligation to ensure the effective implementation of the norms they enact and of the provisions of international human rights law that bind them³²¹. To this end, a coordinated and systematic policy must be adopted that involves all State entities with competencies related to guaranteeing the rights of indigenous and tribal peoples, in accordance with the standards established in the American Declaration on Indigenous Peoples and the UN Declaration on Indigenous Peoples, which affirmed the right to self-determination, and the other international normative sources already referred to.
213. This requires the promotion of an intercultural dialogue on human rights, the generation of culturally appropriate services, and differentiated attention to the most vulnerable groups.

³¹⁸ IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 51.

³¹⁹ IACHR. *Situation of the Human Rights of the Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 43.

³²⁰ IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, recommendation 16.

³²¹ IACHR. Report No. 2/12. Case 12.094. Merits. Indigenous communities members of the Lhaka Honhat Association (Our Land). Argentina. January 26, 2012, para. 236.

indigenous and tribal peoples³²². It also implies guaranteeing effective participation through the right to consultation and, where appropriate, free, prior and informed consent. Such consultation must be culturally appropriate, that is, it must take into account the people's own methods of decision-making, as well as their forms of representation³²³. The IACHR Court has held that the State, when adopting measures involving indigenous and tribal peoples, must consider that they possess a cultural identity that differentiates them from majority groups or collectivities and, consequently, it will be necessary to provide "effective protection that takes into account their own particularities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, uses and customs".

214. The recognition and protection of indigenous and tribal peoples as culturally distinct peoples also requires that their participation in public life be guaranteed through inclusive political and institutional structures and the protection of their cultural, social, economic and political institutions in decision-making³²⁵. In addition, it is recognized that the objective of establishing horizontal and balanced relations between indigenous peoples and the rest of the population of the States is aimed at overcoming the colonial situation, which is in keeping with the purposes pursued by the recognition of their right to self-determination³²⁶.

4. Gender approaches and intergenerational

215. The IACHR has noted that indigenous women have faced and continue to face multiple forms of discrimination based on gender, ethnicity and poverty that exacerbate their exposure to human rights violations in different contexts. They also encounter different forms of discrimination and violence in their own communities.³²⁷ Therefore, it has promoted the gender approach that "accounts for the presence of a power structure

³²² IACHR. *Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extraction, exploitation and development activities*. OEA/Ser.L/V/II. Doc. 47/15. 31 December 2015, para. 150; IACHR. *Situation of the human rights of the indigenous and tribal peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 45.

³²³ IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 45.

³²⁴ I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, Series C No 125, paras. 51 and 63.

³²⁵ IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. Doc. 176, 2019, para. 44.

³²⁶ Kuppe, René. "Autonomy of indigenous peoples - the perspective from the Declaration on the Rights of Indigenous Peoples". GONZÁLES, Miguel et al. *La autonomía a debate. Autogobierno indígena y Estado plurinacional en América Latina*. Quito: FLACSO, Sede Ecuador; GTZ; IWGIA; CIESAS; UNICH, 2010, p. 125-128.

³²⁷ IACHR. *Indigenous women and their human rights in the Americas*. OEA/Ser.L/V/II. Doc.44/17, 2017, paras. 228, 230.

asymmetrical system that assigns differential values, positions, and habits to each of the sexes, and therefore structures a system of power relations accordingly, which has become a pervasive cultural, social, economic, and political logic in all spheres of social relations. In previous reports, the Commission has noted the differentiated impacts on indigenous women in various contexts, such as the development of extractive activities, armed conflict, militarization of indigenous lands, in the domestic sphere, in the exercise of economic, social and cultural rights, in the urban environment (migration and displacement processes), and in leadership processes and defense of rights³²⁹.

216. Along these lines, the IACHR has indicated that the gender approach, accompanied by the intercultural approach, makes it possible to recognize the special position of indigenous and tribal women, and to adopt culturally appropriate measures that guarantee the enjoyment of their rights and fundamental freedoms, and allow them a life free of discrimination and violence³³⁰. The Commission considers that, through these approaches, States must guarantee the protection of the rights of indigenous and tribal women and their access to justice and reparations for situations of human rights violations they face. They should also be applied to consultation and other participatory processes with indigenous and tribal peoples so that women can participate in internal decision-making processes through means that are respectful of their customary law³³¹. It is therefore an approach that is also necessary in the exercise of self-determination and other rights and constituent elements of that right.
217. On the other hand, the IACHR has also highlighted intergenerational solidarity as a necessary approach to addressing the rights of indigenous and tribal peoples. Given the special importance attributed by these peoples to ancestors and future descendants, intergenerational solidarity is understood as social cohesion between generations, which manifests itself in a strong commitment to values and experiences transmitted through oral memory, as well as the need to replicate such knowledge. Part of the cultural heritage of indigenous and tribal peoples is linked to returning to the past for the projection

³²⁸ IACHR. Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia. OAS/Ser.L/V/II. (September 29, 2019), para. 46, *citing* Pautassi, Laura. Equality in waiting: the gender approach. Revista Lecciones y ensayos No. 89, 2011, p. 281.

³²⁹ IACHR. Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia. OAS/Ser.L/V/II. (September 29, 2019), para. 47; IACHR. Indigenous women and their human rights in the Americas. OEA/Ser.L/V/II. Doc.44/17, 2017, paras. 87-130.

³³⁰ IACHR. Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia. OAS/Ser.L/V/II. (September 29, 2019), para. 48.

³³¹ IACHR. Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia. OAS/Ser.L/V/II. (September 29, 2019), para. 48.

- of the collective's future. It is about taking care of the territory and nature, its values, assets and knowledge, for current and future generations³³².
218. The IACHR takes note of several responses to the questionnaire for this report that show how these approaches have been incorporated by indigenous and tribal peoples. For example, representatives of an indigenous women's organization in Peru highlighted the need for an autonomous organization for indigenous women due to the situation of inequality in which they find themselves. They also reported on the training work they carry out, which is aimed at women of all ages and which seeks to encourage more young people to join in order to continue their organization and struggle³³³. Another Amazonian indigenous organization in Peru reported on its efforts to address inequality in the participation of women, and has established minimum quotas for participation in candidacies for leadership positions, as well as in the composition of its technical teams³³⁴.
219. For their part, representatives of the Nahua people of Honduras highlighted the leadership of women in their representative organization, and the participation of men, women, youth and elders on the board of directors, as well as the inclusion of women in coordination positions at the local community level, and the inclusion of children in community activities and training³³⁵.
220. Similarly, various representatives of indigenous peoples and organizations of Brazil highlighted the fundamental role of women, the elderly, children and youth in the indigenous movement, and the promotion of spaces for the education of young people for leadership change processes in indigenous peoples and communities, and efforts in their internal assemblies and autonomous processes to ensure parity between women and men in leadership election and decision-making processes. Likewise, the important role of women and youth in leadership spaces and in the promotion and defense of the territories of the Quilombola³³⁶ communities was also reported.

³³² IACHR. *Situation of the Human Rights of Indigenous and Tribal Peoples of Panamazonia*. OAS/Ser.L/V/II. (September 29, 2019), para. 49.

³³³ National Organization of Andean and Amazonian Indigenous Women of Peru (ONAMIAP), Response to the Questionnaire on Self-Determination of Indigenous and Tribal Peoples, 2021.

³³⁴ Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD) and Earth Rights International, Joint Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, April 26, 2020, p. 34.

³³⁵ Nahua Indigenous Federation of Honduras, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, June 2021.

³³⁶ Responses of Articulação dos Povos e Organizações Indígenas do Nordeste, Minas Gerais e Espírito Santo; Levante Tupinambá Mairi; Associação Indígena Tapeba Atãbaré; Cáritas Brasileira Regional Norte II and Comunidade Quilombola do Abacatal - Sítio Bom Jesus to the Questionnaire on Self-Determination of Indigenous and Tribal Peoples, 2021.

CHAPTER 4

GOOD PRACTICES AND OBSTACLES TO THE EXERCISE OF INDIGENOUS AND TRIBAL PEOPLES' SELF- DETERMINATION

GOOD PRACTICES AND OBSTACLES TO THE EXERCISE OF INDIGENOUS AND TRIBAL PEOPLES' SELF-DETERMINATION

A. Recognition of self-determination in the legal systems of the American States

221. In the States of the Americas, there have been varying degrees of recognition of the autonomy and/or self-determination of indigenous and tribal peoples. This section will address some of the ways in which self-determination has been recognized in the legal frameworks, policies and practices of the different countries of the continent. Despite the limitations in these normative and political frameworks, since considerable challenges persist in the exercise of self-determination, it can be seen that the recognition of the rights to autonomy, self-government and other aspects of self-determination in favor of these peoples can occur within the framework of the territorial integrity of the States. The Commission emphasizes that, in some cases, the recognition of these rights has helped to overcome situations of conflict between indigenous and tribal peoples and the State that arose precisely because of the lack of respect for the rights of these peoples.
222. This is followed by examples of the recognition of rights to autonomy, self-government, lands and territories, and other rights, through the signing of treaties and agreements and other arrangements between States and indigenous and tribal peoples in countries such as the United States and Canada. This is followed by a discussion of the recognition of the self-determination of indigenous and tribal peoples in various constitutions and legislation in the Latin American region, which in many cases reflect the regional trend towards recognition of the multicultural, pluricultural and/or plurinational nature of States. This includes examples of the establishment of special regimes of autonomy and self-government, rights to their lands and territories, and their own systems of law, justice and jurisdiction. Along these lines, examples are given of the recognition of these rights in Bolivia, Brazil, Colombia, Ecuador, Mexico, Nicaragua, Panama, Peru and Venezuela. It also mentions initiatives or

state programs related to the recognition and promotion of indigenous justice systems and jurisdiction.

1. Treaties and agreements between States and indigenous and tribal peoples

223. In the United States, the British colonization process included the practice of signing treaties with indigenous peoples. Subsequently, the U.S. government adopted this practice in the context of land acquisition following armed resistance by indigenous peoples. Although this meant the loss of a large part of indigenous ancestral lands, it laid the foundations for the recognition and establishment of indigenous reservations with certain rights of self-government and their own jurisdiction, rights that since the 19th century have gone through stages of both recognition and weakening by federal legislation and Supreme Court rulings³³⁷.
224. The treaties historically entered into with indigenous peoples can be understood as implicit recognition of their inherent sovereignty and the establishment of nation-to-nation, or government-to-government, political relationships.³³⁸ After several laws and policies of assimilation of indigenous peoples, self-determination began to figure explicitly as a federal policy with the adoption of federal laws such as the Indian Self-Determination and Education Assistance Act (1975). Since then, as well as political mobilizations in the 1960s and 1970s, indigenous peoples have gained greater control over their own internal governance systems, including judicial systems, as well as education, health and other socio-economic issues.³³⁹ However, they face challenges in exercising their rights to self-determination and self-determination. However, they face challenges in practically and effectively exercising their self-determination, particularly in relation to regulation and jurisdiction over external persons and interests.

³³⁷ Forest Peoples Worldwide - University of Colorado - Boulder, Legal Framework in the United States for Indigenous Peoples, Supplemental Response to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021).

³³⁸ Harvard Project on American Indian Economic Development, Eric C. Henson, et, al, *The State of Native Nations: Conditions under U.S. policies and self-determination*, New York: Oxford University Press, 2008, p. 3; David E. Wilkins & K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law*, Norma: University of Oklahoma Press, 2001, pp. 40-41.

³³⁹ Harvard Project on American Indian Economic Development, Eric C. Henson, et, al, *The State of Native Nations: Conditions under U.S. policies and self-determination*, New York: Oxford University Press, 2008, pp. 3-6, 10; First Peoples WorldWide - University of Colorado - Boulder, Response to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021); Attorney, Inuit Alaska Pueblo, Response to IACHR Questionnaire on Indigenous and Tribal Peoples' Self-Determination, 2021.

225. The IACHR notes that in the case of Canada, the federal government initially signed 11 treaties with indigenous peoples between 1871 and 1921.³⁴⁰ The Constitution Act of 1982 affirmed the rights recognized in favor of indigenous peoples in existing treaties, as well as those rights acquired through land claims agreements negotiated to date between the government and indigenous peoples.³⁴¹ The rights are not defined in the Act, but have been understood to include rights such as to land, traditional hunting and fishing, culture, and to enter into agreements or treaties.
226. However, the meaning of treaty rights continues to be contested between the State and indigenous peoples, resulting in numerous disputes and interpretations by the Supreme Court with varying results.³⁴² It has been understood that, following the Constitution Act, the right of indigenous peoples to self-government, including the right to their jurisdiction, is part of Canadian constitutional law.³⁴³ The right of indigenous peoples to self-government, including the right to their jurisdiction, is now part of Canadian constitutional law.³⁴⁴ The right of indigenous peoples to self-government, including the right to their jurisdiction, is now part of Canadian constitutional law.
227. On the other hand, the right to indigenous self-government must be negotiated with the federal government through specific negotiation agreements between indigenous peoples and the federal government (self-government agreements), through which they can adopt their own laws and policies, which has varied according to the region or indigenous community.³⁴⁴ The rights to self-government in such agreements must be approved by federal legislation.³⁴⁵ In addition, such agreements create a series of government-to-government relationships with the relevant provincial and territorial governments.³⁴⁶ The negotiation of these agreements means that the Indian party is not subject to the jurisdiction of the Indian Act, which has been in force since 1876 and through which the federal government has exercised control over their lands, services, and property rights.

³⁴⁰ First Peoples Worldwide - University of Colorado Boulder, Canadian Indigenous Peoples - Legal Framework and Significant Issues, Summary of Responses to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021).

³⁴¹ Constitution Act, 1982, Schedule B to the Canada Act 1982, Sec. 35

³⁴² First Peoples Worldwide - University of Colorado Boulder, Canadian Indigenous Peoples - Legal Framework and Significant Issues, Summary of Responses to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021).

³⁴³ Kent McNeil, The Jurisdiction of Inherent Right Aboriginal Governments, Research Paper for the National Centre for First Nations Governance (October 11, 2007), p. 1.

³⁴⁴ First Peoples Worldwide - University of Colorado Boulder, Canadian Indigenous Peoples - Legal Framework and Significant Issues, Summary of Responses to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021).

³⁴⁵ First Peoples Worldwide - University of Colorado Boulder, Canadian Indigenous Peoples - Legal Framework and Significant Issues, Summary of Responses to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021).

³⁴⁶ OECD (2020), Linking Indigenous Communities with Regional Development in Canada, OECD Rural Policy

Reviews, OECD Publishing, Paris, Ch. 1. "Overview of Indigenous governance in Canada: Evolving relations and key issues and debates".

social issues, official recognition of indigenous persons, and many aspects of indigenous peoples' lives³⁴⁷.

228. In Jamaica, the Commission was informed that the Maroon communities claim territorial and self-determination rights as indigenous and tribal peoples based on treaties they signed in 1739 with the British Crown. These treaties recognized the rights of the Maroon communities over certain tracts of land in the country, as well as rights to political and economic autonomy. Since then they have lived and reproduced their culture as distinct communities. However, since Jamaica gained independence in 1962, the Maroons have faced the disregard of colonial treaties and as a result have felt their distinct cultural identity, land rights and autonomy threatened. As a result, they have demanded the delimitation, demarcation and titling of Maroon lands to preserve and protect their culture, identity and economies³⁴⁸.

2. Recognition of indigenous self-determination and autonomy in the Latin American region

229. The IACHR highlights that in the Latin American region, there are some precedents of recognition of indigenous autonomy rights in the first half of the century. 20. In Panama, following the armed uprising by the Guna people in 1925 in response to assimilation policies, the government signed a treaty with the Guna, and subsequently the constitution was reformed to include the indigenous comarcas as part of the political division of the Panamanian State³⁴⁹. Through Law No. 16 of 1953, the State recognized, for the first time, the existence of the Comarca of San Blas del Congreso General Kuna, which included the recognition of its Organic Charter as an indigenous form of government, its traditional authorities, protections against the adjudication of land to non-indigenous persons, education according to their cultures and customs, and the jurisdiction of indigenous authorities over legal infractions, except for criminal law.³⁵⁰ This experience served as a model for other indigenous peoples in Panama and their efforts to

³⁴⁷ OECD (2020), *Linking Indigenous Communities with Regional Development in Canada*, OECD Rural Policy Reviews, OECD Publishing, Paris, Ch. 1. "Overview of Indigenous governance in Canada: Evolving relations and key issues and debates".

³⁴⁸ Presentation by Maroon Indigenous Women Circle (Jamaica) to the Virtual Regional Caribbean Meeting on the Right of Self-Determination of Indigenous and Tribal Peoples (May 27, 2021); Kenneth M. Bilby, *Maroon Autonomy in Jamaica*, Cultural Survival Quarterly Magazine, December 2001.

³⁴⁹ Aresio Valiente López, compiler, *Derechos de los Pueblos Indígenas de Panamá*, San José: Impresora Gossesstra Intl, 2002, p. 14.

³⁵⁰ Aresio Valiente López, compiler, *Derechos de los Pueblos Indígenas de Panamá*, San José: Impresora Gossesstra Intl, 2002, pp. 14-15.

obtain legal reforms for the creation of indigenous comarcas and the recognition of their self-government³⁵¹.

230. In the 1980s, the autonomy regime in the Caribbean Coast of Nicaragua was established as a result of the peace agreement (Yulu Agreement) between the government and the indigenous and Afro-descendant peoples as a result of the armed insurgency in that region that arose from the imposition of state policies that ignored communal property and the indigenous peoples' own representative structures, among other factors within the complex political scenario that Nicaragua was experiencing at that time³⁵². The Autonomy Statute (Law No. 28) of 1987 establishes the autonomy regime through which the rights of the indigenous and Afro-descendant peoples of that region to the preservation and development of their languages, religions and cultures, communal property, education in their mother tongue and their political representation in the regional government bodies, among others, are recognized³⁵³. Law No. 28 establishes the Autonomous Regions of the Northern Caribbean Coast and the Southern Caribbean Coast, each with its respective Regional Council as a popularly elected representative body. The Commission notes that the indigenous and Afro-descendant peoples of this region face serious challenges in the protection and guarantee of their self-determination, territories and other human rights, which are due to inherent deficiencies in the model of autonomy and political representation that was adopted.
231. The main advances in the recognition of the rights of indigenous peoples in the region occurred in the last four decades as a result of constitutional reforms that in many countries accompanied processes of democratic transition and the ratification of international human rights treaties that, in general throughout the region, enjoy constitutional status³⁵⁴. The ratification of Convention 169 by the vast majority of Latin American States has played an important role since the 1990s in processes of constitutional and legal reform and jurisprudential advances in the region³⁵⁵. The adoption of the Declaration of

³⁵¹ Aresio Valiente López, compiler, *Derechos de los Pueblos Indígenas de Panamá*, San José: Impresora Gossestra Intl, 2002, p. 15; Bernal D. Castillo, "Neggsed (Autonomía): avances y desafíos del autogobierno del pueblo gunadule de Panamá", in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Editorial Universitaria Abya-Yala (2021), pp. 324-6.

³⁵² Creole Communal Government of Bluefields - Nicaragua, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (May 2021). For more information on the political context in which the recognition of autonomy in the Caribbean Coast took place, see generally, Miguel González, "La tragedia de Alal: regresión (no restitución) de derechos en el Régimen de Autonomía en Nicaragua," in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Editorial Universitaria Abya-Yala (2021), pp. 164-7.

³⁵³ Law No. 28, *Statute of Autonomy of the Regions of the Caribbean Coast of Nicaragua, with its incorporated reforms*, La Gaceta No. 155, August 18, 2016, art. 11.

³⁵⁴ See in this regard, ILO, *The application of Convention No. 169 by national and international courts in Latin America: a compilation of cases / International Labour Organization*. - Geneva: ILO, 2009, pp. 6-8; Economic Commission for Latin America and the Caribbean (ECLAC)/Fondo para el Desarrollo de los Pueblos Indígenas de América Latina y el Caribe (FILAC), "Los pueblos indígenas de América Latina - Abya Yala y la Agenda 2030 para el Desarrollo Sostenible: tensiones y desafíos desde una perspectiva territorial", Project Documents (LC/TS.2020/47), Santiago, 2020, pp. 39-43.

³⁵⁵ ILO, *The application of Convention No. 169 by national and international courts in Latin America: a compilation of cases / International Labour Organization*. - Geneva: ILO, 2009, p. 9.

The UN Declaration on Indigenous Peoples has also been an important point of reference, resulting, for example, in the incorporation of the text in its entirety in Bolivia³⁵⁶.

232. In several countries, these constitutional reforms led to the recognition of the multiethnic, multicultural or pluricultural nature of the States. In the case of indigenous peoples, this included recognition of the original and collective nature of their property, the right to special protection and demarcation of their indigenous lands and territories, the right to exercise autonomy or some degree of it in their territories, and recognition of legal pluralism or indigenous peoples' own law³⁵⁷.
233. In some countries, similar rights were recognized in favor of Afro-descendant peoples and communities in the region. In Bolivia, for example, the 2019 Constitution recognizes the rights of the Afro-Bolivian people to enjoy the economic, social, political and cultural rights recognized in the Constitution for indigenous peoples³⁵⁸. In Colombia, Law 70 of 1993 recognizes black communities in different regions of the country and includes provisions on collective property rights, land use and protection of natural resources and the environment, intercultural education, economic and social development, among others³⁵⁹. Brazil's Law of Transitory Constitutional Provisions recognizes the definitive ownership of the quilombola communities over their lands and obliges the State to grant them the respective titles³⁶⁰. For its part, Chile's Law 21.151, approved in 2019, grants legal recognition to the Chilean Afro-descendant tribal people, which includes their cultural identity, language, historical tradition, culture, institutions, worldview and the right to be consulted regarding legislative or administrative measures that may directly affect them³⁶¹.

