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Human Rights of Indigenous Peoples in the Terms of Legal Pluralism and Interculturality*

[English Version]

Derechos humanos de los pueblos indígenas en clave de pluralismo jurídico e interculturalidad

Direitos humanos dos povos indígenas na chave do pluralismo jurídico e da interculturalidade

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Abstract

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Objective: to determine and understand the international normative developments of Human Rights instruments in indigenous peoples, according to the focus of legal pluralism and interculturality.

Methodology: documentary research with a qualitative approach. International instruments and specialized literature were consulted according to the core categories of the text, namely: human rights, indigenous peoples, legal pluralism and interculturality.

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Results: existence of a profuse conventional development in Human Rights on indigenous peoples. It was also shown that, despite the broad legal protection in the field of international law, the Colombian State's commitment to refrain from voting or formulating objections to different instruments is limited. It was found, moreover, that international norms on indigenous peoples tend to expand the core of protection progressively by contemplating not only respect and the guarantee of individual and collective material rights, but also spiritual and epistemic rights that are vital for these peoples. **Conclusions:** the international instruments on the human rights of indigenous peoples, during the 21st century have transcended assimilationist and integrationist focuses towards legal pluralism; However, this focus is still in default of overcoming the influence of legal monism to recognize, in addition to the mere existence of other legal-cultural systems, such as those of indigenous peoples, its true value to revitalize sociopolitical and legal struggles by the dignity and autonomy of other plural systems that take place in the Rule of Law in America.

Keywords: Human rights; Indigenous population; Interculturality; legal Pluralism.

Resumen

Objetivo: determinar y comprender los desarrollos normativos internacionales de los instrumentos de Derechos Humanos de los pueblos indígenas, según el enfoque del pluralismo jurídico y la interculturalidad. **Metodología:** investigación de corte documental con enfoque cualitativo. Se consultaron instrumentos internacionales y literatura especializada en función de las categorías medulares del texto, a saber: derechos humanos, pueblos indígenas, pluralismo jurídico e interculturalidad. **Resultados:** se encontró un profuso desarrollo convencional en Derechos Humanos sobre pueblos indígenas. También se evidenció que, pese a la amplia protección jurídica en el ámbito del derecho internacional, es limitado el compromiso del Estado colombiano al abstenerse de votar o formular objeciones a distintos instrumentos. Se halló, además, que las normas internacionales sobre pueblos indígenas tienden a ampliar el núcleo de protección de manera progresiva al contemplar no solo el respeto y la garantía de derechos materiales individuales y colectivos, sino también espirituales y epistémicos que resultan vitales para estos pueblos. **Conclusiones:** los instrumentos internacionales sobre derechos humanos de los pueblos indígenas durante el siglo XXI han trascendido los enfoques asimilacionistas e integracionistas hacia el pluralismo jurídico; sin embargo, este enfoque aún se encuentra en mora de superar la influencia del monismo jurídico para reconocer, además de la mera existencia de otros sistemas jurídico-culturales, como los de los pueblos indígenas, su

auténtico valor para revitalizar las luchas sociopolíticas y jurídicas por la dignidad y la autonomía de otros sistemas plurales que tengan lugar en los Estados de Derecho en América.

Palabras-clave: Derechos humanos; Población indígena; Interculturalidad; Pluralismo jurídico.

Resumo

Objetivo: determinar e compreender os desenvolvimentos normativos internacionais dos instrumentos de direitos humanos dos povos indígenas, de acordo com a abordagem do pluralismo jurídico e da interculturalidade. **Metodologia:** pesquisa documental com abordagem qualitativa. Instrumentos internacionais e literatura especializada foram consultados de acordo com as categorias principais do texto, a saber: direitos humanos, povos indígenas, pluralismo legal e interculturalidade.

Resultados: foi encontrado um desenvolvimento convencional profuso em Direitos Humanos sobre os povos indígenas. Mostrou-se também que, apesar da ampla proteção jurídica no campo do direito internacional, o compromisso do Estado colombiano de abster-se de votar ou formular objeções a diferentes instrumentos é limitado. Constatou-se, ademais, que as normas internacionais sobre os povos indígenas tendem a ampliar progressivamente o núcleo da proteção, contemplando não apenas o respeito e a garantia dos direitos individuais e coletivos, mas também os direitos espirituais e epistêmicos que são vitais para esses povos. **Conclusões:** os instrumentos internacionais sobre os direitos humanos dos povos indígenas durante o século XXI transcenderam as abordagens assimilacionistas e integracionistas em relação ao pluralismo jurídico; No entanto, esta abordagem ainda está em falta de superar a influência do monismo legal para reconhecer, além da mera existência de outros sistemas jurídico-culturais, como os dos povos indígenas, seu verdadeiro valor para revitalizar as lutas sociopolíticas e legais a dignidade e autonomia de outros sistemas plurais que ocorrem nos Estados de Direito na América.

Palavras-chave: Direitos humanos; População indígena; Interculturalidade; Pluralismo legal.

Introduction

The discussion about the recognition of the rights of indigenous peoples in the International Human Rights Law (IHL), was not on the agenda of Western societies until the middle of the 20th century, barring the colonial rational that has persisted for more than five centuries, founded on a negation premise over the epistemic and cultural otherness that these peoples represent; this, steered indigenous policies until the 1950' decade.

