United Nations Seminar of the Expert Mechanism on the Rights of Indigenous Peoples

"Analysis of laws, legislation, policies, constitutions, judicial decisions, and other mechanisms concerning how States have taken measures to achieve the ends of the UN Declaration consistent with Article 38."

USES OF UNDRIP IN THE JURISPRUDENCE OF LATIN AMERICA AND THE CARIBBEAN

Víctor Toledo

University for Peace (UPEACE),
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Victor Toledo[1]

In this presentation I show advances of an ongoing research regarding the application of the UN Declaration on the Rights of Indigenous Peoples (hereinafter "the Declaration" or "UNDRIP") in the jurisprudence of international courts and high national courts in Latin America and the Caribbean.

I will show that we are witnessing an increasing jurisprudential application of UNDRIP. The Declaration has become an internationally relevant legal instrument for the interpretation and adjudication of indigenous peoples' rights in the region.

In this context, it is essential to analyze the diversity of uses of the Declaration to understand the ways in which it is being incorporated and internalized into national legal systems, its impact, and how its application can continue to be promoted.

How and for what purposes are the courts applying UNDRIP? Is UNDRIP part of the ratio decidendi or merely obiter dicta? In relation to which rights are the courts using UNDRIP in their reasoning and adjudication?

I have organized my presentation in three sections. First, I present statistical data on the growing number of judgments from regional and national courts and international bodies examining countries in the region that cite and apply UNDRIP.

Second, I present a typology classifying the different ways in which these Latin American and Caribbean judicial bodies are applying UNDRIP.

Third, I analyze the jurisprudence of the Inter-American Court and the Caribbean Court where UNDRIP has been used, applying the typology presented.

Finally, some considerations are made regarding factors that contribute to or hinder the use of UNDRIP by national and regional courts, and some recommendations to reinforce and expand this jurisprudential trend.

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1.- THE DATA. UNDRIP IS ALREADY BEING APPLIED IN HUNDREDS OF JUDGMENTS BY NATIONAL AND REGIONAL COURTS IN LATIN AMERICA AND THE CARIBBEAN

After the adoption of the Declaration in 2007, an intense debate opened up about the status and legal force of the new international instrument, and whether UNDRIP could be applied by the courts. Some states that voted against UNDRIP in 2007 stated that the Declaration lacked backing in state practice, and therefore could not provide "an appropriate basis for legal actions, complaints, or other claims in any international, domestic, or other proceeding."[2]

In favor of applying the Declaration, some scholars stress that UNDRIP contains some provisions that correspond to existing state obligations under customary international law[3], and that it could advance to become customary law. Others have posited the binding nature of UNDRIP based on its genesis as an agreement between states and peoples.[4] From an alternative approach, which seeks to move beyond the binding/non-binding dilemma, the need to focus on rights rather than dispute the legal nature of the instrument is underscored.[5] Finally, there is a general understanding that UNDRIP synthesizes the specification of human rights already enshrined in various treaties and international jurisprudence in the context of indigenous peoples. [6]

This debate was at the heart of the 2016 Human Rights Council resolution that modified the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). The goal was for a specialized body to monitor the state and international practice of applying UNDRIP. [7]

Beyond those interesting questions, fifteen years later, empirical evidence indicates that in Latin America and the Caribbean, indigenous peoples are basing their judicial claims on the Declaration, and regional and national courts are already applying UNDRIP, in what constitutes widespread, systematic and consistent state practice.

1.1.- UNDRIP in the jurisprudence of constitutional courts and supreme courts

In our ongoing research, we have found so far 791 judgments from constitutional courts and supreme courts in Latin America that have applied UNDRIP between 2007 and 2023. This

[2] Cited in James Anaya y Siegfried Wiessner, «The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment», *Jurist*, October 3, 2007.

[3] International Law Association, «Resolution N° 5/2012. Rights of indigenous peoples. 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012», 2012.

[4] Bartolomé Clavero. "Cometido del Foro Permanente para las Cuestiones Indígenas a la Luz del Valor Vinculante y con Vistas a la Mayor Eficacia del Derecho Internacional de los Derechos Humanos", Foro Permanente para las Cuestiones Indígenas, PFII/2009/EGM1/4 (4 Enero, 2009)

[5] Luis Rodríguez-Piñero, «"Cuando proceda": vigilancia y aplicación de los derechos de los pueblos indígenas según la Declaración», en *El desafío de la Declaración. Historia y futuro de la Declaración de la ONU sobre Pueblos Indígenas* (Copenhague, Dinamarca: IWGIA, 2010), 336-65.

