

BRAZIL and THE URGENT NEED TO PROTECT AND PROMOTE THE LAND RIGHTS OF INDIGENOUS PEOPLES

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INTRODUCTION

I would like to thank the Brazilian Federal Prosecution Service, the Conselho Indigenista Missionário (CIMI), Instituto Socioambiental (ISA), Articulação dos Povos Indígenas do Brasil (APIB) and Plataforma Dhesca Brasil for the invitation to participate in this important Seminar.

I have been asked to address the rights of indigenous peoples to their traditional lands and the International System of Human Rights Protection. In this presentation, I will address the relevant significant international commitments that Brazil has made; address some of the more recent developments, including the Sustainable Development Goals, which may have the potential to advance the rights and interests of Brazil's Indigenous peoples at the international level.

As Indigenous peoples successfully argued at the international level, their land rights are grounded in the profound relationship that they have to their lands, territories and resources. This deep, spiritual relationship to their territories has long been recognized and has numerous interrelated, indivisible and interdependent dimensions for the exercise of all their other human rights.

For example, the language of my people, the Inuit, has been recognized to contain intricate knowledge “sea ice that we’ve seen no others demonstrate” – this speaks volumes about our culture, intellectual property, our relationship to the ocean and sea ice, our food security, our physical health and mental well-being, our distinct kinship patterns, our responsibilities to one another and to future generations, and many other elements of our characteristics as Arctic Indigenous peoples. Indeed, the 2007 UN Declaration on the Rights of Indigenous Peoples affirms that

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”¹

There are important, solemn legal obligations that have been undertaken by Brazil in relation to the individual and collective human rights of the Indigenous peoples of Brazil. Brazil is obligated, by its own legal commitments in international human rights treaties, to recognize and protect indigenous peoples' rights to lands and resources. In addition, customary international law requires Brazil to uphold these rights apart from its treaty commitments.

1 Article 25, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007), Annex (*UN Declaration*).

As everyone present knows, your Constitution guarantees the fundamental rights of Indigenous peoples to the lands they have traditionally occupied and the need to ensure respect for all their property (article 231).

In contemporary international law, the right to property includes the rights of indigenous peoples to their traditional lands and natural resources. Brazil has acceded to numerous international treaties, including the International Covenant on Civil and Political Rights,² International Covenant on Economic, Social and Cultural Rights,³ the Convention on the Elimination of All Forms of Racial Discrimination,⁴ the Convention on the Rights of the Child,⁵ and the Charter of the Organization of American States,⁶ all of which have been authoritatively interpreted to require states to respect the rights of indigenous peoples over their lands and resources. In addition, customary international law requires Brazil to uphold these rights apart from its affirmative commitments under international treaties.

REGIONAL COMMITMENTS

Regarding Brazil's treaty obligations, *on a regional basis*, as a member of the Organization of American States and a party to its foundational treaty, the OAS Charter, Brazil is obligated to respect and protect the human rights affirmed in the American Declaration on the Rights and Duties of Man.⁷ This obligation has been well established by the Inter-American human rights

² International Covenant on Civil and Political Rights (ICCPR), arts. 1(2), 17, 23, 27, 16 December 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171. In this regard, the Human Rights Committee has stated: 1. Brazil, CCPR/C/BRA/CO/2, 1 December 2005 6. The Committee is concerned about the slow pace of demarcation of indigenous lands, the forced evictions of indigenous populations from their land and the lack of legal remedies to reverse these evictions and compensate the victimized populations for the loss of their residence and subsistence (arts. 1 and 27). The State party should accelerate the demarcation of indigenous lands and provide effective civil and criminal remedies for deliberate trespass on those lands.

³ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 23 April 2017]. In this regard, the corresponding Committee has stated "The Committee is concerned at the slow progress in the land reform process notwithstanding the Constitutional rights to property and self-determination, as well as the enactment of legislation to facilitate the demarcation of land belonging to the indigenous peoples, the State party's adoption of the UN Declaration on the Rights of Indigenous Peoples (2007) and its ratification of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. (art. 1.1) The Committee recalls the recommendation made in its concluding observations on the State party's initial report in this regard and recommends that the State party expeditiously complete the process of demarcation and allocation of indigenous land in accordance with the Constitution and existing laws." 2. Brazil: E/C.12/BRA/CO/2, 22 May 2009

⁴ International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention), 4 January 1969, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195.

⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 23 April 2017]. Here too, the corresponding Committee has addressed Indigenous land rights in Brazil. See e.g. Brazil, CRC/C/BRA/CO/2-4, 30 October 2015, para. 66 recommending that Brazil "Expediently end illegal mining activities, particularly in the Tapajos-Xingu area, and design and implement measures to mitigate the negative effect of these activities and those related to the construction of the Belo Monte dam on the rights of indigenous children and their families; see also Brazil, CRC/C/BRA/CO/2-4, 30 October 2015, para 79(d) expressing concern about the delay in the demarcation of indigenous peoples land and how this has negatively impacted indigenous children.

⁶ Charter of the Organization of American States, 13 December 1951, 119 U.N.T.S. 3.

institutions, which have been endowed with authority by states to promote human rights throughout the OAS system.⁸

Article XXIII of the American Declaration affirms the right to property. The Inter-American Commission on Human Rights has held that customary indigenous land tenure constitutes property that is protected by Article XXIII, and hence by the OAS Charter.

The Inter-American Commission on Human Rights has also recognized that the right of indigenous peoples to lands and resources should be viewed in light of their right to cultural protection, noting that “[i]t has been the Commission’s longstanding view that the protection of the culture of indigenous peoples encompasses the preservation of ‘the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.’”⁹

The Inter-American Commission on Human Rights has held that customary indigenous land tenure constitutes property that is protected by Article XXIII and hence, by the OAS Charter. In the case of the Maya people of Belize the Commission provided

Are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state’s formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition.

Also, in the *Awas Tingni v. Nicaragua* case, the International Court of Human Rights affirmed that

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not

⁷ *Ibid.* art. 17 (“Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, *the State shall respect the rights of the individual and the principles of universal morality.*”), art. 3(1) (“The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex”), and preambular paragraph 4 (“Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man”). See *Reg. v. Reyes* [2002] UKPC 11 para. 27 (“By becoming a member of the Organization of American States Belize proclaimed its adherence to rights which, although not listed in the charter of the Organization, are expressed in the Declaration.”).

⁸ Statute Of The Inter-American Commission On Human Rights, G.A. Res. 447, Inter-Am C.H.R., 9th Sess. (1979), 22 May 2001, OAS/Ser.L/V/II.4 rev.8, , art. 18 Empowering the Commission to develop awareness, write reports and make recommendations to OAS member States in matters of human rights; art. 20 Empowering the Commission to monitor compliance with the American Declaration by States not party to the American Convention on Human Rights, to examine communications concerning violations of the Declaration and make recommendations to the state.

⁹ *Maya Indigenous Cmty. of Toledo Dist. v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev., para. 117 (2004), para. 120.

merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

Specifically, in relation to the rights of Indigenous peoples in Brazil, the Commission granted precautionary measures in favor of the Xingu River Basin of Pará in Brazil in the context of the impacts of the Belo Monte hydroelectric power plant.¹⁰

INTERNATIONAL COMMITMENTS

At the international level, Brazil is a member of the United Nations and a party to the UN Charter, which affirms as a key purpose of “promoting and encouraging respect for human rights.”¹¹ This aim has been complemented by a rigorous human rights regime of diverse international human rights instruments and corresponding treaty bodies to provide oversight of state compliance with their international legal obligations and to address human rights violations.

In this regard, member state ratification of the core human rights instruments and their unfortunate history of human rights violations specifically in relation to Indigenous peoples has prompted several treaty bodies to address such state behavior.

Brazil has ratified the International Covenant on Civil and Political Rights,¹² which affirms the rights of indigenous peoples to their lands and resources as part of their right to their own means of subsistence and their right to protection of their cultural integrity. Twin Article 1 of the Covenant affirms for all peoples the right of self-determination, control of their own resources, and access to their means of subsistence.¹³ The UN Human Rights Committee, responsible for oversight and compliance, has held that “the right to self-determination requires, *inter alia*, that