In the countries of the Americas, the majority of its population is mestizo [mixed]. With the exception of the Plurinational State of Bolivia, where the indigenous population is the demographic majority with an estimated 6,216,026 people, corresponding to 62.2% of its total population in 2010 (Economic Commission for Latin America and the Caribbean [ECLAC], 2014, p. 43). Other countries with representative indigenous population in demographic terms for the same year are Guatemala, with 5,881,009 people, 41% of its population; Peru, whose indigenous population was projected at 7,021,271, 24% of the total population and Mexico, with 16,933,283 indigenous people for 15.1% of its population. In Colombia, this population represents only 3.4% of the total; that is, 1,559,852 indigenous people, according to the Latin American and Caribbean Demographic Center, CELADE (ECLAC, 2014, p. 43).

Due to the above, with the exception of Bolivia, in the Americas, indigenous peoples are an ethnic minority both demographically and sociopolitical. This is because it is a population historically subjected to segregation or racism and subjugated to the predominance of legal monism of the States of which these nations and indigenous peoples of the continent are part. However, in recent years, valuable gains have been achieved in legal and political terms, which can serve as a bridge to materially execute rights that have already been formally recognized and others that may be in constant dispute such as collective, spiritual and epistemic.

Therefore, the objective of this article is to address some of the international instruments on the protection of human rights of indigenous peoples, in order to provide context and analysis to the universal declaration of human rights (UDHR) that protects the individual and collective rights of these populations. In this regard, this research aims to provide tools for holistic studies on international human rights instruments where pertinent, in addition to the legal elements, sociopolitical or cultural factors.

Methodology

This research based on a qualitative case study of an indigenous town of the municipality of Riosucio in the department of Caldas, involved both documentary analysis and fieldwork.

However, as the purpose of this paper is to respond to one of the specific objectives facing the normative evolution of the international instruments based on UDHR of indigenous peoples, a tracing of declarative and conventional instruments of international law was made, and in particular, to the Universal System of Human Rights (USHR) and the Inter-American Human Rights System (IHRS), related to the protection of specific rights for indigenous peoples. Instruments such as the 1992 Convention on Biological Diversity of the United Nations or the discussions of organisms such as the World Intellectual Property Organization, WIPO or World Health Organization, WHO, were not taken into account, due to the specificity of their subjects,

After the selection of the international instruments subject to analysis, proceeded a doctrinal tracing regarding these instruments, priority for incorporation into the text was awarded by virtue of the level of treatment and depth that the authors offered on said norms. Lastly, the legal component derived from international instruments with specialized legal sociology literature was complemented by critical approaches or trends such as southern epistemologies and decoloniality. A jurisprudential analysis or elaboration was not contemplated as it goes beyond the objective of this study.

Results

The results are presented in two sections: the first, proposes a conceptualization against what is called interculturality and legal pluralism and its relation to the instances of indigenist policies from the sixteenth century to the twenty-first century; In the second block, some IHRL provisions on indigenous peoples are addressed from a critical perspective, both in the USHR and in the IHRS.

The Concept of Interculturality

Both interculturality and legal pluralism start from a fundamental premise: respect for the difference of manifestations and cultural, social and spiritual practices that differ or do not coincide with those recognized or validated by the dominant society or demographic majority such as the West. The discourse of diversity is constructed in the presence of conservative positions that promote the policies of exclusion and segregation; Thus, excluded groups such as women, Jews, indigenous people, blacks, disabled or people with diverse sexual orientation have had to struggle for recognition of their human condition, denied by their difference of sex, ethnicity, culture, religion: it is this characteristic that reduces their humanity to a mere condition that identifies them and simultaneously stigmatizes them, with the understanding that a person is indigenous or a disabled person before a human being (Tovar, 2015, p.121). The above, allows the establishment of a channel for the development of concepts of interculturality and legal pluralism.

According to De Sousa-Santos (2012a), the liberal model of multiculturalism recognizes the existence of other non-Eurocentric cultures, as long as they do not interfere with knowledge and its forms of appropriation, preponderant in society and dominant culture (p.20); These cognitive processes, which were inherited by European colonialism, became entrenched in the Americas insofar as they destroyed other epistemes, such as those of indigenous and Afro populations.

In this regard, the interculturality in pluriethnic and culturally diverse States such as the countries of the Americas cannot be exhausted by the mere formal (legal-normative) recognition of difference, but must "(...) celebrate cultural diversity and reciprocal enrichment between the various present cultures "(De Sousa-Santos, 2012a, p.20). In this respect, Walsh's (2008) approaches on the difference between multi, pluri and inter (culturality) are relevant:

The "multi" has its roots in Western countries, in a cultural relativism that obviates the relational dimension and hides the permanence of social inequalities and inequities. Currently, it is of greater global use, orienting state and transnational inclusion policies within a neoliberal model that seeks inclusion within the market. The "pluri", on the other hand, is the most commonly used term in South America; it reflects the particularity and reality of the region where indigenous and black peoples have lived together for centuries with white-mestizos and where racial mixings have played a significant role (p.140).

For the author, the "multi" is a mere collection of cultures that are not related to each other, but that are part of a dominant and hegemonic (Eurocentric) culture. On the contrary, the "pluri" indicates that there is a cultural coexistence within the same territory, although it is not possible to advocate an equitable relationship in this coexistence, because there is a prevailing cultural system that relegates the other to a second plane. Contrary to this, Walsh (2008) proposes that interculturality:

(...) it does not exist yet. It has yet to be built. It goes far beyond respect, tolerance and recognition of diversity; it indicates and fosters, rather, a political process and social project aimed at the construction of new and different societies and relations and conditions of life. Here I am referring not only to economic conditions but also to those that have to do with the cosmology of life in general, including knowledge, ancestral memory, and the relationship with Mother Nature and spirituality, among others (p. 140).

