UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

Advisory Note - Protection of indigenous peoples' rights in Brazil under COVID-19

30 March 2021

Contents

1. Mandate and Process

1. The EMRIP undertakes this engagement with the Coordenação das Organizações Indígenas da Amazônia Brasileira.(COIAB[1],) on the situation of indigenous peoples in Brazil

[1] COIAB was founded on April 19, 1989 by leaders of existing indigenous organizations, COIAB is a private, non-profit, indigenous organization whose mission is to defend indigenous rights to land, health, education, and culture, to ensure the sustainability of indigenous peoples and organizations in all their diversity and to seek to advance their autonomy through advocacy and empowerment. COIAB is the largest indigenous organization of Brazil, and represents local indigenous associations, regional indigenous federations, indigenous women's organizations, and indigenous professors and students in the nine states of the Brazilian Amazon (Amazonas, Acre, Amapá, Maranhão, Mato Grosso, Pará, Rondônia, Roraima, and Tocantins). At the national level it is linked to the Articulation of indigenous peoples of Brazil – APIB, and at the international level to the Coordination of Indigenous Organizations in the Amazon Basin - COICA, one of the largest indigenous organizations in the world, composed of indigenous peoples and organizations from the nine countries of the Amazon basin.

during the COVID-19 crisis, pursuant to Human Rights Council resolution 33/25 (para.2), to "assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples, as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes."

2. In several letters commencing June 2020, the EMRIP received a request for country engagement from COIAB supported by the Indian Law Resource Centre (ILRC). The EMRIP agreed to submit an advisory note to COIAB on how to ensure the promotion and protection of indigenous peoples' rights and prevention of violations of their rights, in accordance with the UN Declaration on the Rights of indigenous peoples and other relevant international instruments, during and in the aftermath of the current COVID-19 pandemic. Given the context of limited travel due to the COVID-19 pandemic, all engagement was undertaken remotely, orally, on line and by telephone, and through email exchanges.

3. The Terms of Reference (see annex) were agreed to by the EMRIP and COIAB. The EMRIP held a number of meetings virtually to establish the factual situation in Brazil. (See Chronology of engagement).

4. In developing the advice below, the EMRIP also took into account recommendations provided by the WHO/PAHO[2] in PAHO's joint statement having met with indigenous groups, including COICA[3]; guidelines from PAHO in relation to COVID-19, entitled "Considerations on indigenous peoples, Afro-Descendants, and Other Ethnic Groups During the COVID-19 Pandemic support from PAHO"[4]; and the Cooperação técnica da OPAS/OMS Brasil em resposta à COVID-19 sob a perspectiva de direitos humanos, equidade, gênero e etnicidade e raça.

2. Chronology of engagement [5]

[2] PAHO wears two institutional hats: it is the specialized health agency of the Inter-American System and also serves as Regional Office for the Americas of the World Health Organization (WHO), the specialized health agency of the United Nations. See https://www.paho.org/en/who-we-are

[3]https://www.paho.org/es/documentos/acuerdo-para-respuesta-pandemia-COVID-19-organizaciones-pueblos-nacionalidades-amazonia

[4]https://www.paho.org/en/documents/considerations-indigenous-peoples-afro-descendants-and-other-ethnic-groups-during-COVID-19

[5] Prior to the actual request: the EMRIP was made aware of a letter from the Indian Law Resource Centre to the Secretary General of the UN alleging violations of indigenous peoples rights in Brazil, of 15 April 2020; on 28 April 2020, EMRIP received a letter from COIAB with information to support international condemnation in light of the vulnerable situation of indigenous peoples of the Amazon within the context of the COVID-19 pandemic; on 4 May 2020, the EMRIP sent a letter to Brazil indicating its openness to engage with Brazil on the issue of indigenous health under its country engagement mandate (Human Rights Council Resolution 33/25) to help States and indigenous peoples realize the aims of the UN Declaration on the Rights of indigenous peoples; on 5 May 2020, the EMRIP had a virtual meeting with the Indian Law Resource Centre on a possible request for country engagement from COIAB; on 28 May 2020, the Ambassador of Brazil sent a letter to the High Commissioner for Human Rights, copied to the EMRIP, on how the Brazilian authorities were responding to the COVID-19 crisis; on 20 August 2020, the EMRIP received a letter from the Brazilian Ambassador in Geneva declining the offer of assistance from the EMRIP (in its letter of 4 May 2020) but offering to have a virtual meeting with the EMRIP.

