



## **Human Rights Law Clinic Papers 2019**

### **A Right to Remain Uncontacted: Strategies and Sources of Law for the Protection of Uncontacted Indigenous Peoples**

---

To: Sarah Shenker and Xilonem Clarke, Survival International

Submitted by: Celina Luzi Stoutland and Katie Lynn Pimenta

May 2019

This memorandum is a research paper prepared on a pro bono basis by students undertaking the LLM in International Human Rights Law at Sussex Law School at the University of Sussex. It is a pedagogical exercise to train students in the practice and application of international human rights law. It does not involve the giving of professional legal advice. This memorandum cannot in any way bind, or lead to any form of liability or responsibility for its authors, the convenor of the Human Rights Law Clinic, the Sussex Centre for Human Rights Research or the University of Sussex.



### Sussex Law School Human Rights Law Clinic

The Human Rights Law Clinic operates as an optional module in the LLM degree in International Human Rights Law at Sussex Law School at the University of Sussex. The Clinic offers students the chance to build on law and theory through the preparation of pro bono legal opinions for clients. Students work under the supervision of the Clinic's convenor, an academic and practitioner in human rights, on specific legal questions related to international human rights law coming from clients. Depending on the complexity and nature of the legal opinions sought, students work individually or in small groups to produce memoranda for their clients, following a process of consultation with clients, close supervision, oversight and review by the Clinic's convenor, seminar discussions on work in progress, and presentations to clients of draft memoranda.

[www.sussex.ac.uk/schrr/clinic](http://www.sussex.ac.uk/schrr/clinic)

### Sussex Centre for Human Rights Research

Sussex Law School's Sussex Centre for Human Rights Research aims to foster a vibrant research culture for human rights researchers within the Sussex Law School. Its work has a global as well as national focus and its researchers adopt a range of approaches to human rights research (e.g. doctrinal, critical, theoretical, practical and inter-disciplinary). The Human Rights Law Clinic operates in pursuit of the Centre's objectives to feed into human rights debates and collaborate with relevant organisations, locally, nationally and internationally; and to attract and give opportunities to high-quality postgraduate students.

[www.sussex.ac.uk/schrr](http://www.sussex.ac.uk/schrr)

## Contents

*i. Table of Cases*

*ii. Table of Legal Instruments*

*iii. Table of Abbreviations*

1. Introduction and Background

2. Interpreting International Law

    2.1. The Right to Life and Interrelated Rights

    2.2. The Right to Self-Determination and Interrelated Rights

3. Strengthening Domestic Law: Monitoring and Enforcement of Recognition and Protection of Lands

4. Recommendations and Conclusion

Bibliography

## ***i. Table of Cases***

### *Cases*

African Commission on Peoples and Human Rights 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 2001

Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs) Series C No. 309 (November 25, 2015), para 102

*Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (August 31, 2001)

Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname* (2007) Series C No 172

Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v Paraguay* (2006) Series C No 146

*Orissa Mining Corporation v Ministry of Environment & Forest & Others* WP (Civil) No 180 of 201

### *African Commission*

African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003

African Commission on Human and Peoples' Rights, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (2007)

African Commission on Human and People's Rights, 'Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria' (2001) Communication 155/96

### *Inter-American Commission*

Inter-American Commission on Human Rights, "*Ache*" *Indians v Paraguay* (1977) Communication 1802 OEA/Ser.L/V/II.43

Inter-American Commission on Human Rights, 'Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights' (December 2013) OEA/Ser.L/V/II 44

Inter-American Commission on Human Rights, 'Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights' (December 2013) OEA/Ser.L/V/II.47/13

Inter-American Commission on Human Rights, 'Tagaeri and Taromenani Indigenous Peoples in Isolation' (2014) OEA/Ser.L/V/II.153

## ***ii. Table of Legal Instruments***

### *International Treaties*

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 2

International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169* (adopted 27 June 1989, entered into force 5 September 1991)

International Labour Organization (ILO), *Indigenous and Tribal Populations Convention, C107* (adopted 26 June 1957, entered into force 2 June 1959)

Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, (adopted 22 November 1969, entered into force 18 July 1978)

United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI

### *International Soft Law*

United Nations General Assembly, Declaration on the Rights of Indigenous Peoples (2007) UN Doc A/RES/61/295

United Nations General Assembly, Universal Declaration of Human Rights (1948) Res 217 A (III)

### *Domestic Law*

BRASIL. Decreto no 5.051, de 19 de Abril de 2004. Promulga a Convenção nº 169 da Organização Internacional do Trabalho - OIT sobre Povos Indígenas e Tribais. Diário Oficial da União, Poder Executivo, 20/4/2004. Seção 1, p. 1

BRASIL. Decreto no 7.336, de 19 de Outubro de 2010. Aprova a Estrutura Regimental e o Quadro Demonstrativo dos Cargos em Comissão e das Funções Gratificadas do Ministério da Saúde, e dá outras providências. Diário Oficial da União, Poder Executivo, 20/10/2010. Seção 1, p. 6

BRASIL. Lei no 1.775, de 8 de Janeiro de 1996. Dispõe sobre o procedimento administrativo de demarcação das terras indígenas e dá outras providências. Diário Oficial da União, Poder Executivo, 8/1/1996. Seção 1, p. 265

BRASIL. Lei no 9.985, de 18 de Julho de 2000. Institui o Sistema Nacional de Unidades de Conservação da Natureza e dá Outras Providências. Diário Oficial da União, Poder Executivo, 18/7/2000. Seção 1, p. 265

BRASIL. Medida Provisória no 870 de 1 de Janeiro de 2019. Estabelece a organização básica dos órgãos da Presidência da República e dos Ministérios. Diário Oficial da União, Poder Executivo, 1/1/2019. Seção 1 Edição Especial, p.1

BRASIL. Portaria no. 281/PRES/FUNAI de 20 de abril de 2000. Diário Oficial da União, Poder Executivo, 20/4/2000. Seção 1, p. 367

Colombia, Decreto 1066 de 26 de Mayo de 2015 'Decreto Único Reglamentario del Sector Administrativo del Interior'

Colombia, Decreto 1232 de 17 de Julio de 2018. Por el cual se adiciona el Capítulo 2, del Título 2, de la Parte 5, del Libro 2 del Decreto 1066 de 2015, Único Reglamentario del Sector Administrativo del Interior

Colombia, Ley 21 de 4 de Marzo de 1991. Convenio sobre Pueblos Indígenas y Tribales en Países Independientes

Colombia, Ley 160 de 3 de Agosto de 1994. Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino. Diario Oficial No. 41.479

Constitution of the Republic of Brazil 1988  
<[https://www.constituteproject.org/constitution/Brazil\\_2014.pdf](https://www.constituteproject.org/constitution/Brazil_2014.pdf)> accessed 7 April 2019

Constitution of the Republic of Colombia 1991  
<[https://www.constituteproject.org/constitution/Colombia\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en)> accessed 7 April 2019

Constitution of the Republic of Ecuador 2008  
<<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> accessed 12 April 2019

Constitution of the Republic of India 1949

Constitution of the Republic of Paraguay 1992  
<[https://www.constituteproject.org/constitution/Paraguay\\_2011.pdf](https://www.constituteproject.org/constitution/Paraguay_2011.pdf)> accessed 15 April 2019

Constitution of the Republic of Peru 1993  
<[https://www.constituteproject.org/constitution/Peru\\_2009.pdf?lang=en](https://www.constituteproject.org/constitution/Peru_2009.pdf?lang=en)> accessed 15 April 2019

India, Office of the Chief Commissioner, Andaman and Nicobar Islands, Notification No. 4 of 1956 <[https://www.tribal.nic.in/DivisionsFiles/clm/AN1\(3061956\).pdf](https://www.tribal.nic.in/DivisionsFiles/clm/AN1(3061956).pdf)> accessed 20 March 2019

India, Office of the Chief Commissioner, Andaman and Nicobar Islands, Notification No. 3 of 1957 <<https://www.tribal.nic.in/DivisionsFiles/reserveNoti.pdf>> accessed 20 March 2019

India, Office of the Chief Commissioner, Andaman and Nicobar Islands, The Andaman and Nicobar Islands (Protection of Aboriginal Tribes) Regulation, Notification No. 3 of 1958 <[http://www.and.nic.in/archives/C\\_Charter/Dir\\_tw/2012/PAT1956.pdf](http://www.and.nic.in/archives/C_Charter/Dir_tw/2012/PAT1956.pdf)> accessed 15 March 2019

India, Lieutenant Governor (Administrator), Andaman and Nicobar Islands, Andaman and Nicobar Administration Directorate of Tribal Welfare, Notification No.15 of 2013 <<https://www.tribal.nic.in/DivisionsFiles/andaman.pdf>> accessed 20 March 2019

India, Lieutenant Governor (Administrator), Andaman and Nicobar Islands, Andaman and Nicobar Administration, Notification No. 149 of 2012 <[https://www.tribal.nic.in/DivisionsFiles/clm/AN4\(9\\_7\\_2012\)-4.pdf](https://www.tribal.nic.in/DivisionsFiles/clm/AN4(9_7_2012)-4.pdf)> accessed 20 March 2019

India, Lieutenant Governor (Administrator), Policy on Jarawa Tribe of Andaman Islands, No. 210 of 2004 <[https://www.tribal.nic.in/DivisionsFiles/clm/AN\(B\)-6.pdf](https://www.tribal.nic.in/DivisionsFiles/clm/AN(B)-6.pdf)> accessed 30 March 2019

Paraguay, Ley no 5469 de 17 de Dec de 2015. Creation de la Dirección Nacional de Salud de los Pueblos Indígenas – DINASAPI

Paraguay, 'Protocolo de Actuación, Prevención y Contingencia Para Pueblos Indígenas en Situación de Aislamiento y/o en Situación de Contact Inicial en el Patrimonio Natural y Cultural Ayoreo Totobiegosode.' 2018

Peru. Código Civil, Decreto Legislativo no 295 de 24 de Julio de 1984

Peru, Decreto No 22175, de 9 de Mayo de 1978. Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y de Ceja de Selva

Peru, Decreto Supremo no 065-2005-PCM. Reglamento de la Ley no 28495, que crea el Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuano



Peru, Ley no 28495, Creación de el Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuano

Peru, Ley no 28736, de 18 de Mayo de 2006. Ley Para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial. Lima, *Diario Oficial El Peruano*, p. 318954

Peru, Ley no. 29207 de 25 de Marzo de 2008. Ley que Declara de Necesidad Pública y de Interés Nacional la Construcción de la Ferrovía Transcontinental “Brasil-Perú” Atlántico-Pacífico (FETAB’) *Diario Oficial El Peruano*

Peru, Resolución Legislativa no 26253 de 27 de Junio de 1989. Aprueban el “Convenio 169 de la OIT sobre pueblos Indígenas y Tribales en países Independientes. *Diario Oficial El Peruano*

### ***iii. Table of Abbreviations***

FPEs	Ethno-environmental Protection Fronts
FPIC	Free, prior and informed consent
CGIRC	General Coordination Unit for Uncontacted and Recently-Contacted Indians
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO 169	International Labour Organisation Convention on Indigenous and Tribal Peoples
ILO 107	International Labour Organisation's Indigenous and Tribal Populations Convention
FUNAI	National Foundation of the Indian (Fundação Nacional do Índio)
INDEPA	The National Institute of Development of the Andean, Amazonian and Afro-Peruvian Peoples (Instituto Nacional de Desarrollo de los Pueblos Andinos, Amazónicos y Afroperuano)
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

## 1. Introduction and Background

Uncontacted indigenous peoples are one of the most unprotected groups in the world. There are no international human rights articles pertaining specifically to their protection, but the issues they face are distinctive and do not always overlap with those of other indigenous peoples or the population more generally. Forced contact of uncontacted indigenous groups has alarming consequences that are often ignored by States, creating a system of impunity in which uncontacted indigenous peoples' lives and lands are constantly under threat. This is especially so in the Amazon, where the majority of uncontacted indigenous peoples live, and in the Andaman and Nicobar Islands in India. This memorandum will use the international human rights law obligations of Brazil, Colombia, India, Peru and Paraguay to argue that these States must strengthen their domestic legal systems to effectively prohibit forced contact.

To do this, the memorandum first sets out a definition of 'uncontacted indigenous peoples' and then discusses the issue of 'forced contact', outlining its causes and effects and giving some examples for context. The second section discusses international law, arguing for the existence of a right to no contact primarily through the interpretation of the right to life and right to self-determination for uncontacted indigenous peoples. Interrelated rights, such as the right to health and right to land, will also be discussed. Since uncontacted indigenous groups face distinctive issues that largely relate to forced contact, generic and indigenous rights must be interpreted to apply specifically to safeguard their right to no contact, which has been done to some extent by the IACHR and the Special Rapporteur on the Rights of Indigenous Peoples. The third section argues that uncontacted indigenous peoples' right to no contact is not safeguarded in any of the considered States, although Colombia and Brazil could be considered to have the most progressive policies. This is because they have more extensive monitoring bodies and laws pertaining to recognition and protection of land. The domestic legislation of these States are analysed in light of their human rights obligations, and recommendations are given to strengthen national laws.

There is no universal definition of 'indigenous peoples.' For international law, defining 'indigenous peoples' is neither necessary nor desirable, for it is indigenous populations that must self-define.<sup>1</sup> However, some characteristics include having common ancestry with pre-colonial societies, living on lands that have territorial continuity with all or parts of their ancestral lands and/or considering one's group as distinct from other sectors of society.<sup>2</sup> 'Uncontacted indigenous peoples' will refer to indigenous peoples who have either never had

---

<sup>1</sup> UNCHR 'Study of the Problem of Discrimination Against Indigenous Populations. Definition of Indigenous Populations' (20 June 1982) UN Doc E/CN.4/Sub.2/1982/2/Add.6.

<sup>2</sup> UNHCR (n 1) para 380.

contact with people outside their group or extended group (e.g. other indigenous groups that live in proximity to them) or return to having no contact, after having intermittent contact.<sup>3</sup>

‘Forced contact’ encompasses all activities that violate uncontacted indigenous peoples’ decision to reject interactions with other parts of society. These activities include illegal logging, mining and activities by oil and gas companies, which not only destroy the lands uncontacted indigenous peoples rely on, but also result in killing, enslaving and integrating peoples, such as in the Murunahua Territorial Reserve in Peru.<sup>4</sup> They also include missionary work, contact by outsiders or government officials. There are two types of forced contact. In the first case, outside actors force contact on indigenous peoples. In the second, indigenous peoples are forced to contact outside actors against their will due to the threats on their livelihood and are therefore defined as in ‘initial contact’. This occurred with the Ayoreo-Totobiegosode population in Paraguay, where activities such as bulldozing forced them to seek outside help to protect themselves.<sup>5</sup> States must protect a different set of rights when uncontacted indigenous peoples are in initial contact, such as ensuring that anyone they have contact with is properly immunised. Due to the limited space, this memorandum will strictly address the specific rights of uncontacted peoples remaining in isolation.<sup>6</sup> The decision to not have contact with the wider national society is therefore often a survival strategy,<sup>7</sup> due to the many threats of forced contact. The next section will discuss the rights that exist in international law that can be used to establish a right to no contact.

---

<sup>3</sup> UNCHR ‘Directrices de Protección para los Pueblos Indígenas en Aislamiento y en Contacto Inicial de la Región Amazónica, el Gran Chaco y la Región Oriental de Paraguay’ (February 2012) UN Doc A/HRC/EMRIP/2009/6 09-14447 7.

<sup>4</sup> International Work Group for Indigenous Affairs (IWGIA) - Instituto de Promoción Estudios Sociales (IPES), *Indigenous Peoples in Voluntary Isolation and Initial Contact* (June 2013) 73.

<sup>5</sup> Survival International ‘Ayoreo indigenous people in Paraguay celebrate land victory’ (*Survival International*, 1 April 2019) <<https://www.survivalinternational.org/news/12124>> accessed 15 April 2019. It is important to note that the Ayoreo have experienced both types of ‘forced contact’. The uncontacted Ayoreo were contacted in the 1970s and 1980s when missionaries organised ‘man hunts’, and later in 2004 sought contact.

<sup>6</sup> This is not to say that the rights that need to be protected for uncontacted indigenous peoples and indigenous peoples in initial contact do not overlap. Indigenous peoples’ in initial contact must have their right to life, land, health, adequate standard of living, etc. respected, but in practice this entails different policies.

<sup>7</sup> IWGIA – IPES (n 4) 70.

## 2. Interpreting International Law

It will be argued that the right to no contact can be established mainly through the right to life and the right to self-determination, because by protecting these two rights many crucial and interrelated rights are also upheld, such as the right to health, to an adequate standard of living, to land and to natural resources. This section will discuss the legal framework and how the interpretations of these rights by regional courts and treaty bodies can be applied to uncontacted indigenous peoples.

### 2.1. The Right to Life and Interrelated Rights

The right to life is enshrined in article 6 of the International Covenant on Civil and Political Rights ('ICCPR') and article 7 of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'). Article 6 of the ICCPR stipulates that the right to life is inherent in every human being, must be protected by law and that "no one shall be arbitrarily deprived of his life."<sup>8</sup> UNDRIP emphasises the "collective right to live in freedom, peace and security as distinct peoples."<sup>9</sup> This right is not to be interpreted narrowly and entitles individuals to be free from acts or omissions that "may be expected to cause their unnatural or premature death."<sup>10</sup>

States parties have a duty to establish a legal framework to protect life from "all reasonably foreseeable threats," including those from private persons or entities, international organisations and foreign corporations.<sup>11</sup> Forced contact, whether it be a product of religious missions, illegal logging and mining, natural resource extraction and deforestation, has been recognised by the Inter-American Commission on Human Rights ('IACHR')<sup>12</sup> and the UN Special Rapporteur on the Rights of Indigenous Peoples as a grave risk for uncontacted peoples' lives.<sup>13</sup> This is due to the spread of diseases, pollution of lands and destruction of natural resources and territories. Several cases from the African Court on Human and Peoples' Rights and the Inter-American Court on Human Rights ('IACtHR') have found States

---

<sup>8</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.1.

<sup>9</sup> UNGA Declaration on the Rights of Indigenous Peoples (2007) UN Doc A/RES/61/295 art 7.2.

<sup>10</sup> Human Rights Committee, 'General Comment No 36' (30 October 2018) UN Doc CCPR/C/GC/36 para 3.

<sup>11</sup> Human Rights Committee (n 10) paras 18 and 22.

<sup>12</sup> Inter-American Commission on Human Rights, 'Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights' (December 2013) OEA/Ser.L/V/II 44.

<sup>13</sup> UNCHR 'Summary of Meeting, Jointly Prepared by the Special Rapporteur on the Rights of Indigenous Peoples of the United Nations and the Rapporteur on the Rights of Indigenous Peoples of the Inter-American Commission on Human Rights' (27 June 2018) UN Doc A/HRC/39/17/Add.1. It is important to note that the Special Rapporteur's comments are not legally binding, however, they are a persuasive authority on the topic.

in violation of the right to life for allowing the pollution and degradation of indigenous lands<sup>14</sup> and failing to ensure the right of indigenous peoples to their ancestral territory.<sup>15</sup> Establishing a right to no contact would uphold the right to life because it would require States to safeguard uncontacted indigenous peoples' land and natural resources by prohibiting states or private entities from entering their land. It would uphold indigenous peoples' collective right to live in freedom and security and oblige States parties to pre-empt and combat the threats to uncontacted indigenous peoples' right to life.

The most serious arbitrary deprivation of life is genocide. Genocide is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."<sup>16</sup> Forced contact has, in the past, destroyed part or all of uncontacted indigenous groups, due to the destruction of the lands needed for their survival, the spread of epidemics and the change in ways of life that it inevitably brings.<sup>17</sup> However, to constitute genocide, there must be an intent to destroy a specific group, while often the death and decimation of uncontacted indigenous groups is an indirect result of the extraction of natural resources or spread of diseases. For example, around 85 percent of the Aché indigenous group in Paraguay have been killed due to the State's development activities on their lands.<sup>18</sup> However, the IACHR found that Paraguay had not carried out genocide, because their killings were perpetrated to exploit the land and not with the intent to destroy the group.<sup>19</sup> Therefore, it is very difficult to establish genocide of uncontacted indigenous peoples and there has yet to be a case in international law that recognises genocide of indigenous peoples. However, it is interesting to note that there has been a recent hearing regarding the Waimiri-Atroari reserve in Brazil, accusing the State of genocide.<sup>20</sup> If the arguments surrounding intent are accepted, then this case could be groundbreaking, and set a possible future precedent.