Understood in this way, interculturality is a stage rather than an epistemological normative. There may be rules tending to respect the coexistence of other cultures that have other knowledge, other ways of conceiving the world different from the Eurocentric vision or another relationship with the nature of what capitalism has with its extractive desire ; nevertheless, the mere creation of norms does not guarantee in the absolute, that these other visions are taken seriously or given a real importance in a scenario of interlocution with the mestizo society -majority in several countries of the Americas-. In this way, these other visions can participate in the field of politics and the validity of their voices can be recognized in the same terms as that of parties or interest groups.

The Concept of Legal Pluralism

Linked to interculturality appears the concept of legal pluralism. It is evident that modern law and legal tradition in the countries of the Americas are permeated by Eurocentric legal tradition, which, as De Sousa-Santos (2012b) affirms, was embodied in the architecture of ordinary/state justice and in the legal theory as well as in the curricula of law schools.

Legal pluralism has its precedent in the legal monism of the 19th century. Yrigoyen (2012), recalls that the liberal states of this period were configured under that model that was based on the idea that there is only one legal system within a State and, consequently, a *General Law* applicable to all citizens; Yrigoyen (2012), then, understands legal pluralism as the form of coexistence be-

tween several normative systems within the same geopolitical space (Yrigoyen, 2012, p. 172).

For his part, the Brazilian jurist Wolkmer (2003) defines legal pluralism as the multiplicity of practices that interact in a socio-political space, interacting through conflicts or consensus and that may or may not be official, but that preserve their *raison d'être* in the existential, material and cultural needs (p.5).

In a broader sense, De Sousa-Santos (2007) states that in the countries of our region there cannot be a unitary legal system and recognizes that at least there are two legal systems: The Eurocentric and the Indocentric, which are not completely separated, because this would put at risk the unity of the State. Therefore, he invites us to think about ways of coexistence between these two systems and exemplifies it with the idea of a plurinational, intercultural and postcolonial constitutional court, with the capacity to resolve conflicts, pointing out that the objective of these institutions is not to achieve a consensus for uniformity, but a consensus on the recognition of differences (De Sousa-Santos, 2007, p. 24).

For this author, "legal pluralism is fundamental in intercultural and postcolonial situations because it is the best way, perhaps the clearest way, to articulate unity with diversity, showing limits of both" (From Sousa-Santos, 2008, p.27). And he adds, particularly on the indigenous jurisdiction and state justice, that they cannot be separate justices - on the one hand indigenous justice and, on the other, Eurocentric justice, because this breaks the unity of the State. On the contrary, he says, there must be an articulation between the two and he gives Colombia as an example, since there, the special indigenous jurisdiction is independent of the ordinary state justice system, but in certain cases it can be supplemented to resolve the conflicts (De Sousa-Santos, 2008, p. 27).

State Moments against the Rights of Indigenous Peoples

The legal pluralism now recognized in the constitutions and laws of the Americas has precedents in relation to the treatment received by the indigenous peoples colonized by the Europeans who arrived in the region. For Yrigoyen (2006), there are five moments or models of state policies regarding indigenous peoples:

1. The project of occupation and submission of the XVIth century by military means as a founding event of the condition of indigenous. 2. The project of political subordination and colonial segregation between the sixteenth century and the beginning of the nineteenth; in it, the Indians are reduced to *Indian*

villages and colonial charges are imposed as tribute and forced labor, Indian law granted mayors or cacique civil and criminal jurisdiction for minor disputes between Indians. **3.** After the processes of independence in America, the assimilationist project emerged from the 19th century until the mid-20th century and whose aim was to turn the Indians into citizens, thus eliminating their collective territories, language, authorities and practices. **4.** For its part, the integrationist project of the mid-twentieth century recognizes some collective and specific rights to indigenous people, but does not abandon the idea of *legal monism* and state supremacy and, finally, **5.** It locates the legal pluralism that begins to take force at the end of the 20th century and has had important developments in recent years, a juridical-political moment that is consolidated in Latin America thanks to the constitutional reforms derived from the ratification of Convention 169 of the International Labor Organization, hereinafter ILO, and whose main advances are the pluricultural recognition of the State to indigenous peoples and legal pluralism (p.541).

What the author describes allows us to propose some comments on how European colonialism in the Americas was consolidated through various manifestations corresponding to the moments previously stated:

i) The military route was based on a basic premise, which was the physical extermination of the original peoples of the region for not adjusting to the social, cultural, religious and racial patterns of the conquerors

ii) Political subordination was the response to the impossibility of a total annihilation of the original peoples of the conquerors and, in this sense, the latter created various *legal forms* to maintain the newly imposed social, racial and political hierarchy, through tribute or slavery as pointed out by Yrigoyen (2006)

iii) The assimilation of native peoples as *uncivilized subjects*, that should be progressively incorporated into the logic of the new independent states that were emerging in the region, propitiated the process of epistemic genocide or *epistemicide*; This is the loss of cognitive experiences due to the destruction of knowledge and the ancestral practices of the peoples, caused by European colonialism that materializes in the institutional hegemonic knowledge (De Sousa-Santos, 2010, p.8, 57)

iv) In the integrationist project of the mid-twentieth century, although there are marginal recognitions of collective rights to indigenous peoples, these are not significant, since they continue under the assumption of legal monism, which, as it will be seen later, is closely related to the ILO's first international instrument on human rights of these populations; it is about Convention 107 of 1957

v) The model of legal pluralism, as mentioned by Yrigoyen (2006), began to be strengthened after the adoption of ILO Convention 169 of 1989 -in a sense it was an update of Convention 107, which also ceased to be subject to new ratifications after the adoption of those - and following the ratification of the various States, particularly Latin Americans, the recognition of collective rights to the indigenous peoples living in these territories begins to materialize, at least on the normative level; whose recognition had been ignored by those States.