5 May 2020: Preliminary meeting with COIAB and the EMRIP

12 June 2020: The EMRIP received the original request from COIAB

19 June 2020: Report on indigenous peoples in the Brazilian Amazon from the Indian Law Resource Centre (ILRC).

3 July 2020: The EMRIP requested to meet with COIAB to discuss elements of its request.

10 July 2020: Virtual meeting between the EMRIP, COIAB and ILRC.

16 July 2020: Following feedback from the EMRIP, COIAB sent a revised request.

4 August 2020: The Secretariat had a meeting with the WHO, on behalf of the EMRIP.

14 August 2020: The Secretariat updated COIAB on a meeting, on behalf of the EMRIP with the WHO.

24 August 2020: The EMRIP accepted an invitation from Brazil to meet virtually, pursuant to an earlier letter from EMRIP (4 May 2020) to Brazil on country engagement in general.

18 September 2020: The EMRIP informed Brazil that it had received a country engagement request from COIAB and would welcome an opportunity to introduce this request to the Brazilian authorities during the upcoming virtual meeting.

22 September 2020: The EMRIP met virtually with the Ministry of Health, the Special Secretariat of Indigenous Health and FUNAI. They agreed that this meeting should be followed up with a meeting between the Chair of the EMRIP and the Special Secretariat of Indigenous Health. The SESAI also stated that once the COVID-19 crisis allows travel, they could plan a visit/mission to Brazil.

28 October 2020: The EMRIP wrote to COIAB with a summary of the meeting of 22 September and a request for an update on the implementation of the Supreme Court decision directing the State to take action through a contingency plan for the protection of Indigenous peoples in the context of COVID-19.

1 December 2020: The EMRIP received a response from COIAB to its letter of 28 October 2020.

26 January 2021: The EMRIP met with the Conselho Nacional De Direitos Humanos (CNDH) and the Articulation of indigenous peoples of Brazil (AIPB).

8 February 2021: The EMRIP met with the Office of the Federal Public Defender, Defender for Human Rights Issues and the Working Group for the Assistance of Indigenous Populations from the Federal Public Defender's office.

22 February 2021: Email from COIAB updating information.

9 March 2021: The EMRIP met virtually for the second time with the Ministry of Health, the Special Secretariat of Indigenous Health (SESAI) and FUNAI.

3. Issues identified by COIAB as negatively affecting indigenous peoples during the COVID-19 pandemic

A. Indigenous peoples not in voluntary isolation

5. The information COIAB provided was supplemented by meetings with the CNDH, the AIBP, and the Public Defender's Office[6]. Reference to other sources is made in the footnotes.

6. Prior to the outbreak of COVID-19, indigenous peoples in Brazil were suffering disproportionately from health issues and access to health care. [7] Since the COVID-19 outbreak, COIAB states that indigenous peoples have continued to suffer from a lack of sufficient medical care and a lack of sufficient food, forcing them out of their communities.

7. At the time of the request (12 June 2020), COIAB states that the federal government had taken limited action to develop policies and plans to prevent or reduce the spread of COVID-19 among indigenous peoples [8] The vulnerability and lack of an adequate response to address the situation of indigenous migrants and indigenous peoples living in urban areas was also raised.

8. COIAB states that indigenous peoples are not treated equally, as only those indigenous peoples living on demarcated land can claim their full rights as indigenous peoples[9]. COIAB regards this as a form of structural racism. In terms of their health care, as confirmed by the Special Indigenous Health Service (SESAI), the latter only provides primary care within indigenous territories, i.e. to around 755,898 Indigenous people. [10]Thus, COIAB states that

[6] The information provided here is contained in COIAB's submissions of 12 June and 3 July to the EMRIP as well as a further submission in support of the request from the Indian Law Resource Centre of 19 June 2020.
[7] See also submission under the UPR process in 2017 - https://www.ohchr.org/EN/HRBodies/UPR/Pages/BRIndex.aspx and https://www.paho.org/es/documentos/acuerdo-para-respuesta-pandemia-COVID-19-organizaciones-pueblos-nacionalidades-amazonia
[8] See Supreme Court Decision "ADPF 709"of 5 August 2020, in which it ordered the State to take emergency measures to protect indigenous peoples from COVID-19.
[9] According to the CNDH, only 40% of indigenous land has be demarcated.
[10] They also refer to a comment allegedly made by General Augusto Heleno, chief minister of the Institutional Security Office (GSI), made in the "Situation Room", that "Those who are outside these territories would be considered "rural producers".)

SESAI does not provide primary care to indigenous peoples who live outside their territories and/or in urban areas, leading to the absence of culturally appropriate treatment that recognizes their status as indigenous patients. Such indigenous peoples are looked after by the regular health system.