10 PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> April 1, 2011.

On April 1, 2011, the IACHR granted precautionary measures for the members of the indigenous communities of the Xingu River Basin in Pará, Brazil: the Arara of Volta Grande do Xingu; the Juruna of Paquiçamba; the Juruna of “Kilómetro 17”; the Xikrin of Trincheira Bacajá; the Asurini of Koatinemo; the Kararaô and Kayapó of the Kararaô indigenous lands; the Parakanã of Apyterewa; the Araweté of the Igarapé Ipixuna; the Arara of the Arara indigenous lands; the Arara of Cachoeira Seca; and the Xingu Basin indigenous communities in voluntary isolation. Further, on July 29, 2011, during its 142nd regular session, the IACHR evaluated Precautionary Measure 382/10. The IACHR requested that the State: 1) Adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities in voluntary isolation and to protect the cultural integrity of those communities, including effective actions to implement and execute the legal/formal measures that already exist, as well as to design and implement specific measures to mitigate the effects the construction of the Belo Monte dam *will have on the territory and life of these communities in isolation*...; and 3) Guarantee that the processes still pending to regularize the ancestral lands of the Xingu Basin indigenous peoples will be finalized soon, and adopt *effective measures to protect those ancestral lands against* intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources....

11 U.N. Charter, art. 1(3) (“The purposes of the United Nations are ... to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all ...”), art. 55(c) (“...the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all...”)

12 ICCPR, supra note 2. Ratifications at <http://www.ohchr.org/english/law/ccpr-ratify.htm>.

13 ICCPR, supra note 2, art. 1(1).

all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.”¹⁴ Furthermore, Article 27 provides

In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹⁵

In this regard, the Committee has confirmed that “the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”¹⁶ and further acknowledged that

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.¹⁷

Furthermore, the Committee has confirmed that states should take affirmative measures to protect those aspects of culture that are important to a group’s identity, including, in the case of indigenous peoples, aspects related to lands and resources.¹⁸

Brazil has also ratified the International Covenant on Economic, Social and Cultural Rights and Article 1 is the twin of that found in the ICCPR. In 2009, the Committee on Economic, Social and Cultural Rights in relation to Brazil has commented upon “the slow progress in the land reform process” and “enactment of legislation to demarcate” lands of Indigenous peoples.¹⁹

14 U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, paras. 8-11, U.N. Doc. CCPR/C/79/Add.105 (7 April 1999) cautioning Canada to correct its behavior to uphold the rights of indigenous peoples in manner consistent with this principle. See also *UN Declaration*, arts. 3, 4, 20, June 29, 2006; and *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO C169), art. 14.1, 7 June 1989, 28 I.L.M. 1382; and now *American Declaration on the Rights of Indigenous Peoples*, Res. AG/doc.5537, adopted without vote by Organization of American States, General Assembly, 46th sess., Santo Domingo, Dominican Republic, 15 June 2016 (*American Declaration*), arts III, XXI, XXV, and XXIX.

15 ICCPR, *supra* note 3, art. 27.

16 Chief Bernard Ominayak and the Lubicon Lake Band v. Canada, para. 32.2, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

17 U.N. Human Rights Comm., *General Comment No. 23(50): The Rights of Minorities (Art. 27)*, para. 7, UN Doc. CCPR/C/21/Rev.1/Add.5 (6 April 1994).

18 *Ibid.* paras. 6.1-6.2, 7.

19 See *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/BRA/CO/2, 22 May 2009 “The Committee is concerned at the slow progress in the land reform process notwithstanding the Constitutional rights to property and self-determination, as well as the enactment of legislation to facilitate the demarcation of land belonging to the indigenous peoples, the State party’s adoption of the UN Declaration on the Rights of Indigenous Peoples (2007) and its ratification of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, art. 1.1. The Committee recalls the recommendation made in its concluding observations on the State party’s initial report in this regard and recommends that the State party expeditiously complete the process of demarcation and allocation of indigenous land in accordance with the Constitution and existing laws.”

The United Nations Committee on the Elimination of All Forms of Racial Discrimination, which is mandated to monitor compliance with the Convention, has confirmed that the failure of states to recognize and respect indigenous customary land tenure is a form of racial discrimination incompatible with the Convention, and hence it has issued a call upon states

to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.²⁰

Brazil has explicit obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,²¹ which is the subject of the Committee's oversight. And, though the treaty requires states to take measures to eradicate all manifestations of racial discrimination wherever they exist, including with regard to property, the government of Brazil has been cited for violations in relation to treatment of Indigenous peoples in Brazil, including an Early Warning/Urgent Action and Follow Up Procedures.²² And, finally, under the Universal Periodic Review process, Brazil has been consistently questioned about its human rights obligations toward Indigenous peoples.