What has been explored up to this point allows us to establish a relationship between legal pluralism and interculturality. The first, tends to recognize the various practices that can converge in the same territory not only in legal terms, but also sociopolitical and that even not being official, can enjoy legitimacy because they are based on needs and reasons that not necessarily must be legal, for example spiritual, cultural or collective.

In this sense, interculturality has a place in legal pluralism, but it goes far beyond mere formal recognition, because as explained in previous lines, its purpose is also in the political sphere as a project in itself, aimed at the consolidation and materialization of collective rights and new relationships between subjects and not only with human beings, but also with other living beings, with the territory and with nature itself.

This suggests that interculturality and legal pluralism should be understood as an epistemological rather than a normative stage, in order not to assume that in the current conditions of postcolonial domination such enterprise can be consolidated; However, in the last decades, fundamental conquests have been achieved for this purpose, both in legal-constitutional and socio-political terms; some of them will be stated in the next section.

The International Law of Human Rights in the Protection of Indigenous Peoples

In this section, some international normative instruments of the IHRL will be developed. In the first part, some conventional instruments are exposed, that is, binding for the States that ratify said treaty and that oblige them to comply with the provisions contained therein: i) the Convention on the Inter-American Indian Institute of 1940, ii) ILO Convention 107 of 1957, and iii) ILO Convention 169 of 1989, also some comments on the historical moments of the policies on the rights of indigenous peoples in which they are registered will be made.

In a second segment, more recent international instruments are addressed, but they are not binding because they are declarations; that is, declarations of will of the States that adopt such instruments, although they are not obliged in-

ternationally to comply with their content, since the declarations are not subject to ratification and, in this sense, they offer a frame of reference for the respect and guarantee of these rights, but not of obligation; they are: i) the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and with a universal vocation; and ii) the American Declaration on the Rights of Indigenous Peoples (ADRIP) of the Organization of American States (2016a), whose territorial scope is, of course, the countries of the Americas.

Convention on the Inter-American Indian Institute

America pioneered international instruments for the protection of the rights of indigenous peoples in 1940. Thus, prior to the founding of the Organization of the United Nations, the Convention on the Inter-American Indian Institute (CIII) was created, signed by 18 countries and that emerged from the International Congress of Patzcuaro in Mexico in the same year. The III was constituted as a specialized organism of the Organization of American States (OAS) in 1953 and its primary objective was to promote research and training for indigenous development, as well as to participate in the coordination of the indigenous policies of the member states (Yrigoyen, 2009, p.17).

This Convention, despite its specific mandate for the creation of the Institute, highlights the importance that indigenous peoples have in this region of the world, evidencing the interest of the States of the continent to recognize them as political subjects in society; Despite the historical moment in which it arises, that is, the integrationist project, the instrument is relevant because it is one of the first manifestations of recognitions of international rights to indigenous peoples.

ILO Convention 107 of 1957

The International Labor Organization, ILO, also precedes the United Nations Organization, since it was created in 1919; however, in 1946 it became a specialized agency of the UN¹. This institution has a unique tripartite structure in international law, since non-state actors participate there: both representatives of employers and workers' representatives, as well as member states; the

1 The United Nations (UN) was officially created in 1945 through its founding instrument of constitution, known as the San Francisco Charter.

three actors have in this organization the quality of full subjects of international law (Mereminskaya, 2011, p.217).

In 1957, one of the most relevant international instruments on regulation of the international obligations of States in relation to indigenous peoples emerged: ILO Convention 107 was born as a result of an investigation carried out by this organization on global precarious working conditions, the which showed that most of these workers were part of various indigenous peoples around the planet.

For the time, the Convention represented an important advance in the recognition of some rights such as the collective ownership of their ancestral lands (Article 11) or the education of children in their mother tongue (art.23).

This instrument, however, also reflected the paternalistic stance of Western society against indigenous peoples and nations (Gaete, 2012, pp. 78-80).

As highlighted by Mereminskaya (2011), the ILO Secretariat had initially designed to formulate a Recommendation - an international instrument of a non-binding nature - that would serve as a guide for member states when establishing public policies aimed at the treatment of indigenous peoples; but the International Labor Conference of the ILO voted overwhelmingly to convert the document into a binding international instrument - also approving Recommendation 104 dealing with other aspects of rights related to these peoples. It should be noted that the indigenous peoples did not participate in the negotiation or drafting of the Convention, for which the Second World Congress of Indigenous Peoples, held in 1977, decided to reject ILO Convention 107 and Recommendation 104 (Mereminskaya, 2011, p.220).

Convention 107 is part of the integrationist project that would begin to take shape during this decade. This is evident in several sections of the text, as in the same preamble that enshrines "(...) international standards will facilitate the *progressive integration* [of indigenous populations] in their respective national collectivities "(emphasis added). In addition, article 1.1 assumes that members of *tribal or semitribal* populations have social and economic conditions less advanced than those of the rest of the population. The article 2.1 that urges governments to develop programs aimed at the *progressive integration* of these communities into *life* in the respective country and, article 3.1, which affirms that the social, economic and cultural situation of these populations prevents them from *benefiting* from national legislation (ILO, 1957).