³⁵⁶ Law No. 3760 of November 7, 2007 (Bolivia), which elevates to the rank of Law the 46 articles of the United Nations Declaration on the Rights of Indigenous Peoples.

³⁵⁷ See, Economic Commission for Latin America and the Caribbean (ECLAC)/Fondo para el Desarrollo de los Pueblos Indígenas de América Latina y el Caribe (FILAC), "[Los pueblos indígenas de América Latina - Abya Yala y la Agenda 2030 para el Desarrollo Sostenible: tensiones y desafíos desde una perspectiva territorial](#)", Documentos de Proyectos (LC/TS.2020/47), Santiago, 2020, p. 40; and Raquel Yrigoyen Fajardo, "El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización", in Cesar Rodríguez Garavito, coord. *El derecho en América Latina: un mapa para el pensamiento jurídico del siglo XXI*, 1st ed. Buenos Aires: Siglo Veintiuno Editores, 2011, pp. 141-144.

³⁵⁸ [Political Constitution of the Plurinational State of Bolivia \(2009\)](#), art. 2.

³⁵⁹ [Law 70 of 1993](#), which develops transitory article 55 of the Political Constitution. The procedure for recognizing the collective property of these communities was regulated by [Decree 1745 of 1995](#).

³⁶⁰ [Ato das Disposições Constitucionais Transitórias](#). ADCT of 1988, Art. 68. [Decree No. 4.887 of 2003](#) regulates the procedure for the identification, recognition, delimitation, demarcation and titling of lands occupied by Quilombola communities.

³⁶¹ [Law No. 21.151](#), Granting legal recognition to the Chilean Afro-descendant Tribal People (2019).

3. Recognition of self-determination within the framework of interculturality and pluriculturality.

234. The autonomy and self-determination of indigenous peoples are fundamental principles in the Bolivian Constitution. In this sense, the State is recognized as "democratic, intercultural, decentralized and with autonomies" based on plurality and pluralism, political, economic, legal, cultural and ^{linguistic}³⁶². Article 2 recognizes, within the framework of the unity of the State, the self-determination of the indigenous native peasant nations and peoples, given their pre-colonial existence and ancestral dominion over their territories, and "which consists of their right to autonomy, self-government, their culture, the recognition of their institutions and the consolidation of their territorial entities" ³⁶³.
235. The Constitution of Ecuador recognizes the intercultural and plurinational nature of the ^{State}³⁶⁴ and the existence of indigenous nationalities, the Afro-Ecuadorian people, the Montubio people and the communes, which "form part of the single and indivisible Ecuadorian State" ³⁶⁵. Despite enshrining a series of collective rights in favor of indigenous peoples, the right to self-determination is not expressly recognized, except in the case of peoples in voluntary isolation, to whom the State would direct measures to "guarantee their lives, ensure respect for their self-determination and their will to remain in isolation. Likewise, the indigenous, Afro-Ecuadorian and Montubio peoples "may constitute territorial districts for the preservation of their culture" ³⁶⁷. However, there have been challenges for indigenous peoples to form indigenous territorial ^{districts}³⁶⁸.
236. In turn, the Mexican Constitution recognizes the pluricultural composition of the Nation and also expressly recognizes the right to self-determination of indigenous peoples and communities, which "shall be exercised within a constitutional framework of autonomy that ensures national unity" ³⁶⁹. The autonomy of the indigenous peoples is recognized with respect to their internal forms of social, economic, political and cultural organization, to apply their own normative systems for the regulation and solution of internal conflicts, to elect their own authorities or representatives, according to their traditional norms, procedures and practices, among other rights. However, the same text establishes that it will be the federal entities that will establish "the characteristics of self-determination and

³⁶³ [Political Constitution of the Plurinational State of Bolivia \(2009\)](#), art. 1.

³⁶⁴ [Political Constitution of the Plurinational State of Bolivia \(2009\)](#), art. 2.

³⁶⁵ [Political Constitution of Ecuador \(2008\)](#), art. 1.

³⁶⁶ [Political Constitution of Ecuador \(2008\)](#), art. 56.

³⁶⁷ [Political Constitution of Ecuador \(2008\)](#), art. 57.

³⁶⁸ [Political Constitution of Ecuador \(2008\)](#), art. 60.

³⁶⁹ Alliance for Human Rights - Ecuador, *Report on Self-Determination under the United Nations Declaration on the Rights of Indigenous Peoples* (2021).

³⁶⁹ [Political Constitution of the United Mexican States](#). Diario Oficial de la Federación (1917), last amendment published DOF 28-05-2021, art 2.

³⁷⁰ The disparity in the recognition and guarantee of this right by the different state governments³⁷¹ has been pointed out.

237. The IACHR takes note of the information received regarding the proposed constitutional reform on the rights of indigenous and Afro-Mexican peoples that was presented by indigenous representatives to the President of the Republic in September 2021. This proposal recognizes indigenous peoples as subjects of public law with legal personality, reaffirms and develops the right to self-determination and different ways for indigenous peoples to exercise it, including through the constitution of indigenous municipalities. Likewise, the constitutional reform proposal contains provisions on the rights of indigenous women, children and youth; lands, territories, biodiversity and environment; indigenous normative systems and coordination and access to national justice; education, health, communication, development and food self-sufficiency; and on indigenous migration and indigenous populations in urban and cross-border contexts³⁷².

4. Recognition from the autonomy, self-government and territories

238. With regard to the Bolivian Constitution, the Commission notes that it establishes four types of autonomy: departmental, regional, municipal and indigenous native-peasant. The requirements for the establishment of these autonomies are defined in the Framework Law on Autonomies and Decentralization (2010). According to the Constitution, "[i]ndigenous-original peasant autonomy is based on the ancestral territories, currently inhabited by these peoples and nations, and on the will of their population" and will be exercised "according to their norms, institutions, authorities and procedures, in accordance with their attributions and competences"³⁷³. The powers recognized in favor of the indigenous native peasant autonomies include, among others, the elaboration of their Statute for the exercise of their autonomy; the definition and management of their own forms of economic, social, political, organizational and cultural development, in accordance with their identity and vision as a people; the management and administration of renewable natural resources, in accordance with the Constitution; the exercise of indigenous jurisdiction; the administration of their own taxes, in accordance with the Constitution; and the administration of their own economic, social, political, organizational and cultural development, in accordance with their identity and vision as a people.

³⁷⁰ Political Constitution of the United Mexican States. Diario Oficial de la Federación (1917), last amendment published DOF 28-05-2021, art 2.

³⁷¹ Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 2.

³⁷² Daniela Pastrana, "Presentan propuesta de reforma constitucional; van por las autonomías de los pueblos indígenas", Pie de Página (September 29, 2021); and Propuesta de Iniciativa de Reforma Constitucional sobre derechos de los pueblos indígenas y afromexicano, Entregada al Licenciado Andrés Manuel López Obrador, Presidente de México en ocasión del acto conmemorativo: "Justicia al Pueblo Yaqui: Petition for forgiveness for grievances against the Original Peoples".

³⁷³ Political Constitution of the Plurinational State of Bolivia (2009), art. 290.

competence; and to elaborate, approve and execute their operational programs and budget³⁷⁴. However, the implementation of the Framework Law on Autonomies and Decentralization has presented many complications for indigenous peoples seeking to access autonomy and exercise the different powers recognized in the Constitution.

239. According to the Colombian Constitution of 1991, the indigenous territories are territorial entities, equal to the departments and municipalities, which enjoy autonomy for the management of their interests, have the right to administer resources and establish taxes for the fulfillment of their functions, and also the right to govern themselves by their own authorities, through councils formed according to their uses and customs.³⁷⁵ According to the information received, the organic law of territorial ordering ordered in Article 329 of the Constitution for the conformation and delimitation of the indigenous territorial entities has not yet been adopted. In the face of this legal vacuum, several decrees have been enacted with the character of law in relation to various matters, among them: decree 1088 of 1993 which regulates the creation of Associations of Cabildos and/or Indigenous Traditional Authorities as entities of public law with legal personality, their own assets and administrative autonomy, and Decree 1053 of 2014 to facilitate the functioning of the indigenous territories with respect to the public functions attributed to them in the Constitution and the administration and execution of the resources provided for their financing³⁷⁶. Decree 1953 defines autonomy and free self-determination as the "exercise of the law of origin, major law or indigenous peoples' own law, which based on their worldviews allows them to determine their own institutions and government authorities, exercise jurisdictional, cultural, political and administrative functions within their territorial scope, the full exercise of the right of ownership of their territories and live their life plans, within the framework of the Political Constitution and the law" ³⁷⁷.
240. In the framework of the autonomy regime in the Caribbean Coast of Nicaragua, Law No. 445 of 2003 regulates the communal property regime of the lands of the indigenous and Afro-descendant communities of the Caribbean Coast and the basins of the Coco, Bocay, Indio and Maíz rivers. Its objectives include guaranteeing indigenous and Afro-descendant peoples "the full recognition of communal property rights, use, administration and management of traditional lands and its

³⁷⁴ [Political Constitution of the Plurinational State of Bolivia \(2009\)](#), art. 304.

³⁷⁵ [Political Constitution of Colombia](#), updated and concordada - 2020, arts. 286-7, 330.

³⁷⁶ [Decree 1088 of 1993](#), which regulates the creation of the Associations of Cabildos and/or Traditional Indigenous Authorities; and [Decree 1953 of 2014](#), By which a special regime is created in order to put into operation the Indigenous Territories with respect to the administration of the indigenous peoples' own systems until Congress issues the law referred to in Article 329 of the Political Constitution, art.1.

³⁷⁷ [Decree 1953 of 2014](#), Whereby a special regime is created in order to put into operation the Indigenous Territories with respect to the administration of the indigenous peoples' own systems until Congress issues the law referred to in Article 329 of the Political Constitution, art.10.a.

natural resources, through their demarcation and titling "³⁷⁸. Law No. 445 establishes and defines concepts of communal lands and property, as well as "indigenous and ethnic territory" defined as "the geographic space that covers the entire habitat of a group of indigenous and [Afro-descendant] communities that form a territorial unit, where they develop, in accordance with their customs and traditions" ³⁷⁹. This legislation takes up aspects to develop communal and territorial autonomy and the relationship of the communities with the municipal, regional and national governments³⁸⁰.

241. Although several other constitutions do not make express reference to self-determination, they recognize other rights considered important for its exercise, particularly in relation to lands and territories. In the case of the Constitution of Guatemala, Article 67 of the Constitution provides for the special protection of the territories of indigenous communities and that special administration systems will be maintained for these territories³⁸¹.
242. In Peru, it has been noted that there is no constitutional recognition of self-determination. However, certain autonomous powers can be exercised by indigenous communities through the forms of organization of peasant and native communities and peasant patrols³⁸². Article 89 of the Constitution recognizes that the "peasant and native communities" are autonomous in their organization, in the use and disposition of their lands, as well as in economic and administrative matters³⁸³. It should be noted that the recognition of legal status is only given through the figures of peasant and native communities, which does not include the concept of peoples, and therefore the legal status of those indigenous peoples or nations that wish to be recognized as such is not yet recognized³⁸⁴.
243. In the case of Brazil, the Commission notes that, although the 1988 Constitution does not expressly mention the self-determination of indigenous peoples and other traditional communities, this right can be inferred from Article 231, which recognizes the organization, customs, languages, traditions and original rights of indigenous peoples over the lands they traditionally occupy,

³⁷⁸ [Law on the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio and Maíz Rivers, Law No. 445](#), Diario Oficial la Gaceta No. 16, (January 23, 2003), arts. 1, 2.1.

³⁷⁹ [Law of the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio and Maíz Rivers, Law No. 445](#), Diario Oficial la Gaceta No. 16, (January 23, 2003), art. 3.

³⁸⁰ CEJUDHCAN - Nicaragua, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021.

³⁸¹ Xinka People - Guatemala, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021; [Political Constitution of the Republic of Guatemala](#), 1985 with 1993 reform, art. 67.

³⁸² International Institute of Law and Society, Inputs to the Thematic Report on Indigenous and Tribal Peoples' Self-Determination, May 2021, pp. 9-10.

³⁸³ [Political Constitution of Peru](#), updated 2021, Art. 89.

³⁸⁴ International Institute of Law and Society, Inputs to the Thematic Report on Indigenous and Tribal Peoples' Self-Determination, May 2021, pp. 8-9.

According to the Constitution, the lands traditionally occupied by indigenous peoples are those inhabited "on a permanent basis, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions"³⁸⁶. In addition, such lands "are destined for their permanent possession, corresponding to them the exclusive usufruct of the riches of the soil, rivers and lakes existing therein" and are "alienable and unavailable and the rights over them imprescriptible"³⁸⁷.

244. Likewise, in Brazil, the use of water resources, including energy activities and extraction of mineral wealth on indigenous lands requires authorization from the National Congress, with the consent of the affected communities, and that the affected communities participate in the results of the extraction³⁸⁸. Likewise, "the full exercise of cultural rights and access to cultural sources" is recognized, which includes the protection of indigenous and Afro-Brazilian cultural manifestations (Article 215.1) and the ways of creating, doing and living, as part of the cultural heritage, including traditional peoples (Article 216.2).³⁸⁹ On the other hand, indigenous peoples, their communities and organizations are recognized as legitimate parties that may act in defense of their collective rights and interests³⁹⁰.
245. With respect to Venezuela, important elements for self-determination can be found in Article 119 of the Constitution with respect to the right of indigenous peoples to their own forms of social, political and economic organization, their uses and customs, management of their own affairs, development of their own ways of life and consultation³⁹¹. The territorial rights of the indigenous peoples are recognized, so that it is incumbent upon the Executive, "with the participation of the indigenous peoples, to demarcate and guarantee the right to collective ownership of their lands, which shall be inalienable, imprescriptible, unseizable and non-transferable"³⁹².

³⁸⁵ Office of the Public Defender of the Union - Brazil, Written Observations to the Consultation Questionnaire on the Right to Self-Determination of Indigenous and Tribal Peoples (April 27, 2021), citing Political Constitution of 1988, Federative Republic of Brazil, last updated Nov. 2008, art. 231.

³⁸⁶ Political Constitution of 1988, Federative Republic of Brazil, last updated Nov. 2008, art. 231.1.

³⁸⁷ Political Constitution of 1988, Federative Republic of Brazil, last updated Nov. 2008, art. 231.2, 231.4.

³⁸⁸ Political Constitution of 1988, Federative Republic of Brazil, last updated Nov. 2008, art. 231.3.

³⁸⁹ Political Constitution of 1988, Federative Republic of Brazil, last updated Nov. 2008, art. 215.1, 216.2.

³⁹⁰ Political Constitution of 1988, Federative Republic of Brazil, last updated Nov. 2008, art. 232.

³⁹¹ Working Group on Indigenous Affairs (WGIA) - Venezuela, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, April 2021, in reference to Constitution of the Bolivarian Republic of Venezuela - 1999, arts. 119, 120.

³⁹² Constitution of the Bolivarian Republic of Venezuela - 1999, art. 120.

5. Acknowledgment of right own, systems justice systems and jurisdiction

246. With regard to indigenous peoples' systems of justice and jurisdiction, the Commission notes that a number of States recognize such systems in their constitutions. In general, the exercise of this right is conditioned to the fundamental rights in national constitutions and/or international human rights law, and its application has been limited to its members within their territories and to minor offenses or infractions. They also establish that the coordination mechanisms between the indigenous justice and national justice systems would be created through secondary legislation, which is a pending issue in most of the States.
247. In the case of Peru, peasant and native communities, with the support of the peasant patrols, have the right to exercise jurisdictional functions within their territorial scope, in accordance with their customary ^{law}³⁹³. The Venezuelan Constitution establishes that the "legitimate authorities of the indigenous peoples may apply in their habitat instances of justice based on their ancestral traditions and that only affect their members, according to their own norms and procedures, as long as they are not contrary to this Constitution, the law and public order "³⁹⁴. The Organic Law of Indigenous Peoples and Communities (2005) recognizes indigenous law as "the set of norms, principles, values, practices, institutions, uses and customs, which each indigenous people considers legitimate and obligatory, which allows them to regulate social and political life, self-govern, organize, guarantee internal public order, establish rights and duties, resolve conflicts and make decisions in the internal sphere "³⁹⁵. Said Law also states that the special indigenous jurisdiction will carry out actions of investigation, decision and resolution of conflicts based on conciliation, dialogue, mediation and reparation of damages in order to reestablish harmony and ^{social} peace³⁹⁶ .
248. Article 246 of the Colombian Constitution enshrines the right of the authorities of indigenous peoples to "exercise jurisdictional functions within their territorial scope, in accordance with their own rules and procedures, provided that they are not contrary to the Constitution and laws of the republic "³⁹⁷. According to Decree 1953 of 2014, "[l]awful operators must recognize and respect the power that the authorities of indigenous peoples have within their territorial scope to establish their own legal norms in accordance with the law

³⁹³ [Political Constitution of Peru](#), updated 2021, Art. 149.

³⁹⁴ [Constitution of the Bolivarian Republic of Venezuela - 1999](#), arts. 260.

³⁹⁵ [Organic Law on Indigenous Peoples and Communities \(2005\)](#), art. 131.

³⁹⁶ [Ley Orgánica de Pueblos y Comunidades Indígenas \(2005\)](#), art. 132. For more information, see, Vladimir Aguilar Castro, Guillermo Marciales Rodríguez, Vercilio Mejías, Coords. *La Jurisdicción Especial Indígena en Venezuela como derecho propio*, Mérida: Universidad de los Andes, Ediciones Dabánatà, pp. 67-69.

³⁹⁷ [Political Constitution of Colombia](#), updated and concordada - 2020, art. 246.

of origin, the greater right and the proper right, and to exercise in a preferential manner one's own jurisdiction" ³⁹⁸.

249. The Constitution of Ecuador, for its part, recognizes the right of indigenous authorities to "exercise jurisdictional functions, based on their traditions and their own law, within their territorial scope, with guaranteed participation and decision-making by women" (Article 171). The authorities shall apply their own rules and procedures for the resolution of internal conflicts that are not contrary to the Constitution and the human rights recognized in international instruments. It also establishes that the decisions will be respected by the institutions and authorities and, at the same time, will be subject to the control of constitutionality³⁹⁹.
250. The Bolivian Constitution recognizes the right of the indigenous native peasant nations and peoples of Bolivia to exercise jurisdictional and jurisdictional functions through their authorities and to apply their own principles, cultural values, norms and procedures. It establishes that indigenous jurisdiction respects the right to life, defense and other constitutional rights and guarantees.⁴⁰⁰ It also provides that a Law of Jurisdictional Demarcation will determine the mechanisms of coordination and cooperation with the indigenous jurisdiction with the ordinary jurisdiction and other constitutionally recognized jurisdictions.⁴⁰¹ The Law of Jurisdictional Demarcation will determine the mechanisms of coordination and cooperation with the indigenous jurisdiction with the ordinary jurisdiction and other constitutionally recognized jurisdictions. Said Law was adopted in 2010.
251. For its part, the Statute of Autonomy of the Caribbean Coast of Nicaragua establishes that, in the Autonomous Regions, the administration of justice will be governed "by special regulations that will reflect the cultural particularities of the Communities of the Caribbean Coast, in accordance with the Political Constitution of Nicaragua" ⁴⁰². The Nicaraguan Penal Code establishes that crimes and misdemeanors committed by members of indigenous peoples and Afro-descendant communities on the Atlantic Coast "within and between communities, whose penalty does not exceed five years imprisonment, shall be judged in accordance with customary law, which in no case may contradict the Political Constitution of Nicaragua. However, the right of the victim to choose the state justice system at the very beginning of the prosecution and with absolute respect for the prohibition of multiple criminal prosecution is not affected" ⁴⁰³. With respect to emergency protection measures for victims of family or domestic violence, the Penal Code establishes that, in the case of indigenous peoples of the Caribbean Coast,

³⁹⁸ [Decree 1953 of 2014](#), Whereby a special regime is created for the purpose of putting into operation the Indigenous Territories with respect to the administration of the indigenous peoples' own systems until Congress issues the law referred to in Article 329 of the Political Constitution, art.95.

³⁹⁹ Political Constitution of Ecuador (2008), art. 171.

⁴⁰⁰ [Political Constitution of the Plurinational State of Bolivia \(2009\)](#), art. 190.

⁴⁰¹ [Political Constitution of the Plurinational State of Bolivia \(2009\)](#), art. 192.

⁴⁰² Law No. 28, Statute of Autonomy of the Regions of the Caribbean Coast of Nicaragua, with its incorporated reforms, La Gaceta No. 155, August 18, 2016, art. 18.

⁴⁰³ Law No. 641, Penal Code of Nicaragua, art. 20.

"the measures shall be applied by the communal authority in accordance with customary law and the laws in force" ⁴⁰⁴.