9. There is a discrepancy between the State and indigenous peoples' representatives on the number of indigenous people recognised as indigenous in Brazil.[11] COIAB states that both this discrepancy and the differential care provided to indigenous peoples based on their location is expected to have a negative impact on the distribution of the vaccine against COVID-19. While COIAB assesses the number of indigenous peoples in Brazil as just under 1,000,000, the official State figure is around 817,963. In a meeting on 26 January 2021, APIB stated that only 410,000 thousand vaccines had been allocated to indigenous peoples, excluding indigenous peoples in urban contexts and on non-demarcated lands.[12]

10. A further challenge to indigenous peoples accessing the COVID-19 vaccine is said to be the lack of a national vaccination programme thus the order of preference of distribution depends on the State in question and indigenous peoples are not all necessarily given priority.

11. Reports of disinformation also arose in the course of discussions with interlocutors, on all aspects of COVID-19 and in particular with respect to the vaccine, which missionaries have claimed will kill children and elders.[13]

12. A concern also arose that the newly defined criteria of "heteroidentification" (through Resolution No.4 of 22 January 22, 2021, by FUNAI) can have a negative impact on access to the vaccine, for indigenous peoples, as it limits their right to self-identification. Thus, if they are not recognised as indigenous they may not be considered a priority in terms of access to vaccinations against COVID-19.[14]

13. Since the COVID-19 outbreak, COIAB states that; indigenous peoples´ land rights, already under threat prior to the COVID-19 crisis, have been inadequately enforced, reflected by a halt in the process of demarcation of indigenous lands even before the crisis. In addition, demarcation procedures are said to be complex, burdensome and very lengthy. [15].

[11] According to Brazil's periodic report of June 2020 to the CESCR, there are 817,963 (502,783 of indigenous peoples live in the countryside and 315,180 live in urban areas) indigenous peoples from 305 different ethnic groups and speaking 274 languages live in Brazil. AIPB says 1,000,000.
[12] This information came from APIB who attended a meeting between the EMRIP and the CNDH. In answer to a question on how indigenous peoples in urban contexts access health services, CNDH indicated that access to hospitals by indigenous people is foreseen in the Supreme Court decision "ADPF 709", that, in some states, specific laws were created for access to health for indigenous peoples, but this is not the reality throughout the country, and there are still reports of chaos, and difficulties in accessing hospital spaces by indigenous people in certain States.
[13] This came from the Office of the Public Defender who provided this https://abcnews.go.com/Health/wireStory/fear-COVID-19-vaccine-grows-brazils-remote-amazon-75833794
[14] This information came from a meeting between the EMRIP and the CNDH.
[15] Since 1 January 2019, no land has been demarcated according to the Public Defender. In its meeting with the EMRIP, the CNDH indicated that 60% of indigenous land remains to be demarcated. The

14. COIAB states that prior to and since the COVID-19 crisis, efforts have been made to try and undermine indigenous peoples´ Constitutional right to land. They state that farms have been certified in the land management system ("Sigef"), which overlap with indigenous lands currently in the process of demarcation. [16] They state that Normative Instruction No. 09[17], published on April 22, authorizes the issuance of private property titles, including to land that is in the process of demarcation. [18] And they state that draft law 2633[19] from May 2020 will facilitate legalization of illegally occupied government land, give settler landholders an advantage over indigenous communities with respect to land title, and encourage land grabbing and deforestation[20]; and that draft law No. 191/20 will lead to the exploration of natural resources on indigenous lands, as highlighted in EMRIP's Study on the Right to Land in 2020.[21]

15. Since the COVID-19 outbreak, COIAB states that illegal incursions onto indigenous lands by miners, loggers, settlers, and business interests have accelerated as have deforestation and fires on and near their lands, including demarcated land. [22] They state that harmful government rhetoric has emboldened these individuals to take such action.

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requesters refer to a decision of the Inter American Court in 2018, which determined that Brazil was responsible for violating the right to judicial protection and the right to property of the Xukuru indigenous peoples due to a delay of over 16 years to complete the demarcation of land and to remove non-indigenous occupants. See case of the Xucuru Indigenous People and its Members v. Brazil, judgment, 5 February 2018. The Court considered the sentence a form of reparation in itself, decided on a payment of US$ 1 million in compensation and the necessary measures to complete the removal of non-indigenous intruders and the prevention of new intrusions. In its report of 2020 on land rights, the EMRIP already pointed to claims of regressive steps being taken on land rights, putting the survival of indigenous peoples in isolation and in initial contact in serious risk. See https://www.undocs.org/A/HRC/45/38

[16] Together, these farms are said to occupy more than 250 thousand acres of indigenous areas. National Committee for Indigenous Life and Memory. "COVID-19 and the indigenous people. Confronting violence during the pandemic." November 2020. APIB and grassroots organisations.