Convention 169 of 1989

In the 1980s, indigenous organizations around the world would concentrate their efforts to make their situation of vulnerability visible on the international

agenda; until then, in the multiple existing instruments in the DIDH² the members of these towns were protected and, similarly, it was done with the non-indigenous population (Olsen, 2008, p.8). This, because they were not oriented to the development or recognition of the rights of ethnically differentiated populations and started from the assumption of the universality of human rights, thus claiming an idea of *a majority society standardized* under western parameters. All this, inheritance of the Revolutions of the eighteenth century, mainly the American and French, whose statements contemplated a catalog of rights designed for census citizenship: men, owners and enlightened.

The political demands of the indigenous peoples were somehow materialized in the study of United Nations Special Rapporteur José Martínez Cobo, on *The Problem of Discrimination against Indigenous Peoples* of 1983. The actions of these indigenous organizations and movements led to the recognition of their autonomy and self-determination and, to a large extent, they managed to be considered preferentially, subject to collective rights rather than individual rights. In addition to the UN, the ILO played a pivotal role in this decade, as in 1986 a meeting of experts was convened in conjunction with the representative of indigenous peoples - by the way without the right to vote - for the revision of Convention 107, as its assimilationist claim represented the extinction of life forms different from those of Western society. This was achieved, in 1989, by the adoption of ILO Convention 169, and in 1991, after the ratifications of Norway and Mexico, it entered into force and with this, Convention 107 ceased to be open for ratification by States (Gaete, 2012, p. 82).

According to Yrigoyen (2009), Convention 169 quickly had juridical-constitutional impacts on the States that ratified the instrument. The reforms were framed, fundamentally, in the set of democratizing demands of the new social and indigenous movements and their relationship with multiculturalism and in the programs and state adjustments necessary after the adoption of the treaty. Thus, it prohibits the policies of assimilation or forced integration that prevented indigenous peoples from taking their own decisions on the issues that affected them and expressly recognizes their right to define priorities for their development, through prior consultation processes and the guarantee to participate in policies and programs that may harm their rights (Yrigoyen, 2009, p.21).

ILO Convention 169 recognizes in its preamble that indigenous peoples in many parts of the globe cannot enjoy the same human and fundamental rights to the same degree as the rest of the population of the States in which they live.

2 Among others, the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. At the regional level, the American Convention on Human Rights (ACHR) of 1969 or the Additional Protocol to the ACHR on Economic, Social and Cultural Rights of 1988.

It also highlights the contribution of these peoples to cultural diversity and to the social and ecological harmony of humanity.

In its article, in addition, there are transcendental developments of rights such as respect for their integrity, their social and cultural identity, their customs, their traditions and institutions; It also obliges the State to take measures to eliminate socio-economic differences between these and other members of society (Article 2), recognition of the fullness of their rights and the prohibition of discrimination (Article 3), respect for their autonomy and their right to be consulted, to control and decide on development processes and other decisions that affect them (articles 6 and 7). Likewise, collective rights over their ancestral territories are recognized, taking into consideration the cultural and spiritual aspects of their relationship with nature and the right to participate in the benefits reported by economic activities related to mineral or subsoil resources, as in articles 13, 14 and 15 (ILO, 1989).

Other rights are also enshrined in terms of employment conditions (Article 20), vocational training and job training with an emphasis on rural areas (Articles 21, 22 and 23), recognition of rights such as social security, health with a differential approach respecting their cultural, spiritual and traditional practices, education in equal conditions of quality with respect to the rest of the population of their States and the right to be educated in their native languages; the latter consecrated between articles 24 and 31 (ILO, 1989).

Colombia was the third State party to the Convention that ratified and incorporated into its domestic legislation the instrument, through Law 21 of 1991, the same year in which the new Political Charter was issued, which establishes important norms in accordance with the provisions of Convention 169 of the ILO; for example: article 1, promulgates that Colombia is a plural social State of law (...); Article 7 establishes that the State recognizes and protects ethnic and cultural diversity; likewise, article 8 establishes that it is the obligation of the State and of the people to protect the nation's cultural and natural riches. Article 10 recognizes that the languages and dialects of ethnic groups are also official within Colombia and that education in communities with their own linguistic traditions it will be bilingual, on the 63rd, it declares inalienable, imprescriptible and indefeasible the collective territories and the safeguards of the ethnic communities and article 246, recognizes the special indigenous jurisdiction, so that these peoples exercise their own jurisdictional functions in their territories and in accordance with their own rules and procedures as long as they are not contrary to the Constitution and the law (ILO, 1989).

Up to this point, three legal instruments of international law that have a conventional character have been explored; that is to say, that they have been

binding for the States that have ratified them and, in that sense, obliges them to respect and guarantee the normative consecrations consigned in them:

i) the Convention on the Inter-American Indian Institute (1940), which, as noted, has its scope of application in America, and is currently in force as a specialized agency of the OAS; ii) ILO Convention 107 (1957), which was based on the integrationist model and was framed within the legal monism of the States in which indigenous peoples remained subordinated to that State right without being able to fully self-determine and iii) Convention 169 of the ILO (1989), which is part of the model of legal pluralism and contemporary multiculturalism; The ratification of the latter by some States in Latin America led to profound constitutional and legislative reforms tending to incorporate the rights set forth in the treaty, with special emphasis on collective rights and self-determination, respecting their cultural and spiritual practices and manifestations.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The UNDRIP is an instrument of the United Nations System and therefore its vocation is not local, but global in a sense similar to the Universal Declaration of Human Rights (United Nations [UN], 1948), specifically, oriented to the concrete recognition of the rights of indigenous peoples.