[6] Consejo de Derechos Humanos, «Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, S. James Anaya» (ONU. CDH, 2008).

[7] Consejo de Derechos Humanos. Mecanismo de Expertos sobre los Derechos de los Pueblos Indígenas. Resolución A/HRC/RES/33/25. (2016, 30 de septiembre).

involves building a still developing jurisprudential database. It is highly likely that the number of compiled judgments will increase.

So far, the countries with the most judgments in which the highest courts apply UNDRIP are:

- Mexico with 165 judgments, addressing rights to land, justice, consultation, education.

- Colombia with 150 judgments on land, consultation, autonomy and justice.

- Bolivia with 145 judgments regarding justice, autonomy, consultation and land.

UNDRIP IN THE JURISPRUDENCE OF CONSTITUTIONAL COURTS AND SUPREME COURTS. LATIN AMERICAN AND CARIBBEAN COUNTRIES 2007-2023

COUNTRY	UNDRIP JURISPRUDENCE	NUMBER OF JUDGMENTS	MAIN RIGHTS
Argentina			
Belice	✓	1	Lands
Bolivia	✓	415	Justice, Autonomy, Consultation, Lands
Brasil	✓	1	Lands
Chile	✓	8	Lands, consultation
Colombia	✓	150	Lands, consultation, autonomy, justice, participation
Costa Rica	✓	17	Consultation, education, justice, lands, participation
Ecuador	✓	12	Lands, consultation
El Salvador			
Guatemala	✓	10	Lands, consultation, education
Honduras		3	Consultation, lands
México	✓	165	Lands, justice, consultation, lands, education, participation, autonomy, communication
Nicaragua			
Panamá			
Paraguay			
Perú	✓	9	Consultation, justice, lands
Surinam			
Uruguay			
Venezuela			
TOTAL		**791**	

Own elaboration, Víctor Toledo 2023.

The 791 compiled judgments show that the constitutional courts and supreme courts of the region are applying UNDRIP and granting it legal force in the adjudication of rights in favor of indigenous peoples. Countries like Mexico, Colombia and Bolivia lead this jurisprudential trend of applying UNDRIP in their constitutional processes, advancing the justiciability of rights such as land and territory, prior consultation, autonomy and access to justice.

1.2.- UNDRIP in the jurisprudence of the regional courts of Latin America and the Caribbean

Between 2007 and 2023, the Caribbean Court of Justice and the Inter-American Court of Human Rights have issued a total of 16 judgments applying the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Of these 16 judgments, 1 corresponds to the Caribbean Court of Justice and 15 to the Inter-American Court.

CCJ, IACHR: JUDGMENTS APPLYING UNRIP 2007-2023

COURT	Cases
Caribbean Court of Justice	1) Maya Leaders Alliance et al. V Attorney General of Belize, CCJ Appeal No BZCV2014/002. 30/10/2015.
Corte Interamericana de Derechos Humanos	1) Caso del Pueblo Saramaka vs. Surinam. 28/11/2007. 2) Caso Comunidad Indígena Xákmok Kásek Vs Paraguay. 24/08/2010. 3) Caso Masacres de Río Negro Vs Guatemala. 4/09/2012. 4) Caso Pueblo Indígena Kichwa de Sarayaku Vs Ecuador. 27/06/2012. 5) Caso Norín Catrimán y otros (Dirigentes, Miembros y Activista del Pueblo Indígena Mapuche) Vs Chile. 29/05/2014. 6) Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros vs. Panamá. 14/10/2014. 7) Caso Comunidad Garífuna de Punta Piedra y Sus Miembros vs. Honduras. 8/10/2015. 8) Caso Comunidad Garífuna Triunfo de la Cruz y sus miembros Vs Honduras. 8/10/2015. 9) Caso Pueblos Kaliña y Lokono Vs Surinam. 25/11/2015. 10) Caso Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal Vs Guatemala. 30/11/2016. 11) Caso Pueblo Indígena Xucuru y sus miembros Vs Brasil. 5/02/2018. 12) Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs Argentina. 6/02/2020. 13) Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs Honduras. 31/08/2021. 14) Caso Pueblos Indígenas Maya Kaqchikel de Sumpango y otros Vs Guatemala. 6/10/2021. 15) Caso Comunidad Garífuna de San Juan y sus miembros Vs Honduras. 29/08/2023.

Own elaboration. Víctor Toledo 2023.

These judgments from the regional courts address issues such as collective rights, the right to land and territory, prior consultation, cultural identity, participation, media, access to justice, among other rights of indigenous peoples recognized in the Declaration.