252. The IACHR also received information on various initiatives and programs to promote dialogue and rapprochement between the indigenous justice system and the national justice system in the absence of legislation for coordination between the indigenous jurisdiction system and the ordinary national justice system. With respect to Colombia, information was provided on the program "Support for Coordination between the National Judicial System and the Special Indigenous Jurisdiction" with the participation of the National Indigenous Organization of Colombia and the National Judicial Council of the Judiciary, which has generated a space for the exchange of judicial pronouncements by indigenous authorities and constitutional court decisions on the right of indigenous peoples to special jurisdiction, autonomy and ^{self-government}⁴⁰⁵.
253. In Peru, the Intercultural Justice Commission of the Peruvian Judicial Branch was formed in 2011 and is composed of Supreme Court judges and Superior Judges from areas of the country where indigenous justice is practiced, in order to promote an intercultural approach in the administration of justice and provide guiding criteria for the actions of the judiciary with respect to cases involving members of indigenous peoples. Its main lines of action include: promoting communication and collaboration between the indigenous and national justice systems to avoid confrontation between them; intercultural training on justice systems; and roundtables for dialogue and exchanges between justice operators at the national and regional ^{levels}⁴⁰⁶.
254. The Intercultural Justice Commission of the Peruvian Supreme Court also promoted a bill on intercultural coordination of justice that has not been successful in Congress, so it has published a series of protocols and other documents on coordination between justice systems, judicial action in cases involving community members and ronderos, and the participation of translators and interpreters of indigenous languages in judicial proceedings.⁴⁰⁷ The Commission also reported on actions to promote international standards on prior consultation in cases before the judiciary, the translation of sentences into indigenous languages, and certain actions to incorporate a gender and children's approach in cases heard by the judiciary with indigenous peoples. It also reported on actions to promote international standards on prior consultation in cases before the judiciary, the translation of sentences into indigenous languages, and certain actions to incorporate a gender and children's perspective in cases heard by the judiciary involving members of indigenous ^{peoples}⁴⁰⁸.
255. Since 2016, the Indigenous Justice Chamber of the Judiciary of the State of Oaxaca, Mexico has promoted an intercultural approach to justice through collaborations with civil society organizations, indigenous peoples and state institutions

⁴⁰⁴ [Law No. 641, Penal Code of Nicaragua](#), art. 111.

⁴⁰⁵ Information provided by Comisión Nacional de Territorios Indígenas - Colombia, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

⁴⁰⁶ Presentation by the Intercultural Justice Commission of the Peruvian Judicial Branch at a meeting to

exchange experiences with the IACHR and the Indigenous Justice Chamber of the Oaxaca Judicial Branch, Mexico, August 5, 2021.

407 Presentation by the Intercultural Justice Commission of the Peruvian Judicial Branch at a meeting to exchange experiences with the IACHR and the Indigenous Justice Chamber of the Oaxaca Judicial Branch, Mexico, August 5, 2021.

408 Presentation by the Intercultural Justice Commission of the Peruvian Judicial Branch at a meeting to exchange experiences with the IACHR and the Indigenous Justice Chamber of the Oaxaca Judicial Branch, Mexico, August 5, 2021.

such as the National Institute of Indigenous Peoples in areas of dissemination and strengthening of indigenous jurisdiction. This has included the creation of guidelines on legal pluralism for judicial personnel and a protocol for the harmonization of state, indigenous and Afro-descendant jurisdictions⁴⁰⁹. In specific cases, the Indigenous Justice Chamber has lobbied before different federal courts to achieve the validation of the normative systems and resolutions issued by indigenous justice authorities, to report on the appropriateness of the declination of criminal proceedings by a federal court to be heard by the indigenous jurisdiction, and to promote the recognition of the legal personality of indigenous peoples and communities in fiscal matters for purposes of direct administration of economic resources from the federal government.⁴¹⁰ The indigenous justice chamber has also promoted the recognition of the legal personality of indigenous peoples and communities in fiscal matters for purposes of direct administration of economic resources coming from the federal government.⁴¹⁰ The indigenous justice chamber has also promoted the recognition of the legal personality of indigenous peoples and communities in fiscal matters for purposes of direct administration of economic resources coming from the federal government.

B. Practices and experiences of indigenous and tribal peoples in the exercise of self-determination

256. In preparing this report, the IACHR received information on the various initiatives and experiences throughout the Americas with respect to the exercise of self-government, autonomy, self-rule and other expressions or manifestations of self-determination by indigenous and tribal peoples. The following are examples of how these peoples have developed or consolidated their representative institutions, developed statutes or regulatory instruments for self-government and the administration of their lands and natural resources, autonomy processes at the municipal level, justice and jurisdiction systems, their own protection and security systems, consultation protocols, life plans, political participation and protection strategies in the face of the HIV/AIDS pandemic. The following examples are largely based on the information provided, and different sources recommended, through the virtual meetings and the responses to the questionnaires received by the IACHR in the framework of the preparation of the Report.

1. Representative institutions own

257. In the Andean region of Bolivia, an example of the exercise of local self-government and self-determination are the ayllus and communities, as a form of political organization of the Quechua and Aymara peoples. They have an executive body of authorities, with the figure of the Mallku or general secretary who is in charge of managing and protecting

⁴⁰⁹ Presentation of the Sala de Justicia Indígena del Poder Judicial de Oaxaca, Mexico, August 5, 2021.

⁴¹⁰ Presentation of the Sala de Justicia Indígena del Poder Judicial de Oaxaca, Mexico, August 5, 2021.

the land, territory and natural resources of the ayllu or ^{community}⁴¹¹. Other structures of the ayllus and communities include the Amawtic Councils of Justice or indigenous courts of justice, the assemblies that function as legislative bodies, and other internal institutions in charge of education, health and ^{production}⁴¹². Within the framework of the indigenous jurisdiction recognized in the Constitution, the Amawtic Councils of Justice, made up of four to eight indigenous magistrates, apply justice in their ayllu and/or community and maintain relations with the authorities of the ^{ordinary} justice system⁴¹³. These structures operate according to the processes of each ayllu or community and their own traditional norms and ^{cosmovision}⁴¹⁴.

258. In Guatemala, the Xinka people are organized in communities and in their communal territories they develop their own rules for the use and administration of their territories. Each community elects its own communal authorities, represented by Boards of Directors or Boards of Principals, elected from time to time, which in turn are agglutinated in the Xinka Parliament, as a space for representation of all Xinka ^{communities}⁴¹⁵. As the highest representative of the Xinka people, the Xinka Parliament has among its objectives to promote the economic, social and sustainable development of the Xinka communities, to carry out political advocacy processes to promote public policies in favor of the rights of indigenous peoples and the construction of a plurinational and democratic state, and to promote actions to rescue the Xinka identity and ^{culture}⁴¹⁶.
259. In Chocó, Colombia, the Consejo Comunitario de Comunidades Negras de la Cuenca del Río Tolo y Zona Costera Sur (COCOMASUR) is made up of 32 Afro-Colombian communities organized into nine local councils, which in turn are grouped into a Consejo Mayor whose board of directors is delegated by the General Assembly, COCOMASUR's highest authority. COCOMASUR's objective is to "Promote the rescue of cultural identity and the orderly management of the territory, seeking the improvement of the quality of life that includes integral development (social, economic, political, environmental and cultural), to guarantee the permanence of its members and the conservation of traditions, uses and customs in their communities"⁴¹⁷. At the local community level, the board of directors of their respective Local Council is elected as part of the exercise of territorial government of the community.

⁴¹¹ Qhana Pukara Kurmi Organization - Bolivia, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples (2021).

⁴¹² Qhana Pukara Kurmi Organization - Bolivia, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples (2021).

⁴¹³ Qhana Pukara Kurmi Organization - Bolivia, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples (2021).

⁴¹⁴ Qhana Pukara Kurmi Organization - Bolivia, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples (2021).

⁴¹⁵ Xinka People - Guatemala, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021.

⁴¹⁶ Web page of the [Xinka People's Parliament](#) (2021).

⁴¹⁷ Response of EarthRights International, the Kokonuko, Nasa and U'wa Indigenous Peoples and the Community Council of Black Communities of the Tolo River Basin and Southern Coastal Zone (COCOMASUR) to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples April 26, 2021, pp. 2, 48.

COCOMASUR. COCOMASUR has reportedly developed its own community monitoring methodology as a measure to exercise control over the territory and natural resources of the area collectively titled for the communities⁴¹⁸. Likewise, COCOMASUR carries out community mediation actions based on ancestral practices, to resolve situations that could affect the community fabric, either between families belonging to COCOMASUR or between neighbors and third party occupants in good faith⁴¹⁹.

260. With respect to fishing communities in Brazil, there have been reports of their own forms of organization in the absence of official recognition of their cultural identity, fishing territories and natural resources. In Cabo de Santo Agostinho, Pernambuco, they have organized themselves through entities such as the Z-08 Colony and the Association of Artisanal Fishermen and Fishermen of Santo Agostinho to articulate the promotion and defense of the rights of artisanal fishermen and their traditional ways of life before State institutions, as well as to form alliances with other fishermen's associations at the national level⁴²⁰. In these different spaces of representation, they have also promoted the participation of fisherwomen, including in elections for positions and raising awareness of the particular situation of discrimination they face⁴²¹.

2. Bylaws y other instruments regulatory instruments of self-government and territorial management

a. Mayangna Nation - Nicaragua

261. The Mayangna indigenous people on the Caribbean Coast of Nicaragua have taken steps to affirm and consolidate their own structure of representation and governance, which includes three levels: Ma Pa ki - community, Asangni - territorial governments and

⁴¹⁸ Response of EarthRights International, the Kokonuko, Nasa and U'wa Indigenous Peoples and the Community Council of Black Communities of the Tolo River Basin and Southern Coastal Zone (COCOMASUR) to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples April 26, 2021, pp. 48; Córdoba, E., Guisao, E., *et al.* Systematization of the Experience of Natural Resource Monitoring in COCOMASUR. Ministry of Environment and Sustainable Development. UN-REDD Colombia Program. Bogotá, 2018.

⁴¹⁹ Response of EarthRights International, the Kokonuko, Nasa and U'wa Indigenous Peoples and the Community Council of Black Communities of the Tolo River Basin and Southern Coastal Zone (COCOMASUR) to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples April 26, 2021, pp. 49-50.

⁴²⁰ Colonia Z-08, Consejo Pastoral de Pescadores and Foro Suape Espacio Socioambiental, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, 2021.

⁴²¹ Colonia Z-08, Consejo Pastoral de Pescadores and Foro Suape Espacio Socioambiental, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, 2021.

- Sulani - Nation ⁴²². As reported to the Commission, this structure represents a governance model of the Mayagna people "based on the construction of their philosophy, principles, values, customs and aspirations, in the short, medium and long term" and which affirms their "autonomy with legislative, regulatory and executive capacities, allowing the continuity of territorial self-construction under their own models of community ^{life}⁴²³ .
262. Some Mayangna communities and territories have developed their own regulations and norms for the administration, management and governance of natural resources and communal property as a measure to reverse and mitigate activities that pose a threat to communal land tenure and traditional ^{livelihoods}⁴²⁴. This includes a "Regulation of governance of communal property" of the Awas Tingni community territory and the "Procedural norm of governance of communal property of the Sauni Arungka territory", both instruments have as one of their main objectives to carry out the stage of regulation or relocation of third parties in titled indigenous territories established by Law ⁴⁴⁵⁴²⁵.
263. Likewise, in the case of the latter, it also aims to strengthen its autonomous government bodies at the territorial communal level, community indigenous justice and its internal and external conflict resolution mechanisms, among ^{others}⁴²⁶. Likewise, in 2016, the Mayangna Indigenous Nation drafted a bill called "Law of the Government of the Mayangna Indigenous Nation of Nicaragua" which it submitted to the National Assembly and whose purpose is to formalize its recognition by the State and the right to funding of the means for its development. This initiative is still pending ^{approval}⁴²⁷.

b. Autonomous Territorial Government of the Wampís Nation - Perú

264. In November 2015, the Wampís Nation in the Amazon region of Peru self-proclaimed itself as a nation and enacted its Statute of the Autonomous Territorial Government of the Wampís Nation. The product of several decades of efforts by the Wampís Nation to consolidate its ancestral territory and autonomy due to the limitations of national legislation that, for example, was limited to titling

⁴²² Awas Tingni Community, Written statement to the Special Rapporteur on Indigenous Peoples of the Inter-American Commission on Human Rights, May 2021. As explained, there are 75 ma pa ki, 9 asangni and one Sulani that make up the Mayagna people, with a population of 40,000 inhabitants located in 8,101 km² in the Caribbean Coast.

⁴²³ Awas Tingni Community, Brief to the Special Rapporteur on Indigenous Peoples of the Inter-American Commission on Human Rights, May 2021.

⁴²⁴ Awas Tingni Community, Brief to the Special Rapporteur on Indigenous Peoples of the Inter-American Commission on Human Rights, May 2021.

⁴²⁵ Awas Tingni Community, Brief to the Special Rapporteur on Indigenous Peoples of the Inter-American Commission on Human Rights, May 2021.

⁴²⁶ Awas Tingni Community, Brief to the Special Rapporteur on Indigenous Peoples of the Inter-American Commission on Human Rights, May 2021.

⁴²⁷ Awas Tingni Community, Brief to the Special Rapporteur on Indigenous Peoples of the Inter-American Commission on Human Rights, May 2021.

individualized under the figure of native communities. Likewise, in response to state policies for the exploitation of natural resources in the Amazon region that also affected the territorial and cultural integrity of the indigenous peoples, among other factors.⁴²⁸ The Statute was formally presented to different authorities and branches of the State at the national and regional levels, together with historical and anthropological supporting documents on the territorial occupation of the indigenous peoples. The Statute was formally presented to different authorities and powers of the State at the national and regional levels, together with historical and anthropological documents on the territorial occupation of the Wampís Nation, documents of international legal support for their right to autonomy and self-determination, as well as maps, minutes of integration of the communities that make up the Wampís Nation, agreements of contiguity with neighboring indigenous peoples, among other documents⁴²⁹.

265. The Wampís Nation took this initiative despite not having a law or prior legal recognition by the Peruvian State in relation to their autonomy status, and therefore, this did not represent a conditioning requirement for exercising their rights. The process was initiated as an act of reconstruction of autonomy, based on an original right. As explained by a representative of the Wampís Nation, "we cannot wait for the State to come and solve our problems, to come and recognize us. For us it is the other way around, we have to solve our own problems, decide our own future, because there are strong, disruptive problems"⁴³⁰. Therefore, through this exercise of autonomy, the State was invited to be an ally and to contribute to the process; to work together with the Wampís Nation to solve problems related, for example, to the illegal logging and mining that affects the Wampís territory⁴³¹. According to what was reported to the IACHR, in general, the relationship with State authorities has been positive, some with whom agreements have been developed and where there has been a de facto recognition of the institutionalism and dialogue of the Autonomous Territorial Government of the Wampís Nation⁴³².
266. The Statute of the Wampís Nation affirms the autonomy, self-government, self-determination and other human rights of the Wampís Nation, addressing identity-related aspects from their worldview and intercultural perspective,

⁴²⁸ For more background information on the formation of the autonomous territorial government of the Wampís Nation, see, Shapiom Noningo & Frederica Barclay, "El camino de la autonomía de la Nación Wampís" in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), pp. 572-589.

⁴²⁹ Shapiom Noningo & Frederica Barclay, "El camino de la autonomía de la Nación Wampís" in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), pp. 579-580.

⁴³⁰ Presentation Wampis Nation, IACHR Meeting with representatives of the autonomous indigenous governments of the Wampis Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

⁴³¹ Presentation Wampis Nation, IACHR Meeting with representatives of the autonomous indigenous governments of the Wampis Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

⁴³² Presentation Wampís Nation, IACHR Meeting with representatives of indigenous autonomous governments of Wampís Nation (Peru) and Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021; Shapiom Noningo & Frederica Barclay, "El camino de la autonomía de la Nación Wampís" in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), pp. 582.

citizenship, language, link with their ancestral territory, religion, education, health, food sovereignty, territorial planning, water and other natural resource management, as well as the rights of the people and communities that make up the Wampís Nation and specific provisions on the rights of women, children and youth⁴³³. The structure, functions and competencies of the different levels of government are established, including: the Uun Irúntramu (Central Government) composed of 102 Irunin (community representatives); the Matsatkamu Irúntramu (Watershed Government) and the Communal Government. They also have a Council of Wise Men and Women who function as advisors⁴³⁴. The Statute also establishes guidelines for the election of representatives of the government structures, as well as some guidelines on consultation and prior and informed consent and the relationship with companies and the State⁴³⁵. It also includes provisions on economy and productive development and budget system⁴³⁶, among other aspects of governance.

c. Kichwa people of Sarayaku - Ecuador

267. The Sarayaku People have waged a long struggle for the defense of their territory, which has included the use of the Inter-American human rights system, culminating in the judgment of the Inter-American Court of Human Rights, *Kichwa People of Sarayaku vs. Ecuador* in 2012⁴³⁷.
268. As part of the continuous efforts in the defense and protection of their territory and self-determination, the General Assembly of the Original Kichwa People of Sarayaku declared their territory, in 2018, as *Kawsak Sacha - Living Forest, living being, conscious and subject of rights*. Its model of political and administrative organization is mixed and integrates 7 Kurakakuna or traditional authorities elected by each community and 7 Likuatikuna or people who serve as messengers and provide security, 11 leaders, women and men who exercise self-government and the administration of justice.⁴³⁸ Its Governing Council is appointed by consensus in the People's Congress and is responsible for organizing a technical support team, a team of Kaskirunakuna or guardians of the jungle, a communication and security team. They also have specific organizations for

⁴³³ See generally, Statute of the Autonomous Territorial Government of the Wampís Nation: In memory of our ancestors and for our right to self-determination as a people and nation, November 29, 2015.

⁴³⁴ Statute of the Autonomous Territorial Government of the Wampís Nation: In memory of our ancestors and for our right to self-determination as a people and nation, November 29, 2015, arts. 47-9.

⁴³⁵ Statute of the Autonomous Territorial Government of the Wampís Nation: In memory of our ancestors and for our right to self-determination as a people and nation, November 29, 2015, arts. 32-37, 75-79.

⁴³⁶ Statute of the Autonomous Territorial Government of the Wampís Nation: In memory of our ancestors and for our right to self-determination as a people and nation, November 29, 2015, arts. 81-93.

⁴³⁷ I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku vs. Ecuador*, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012.

⁴³⁸ Pueblo Originario Kichwa de Sarayaku and ALDEA Foundation, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, Territorios de vida: Informe 2021, Consorcio TICCCA: mundial, p. 89.

women (Asociación Kuriñampí o senda de oro) and youth, Sarayaku Malta Runa Tandanakuy (Unión de las y los jóvenes) ⁴³⁹.

269. These authorities have developed various coexistence regulations such as a Natural Resources Management Plan that includes a zoning system and specific regulations for human settlements, housing, crops, hunting, rest and protected areas in order to promote the sustainable use of natural resources based on traditional knowledge and practices⁴⁴⁰. Its Life Plan aims to reach Sumak Kawsay (life in harmony) and ensure a territory without contamination, with productive and abundant land, as well as food security initiatives, including fish tanks, diversified chakras, experimental breeding of wild species and a producers' cooperative⁴⁴¹. Emphasis is placed on ancestral knowledge and sustainable use of the territory for housing, food, medicine and handicrafts.
270. The Commission also notes that sources of funding include a community fund, support for projects by allies, and the compensation received from the State as a result of the Inter-American Court's ruling was used to invest in a Community Bank and in the purchase of the Aero Sarayaku airline⁴⁴². Challenges persist in ensuring that planning and development policies and processes at the local level take into account indigenous life plans, as well as the continuation of State policies that promote extractive activities in the Amazon⁴⁴³.

d. life plans

271. As an example of this important practice in the region, representatives of Amazonian communities in Peru reported on the development of Life Plans as a measure to define, from their own worldview and interests, concrete actions to strengthen their peoples in cultural, social, political, economic and cultural aspects in order to achieve a full life. According to what was reported, the aim is to articulate these life plans to the development plans of the

⁴³⁹ Pueblo Originario Kichwa de Sarayaku and ALDEA Foundation, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, *Territorios de vida: Informe 2021*, Consorcio TICCCA: mundial, p. 89.

⁴⁴⁰ Pueblo Originario Kichwa de Sarayaku and Fundación ALDEA, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, *Territorios de vida: Informe 2021*, Consorcio TICCCA: mundial, pp. 89-90.

⁴⁴¹ Pueblo Originario Kichwa de Sarayaku and ALDEA Foundation, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, *Territorios de vida: Informe 2021*, Consorcio TICCCA: mundial, p. 92.

⁴⁴² Pueblo Originario Kichwa de Sarayaku and ALDEA Foundation, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, *Territorios de vida: Informe 2021*, Consorcio TICCCA: mundial, p. 93.

⁴⁴³ Pueblo Originario Kichwa de Sarayaku and Fundación ALDEA, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, *Territorios de vida: Informe 2021*, Consorcio TICCCA: mundial, pp. 93-5.

municipalities and regional governments to be incorporated into regional policies and corresponding budgets⁴⁴⁴.

272. In the Life Plan of the Boca Pariamanu Native Community, Madre de Dios, the concept of a Life Plan is understood as: a community work plan; a tool for the defense of indigenous rights; a development planning from an indigenous vision; a road map for dialogue and agreement with the State; and a reference for the State's action towards the indigenous peoples.⁴⁴⁵ Its purpose is "to guide the destiny of our community in an orderly and planned manner, promoting the improvement of the standard of living and quality of life of our families, allowing us to enjoy a healthy and safe environment, where we can work and live in an orderly and planned manner, promoting the improvement of the standard of living and quality of life of our families. Its purpose is "to guide the destinies of our community in an orderly and planned manner, promoting the improvement of the standard of living and quality of life of our families, allowing us to enjoy a healthy and safe environment, where we can work and live in harmony with the environment, and generating wealth through the sustainable use of our natural resources"⁴⁴⁶.
273. According to the same Plan, the community has updated its life plans so that it can adapt to new changes that have occurred since the first plan, evaluate the achievements and analyze the issues to be resolved, which have included, among other issues, territorial sanitation, strengthening the management and conservation of natural resources, productive projects, food security, education and other sustainable economic activities⁴⁴⁷.