The discussion on the need for a Declaration to recognize the rights of these peoples began to take place within the United Nations since 1983; They spent a total of 24 years to reach a consensus on the instrument. On September 13, 2007, the United Nations General Assembly adopted the UNDRIP: it obtained 143 votes in favor, 4 against (Canada, the United States, Australia and New Zealand) and 14 States abstained, including Colombia, which it was also the only Latin American country that abstained from voting (Olsen, 2008, p.7).

As it was warned, since it is not a Convention but a Declaration, it has no binding force for the Member States of the United Nations; however, and under the current model of legal pluralism, it develops a wide range of rights, some already previously recognized in ILO Convention 169 (1989); in others, it goes further to strengthen the protection of indigenous peoples in aspects such as: the full enjoyment of all human rights and fundamental freedoms recognized by the IHRL (Article 1), self-determination, in political terms and economic development, social and cultural rights (Article 3), collective rights over their ancestral territories, the right to self-government and autonomy related to their internal and local affairs (Article 4), the right to strengthen their political, legal, economic,

social and cultural (Article 5), and the collective right to live in peace, freedom and security with respect to their particular conditions of relationship (art.7).

It also outlaws the forced assimilation and destruction of their cultures (Article 8), guarantees the right to belong to their indigenous peoples and nations (Article 9), the prohibition of forced displacement of their ancestral territories (Article 10), right to revitalize their traditions, languages, and customs, teach, practice and maintain them (articles 11-14), to enjoy all labor rights (Article 17), to participate in the adoption of decisions on issues that affect them according to their own procedures and to elect their representatives (art. 18). It also highlights the obligation of the States to hold consultations to obtain their prior, free and informed consent and to cooperate in good faith with the indigenous peoples concerned through their institutions and representatives (art. 19). Likewise, rights with a differential focus are recognized, taking into account the special needs of women, children, the elderly and persons with disabilities (Article 22), to their traditional medicines and health practices (Article 24) and their spiritual relationships with nature and control over their ancestral territories (articles 25 and 26).

The list of rights recognized in the UNDRIP continues copiously, but it is relevant to note that each of the rights enshrined in this instrument is followed by a duty correlative to the State, so that, in effect, it respects and guarantees these prerogatives. Thus, although the Declaration is not binding in itself, it offers a wide margin of action and interpretation for the States in their objective of advancing in their domestic law for the recognition and full guarantee of the rights enshrined therein.

American Declaration on the Rights of Indigenous Peoples (ADRIP)

The ADRIP originates within the OAS; therefore, it is a regional instrument for the Americas, promulgated taking into consideration the particularities of the continent in terms of what indigenous population is concerned. This Declaration is very recent in comparison with the other instruments contemplated in this work, since it was approved on June 14, 2016 in the plenary session of the Organization.

It is worth noting that Colombia abstained in the UNDRIP vote in 2007, while in the 2016 ADRIP vote, it objected to several articles related to prior consultation, ancestral territories and demilitarization. The National Indigenous Organization of Colombia, ONIC, described the performance of the Colombian State as an "international shame for the Social State of Law that is Colombia"

also inviting the international community to press the national government to withdraw the objections made to the Declaration (ONIC, 2016).

Like the UNDRIP, the ADRIP faced a long process to obtain its approval, in total the OAS took 17 years (since 1999) to complete the development of the instrument. One of the indigenous leaders who accompanied all the discussions on the ADRIP since its inception, the Panamanian lawyer Hector Huertas, a member of the Guna people of his country, stressed that this instrument defines a new model of relations between States and indigenous peoples within the framework of Human Rights and participates in issues such as sustainable development (OAS, 2016b). He also mentioned that:

The Declaration also makes profound changes within the States, which really allow true democracy and the participation of indigenous people within each of the States. The right to self-determination, to lands, resources and above all to free, prior and informed consent is recognized (OAS, 2016 b).

In terms of content and recognition of rights, the ADRIP is similar to the UNDRIP, since it reaffirms aspects such as the full validity of human rights for these populations (art. V), indigenous peoples as subjects of collective rights (art. VI), the right to belong to indigenous peoples (art. VIII) and other rights such as education, health, the healthy environment, autonomy and self-government, or indigenous jurisdiction.

But the ADRIP goes further to recognize other transcendental rights for indigenous peoples, which until now had not been expressly consecrated in the various international instruments or that had been enunciated by them in a very general way without endowing a robust content in politicians and vindicators terms. In this sense, it is to celebrate the inclusion of articles referring to gender equality (art. VII), protection against genocide (art. XI), rejection of assimilation (X), guarantees against racism, racial discrimination, xenophobia and other related intolerance (art. XII), indigenous family (art. XVII), respect for indigenous peoples in voluntary isolation or initial contact (art. XXVI), and protection of cultural heritage and intellectual property (art. XXVIII), among others.

Thus, these declarations, both the UNDRIP and the ADRIP, represent an important milestone in the protection and guarantee of the rights of indigenous peoples globally and regionally; and, in spite of the fact that they are not binding, the progress they have regarding Convention 169 itself is undeniable, as opposed to other IHRL instruments that *protect all of humanity* under that premise of universality of human rights; this, because the level of specificity in the recognition of rights of these declarations allows to reinforce the protection

of the indigenous peoples not only in legal and political terms, but also cultural, educational, ecological, spiritual and territorial.