[17] https://www.in.gov.br/en/web/dou/-/instrucao-normativa-n-9-de-16-de-abril-de-2020-253343033

[18] According to the Public Defender, Normative Instruction nº 09, authorizes the issuance of a declaration that the land owned/occupied by the petitioner is not within the limits of indigenous lands that have been fully approved. This declaration is not a property title, which is issued by an official estate property notary. Nonetheless, it is a document that certainly helps owners/possessors legalizing their property/possession, regardless of whether there is a formal process of recognition of indigenous land. In April 27th, 2020, FUNAI published a statement clarifying that the prior denial of the issuance of such declaration was unconstitutional, as it limited property and possession. http://www.funai.gov.br/index.php/comunicacao/noticias/6067-nota-sobre-a-instrucao-normativa-n-9-2020

[19] Portal da Câmara dos Deputados (camara.leg.br)

[20] https://nordsip.com/2020/06/23/investors-warn-brazil-against-deforestation-law/

[21] See http://apib.info/2020/02/12/statement-in-condemnation-of-draft-law-no-19120-on-the-exploration-of-natural-resources-on-indigenous-lands/?lang=en – and https://undocs.org/A/HRC/45/38 and https://www.wwf.org.br/?75122/Federal-Government-bill-tightens-the-siege-on-indigenous-peoples-in-Brazil and submission by Brazil

[22] National Committee for Indigenous Life and Memory. "COVID-19 and the indigenous people. Confronting violence during the pandemic." November 2020. APIB and grassroots organisations. In its meeting with the EMRIP, the CNDH also indicated an increase in invasions of indigenous land since the pandemic due to weakening indigenous policy and more flexible norms on mining on indigenous

16. COIAB states that limited steps have been taken to prevent these activities partly due to reduced environmental inspections carried out by the agency IBAMA that implements ant-deforestation laws, caused by reduced financial resources.

B. Indigenous peoples in voluntary isolation and initial contact

17. In addition to the concerns above, indigenous peoples in voluntary isolation and initial contact face additional challenges. According to COIAB, the federal government has not taken sufficient effective preventive measures to protect those in voluntary isolation and initial contact and refers to the failure to implement the decision of the Supreme Court, "ADPF 709", of 5 August 2020, within the deadlines, as it relates to sanitary barriers.

18. COIAB states that incursions on their land pose a threat to their existence. They give the example of the situation in Yanomami, where the Inter American Commission on Human Rights asked Brazil to take all measures necessary to protect the rights to health, life, and personal integrity of members of the Yanomami and Ye'kwana indigenous peoples.[23] This reflects previous concerns raised in this area by the UN Special Rapporteur on Hazardous Waste and precautionary measures granted by the Inter-American Commission with respect to other peoples mentioned below (paras.63 and 64).[24]

19. Since the COVID-19 crisis, it is reported that the number of aggressive, and unwelcome intrusions by missionary groups have been on the rise, threatening the livelihoods and lives of isolated indigenous communities. It is reported that the federal government has taken limited to no action to prevent or punish criminal activities of certain Christian missionary groups that are said to take advantage of the current health crisis to force contact on indigenous peoples living in voluntary isolation or initial contact. In support, they refer to the Federal Civil and Criminal Trial Court of Tabatinga/AM Court decision in April 2020, in which the judge banned a group of Christian missionaries from entering a vast Amazon indigenous reserve in the Javari valley with the world's highest concentration of isolated tribes, citing risks from the coronavirus pandemic as one of his reasons.

4. Information from Brazil on its COVID-19 response to indigenous peoples [25]

20. At the federal level, the majority of actions are undertaken by two government agencies: the National Indigenous Foundation (FUNAI/MJSP) and the Special Secretariat for

lands supported by the federal government.

[23] http://www.oas.org/en/iachr/media_center/PReleases/2020/168.asp

[24] The Commission stated that "The situation of the Yanomami people, contaminated by mercury pollution from artisanal and small-scale gold mining or 'garimpo' activities on their lands serves as an example whereby their claims to lands rich in gold and other precious metals, their rights to life and health are disregarded, and discrimination is levelled on them on the basis of their ethnic and social origin. The arguments of the Government of bringing jobs and economic activities to indigenous peoples is not only disingenuous, but also proves that their rights, including their cultural rights, are not being respected." https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25434&LangID=E

[25] This information was provided in the letter from Brazil to the High Commissioner for Human Rights on 4 May 2020, in PowerPoint presentations provided by SESAI and FUNAI during a meeting with the EMRIP in September 2020 and during a second virtual meeting on 9 March 2021.

Indigenous Health of the Ministry of Health (SESAI/MS). The Secretariat for the Promotion of Racial Equality of the Ministry of Women, Family and Human Rights (SEPPIR/MMFDH) and the Ministry of Defense (MD) also play crucial roles on the issue.