To uphold the right to life, States must also protect the right to health. The right to health of indigenous peoples is affected by environmental degradation, pollution and the failure to protect ancestral territories and natural resources. The right to health is in article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), in which

---

<sup>14</sup>African Commission on Human and People's Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) Communication 155/96.

<sup>15</sup> Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v Paraguay* (2006) Series C No 146.

<sup>16</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 2.

<sup>17</sup> 'Department of Economic and Social Affairs of the United Nations Secretariat, 'State of the World's Indigenous Peoples' (April 2019) ST/ESA/328 236.

<sup>18</sup> Churchill, Ward (2000). Israel W. Charny (ed.). *Encyclopedia of Genocide*.

<sup>19</sup> Inter-American Commission on Human Rights, *"Ache" Indians v Paraguay* (1975) Communication 1802 OEA/Ser.L/V/II.43.

<sup>20</sup> Mauricio Savarese 'At Hearing, Amazon Tribe accuses Brazil Army of atrocities' (*AP News*, 8 March 2019) <<https://apnews.com/9b7372ee4abc4b0aa659bdfb82492851>> accessed 1 May 2019.

States parties must “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and take steps to achieve the full realisation of this right.<sup>21</sup> It is also in article 24 of UNDRIP, which emphasises the right to traditional medicines and health practices,<sup>22</sup> and article 25 of the International Labour Organisation Convention on Indigenous and Tribal Peoples (‘ILO 169’), which emphasises the role of indigenous communities in delivering and designing their own health services.<sup>23</sup>

A State party of ICESCR or ILO 169 has the obligation to not interfere directly or indirectly with the enjoyment of the right to health.<sup>24</sup> It violates this right through actions, policies and laws that are likely to result in bodily harm, unnecessary morbidity and preventable mortality.<sup>25</sup> They must also ensure that individuals, groups or corporations do not violate the right to health of persons in their jurisdiction.<sup>26</sup> The IACtHR has stated that “transmitting diseases is one of the most serious threats to physical survival stemming from contact” for uncontacted indigenous peoples.<sup>27</sup> In the case of the uncontacted Yora (Nahua) people in Peru, approximately 50% of the population died, after some members contracted a common cold from illegal loggers and infected others upon return to their village.<sup>28</sup> A right to no contact would ensure that diseases are not transmitted to uncontacted indigenous peoples and that the land that they rely on for traditional medicines remains intact. The State therefore has the obligation to enforce the right to no contact for uncontacted indigenous peoples, for it must take appropriate legislative and administrative measures to ensure their right to health.

Forced contact also deprives indigenous peoples of an adequate standard of living. This right is enshrined in article 11 of ICESCR<sup>29</sup> and article 25 of the Universal Declaration of Human Rights (‘UDHR’).<sup>30</sup> This right includes “adequate food, clothing and housing, and the continuous improvement of living conditions.”<sup>31</sup> States must ensure that natural resources are protected. This is imperative for uncontacted indigenous peoples for their land is the sole source of food, water and adequate housing.<sup>32</sup> To uphold this right, States must ensure that state and non-state actors do not encroach on their lands and force contact. Therefore, the right to no contact must be protected to ensure adequate food, housing and standard of living.

---

<sup>21</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 2 art 12.

<sup>22</sup> UNGA (n 9) art 24.

<sup>23</sup> International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169* (adopted 27 June 1989, entered into force 5 September 1991) art 25, especially 25.1 and 25.2.

<sup>24</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No 14’ (11 August 2000) UN Doc E/C.12/2000/4 para 33.

<sup>25</sup> *ibid* para 50.

<sup>26</sup> *ibid* para 51.

<sup>27</sup> Inter-American Commission on Human Rights, (n 12) 66.

<sup>28</sup> *ibid*.

<sup>29</sup> International Covenant on Economic, Social and Cultural Rights (n 21) art 11.

<sup>30</sup> United Nations General Assembly, Universal Declaration of Human Rights (1948) Res 217 A (III) art 25.

<sup>31</sup> International Covenant on Economic, Social and Cultural Rights (n 21) art 11.1.

<sup>32</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No 7’ (20 May 1997) UN Doc E/1998/22.

## 2.2. The Right to Self-Determination and Interrelated Rights

The right to self-determination gives peoples the freedom to determine “their political status and freely pursue their economic, social and cultural development.” This right is enshrined in article 1 of the ICCPR,<sup>33</sup> ICESCR<sup>34</sup> and the UN Charter,<sup>35</sup> and article 3 of UNDRIP.<sup>36</sup> The right to self-determination was not included in the ILO 169,<sup>37</sup> since its mandate focused on economic and social rights and self-determination was considered to be out of this scope.<sup>38</sup> However, the right to self-determination is recognised by the Special Rapporteur on the Rights of Indigenous Peoples as “a fundamental principle of international law and of utmost importance for indigenous peoples.” As the IACHR has stated, the decision of indigenous peoples to remain uncontacted is their outward expression of their self-determination.<sup>39</sup> For example, where uncontacted indigenous peoples lack access to their territory, because of contact, this would prevent them from exercising their right to self-determination.<sup>40</sup> As seen within Peru, in which contact between Las Piedras Chanchamayo and Chiclayo Rivers, Mascho-Piro and illegal mahogany loggers,<sup>41</sup> resulted in violence and loss of life. The aggression they suffer is the reason that some have chosen to live outside of national society and the national economy.<sup>42</sup> “Their decision to remain in isolation is a survival strategy resulting in part from outside pressures,” as Castillo states, “it is an expression of the autonomy of these peoples as holders of human rights, and as such should be respected.”<sup>43</sup> Forced contact, like illegal logging, strips indigenous peoples of their autonomy, by prohibiting

---

<sup>33</sup> International Covenant on Civil and Political Rights (n 8) art 1.

<sup>34</sup> International Covenant on Economic, Social and Cultural Rights (n 21) art 1.

<sup>35</sup> United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI art 1.

<sup>36</sup> United Nations General Assembly (n 9) art 3.

<sup>37</sup> International Labour Organization, ‘Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents’ (Geneva 2013).

<sup>38</sup> International Labour Organization, ‘Indigenous and Tribal Peoples’ Rights in Practice: A guide to ILO Convention No. 169’ (2009) 25.

<sup>39</sup> Inter-American Commission on Human Rights, ‘Tagaeri and Taromenani Indigenous Peoples in Isolation’ (2014) OEA/Ser.L/V/II.153 8.

<sup>40</sup> *ibid* 69.

<sup>41</sup> FENAMAD, ‘Respeten la decisión de las comunidades nativas sobre el uso y la libre disposición de sus tierras, desprendiéndose de ello la facultad para decidir quienes ingresan a su territorio’ (*FENAMAD*, 12 May 2017) <<http://www.fenamad.com.pe/2017/05/12/fenamad-respeten-la-decision-de-las-comunidades-nativas-sobre-el-uso-y-la-libre-disposicion-de-sus-tierras-desprendiendose-de-ello-la-facultad-para-decidir-quienes-ingresan-a-su-territorio>> accessed 20 April 2019; Cultural Survival, ‘Drilling and Logging Threatens Isolated Peoples of the Peruvian Amazon’ (*Cultural Survival*) <<https://www.culturalsurvival.org/news/drilling-and-logging-threatens-isolated-peoples-peruvian-amazon>> accessed 20 April 2019.

<sup>42</sup> Darcy Ribeiro, *Os índios e a civilização* (Vozes 1977).

<sup>43</sup> Beatriz Huertas Castillo, ‘Los Pueblos Indígenas en Aislamiento. Su Lucha por la Supervivencia y la Libertad’ (IWGIA 2002) 22.



such contact it would protect their decision to be in isolation.

The prohibition of forced contact ensures that uncontacted indigenous peoples are able to freely determine their social structure and use of lands and natural resources. Forced contact often results in destruction of uncontacted peoples' lands and the violation of their territorial claims, and therefore must be prohibited to fully uphold their right to self-determination. This was affirmed in the case of *Saramaka People v. Suriname*.<sup>44</sup> The Court found that indigenous peoples' right to freely determine and enjoy their own social, cultural and economic development, includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied.<sup>45</sup> The prohibition of forced contact therefore protects uncontacted indigenous peoples' choices and control over their territory and upholds their right to self-determination.

The land that uncontacted indigenous peoples occupy is of fundamental importance to their society. As stated by the Special Rapporteur on the Rights of Indigenous Peoples, "indigenous peoples' relationship to their lands, territories and resources is what makes them different from other sectors and remains the main foundation of their distinct identities, cultures and knowledge systems, and their physical, economic and social well-being."<sup>46</sup> The right to ancestral land is found in article 25 and 26 of UNDRIP,<sup>47</sup> article 14 of ILO 169,<sup>48</sup> article 11 of the International Labour Organisation's Indigenous and Tribal Populations Convention ('ILO 107'),<sup>49</sup> and is mentioned in General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination ('CERD').<sup>50</sup> This right is accepted as "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised."<sup>51</sup>

Issues surrounding uncontacted indigenous peoples right to land can include forcing contact to build infrastructure that requires deforesting millions of hectares, jeopardising their homes, food sources, and overall livelihood. As is the case within Bolivia and the Mojeño-Trinitario, Yuracaré and Tsimané indigenous groups in the Tipnis national park, carving out

<sup>44</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, (adopted 22 November 1969, entered into force 18 July 1978) art 21.

<sup>45</sup> Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname* (2007) Series C No 172 para 93.

<sup>46</sup> UNCHR, 'Statement of Ms. Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, at the 17<sup>th</sup> Session of the United Nations Permanent Forum on Indigenous Issues' (18 April 2018).

<sup>47</sup> UNGA (n 9) art 26.