Conclusions

These considerations, more than conclusive, are reflexive in face of the recognition of the human rights of vulnerable or minority populations in demographic or sociopolitical terms, as exemplified in this text based on the specific case of indigenous peoples.

There are important international processes of political vindication of historically excluded populations. The development of human rights in recent years has opened possibilities aimed at the emancipation and progressive eradication of segregation, be it ethnic, gender, nationality, and so on; In turn, although more slowly, the colonial origin and the claim of universality of human rights has been shifting towards a more localized conception, focused on the special subjects of protection and their particular needs. While the dynamics of these international bodies obey the logics of domination of the military and economic powers of the globe, it is this same condition of subordination that allows the dominated to seek and find ways to resist such claims.

The project of legal pluralism and the political commitment to interculturality in Latin America that has taken hold in the region since the 1990s, puts into discussion a new understanding of ethnic-cultural diversity; Walsh (2009) mentions that the attention is put on it

(...) part of legal recognitions and of an increasing need to promote positive relationships between different cultural groups, to confront discrimination, racism and exclusion, to train citizens aware of differences and capable of working together in the development of the country and in the construction of a just, equitable, egalitarian and plural society. Interculturality is part of this effort (p. 2).

Within the framework of this legal-political proposal for pluralism and interculturality to build other forms of relationship not only in the institutional, but also social and community frameworks, is the law and, specifically, the IHRL, a useful and necessary tool -Not enough-so that from the legal-normative, the struggles and demands of populations such as indigenous peoples can materialize on the level of politics. Some radical positions - according to which human rights of colonial origin cannot be compatible with the vindication of the rights

of marginalized or vulnerable populations in their struggle for emancipation - tend to fall into another absolutism that, instead of creating epistemological alternatives and Practices to materialize interculturality, such possibilities close under the reproduction of unproductive binarism.

The consecration of the rights of indigenous peoples in the international instruments presented here-binding or not-have been conceived at very specific moments of the normative and epistemological development of these populations. The Convention on the Inter-American Indigenous Institute (1940) in the regional sphere and ILO Convention 107 (1957) in the world order, were instruments inscribed within the integrationist model with some lags of assimilationism, which was progressively losing its provisions. And, specifically, the provisions of Convention 107 also demonstrate this, because despite a marginal recognition of collective rights, its logic was more oriented to appease the demands of social and indigenous movements than to endow them with true autonomy over their territories, practices, customs and traditions.

In contrast, Convention 169 of the ILO (1989) advocated for a real normative consecration, in favor of the recognition of the individual and collective rights of indigenous peoples, also providing them with some legal tools to materialize their demands and interests. In this sense, it is predicable that the model in which this Agreement is registered is in the current political project and vindicator of legal pluralism, since in this instrument the capital importance of the indigenous peoples themselves through their representatives and institutions is evident in the decisions that affect or benefit them; also. their autonomy, self-government and free self-determination are finally recognized within the framework of the respect and guarantee of these particular conditions of existence on the part of the States in which they live.

For all of the above, the Declarations (UN, 2007 and OAS, 2016b) are another step towards the realization of the rights of indigenous peoples that were previously recognized; the fact that they are not in themselves instruments of a binding nature subject to ratification by States and there is no legal obligation to verify compliance does not detract from any merit, because their consecrations in terms of collective rights, civil, political, economic, social, cultural, territorial and spiritual, give a holistic nature to these instruments; In this way, it is a very valuable tool for the reaffirmation and vindication of the rights against the State by indigenous peoples and civil society, so that they can join the project of legal pluralism with an intercultural vocation.

In America, indigenous peoples are at imminent risk of an *epistemicide*; Ancestral knowledge and cognitive experiences are lost due to the processes of colonization in the region, which devastated, physically and culturally, many of

these peoples and left others in a situation of unprotected legal and socio-political unfavorable to the future.

In the Colombian case, the Political Constitution of 1991, although it stands as pluri-ethnic, multicultural and based on the imperative of human dignity - as a consequence of the obligations assumed by the State upon ratifying ILO Convention 169 - is a delayed norm in terms of consecration and recognition of the rights of ethnic minorities and other vulnerable groups; The rights of the indigenous peoples, although they were formally included in the constitutional text, have not been fully guaranteed by the State and actions such as the objection to the ADRIP is a clear sign that their interest is not aimed at respecting and guaranteeing the rights of these populations.

The creation of norms does not solve the structural problems of a society that fears difference and that repudiates otherness; for this reason, the processes of political, institutional and citizen transformation have become slow to solve the legal and cultural obstacles that the realization of the rights of indigenous peoples and other vulnerable population groups entails.

However, the Constitution, although pretentious in terms of guarantees, has latent potentialities that can only materialize to the extent that society appropriates its role as a political actor to achieve the realization of the broad catalog of rights that have been recognized in the charter. But, while this is a relevant tool to achieve these claims, it is not enough as long as mobilization processes do not occur that allow converting the consecrations of abstract rules into transformations of particular realities; in addition, specifically, the materialization of the rights of indigenous peoples in a manner consistent with the claims and recognitions already achieved in international law, through the normative instruments such as the Conventions and the Declarations object of this study.

References

Comisión Económica para América Latina y el Caribe, CEPAL. (2014). *Los Pueblos Indígenas en América Latina (Síntesis)*. Santiago de Chile: CEPAL. https://repositorio.cepal.org/bitstream/handle/11362/37050/S1420783_es.pdf [Accessed March 15, 2018].