A. National Indigenous Foundation (FUNAI/MJSP)

21. FUNAI states that it coordinates policies on indigenous peoples in Brazil, carrying out awareness-raising and prevention campaigns among indigenous peoples in partnership with SESAI, following the guidelines of the National Contingency Plan for Human Infection by COVID-19, in compliance with safety standards, health protocols and sanitary measures established by the Ministry of Health.

22. FUNAI states that it disseminates information through the agency's network of decentralized units and advises indigenous peoples to stay in their villages as the most effective way to prevent collective contamination. To minimize contagion, FUNAI states that their teams use personal protective equipment (PPE) during all actions.

23. On 19 March 2020, FUNAI stated that they established temporary measures to prevent infection and spread of the new coronavirus. Among them, the indefinite suspension of authorizations to enter indigenous lands, as well as all activities that involve contact with isolated indigenous communities and reinforced monitoring through its decentralized units throughout Brazil, and partnerships with governmental, environmental and public security authorities.

24. FUNAI also has a Remote Monitoring Center (CMR), a tool developed to enable daily monitoring of occurrences such as deforestation, degradation, changes in land use, and occupation in indigenous territories. FUNAI recognizes that environmental/territorial illicit acts can facilitate the contagion and spread of the epidemic among indigenous populations. For this reason, FUNAI, states that it carries out inspections.

25. FUNAI states that it distributes food baskets to indigenous communities, acquired with the Foundation's resources or through donations, to guarantee food security for indigenous peoples during the pandemic, when they must remain in their villages to avoid contagion. According to FUNAI, by May 2020, more than 45 thousand baskets had been distributed. Another 40 thousand were in the process of distribution. FUNAI stated that it had received approximately R$10 million for actions to combat the new coronavirus in the villages. FUNAI stated that it had received approximately R$ 6 million to carry out the logistics of distributing food baskets to indigenous families in the more than 3 thousand indigenous communities spread through the national territory. The goal was to distribute food baskets to approximately 154 thousand indigenous families in 26 states. FUNAI stated that indigenous peoples can also benefit from general measures to support informal workers issued by the Ministry of Economy, including an emergency aid of R$ 600 to R$1200.00,for three months. FUNAI also referred to what they describe as the many and regular consultations they have

with indigenous peoples and the challenges of trying to engage with as many people as possible virtually.[26]

26. FUNAI provided information on the number of bases/sanitary barriers[27] that they state had been established in areas with indigenous peoples in voluntary isolation, indicating the high cost of these installations, the complication in establishing them in remote parts of the amazon, and the limitation on their budget. In other indigenous territories, they stated that there had been a doubling of checkpoints since the Supreme Court Decision ADPF 709. FUNAI also indicated their concern at attempts by some missionary groups trying to enter indigenous land to persuade indigenous peoples not to take the vaccine and indicated the efforts they were making to counter these disinformation.[28]

People in voluntary isolation and initial contact

27. The General Coordination of Isolated and Recently Contacted indigenous peoples (CGIIRC) of FUNAI stated that they also developed a Contingency Plan. Since then, all the agency's 11 Ethno-Environmental Protection Fronts (FPE) have been regularly in dialogue with the Special Indigenous Sanitary Districts (DSEIs) to carry out emergency action and prepare Local Contingency Plans based on CGRIIRC guidelines. Among the Contingency Plans' actions, they highlight the protection and territorial management to guarantee the lives of isolated and recently contacted indigenous peoples. As a first step, FUNAI stated that they ensured the permanence of the teams of the Bases of Ethno-Environmental Protection - BAPEs, the main instrument for the protection of isolated and recently contacted populations.

B. Special Secretariat for Indigenous Health of the Ministry of Health (SESAI/MS)

28. SESAI's work is based on Law nº 8.080, of September 19, 1990, modified by law nº 9.836, of September 23, 1999; Decree nº 3.156, of August 27, 1999; Ministerial Order GM/MS nº 70/2004, included in the Consolidation Order nº 2, of September 28, 2017; and Ministerial Order GM/MS nº 254, of January 31, 2002, National Policy for the Health Care of indigenous peoples.