<sup>48</sup> International Labour Organization (n 23) art 14.

<sup>49</sup> International Labour Organization (ILO), *Indigenous and Tribal Populations Convention, C107* (adopted 26 June 1957, entered into force 2 June 1959) art 11. It should be noted that this convention may potentially be denounced 02 Jun 2019 - 02 Jun 2020, though it is still in effect while writing this memorandum.

<sup>50</sup> Committee on the Elimination of Racial Discrimination, 'General Recommendation No 23' (18 August 1997) UN Doc A/52/18, annex V.

<sup>51</sup> International Labour Organization (n 23) art 14.

1.2 million hectares of forest for a 190-mile highway.<sup>52</sup> Even though these activities do not explicitly seek contact with indigenous groups, they will inevitably result in impacting their way of life and belief systems. If contact results in diminishing their land or failing to recognise their rights of ownership, it then infringes upon their right to ancestral land. Enforcement of the right to land of uncontacted indigenous peoples entails enforcing a right to no contact, to adequately protect their land rights.

The natural resources within uncontacted indigenous peoples' lands make their communal property extremely valuable and desirable. "The majority of the world's remaining natural resources- minerals, freshwater, potential energy sources and more – are found within indigenous peoples' territories," because the preservation of natural resources is of utmost importance to indigenous peoples' survival. The right to natural resources is located within article 15 of the ILO 169,<sup>53</sup> and article 32 of UNDRIP.<sup>54</sup> Unfortunately, ILO 107 is silent on the concept of the right to natural resources for indigenous peoples and therefore India lacks an international obligation to respect this right. Indigenous peoples have a right to not only their ancestral land but specifically to the natural resources within it, to participate in the use, management, protection and conservation of these resources.<sup>55</sup>

Uncontacted indigenous peoples' right to natural resources is often violated by resource-intensive industries and the privatisation of land, which often results in eviction due to deforestation and acidification of water supplies. For example, the Riberinhos peoples are being affected by the Santo Antonio dam being built on the Madeira river, which threatens their right to land because the national interest often takes precedent and there is a continuous demand for energy in Brazil.<sup>56</sup> This would not only affect the riverbanks they inhabit, but also the water and food supply, the natural resources of the land. Only by effectively prohibiting forced contact will uncontacted indigenous peoples' right to natural resources be protected. By adding adequate safeguards through States' international obligations, their right to natural resources, land<sup>57</sup> and self-determination will be respected. The right to ancestral lands is intertwined with the rights to natural resources within that land. Implementing international obligations that prohibit no contact and establish it as a right would ensure that uncontacted indigenous peoples' land and natural resource rights are upheld to the highest possible standard.

---

<sup>52</sup> Myles McCormick, "They lied': Bolivia's untouchable Amazon lands at risk once more' (*The Guardian*, 11 September 2017) <<https://www.theguardian.com/environment/2017/sep/11/they-lied-bolivia-untouchable-amazon-lands-tipnis-at-risk-once-more>> accessed 20 March 2019.

<sup>53</sup> International Labour Organization, (n 23) art 15.

<sup>54</sup> UNGA, (n 9) art 32.

<sup>55</sup> International Labour Organization, (n 23) art 15.

<sup>56</sup> BBC News, 'Amazon culture clash over Brazil's dams' (*BBC News*) <<https://www.bbc.co.uk/news/world-latin-america-38391377>> accessed 19 April 2019.

<sup>57</sup> UNGA (n 9) art 15.2. In addition, they do have a right to be compensated (by the government, not private companies)– however this would be in relation to initial contact or contacted indigenous peoples. This is would be outside the scope for this memorandum on uncontacted indigenous peoples.

The right to free, prior and informed consent ('FPIC') has been established to protect indigenous peoples' claims to their land and self-determination, for too often they have been displaced without their knowledge or by signing away claims to land without being fully informed of its consequences. This principle is found within articles 10, 11, 19, 29, 30, 32 of UNDRIP, and article 15.2 of the ILO 169, which states that indigenous peoples "shall be consulted before natural resources on their lands are explored or exploited." Within article 12 of ILO 107 "the populations concerned shall not be removed without their free consent from their habitual territories..."<sup>58</sup> Requiring consent is not solely for the use of their lands, but also in any laws or policies that might affect them.<sup>59</sup> This right provides a check and balance for States, grants more power to indigenous communities and prevents exploitation of their lands.

For uncontacted indigenous people, the principle of FPIC still applies, even though gaining their consent is unlikely, but also dangerous. An illustration of this is within Ecuador, where it is the Waorani who should be consulted over the design of a law on isolated peoples, the demarcation of territory, so that their participation can be included in the design of these policies; otherwise, grave errors may be committed.<sup>60</sup> The issue here is the aspect of consultation, and not consent. The Ecuadorian constitution offers the right to Free, Prior, Informed *Consultation*, not consent.<sup>61</sup> The two are not synonymous because consultation does not provide a right of indigenous peoples to veto government-imposed extraction projects on their ancestral territory.<sup>62</sup> This is highly problematic, as this process can be coercive and ignore specific stakeholders. In other situations FPIC proves to be significant, such as the 2013 Supreme Court of India case of *Orissa Mining Corporation v. Ministry of Environment & Forest & Others*, in which the Court found that the forest-dwellers, who are affected by resource intensive operations, should have the power to give or withhold their consent for activities on their land.<sup>63</sup> This gave the Dongria Kondh tribe power in protecting the Niyamgiri hills, in rejecting the bauxite mining project.<sup>64</sup>

The Expert Mechanism on the Rights of Indigenous Peoples has stated that "indigenous peoples in isolation use the principle of free prior and informed consent by not participating, not taking part in any consultations and not giving their consent to any intrusion

---

<sup>58</sup> International Labour Organization, (n 23).

<sup>59</sup> IWGIA – IPES (n 4) 184.

<sup>60</sup> *ibid.*

<sup>61</sup> Constitution of the Republic of Ecuador 2008 <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> accessed 12 April 2019.

<sup>62</sup> Kevin Koenig, 'Community Consent: Business Lessons for the Amazon (*Amazon Watch*, March 2017) <<https://amazonwatch.org/news/2017/0323-community-consent-business-lessons-from-the-amazon>> accessed 12 April 2019.

<sup>63</sup> *Orissa Mining Corporation v Ministry of Environment & Forest & Others* WP (Civil) No 180 of 2011 para 60.

<sup>64</sup> Jo Woodman, 'India's rejection of Vedanta's bauxite mine is a victory for tribal rights' (*The Guardian*, 14 January 2014) <<https://www.theguardian.com/global-development/poverty-matters/2014/jan/14/india-rejection-vedanta-mine-victory-tribal-rights>> accessed 12 April 2019.

into their lands and territories.”<sup>65</sup> By refusing to be contacted, uncontacted indigenous peoples also refuse to give any consent to have their lands or natural resources exploited. If States prohibit contact, then they also are able to protect the interest of uncontacted indigenous peoples and their lands.

---

<sup>65</sup> UNCHR, 'Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco' (30 June 2009) UN Doc A/HRC/EMRIP/2009/6 7.

### 3. Strengthening Domestic Law: Monitoring and Enforcement of Recognition and Protection of Lands

This section argues that States prohibit forced contact to the extent that they have monitoring bodies and practices that enforce laws pertaining to comprehensive recognition of indigenous peoples and protection of their lands as required by international law. To discuss to what extent domestic law prohibits forced contact in the five States, this report will group the States according to how strong their practices are.

For monitoring bodies to be effective and comply with international law, they have to be funded well, be representative,<sup>66</sup> and have proper training on health, rights and the prohibition of forced contact.<sup>67</sup> Having effective monitoring bodies is not explicitly required in international law, but its importance has been stressed by the Special Rapporteur on the Rights of Indigenous Peoples on various occasions.<sup>68</sup> For example, although Colombia has progressive domestic legislation, the Special Rapporteur criticised its ineffective monitoring bodies, which has led to serious violations of indigenous peoples' human rights.<sup>69</sup> Furthermore, the Special Rapporteur has argued that monitoring bodies should exist at a national and local level to best protect uncontacted indigenous peoples' land, natural resource and health and therefore comply with States' international obligations.<sup>70</sup>

Recognition of uncontacted indigenous peoples refers to whether States have laws that affirm the existence of uncontacted indigenous peoples on their land and recognise that they experience distinct issues relating to protection of land, health and prohibition of contact.<sup>71</sup> ILO 169 specifies that States must recognise the "social, cultural, religious and spiritual values

---

<sup>66</sup> For example, Brazil was criticised for not having 'participatory monitoring units'. Furthermore, if they are not representative they could violate self-determination, because their interests and needs are not being accounted for or respected. See A/HRC/33/42/Add.1 para 42.

<sup>67</sup> UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil', (8 August 2016) UN Doc A/HRC/33/42/Add.1 para 101.

<sup>68</sup> See, for example, UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil', (8 August 2016) UN Doc A/HRC/33/42/Add.1 para. 93; UNCHR 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. James Anaya on the situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur' UN Doc A/HRC/15/37/Add.3 para 56.

<sup>69</sup> UNCHR, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mr. Rodolfo Stavenhagen, Addendum: Mission to Colombia' (10 November 2004) UN Doc E/CN.4/2005/88/Add.2 para 5.

<sup>70</sup> UNCHR, 'Resumen de reunion, emitido conjunto por la Relatora Especial de las Naciones Unidas sobre los derechos de los pueblos indígenas, Victoria Tauli-Corpuz y por el Relator sobre los Derechos de los Pueblos Indígenas de la Comisión Interamericana de Derechos Humanos, Francisco Eguiguren' (28 February 2018) UN Doc A/HRC/39/17/Add.1, para 55.

<sup>71</sup> UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (2014) UN Doc A/HRC/27/52, para 14.

and practices of these peoples.”<sup>72</sup> Both CERD<sup>73</sup> and IACtHR<sup>74</sup> have emphasised the importance of establishing juridical personality, which is the recognition of indigenous peoples before the law,<sup>75</sup> for without it uncontacted indigenous peoples are denied rights in domestic and international law, such as their right to land. To adhere to this right, States must “fully [respect] their customs and traditions,”<sup>76</sup> which for uncontacted indigenous peoples would mean respecting their wish to remain uncontacted.