De Sousa-Santos, B. (2007). *La reinvencción del Estado y el Estado plurinacional*. Santa Cruz de La Sierra, Bolivia: CEDIB, CENDA, CEJUS.

- De Sousa-Santos, B. (2008). *Pensar el Estado y la sociedad: desafíos actuales*. La Paz, Bolivia: CLACSO, Comuna, Muela del Diablo.
- De Sousa-Santos, B. (2010). *Descolonizar el saber, reinventar el poder*. Montevideo, Uruguay: Ediciones Trilce.
- De Sousa-Santos, B. (2012a). *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*. La Paz, Bolivia: Ediciones Abya-Yala.
- De Sousa-Santos, B. (2012b). *De las dualidades a las ecologías*. La Paz, Bolivia: Punto de Encuentro.
- Gaete, L. (2012). El Convenio N° 169. Un análisis de sus categorías problemáticas a la luz de su historia normativa. *Lus et Praxis*, 18(2), 77-124. <https://scielo.conicyt.cl/pdf/iusetp/v18n2/art04.pdf> [Accessed March 16].
- Instituto Indigenista Interamericano (1940). *Convención sobre el Instituto Indigenista Interamericano*. <http://www.oas.org/juridico/spanish/firmas/b-26.html> [Accessed June 16, 2018].
- Mereminskaya, E. (2011). El Convenio 169 de la OIT sobre pueblos indígenas y tribales. *Estudios Públicos*, 121, 213-276. https://www.cepchile.cl/cep/site/artic/20160304/asocfile/20160304095448/rev121_EMereminskaya.pdf [Accessed July 17, 2018].
- Olsen, V. (2008). Marco legal para los derechos de los pueblos indígenas en Colombia. *HREV Human Rights Everywhere*, 1. https://site.inali.gob.mx/pdf/Colombcartilla_derechos_pueblos.pdf [Accessed March 16, 2018].
- Organización de Estados Americanos, OEA. (2016a). *Declaración Americana sobre los Derechos de los Pueblos Indígenas* (DADPI). <https://www.oas.org/es/sadye/documentos/res-2888-16-es.pdf> [Accessed October 19, 2018].
- Organización de Estados Americanos, OEA. (2016b). Fin a 17 años de espera para los Pueblos Indígenas. http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-075/16 [Accessed April 19, 2018].
- Organización de las Naciones Unidas, ONU. (1948). *Declaración Universal de Derechos Humanos*. <https://www.un.org/es/universal-declaration-human-rights/> [Accessed February 20, 2018].

- Organización de las Naciones Unidas, ONU. (2007). *Declaración sobre los Derechos de los Pueblos Indígenas*. <https://www.un.org/development/desa/indigenous-peoples-es/declaracion-sobre-los-derechos-de-los-pueblos-indigenas.html> [Accessed April 16, 2018].
- Organización Internacional del Trabajo, OIT. (1957). Convenio sobre poblaciones indígenas y tribales. *Normlex*, 107. https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107 [Accessed March 19, 2018].
- Organización Internacional del Trabajo, OIT. (1989). Convenio sobre pueblos indígenas y tribales. *Normlex*, 169. https://www.ilo.org/dyn/normlex/es/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312314 [Accessed September 6, 2018].
- Organización Nacional Indígena de Colombia, ONIC. (2016). *Con objeción por Colombia, fue aprobada la Declaración Americana sobre los Derechos de los Pueblos Indígenas*. <http://www.onic.org.co/comunicados-onic/1315-con-objecion-por-colombia-fue-aprobada-la-declaracion-americana-sobre-los-derechos-de-los-pueblos-indigenas> [Accessed July 1, 2018].
- Tovar, T. (2015). Debate y modelo de educación inclusiva. En E. Salmón y R. Bregaglio, *Nueve conceptos claves para entender la Convención sobre los Derechos de las Personas con Discapacidad* (pp. 119-148). Lima, Perú: IDEPUCP.
- Walsh, C. (2008). Interculturalidad, Plurinacionalidad y Decolonialidad: las insurgencias político-epistémicas de refundar el Estado. *Tabula Rasa*, 9, 131-152. <http://www.redalyc.org/articulo.oa?id=39600909> [Accessed March 14, 2018].
- Walsh, C. (2009). Interculturalidad crítica y educación intercultural. In J. Viaña, L. Tapia y C. Walsh (Eds.). *Construyendo Interculturalidad Crítica* (pp. 75-96). La Paz, Bolivia: Convenio Andrés Bello.
- Wolkmer, A. C. (2003). *Pluralismo jurídico: nuevo marco emancipatorio en América Latina*. <http://biblioteca.clacso.edu.ar/clacso/otros/20111021100627/wolk.pdf> [Accessed April 23, 2018].
- Yrigoyen, R. (2006). Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino.

En M. Berraondo. *Pueblos indígenas y derechos humanos* (pp. 537-567). Bilbao, España: Universidad de Deusto.

Yrigoyen, R. (2009). Aos 20 anos do Convênio 169 da OIT: balanço e desafios da implementação dos direitos dos povos indígenas na América Latina. En R. Verdum, *Povos Indígenas. Constituições e Reformas Políticas na América Latina* (pp. 9-62). Brasília, Brasil: Instituto de Estudos Socioeconômicos.

Yrigoyen, R. (2012). Pluralismo jurídico y jurisdicción indígena en horizonte del constitucionalismo pluralista. In H. Ahrens & A. Helen (Ed.). *El Estado de derecho hoy en América Latina* (pp. 171-194). Montevideo, Uruguay: Konrad Adenauer Stiftung.