UNDRIP is already part of the juris corpus of Inter-American and Caribbean jurisprudence on indigenous matters. Its increasing application shows that it is considered a relevant legal norm for the interpretation and adjudication of the rights of native peoples in the region.

Beyond the doctrinal debate on the binding nature of the Declaration, in the legal practice of the high national and regional courts of Latin America and the Caribbean, this international human rights instrument is making headway as a mandatory reference standard on the rights of indigenous peoples.

1.3 - Application of UNDRIP by international human rights bodies and mechanisms

In addition to examining court judgments, the application of UNDRIP in the legal interpretation work carried out by international bodies and mechanisms when examining state compliance with their human rights obligations must also be examined.

The evidence shows that various international human rights bodies and mechanisms have also adopted UNDRIP as part of their normative framework of reference when examining states. For example, treaty bodies such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, as well as the Special Procedures and fact-finding missions of the Human Rights Council and the Universal Periodic Review (UPR), regularly invoke UNDRIP in their observations, recommendations and reports on the human rights situation of indigenous peoples in different countries.

UNDRIP IN JUDGMENTS OF NATIONAL AND REGIONAL COURTS AND UN RECOMMENDATIONS BY COUNTRY

COUNTRY	National Jurisprudence UNDRIP	IACHR CCJ Jurisprudence	Special Procedures and Special Missions UNDRIP	Treaty Bodies UNDRIP	UPR UNDRIP
Argentina		✓	✓		✓
Belice	✓	✓			✓
Bolivia	✓		✓	✓	✓
Brasil	✓	✓	✓	✓	✓
Chile	✓	✓	✓	✓	✓
Colombia	✓		✓	✓	✓
Costa Rica	✓		✓	✓	✓
Ecuador	✓	✓	✓	✓	✓
El Salvador			✓	✓	
Guatemala	✓	✓	✓	✓	✓
Guyana				✓	✓
Honduras	✓	✓	✓	✓	✓
México	✓		✓	✓	
Nicaragua			✓	✓	
Panamá		✓	✓	✓	
Paraguay		✓	✓	✓	✓
Perú	✓		✓	✓	
Surinam		✓		✓	
Uruguay				✓	
Venezuela			✓		

Own elaboration. Víctor Toledo 2023.

We can observe a convergence between the jurisprudence of national and regional courts, and the interpretation of international human rights bodies, regarding the application of UNDRIP, in a sui generis process of jurisprudential dialogue, where national courts cite UNDRIP together with the jurisprudence of the Inter-American Court.

The joint analysis of court judgments and reports and interpretations of international human rights bodies that apply UNDRIP is useful to understand its growing relevance as a benchmark for the rights of indigenous peoples in each country, and at the regional level. Through various channels, UNDRIP appears for states as part of the normative framework on indigenous peoples' rights. This convergence is forming a kind of “interpretive

jurisprudence" which constitutes a relevant guide for states and courts and strengthens the legal status of UNDRIP.

2.- TYPES OF USES OF UNDRIP IN THE JURISPRUDENCE OF LATIN AMERICA AND THE CARIBBEAN

As we have shown, it is a notorious fact that the Declaration is being applied by the high regional and national courts. However, the way in which the courts are applying UNDRIP varies between different courts and legal systems. Given this diversity of jurisprudential uses, it is useful to develop a typology to systematize this jurisprudence.

It is necessary to qualify the legal value of these different uses of UNDRIP by the courts. Not all the ways in which courts invoke international instruments like UNDRIP have the same legal weight.

To assess the jurisprudential impact of UNDRIP, it is essential to systematically examine the judgments, distinguishing between mere references, and those uses where UNDRIP is part of the motivation for the judicial decision.

For analytical purposes I have developed a typology that classifies uses into the classic categories of "ratio decidendi" and "obiter dicta", a distinction that although it comes from common law, serves us as a useful guide to analyze the value of Latin American judgments.

As is known, ratio decidendi refers to the part of a judicial decision that establishes the legal principle or reasoning on which the decision is based. Obiter dicta, on the other hand, refers to incidental comments or observations made by the court that are not essential to reach the decision. Although they do not use such terms, in practice Latin American courts and the IACHR distinguish between the central arguments that motivate a decision and secondary or complementary statements. [8]

In our typology we have identified various types of "obiter dicta" and "ratio decidendi" in relation to UNDRIP. The typology was developed by applying grounded theory methods to a sample of judgments. Through a coding process, recurrent types of uses were identified, then their characteristic elements or distinctive features were delimited for their definition. We can identify at least eight types of uses of UNDRIP: a) Obiter dicta: 3 types of uses; b) Ratio decidendi: 5 types of use. Certainly, it is possible that, in the same judgment, the courts use UNDRIP in a variety of types.