3. Conformation of territorial, municipal and other political-administrative entities based on indigenous autonomy

a. Land claims settlement, aboriginal self-government and other claims processes in Canada

274. As mentioned above, a process of negotiating agreements and treaties, including land claims agreements and indigenous self-government agreements, has been undertaken in Canada as a measure to address the historical grievances of indigenous peoples with respect to their rights. As an effort to effect reconciliation processes through specific arrangements for

⁴⁴⁴ Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD) and Earth Rights International, Joint Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, April 26, 2020, pp. 28-29.

⁴⁴⁵ FENAMAD, COINBAMAD, AFIMAD, Plan de Vida de la Comunidad Nativa Boca Pariamanu, Period 2014-2018, p. 5.

⁴⁴⁶ FENAMAD, COINBAMAD, AFIMAD, Plan de Vida de la Comunidad Nativa Boca Pariamanu, Period 2014-2018, p. 5.

⁴⁴⁷ FENAMAD, COINBAMAD, AFIMAD, Plan de Vida de la Comunidad Nativa Boca Pariamanu, Period 2014-2018,

reconciliation of national and indigenous peoples' interests, such agreement processes constitute an important practice in this regard⁴⁴⁸.

275. In addition to these settlement or treaty processes, there is the Specific Claims Tribunal mechanism for the resolution of claims for monetary damages brought by an indigenous people against the government relating to the administration of lands or other property, and to the enforcement of treaties that have not been addressed or resolved in a negotiated settlement process.⁴⁴⁹ In addition, there is the Treaty Land Entitlement Mechanism for settling claims for lands that First Nations did not receive under historic treaties, which has helped to resolve the debt for lands that First Nations did not receive under historic treaties. In addition, the Treaty Land Entitlement Mechanism exists to settle land debt that First Nations did not receive under historic treaties, which has helped many indigenous peoples to expand their land base⁴⁵⁰.
276. To date, there are about 26 comprehensive claims agreements, 18 of which include self-government provisions or have self-government agreements attached to them. There are also four separate self-government agreements⁴⁵¹. The land claim agreements cover at least 40 percent of Canadian territory and affect more than 95 indigenous communities⁴⁵². The Inuit people have signed land claim agreements as part of self-government negotiations covering the main regions they inhabit⁴⁵³. Among these agreements, the 1993 Nunavut Claims Agreement between the Tungavik Inuit Federation of Nunavut and the territorial government of the Northwest Territories resulted in the creation of a new official territory in Canada called Nunavut ("our land")⁴⁵⁴. Through these agreements, the Inuit were granted title to over 350,000 km² of land, equivalent to 18% of Nunavut, subsurface mineral rights to approximately 36,000 km² of that land, over \$1 billion Canadian in federal compensation, as well as rights to a share of royalties from oil and gas extraction on public lands, rights to a portion of the royalties from the extraction of oil and gas on public lands, and rights to a portion of the royalties from the extraction of oil and gas on public lands.

⁴⁴⁸ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples of Canada, A/HRC/27/52/Add.2 (July 4, 2014), para. 58.

⁴⁴⁹ Website - Specific Claims Tribunal Canada.

⁴⁵⁰ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples of Canada, A/HRC/27/52/Add.2 (July 4, 2014), para. 58.

⁴⁵¹ OECD (2020), Linking Indigenous Communities with Regional Development in Canada, OECD Rural Policy Reviews, OECD Publishing, Paris, Ch. 1. "Overview of Indigenous governance in Canada: Evolving relations and key issues and debates".

⁴⁵² Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples of Canada, A/HRC/27/52/Add.2 (July 4, 2014), para. 58.

⁴⁵³ First Peoples Worldwide - University of Colorado Boulder, Canadian Indigenous Peoples - Legal Framework and Significant Issues, Summary of Responses to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021).

⁴⁵⁴ Roberta Rice, "Innovation in indigenous governance in Canada and Latin America: emerging practices and real challenges" in Miguel González, et al, Autonomías y autogobierno en la América diversa, Quito: Editorial Universitaria Abya-Yala (2021), p. 669.

- and fishing and the right to participate in decisions on land and resource management⁴⁵⁵.
277. The government established is a public government that serves both indigenous and non-indigenous residents of the territory⁴⁵⁶. As part of its governance structure, joint management commissions were created to deal with land, wildlife and environmental issues to ensure indigenous participation in decisions affecting their culture and livelihoods, and also created specific departments on culture, heritage, environment, economic development and transportation⁴⁵⁷. An agreement is currently being implemented for the devolution of public lands and natural resources from the Crown to the Government of Nunavut, which would allow Nunavut residents to make decisions about the use and development of the lands and natural resources.⁴⁵⁸ The Nunavut government is currently implementing a devolution agreement.
278. Another important agreement is the Nunatsiavut Inuit Land Claims Agreement of Labrador (2005), which was the first to include provisions for indigenous self-government. Although still part of the province of Newfoundland and Labrador, the Nunatsiavut government is a regional Inuit government that has authority over core areas of government, such as health, education, culture, language, justice and community affairs. It has the power to make laws on these matters in accordance with the Labrador Inuit Constitution⁴⁵⁹. At the regional level, the Nunatsiavut government has seven departments in areas including health and social development, land and natural resources, education, culture, recreation and tourism, finance and human resources. The Nunatsiavut Assembly, whose members are democratically elected, makes laws and gives policy direction to the government⁴⁶⁰.
279. The Commission notes that, despite the positive aspects of negotiation processes when they result in agreements, many Canadian indigenous peoples are still engaged in extensive negotiations that have taken many years or even decades. Among the difficulties encountered in certain cases is the government's refusal to recognize aboriginal land rights and instead of land restitution, monetary compensation is chosen. Another critical issue is the power to decide on the exploitation of natural resources, even on lands that are the subject of unresolved negotiations. The points of

⁴⁵⁵ Roberta Rice, "Innovation in indigenous governance in Canada and Latin America: emerging practices and real challenges" in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), p. 669; Nunavut Tungavik, *The Nunavut Agreement* (1993).

⁴⁵⁶ OECD (2020), *Linking Indigenous Communities with Regional Development in Canada*, OECD Rural Policy Reviews, OECD Publishing, Paris, Ch. 1. "Overview of Indigenous governance in Canada: Evolving relations and key issues and debates".

⁴⁵⁷ Roberta Rice, "Innovation in indigenous governance in Canada and Latin America: emerging practices and real challenges" in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), pp. 670-1.

⁴⁵⁸ Government of Nunavut, Department of Executive and Intergovernmental Affairs. *Devolution*.

⁴⁵⁹ *Nunatsiavut Government website*.

⁴⁶⁰ For more information on the structure of the Nunatsiavut government, see, *Nunatsiavut Government website*.

disagreement may end up being litigated in judicial processes that last for years with great economic costs for indigenous peoples, which may also result in a deterioration of relations between the parties⁴⁶¹.

b. Autonomy processes at the municipal level at Mexico

280. In the state of Michoacán, Mexico, the indigenous Purhépecha community of San Francisco Cherán, in the municipality of the same name where other Purhépecha communities are also located, achieved recognition of the right to carry out their electoral election processes according to their own uses and customs and without the participation of political parties⁴⁶². This was a product of the movement undertaken by the community to reaffirm their own forms of government, normative systems and control over the natural resources on their lands, after the situation of violence and murders against members of the community by organized crime and illegal logging of their forests. In 2011, faced with the inaction of municipal, state and federal authorities to address the situation, the community decided to forcibly expel the loggers, members of organized crime and municipal authorities⁴⁶³. They undertook legal action, which resulted in a ruling by the federal electoral court in 2011 that paved the way for Cherán to hold elections according to its uses and customs and integrate a municipal government of its own. In addition, in 2014 the Supreme Court of the Nation recognized Cherán's character as an indigenous municipality⁴⁶⁴. The Purhépecha of Cherán decided to outlaw political parties from their political organization and consolidate their own structures of representation and government, which include the ancestral systems of neighborhoods, community meetings or bonfires, the community assembly, Consejo Mayor which is the highest governing administrative body, and several other Councils in charge of issues such as: communal property; procurement, oversight and mediation of justice; social, economic and cultural programs, issues related to women and youth, among others. They have also strengthened their regulatory system, developed their own municipal development plans and undertaken several communal enterprises⁴⁶⁵.

⁴⁶¹ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples of Canada, A/HRC/27/52/Add.2 (July 4, 2014), paras. 61-67, .

⁴⁶² Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 27.

⁴⁶³ Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 27.

⁴⁶⁴ See in this regard, Naayeli E. Ramírez Espinosa and Daniel Cerqueira, Experiencia y regulación de la libre determinación de los pueblos indígenas en México, Fundación para el Debido Proceso, Fundar, Oxfam Mexico, Oaxaca: Mexico, p. 53.

⁴⁶⁵ For more information on these different initiatives in San Francisco de Cherán, see Naayeli E. Ramírez Espinosa and Daniel Cerqueira, Experiencia y regulación de la libre determinación de los pueblos indígenas en México, Fundación para el Debido Proceso, Fundar, Oxfam México, Oaxaca: México, pp. 52-56.

281. In 2014, the municipality of Ayutla de los Libres in Guerrero, which is home to more than 100 communities of the indigenous peoples Nuu savi, Me'phaa and Nahuas, requested the Electoral and Participation Institute of the State of Guerrero that the 2015 municipal elections be held in accordance with their uses and customs. As in Cherán, this effort also took place in a context of increasing insecurity, violence, corruption and interference of national political parties and organized crime in municipal governments. After a favorable resolution from the Federal Electoral Tribunal ordering the necessary consultations to determine the will of the population to carry out the elections in accordance with their normative systems, they carried out the election of representatives and installed for the first time in Guerrero a municipal government through uses and customs in ²⁰¹⁸⁴⁶⁶. The municipal government is vested in a community municipal council, an assembly of representatives as the maximum authority in the municipality, community assemblies of each community that makes up the municipality and an elective assembly, which is the authority in the ^{appointment} processes⁴⁶⁷.
282. The IACHR also received information on negotiation processes with municipal governments and resolutions of electoral courts and the State Electoral Institute that resulted in the recognition of the right of Purhépecha communities in Michoacán to be directly allocated their share of the municipal budget. In this way the communities can decide on the use of their resources according to their priorities.⁴⁶⁸ However, it is noted that these communities face several obstacles to achieve full recognition of their authorities, among which are criminalization and harassment, internal divisions, as well as the reluctance of the municipalities to grant the resources that correspond to the communities. According to a representative of the community of Arantepacua, Michoacán, which achieved recognition of this right through the courts, the difficulty in accessing budgetary resources is due to the resistance of the municipal authorities in a community that elects its own authorities and is governed by its own customs and traditions, particularly due to the interference of political parties. Although they currently receive economic resources directly, one challenge has to do with the requirements established for the justification of expenses to cover different needs and particular priorities of the community, such as the health care of the population.⁴⁶⁹ Notwithstanding the above challenges, as indicated to the IACHR, the

⁴⁶⁶ Naayeli E. Ramírez Espinosa and Daniel Cerqueira, *Experiencia y regulación de la libre determinación de los pueblos indígenas en México*, Fundación para el Debido Proceso, Fundar, Oxfam Mexico, Oaxaca: Mexico, pp. 59-60.

⁴⁶⁷ For more information see, Naayeli E. Ramírez Espinosa and Daniel Cerqueira, *Experiencia y regulación de la libre determinación de los pueblos indígenas en México*, Fundación para el Debido Proceso, Fundar, Oxfam Mexico, Oaxaca: Mexico, pp. 59-60.

⁴⁶⁸ Naayeli E. Ramírez Espinosa and Daniel Cerqueira, *Experiencia y regulación de la libre determinación de los pueblos indígenas en México*, Fundación para el Debido Proceso, Fundar, Oxfam Mexico, Oaxaca: Mexico, pp. 57-58.

⁴⁶⁹ Presentation by representative of the indigenous community of Arantepacua, Michoacán during IACHR meeting with organizations, authorities and members of indigenous government institutions in Mexico for the report on the right to self-determination, May 7, 2021.

community has managed to open a door on its path to self-determination, and to show the need for greater unity and harmony internally⁴⁷⁰.

4. Territories indigenous territories as entities administrative entities in the Colombian Amazon

283. Indigenous representatives of the Colombian Amazon informed the IACHR about initiatives developed for the realization of self-determination at the local level. Through the Amazon Regional Roundtable, an instance of consultation between the indigenous peoples of the six Amazon departments and the National Government, Decree Law 632 on the establishment of indigenous territories in non-municipalized areas of the departments of Amazonas, Guainía and Vaupés was constructed and agreed upon, which formalizes the recognition of their Indigenous Councils as self-government figures and puts into operation the indigenous territorial entities recognized in the Colombian Constitution⁴⁷¹. Decree Law 632 recognizes the indigenous territories in these non-municipalized areas as special political-administrative organizations for the exercise of public functions through their own authorities. It establishes as a principle the functioning of the indigenous territories primarily by their uses, customs, traditions and their own systems of regulation⁴⁷².
284. Self-determination is another principle of the decree, whereby the indigenous territories have the right "to maintain and strengthen their normative and governmental systems, their legal and social institutions, their productive and economic models, in accordance with the principles of equality and diversity".⁴⁷³ Under this decree, the indigenous territories will be governed through the Indigenous Councils, formed and regulated according to their uses and customs.⁴⁷⁴ The decree also contains provisions on the requirements for the operation and delimitation of the indigenous territories, and on the sources of financing available for the indigenous territories subject to the decree law, and their delimitation. It also contains provisions on the requirements for the implementation and delimitation of the indigenous territories, and on the sources of financing available for the indigenous territories covered by the decree law, and their

⁴⁷⁰ Presentation by representative of the indigenous community of Arantepacua, Michoacán during IACHR meeting with organizations, authorities and members of indigenous government institutions in Mexico for the report on the right to self-determination, May 7, 2021.

⁴⁷¹ National Organization of Indigenous Peoples of the Colombian Amazon and Gaia Amazonas, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

⁴⁷² Decree Law No. 632, Whereby the fiscal and other regulations necessary to put into operation the indigenous territories located in non-municipalized areas of the departments of Amazonas, Guainía and Vaupés are issued (April 10, 2018), arts. 3, 4.

⁴⁷³ Decree Law No. 632, Whereby the fiscal and other regulations necessary to put into operation the indigenous territories located in non-municipalized areas of the departments of Amazonas, Guainía and Vaupés are issued (April 10, 2018), art. 4.

⁴⁷⁴ Decree Law No. 632, Whereby the fiscal and other regulations necessary to put into operation the

indigenous territories located in non-municipalized areas of the departments of Amazonas, Guainía and Vaupés are issued (April 10, 2018), art. 6.

- capacity to administer and execute the resources allocated to the indigenous reserves⁴⁷⁵.
285. The implementation of Decree 632 presents an important opportunity to exercise self-determination functions for peoples in non-municipalized areas in the Colombian Amazon. In this context, Amazonian indigenous peoples reported on initiatives such as the creation of a political training school for youth and adults to enable them to exercise leadership positions in their territories⁴⁷⁶, as well as an indigenous environmental leadership training program, with a focus on intergenerational transmission of their own knowledge, as a leadership training measure with respect to the implementation of indigenous territorial entities⁴⁷⁷. They also reported on initiatives for their own intercultural education and health systems.
286. The Commission warns that despite the progress made, there are still practical challenges for access to resources, such as the intermediation of the departments and municipalities in the execution of funds that should be allocated to indigenous territories, which makes it difficult to ensure sufficient investment for the priorities defined by the indigenous peoples.⁴⁷⁸ Other structural problems have to do with the existence of norms that seek to impose municipalities on the indigenous territories and reverse previous advances in the recognition and consolidation of indigenous territories. Other structural problems have to do with the existence of norms that seek to impose the figure of municipalities on indigenous territories and reverse previous advances in the recognition and consolidation of indigenous territories. Other important challenges include the promotion of national models for the development of subsoil resources; the practices of state institutions that arrogate to themselves the power to decide who are or are not indigenous peoples, which affects respect for their self-government structure and their right to receive resources; as well as the presence of armed actors in their territories, among others⁴⁷⁹.

5. Justice systems and jurisdiction

287. In the United States, from the late nineteenth to the mid-twentieth centuries, the federal government imposed on Indian reservations the adoption of Western institutions and government structures, including courts and tribunals, in order to assimilate indigenous peoples. However, several indigenous peoples, including

⁴⁷⁵ Decree Law No. 632, Whereby the fiscal and other regulations necessary to put into operation the indigenous territories located in non-municipalized areas of the departments of Amazonas, Guainía and Vaupés are issued (April 10, 2018), arts. 9-18; 19, 24.

⁴⁷⁶ See the [web page of the Political Training School](#) - National Organization of Indigenous Peoples of the Colombian Amazon.

⁴⁷⁷ National Organization of Indigenous Peoples of the Colombian Amazon and Gaia Amazonas, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

⁴⁷⁸ National Organization of Indigenous Peoples of the Colombian Amazon and Gaia Amazonas, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

⁴⁷⁹ National Organization of Indigenous Peoples of the Colombian Amazon and Gaia Amazonas, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

They, the Navajo Nation, used these same structures to incorporate elements of their own traditional law based on restoring harmony between the parties and responsibilities derived from their traditional histories and their kinship or family clan systems that also play a role in seeking redress and conflict resolution.

288. The Navajo judicial system includes the use of *peacemakers*, as well as a system of courts and even a Supreme Court, which interpret a series of civil and criminal codes and other norms developed domestically over the decades that initially copied the Western legal system. However, the Navajo Supreme Court and domestic courts have emphasized that the interpretation of these normative sources must be based on Navajo *common law* derived from the various elements of traditional law referred to above, as a means of asserting autonomy and self-determination, despite various challenges such as scarce financial resources and hostile political attitudes from ^{outside}⁴⁸⁰.
289. In Venezuela, initiatives of indigenous justice and jurisdiction stand out despite the lack of official recognition and legislation provided for in the Constitution on the coordination of the special indigenous jurisdiction with the national judicial system⁴⁸¹. Among various initiatives, the Commission received information on the efforts of the Huöttöja people of Cataniapo to exercise their own law and issue rulings in specific cases as a measure of territorial defense against the unconsulted imposition of land-use planning programs or policies, the presence of irregular armed groups and illegal mining. Likewise, to urge national authorities to respect their cultural norms, for example, to propose alternatives to carrying out autopsies of their ^{members}⁴⁸². The use of these jurisdictional powers has also served to complement other strategies for the defense and management of their territory, such as the self-demarcation of their territory, in order to assert their rights of jurisdiction and administration before national authorities and other third parties. This in the face of the gaps that exist due to the pending demarcation of territories mandated by the Constitution and the strong external interests over the lands, territories and natural resources of the indigenous ^{peoples}⁴⁸³.

⁴⁸⁰ For more information on the historical, political and legal context in which Navajo courts developed and currently operate and their use of self-rule, see, Raymond D. Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, Minneapolis: University of Arizona Press.

⁴⁸¹ Working Group on Indigenous Affairs (WGIA) - Venezuela, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, April 2021.

⁴⁸² Vladimir Aguilar Castro, Guillermo Marciales Rodríguez, Vercilio Mejías, Coords. *La Jurisdicción Especial Indígena en Venezuela como derecho propio*, Mérida: Universidad de los Andes, Ediciones Dabánatà, pp. 70-80.

⁴⁸³ For more information on other experiences of special indigenous jurisdiction, its advances and challenges, see, Vladimir Aguilar Castro, Guillermo Marciales Rodríguez, Vercilio Mejías, Coords. *La Jurisdicción Especial Indígena en Venezuela como derecho propio*, Mérida: Universidad de los Andes, Ediciones Dabánatà.

6. Proprietary protection systems and security

290. The Commission has received information on self-protection and security mechanisms adopted by indigenous and Afro-descendant tribal peoples as an important element for the exercise of autonomy and self-determination and the protection of their territories.

a. The Indigenous Guard and the Maroon Guard at Colombia

291. In Colombia, the use of the Indigenous Guards, by indigenous peoples, and the Cimarrona Guard, by Afro-descendant peoples, constitute important references of structures of self-protection mechanisms. Both Guards are based on previous ancestral structures of both peoples and their respective historical processes. They are integrated by men and women, and girls and boys in the case of the Indigenous Guards in Cauca⁴⁸⁴. The figure of the Indigenous Guard is constitutionally recognized as an integral part of the special indigenous jurisdiction, however, the Cimarrona Guard has not yet received such recognition. As a joint document from the Palenke Alto Cauca, in relation to its Maroon Guard, and the Cañamomo Lomapieta Indigenous Resguardo, in relation to its Indigenous Guard, explains: "The Guards at both sites are in fact voluntary custodians, guardians and defenders of the ancestral territories, who monitor the ancestral territories on behalf of their traditional authorities, ensuring that ancestral law is implemented, and alerting the traditional authorities of foreign incursions - all without resorting to violence and without carrying weapons."⁴⁸⁵

292. The Indigenous and Cimarrona Guards have developed different strategies for the protection of their respective territories. Actions carried out by the Indigenous Guard in Cauca include humanitarian work such as searches for missing, kidnapped or detained persons, transfers of the wounded and first aid and security and protection of mobilizations, marches or assemblies carried out by their peoples⁴⁸⁶. The Guardia Cimarrona is also an important actor in the administration of justice and the peaceful resolution of conflicts in the territories of Afro-Colombian communities and the protection of their natural resources⁴⁸⁷. The Guardia Cimarrona of the Palenke Alto Cauca and the Indigenous Guard of the Resguardo

⁴⁸⁴ For more information see, CRIC-Colombia (Web Page), [Componente Guardia Indígena](#), and Ekobio Neil Alfonso Quejada Mena, "[La Guardia Cimarrona, experiencia que inspira a los Consejos Comunitarios de Urabá](#)", C.N.O.A. Web Page.