20 U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXIII: Rights of Indigenous Peoples*, para. 5, U.N. Doc. A/52/18 Annex V, 18 August 1997.

21 CERD Convention, *supra*, note 4.

22 Venezuela, CERD/C/VEN/CO/19-21, 23 September 2013 in context of Amazon region, the Committee stated "The Yanomami people 16. Despite the State party's efforts to protect the peoples of the Amazon region, the Committee is concerned about the situation of the Yanomami people, particularly in view of the presence of illegal miners and their attacks on members of the indigenous communities living in this region (arts. 5 (b) and 6). The Committee urges the State party to increase the protection afforded to the indigenous peoples living in the Amazon region and recommends that it conduct a thorough investigation into violent attacks by illegal miners against members of the Yanomami people. The Committee urges the State party to take into account the guidelines on the protection of indigenous peoples in voluntary isolation and initial contact in the Amazon Basin, El Chaco and the Eastern Region of Paraguay, as adopted following consultations organized by the Office of the United Nations High Commissioner for Human Rights in the region of the Plurinational State of Bolivia, *Brazil*, Colombia, Ecuador, Paraguay, Peru and the Bolivarian Republic of Venezuela." In addition, see Raposa Serra do Sol **Brazil, 31/05/2010 (Urgent Action)** addressing removal of indigenous peoples from their lands, violence against Indigenous peoples and FPIC; and later B. **Early Warning/Urgent Action and Follow Up Procedures 1. Brazil, 11/03/2011 (UA/EW)** The committee welcomes the responses provided in the Permanent Missions note verbale dated 23 August 2012 and takes note with satisfaction of the ruling of the federal Supreme Court of 19 March 2009 which reaffirmed recognition of the rights of the indigenous people to their traditional lands and upheld the constitutionality of the demarcation of the Raposa Serra do Sol indigenous land, as well as the administrative procedures applied. The Committee also welcomes the reorganization of the FUNAI through decree 7056/2009 of December 2009 aimed at strengthening participatory management and at prioritizing the role of the indigenous peoples in the decisions affecting them. 17. **Brazil, 28/09/2009 (Urgent Action):** In this regard, the Committee welcomes the decision of the Federal Supreme Court on the demarcation of Raposa, which allows the Government to complete the removal of non-indigenous trespassers. The Committee would urge the State party to continue its positive steps and ensure careful implementation of this decision so as to avoid any negative repercussions. 6. **BRAZIL, 07 MARCH 2008 URGENT ACTION (LETTER)** Recalling the previous letters of the chairperson of the Committee on the Elimination of Racial Discrimination (CERD), I write to inform you that at its 72nd session (18th February to 7th March 2008), the Committee considered further the situation of the Macuxi, Wapichana, Taurepang, Ingaricó and Patamona peoples in the Indigenous Land of Raposa Serra do Sol (RSS) of the State of Roraima, Brazil, in light of the responses provided by the Brazilian Government and of information from non-governmental organizations; 2006; 2004; and 49. **Brazil: 27/09/96. CERD/C/304/Add.11**

In relation to special procedures, the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People as recently as 2016 has addressed land rights concerns of Indigenous peoples, including those of Brazil.²³ Furthermore, the Special Rapporteur in the Field of Cultural Rights, during a 2010 mission to Brazil, acknowledged the linkage between land rights disputes and particular socioeconomic conditions, such as poverty, suicide, malnutrition and other forms of violence adversely impacting Indigenous peoples in the Mato Grosso do Sul.²⁴

In addition, the Working Group on the issue of human rights and transnational corporations and other business enterprises has also substantively commented on the impacts of large scale development projects, including hydropower plants and mines.²⁵

Clearly, Brazil's ratification of International Labor Organization Convention No. 169²⁶ is germane to the topic at hand. As noted above, there is a clear synergy between land rights²⁷ and all other Indigenous human rights. In this way, Convention No 169 affirms that recognition of the "particular significance and cultural and spiritual values that indigenous peoples attach to their lands and territories, which go far beyond their simple monetary or productive value."²⁸ There are a range of protections that complement the affirmation of Indigenous land rights in the ILO C169, including prevention of intrusion and dispossession. It is common knowledge that Brazil has had a long history of scrutiny of their behavior in relation to their international, legally binding obligations under ILO C169.²⁹