Brazil, Colombia and Peru have laws that recognise uncontacted indigenous peoples as groups that face distinct issues and are therefore in need of special protection. They therefore comply with international law by recognising their juridical personality. They also have national policies to specify their domestic rights and monitoring bodies to enforce them. However, the effectiveness of these monitoring bodies differs.

Brazil and Colombia are the only States that have monitoring bodies that coordinate at both the national level and the local level, thereby having the most effective prohibition of forced contact. At the national level, the functions of the monitoring bodies differ somewhat. In Brazil, the National Foundation of the Indian (Fundação Nacional do Índio - ‘FUNAI’) is responsible for indigenous policies, and within it the General Coordination Unit for Uncontacted and Recently-Contacted Indians (CGIRC) is the department responsible for the protection of uncontacted indigenous peoples. This body creates regulations related to the recognition, location and protection of these peoples.<sup>77</sup> FUNAI also has a Special Health Service department, which equips and trains health staff to work specifically with uncontacted indigenous peoples.<sup>78</sup> In Colombia, the National Commission of Indigenous Peoples’<sup>79</sup> role is

---

<sup>72</sup> International Labour Organization, (n 23) art 5.

<sup>73</sup> UN Committee on the Elimination of Racial Discrimination, ‘Follow-up Procedure Decision 3 (66). Suriname’. In ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 April 2005) UN Doc CERD/C/DEC/SUR/1, para. 3. See also, UN Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports Submitted by States parties Under Article 9 of the Convention. Concluding observation of the Committee on the Elimination of Racial Discrimination’. (4 April 2006) UN Doc CERD/C/BWA/CO/16.

<sup>74</sup> *Case of the Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 309 (November 25, 2015), para 102. In this case, the IACtHR found a violation of Article 3 of the ACHR, the right to juridical personality, because Suriname failed to recognise indigenous peoples on its territory.

<sup>75</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, (adopted 22 November 1969, entered into force 18 July 1978), art 3.

<sup>76</sup> *Case of the Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 309 (November 25, 2015), para 107.

<sup>77</sup> ‘Special Health Service for Isolated and Recently-contacted Indians’ was created through Decree No. 7,336/2010 and is aimed at coordinating and implementing indigenous healthcare plans. Guidelines include Regulation No. 281/PRESI/FUNAI, of 20 April 2000, which reiterated FUNAI’s stance towards avoiding contact and preserving their culture, guaranteeing uncontacted indigenous peoples’ lands and accessibility of natural resources, banning any outside activity and ensuring that their health is a priority.

<sup>78</sup> BRASIL. Decreto no 7.336, de 19 de Outubro de 2010. Aprova a Estrutura Regimental e o Quadro Demonstrativo dos Cargos em Comissão e das Funções Gratificadas do Ministério da Saúde, e dá outras providências. Diário Oficial da União, Poder Executivo, 20/10/2010. Seção 1, p. 6.

<sup>79</sup> Colombia, Decreto 1066 de 26 de Mayo de 2015 ‘Decreto Único Reglamentario del Sector Administrativo del Interior’ Art 2.5.2.2.2.5.

to oversee the policies of the National System of Prevention and Protection of the Rights of Indigenous Peoples in Isolation, created through Decree 1232/2018.<sup>80</sup> This is a set of principles used to design, implement and monitor the prevention and protection measures for uncontacted indigenous peoples. Therefore, in Brazil, the CGIRC is able to adopt a more flexible approach to recognition, in which it uses its expertise and knowledge to craft policies to protect uncontacted indigenous peoples. In Colombia, the National Commission simply implements the existing policy.

At the local level, Ethno-environmental Protection Fronts (FPEs) in Brazil implement the ‘Protection System,’ a set of actions that are in line with the CGIRC’s mission. They locate and monitor uncontacted indigenous peoples, through field research that identifies signs of their existence while taking precautions to ensure there is no contact.<sup>81</sup> This ensures their right to self-determination is being upheld and affords them protections that, in theory, guarantee their right to land and natural resources. In Colombia, the Local Committees do not simply implement policy, but take a more proactive role in designing, implementing and evaluating preventative strategies for protecting the rights of uncontacted indigenous peoples.<sup>82</sup> Both Brazil and Colombia’s approach to recognition exemplifies best practice since they accept differing types of evidence such as satellite images, oral testimony, or found objects. Furthermore, the autonomy these bodies have is important because they are knowledgeable of the issues uncontacted indigenous peoples face and therefore can be more flexible in its approach to recognition.<sup>83</sup>

In Peru, Law 28.736/ 2006 stipulates that for uncontacted indigenous peoples to be officially recognised, a Commission presided by the National Institute of Development of the Andean, Amazonian and Afro-Peruvian Peoples (Instituto Nacional de Desarrollo de los Pueblos Andinos, Amazónicos y Afroperuano ‘INDEPA’) must conduct a study that provides evidence of their existence, the size of their population and the land they inhabit.<sup>84</sup> However, the methodology or criteria to conduct these studies is not specified, which could result in the use of invasive measures that do not fully respect the right to no contact. INDEPA is responsible for proposing and supervising compliance with national policies and coordinating

---

<sup>80</sup> Colombia, Decreto 1232 de 17 de Julio de 2018. Por el cual se adiciona el Capítulo 2, del Título 2, de la Parte 5, del Libro 2 del Decreto 1066 de 2015, Único Reglamentario del Sector Administrativo del Interior. Art 2.5.2.2.2.1.

<sup>81</sup> IWGIA - IPES (n4) 30.

<sup>82</sup> Colombia, Decreto 1066 de 26 de Mayo de 2015 ‘Decreto Único Reglamentario del Sector Administrativo del Interior’ Art 2.5.2.2.2.7.

<sup>83</sup> UNCHR, ‘Resumen de reunion, emitido conjunto por la Relatora Especial de las Naciones Unidas sobre los derechos de los pueblos indígenas, Victoria Tauli-Corpuz y por el Relator sobre los Derechos de los Pueblos Indígenas de la Comisión Interamericana de Derechos Humanos, Francisco Eguiguren’ (28 February 2018) UN Doc A/HRC/39/17/Add.1, para 55.

<sup>84</sup> Peru, Ley no 28736, de 18 de Mayo de 2006. Ley Para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial. Lima, *Diario Oficial El Peruano*, p. 318954.

with the regional governments to promote and protect the rights of the Andean, Amazonian and Afro-Peruvian Peoples.<sup>85</sup> However, indigenous peoples are under-represented in the Council of INDEPA<sup>86</sup> and representatives from the Ministry of Agriculture and the Ministry of Production reside on it.<sup>87</sup> This could weaken the principle of self-determination, because indigenous groups would not have the final say on INDEPA's decisions.<sup>88</sup>

India and Paraguay do not have comprehensive laws recognising the existence of uncontacted indigenous peoples and protections afforded to them, and therefore do not have national monitoring bodies that implement these laws. They are therefore in violation of international law, specifically the right to self-determination, but also right to health, life and land because they do not have laws or bodies that prohibit forced contact. They do, however, have resolutions and protocols that protect some uncontacted groups. In Paraguay, the Law on Indigenous Health<sup>89</sup> recognises that uncontacted indigenous peoples require special protections, although it does not specify how to identify them or what the protections are, therefore seeming quite weak. The only group that has been legally recognised is the Ayoreo Totobiegosode, and measures are in place to monitor, protect and prevent contact.<sup>90</sup> An Interinstitutional Commission was created to regulate and implement the Protocol on the Ayoreo Totobiegosode.

India does not recognise uncontacted indigenous peoples because it does not recognise indigenous peoples on its territory at all, instead terming individuals who would be considered indigenous peoples as 'Scheduled Tribes.' India did vote for UNDRIP, but included a condition that all Indians are considered indigenous after their independence, thus minimising the impact of UNDRIP.<sup>91</sup> India recognises 'Scheduled Tribes' as communities in need of special protection,<sup>92</sup> and bestows on the President the powers to identify peoples as Scheduled Tribes.<sup>93</sup> The Jarawa Tribe of the Andaman Islands were protected in a 2004 policy, which calls for maximum autonomy and prohibits intervention and natural resource exploitation within their reserve "while they are not physically, socially and culturally prepared

---

<sup>85</sup> Peru, Ley no 28495, Creación de el Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuano.

<sup>86</sup> Only 9 of 23 members are indigenous people.

<sup>87</sup> Peru, Ley no 28495, Creación de el Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuano, Art 6.

<sup>88</sup> INDEPA has also been through various ministerial change. It has been transferred to the Ministry of Women and then Culture, which has made it very unstable and unable to work efficiently. See 'Despojo Territorial, Conflicto Social y Exterminio. Pueblos Indígenas en Situación de Aislamiento.' Beatriz Huertas Castillo, p. 54.

<sup>89</sup> Paraguay, Ley no 5469 de 17 de Diciembre de 2015. Creation de la Dirección Nacional de Salud de los Pueblos Indígenas – DINASAPI, Art 10j.

<sup>90</sup> Paraguay, 2018 Protocolo de Actuación, Prevención y Contingencia Para Pueblos Indígenas en Situación de Aislamiento y/o en Situación de Contact Inicial en el Patrimonio Natural y Cultural Ayoreo Totobiegosode.

<sup>91</sup> IWGIA 'The Indigenous World 2019' (21 March 2019) <[https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019\\_UK.pdf](https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf)> accessed 1 May 2019, 347.

<sup>92</sup> Constitution of the Republic of India 1949, Art 46.