⁴⁸⁵ See, Vivinane Weitzner, "'Guardia, Guardia': autonomías y defensa territorial en el contexto de pos-Acuerdo colombiano, in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), pp. 608-09, citing Palenke Alto Cauca, Resguardo Indígena Cañamomo Lomapieta, Forest peoples programme (PAC, RICL, FPP). (2018). Project: *Caring for and Defending Our Territories, Our Peoples and Our Leaders*. Internal Document.
CRIC-Colombia (Web Page), [Indigenous Guard Component](#).

⁴⁸⁷ Ekobio Neil Alfonso Quejada Mena, "[La Guardia Cimarrona, experiencia que inspira a los Consejos Comunitarios de Urabá](#)", C.N.O.A. website.

Indigenous Cañamomo Lomaprieta have created strategic alliances to confront mining interests that threaten their territories and natural resources. There are also initiatives to promote the recognition of the Guards as protection mechanisms in ethnic territories in the framework of the implementation of the security issues of the Peace Agreement in different regions of the country⁴⁸⁸.

293. The Commission emphasizes that the Guardia Indígena and the Guardia Cimarrona carry out their work in a difficult context of violence, stigmatization, threats and assassinations faced by their leaders as a result of the continued presence of armed actors and economic interests on their lands and natural resources. Nevertheless, it highlights and values the important initiative that both Guards represent as a necessary component for the design of protection measures for the indigenous and Afro-descendant peoples of Colombia based on a differentiated ethno-cultural approach.

b. Indigenous Community Police of Guerrero, Mexico

294. The Community Police of the Regional Coordinator of Community Authorities (CRAC-PC) was founded in 1995 and is currently an institution of the Me'Phaa, Naua, Nuu Savi, Nn'anncue Ñomndaa and Afromexican peoples of the State of Guerrero whose objective is to provide security and justice based on their own normative systems and to promote development from a community perspective⁴⁸⁹. The Community Police was born as an initiative of the indigenous peoples of Guerrero to solve the insecurity crisis that has been experienced in the region; as well as a response to the inefficiency and corruption of local authorities. It provides justice from a restorative and traditional community perspective focused on re-education, community work and the reintegration of offenders into their communities. It has also functioned as a mechanism for surveillance and defense of the territory against extractive activities developed in their territories⁴⁹⁰. The CRAC-PC has allowed the indigenous communities of the mountain coast region of Guerrero to maintain control and security of their territory and to stop the entry of organized crime⁴⁹¹.

⁴⁸⁸ Viviane Weitzner, "'Guardia, Guardia': autonomías y defensa territorial en el contexto de pos-Acuerdo colombiano, in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Quito: Editorial Universitaria Abya-Yala (2021), pp. 608-17.

⁴⁸⁹ Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 22.

⁴⁹⁰ Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 22.

⁴⁹¹ For more information on this, see, Sandra Ley, Shannan Mattiace & Guillermo Trejo (2019). *"Indigenous Resistance to Criminal Governance: Why Regional Ethnic Autonomy Institutions Protect Communities from Narco Rule in Mexico."* Latin American Research Review, 54(1), 181-200.

295. The IACHR was informed that, over the years, the CRAC-PC has faced questioning and resistance from Guerrero state institutions, including the criminalization of community police members based on accusations of crimes such as kidnapping and illegal deprivation of liberty or through the release of persons serving community sentences handed down by the CRAC-PC.⁴⁹² In recent years, the state of Guerrero unconstitutionally approved a series of legal reforms that abolished the previous legal and constitutional recognition previously enjoyed by the community police. In recent years, the state of Guerrero unconsultedly approved a series of legal reforms that eliminated the previous legal and constitutional recognition previously enjoyed by the community police.
296. In response to these setbacks, indigenous and civil society organizations have promoted proposals for constitutional reform in Guerrero for the recognition of indigenous and Afro-Mexican peoples as subjects of public law, the recognition of their community security and justice systems, as well as intercultural health and education, among other issues⁴⁹³. Another proposed issue is the right of the CRAC to be integrated into the state budget, since for more than 26 years this indigenous institution has been sustained through the voluntary cooperation of the indigenous peoples of the region to cover food, uniforms, fuel and other provisions to be able to carry out their security tours. As one CRAC representative pointed out, access to the budget is a matter of dignity, "it is our own security that we are taking care of, our territory. That's why we don't have crime and we have security".
- ⁴⁹⁴. However, there has still been no response to these initiatives of the indigenous peoples, which is why they face a lack of recognition by the State⁴⁹⁵.

7. Protocols stand-alone from consultation y other consultation and consent instruments

297. Indigenous and tribal peoples have employed their own mechanisms for the implementation of consultation and consent, mainly through consultation protocols, or autonomous community consultation protocols. The IACHR received information on various initiatives by indigenous and tribal peoples in this regard. One of the countries where this practice has been developed is Brazil, where, according to what was reported, since 2014, the construction of various consultation and consent protocols in documentary, written form has been recorded,

⁴⁹² Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 23.

⁴⁹³ Alianza por la Libre Determinación y la Autonomía (ALDEA) for the Thematic Report prepared by the Rapporteurship on Indigenous Peoples of the Inter-American Commission on Human Rights on this matter (May 2021), p. 24.

⁴⁹⁴ Presentation by representative of CRAC-PC Guerrero Mexico, Meeting of the IACHR with indigenous organizations, authorities and members of government institutions in Mexico for the Report on the right to self-determination, May 7, 2021.

⁴⁹⁵ For more information on the CRAC-PC see, Naayeli E. Ramírez Espinosa and Daniel Cerqueira, [Experiencia y regulación de la libre determinación de los pueblos indígenas en México](#), Fundación para el Debido Proceso, Fundar, Oxfam Mexico, Oaxaca: Mexico, pp. 61-63.

The indigenous peoples, quilombolas and traditional communities have elaborated their protocols to externalize to the State the respective rules, norms and procedures for carrying out consultations, as well as the forms of organization and decision making of each people⁴⁹⁶. These peoples have elaborated their protocols to externalize to the State, the respective rules, norms and procedures for the realization of consultations, as well as the forms of organization and decision making of each people⁴⁹⁶.

298. The Commission notes with satisfaction that, as of the publication of this report, approximately 13 protocols have been published or are under construction in the country for quilombola communities, 25 for indigenous peoples, 1 joint protocol between indigenous and quilombola peoples who share the same territory, and approximately 14 protocols for traditional communities. With respect to the protocols of traditional communities, a diversity of collective identities are contemplated, such as extractive communities, fishermen, river dwellers, flower pickers and the Roma Calon people. In addition, several biocultural protocols have been developed on traditional knowledge and biodiversity⁴⁹⁷.
299. In the framework of regional meetings and responses to the questionnaire for this report, the IACHR received information on protocols published by other indigenous peoples or that are in the process of being drafted in other countries. For example: the Protocol for Free, Prior and Informed Consultation with the vision of the Uwottuja People of Venezuela⁴⁹⁸, the protocol for free, prior and informed consent of the Nahua people of Honduras⁴⁹⁹, as well as other initiatives of the Lenca and Chortí peoples of Honduras for the development of consultation protocols related to forest governance⁵⁰⁰, and initiatives in Suriname for the development of consultation protocols⁵⁰¹, among other examples. Likewise, Maya representatives from Belize reported on a consultation protocol developed jointly with the Belizean government regarding activities that impact their territorial rights⁵⁰².
300. The above demonstrates the growing interest of indigenous and tribal peoples in taking this type of initiative to implement consultation and consent particularly in the face of what they consider to be state practices, laws and policies that

⁴⁹⁶ Intervention of the Observatory of Community Protocols on Consultation and Free, Prior and Informed Consent at the Regional Meeting on the Right to Self-Determination (South America), May 11, 2021.

⁴⁹⁷ Intervention of the Observatory of Community Protocols on Consultation and Free, Prior and Informed Consent at the Regional Meeting on the Right to Self-Determination (South America), May 11, 2021. For more information on the consultation protocols of indigenous and tribal peoples in Brazil, as well as in other countries, see the website of the [Observatory of Community Protocols for Consultation and Free, Prior and Informed Consent](#).

⁴⁹⁸ Uwottja People. Protocol for Prior, Free and Informed Consultation with the vision of the Uwottja People. A tool for the Protection of Our Ancestral Territory. 2018.

⁴⁹⁹ Nahua Indigenous Federation of Honduras, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, June 2021.

⁵⁰⁰ Lenca Indigenous Movement of Honduras. Brief report submitted to the IACHR in the framework of the report on the self-determination of indigenous and tribal peoples of African descent, May 16, 2016.

⁵⁰¹ Presentation by the Association of Indigenous Community Leaders of Suriname - VIDS, at the Regional Meeting on the Right to Self-Determination (Caribbean), May 27, 2021.

⁵⁰² Presentation by Maya Leaders Alliance - Belize, Regional Meeting on the Right of Self-Determination of Indigenous and Tribal Peoples in the Caribbean, 27 May 2021.

do not effectively guarantee consultation and consent in the context of extractive or other similar projects that would affect their rights. Indigenous and tribal peoples base these protocols on their right to self-determination and on international instruments such as Convention 169 and the UN and OAS Declarations on the rights of indigenous peoples. Some progress has been reported in the recognition of consultation protocols in specific cases, for example, by the Federal Court in Brazil, which recognized the binding nature of the Juruna People's Protocol, suspending the Belo Sun⁵⁰³ mining project. Similarly, the Colombian Constitutional Court ruled that consultations carried out by the State on mining activities that would affect the Cañamomo and Lomapieta Resguardo of the Embera Chamí people must be carried out respecting their traditional protocols and procedures for decision-making⁵⁰⁴.

301. The IACHR considers that the development of autonomous consultation protocols has helped these instruments to move away from being centered on the interpretation and application of the consultation carried out by the States and to become instruments of autonomy and self-determination of indigenous and tribal peoples. Protocol-building processes can help strengthen the institutions and normative instruments of self-governance and decision-making of these peoples, and can help strengthen unity within the peoples and communities, and consolidate their positions regarding the measures necessary to respect their rights⁵⁰⁵.
302. Other practices include the incorporation of international standards on free, prior and informed consent into indigenous peoples' own regulations. In this regard, the initiatives of the Spokane Tribe, United States, to apply the international standard of consultation and free, prior and informed consent as a guiding principle for the codification of policies regulating fishing activities by non-indigenous persons on their reservation are noteworthy. Thus, state agencies or companies seeking to conduct fishing activities on their lands must respect that the final decision on fishing activities on the reservation rests with the Spokane Tribe, thereby affirming their own understanding of what consultation and consent is. As reported, this assertion of their right to consent is intended to regain access to the Spokane Tribe's land.

⁵⁰³ Intervention of the Observatory of Community Protocols on Consultation and Free, Prior and Informed Consent at the Regional Meeting on the Right to Self-Determination (South America), May 11, 2021.

⁵⁰⁴ Constitutional Court of Colombia, [Judgment T-530/16](#), September 27, 2016.

⁵⁰⁵ Doyle, C., Whitmore, A. and Tugendhat, H. (2019) (eds.). [Free, prior and informed consent protocols as instruments of autonomy: laying the groundwork for rights-based interactions](#), INFOE, ENIP, pp. 91-100. This publication contains experiences and lessons learned regarding consultation protocols carried out by indigenous and tribal peoples in Brazil, Colombia and Peru. Also recommended is the publication, Salvador Millaleo Hernández, ed. [Autonomous Protocols for Indigenous Prior Consultation in Latin America: Case Studies in Bolivia, Brazil, Chile, Colombia, Honduras, Mexico and Peru](#), Copenhagen: IWGIA, October 2020.

salmon that has been an important part of the traditional economic and spiritual life of the Spokane⁵⁰⁶.

8. Responses and Strategies to the COVID Pandemic-19

303. Through [resolutions⁵⁰⁷](#) and [press releases⁵⁰⁸](#), the IACHR has reported on the differentiated impacts that the COVID-19 pandemic has had on indigenous peoples, the serious risks they face, particularly the peoples in isolation and initial contact, and the need for urgent measures to protect their health while respecting their worldview and cultural diversity. The pandemic has exposed the inequalities and other structural problems faced by these peoples in terms of access to health, water and other basic services, and the consequences of the lack of protection of their lands and territories from intrusions by people who generate situations of violence and risk of contagion.
304. As part of the preparation of this report, indigenous and tribal representatives reported on various initiatives and strategies for dealing with the pandemic in the absence of adequate attention and support from States. In general, they indicated that the circumstances they face made it necessary to exercise their self-determination to cope with the differential impacts of the pandemic on their peoples.
305. In Bolivia, it was reported that the measures adopted by the State, such as vouchers, health brigades and medicines did not reach the indigenous territories or were not sufficient. Several indigenous communities, exercising their self-determination, adopted measures to control entry and movement to their communities, as well as quarantine measures to prevent contagion by people moving into their territories. Likewise, indigenous grassroots organizations in

⁵⁰⁶ Spokane Tribe Chair, Meeting on the Right of Self-Determination of Indigenous and Tribal Peoples in the United States, May 17, 2021.

⁵⁰⁷ IACHR. [73/20 - IACHR adopts Resolution on Pandemic and Human Rights in the Americas](#). Washington, D.C., April 10, 2020; IACHR. [180/20 - IACHR adopts Resolution 4/20 establishing Inter-American Guidelines on the "Human Rights of Persons with COVID-19"](#). Washington, D.C., July 27, 2020.

⁵⁰⁸ IACHR. [Press Releases. 200/20 - The IACHR urges the States of the Pan-Amazonian and Gran Chaco region to adopt urgent measures to address the critical situation of indigenous peoples due to the pandemic](#). Washington, D.C., August 17, 2020; [126/20 - Indigenous Amazonians are "at serious risk" from COVID-19, warn UN Human Rights and IACHR](#). Santiago/ La Paz /Bogota/ Washington DC, June 4, 2020; [120/20 - IACHR warns of health crisis in the Urban Indigenous Community of Cantagallo, Peru](#). Washington, D.C., May 27, 2020; [103/20 - The IACHR warns about the special vulnerability of indigenous peoples in the face of the COVID-19 pandemic and calls on States to take specific measures in accordance with their culture and respect for their territories](#). Washington, D.C., May 6, 2020.

- Beni, took steps to obtain medicines and the means to take them to needy communities⁵⁰⁹.
306. In the State of Pará, Brazil, community decrees issued by about 5 quilombola communities aimed at restricting the movement of strangers during the initial period of the pandemic were reported⁵¹⁰.
307. The pandemic situation also generated the need to promote and rescue ancestral knowledge and wisdom in the absence of adequate health services. In Honduras, efforts to promote their own knowledge of natural medicine were reported, which contributed to a relatively lower number of deaths among indigenous and Afro-descendant populations⁵¹¹. Likewise, in the absence of sufficient state resources, indigenous communities created rural funds or communal banks and measures for the creation of small businesses or cooperatives⁵¹².
308. Indigenous representatives from Peru reported on actions taken by several Amazonian communities that included self-isolation measures, promotion of traditional medicine and efforts to provide their own food. Along these lines, they also implemented community surveillance systems to record epidemiological alerts and situations of contagion risk, as well as protocols for recording information on cases of contagion and notification to the competent authorities⁵¹³. Likewise, indigenous organizations and communities negotiated with the State so that economic resources under special State programs would be redirected to the purchase of medicines, mobilization of the sick and other health care measures⁵¹⁴. However, these important initiatives have been developed in a general context in which the State response has not been constructed and implemented with the participation and consultation of the indigenous peoples through their representative institutions, which has resulted in the absence of a differential and culturally appropriate approach to the health measures adopted, as well as a disregard for self-isolation and other measures.

⁵⁰⁹ Guaraní, Mojeño, Uchupiamonas Indigenous Peoples and the Charcas Indigenous Nation, EarthRights International and Bolivian Forum on Environment and Development. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021.

⁵¹⁰ Caritas Brasileira Regional Norte II and Comunidade Quilombola do Abacatal - Sítio Bom Jesus, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, 2021.

⁵¹¹ Lenca Indigenous Movement of Honduras. Brief report submitted to the IACHR in the framework of the report on the self-determination of indigenous and tribal peoples of African descent, May 16, 2016.

⁵¹² Lenca Indigenous Movement of Honduras. Brief report submitted to the IACHR in the framework of the report on the self-determination of indigenous and tribal peoples of African descent, May 16, 2016.

⁵¹³ Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD) and Earth Rights International, Joint Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, April 26, 2020, p. 30.

⁵¹⁴ Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD) and Earth Rights International, Joint Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, April 26, 2020, p. 30.

protection measures adopted by indigenous peoples to address the pandemic⁵¹⁵.

309. For its part, the Commission was informed that the Kichwa people of Sarayaku in Ecuador faced a double crisis in 2020 due to the advance of the pandemic and a series of floods of the Bobonaza River that caused the loss of homes, crops or *chakras*, and serious damage to schools, bridges, roads and means of transportation. The pandemic context and the confinement measures decreed by the State complicated the population's access to emergency and contingency vouchers available for people affected by both crises. Given the insufficient response of provincial and national authorities to this situation, the Sarayaku people developed their own Contingency Plan to COVID-19, which included the formation of groups of people with knowledge of medicinal plants to collect, store, prepare and distribute them to the communities as a form of prevention. They also formed an Internal Emergency Operation Committee and a team of paramedic volunteers to attend to vulnerable people with symptoms of the disease. Through such initiatives, it was possible to provide urgent and culturally appropriate care despite the challenges presented by the pandemic and the destruction of communication routes with other communities and population centers⁵¹⁶.

C. Obstacles to the exercise of indigenous and tribal peoples' self-determination

1. Challenges in the recognition of indigenous and tribal peoples

310. The Commission notes with concern that, in several countries, indigenous and tribal peoples face obstacles to the exercise of their self-determination due to limitations in national legal and policy frameworks with respect to their identification and recognition as distinct peoples, and/or the aspects of their identity as indigenous and tribal peoples.

⁵¹⁵ Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD) and Earth Rights International, Joint Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, April 26, 2020, pp. 31-3.

⁵¹⁶ Pueblo Originario Kichwa de Sarayaku and Fundación ALDEA, "La Selva Viviente del Pueblo del Medio Día en la Amazonía Ecuatoriana", in Consorcio TICCA, *Territorios de vida: Informe 2021*, Consorcio TICCCA: mundial, pp. 95-6.

collective rights. In some States, this includes requirements related to obtaining legal personality. The Commission recalls that the granting of legal personality should not constitute a condition for indigenous and tribal peoples to be able to exercise their rights, since it is a merely declaratory and not constitutive act, and taking into account the pre-existence of these peoples, *supra* Chapter 3.

311. U.S. indigenous representatives pointed out that the federal government maintains control over the official recognition of indigenous peoples, which affects their right to self-government, self-determination and access to services and benefits available at the federal level. This represents a continuation of the historical paternalism that has characterized the legal and political treatment of indigenous peoples, including the concept of *plenary power* of Congress that always leaves the possibility that it can eliminate the status of a recognized tribe of an indigenous people, or even annul the obligations of the government that derive from treaties signed with indigenous peoples.⁵¹⁷ This deprives indigenous peoples of the right to self-governance, self-determination, and access to services and benefits available at the federal level. This deprives indigenous peoples of the right to be able to recognize themselves as such, and there are currently more than 200 indigenous peoples that have not yet been recognized by the federal government, so that they cannot develop and apply their own norms and laws⁵¹⁸.
312. With respect to Argentina, information was received on the challenges in recognizing the legal status of indigenous peoples and the collective nature of their rights. This can cause problems for indigenous peoples seeking protection under Law 26.160, which protects indigenous peoples whose legal status has been duly registered in the National Registry of Indigenous Communities against evictions and orders a territorial survey of their territories⁵¹⁹. This registration process can take place at the national and provincial levels, but in some cases there has been an excess of requirements to grant legal personality or dissimilar interpretations of such requirements in the different jurisdictions. In some provinces, until very recently, indigenous communities could only register as civil associations, which is alien to their own forms of organization and worldview⁵²⁰. Likewise, the

⁵¹⁷ IACHR Meeting on Self-Determination of Indigenous Peoples in the United States; First Peoples Worldwide, Outcome Document: Meeting on the Right of Self Determination of Indigenous and Tribal Peoples in the United States, May 17, 2021. The plenary power doctrine was affirmed in the 1903 U . S . Supreme Court Ruling in the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553, 1903 which states that the plenary power of Congress, in that case to abrogate treaty obligations to Native American tribes, has always been considered a political power not subject to the judicial department of the government. According to the same ruling, this is due to the character of wards or dependents of the indigenous peoples and notions of the supposed inferiority of the Indians.

⁵¹⁸ IACHR Meeting on Self-Determination of Indigenous Peoples in the United States; First Peoples Worldwide, Outcome Document: Meeting on the Right of Self Determination of Indigenous and Tribal Peoples in the United States, May 17, 2021.