A typology of the jurisprudential uses of UNDRIP can provide several benefits for studies such as the one we are meeting for in this Seminar. On the one hand, it allows identifying jurisprudential patterns and trends, and innovative practices in the use of UNDRIP that can be replicated in other contexts. Likewise, it is important to determine in which cases and how UNDRIP is part of the ratio decidendi in the jurisprudence of national and international courts, to rigorously assess the progress of its crystallization as emerging customary law regarding the rights of indigenous peoples.

[8] "Ratio decidendi". Eduardo Ferrer Mac-Gregor, Fabiola Martínez, y Giovanni Figueroa, eds., *Diccionario de derecho procesal constitucional y convencional. Tomo II* (Ciudad de México: UNAM Instituto de Investigaciones Jurídicas, 2014).

Below I present a table with the typology of jurisprudential uses of UNDRIP:

TYPOLOGY OF USES OF UNDRIP IN JURISPRUDENCE. A PROPOSAL

	TYPE	DESCRIPTION
Obiter dicta	**1. Exclusion**[9]	The court refers to UNDRIP to exclude it from its reasoning, arguing that it is not a binding treaty and/or that it is not part of the constitutionality/conventionality bloc..[10]
	2.- Simple mention	UNDRIP is mentioned in an accessory way, without further argumentative development on its implications for the specific case.
	3.- Complementary reference	UNDRIP is referred to "for greater abundance", in a complementary way to other instruments, in a context where such mention does not relevantly affect the decision.
Ratio decidendi	**4.- Criterion that reinforces an interpretation**	UNDRIP is used to reinforce an interpretation of some right, already established by the court or other instruments, for example ILO Convention 169.
	5.- Criterion that modifies an interpretation	UNDRIP is invoked as a basis for modifying or reviewing the previous jurisprudential line, or reinterpreting other instruments in relation to some indigenous peoples' right.
	6.- Expanding content and scope	UNDRIP is used to expand the scope of rights beyond what was previously recognized in jurisprudence or norms, or to give them a more extensive content to the essential core of a right.
	7.- Source of rights	UNDRIP is invoked as a normative source for the recognition of rights not previously established in the court's jurisprudence or domestic legislation.
	8.- Parameter of constitutionality/ conventionality	UNDRIP is used as a parameter for constitutional/conventionality review, as part of the constitutionality bloc.

Own elaboration. Víctor Toledo 2023.

From a constructivist approach to international law, the interaction between international norms and domestic legal systems is bidirectional. Therefore, understanding how high courts use UNDRIP allows us to assess its impact on the internalization of these global standards at the local level.

3.- ANALYSIS OF THE USES OF UNDRIP BY REGIONAL COURTS

The first application of the typology of uses of UNDRIP was carried out by examining the jurisprudence of two regional courts: the Inter-American Court of Human Rights and the Caribbean Court of Justice. Below is a summary of the results.

[9] The "omission" of UNDRIP by the courts is not included as a type of use, although it is possible to infer in some judgments that the court engages in an implicit dialogue with UNDRIP while refraining from mentioning it.

[10] A case of deliberate exclusion of UNDRIP are some recitals (obiter dicta) in the judgment of the Supreme Court of Justice of Argentina, "Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia del Neuquén s/ acción de inconstitucionalidad", 8 de abril de 2021, Fallos: 1490, XLVII.

3.1. INTER-AMERICAN COURT. UNDRIP AS PART OF THE INTERNATIONAL CORPUS JURIS

Between 2007 and 2023 the IACHR has resorted to UNDRIP in 15 cases, in all of them UNDRIP has been part, to varying degrees, of the ratio decidendi of the judgments. For the Inter-American Court of Human Rights (IACHR), UNDRIP is an integral part of the corpus juris of international human rights law.

3.1.1. UNDRIP in the Inter-American corpus juris.

Since the 2000s, in contentious cases on the rights of indigenous communities, the Court began to refer more broadly and frequently to the corpus juris to base an evolutionary, systemic and pro persona interpretation of the American Convention. Consequently, once UNDRIP was adopted in September 2007, it became part of the Inter-American corpus juris, applying it immediately in the Saramaka v. Suriname case,[11] resolved on November 28, 2007, just a few months after UNDRIP was adopted.