29. SESAI is responsible for the coordination and execution of the National Policy for the Attention to Health of indigenous peoples and the management of the Subsystem for Attention to Indigenous Health (SASISUS) in the Unified Health System (SUS) through multidisciplinary indigenous health teams.[29] SESAI states that its responsibility is to provide primary care within indigenous territories that means 755,898 Indigenous peoples; 5,852 indigenous villages; 305 ethnic groups; 274 languages; in 34 DSEI (Indigenous Special Sanitary Districts). SESAI states that indigenous peoples who do not live in demarcated

[26] Meeting 9 March 2021.
[27] Currently 29 established, 3 more to be built in 2021 and 2 in 2022.
[28] Meeting 9 March 2021.
[29] General information on SESAI's actions: https://www.saude.gov.br/saude-indigena
Educational videos aimed at the indigenous population (Canal Indígenas do Brasil Saúde e Vida): https://www.youtube.com/channel/UCBDWbs0003k -AkOwHOaY6Q/videos
SESAI's Press Releases: http://www.saudeindigena.net.br/coronavirus/notas.php

territories are looked after by the regular health system. However, since the Supreme Court Decision ADPF 709, SESAI indicated that the Indigenous Health Subsystem has been asked to assist all indigenous peoples in tribal villages, regardless of the status of their territories and thus they are providing primary care to such villages including vaccinations. This does not include indigenous peoples in rural or urban settings, who continue to be looked after by the regular health system.[30]

30. On April l, 2020, SESAI stated that it established the National Crisis Committee, formed by the Central Crisis Committee (within SESAI) and the District Crisis Committees (within each of the Special Indigenous Health Districts). The National Committee is responsible for planning, coordination, execution, supervision, and monitoring the impacts of COVID-19 on indigenous peoples. It prepared District Contingency Plans for Human Infection of the new Coronavirus (COVID-19) in indigenous peoples as well as technical reports, recommendations, clinical management protocols, epidemiological bulletins, and general recommendations. SESAI states that daily updates on COVID-19 numbers can be found at this link SESAI's epidemiological bulletins daily updates[31]:

31. On April 14, 2020, SESAI states that it established the Rapid Response Team (ERR), within the Special Indigenous Health Districts (DSEI), to tackle the COVID-19 pandemic distributing supplies, medicines, PPE, health equipment, as well as the necessary logistics. By August, R$ 2,3 million had been spent on indigenous health that had been frozen in the Municipal Health Funds since 2012, and another R$ 14 million was in the process of being released.

32. SESAI states that it conducts joint missions with the Ministry of Defense to send equipment, supplies and health professionals to work in the combat of COVID-19 and specialized services in the Alto Rio Negro, Alto Rio Solimões, Amapá e Norte do Pará, Vale do Javari, Xavante, Cuiabá, Araguaia, Leste de Roraima, Yanomami, Mato Grosso do Sul, Xingu and Maranhão Health Unit in Indigenous Areas (DSEI).

33. SESAI states that it dialogues with states and municipalities in order to improve medium and highly complex services. Regarding two remote municipalities in the state of Amazonas with a large number of cases among the indigenous population, SESAI and the Ministry of Defense formed a task force. In both Tabatinga and São Gabriel da Cachoeira (the largest indigenous population among Brazilian cities/90% of over 40 thousand inhabitants) the work consists of a coordinated effort to assess needs and bring medical resources to the area and ICU beds reserved for indigenous peoples. SESAI also requested the support of other states of the Federation to guarantee indigenous peoples' access to SUS reference units during the pandemic period since SESAI's responsibility is to provide primary care within indigenous territories. [32]

[30] Meeting 9 March 2021.
[31] http://www.saudeindigena.net.br/coronavirus/mapaEp.php
[32] Brazil confirmed this in its letter of 28 May 2020, to the High Commissioner for Human Rights, copied to EMRIP stating that "SESAI's responsibility is to provide primary care within indigenous territories" i.e. land demarcated.

34. SESAI states that it also established indigenous exclusive wards in the hospitals of Amazonas (Manaus, Atalaia do Norte, Benjamim Constant, Santo Antônio do Içá), Pará (Belém, Marabá, Santarém) and Amapá (Macapá). [33]The Special Secretary of Indigenous Health went on a technical visit to Bahia, Ceará, Potiguara and Maranhão Indigenous Areas, from 14 to 21 September. According to SESAI, they performed over 7,600,000 consultations from January to August 2020.

35. SESAI states that, in partnership with the Secretariat for Labour Management and Health Education (SGTES / MS), they are publishing a series of educational videos aimed at the indigenous population, indigenous health agents, indigenous sanitation agents, and other health workers on preventing and coping with the new coronavirus pandemic.