⁵¹⁹ Ministerio Público de la Defensa - Defensoría General de la Nación, Response to the IACHR Questionnaire on the Right to Self-Determination of Indigenous and Tribal Peoples, April 23, 2021; National Institute of Indigenous Affairs - Argentina, Response to the Questionnaire for the IACHR Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (2021).

⁵²⁰ Ministerio Público de la Defensa - Defensoría General de la Nación, Response to the IACHR Questionnaire on the right to self-determination of indigenous and tribal peoples, April 23, 2021.

Ignorance of the collective nature of indigenous peoples has generated problems for families or communities facing criminal cases for usurpation or civil actions such as eviction, which makes it impossible to defend their rights in matters of territorial claims and rights⁵²¹.

313. The indigenous and tribal peoples of Suriname have demanded their legal recognition through a draft law on the subject that has not yet been adopted. They face a dominant political attitude that considers indigenous and tribal peoples as seeking to create a "state within a state" and perceives them as a minority ethnic group without the right to self-determination⁵²².
314. In turn, representatives of the Barbuda council reported on the Barbudans' efforts to be recognized as an indigenous and tribal people, particularly in the face of the threat posed by the development of natural resource exploitation projects. As noted by the IACHR in its 2018 annual report, legislative initiatives before the Senate of Antigua and Barbuda would deprive the Barbudans of their ancestral community lands in order to use them for extractive activities, industry and tourism⁵²³. They stated that such a situation reflects a disregard for their collective identity as an indigenous and tribal people, their special relationship with their territory and natural resources, and the deep ecological knowledge that has allowed them to manage the territory, conserve resources, and adapt their traditional economic activities to the particular conditions of the island⁵²⁴.
315. The Commission takes note of the constituent process in Chile, in which seventeen seats have been allocated to representatives of the country's indigenous peoples through the system of reserved seats established by the legislature⁵²⁵. Although, as reported to the Commission, this system was established without prior consultation, the Commission considers that it constitutes an extremely important modality of democratic participation to channel the demand of indigenous peoples for the recognition and guarantee of their territorial rights, self-determination and the plurinational character of the country in the new Constitution.
316. The constituent process is of historical importance since the current constitution does not expressly recognize indigenous peoples and the

⁵²¹ Ministerio Público de la Defensa - Defensoría General de la Nación, Response to the IACHR Questionnaire on the right to self-determination of indigenous and tribal peoples, April 23, 2021.

⁵²² Presentation by the Association of Indigenous Community Leaders of Suriname - VIDS, at the Regional Meeting on the Right to Self-Determination (Caribbean), May 27, 2021.

⁵²³ IACHR, [Annual Report 2018](#), para. 16.

⁵²⁴ Presentation by the Barbuda Council, at the regional meeting on the right to self-determination (Caribbean), May 27, 2021.

⁵²⁵ [Law 21298](#) "Amends the fundamental charter to reserve seats for representatives of indigenous peoples in the constitutional convention and to safeguard and promote the participation of persons with disabilities in the election of constitutional convention members" Published on December 23, 2020; Also, see: GOB.CL "Ministra Rubilar tras aprobación de escaños reservados: 'Es una jornada histórica. The new Constitution will be written in indigenous handwriting'", December 16, 2020.

domestic legislation does not recognize indigenous peoples as "peoples"⁵²⁶. This is reflected in the 1993 Indigenous Law, which treats indigenous peoples as "ethnic groups", thus denying the right to self-determination implied by the concept of "peoples".

317. On the other hand, regarding the scope of participation in the constituent assembly, the Commission notes with concern that the Chilean Afro-descendant tribal people were excluded from the process despite the fact that Law No. 21,151 recognizes their cultural identity and the right to be consulted on measures that would affect them, among other rights. As an Afro-Chilean representative explained, without such representation in the constituent process, there are no guarantees for the constitutional recognition of their people, which will perpetuate racism and exclusion against them⁵²⁷.

2. Challenges in the respect of representative structures own

318. A problem repeatedly denounced by indigenous and tribal representatives is the challenge in exercising their right to elect truly representative authorities and the interference in their own systems for electing authorities, all of which undermines the exercise of their self-government and self-determination.
319. In the case of the Caribbean Coast of Nicaragua, the implementation of the electoral reform ordered by the Inter-American Court in the case of *Yatama v. Nicaragua* to guarantee that indigenous and Afro-descendant peoples can participate in electoral processes taking into account their traditions, uses and customs⁵²⁸ is still pending. One concern expressed is that the autonomy regime in the Caribbean Coast has not guaranteed that the authorities elected to the Regional Councils truly represent the indigenous and Afro-descendant peoples. The interference of authorities and political parties in communal decisions has been denounced, which has resulted in the imposition of authorities at the level of the councils and the regional, municipal and territorial governments⁵²⁹.
320. The IACHR also received information on the existence of a Procedural Manual for the Certification of Territorial and Communal Authorities, approved by the Autonomous Regional Council of the Southern Caribbean Coast in 2020, which affects the right of indigenous and Afro-descendant peoples to choose their

⁵²⁶ Presentation by Mapuche lawyer, at the Regional Meeting on the Right to Self-Determination of Indigenous and Tribal Peoples (South America), May 11, 2021.

⁵²⁷ Presentation by Organización Limbanga - Chile, at the Regional Meeting on the Right to Self-Determination of Indigenous and Tribal Peoples (South America), May 11, 2021.

⁵²⁸ I/A Court H.R., Case of *Yatama v. Nicaragua*. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005, Operative Points 10 and 12.

⁵²⁹ Creole Communal Government of Bluefields - Nicaragua, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (May 2021); and CEJUDHCAN - Nicaragua, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, May 2021.

communal authorities through their assemblies⁵³⁰. Information was also obtained on another instrument approved by the same regional council regarding the prior consultation procedure for investment programs and projects in indigenous and Afro-descendant territories in the southern Caribbean Coast, which would affect the territorial rights and self-determination of these peoples with respect to investment projects.⁵³¹ According to the information received by the IACHR, as a result of actions that weaken and supplant traditional self-government structures, the dispossession of indigenous and Afro-descendant communities has been facilitated. According to the information received by the IACHR, as a consequence of actions that weaken and supplant traditional self-government structures, the dispossession and usurpation of the lands, territories and natural resources of the indigenous and Afro-descendant peoples of the Caribbean Coast has been facilitated⁵³².

321. Similarly, with respect to Panama, information was received regarding obstacles to the exercise of indigenous self-determination due to interference by government authorities, and on other occasions political parties, in the processes of electing indigenous authorities, decision-making and consultations, particularly when there is interest in promoting investment projects in indigenous territories⁵³³. Interference in the Organic Charter of the Ngäbe Buglé Comarca to call elections for new authorities in 2010 was reported, which reportedly had a more favorable position regarding the installation of the Barro Blanco hydroelectric project⁵³⁴. Likewise, it was reported that communities of the same people that were left out of the Ngäbe Buglé Comarca created in 1997 and therefore face legal insecurity of their lands have questioned consultation processes regarding the construction of an electric transmission line called the Fourth Electric Transmission Line that affects ancestral lands of the Ngäbe Buglé people. Among the main concerns raised are the lack of representativeness of the people summoned to the consultation.

⁵³⁰ Creole Communal Government of Bluefields - Nicaragua, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (May 2021).

⁵³¹ Creole Communal Government of Bluefields - Nicaragua, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples (May 2021).

⁵³² CEJUDHCAN - Nicaragua, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021. For further analysis of the political power dynamics that have affected the capacity of the autonomy regime of the Caribbean Coast to be a space of effective representation of indigenous and Afro-descendant peoples, and the consequences on their human rights, see, Miguel González, "La tragedia de Alal: regresión (no restitución) de derechos en el Régimen de Autonomía en Nicaragua", in Miguel González, et al, *Autonomías y autogobierno en la América diversa*, Editorial Universitaria Abya-Yala (2021), pp. 161-189.

⁵³³ Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro (MODETEAB), Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe, and Center for International Environmental Law (CIEL), Responses to the questionnaire on the right to self-determination, from the experiences of the Ngäbe and Buglé indigenous peoples of Panama, April 26, 2021, pp. 6-8.

⁵³⁴ Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro (MODETEAB), Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe, and Center for International Environmental Law (CIEL), Responses to the questionnaire on the right to self-determination, from the experiences of the Ngäbe and Buglé indigenous peoples of Panama, Apr. 26, 2021, pp. 7-8; Report of the

Special Rapporteur on the rights of indigenous peoples, James Anaya, [Addendum: The Situation of the Rights of Indigenous Peoples in Panama](#), A/HRC/27/52/Add.1 (July 3, 2014), paras. 55.

consultation, the lack of information on social and environmental impacts, and the lack of translation of information into Ngäbe Buglé languages⁵³⁵.

322. The IACHR was also made aware of the challenges faced by the Xinka people of Guatemala in recognizing their representative authorities in planning consultation processes ordered by the Constitutional Court in a 2017 ruling that ordered the suspension of a mining project in Xinka indigenous territory until the feasibility of the project's continuation was consulted.⁵³⁶ The IACHR was also informed of the challenges faced by the Xinka people of Guatemala in recognizing their representative authorities in planning consultation processes ordered by the Constitutional Court in a 2017 ruling that ordered the suspension of a mining project in Xinka indigenous territory until the feasibility of the project's continuation was consulted.⁵³⁶ As recounted, state authorities insisted that only a small number of indigenous representatives could participate in the consultation processes, and it was only this year that the participation of indigenous authorities was accepted. However, concerns persist that prior consultation is considered a mere formality and not a right linked to their territorial rights and culture⁵³⁷.
323. On the other hand, the challenge of ensuring the representation of indigenous peoples in government spaces at the regional and national levels was reported. In this regard, it was pointed out that in Oaxaca, Mexico, although the right to elect their own authorities at the municipal level has been recognized and exercised, the representation of indigenous peoples as collectives in state and national government structures must also be extended⁵³⁸.
324. In Guyana, despite the recognition of indigenous community authorities or *Toshaos*, they do not directly represent their peoples in the regional and national governments, since in those spaces such representation is assumed by representatives of political parties⁵³⁹. It has also been pointed out that during the last three decades there has been a selective recognition by the government of the indigenous communities, organizations and individuals with whom it decides to coordinate⁵⁴⁰.
325. With respect to Trinidad and Tobago, it was reported that the Santa Rosa/ Santa Rosa *First Peoples Community* in Arima was recognized by the government as an indigenous people in 1990. Although their right to self-determination is not legally recognized, several administrations of

⁵³⁵ Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro (MODETEAB), Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe, and Center for International Environmental Law (CIEL), Responses to the questionnaire on the right to self-determination, from the experiences of the Ngäbe and Buglé indigenous peoples of Panama, April 26, 2021, pp. 6-7.

⁵³⁶ Presentation by Xinka People's lawyer, at regional meeting on the right to self-determination (Central America), May 12, 2021.

⁵³⁷ Presentation by attorney Xinka People - Guatemala, at regional meeting on the right to self-determination (Central America), May 12, 2021.

⁵³⁸ Representative of the Ayuuk People, Oaxaca, in Meeting of the IACHR with indigenous organizations, authorities and members of government institutions in Mexico for the Report on the right to self-determination, May 7, 2021.

⁵³⁹ Presentation by Association of Padawong Amuk, Indigenous Peoples Association, at regional meeting on the right to self-determination (Caribbean), May 27, 2021.

⁵⁴⁰ Guyanese Organization of Indigenous Peoples, Response to the IACHR Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, May 2021.

government supported the community's efforts to raise public awareness of indigenous peoples' cultures and traditions and their contributions to the country's development. At the national level, they see a challenge in obtaining an independent seat in the local governments of Arima and other areas with a greater indigenous presence, which would help ensure greater inclusion of their rights and interests at the local level⁵⁴¹. According to the representative of this community, this measure, as well as the recognition of their representative authorities and the granting of sufficient land to create a space for the revitalization of traditional culture and spirituality, to be called *First Peoples Heritage Village*, would be important steps that the State and the indigenous peoples can take towards reparations for the historical violations of the latter's human rights.

326. Information was also received on efforts to revitalize mechanisms for the self-representation of indigenous and tribal peoples and communities. Information was provided on the efforts of the Garifuna people of Belize to reinstitute the system of mayors that previously existed at the community level, similar to that exercised by the Mayan people of that country. According to what was reported, this would allow decision making at the community level, as this is not possible with the representation mechanism established by the government⁵⁴².
327. In relation to the indigenous peoples of the State of Alaska, in the United States, the obstacles that the peoples have faced in the exercise of self-determination following the adoption of the *Alaska Native Claims Settlement Act* (ANCSA) of 1971 were presented. ANCSA imposed Native corporations on behalf of indigenous peoples as representative entities. An Alaska Native representative explained that these corporations have created divisions among Native peoples and created barriers to their relationship with their ancestral lands. Instead of the indigenous peoples owning the land, the companies hold it in trust, creating a conflict between traditional concepts of land care and stewardship and the trust interests of the companies.⁵⁴³ A system was established that put pressure on the indigenous peoples to take ownership of the land. A system was established that pressured native companies to exploit natural resources and also facilitated the sale and lease of indigenous lands by the federal government for such projects. In that sense, the ANCSA affected the right of Alaska Native peoples to control, use and benefit from their lands.⁵⁴⁴

⁵⁴¹ Presentation by Santa Rosa First Peoples Community, at regional meeting on the right to self-determination (Caribbean), May 27, 2021.

⁵⁴² Presentation by National Garifuna Council - Belize, at regional meeting on the right to self-determination (Caribbean), May 27, 2021.

⁵⁴³ IACHR Meeting on Self-Determination of Indigenous Peoples in the United States; First Peoples Worldwide, Outcome Document: Meeting on the Right of Self-Determination of Indigenous and Tribal Peoples in the United States, May 17, 2021.

⁵⁴⁴ First Peoples Worldwide - University of Colorado - Boulder, Legal Framework in the United States for Indigenous Peoples, Supplemental Response to IACHR Questionnaire on Indigenous and Tribal Peoples' Right to Self-Determination (2021). For more information on the history, motives and effects of ANCSA, see,

3. Challenges in the procedures for the recognition of indigenous autonomies and indigenous territorial entities

328. As noted in the case of Bolivia, the Constitution provides for access to indigenous autonomy, under the figures of indigenous territories, municipalities or regions, whose procedure is governed by the Framework Law on Autonomies and Decentralization of 2010. Although this legislation is an important measure for indigenous peoples to exercise legislative, supervisory, regulatory and other powers set forth in the Constitution, the challenges in putting it into practice have been pointed out due to the requirements and procedures established, which represent a considerable obstacle for indigenous peoples who want to create their own autonomies⁵⁴⁵. As of 2020, only three territories have managed to consolidate as autonomous indigenous governments out of a total of 36 autonomy procedures initiated since 2010. The other cases have been suspended due to internal conflicts or are still trying to complete the more than 12 stages required for this process⁵⁴⁶. Some of these indigenous peoples have had to initiate administrative and judicial challenge mechanisms, as well as mechanisms to modify legislation⁵⁴⁷. In 2019, the modification of said law was achieved to allow the autonomous statutes developed by the petitioning indigenous peoples to be approved through their own rules and procedures and not through referendum, as a sufficient requirement for the creation of the corresponding territorial unit⁵⁴⁸.
329. Representatives of two of the first autonomies established in Bolivia - Rajaypampa, established as an autonomous territory in the Andean region, and the Guaraní Charagua Iyambae, established through municipalities in the Chaco region, reported highly bureaucratic and cumbersome processes for the establishment of their autonomies and the approval of their statutes and autonomy designs by the local governments.

University of Alaska Fairbanks, [Alaska Native Claims Settlement Act \(ANCSA\) 1971](#), Federal Indian Law for Alaska Tribes; and ANCSA Regional Association, [About the Alaska Native Claims Settlement Act](#).

⁵⁴⁵ Guaraní, Mojeño, Uchupiamonas Indigenous Peoples and the Charcas Indigenous Nation, EarthRights International and Bolivian Forum on Environment and Development. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021; IACHR meeting with representatives of autonomous indigenous governments of Wampis Nation (Peru) and Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

⁵⁴⁶ Leonardo Tamburini, Bolivia, in [The Indigenous World 2021](#) (35th edition), Copenhagen: IWGIA, p. 353.

⁵⁴⁷ Guaraní, Mojeño, Uchupiamonas Indigenous Peoples and the Charcas Indigenous Nation, EarthRights International and Bolivian Forum on Environment and Development. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021.

⁵⁴⁸ Guaraní, Mojeño, Uchupiamonas Indigenous Peoples and the Charcas Indigenous Nation, EarthRights International and Bolivian Forum on Environment and Development. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021; IACHR meeting with representatives of autonomous indigenous governments of Wampis Nation (Peru) and Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

different levels of government⁵⁴⁹. One point reiterated was that, despite the constitutional recognition of the autonomies, the rest of the State's institutional and legal framework related to public administration has not yet been reformed to truly recognize and accommodate the new forms of indigenous autonomy, and in some cases, public officials consider them as just another municipality. Likewise, it has been brought to the Commission's attention that they do not receive sufficient funds from the State to carry out all the competencies conferred by law⁵⁵⁰. In this sense, the legal framework of the autonomies is still defined from a state-centric vision. Despite these challenges, representatives of both autonomous territories highlighted important achievements as they were able to open the door to the creation of autonomies and to develop or strengthen their own systems of community democracy, justice, leadership and normative instruments. In the case of Charagua Iyambae, this includes regulations for the creation of protected areas in their territory⁵⁵¹.

330. The IACHR highlights that Ecuador is another country with advanced legislation on territorial planning in favor of indigenous peoples. However, representatives of indigenous peoples reported that this figure is born with a limitation in the Constitution, because it states that the autonomous indigenous territorial governments must be created within the pre-established territorial limits of the State, that is, within parish, cantonal and provincial boundaries. They reported that this represents the fragmentation of the territories of the nationalities, and responds to a colonial political division that is still in force⁵⁵². The Ecuadorian Constitution includes the creation of Indigenous Territorial Circumscriptions (CTIs). Territorial circumscriptions in favor of indigenous peoples are recognized at the constitutional level, but according to information provided to the IACHR, the requirements to establish them are almost impossible to meet. For example, it is necessary to have a consensual project of autonomy for the CTI, an organic law (which must be presented by the President of the Republic), a political alliance within the National Congress, competencies and a system of coordination with the sectional entities, among others. In turn, within the steps to follow to create an ECI, a popular consultation must be carried out, with universal and direct voting, in which 2/3 of the vote must be in favor. According to the information received

⁵⁴⁹ IACHR meeting with representatives of the autonomous indigenous governments of the Wampís Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

⁵⁵⁰ IACHR meeting with representatives of the autonomous indigenous governments of the Wampís Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

⁵⁵¹ IACHR meeting with representatives of the autonomous indigenous governments of the Wampís Nation (Peru) and the Territorial Governments of Charagua and Rajaypampa (Bolivia), held on May 21, 2021.

⁵⁵² Regional meeting with representatives of indigenous, tribal and Afro-descendant peoples of South America (Brazil, Colombia, Chile, Ecuador, Suriname), held on May 11, 2021. Alliance for Human Rights; Amazon Watch and Amazon Frontlines. Update on the IACHR Report on the Situation of Human Rights in Pan-Amazon in 2019. June 7, 2021.

by the Commission, is highly complex when considering that the majority of voters in the country are non-indigenous persons⁵⁵³.

4. Recognition, protection and guarantee of rights to lands, territories and natural resources

331. The recognition, protection and guarantee of the rights of indigenous and tribal peoples over their lands, territories and natural resources is an essential element for the exercise of self-determination. As a Maya representative from Belize explained to the Commission, self-determination is at the heart of their struggle, and for this it is fundamental to be able to own, govern, manage and develop their ancestral lands and resources. Land is the source of their social, cultural and political identity and the basis of their traditional knowledge systems and traditional systems of governance⁵⁵⁴. However, this self-determination is limited by the absence of protections in favor of the territory in the face of development projects, delays in the implementation of consultation and consent through joint protocols between the Maya people and the government, and the lack of recognition of their representative authorities⁵⁵⁵.
332. Indigenous representatives pointed out the contradictory visions of territory and development and their impact on self-determination. A representative of the Nayari people of Mexico explained that self-determination includes the right to decide on territory, which should be understood as the whole space, not only the land they work, but also the water, the sky and the subsoil. The life projects of indigenous peoples, with their own conception of territory and that take into account the next generations, clash with the interests of corporate development and local and national governments⁵⁵⁶. A Mayan representative from Guatemala also pointed out the limitations to indigenous peoples' decisions due to different visions of what constitutes development and territoriality. As a result, it was noted that there is a discourse on the part of business and state agents that has linked the defense of territory and the rights of indigenous peoples to organized crime or terrorist activities, which has generated

⁵⁵³ Presentation, Kichwa Sarayaku People, at Regional Meeting on the Right to Self-Determination of Indigenous and Tribal Peoples (South America), May 11, 2021; Viteri Gualinga, Leonardo. "Autonomy project of the Kichwa People of Pastaza: Ecuadorian Amazon region". In Pablo DÁVALOS (ed.). *Pueblos Indígenas, Estado y democracia*. Buenos Aires: CLACSO, 2005, p. 356.

⁵⁵⁴ Presentation by Maya Leaders Alliance - Belize, Regional Meeting on the Right of Self-Determination of Indigenous and Tribal Peoples in the Caribbean, 27 May 2021.

⁵⁵⁵ Presentation by Maya Leaders Alliance - Belize, Regional Meeting on the Right of Self-Determination of Indigenous and Tribal Peoples in the Caribbean, 27 May 2021; Amandala, [Implementing "FPIC" an uphill battle](#), June 23, 2021.