<sup>93</sup> Constitution of the Republic of India 1949, Art 342, clause 1.



for such interference.<sup>94</sup> India is in violation of international law and instead must understand the term ‘indigenous people’ as denoting those who have a particular cultural attachment to and use of ancestral land for survival, as various regional courts and international treaty bodies have stated.<sup>95,96</sup>

This memorandum now turns to States’ obligations in protecting uncontacted indigenous lands. The Special Rapporteur on the Rights of Indigenous Peoples has noted that restrictive criteria for indigenous peoples’ recognition impinge on their right to land.<sup>97</sup> States must recognise indigenous peoples’ distinct issues and circumstances, including their connections to lands and the importance of land and natural resources. This memorandum analyses to what extent States prohibit forced contact by first outlining the laws concerning the demarcation of uncontacted indigenous peoples’ ancestral lands and by discussing the issue of land titles. These laws are essential for the States that have ratified ILO 169,<sup>98</sup> which requires States parties to identify lands that indigenous peoples traditionally occupy and guarantee their rights of ownership.<sup>99</sup> A lack of a land title should not be a barrier to indigenous peoples’ ability to exert their rights, as established by the IACtHR in *Awas Tingni v. Nicaragua*.<sup>100</sup> Then it discusses the protection of uncontacted indigenous peoples’ lands, such as the prohibition of entry and its exceptions, the laws on natural resource exploitation and the use of buffer zones, which are an important additional safeguard for the prohibition of contact. Lastly, it turns to the issue of conservation. States ignore the connection between land and indigenous peoples when they create one-sided laws that are aimed only at conserving the land and do not allow indigenous peoples to live on conservation units.<sup>101</sup>

---

<sup>94</sup>India, Lieutenant Governor (Administrator), Policy on Jarawa Tribe of Andaman Islands, No. 210 of 2004 <[https://www.tribal.nic.in/DivisionsFiles/clm/AN\(B\)-6.pdf](https://www.tribal.nic.in/DivisionsFiles/clm/AN(B)-6.pdf)> accessed 30 March 2019.

<sup>95</sup> UN Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports Submitted by States parties Under Article 9 of the Convention. Concluding observation of the Committee on the Elimination of Racial Discrimination’ CERD/C/IND/CO/19, 5 May 2007.

<sup>96</sup> Ie. African Commission on Human and Peoples’ Rights, 9 Communication 276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya or ACHPR, Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples.

<sup>97</sup> UNCHR ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ (2014) UN Doc A/HRC/27/52 para 14.

<sup>98</sup> Brazil, Colombia, Peru and Paraguay have all ratified ILO 169. Brazil has enacted ILO 169 in its national legislation through Decree 5,051/04. Colombia enacted ILO 169 through Law 21/ 1991. Peru enacted ILO 169 via Resolución Legislativa 26253.

<sup>99</sup> International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, Art 14.2.

<sup>100</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (August 31, 2001). Nicaragua was found in violation of article 25 on judicial protection and article 21 on the right to property because it had not officially demarcated and titled the Awas Tingni’s land. Even without a paper title, their right to property was violated because they could prove that the lands were their ancestral ones.

<sup>101</sup> UNCHR ‘Report of the Special Rapporteur on the Rights of Indigenous peoples: Indigenous Peoples and Conservation’ (21 July 2012) UN Doc A/71/229 19.

Colombia is the only State in which a paper title is not necessary for indigenous peoples to exert their lands rights.<sup>102</sup> This should safeguard the rights of indigenous peoples whose land has not yet been recognised and is in compliance with that IACtHR ruling in *Awasi Tingni v Nicaragua*. However, Brazil, Peru and Paraguay violate regional law by not guaranteeing property rights to groups that lack a land title. In Peru, reserves are established through a study presided by INDEPA, and the rights to no contact, self-determination and property are only extended to those indigenous territories that are legally recognised.<sup>103</sup> In Brazil, lack of a land title means they do not have formal rights and land evictions have been an increasingly frequent issue with indigenous peoples.<sup>104</sup> Furthermore, in the initial stages of demarcation of indigenous lands, State governments and commercial interests in Brazil can challenge the process.<sup>105</sup> This significantly weakened the demarcation process, as more than a thousand appeals were submitted in the first two weeks of the decree.<sup>106</sup> In addition, the current Presidential administration<sup>107</sup> has changed FUNAI from the Ministry of Justice to the Ministry of Human Rights, Family, and Women, therefore weakening its overall mandate. It has also transferred powers of land demarcation to the Ministry of Agriculture.<sup>108</sup> This violates international law by weakening their right to self-determination, potentially allowing private interests to interfere in the land demarcation process.

The Constitutions and Civil Codes of Peru,<sup>109</sup> Brazil,<sup>110</sup> Colombia<sup>111</sup> and Paraguay<sup>112</sup> recognise the inalienable and non-transferable character of indigenous lands and indigenous

<sup>102</sup> Colombia, Ley 160 de 3 de Agosto de 1994. Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino. Diario Oficial No. 41.479.

<sup>103</sup> Peru, Ley no 28736, de 18 de Mayo de 2006. Ley Para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial. Lima, *Diario Oficial El Peruano*, p. 318954. Peru has only legally recognised 5 indigenous reserves. See Beatriz Huertas Castillo, 'Despojo Territorial, Conflicto Social y Exterminio. Pueblos Indígenas en Situación de Aislamiento, Contacto Esporádico y Contacto Inicial de la Amazonia Peruana' (IWGIA 2010), p. 56.

<sup>104</sup> UNCHR, 'Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil', 8 August 2016, A/HRC/33/42/Add.1 para 69.

<sup>105</sup> BRASIL. Lei no 1.775, de 8 de Janeiro de 1996. Dispõe sobre o procedimento administrativo de demarcação das terras indígenas e dá outras providências. Diário Oficial da União, Poder Executivo, 8/1/1996. Seção 1, p. 265.

<sup>106</sup> Sara Gavney Moore and Maria Carmen Lemos 'Indigenous Policy in Brazil: The Development of Decree 1775 and the Proposed Raposa/Serra do Sol Reserve, Roraima, Brazil' 21(2) Human Rights Quarterly 1999, 453.

<sup>107</sup> This memorandum is up to date on the given situations regarding Brazil and the tension between the government and indigenous peoples, as of 10 May 2019.

<sup>108</sup> BRASIL. Medida Provisória no 870 de 1 de Janeiro de 2019. Estabelece a organização básica dos órgãos da Presidência da República e dos Ministérios. Diário Oficial da União, Poder Executivo, 1/1/2019. Seção 1 Edição Especial, p.1.

<sup>109</sup> Constitution of the Republic of Peru 1993 <[https://www.constituteproject.org/constitution/Peru\\_2009.pdf?lang=en](https://www.constituteproject.org/constitution/Peru_2009.pdf?lang=en)> accessed 15 April 2019 Art 287 and Peru. Código Civil, Decreto Legislativo no 295 de 24 de julio de 1984 Art 136.

<sup>110</sup> Constitution of the Republic of Brazil 1988 <[https://www.constituteproject.org/constitution/Brazil\\_2014.pdf](https://www.constituteproject.org/constitution/Brazil_2014.pdf)> accessed 7 April 2019 Art 231.

<sup>111</sup> Constitution of the Republic of Colombia 1991 <[https://www.constituteproject.org/constitution/Colombia\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en)> accessed 7 April 2019 Arts 63, 286 and 287.

<sup>112</sup> Constitution of the Republic of Paraguay 1992 <[https://www.constituteproject.org/constitution/Paraguay\\_2011.pdf](https://www.constituteproject.org/constitution/Paraguay_2011.pdf)> accessed 15 April 2019, Art 64.

peoples' autonomy to manage those lands. In Peru,<sup>113</sup> Brazil<sup>114</sup> and Colombia<sup>115</sup> uncontacted indigenous peoples' territories cannot be entered by third parties, and natural resource extraction by third parties is forbidden. The right to no contact and self-determination is enshrined in law. In addition, in Colombia their territories must have buffer zones, in which local entities must take precautions and limit any activity that would cause damage to the ecosystem.<sup>116</sup> Brazil does not include clauses relating to buffer zones and in Peru buffer zones only exist around the Manu National Park, in which indigenous peoples live.<sup>117</sup> This increases the risk of forced contact for uncontacted indigenous peoples and to best adhere with their international obligations States should create buffer zones. Paraguay is the only State that does not have national policies to protect uncontacted indigenous peoples' lands, because the right to no contact and self-determination only extends to the Ayoreo-Totobiegosode, as the sole uncontacted indigenous peoples recognised in the State.<sup>118</sup> Third parties cannot access resources without free, prior and informed consent, but this does not extend to the other four unrecognised indigenous peoples.

There are exceptions to the prohibition on entry, which in Brazil includes allowing entry on the basis of 'national interest'. In Colombia<sup>119</sup> and Peru,<sup>120</sup> entry can occur if illegal activities are reported, or in case of public health emergencies, national defence or public order. Vague clauses such as 'national interest' or 'public order' have been interpreted as simply needing to build a highway or dam,<sup>121</sup> and therefore, these clauses weaken protections for indigenous peoples and undermine their right to self-determination, to property and to natural resources. Furthermore, in Peru natural resource extraction is allowed on lands "if it does not affect

---

<sup>113</sup> Peru, Ley no 28736, de 18 de Mayo de 2006. Ley Para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial. Lima, *Diario Oficial El Peruano*, p. 318954.

<sup>114</sup> BRASIL. Portaria no. 281/PRES/FUNAI de 20 de abril de 2000. Diário Oficial da União, Poder Executivo, 20/4/2000. Seção 1, p. 367. In Brazil, the CGIRC and FPEs have policing powers to "control the entry and transit of third parties into and across areas in which there is a confirmed presence of [uncontacted] indigenous peoples".

<sup>115</sup> Colombia, Decreto 1232 de 17 de Julio de 2018. Por el cual se adiciona el Capítulo 2, del Título 2, de la Parte 5, del Libro 2 del Decreto 1066 de 2015, Único Reglamentario del Sector Administrativo del Interior.

<sup>116</sup> Colombia, Decreto 1232 de 17 de Julio de 2018. Por el cual se adiciona el Capítulo 2, del Título 2, de la Parte 5, del Libro 2 del Decreto 1066 de 2015, Único Reglamentario del Sector Administrativo del Interior. Art 2.5.2.2.3.12.

<sup>117</sup> IWGIA - IPES, *Indigenous Peoples in Voluntary Isolation and Initial Contact* (June 2013) p 60.

<sup>118</sup> Paraguay, Rules of Procedures Article 25; Inter-American Commission on Human Rights Resolution 4/2016 Precautionary Measure no. 54-13 issue communities in voluntary isolation of the Ayoreo-Tolobiegosode people respect of Paraguay 3 February 2016.