23 United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Victoria Tauli-Corpuz, A/HRC/33/42/Add.1 Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil, referenced "in the eight years since the visit of the previous mandate holder, there has been a disturbing absence of progress in the implementation of his recommendations and the resolution of long-standing issues of key concern to indigenous peoples. The Special Rapporteur noted a worrying regression in the protection of indigenous peoples' rights. In the current political context, the threats facing indigenous peoples may be exacerbated and the long-standing protections of their human rights may be at risk."

24 United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Victoria Tauli-Corpuz, Mission to Brazil (8-19 November 2010), A/HRC/17/38/Add.1, 21 March 2011 71. During her visit, the independent expert visited Guaraní indigenous peoples in Mato Grosso do Sul State in the proximities of Dourados and Campo Grande. Two contrasting trends were observed in situ by the independent expert. On the one hand, she observed and interacted with Guaraní communities involved in ongoing land rights disputes. State interventions reported in these communities include the provision of subsidies for families to alleviate poverty and specific subsidies for the elderly. Nevertheless, the community reportedly suffers high rates of suicide and school drop-out, malnutrition, domestic and other forms of violence and alcoholism, together with a lack of self-esteem and the systematic loss of cultural identity.

25 See A/HRC/32/4/Add.1, 12 May 2016.

26 ILO C169, supra note 14, Ratifications at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314

27 ILO C169, articles 7, 15, 17

28 Indigenous peoples' rights to lands, territories, and resources, Birgitte Feiring, International Land Coalition, at <http://www.landcoalition.org/en/resources/ilc-publishes-study-indigenous-peoples-rights-lands-territories-and-resources>, p 17.

29 See most recent communications: Observation (CEACR) - adopted 2015, published 105th ILC session (2016) Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Brazil (Ratification: 2002); REPRESENTATION (article 24) - BRAZIL - C169 - 2009 Union of Engineers of the Federal District (SENGE/DF) originating in 2005 at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507317,en:NO;

To be sure, one of the most important results of Indigenous peoples' engagement with the UN was the adoption of the *Declaration on the Rights of Indigenous Peoples* on September 13, 2007 by the General Assembly. The *UN Declaration* is a comprehensive international human rights instrument that affirms the distinct status and human rights of the world's Indigenous peoples, including those within Brazil. Article 43 affirms that the norms embraced by the *UN Declaration* constitute "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

Among other inter-related human rights, the operative provisions of the *UN Declaration* affirm that Indigenous peoples have the right of self-determination as well as "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Also, protection of environmental integrity, the right to culture, subsistence, and a host of many other rights are explicitly affirmed in the *UN Declaration*.

Furthermore, UN member state support for this human rights instrument has recently been reiterated in no less than three additional General Assembly resolutions.³⁰ It must be emphasized that with the adoption of the UN Declaration, the ILO has pronounced that C169 must now be read as mutually reinforcing and complementary to the UN Declaration.³¹

CUSTOMARY INTERNATIONAL LAW

According to the Statute of the International Court of Justice, customary international law is one source of international law.³² In contrast to legal obligations that arise from international treaties, customary international law results from a general, consistent or established practice of states that they follow from a sense of legal obligation. Indeed, in some cases, it was based on the consistent practice of states that Indigenous peoples were able to successfully argue for inclusion of particular articles of the *UN Declaration*. For example, numerous states, well before the adoption of the *UN Declaration*, affirmed the rights of Indigenous peoples to their lands, as well as the collective dimension of such rights. These distinct rights reflect well-established and widespread state practice in relation to Indigenous peoples. Therefore, as a source of

and others.

30 General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/71/178 (19 December 2016) (without a vote), preamble: "Reaffirming the United Nations Declaration on the Rights of Indigenous Peoples, which addresses their individual and collective rights". See also General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble. General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, para. 3: "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples".