⁵⁵⁶ Presentation by representative of Mesa del Nayari, Nayari people, Mexico, Meeting of the IACHR with indigenous organizations, authorities and members of government institutions in Mexico for the Report on the right to self-determination, May 7, 2021.

social conflict, criminalization and prosecution of authorities and people who exercise leadership in the communities⁵⁵⁷.

333. A particular concern is the need for effective implementation of domestic legal systems on indigenous peoples' land rights in accordance with international and inter-American standards. With respect to Guyana, the IACHR was informed that despite the *Amerindian Act*⁵⁵⁸, which provides for collective rights of indigenous communities and the granting of lands, it was noted that it does not adequately recognize traditional forms of tenure and traditional use of indigenous territories and that large-scale mining activities may override peoples' decisions to say no to such activities, so that their traditional lands may be affected without effectively implementing free, prior and informed consultation and consent⁵⁵⁹.
334. In Nicaragua, Law 445 represented a significant advance for the demarcation and titling of indigenous and Afro-descendant peoples' lands on the Caribbean Coast. As reported, between 2005 and 2020, the Nicaraguan State approved and delivered 23 titles to indigenous and Afro-descendant territories corresponding to 314 communities in an extension that represents 31% of the national territory.⁵⁶⁰ However, the last phase consisting of the regularization of the titled territories was suspended since 2014, which has encouraged the illegal and violent occupation of indigenous and Afro-descendant territories by powerful economic interests, ranchers and settlers.⁵⁶¹ The situation of violence faced by indigenous and Afro-descendant peoples in the Caribbean Coast of Nicaragua is still ongoing. The situation of violence faced by indigenous and Afro-descendant peoples on the Caribbean Coast of Nicaragua, including acts of aggression, threats and murders against members of indigenous peoples due to this situation of lack of protection of their lands and territories has been the subject of precautionary and provisional measures of the ISHR and pronouncements by the Commission⁵⁶².

⁵⁵⁷ Presentation by Consejo del Pueblo Maya - Guatemala, at regional meeting on the right to self-determination (Central America), May 12, 2021.

⁵⁵⁸ [Amerindian Act 2006](#).

⁵⁵⁹ Presentations by Association of Padawong Amuk, Indigenous Peoples Association, National Toshias Council and Amerindian Research Unit - University of Guyana, at regional meeting on the right to self-determination (Caribbean), May 27, 2021.

⁵⁶⁰ CEJUDHCAN - Nicaragua, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021.

⁵⁶¹ CEJUDHCAN - Nicaragua, Response to the Questionnaire for the Thematic Report on the right to self-determination of indigenous and tribal peoples, May 2021; Miguel González, "La tragedia de Alal: regresión (no restitución) de derechos en el Régimen de Autonomía en Nicaragua", in Miguel González, et al, [Autonomías y autogobierno en la América diversa](#), Editorial Universitaria Abya-Yala (2021), pp. 161-189.

⁵⁶² IACHR. Press Release No. 242/21, [IACHR requests Inter-American Court to extend provisional measures in favor of the communities of the Miskitu indigenous people in Nicaragua](#), September 17, 2021; and IACHR, [@IACHR Twitter August 27, 2021](#), condemning attack against Mayangna and Miskito community members in the Kiwakumbaih community, in the Bosawas Biosphere Reserve, perpetrated by armed individuals and which left at least 11 indigenous people murdered.

335. With respect to Panama, as mentioned above, indigenous comarcas were established in the first part of the 20th century, and there are currently six of them. However, there are still many indigenous communities that were left out of these comarcas or that are located in areas contiguous to them, and that face serious difficulties in achieving the establishment of comarcas or the recognition of their collective property in their ancestral lands. In his 2014 report on the situation of the rights of indigenous peoples in Panama, the former UN Special Rapporteur on indigenous peoples noted that approximately 100 indigenous communities have not had titles or other forms of official recognition despite the fact that many had completed applications for the legalization of their collective lands. According to the report, the delays were due to opposition from third parties claiming the same lands, or other problems such as the location of some in State-declared protected areas. This has resulted in situations of vulnerability to the continuous intrusions of third parties on these lands and investment projects, which has even affected indigenous peoples who have their own comarcas⁵⁶³. The most recent comarca is the Naso Tjër Di Comarca established in late 2020, after a struggle of more than 50 years to achieve official recognition of their ancestral lands⁵⁶⁴ that culminated in a Supreme Court ruling in October of that same year, which affirmed the constitutional right of indigenous peoples to the reservation of the necessary lands and the collective ownership of the same to achieve the⁵⁶⁵.
336. The lack of progress in land demarcation processes of indigenous and quilombola peoples in Brazil due to long delays in being resolved at the administrative level and through judicial processes, in addition to legislative initiatives that would mean serious setbacks to the protections for indigenous lands and territories provided by the Constitution, speeches by the government considered hostile and racist against indigenous and Quilombola peoples, the dismantling of policies and programs favorable to the peoples, and the consequent intensification of conflicts and violence against indigenous and Quilombola communities have been concerns reiterated by indigenous and tribal peoples and civil society in that country⁵⁶⁶.

⁵⁶³ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, *Addendum: The Situation of the Rights of Indigenous Peoples in Panama*, A/HRC/27/52/Add.1 (July 3, 2014), paras. 29-38.

⁵⁶⁴ Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro (MODETEAB), Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe, and Center for International Environmental Law (CIEL), Responses to the questionnaire on the right to self-determination, from the experiences of the Ngäbe and Buglé indigenous peoples of Panama, April 26, 2021, pp. 2-4.

⁵⁶⁵ Judicial Body of the Republic of Panama, *El Pleno de la CSJ Reitera que las Comarcas Indígenas son Parte de la Herencia Histórica de Nuestra Nación*, November 12, 2020.

⁵⁶⁶ Presentation by Articulação dos Povos Indígenas do Brasi -APIB at Regional Meeting on the Right to Self-Determination (South America), May 11, 2021; and Responses to the Questionnaire for the Report on Self-Determination sent by various organizations, including: Articulação dos Povos e Organizações Indígenas do Nordeste, Minas Gerais e Espírito Santo - APOINME; Org. Levante Tupinambá Mairi; Tupinambá People, Autoctones Latin America Youth Organization; Forum Suape Especio Social e Ambiental and Quilombola Mercês Island Association; Missionary Indigenous Council - CIMI, April-May 2021.

337. The IACHR recalls in its report on the Situation of Human Rights in Brazil that, although the State reported that 435 territories have been regularized, currently there are still 847 indigenous territories with cases pending to be remedied by the State, which corresponds to only 64% of the 1,306 indigenous lands⁵⁶⁷. Regarding regressive legislative initiatives to the rights of indigenous peoples, according to information, in 2017, 33 anti-indigenous proposals were identified before the legislative branch, including numbers of proposals to change the processes of demarcation of indigenous lands, authorize leases on indigenous lands and the exploitation of natural resources among others⁵⁶⁸. The IACHR expressed concern over the recent passage of bills that, among other issues, would authorize the denunciation of Convention 169 on indigenous and tribal peoples, withdraw environmental requirements for agricultural and energy enterprises, and allow extractive and energy activities and military infrastructure on indigenous lands⁵⁶⁹. It also ruled on the application of the legal thesis of the "temporal framework", which consists of the recognition of only those territories that were occupied by indigenous peoples at the time of the promulgation of the 1985 Federal Constitution⁵⁷⁰.
338. With respect to traditional fishing communities in Brazil, the absence of procedures for the recognition of their rights to their fishing territories and natural resources was reported, which places them in a precarious situation in the face of commercial interests that have affected their traditional fishing areas, beaches, rivers, islands, mangroves and lands. Examples of these concerns include the Suape Industrial and Port Complex in Cabo that has affected the communities of Cabo de Santo Agostinho, Pernambuco⁵⁷¹. The traditional fishing communities have presented a legislative initiative for the recognition of their rights that has not yet advanced in the National Congress⁵⁷².
339. In relation to peoples in isolation and initial contact (PIACI), concern has been expressed about the challenges in ensuring the recognition and protection of these peoples despite the existence of national regulations in their favor. In Peru, despite the adoption of Law 28736 in 2006, and its regulation in 2007, on the protection of these peoples and the procedure for the creation of reservations in their favor, the complexity of the procedure for the

⁵⁶⁷ IACHR. [Situation of human rights in Brazil](#), OEA/Ser.L/V/II, February 12, 2021, para. 63.

⁵⁶⁸ Consejo Indigenista Misionero - CIMI, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, 2021.

⁵⁶⁹ IACHR. Press Release No. 236/21, [IACHR expresses concern over draft laws in Brazil that could constitute setbacks in terms of the human rights of indigenous peoples](#), September 9, 2021.

⁵⁷⁰ IACHR. Press Release No. 219/21, [The IACHR reiterates its concern over the legal thesis of the "temporary framework" in Brazil and its impact on the human rights of indigenous and tribal peoples](#), August 23, 2021.

⁵⁷¹ Colonia Z-08, Consejo Pastoral de Pescadores and Foro Suape Espacio Socioambiental, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, 2021.

⁵⁷² Colonia Z-08, Consejo Pastoral de Pescadores and Foro Suape Espacio Socioambiental, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, 2021.

creation of reserves. Since the adoption of these regulations, several applications are still pending, and only one reserve has been created. The lands inhabited by these peoples face constant pressures on their territories due to the presence of outsiders and forestry and hydrocarbon concessions, illegal logging and drug trafficking in their territories. Likewise, it was reported that there are insufficient economic resources for the protection of the territories of the PIACI, which results in the lack of protection against external presence and the effective enjoyment of their self-determination⁵⁷³.

340. In Colombia, there is a regulatory framework in favor of peoples in isolation including Decree 1232 of 2018 that recognizes the self-determination of these peoples and their decision to remain uncontacted, establishes territorial intangibility that prohibits direct or indirect interventions in their territories and creates the National System for the Prevention and Protection of the Rights of Peoples in Isolation⁵⁷⁴. Nevertheless, the presence of external actors represents a threat to peoples in isolation such as the Yuri people, who even have a protection framework within the framework of the establishment of the Rio Puré National Natural Park decreed in 2002. As a border region with Brazil, the Yuri and Passé peoples are threatened by logging activities, illegal mining and drug trafficking routes through their territories. This has resulted in the abandonment and dismantling of the park's surveillance and control posts. It was reported that, despite binational coordination mechanisms with Brazil, these have not been effective in protecting the Yuri and Passé peoples in isolation. In addition, regional organizations have issued warnings about the situation that require greater attention from the system for the prevention and protection of peoples in isolation⁵⁷⁵.
341. With respect to Suriname, it was noted that the absence of domestic legislation that recognizes the rights of indigenous peoples is of particular concern considering that the entire national territory and natural resources are legally considered State property, and there is no legislation that recognizes their right to consultation and consent⁵⁷⁶. The lack of implementation of IACHR Court rulings, such as the *Kaliña and Lokono* case, reflects the lack of protection of indigenous and tribal peoples' territories in the face of extractive projects, infrastructure projects, illegal mining, and the establishment of protected areas.

⁵⁷³ Expert Meeting on Indigenous Peoples in Isolation and Initial Contact, May 24, 2021. Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, June 2021.

⁵⁷⁴ [Decree 1232 of 2018](#), Whereby Chapter 2, of Title 2, of Part 5, of Book 2 of Decree 1066 of 2015, Sole Regulatory Decree of the Administrative Sector of the Interior, is added to establish special measures for the prevention and protection of the rights of Indigenous Peoples in Isolation or Natural State and the National System for the Prevention and Protection of the rights of Indigenous Peoples in Isolation or Natural State is created and organized.

⁵⁷⁵ Amazon Conservation Team - Colombia, Response to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, June 2021.

⁵⁷⁶ Presentation by the Association of Indigenous Community Leaders of Suriname - VIDS, at the Regional Meeting on the Right to Self-Determination (Caribbean), May 27, 2021.

without their consent. In addition, there is a serious lack of access to water, health, education and investment for their own economic, social and cultural development⁵⁷⁷.

5. The lack of recognition and limits imposed on justice and jurisdiction systems

342. The Commission has been informed of the challenges presented by the non-recognition of indigenous peoples' own legal systems. The National Constitution of Argentina recognizes the ethnic and cultural pre-existence and several fundamental rights of indigenous peoples, but does not make explicit the rights to their legal systems. At the provincial level, the Public Prosecutor's Office of Neuquén adopted in 2014 the "Declaration of Palmari" as an instrument that recognizes indigenous justice to resolve certain criminal cases limited to conflicts between members of indigenous communities, occurring only in recognized territory of the communities, and to minor offenses⁵⁷⁸. However, there is still the challenge of overcoming a monistic vision of law at the national level, since most of the problems are dealt with before the ordinary justice system. Projects and policies are required at the national level to promote the recognition and strengthening of indigenous peoples' own systems of law and conflict resolution⁵⁷⁹.
343. On the other hand, as noted above, recognition of the indigenous justice system and jurisdiction has generally been conditioned on their being in accordance with the fundamental rights in national constitutions and/or international human rights law, and their application has been limited to their members within their territories, and generally with respect to relatively minor crimes or infractions. This may result in restrictions on the exercise of self-determination when indigenous peoples consider that broader personal, territorial or material jurisdiction is necessary. It may also result in challenges to the decisions issued by indigenous justice authorities by persons who are dissatisfied with the decisions of their authorities or cases in which the decisions possibly contradict fundamental rights, particularly the rights of women, children or other vulnerable sectors within the indigenous peoples themselves. All these factors imply situations that could result in restrictions to the autonomy and jurisdiction of indigenous peoples.
344. Along these lines, an indigenous representative of the Ayuuk people of Oaxaca observed that community authorities are not allowed to hear cases of serious crimes, which

⁵⁷⁷ Presentation by the Association of Indigenous Community Leaders of Suriname - VIDS, at the Regional Meeting on the Right to Self-Determination (Caribbean), May 27, 2021.

⁵⁷⁸ Public Prosecutor's Office - Province of Neuquén, [Historical: agree on the recognition of indigenous justice](#), August 29, 2014.

⁵⁷⁹ Public Ministry of Defense - National Public Defender's Office, Response to the IACHR Questionnaire on the right to self-determination of indigenous and tribal peoples, April 23, 2021.

means that the community people involved have to submit to the ordinary justice system, speak a different language and operate in another culture. Also, in some cases, indigenous authorities have felt intimidated by legal actions that question their decisions and their capacity to impart justice. The communities have had to hire lawyers to deal with these actions⁵⁸⁰.

345. In Guatemala, the Constitutional Court has established that the decisions of indigenous peoples must be respected regardless of the outcome of the decision⁵⁸¹. However, in the face of disagreement with the decisions adopted, community members have filed complaints with the Public Prosecutor's Office, resulting in investigations that do not take into account the legality of the decisions made by the indigenous authorities. On the other hand, regarding the parameters of material, personal, territorial and other competencies established by the Constitutional Court, one concern is that they do not take into account those cases in which community and external persons would be willing to accept the authority of the indigenous justice system and reach a resolution of a matter⁵⁸².
346. The lack of a law of coordination between the special indigenous jurisdiction and the ordinary jurisdiction has been pointed out as a problem in Colombia. There are situations that present conflicts of competence whose resolution is not defined. As explained by representatives of the U'wa people, this lack of clarity arises, for example, when an indigenous person commits a crime outside their ancestral territory.⁵⁸³ They also expressed concern about the need for greater recognition of the decisions of indigenous justice by the operators of ordinary justice, particularly with regard to penalties imposed on their members other than imprisonment, but in accordance with their ancestral concepts of justice.⁵⁸⁴
347. On the United States, the limits imposed on the civil and criminal regulatory jurisdiction of indigenous peoples were reported, particularly as they apply to outsiders within the boundaries of Indian reservations. In recent decades, the Supreme Court has issued rulings that have limited the ability of Indian tribes to exercise jurisdiction over non-Indian persons.

⁵⁸⁰ Representative of the Ayuuk People, Oaxaca, in Meeting of the IACHR with indigenous organizations, authorities and members of government institutions in Mexico for the Report on the right to self-determination, May 7, 2021.

⁵⁸¹ Presentation by Bufete Jurídico Popular de Rabinal - Guatemala, at regional meeting on the right to self-determination (Central America), May 12, 2021.

⁵⁸² Presentation by Bufete Jurídico Popular de Rabinal - Guatemala, at the regional meeting on the right to self-determination (Central America), May 12, 2021.

⁵⁸³ Response of EarthRights International, the Kokonuko, Nasa and U'wa Indigenous Peoples and the Community Council of Black Communities of the Tolo River Basin and Southern Coastal Zone (COCOMASUR) to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples April 26, 2021, pp. 45.

⁵⁸⁴ Response of EarthRights International, the Kokonuko, Nasa and U'wa Indigenous Peoples and the Community Council of Black Communities of the Tolo River Basin and Southern Coastal Zone (COCOMASUR) to the Questionnaire for the Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples April 26, 2021, pp. 45.

indigenous people on their lands, which has resulted in cases of impunity. This has been particularly serious in cases of violence perpetrated by non-indigenous men against indigenous women on indigenous lands⁵⁸⁵. In recent years there have been initiatives to address the gaps in this situation, particularly with respect to violence against indigenous women⁵⁸⁶. *Cooley* (2021) affirmed the right to self-determination of indigenous peoples to ensure the safety and security of their members on Indian reservations. In that case, it ruled that tribal police officers of the Crow Nation in Montana may search and temporarily detain non-Indians traveling on public roads on Indian reservations for possible violations of state or federal law⁵⁸⁷. While this may be considered an advance for the recognition of jurisdiction of indigenous peoples over outsiders who may pose a harm to their members, concerns remain about requirements imposed in other Supreme Court rulings that may present limitations on indigenous jurisdiction in different cases⁵⁸⁸.

348. With respect to Bolivia, the information received indicates that the 2010 Law of Jurisdictional Demarcation, whose purpose is to regulate the mechanisms of coordination and cooperation between the indigenous jurisdiction and the other jurisdictions recognized in the Constitution, has presented problems by limiting the areas of competence of the indigenous jurisdiction, for example, to matters related only to a specific community.⁵⁸⁹ The law also includes a considerable list of matters in which the indigenous jurisdiction may hear matters that have historically and traditionally been heard under their own norms, procedures and knowledge. Although this law provides that the original indigenous peasant jurisdiction can hear matters that the communities have historically and traditionally heard under their own norms, procedures and knowledge, at the same time it includes a considerable list of matters in which it does not have jurisdiction⁵⁹⁰. It can be seen that the exclusion of matters established by said law inhibits the necessary intercultural dialogue to promote a true

⁵⁸⁵ See generally, Amnesty International, *Maze of injustice: The failure to protect indigenous women from sexual violence in the USA*, New York: Amnesty International, 2007.

⁵⁸⁶ IACHR Meeting on Self-Determination of Indigenous Peoples in the United States; First Peoples Worldwide, Outcome Document: Meeting on the Right of Self Determination of Indigenous and Tribal Peoples in the United States, May 17, 2021; and Amnesty International, *Maze of Injustice: A Summary of Amnesty International Findings*, August 8, 2011.

⁵⁸⁷ *United States v. Cooley*, 593 U.S. __ (2021).

⁵⁸⁸ Acee Agoyo, *Supreme Court backs tribal sovereignty in law enforcement case*, Indianz.Com, June 1, 2021.

⁵⁸⁹ Guarani, Mojeño, Uchupiamonas Indigenous Peoples and the Charcas Indigenous Nation, EarthRights International and Bolivian Forum on Environment and Development. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021; Gobierno Autónomo Indígena Originario Campesino Charagua Iyambae, Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021.

⁵⁹⁰ Law 073, *Jurisdictional Demarcation Law*, December 16, 2010. The matters excluded from the material competence of the indigenous jurisdiction include, among others: crimes against international law, crimes against the internal and external security of the State, tax and customs crimes, corruption crimes or any other crime whose victim is the State, human trafficking and smuggling, arms trafficking and drug trafficking crimes, crimes against the bodily integrity of children and adolescents, crimes of rape, murder or homicide, and in civil matters, any process in which the State is a party or interested third party.

legal pluralism⁵⁹¹. Along these lines, indigenous representatives pointed out that the drafting of this law should have been the result of dialogue and consultation with the indigenous peoples so that its provisions would be the product of consensus⁵⁹².

349. On the other hand, the IACHR takes note of the jurisprudence of the Plurinational Constitutional Court of Bolivia, which has reinterpreted said provision in accordance with the international principles of progressive rights and Article 29 of the American Convention, which prohibits any interpretation that limits the enjoyment and exercise of rights recognized in the Convention and in the laws of the States. In accordance with these principles, the Court has ruled that the jurisdictional exclusions of indigenous jurisdiction contained in the Jurisdictional Demarcation Law must be interpreted "in a restrictive and exceptional manner, in order to avoid suppressing the exercise of the right to self-determination of the indigenous native peasant nations and peoples [... and] in order to consolidate the maximum effectiveness and full validity of the principle of self-determination of the indigenous native peasant nations and peoples, an aspect consistent with the postulate of egalitarian plurinationality, with social harmony and respect, the basis of the constitutional order established by the Political Constitution of the State of 2009"⁵⁹³.
350. The Commission agrees that coordination between indigenous and ordinary justice should include the creation of spaces for intercultural dialogue in which to address the matters that the indigenous authorities consider should have jurisdiction and to reach agreements on them before or even instead of their being codified by legislation. In this sense, there should be flexibility in the definition of the areas of competence and the possibility that indigenous jurisdiction is not limited only to events occurring within the territory of a community or that it applies only to members of the same indigenous people or community.⁵⁹⁴ As noted by the former UN Special Rapporteur on indigenous peoples, the capacity of indigenous justice systems to be dynamic and to evolve and adapt to future situations and contexts in accordance with their own social, political and cultural precepts must be recognized⁵⁹⁵. In this

⁵⁹¹ Farit L. Rojas Tudela, "Dimensiones de lo plurinacional," in OEP-TSE/MP-VA/CONAIOC/UNDP, *Diversidad institucional: Autonomías indígenas y Estado Plurinacional en Bolivia*, Bolivia: UNDP 2018, p. 48.