36. Both SESAI and FUNAI spoke of their concern over disinformation on the COVID-19 vaccine which they say comes from some religious groups and the internet, which is then shared among indigenous peoples. They indicated the ways they are trying to combat this through videos and information sharing in indigenous languages albeit difficult to do so given the 274 languages spoken in Brazil.[34]

C. Law No. 14.021 on protecting vulnerable groups, including indigenous peoples during the COVID-19 crisis[35]

37. Law No. 14.021[36], signed on 7 July 2020[37], inter alia provides for social protection measures to prevent contagion and the spread of COVID-19 in indigenous territories. The law covers all indigenous peoples regardless of location in Brazil, it considers indigenous peoples as groups in situations of extreme vulnerability, high risk and beneficiaries of actions related to the confrontation of epidemic and pandemic emergencies. It indicates that it shall take into consideration the social organization, languages, customs, traditions and the right to territoriality of the indigenous peoples, under the terms of Article 231 of the Federal Constitution. It then sets out a detailed emergency plan to confront COVID-19 in indigenous territories with the effective participation of indigenous peoples by means of their representative entities.

38. Some aspects of this plan includes 1. Forbidding third parties from entering areas with the confirmed presence of isolated indigenous peoples, except for persons authorized by the federal indigenous agency, in the event of an epidemic or a calamity that endangers the physical integrity of isolated indigenous peoples. 2. Religious missions that are already in the

[33] COIAB contests this information and states that theses wards were established by municipalities and states, in response to indigenous demands.
[34] Meeting 9 March 2021. According to COAIB, no effective measures have been taken by the government to combat this disinformation.
[35] The information in this section is a summary of public information available from a variety of sources.
[36] http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L14021.htm and https://www.in.gov.br/en/web/dou/-/lei-n-14.021-de-7-de-julho-de-2020-265632745
[37] It had been aapproved by the National Congress on 16 June 2020, in a virtual session

indigenous communities must be evaluated by the responsible health team and may remain subject to the approval of the responsible doctor. 3. Health care for indigenous peoples living outside of indigenous lands and indigenous migrants will be provided directly by the network of the Unified Health System (SUS) rather than SESAI.

39. In December 2020, the Articulação dos Povos Indígenas do Brasil (APIB) (Articulation of the Indigenous Peoples of Brazil) and the Partido dos Trabalhadores (PT) (Workers' Party) filed a Direct Unconstitutionality Action (ADI) before the Supreme Court, for a declaration of unconstitutionality of the aspect of Law 14.021/2020[38], which expressly authorizes the permanence of religious missions that were already in the indigenous communities, after evaluation of the health team and authorization of the responsible Doctor.

40. The law had been signed on 7 July with several vetoes. However, almost all of the vetoes were overridden in a joint session of the Congress that took place in 19 August 2020. The President, Jair Bolsonaro, had vetoed provisions of the law that obligated the federal government to provide drinking water, disinfectants and a guarantee of hospital beds to indigenous communities amid the COVID-19 pandemic, funding for the states and local governments with emergency plans for indigenous communities, as well as provisions to help give them more information on coronavirus, including greater internet access, on the grounds that they were "against the public interest" and "unconstitutional," by creating expenses for the federal government without new sources of revenue to cover them.[39]

D. Relevant Domestic Court Decisions[40]

41. In April 2020, the Federal Civil and Criminal Trial Court of Tabatinga/AM[41] banned missionaries from the Javari reserve and this decision was confirmed on appeal in July 2020.

42. The Supreme Court is due to pronounce on an extraordinary appeal in Case No. 1,017,365[42] on the interpretation of the legal framework of the traditional right of indigenous peoples over their lands. As expressed below, the outcome of this decision will invariably impact indigenous peoples' right to land.

43. On 5 August 2020[43], following an action brought by the APIB and other indigenous peoples' organisations, the Supreme Court (Judge Robert Barroso) in "ADPF 709" ordered

[38] 1st paragraph (§ 1º) of the article 13
[39] https://www.reuters.com/article/us-health-coronavirus-brazil-indigenous/brazils-bolsonaro-vetoes-plans-to-offer-COVID-19-support-to-indigenous-people-idUKKBN2492XX
[40] The information in this section is a summary of public information available from a variety of sources.
[41] Case no. 1000314-60.2020.4.01.3201. The decision was signed by federal judge Fabiano Verli. The plaintiff is União dos Povos Indígenas do Javari (Univaia) (Union of the Indigenous People of Javari) and the defendants are Mrs. Thomas Andrew Tonkin, Josiah Mcintyre, Pastor Wilson De Benjamin and Missão Novas Tribos do Brasil (evangelic entity).
[42] It involves the Xokleng, Kaingang and Guarani peoples of TI Xokleng La Klaño, in the state of Santa Catarina.
[43] This case had been taken to the Supreme Court because of the inaction of the Government in creating a specific plan to protect and promote the health of the indigenous people during the pandemic, which had been formally

the State to take emergency measures to protect indigenous peoples from COVID-19 by (1) establishing a "Situation Room", concerning isolated and recently contacted indigenous peoples (PIIRC). (2) a plan for Sanitary Barriers (3) the establishment of the COVID-19 General Plan for indigenous peoples (4) the extension of the assistance of the Indigenous Health Subsystem.