The corpus juris is the set of international instruments that make up the legal system for the protection of human rights. According to the jurisprudence of the IACHR, this corpus juris is made up of both binding treaties and conventions, as well as non-binding declarations and instruments that contribute to interpreting and giving greater scope to the obligations of States.

In the words of the IACHR:

> "The corpus juris of International Human Rights Law is made up of a set of international instruments of varied content and legal effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on International Law, in terms of affirming and developing the latter's ability to regulate relations between States and human beings under their respective jurisdictions. Therefore, this Court must adopt an appropriate approach to examine the issue under consideration within the framework of the evolution of the fundamental rights of the human person in contemporary international law." [12]

The IACHR has expressly established that UNDRIP is part of the corpus juris that defines the obligations of the States Parties to the American Convention. Thus, in the judgments of the Triunfo de la Cruz Garifuna Community and Its Members v. Honduras case (2015), Xucuru Indigenous People and Its Members v. Brazil case (2018) and San Juan Garifuna Community and Its Members v. Honduras case (2023), the IACHR states:

> "The jurisprudence of this Court has repeatedly recognized the indigenous peoples' right to property over their traditional territories, and the duty to protect arising from Article 21 of the American Convention in light of ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, as well as the rights

[11] Corte IDH, Caso del Pueblo Saramaka vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Serie C No. 172 (28 de noviembre de 2007).

[12] Corte IDH, El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal, Opinión Consultiva OC-16/99, Serie A, no. 16 (1 de octubre de 1999), párr. 115. En el mismo sentido, Corte IDH, Condición Jurídica y Derechos de los Migrantes Indocumentados, Opinión Consultiva OC-18/03, Serie A, no. 18 (17 de septiembre de 2003), párr. 120.

> recognized by States in their domestic laws or in other international instruments and decisions, thus forming a corpus juris that defines the obligations of the States Parties to the American Convention, in relation to the protection of indigenous property rights. Therefore, in analyzing the content and scope of Article 21 of the Convention in the present case, the Court will take into account, in light of the general rules of interpretation established in Article 29(b) thereof and as it has done previously, the aforementioned special relationship of communal property of lands for indigenous peoples, as well as the alleged efforts made by the State to fully enforce these rights".[13]

As stated by the main promoter of the corpus juris doctrine, former President of the IACHR and former ICJ judge Antônio Cançado Trindade, the integration of an instrument into the Inter-American corpus juris means that the Court must resort to its norms to carry out a systemic, evolutionary and pro homine interpretation of the rights enshrined in the American Convention on Human Rights.[14]

The incorporation of UNDRIP into the corpus juris contributes to determining the greater scope and content of the rights protected by the American Convention in relation to indigenous peoples, in light of the comprehensiveness of international human rights law.

3.1.2. Uses of UNDRIP in the jurisprudence of the IACHR

The fact that UNDRIP is part of the corpus juris does not imply that its uses by the IACHR are of a single type. The examination of the 15 judgments that expressly refer to UNDRIP shows a diversity of uses.

(a) UNDRIP as reinforcement of the Court's previous interpretations. (Type 4 use).

The Inter-American Court has used UNDRIP as a normative basis that comes to support or reinforce interpretations already adopted by the Court on the scope of certain indigenous peoples rights. For example, regarding the right to collective property, prior consultation or the relationship of indigenous peoples to their ancestral lands.

These are the cases of Río Negro Massacres v. Guatemala (2012); Norín Catrimán et al v. Chile (2014); Kuna de Madungandí and Emberá de Bayano Indigenous Peoples v. Panama (2014); Punta Piedra Garifuna Community and Its Members v. Honduras (2015); Triunfo de la Cruz Garifuna Community and Its Members v. Honduras (2015); Kaliña and Lokono Peoples v. Suriname (2015); Members of the Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala (2016); Xucuru Indigenous People and Their Members v. Brazil (2018). In these judgments, the Inter-American Court uses UNDRIP to give greater support to its previous interpretive line regarding certain rights.

[13] Caso Comunidad Garífuna Triunfo de la Cruz y sus miembros Vs Honduras. Fondo, Reparaciones y Costas. Sentencia de 8 de octubre de 2015. Serie C No 305 (8 de octubre de 2015); Corte IDH, Caso Pueblo Indígena Xucuru y sus miembros Vs Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Serie C No 346 (5 de febrero de 2018). Párr. 116; Corte IDH. Caso Comunidad Garífuna de San Juan y sus miembros Vs Honduras. Excepciones Preliminares, Fondo, Reparaciones y Costas. Serie C No 496 (29 de agosto de 2023). Párr. 93.