31 The International Labour Organization did not consider the right to self-determination when it negotiated the ILO C169. The ILO felt it did not have the mandate to consider self-determination and left it to the UN. Thus, C169 should now be interpreted together with *UN Declaration on the Rights of Indigenous Peoples*. See for example the UN-Indigenous Peoples' Partnership (UNIPP), "For democratic governance, human rights and equality", Multi-Donor Trust Fund, Terms of Reference ILO, OHCHR, UNDP, Framework Document, 15 February 2010, at 4: "With the adoption of the UN Declaration, the international normative framework regulating the protection of the rights of indigenous peoples has been firmly strengthened. The [*Indigenous and Tribal Peoples Convention, 1989*], is fully compatible with the UN Declaration on the Rights of Indigenous Peoples and the two instruments are mutually reinforcing."

32 Article 38(1)(b), [Statute of the International Court of Justice](#).

international law, human rights standards of a customary international law nature create legally binding obligations upon states.

According to both the International Law Association and the former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, the *UN Declaration* does in fact include such customary international norms. Both the ILA and Anaya have asserted that although the whole of the *Declaration* cannot be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to *established principles of general international law*, therefore implying the existence of equivalent and parallel international obligations to which states are *bound* to comply. Therefore, it is indisputable that “customary norms concerning Indigenous Peoples and their pull toward compliance”³³ are a reality in the context of the contemporary international legal order. In this way, the UN Declaration has diverse legal effects.

It is also important to underscore that the *Declaration* affirms the inherent³⁴ human rights of Indigenous peoples. It does not create new rights. The *UN Declaration* is “an interpretative document that explains how the existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights”.³⁵ Former Special Rapporteur on the rights of Indigenous peoples James Anaya has concluded:

... the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a **contextualized elaboration** of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.³⁶

The Inter-American Commission on Human Rights has also held that “general international legal principles” applicable inside and outside of the Inter-American system, include the following:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources that they have historically occupied; and
- where property and use rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and recognition that such title may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also

33 Anaya, S. James. (2004). *Indigenous Peoples in International Law*, 2nd ed.

34 *UN Declaration*, supra note 1, 7th preambular para.

35 James Y. Henderson, “A snapshot in the journey of the adoption of the UN Declaration on the Rights of Indigenous Peoples”, *Justice as Healing*, Newsletter, Native Law Centre, University of Saskatchewan, vol. 13, No. 1, 2008, at 2-3.

36 Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9 (11 August 2008), para. 86.

implies the right to fair compensation in the event that such property and user rights are irrevocably lost.

Significantly, the *UN Declaration* includes six provisions that explicitly comprise the normative standards related to free, prior and informed consent, some of which are tied directly to the matter of land rights.³⁷ Such provisions include to forcible removal [Article 10]; lands, territories and resources [Article 28(1)] taken without the free, prior and informed consent of Indigenous peoples; Articles 19 and 32 make a clear connection between the duty of states to “*consult and cooperate in good faith with the indigenous peoples...in order to obtain their free, prior and informed consent*” in legislative and administrative matters [Article 19] and in the approval of projects affecting the lands, territories and resources of Indigenous peoples [Article 32], respectively. In addition, other *UN Declaration* provisions trigger the need for “consent” of the Indigenous peoples concerned where “free, prior and informed consent” is not explicitly referenced.³⁸

Because of the reality of historical and ongoing contention between states and Indigenous peoples specifically over lands, territories and resources and the abuse of Indigenous Peoples rights related to forced development or the exercise of development by others, namely colonial forces and powers, the part of the *UN Declaration* concerning lands, territories, and resources is one of the most essential cluster of rights. Furthermore, Article 32(1) affirming that Indigenous peoples have the right to determine and develop strategies for the development or use of their lands, territories and other resources. In accordance with Article 32(2), states must consult and cooperate with Indigenous peoples to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly about the development, utilization or exploitation of mineral, water or other resources.

RECENT DEVELOPMENTS

Turning to recent developments, I would like to briefly mention the adoption of the American Declaration on the Rights of Indigenous Peoples and the adoption of the Sustainable Development Goals as two recent obligations that the government of Brazil must now adhere to. I will not provide a full analysis of these two developments, but rather make a few points about these two new instruments.