<sup>119</sup> Colombia, Decreto 1232 de 17 de Julio de 2018. Por el cual se adiciona el Capítulo 2, del Título 2, de la Parte 5, del Libro 2 del Decreto 1066 de 2015, Único Reglamentario del Sector Administrativo del Interior. Art 2.5.2.2.3.13.

<sup>120</sup> Peru, Ley no 28736, de 18 de Mayo de 2006. Ley Para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial. Lima, *Diario Oficial El Peruano*, p. 318954 Art 6.

<sup>121</sup> For example, the Brazilian and Peruvian government have been promoting a policy of cross-border development, which includes the construction of a highway that runs between Cruzeiro del Sur in Brazil and Pucallpa in Peru, through the Isconahua Reserve. Peru has declared this a matter of public necessity and national interest through law no. 29207/ 2008. See IWGIA, 'Indigenous Peoples in Voluntary Isolation and Initial Contact', p. 82.

uncontacted indigenous peoples' rights and if an environmental study allows."<sup>122</sup> This significantly weakens the protections on their land under the State's international obligation to protect their natural resources.<sup>123</sup>

Brazil, Colombia and Peru are the only three States that discuss the relation between conservation and indigenous peoples, which is important due to the internationally recognised link between land rights and environmental protection.<sup>124</sup> In Brazil, the law does not allow people to live inside protected conservation units, so indigenous peoples can not legally live in these areas.<sup>125</sup> Brazil's approach is misguided as it juxtaposes conservation with indigenous territories, which have instead been recognised as compatible. In Peru, indigenous peoples are legally allowed to live in national parks without land titles as long as their activities do not go against conservation principles.<sup>126</sup> Land titles should be given to indigenous peoples with the understanding that there is a relationship between conservation and indigenous peoples' land. Furthermore, the clause of indigenous peoples' actions going against conservation principles is quite vague. Colombia has one of the most progressive laws in this regard, for it recognises the compatibility of national parks with the protection of uncontacted indigenous peoples. One of the priorities in the creation of Río Puré National Park was the protection and right of no contact of uncontacted indigenous peoples,<sup>127</sup> Chiribiquete National Park also protects uncontacted indigenous peoples.<sup>128</sup> In contrast, India and Paraguay do not have any laws regarding indigenous peoples and their importance for conservation of lands, as required under international law.<sup>129</sup>

Lastly, India's Constitution does not allow Scheduled Tribes to self-govern their land and territories. The Andaman and Nicobar Islands are Union Territories directly under the

---

<sup>122</sup> Peru, Ley no 28736, de 18 de Mayo de 2006. Ley Para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial. Lima, *Diario Oficial El Peruano*, p. 318954 art 5.

<sup>123</sup> International Labour Organization, (n 22) art 15.

<sup>124</sup> The Special Rapporteur on the Rights of Indigenous Peoples has emphasised the importance of human rights-based conservation. See UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous peoples: Indigenous Peoples and Conservation' (21 July 2012) UN Doc A/71/229, para 11. The inter-relatedness of international human rights law and international environmental law. See UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous peoples: Indigenous Peoples and Conservation' (21 July 2012) UN Doc A/71/229., para 21.

<sup>125</sup> BRASIL. Lei no 9.985, de 18 de Julho de 2000. Institui o Sistema Nacional de Unidades de Conservação da Natureza e dá Outras Providências. Diário Oficial da União, Poder Executivo, 18/7/2000. Seção 1, p. 265.

<sup>126</sup> Peru, Decreto No 22175, de 9 de Mayo de 1978. Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y de Ceja de Selva.

<sup>127</sup> Ministerio del Medio Ambiente, Resolución 0764, 05 Agosto 2002. Indigenous communities agreed to the creation of the park, and Articles 6 and discuss the protection of the Yuri, Aroje and Carabayo uncontacted peoples <[http://siatac.co/c/document\\_library/get\\_file?uuid=e98e3e82-1594-4523-bda8-a9db163d8d70&groupId=762](http://siatac.co/c/document_library/get_file?uuid=e98e3e82-1594-4523-bda8-a9db163d8d70&groupId=762)> accessed 15 March 2019.

<sup>128</sup> The Amazon Conservation Team, 'Legalization of Indigenous Territories in Colombia' <<https://www.amazonteam.org/maps/colombia-land-rights/en/index.html>> accessed 15 March 2019.

<sup>129</sup> UNCHR, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz' (6 August 2015) A/HRC/30/41/Add.1, para 83.

control of the President and Central Government,<sup>130</sup> and control of territories is only vested to the groups through separate regulations. Four indigenous reserves were created in 1957,<sup>131</sup> but the Lieutenant Governor of the area is given far-reaching powers in altering their territorial limits. These powers can be used to reserve areas<sup>132</sup> for trade and businesses.<sup>133</sup> These policies give a disproportionate amount of arbitrary power to the Lieutenant Governor. This undermines uncontacted indigenous peoples' right to self-determination and right to land, for they are not the ones with authority over their land. In 2012 the Lieutenant Governor was given the power to declare buffer zones in which no person can establish or operate tourist or commercial operations.<sup>134</sup> Buffer zones around the Jarawa Tribe's land were created in a 2013 law.<sup>135</sup> The system in India is therefore flawed because the Lieutenant Governor has the power to create reserves, alter their limits and create buffer zones, therefore violating uncontacted indigenous peoples' right to land and self-determination.

---

<sup>130</sup> Constitution of the Republic of India 1949, Art 240.

<sup>131</sup> India, Office of the Chief Commissioner, Andaman and Nicobar Islands, Notification No. 3 of 1957 <<https://www.tribal.nic.in/DivisionsFiles/reserveNoti.pdf>> accessed 20 March 2019.

<sup>132</sup> India, Office of the Chief Commissioner, Andaman and Nicobar Islands, Notification No. 4 of 1956 <[https://www.tribal.nic.in/DivisionsFiles/clm/AN1\(3061956\).pdf](https://www.tribal.nic.in/DivisionsFiles/clm/AN1(3061956).pdf)> accessed 20 March 2019 accessed 20 March 2019.

<sup>133</sup> India, Office of the Chief Commissioner, Andaman and Nicobar Islands, The Andaman and Nicobar Islands (Protection of Aboriginal Tribes) Regulation, Notification No. 3 of 1958 <[http://www.and.nic.in/archives/C\\_Charter/Dir\\_tw/2012/PAT1956.pdf](http://www.and.nic.in/archives/C_Charter/Dir_tw/2012/PAT1956.pdf)> accessed 15 March 2019. Section 4 (b).

<sup>134</sup> India, Lieutenant Governor (Administrator), Andaman and Nicobar Islands, Andaman and Nicobar Administration, Notification No. 149 of 2012 <[https://www.tribal.nic.in/DivisionsFiles/clm/AN4\(9\\_7\\_2012\)-4.pdf](https://www.tribal.nic.in/DivisionsFiles/clm/AN4(9_7_2012)-4.pdf)> accessed 20 March 2019.

<sup>135</sup> India, Lieutenant Governor (Administrator), Andaman and Nicobar Islands, Andaman and Nicobar Administration Directorate of Tribal Welfare, Notification No.15 of 2013 <<https://www.tribal.nic.in/DivisionsFiles/andaman.pdf>> accessed 20 March 2019.

## 5. Recommendations and Conclusion

This section will use the same three categories discussed in the ‘Domestic Law’ section to give recommendations for States to better comply with the right to no contact and therefore the rights to life, self-determination and the interrelated rights.

States must ensure that all uncontacted indigenous peoples on their territories are recognised. A national criterion must be in place to establish recognition of these peoples. The methods used must be non-invasive and respect the right to no-contact and must ensure that all types of evidence for the existence of uncontacted indigenous peoples is considered. This report recommends the use of remote sensing and maximum entropy tools for the recognition of uncontacted indigenous peoples, for it is a “low cost and non-invasive method.”<sup>136</sup> As stated by the Special Rapporteur on the Rights of Indigenous Peoples, the concern is that by failing to recognise indigenous peoples States avoid having to enforce their international human rights obligations.<sup>137</sup> By not recognising these groups or creating national policies for them, they are in violation of international law, such as the suggested recommendations of CERD to recognise all ethnic groups in their State.<sup>138</sup> States must also ensure that if there are indications of uncontacted indigenous peoples that are not, as of yet, recognised, they are nonetheless still included in the protections guaranteed to those who are recognised.<sup>139</sup>

As well as ensuring non-invasive recognition for all uncontacted indigenous peoples on its territories, and extending protection to those who are not recognised, States must ensure that uncontacted indigenous peoples’ lands are protected, to fully protect their right to no contact. They must have non-invasive measures to delimit and title their lands and appropriate studies that consider the total land area they use. States must also adopt measures to control and prohibit the entry of third parties and sanction anyone who violates these measures. This includes prohibiting economic activity and creating buffer zones.<sup>140</sup> Any exceptions on the prohibition of entry must not reference ‘public interest,’ as is the case in the Brazilian Constitution, but must only be allowed to safeguard uncontacted indigenous peoples and in case of exceptional emergency situations. Furthermore, States must ensure that indigenous peoples’ lands are not polluted or degraded, as this would violate their right to life and health, as well as their right to freely use and dispose of their land and natural

---

<sup>136</sup> Dylan Kesler and Robert Walker, ‘Geographic Distribution of Isolated Indigenous Societies in Amazonia and the Efficacy of Indigenous Territories’, (2015) 10 PLoSONE 5.

<sup>137</sup> UNCHR ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ (2014) UN Doc A/HRC/27/52, para 12.