[14] Antônio Augusto Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos. Volume I* (Porto Alegre, Brasil: Sergio Antonio Fabris Editor, 2003).

(b) UNDRIP to modify interpretation (Type 5 use).

In some precedents, the Inter-American Court has used UNDRIP as a criterion to modify its interpretation criteria on certain rights of indigenous peoples. One example is the Xákmok Kásek Indigenous Community v. Paraguay or Miskito Divers v. Honduras cases. In these cases, the Inter-American Court relies on UNDRIP to review or broaden previous interpretations it had made regarding certain rights or state obligations towards indigenous peoples. In addition, in both cases, the Court will use UNDRIP as a source of rights (type 7).

(c) UNDRIP to expand content of rights (Type 6 use).

In some judgments of the Inter-American Court there is a use of UNDRIP to expand the scope or content of rights previously recognized in its jurisprudence.

The first case in which the IACHR applies UNDRIP was Saramaka v. Suriname. On that occasion, the Court relied on UNDRIP, along with other instruments, to elaborate an expansion of the contents and scope of prior consultation, relating it to free, prior and informed consent, and benefit sharing, based on Article 32 of UNDRIP. Additionally, the Court took into account the conduct of the state through Suriname's own statements when it justified its vote at the UN General Assembly session of September 13, 2007, when approving the Declaration. This was a type 5 and 6 use of UNDRIP: modification of interpretation and expansion of content of rights.

Later, in 2012 in the Sarayaku Indigenous Community v. Ecuador case, the Court revisits the institution of prior consultation, expanding its scope. In 2015, in the Kaliña and Lokono Peoples v. Suriname case, the IACHR relies on UNDRIP to expand the scope of the right to participation in protected areas. In 2020, in the Indigenous Communities Members of the Lhaka Honhat Association v. Argentina case, the Court will rely on UNDRIP, along with other instruments, for a creative elaboration on environmental rights. The Inter-American Court resorts to certain articles of UNDRIP that allow it to expand the scope of these rights beyond what it had previously interpreted based on the American Convention on Human Rights and ILO Convention 169.

(d) UNDRIP as a source of rights (Type 7 use)

In some precedents, the Inter-American Court has used UNDRIP as a normative source for the recognition of new rights not yet developed by the Inter-American corpus juris. One example is the Sumpango Maya Kaqchikel Peoples v. Guatemala case, where the Court relies centrally on UNDRIP to substantiate and recognize indigenous peoples' right to establish their own media.

Other cases where this use could be located are the Xákmok Kásek Indigenous Community v. Paraguay, where UNDRIP is a key source for the recognition of the community's collective rights and territorial rights, or the Miskito Divers v. Honduras case, where the Court turns to UNDRIP to substantiate specific rights.

3.2. CARIBBEAN COURT OF JUSTICE. UNDRIP AS A PARAMETER FOR CONSTITUTIONAL REVIEW

The Caribbean Court of Justice has a remarkable case: Maya Leaders Alliance et al. v Attorney General of Belize, CCJ Appeal No BZCV2014/002, judgment of October 30, 2015. The Court applied UNDRIP as a parameter for constitutional review to resolve the case which, according to our typology, constitutes the most advanced degree of use of UNDRIP. Additionally, this judgment is of special global interest because it comes from a court belonging to the common law legal system.

The CCJ's judgment is the culmination of lengthy strategic litigation by the Maya Leaders Alliance, with the advice of Professor James Anaya, which has given rise to extensive doctrinal elaboration on the rights of indigenous peoples to their lands and natural resources. The first milestone in the case was the 2007 judgment of the Supreme Court of Belize, in which for the first time a high court used the recently adopted Declaration, leading up to the 2015 CCJ judgment. [15]

3.2.1. Uses of UNDRIP by the CCJ. (Types 4, 7, 8)

The CCJ confirmed the constitutional protection of the Maya people's communal property rights in the Toledo District. In its ruling the Court relied on UNDRIP along with other international instruments.

To apply UNDRIP as a parameter for constitutional review, the CCJ relied on the right to the protection of the law enshrined in section 3(a) of the Constitution of Belize. The Court interpreted that the rule of law includes international human rights obligations. The Court then relied on Articles 26 to 28 of UNDRIP, which refer to indigenous peoples' land rights, considering that UNDRIP forms an integral part of international law on indigenous peoples rights.