The *American Declaration on the Rights of Indigenous Peoples* was adopted by consensus in June 2016 by the member states of the Organization of American States.³⁹ Indigenous peoples in the Americas now have two declarations that specifically affirm and elaborate upon their human rights and related State obligations. The new *American Declaration* includes some provisions that fall below the standards in the *UN Declaration on the Rights of Indigenous Peoples* and other provisions that go beyond. In addition, both Declarations include provisions that the other does not have. In my view and that of other legal scholars, in any particular situation, the minimum standard is the one that is *higher* in these two human rights instruments.

³⁷ *UN Declaration*, supra note 1, articles 10, 11, 19, 28, 29 and 32.

³⁸ Without specifically referring to FPIC, numerous provisions in the UN Declaration contain phrases or words that can entail a need for Indigenous peoples' "consent". Such terms include: "in conjunction with", "in consultation and cooperation with", "control" and "treaties, agreements and other constructive arrangements".

³⁹ *American Declaration*, supra note 14.

Section Five of the *American Declaration* is entitled Social, Economic and Property Rights and affirms the collective rights of Indigenous peoples to “the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and affirms the special relationship that Indigenous peoples have with their lands. Furthermore, the *American Declaration* addresses Indigenous peoples in voluntary isolation or initial contact⁴⁰ among other interrelated human rights.

SUSTAINABLE DEVELOPMENT GOALS

At the global level, the international community has taken the lead in crafting sustainable development strategies and approaches that have gained widespread support. Over the years, the United Nations has adopted by consensus key instruments that have contributed to a more robust strategy for sustainable development. The most significant instrument to date is *Transforming Our World: The 2030 Agenda for Sustainable Development*.⁴¹ Though sustainable development existed in international law prior to the 2030 Agenda, on January 1, 2016, the 17 Sustainable Development Goals of the 2030 Agenda came into force. Along with such Goals, there are 169 associated targets. States resolved:

between now and 2030, to *end poverty and hunger everywhere*; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to *protect human rights and promote gender equality and the empowerment of women and girls*; and to *ensure the lasting protection of the planet and its natural resources*.⁴²

States added: “we pledge that *no one will be left behind*. ... we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will *endeavour to reach the furthest behind first*.”⁴³ In December 2015, the General Assembly stressed “the need to ensure that no one is left behind, including indigenous peoples, who will benefit from and participate in the implementation of the 2030 Agenda”.⁴⁴

And, this approach invites important efforts to protect vulnerable groups. In the 2017 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* elaborates on the general obligations of States to protect against environmental harm where human rights are threatened:

States have obligations to adopt legal and institutional frameworks that effectively protect against environmental harm that interferes with the enjoyment of human rights. ... [T]he loss of ecosystem services and biodiversity threatens a broad

⁴⁰ Article XXVI, *American Declaration*.

⁴¹ General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote).

⁴² *Ibid.*, at 3 (Declaration), para. 3. [emphasis added]

⁴³ *Ibid.*, at 3 (Declaration), para. 4. [emphasis added]

⁴⁴ General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble.

spectrum of rights, including the rights to life, health, food, water, culture and non-discrimination. *States therefore have a general obligation to safeguard biodiversity in order to protect those rights from infringement.* That obligation includes a duty to protect against environmental harm from private actors ...⁴⁵

The UN Human Rights Council has cautioned that “while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations”.⁴⁶

Brazil has made significant international and domestic commitments to sustainable development – I make this assertion because the SDGs were adopted in the GA by consensus. In addition, within the OAS negotiations regarding the *American Declaration*, every State at the meeting from Latin America and the Caribbean immediately voted in favor of the following article XIX:

1. Indigenous peoples have the right to live in harmony with nature and to a **healthy, safe, and sustainable environment**, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being.
2. Indigenous peoples have the right to conserve, restore, and protect the environment and to manage their lands, territories and resources **in a sustainable way**.

Though Brazil and other countries are not interpreting “sustainable development” as they should, they must do so in accordance with international law. This is especially urgent within this region as Latin America is one of the poorest regions in the world. Brazil is a relatively wealthier country. However, poverty is widespread among Indigenous peoples. Poverty is not just a term or condition. According to UNICEF, poverty is a denial of human rights and human dignity (UNICEF).

I believe that sustainable development may serve to reinforce a range of rights in the *UN Declaration* and *American Declaration*, as well Brazil’s Constitution and all its other international legal obligations. Such issues include, *inter alia*, resource development; environmental protection (including climate change); Indigenous peoples’ human rights; women’s and children’s rights; and governance issues. Moreover, it is important to underscore the central or keystone, foundations rights to lands, territories and resources, which are intimately tied to all other Indigenous human rights.