<sup>138</sup> Inter-American Commission on Human Rights, ‘Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights’ (December 2013) OEA/Ser.LV/II 44.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*, para 6 and 7.

resources.<sup>141</sup> They must have monitoring mechanisms in case of any extractive activities that occur near the protected areas.<sup>142</sup>

The contradictory laws between conservation and indigenous reserves must be changed, for the establishment of parks and nature reserves must be compatible with uncontacted indigenous peoples' right to land. Their right to self-determination, land and cultural rights must not be curtailed in the name of conservation, for this ignores the reality of the role of indigenous peoples in conservation. The ancestral lands of indigenous peoples contain the most intact ecosystems and are recognised by the Special Rapporteur on the Rights of Indigenous Peoples as providing the most effective and sustainable form of conservation.<sup>143</sup>

Lastly, this report recommends the creation and strengthening of monitoring bodies, for without these the laws on recognition and protection of land are inadequately upheld. Monitoring bodies must be fully staffed and funded,<sup>144</sup> to ensure the lengthy process of recognition occurs in a timely manner, and the protections on indigenous lands are enforced. Enforcement must be strengthened through sanctioning of forced contact and adequate processes of investigation, especially for larger companies and invasive natural resource extraction methods. All relevant State officials must have training programs that inform them of uncontacted indigenous peoples' rights in international law and the health risks these groups face.<sup>145</sup> Furthermore, monitoring bodies should exist at a national and local level.<sup>146</sup>

This memorandum has established uncontacted indigenous peoples' right to no contact through international human rights law. It has established that the right can be founded within an international human rights framework, through the interpretation of the rights to life and self-determination, and the interrelated rights associated with each. Next, it has discussed the domestic laws and policies aimed at prohibiting forced contact. It has identified laws pertaining to recognition, lands rights and monitoring bodies. It has then recommended how these laws should be amended to better uphold the right to no contact. The destruction and exploitation of uncontacted indigenous peoples' land that results in forced contact seriously

---

<sup>141</sup> African Commission on Peoples and Human Rights 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 2001.

<sup>142</sup> UNCHR, Report of the Special Rapporteur on the Rights of Indigenous Peoples on her mission to Brazil, 8 August 2016, A/HRC/33/42/Add.1 para. 46.

<sup>143</sup> UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous peoples: Indigenous Peoples and Conservation' (21 July 2012) UN Doc A/71/229.

<sup>144</sup> For example, Brazil was criticised for not having 'participatory monitoring units'. Furthermore, if they are not representative they could violate self-determination, because their interests and needs are not being accounted for or respected. See A/HRC/33/42/Add.1 para 42.

<sup>145</sup> UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil', (8 August 2016) UN Doc A/HRC/33/42/Add.1 para 101.

<sup>146</sup> UNCHR, 'Resumen de reunion, emitido conjunto por la Relatora Especial de las Naciones Unidas sobre los derechos de los pueblos indígenas, Victoria Tauli-Corpuz y por el Relator sobre los Derechos de los Pueblos Indígenas de la Comisión Interamericana de Derechos Humanos, Francisco Eguiguren' (28 February 2018) UN Doc A/HRC/39/17/Add.1, para 55.

curtails their human rights. It is imperative that States meet their international obligations and implement laws that better protect uncontacted indigenous peoples, before it is too late.



## **Bibliography**

### Primary Sources

#### *Committee on Economic, Social and Cultural Rights*

Committee on Economic, Social and Cultural Rights, 'General Comment No 7' (20 May 1997) UN Doc E/1998/22

Committee on Economic, Social and Cultural Rights, 'General Comment No 14' (11 August 2000) UN Doc E/C.12/2000/4

#### *Committee on the Elimination of Racial Discrimination*

Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States parties Under Article 9 of the Convention. Concluding observation of the Committee on the Elimination of Racial Discrimination'. (4 April 2006) UN Doc CERD/C/BWA/CO/16.

Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States parties Under Article 9 of the Convention. Concluding observation of the Committee on the Elimination of Racial Discrimination' CERD/C/IND/CO/19, 5 May 2007.

Committee on the Elimination of Racial Discrimination, 'Follow-up Procedure Decision 3 (66). Suriname'. In 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 April 2005) UN Doc CERD/C/DEC/SUR/1

Committee on the Elimination of Racial Discrimination, 'General Recommendation No 23' (18 August 1997) UN Doc A/52/18, annex V

Human Rights Committee, 'General Comment No 36' (30 October 2018) UN Doc CCPR/C/GC/36

#### *International Labour Organization*

International Labour Organization, 'Indigenous and Tribal Peoples' Rights in Practice: A guide to ILO Convention No. 169' (2009)

International Labour Organization, 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents' (Geneva 2013)

#### *UNCHR*

UNCHR 'Directrices de Protección para los Pueblos Indígenas en Aislamiento y en Contacto Inicial de la Región Amazónica, el Gran Chaco y la Región Oriental de Paraguay' (February 2012) UN Doc A/HRC/EMRIP/2009/6 09-14447

UNCHR, 'Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco' (30 June 2009) UN Doc A/HRC/EMRIP/2009/6

UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (2014) UN Doc A/HRC/27/52

UNCHR, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz' (6 August 2015) A/HRC/30/41/Add.1

UNCHR 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. James Anaya on the situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur' UN Doc A/HRC/15/37/Add.3

UNCHR, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mr. Rodolfo Stavenhagen, Addendum: Mission to Colombia' UN Doc E/CN.4/2005/88/Add.2

UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil', (8 August 2016) UN Doc A/HRC/33/42/Add.1

UNCHR 'Report of the Special Rapporteur on the Rights of Indigenous peoples: Indigenous Peoples and Conservation' (21 July 2012) UN Doc A/71/229.

UNCHR, 'Resumen de reunion, emitido conjunto por la Relatora Especial de las Naciones Unidas sobre los derechos de los pueblos indígenas, Victoria Tauli-Corpuz y por el Relator sobre los Derechos de los Pueblos Indígenas de la Comisión Interamericana de Derechos Humanos, Francisco Eguiguren' (28 February 2018) UN Doc A/HRC/39/17/Add.1

UNCHR, 'Statement of Ms. Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, at the 17<sup>th</sup> Session of the United Nations Permanent Forum on Indigenous Issues' (18 April 2018)

UNCHR 'Study of the Problem of Discrimination Against Indigenous Populations. Definition of Indigenous Populations' (20 June 1982) UN Doc E/CN.4/Sub.2/1982/2/Add.6

UNCHR 'Summary of Meeting, Jointly Prepared by the Special Rapporteur on the Rights of Indigenous Peoples of the United Nations and the Rapporteur on the Rights of Indigenous Peoples of the Inter-American Commission on Human Rights' (27 June 2018) UN Doc A/HRC/39/17/Add.1

## Secondary Sources

### *Books and Articles*

Kesler D and Walker R, 'Geographic Distribution of Isolated Indigenous Societies in Amazonia and the Efficacy of Indigenous Territories', (2015) 10 PLoSONE

Moore S G and Lemos M C 'Indigenous Policy in Brazil: The Development of Decree 1775 and the Proposed Raposa/Serra do Sol Reserve, Roraima, Brazil' 21(2) Human Rights Quarterly 1999, 453.

Ribeiro D, *Os índios e a civilização* (Vozes 1977)

### *Reports*

International Work Group for Indigenous Affairs - Instituto de Promoción Estudios Sociales, *Indigenous Peoples in Voluntary Isolation and Initial Contact* (June 2013)

International Work Group for Indigenous Affairs 'The Indigenous World 2019' (21 March 2019) <[https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019\\_UK.pdf](https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf)> accessed 1 May 2019.

Beatriz Huertas Castillo, 'Despojo Territorial, Conflicto Social y Exterminio. Pueblos Indigenas en Situacion de Aislamiento, Contacto Esporadico y Contacto Inicial de la Amazonia Peruana' (IWGIA 2010)

Beatriz Huertas Castillo, 'Los Pueblos Indígenas en Aislamiento. Su Lucha por la Sobrevivencia y la Libertad' (IWGIA 2002)

### *Websites and Online Resources*

BBC News, 'Amazon culture clash over Brazil's dams' (*BBC News*) <<https://www.bbc.co.uk/news/world-latin-america-38391377>> accessed 19 April 2019

Cultural Survival, 'Drilling and Logging Threatens Isolated Peoples of the Peruvian Amazon' (*Cultural Survival*) <<https://www.culturalsurvival.org/news/drilling-and-logging-threatens-isolated-peoples-peruvian-amazon>> accessed 20 April 2019

FENAMAD, 'Respeten la decisión de las comunidades nativas sobre el uso y la libre disposición de sus tierras, desprendiéndose de ello la facultad para decidir quienes ingresan a su territorio' (*FENAMAD*, 12 May 2017) <<http://www.fenamad.com.pe/2017/05/12/fenamad-respeten-la-decision-de-las-comunidades-nativas-sobre-el-uso-y-la-libre-disposicion-de-sus-tierras-desprendiendose-de-ello-la-facultad-para-decidir-quienes-ingresan-a-su-territorio>> accessed 20 April 2019

Kesler D and Walker R, 'Geographic Distribution of Isolated Indigenous Societies in Amazonia and the Efficacy of Indigenous Territories', (2015) 10 PLoS ONE 5

Kevin Koenig, 'Community Consent: Business Lessons for the Amazon' (*Amazon Watch*, March 2017) <<https://amazonwatch.org/news/2017/0323-community-consent-business-lessons-from-the-amazon>> accessed 12 April 2019

Myles McCormick, "They lied": Bolivia's untouchable Amazon lands at risk once more' (*The Guardian*, 11 September 2017) <<https://www.theguardian.com/environment/2017/sep/11/they-lied-bolivia-untouchable-amazon-lands-tipnis-at-risk-once-more>> accessed 20 March 2019

Savarese M 'At Hearing, Amazon Tribe accuses Brazil Army of atrocities' (AP News, 8 March 2019) <<https://apnews.com/9b7372ee4abc4b0aa659bdfb82492851>> accessed 1 May 2019.

Survival International 'Ayoreo indigenous people in Paraguay celebrate land victory' (*Survival International*, 1 April 2019) <<https://www.survivalinternational.org/news/12124>> accessed 15 April 2019

The Amazon Conservation Team, 'Legalization of Indigenous Territories in Colombia' <<https://www.amazonteam.org/maps/colombia-land-rights/en/index.html>> accessed 15 March 2019.

Woodman J, 'India's rejection of Vedanta's bauxite mine is a victory for tribal rights' (*The Guardian*, 14 January 2014) <<https://www.theguardian.com/global-development/poverty-matters/2014/jan/14/india-rejection-vedanta-mine-victory-tribal-rights>> accessed 12 April 2019