⁵⁹² Guaraní, Mojeño, Uchupiamonas Indigenous Peoples and the Charcas Indigenous Nation, EarthRights International and Bolivian Forum on Environment and Development. Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, April - May 2021.

⁵⁹³ Plurinational Constitutional Tribunal - Bolivia, SCP 764/2014 of April 15, cited in: Farit L. Rojas Tudela, "Dimensiones de lo plurinacional," in OEP-TSE/MP-VA/CONAIOC/UNDP, *Diversidad institucional: Autonomías indígenas y Estado Plurinacional en Bolivia*, Bolivia: UNDP 2018, pp. 48-9.

⁵⁹⁴ UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, "[Human rights, indigenous jurisdiction and access to justice: towards dialogue and cultural respect](#)," Presentation for the International Meeting on Research Techniques on Indigenous Issues - Bogotá, Colombia, February 24, 2016; and Report of the Special Rapporteur on indigenous peoples, James Anaya, [Addendum: Observations on the progress and challenges in the implementation of the guarantees of the Political Constitution of Ecuador on the rights of indigenous peoples](#), A/HRC/15/37/Add.7, September 17, 2010, para. 12.

⁵⁹⁵ United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, "[Human Rights, Indigenous Jurisdiction and Access to Justice: Towards Dialogue and Cultural Respect](#)," Presentation for the International Meeting on Research Techniques on Indigenous Issues - Bogotá,

In this line, the need to exercise jurisdiction can be taken as a criterion when a matter "would significantly affect the cultures, traditional institutions, economic livelihoods, social cohesion, or physical security of an indigenous community or people".

351. Regarding concerns about decisions of indigenous justice systems that could contravene human rights, this also requires an intercultural view of human rights and avoiding undue restrictions on the autonomy of indigenous peoples. The jurisprudence of the Constitutional Court of Colombia has been reported on, which in these types of scenarios has defined some criteria regarding possible limitations to the autonomy and jurisdiction of indigenous peoples. In various cases, the Constitutional Court has highlighted a "hard core" of human rights that must be observed, considering that they are rights on which there is an intercultural consensus. These rights include the legality of the proceedings and of the crimes and sentences imposed, the right to due process and defense, the right to life, the prohibitions of torture, slavery and acts that seriously injure human dignity.⁵⁹⁷ In weighing possible restrictions on the jurisdiction of indigenous peoples, the Constitutional Court has also highlighted the right of indigenous peoples to be free from torture, slavery and acts that seriously injure human dignity. When weighing possible restrictions to the jurisdiction of indigenous peoples, the Colombian Constitutional Court has also emphasized as a rule of interpretation the maximization of autonomy, taking into account that a high degree of autonomy makes possible the cultural survival of an indigenous people, so it must ensure the minimization of restrictions, except for what is indispensable to safeguard the aforementioned human rights, so the least burdensome measure for indigenous autonomy must be adopted⁵⁹⁸.
352. Therefore, in cases in which the decisions of indigenous peoples' authorities are reviewed by the ordinary justice system, the IACHR takes note of the need for an interpretation of universal human rights that incorporates a dynamic and intercultural perspective with respect to the various manifestations of human rights in a context of non-discrimination.⁵⁹⁹ Likewise, with respect to norms or practices within traditional justice systems that could violate human rights, the

Colombia, February 24, 2016; and Report of the Special Rapporteur on indigenous peoples, James Anaya, Addendum: Observations on the progress and challenges in the implementation of the guarantees of the Political Constitution of Ecuador on the rights of indigenous peoples, A/HRC/15/37/Add.7, September 17, 2010, para. 10.

⁵⁹⁶ United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, "Human rights, indigenous jurisdiction and access to justice: Towards dialogue and cultural respect", Presentation for the International Meeting on Research Techniques on Indigenous Issues - Bogota, Colombia, February 24, 2016. .

⁵⁹⁷ See, for example, Constitutional Court of Colombia, Judgment T-973/09, December 18, 2009, Grounds 6.4, 7.1; and Constitutional Court of Colombia, Judgment T-921/13, December 5, 2013, Grounds 4.2.

⁵⁹⁸ Constitutional Court of Colombia, Judgment T-349/96, August 8, 1996; Constitutional Court of Colombia, Judgment T-552/03, July 10, 2003.

⁵⁹⁹ Report of the Special Rapporteur on Indigenous Peoples, James Anaya, Addendum: Observations on the progress and challenges in the implementation of the guarantees of the Political Constitution of Ecuador on the rights of indigenous peoples, A/HRC/15/37/Add.7, September 17, 2010, para. 15.

rights and interests of women, children, persons with disabilities, LGBTI and other vulnerable sectors of the population, the IACHR agrees that changes to these norms and practices must come from the communities and peoples themselves, through joint actions with their authorities, peoples and communities to raise awareness about the importance of human rights, and other issues such as the accountability of decision makers. The promotion of positive changes in this sense must respect the autonomy and integrity of indigenous peoples and avoid practices and attitudes that perpetuate historical discrimination and oppression against their cultures, traditions and ^{rights600}.

6. Food sovereignty, climate change and economic, social, cultural and environmental rights

353. The IACHR emphasizes that another essential element of self-determination is food sovereignty. As noted by a representative of El Salvador, since time immemorial, indigenous peoples have been able to meet their needs, especially food needs, based on their ancestral wisdom and ^{knowledge601}. However, the current reality hinders access to sufficient food in accordance with their own culture, and support is needed to strengthen the self-management capacity of indigenous peoples to ensure their food sovereignty and security. The adoption of the Public Policy for Indigenous Peoples of El Salvador in 2015 has been reported, which aims to promote food sovereignty and security in accordance with the knowledge and wisdom of indigenous peoples, with several lines of action that included agriculture and animal husbandry programs, the promotion of ancestral agricultural products, a network of indigenous farmers for the exchange of native seeds, and the creation of an intercultural solidarity market for the transaction of these products. These important objectives have not yet been ^{realized602}.
354. In this regard, decisive measures are required to address the critical situation faced by the indigenous peoples of El Salvador as a result of the deterioration of their crops caused by climate change, the decrease in access to water, the destruction of homes caused by the hurricane season of 2020, and the COVID-19 pandemic, all of which has aggravated the economic situation and extreme poverty in many indigenous communities. Added to this is the situation of violence in the country and the actions of organized crime that threaten land tenure, as well as energy projects promoted in the territories that at the same time generate a situation of persecution and threats against leaders and people.

⁶⁰⁰ Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, [Indigenous Peoples' Rights and Justice](#), A/HRC/42/37, 2 August 2019, paras. 101, 102, 119,120.

⁶⁰¹ TECHANTIT Organization - El Salvador, Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May 2021.

⁶⁰² TECHANTIT Organization - El Salvador, Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May 2021.

indigenous women ^{defenders}⁶⁰³. This type of situation has forced many indigenous people to migrate, especially to the United States where, in many cases, they live in an irregular migratory situation and face discrimination, racism and ^{labor} exploitation⁶⁰⁴.

⁶⁰³ TECHANTIT Organization - El Salvador, Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May 2021.

⁶⁰⁴ TECHANTIT Organization - El Salvador, Response to the questionnaire on the right to self-determination of indigenous and tribal peoples, May 2021.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

*"I don't quite understand why the State is so afraid of the word self-determination. We do not want to move away from the State, always to dialogue, to respect - always. Always harmony. The peoples are not conflictive, but we will defend ourselves when they want to take away our land, our territory, our water and our wealth. Because for many years we have conserved it, we have taken care of it. We, the native peoples, and the women, are the ones who give our lives for it"*⁶⁰⁵.

355. The Inter-American Commission emphasizes that, in accordance with the international and inter-American standards set forth in this report, the indigenous and tribal peoples of the Americas have the fundamental right to self-determination, which includes the right to freely determine their political status and freely pursue their economic, social and cultural development. Both in international law and in the cultural, social, political and legal conceptions of these peoples, self-determination is an inherent right that is fundamental to the effective enjoyment of other human rights. From the historical and cultural perspectives of these peoples, it is understood as a right that pre-exists the creation of the current American States.
356. The exercise of this right gives rise to different measures and in different contexts, and account must be taken of the current aspirations of these peoples, who seek recognition and protection of their rights within the framework of the current States in which they find themselves. Interpretations of this right that distort the nature of these peoples' aspirations with respect to this right, particularly those that represent self-determination as a threat to the territorial integrity of States, should be avoided.
357. Likewise, the constitutions, legislation, policies and jurisprudence of various States throughout the Americas recognize the right of self-determination of these peoples explicitly or in relation to fundamental elements or aspects of this right, such as autonomy, self-government, recognition of the right to self-determination and the right to self-determination.

⁶⁰⁵ Presentation by representative of CRAC-PC Guerrero Mexico, Meeting of the IACHR with indigenous organizations, authorities and members of government institutions in Mexico for the Report on the right to self-determination, May 5, 2021.

of their representative institutions, systems of justice and jurisdiction, and in relation to their lands and territories, among other issues.

358. The jurisprudence of the Inter-American Human Rights System and various previous IACHR reports have referred to the right of self-determination of indigenous and tribal peoples in relation to other fundamental rights recognized in inter-American human rights instruments, particularly their cultural integrity and identity and their lands, territories and natural resources. The report has also pointed out the interrelationship between self-determination and other rights recognized in international and inter-American instruments and in the jurisprudence of the ISHR, such as self-identification and recognition of legal personality, political and participatory rights, consultation and free, prior and informed consent, as well as in the area of economic, social, cultural and environmental rights.
359. Significant challenges persist in the Americas in the recognition and full enjoyment of self-determination and related rights. Significant gaps exist in terms of compliance with the normative and political frameworks favorable to the rights of indigenous and tribal peoples in various States of the Americas, as well as with the international and inter-American standards set out in this report.
360. Among the main problems repeatedly pointed out is the lack of respect for and recognition of indigenous peoples' representative institutions and their decision-making processes, particularly when there are economic, commercial, political, military or other interests in the lands and territories of indigenous peoples. In this sense, it can be observed that a fundamental problem lies in the opposing and conflicting visions and priorities regarding the control and disposition of the lands and territories inhabited by indigenous and tribal peoples and the natural resources found therein. Hence, the main scenarios of confrontation have revolved around natural resource exploitation projects and divergent interpretations between indigenous peoples and state authorities or other actors on the implementation of consultation and free, prior and informed consent. It is evident that such a situation requires a rethinking of consultation and consent from an approach based on the right to self-determination of indigenous and tribal peoples.
361. Recognition of the self-determination of indigenous and tribal peoples should be understood as a reparative measure in the face of historical and contemporary violations of their rights as differentiated groups with their own cultures, social, political and cultural institutions and their own visions and priorities for development, and who have been excluded from the processes of State constitution and from the definition of the economic, social and other policies of the States. This history of exclusion, discrimination and serious violations of the human rights of these peoples must be recognized by the States in order to take decisive measures to protect these peoples and their cultures, the lives and integrity of their members, their lands, territories and natural resources, their right to free, prior and informed consultation and consent, and their right to self-determination.

362. Another considerable obstacle to the full enjoyment of self-determination and other human rights of indigenous and tribal peoples is the situation of violence they face as a result of the presence and invasion of their lands by third parties, whether they are involved in logging, mining, cattle ranching or drug trafficking activities. Situations of armed conflict, or in other cases its aftermath, continue to be sources of serious risk and threat to the physical and cultural survival of these peoples in various countries of the continent, hindering the enjoyment of their rights to their lands, territories, spirituality, cultural practices and freedom from discrimination. This is particularly serious when situations of violence, threats and death affect leaders and other persons of leadership in the social, cultural and spiritual life of their peoples or communities. Of equal concern is the stigmatization and criminalization of authorities and members of the peoples in the context of the defense of their territories, which has a differentiated impact on the women of these peoples.
363. On the other hand, indigenous and tribal peoples face serious challenges in the full enjoyment of their economic, social, cultural and environmental rights. Structural inequalities in access to health, education, water and the precariousness of their food security or sovereignty in many cases have been aggravated by the HIV/AIDS pandemic, which has had a differentiated and disproportionate impact on these peoples.
364. The individual and collective rights of indigenous and tribal peoples in the civil, political, economic, social, cultural and environmental spheres are closely linked to and depend on their effective enjoyment of their lands, territories, natural resources, their own social, cultural and political institutions, and their self-determination.
365. Based on the information and analysis conducted by the Commission throughout this report, and in order to contribute to the protection of the human rights of indigenous and tribal peoples in the region in relation to the right to self-determination, the Inter-American Commission on Human Rights recommends to the American States:
1. Adopt measures to guarantee the right of indigenous and tribal peoples to exercise self-determination in a practical and effective manner within the framework of their own procedures, institutions and worldviews.
 2. Adopt or reinforce the necessary measures for the recognition and functioning of the representative institutions of said peoples, including in the areas of self-government, autonomy, administration of justice, territorial and natural resource management, and other areas that said peoples consider pertinent. Likewise, to provide the financial and other resources necessary for their operation.
 3. Ensure that the procedures established for the recognition and operation of such structures are agile, simple and effective. Likewise, to evaluate, in consultation and coordination with said peoples, the changes or adaptations to the internal political-administrative divisions.

that may be necessary for the real functioning of the autonomous areas of these villages.

4. Promote and/or renew opportunities for dialogue and consultation with indigenous and tribal peoples to address various human rights issues and concerns in accordance with international and inter-American standards on the rights of these peoples.
5. Adopt, in consultation and coordination with indigenous and tribal peoples, the necessary measures so that, within the domestic legal systems of the States, these peoples may effectively and collectively exercise their rights and assert them before State institutions.
6. Promote spaces for intercultural dialogue and coordination between authorities of these peoples and the States, with respect to:
 - a. Coordination and cooperation between indigenous and tribal justice authorities and the national justice system, and agreement on issues such as jurisdictional competencies in the material, personal and territorial aspects, in line with the observations made in *supra* Chap. 4.C.5.
 - b. Where appropriate, recognition of and coordination and cooperation with the peoples' own institutions, such as traditional guards, community police and other similar institutions established for the defense, security, protection and administration of traditional justice in their territories, especially in areas with little state presence.
 - c. Mechanisms for the direct participation of indigenous and tribal peoples, through their own representative structures, in decision-making spaces at the national level for the definition of policies, programs and other measures related to matters of national interest.
 - d. The definition of economic development policies, plans and programs that take into account and give preeminence to the life plans, priorities and proposals of indigenous and tribal peoples for their economic development. Likewise, to facilitate the financial and other necessary mechanisms so that these peoples can undertake their own economic initiatives.
 - e. The definition of policies and programs in the areas of bilingual and intercultural education, intercultural health, food sovereignty, housing, access to water and access to other basic social services.
 - f. The definition of policies and programs for the mitigation of the impacts of climate change, taking into account the impacts of climate change.

and tribal peoples, and their own proposals for dealing with these impacts.

- g. Ensure the participation of indigenous and tribal peoples through their authorities and representative entities in the formulation and implementation of public policies and other measures aimed at prevention and medical care in the context of the COVID- 19 pandemic, in order to guarantee culturally relevant health care in their traditional languages and with a focus on protecting their lives, integrity and territories.
7. Ensure a regulatory, political and institutional framework that guarantees indigenous and tribal peoples the resolution of their claims related to access to and recognition of their territorial rights.
8. Establish effective mechanisms for the delimitation, demarcation, titling and regulation of their lands and territories, in accordance with the standards and jurisprudence of the Inter-American System⁶⁰⁶. This includes protection measures against the actions of third parties that affect their lands, territories and natural resources.
9. Adopt binational or regional measures for the joint protection of the rights of indigenous and tribal peoples divided by state borders, based on the respect and guarantee of the right to self-determination, the right to their lands, territories and resources, the right to health, cultural identity, and the right to participation, consultation and free, prior and informed consent of the affected peoples⁶⁰⁷.
10. Implement the recommendations made by the IACHR in its Report on Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights. In particular, strengthen the protection of the lands and territories of indigenous peoples in voluntary isolation and initial contact, through effective regulatory and institutional frameworks and with the necessary budgets for this purpose. Based on respect for self-determination, the principle of no contact, and the criteria of precaution and caution to guarantee the physical and cultural survival of these peoples:
 - a. Guarantee the intangibility of the territories of peoples in isolation, including the establishment of specific reserves, territorial corridors, oversight mechanisms and prohibition of

⁶⁰⁶ See in this regard, IACHR. [Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System](#). OEA/Ser.L/V/II.Doc.56/09, December 30, 2009; I/A Court H.R., Case of the Garifuna Community of Punta Piedra and its members v. Honduras, Judgment of October 8, 2015, paras. 162-202; I/A Court H.R., [Case of Indigenous Communities Members of the Lhaka Honhat Association \(Nuestra Tierra\) v. Argentina](#). Judgment of February 6, 2020, Series C No, 400, paras. 92-98, 326-329.

⁶⁰⁷ IACHR. [Situation of the human rights of the indigenous and tribal peoples of Panamazonia](#). OAS/Ser.L/V/II. (29 September 2019), para. 419.1.

- the presence of outsiders and the granting of rights in favor of activities that represent a threat to these peoples.
- b. Establish prevention and containment measures, sanitary cordons and other surveillance and epidemiological care measures.
 - c. Address the differentiated risk situations faced by peoples in isolation and peoples in a situation of initial contact, in order to guarantee the protection of their health, territories and self-determination. Likewise, consideration should be given to those situations that would require binational or regional protection measures.
11. Guarantee respect for the autonomous decisions of indigenous and tribal peoples regarding their territories without any kind of interference or pressure from agents or organs of the State or private entities. In this sense, respect their priorities and particular conceptions about development, the use and management of lands and natural resources, and the measures they deem necessary to realize their economic, social, cultural and environmental rights.
 12. Implement consultation and free, prior and informed consent on legislative and administrative measures or projects for the development or exploitation of natural resources that could affect the rights of these peoples from the perspective of their right to self-determination. Therefore, it is recommended:
 - a. Promote the respect, recognition and application of these peoples' own protocols for consultation and relations, or other mechanisms or initiatives for the implementation of consultation and free, prior and informed consent.
 - b. Comply with international and Inter-American standards in the consultation processes carried out⁶⁰⁸, respecting the representative authorities of said peoples, and providing in a prior, accessible, culturally and linguistically appropriate manner all the necessary information on the impacts of a measure in all its dimensions, among other elements, in order to obtain their free, prior and informed consent.

⁶⁰⁸ See in this regard, IACHR. [Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System](#). OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, paras. 273-334; IACHR. [Indigenous peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extractive and development activities](#). OEA/Ser.L/V/II.(31 December 2015), paras. 172-224. IACHR Court. [Case of the Kichwa Indigenous People of Sarayaku v. Ecuador](#). Merits and Reparations. Judgment of June 27, 2012, paras. 159- 220.

- c. Respect and recognize the decisions made by the peoples concerned regarding the granting or withholding of their consent to measures or activities that may affect their human rights.
13. Guarantee effective and accessible mechanisms of justice and redress for violations of the rights of indigenous and tribal peoples, through means that may include restitution or, when this is not possible, just and fair compensation for lands, territories, and resources traditionally owned or occupied or used by them that have been confiscated, taken, occupied, used, or damaged without their free, prior, and informed consent. Such compensation shall consist of lands, territories and resources of equal quality, extent and legal status or monetary compensation or other appropriate redress⁶⁰⁹. Such reparations measures must be agreed and consensual with the peoples concerned.
 14. Establish effective and accessible mechanisms for justice and reparation in cases of aggressions, threats, assassinations and other violations against the life and integrity of members, persons in leadership positions and defenders from these peoples. Likewise, undertake effective investigation and sanction processes, with a focus on cultural and intersectional relevance and that address the underlying causes of risk, and include investigations of perpetrators and masterminds.
 15. Establish protection mechanisms and schemes for leaders and defenders from these peoples who are at risk due to their work in defense of their lands, territories and other rights. In this sense, these measures should be agreed upon with the beneficiaries and their respective communities or peoples, ensuring a gender, ethnic and differential approach and taking into account geographical and collective aspects that these measures should have. Likewise, incorporate the participation of the community security mechanisms that the peoples concerned may have.
 16. Incorporate gender, intercultural and intergenerational solidarity approaches in the actions taken to implement the recommendations in this report.
 17. In conjunction with indigenous and tribal peoples, adopt measures aimed at recognizing, strengthening and promoting the key role of indigenous and tribal women in the exercise of the right to self-determination that may affect their peoples.
 18. Generate spaces for coordination between state justice systems and indigenous and tribal justice systems to incorporate a gender and intercultural perspective in order to increase judicial protection for women.

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United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 13, 2007, art. 28.

indigenous and tribal women when they suffer human rights violations. These spaces should promote the participation of indigenous and tribal women in the justice administration systems and in the reparations approach⁶¹⁰.

⁶¹⁰ IACHR. Indigenous women and their human rights in the Americas. OEA/Ser.L/V/II. Doc.44/17, 2017, paras. 231.3.