The government has also made commitments, both at home and internationally, to implement global sustainable development strategies in Brazil. All such actions are urgent and long

⁴⁵ Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretariat*, UN Doc. A/HRC/34/49 (19 January 2017), para. 33. [emphasis added]

⁴⁶ Human Rights Council, *Human rights and the environment*, UN Doc. A/HRC/RES/34/20 (24 March 2017) (adopted without a vote), preamble.

overdue. One such commitment is good governance. Good governance requires full protection of human rights. Good governance is a key principle in ensuring compliance with human rights. Good governance is also affirmed in the *UN Declaration* as one of the key principles to interpret all its provisions. It is essential that the government of Brazil fully implement its commitment to fulfill its constitutional obligations with respect to Indigenous human rights, as well as adhere to international human rights standards, including those in the *UN Declaration*, the *American Declaration*, the ILO C169 and all other international human rights instruments that Brazil has ratified.

CONCLUSION

In view of their heightened vulnerability of Indigenous peoples, Brazil and other States must meet a higher standard and certainly not impoverish those concerned. Proposed development projects that undermine Indigenous peoples' own means of subsistence or otherwise adversely affect their right of self-determination would severely violate their human rights or their rights to lands, territories and resources. Such developments are not sustainable.

A whole-of-government approach must be effectively implemented within the national government to ensure that there is full respect and protection for Indigenous peoples and individuals. In every situation, government bodies and civil servants must adhere to the international standards described above. In this way, Brazil can and must assume a leadership role.

It is extremely saddening to see the criminalization of Indigenous peoples that seek to gain respect for and recognition of their human rights, especially in relation to maintaining their distinct cultural identity, which is intricately tied to their lands, territories and resources. The growing number of human rights defenders⁴⁷ being subjected to violence and criminalization is intolerable. Clearly, in Brazil, the State is not doing enough to protect Indigenous peoples from killings and other acts that lead to powerlessness, humiliation and dehumanization. Indeed, such acts combined with other human rights violations contribute to the destabilization of the overall human rights idea.

It is also disturbing to see such heightened and extreme manifestations of rights ritualism and discrimination, which leads to the vulnerable state of Indigenous peoples, not only in Brazil, but across the globe. In order to end the pathology of rights ritualism, more can be done by other actors in society and in the international community. For example, trade unions, in collaboration with Indigenous peoples, can increase use of the recourse mechanism of the ILO. Indigenous peoples themselves, in collaboration with human rights organizations can raise awareness about the domestic conditions within the UN and OAS treaty body regime. Increased Indigenous

⁴⁷Concluding Observations of the Committee on Economic, Social and Cultural Rights, *supra* note 19, para 8: The Committee is deeply concerned about the culture of violence and impunity prevalent in the State party. In this regard, the Committee is concerned about reports that human rights defenders, including those assisting individuals and communities in asserting their economic, social and cultural rights, are threatened, harassed and subjected to violence, frequently by private militias commissioned by private and public actors. The Committee is also deeply concerned about the reports of the failure of the Brazilian authorities to ensure the safety of human rights defenders and to prosecute those responsible for committing such acts.

participation in the various special procedures and Indigenous specific mandates would help to amplify the issues. Domestic actions can also be initiated, through the offices of the Seminar sponsors and through additional seminars like this one. Academic can be engaged and become more responsive as well.

However, the ultimate responsibility for human rights falls squarely on the government of Brazil. As a state, Brazil has the power and authority to control the actions within their own territory. This combined with the responsibilities to live up to their international legal obligations, should be used to harness the power to prohibit and punish those who violate Indigenous human rights. Furthermore, Brazil has the power and resources, through law, politics and morality, to protect and promote the minimum human rights standards necessary for the survival and well-being of Indigenous peoples across Brazil.

Everyone must carefully analyze and understand the content of the obligations that Brazil has assumed. And, ultimately take the remedial action necessary to correct the human rights conditions that not only the Constitution of Brazil speaks of, but also to respect and recognize the human rights obligations assumed not only in favor of the Indigenous peoples of Brazil, but in favor of all Brazilians.