The Court found that Belize had failed to recognize and protect Maya land rights enshrined in UNDRIP. Thus, by connecting section 3(a) of the Constitution with Articles 26 to 28 of UNDRIP, the Court concluded that Belize, by not complying with UNDRIP, had violated the Maya people's right to the protection of the law. In summary, the Court made a systematic interpretation between the Constitution of Belize and UNDRIP in order to apply it as a parameter for constitutional review.

Of all the judgments, the Maya Leaders Alliance case of the CCJ is one of the most advanced. The Court displays various types of uses of UNDRIP, both to reinforce an interpretation (type 4), as a source of rights (type 7) and as a constitutional review parameter (type 8) to substantiate the violation of constitutional rights.

[15] Anaya, James. "Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize." Yale Human Rights and Development Journal 1 (1998): 2. Cal (on behalf of the Maya Village of Santa Cruz) and Others & Coy (on behalf of the Maya Village of Conejo) and Others v Attorney-General of Belize and Minister of Natural Resources and Environment Claims Nos. 171 and 172 of 2007, Supreme Court of Belize, Judgment of 18 October 2007; Campbell, M. S., y S. J. Anaya. «The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights». Human Rights Law Review 8, n.º 2 (2008).

3.2.2. The Maya Leaders Alliance case and UNDRIP in common law

It is important to highlight that this groundbreaking judgment was issued by a regional common law court. It is feasible that this judgment may be invoked as a relevant precedent by courts in other common law countries, to resolve cases related to indigenous peoples' land rights.

3.3. SUMMARY

The analyzed regional judgments indicate that the Inter-American Court and the Caribbean Court of Justice have used UNDRIP in various substantive ways in the ratio decidendi, either as a criterion to reinforce or modify interpretations, expand the content and scope of rights, as a source of rights and as a parameter of constitutionality/conventionality. It can be concluded that the regional courts have integrated UNDRIP and make strategic and increasing use of the Declaration, influencing national courts.

USES OF UNDRIP IN THE JURISPRUDENCE OF THE IACHR AND CCJ

COURT	CASE	TYPES OF UNDRIP USE
IACHR	Pueblo Saramaka Vs Surinam. (2007)	5, 6
	Comunidad Indígena Xákmok Kásek Vs Paraguay. (2010)	4, 5
	Pueblo Indígena Kichwa de Sarayaku Vs Ecuador. (2012)	4, 5, 6
	Masacres de Río Negro Vs Guatemala. (2012)	4
	Norín Catrimán y otros Vs Chile. (2014)	4
	Pueblos Kuna de Madungandí y Emberá de Bayano Vs Panamá. (2014)	4
	Comunidad Garífuna de Punta Piedra y sus miembros Vs Honduras. (2015)	4
	Comunidad Garífuna Triunfo de la Cruz y sus miembros Vs Honduras. (2015)	4
	Pueblos Kaliña y Lokono Vs Surinam. Serie C No 309. (2015)	4, 6
	Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal Vs Guatemala. (2016)	4
	Pueblo Indígena Xucuru y sus miembros Vs Brasil. (2018)	4
	Comunidades Indígenas Asociación Lhaka Honhat Vs Argentina. (2020)	7
	Buzos Miskitos Vs Honduras. (2021)	5, 7
	Pueblos Indígenas Maya Kaqchikel de Sumpango y otros Vs Guatemala. (2021)	7
	Comunidad Garífuna de San Juan y sus miembros Vs Honduras. (2023)	4
CCJ	Maya Leaders Alliance et al. v Attorney General of Belize. (2015)	7 y 8

Own elaboration. Víctor Toledo 2023.

4.- PROMOTING THE USE OF UNDRIP

4.1. Factors that facilitate or hinder the use of UNDRIP in jurisprudence

The analyzed jurisprudence shows the crucial role of a broad conception of the human rights corpus juris, to assess compliance by states, together with the pro homine principle as a criterion for interpreting and adjudicating rights.

Constitutional models for incorporating international human rights law can facilitate or hinder the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Latin America. For example, in Argentina human rights treaties must be expressly incorporated into the Constitution, which is used to hinder the application and enforceability of ILO Convention No. 169 on indigenous peoples, and even more so the use of UNDRIP. In contrast, in Mexico the 2011 constitutional reform facilitates the application of international human rights instruments as a parameter of constitutionality, recognizing as fundamental the human rights contained in international treaties, by emphasizing rights, in addition to principles such as interpretation in conformity and pro persona.

Additional, but not decisive, factors for the use of UNDRIP are the constitutional recognition of indigenous peoples or the pluricultural nature of the state; and the ratification of ILO Convention 169. Both factors facilitate resorting to UNDRIP in jurisprudence to interpret indigenous peoples' rights.

Likewise, the application of doctrines such as conventionality control and the pro homine and pro persona principles in constitutional interpretation increases the possibilities of applying the Declaration.

4.2. Good practices to promote the use of UNDRIP in jurisprudence

Among the good practices that can contribute to greater application of UNDRIP by the higher courts in the region, the first is the systematic use of the Declaration in strategic litigation by defenders of indigenous peoples' rights.[16] This includes legal reasoning based on UNDRIP in paradigmatic cases to establish precedents and jurisprudential standards.

Another important measure is training judges and justice operators on the rights of indigenous peoples and on the Declaration itself, its contents and applicability in national legal systems. It is also necessary to promote dialogue and jurisprudential exchange between national courts and between them and international bodies such as the Inter-American Court of Human Rights, to jointly address standards and criteria for applying UNDRIP. Along these lines, creating observatories of jurisprudence on indigenous peoples' rights allows systematizing and analyzing experiences in different countries.

Another strategy is the establishment of recognitions and awards for the best court rulings that apply the Declaration in a novel or creative way. This makes it possible to encourage its use by judges and disseminate exemplary judgments. Likewise, the participatory development of manuals and protocols for judicial action in cases involving indigenous peoples, with guidelines on how to properly apply UNDRIP, is also a useful tool.

In short, the combination of strategic litigation, judicial training, jurisprudential dialogue, systematization, incentives, guidelines and policies on intercultural access, would significantly contribute to greater application of UNDRIP in Latin American higher courts.

5.- CONCLUSIONS

1. The evidence we have compiled in our ongoing research shows an increasing trend in the application of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the

[16] Claire Charters, «The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples», en *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2010).

highest courts in Latin American and Caribbean countries. So far, more than 700 judgments from constitutional courts and tribunals in 14 countries in the region that cite and use UNDRIP between 2007 and 2023 have been identified. Likewise, regional courts such as the Inter-American Court of Human Rights and the Caribbean Court of Justice have also issued at least 16 judgments applying the Declaration in the same period.

2. While UNDRIP is being applied by higher courts, the way in which it is used varies between different national courts and legal systems. Given this diversity, it is useful to build a typology of jurisprudential uses of UNDRIP that allows distinguishing between accessory or complementary references (obiter dicta) and those substantive uses where the Declaration is part of the central grounds motivating the judicial decision (ratio decidendi). This enables a rigorous analysis of the real impact of UNDRIP on jurisprudence.

3. The study of the judgments of regional courts shows that the main substantive uses of UNDRIP have been: to reinforce the Court's previous interpretations of indigenous peoples rights; to modify or expand previous interpretations; to expand the scope of certain rights beyond what was previously recognized; and as a source for the recognition of new rights not yet developed in its jurisprudence. The Caribbean Court of Justice has even applied UNDRIP as a parameter for constitutional review, which constitutes an advanced jurisprudential use.

4. Additionally, there is a growing convergence between the jurisprudence of the regional and national courts of Latin American countries, and the interpretation made by international human rights bodies when examining those same States, regarding the integration of UNDRIP as part of the applicable legal framework on indigenous peoples' rights. This jurisprudential and interpretive convergence is helping to strengthen the legal status of the Declaration and its relevance as an international human rights instrument in the regional sphere.

5. Factors that facilitate the application of UNDRIP include: constitutional models open to the incorporation of human rights recognized in the international corpus juris; constitutional recognition of indigenous peoples and ratification of ILO Convention No. 169, whose updated interpretation requires the application of UNDRIP; adoption of the conventionality control doctrine and pro homine principle. Obstacles are found in rigid models for the reception of human rights recognized in treaties.

6. To continue promoting the use of UNDRIP in the jurisprudence of the highest courts in the region, some recommended good practices are: the systematic legal reasoning invoking UNDRIP in strategic litigation on indigenous peoples' rights; comprehensive judicial training programs on indigenous peoples' rights and on the applicability of the Declaration; generating spaces for jurisprudential dialogue and exchange between national courts and with the Inter-American human rights system; creating regional observatories on indigenous peoples' rights jurisprudence; developing protocols and manuals for judges on the application of UNDRIP; as well as promoting policies on intercultural access to justice, based on UNDRIP.

In conclusion, with the evidence at hand, we can maintain that UNDRIP has been progressively established as a legal benchmark on indigenous peoples rights in Latin America and the Caribbean, through its increasing application by national and regional courts, shaping widespread, systematic and consistent state practice in both domestic and international law.