> (1) The Court granted the plaintiffs' request for the creation of a "situation room" to manage the pandemic and guaranteed the participation of the members of the Federal Prosecution Office, the Federal Public Defender's Office, and of indigenous peoples including APIB and COIAB.
>
> (2) The Court also granted the request for the creation of sanitary barriers where isolated and recently contacted indigenous peoples live, according to a plan to be prepared by the situation room. Health barriers are structures created to establish specific procedures for disinfection, quarantine, and maintenance of the indigenous policy of non-contact. It was highlighted that the option of these indigenous peoples to remain isolated derives from their right to self-determination and represents their way to preserve their cultural identity. For that reason, it was note that the option of isolation is a right, and the State has the responsibility to guarantee it, according to the 169 Convention of the ILO (Article 2, I; Article 4, I and II; Article 5 and Article 7). According to COIAB, the Health Barriers Plan is one of the most sensitive points of this decision and the one capable of guaranteeing the right to health and life of these peoples. According to the Supreme Court: Priority 1 indigenous lands should have had the barriers by September 30; and the indigenous lands of "Priority 2" should have the barriers installed by October**.** However, by November, the judicial order had not been complied with.
>
> (3) The Court partially affirmed the provisional measure to order the federal government to elaborate a new plan to combat COVID-19 for the indigenous population, with the participation of the National Human Rights Council and of representatives of the indigenous peoples and their experts. The decision also established the creation of a working group to achieve that goal, as well as a 30-day deadline, starting from the notification to the parties, for the plan to be presented to the Court. Since the Supreme Court's decision, three plans have been put forward by the government and rejected by the Court, as being of low technical quality. According to SESAI, despite lack of approval of the third plan they had been advised to at least begin the implementation of this plan. They also highlighted that since the beginning of the crisis they have already been implementing their own contingency plan[44]. By the end of January a fourth plan had been submitted to the Court.

recognized by WHO several months prior to that. By the time this case was brought before the Supreme Court, the bill 14.021 had already been approved by the National Congress, but not signed, so that it technically was not a Law, and therefore it could not have been implemented.

[44] Meeting on 9 March 2020.

According to the Associação Brasileira de Saúde Coletivo/the Brazilian Health Collective Association (ABRASCO), this plan continues to be insufficient.[45]

(4) The Court partially granted the request to extend the assistance of the Indigenous Health Subsystem to all Brazilian indigenous peoples, referred to as "Indians", here and in the Constitution. It determined the Indigenous Health Subsystem to assist all indigenous peoples in tribal villages, regardless of the status of their territories. It was noted that being an Indian is a matter of identity and it does not require any measure by the State to legalize or recognize its territory, as stressed by the 169 Convention of the ILO (Articles 1, 2 and 3). However, the decision did not grant the same right to indigenous peoples who are urban dwellers, because they have access to the Brazilian Public Health System, which grants universal and free assistance.

44. As to the request to remove invaders from indigenous lands, the Court noted the existence of information about the presence of over 20,000 illegal miners in just one of the indigenous lands for which removal was required, not taking into account the situation of the others. The Tribunal stressed that the removal of such invaders required the employment of considerable resources involving police and/or military forces in indigenous lands, which would lead to an increase in the risk of contagion for the communities. Furthermore, the measure could present a risk of armed conflict in the indigenous lands and threaten the physical integrity of the indigenous peoples during the pandemic and, as a result, deepen their situation of vulnerability. However, the Court decided that the federal government should draw up a plan for the removal of the invaders and that if nothing is done, he will return to the issue.[46]

5. Rights of indigenous peoples under international law arising in the context of this request

45. The following rights are of particular relevance in the context of the challenges being experienced in Brazil[47] since the outbreak of the COVID-19 virus. All of these rights should be exercised without discrimination of any kind based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status such as disability, age, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation.[48]

46. It is recalled that with all rights protected under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), particular attention shall be paid to the rights and special

[45] https://www.abrasco.org.br/site/

[46] http://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_COVID-1919.pdf and https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=447103&ori=1

[47] All of the instruments below have been ratified where applicable, or endorsed by Brazil.

[48] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights; 2009.

needs of indigenous elders, women, youth, children and persons with disabilities (Article 22, UNDRIP).

Right to their self-determination and be recognised as indigenous peoples

47. Article 3 of the UNDRIP specifically recognizes that indigenous peoples have a right to self-determination (to freely determine their political status and pursue their economic, social and cultural development), the same right as guaranteed to other peoples in articles 1 of the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights. Self-determination is the foundation of all indigenous peoples' human rights, upon which all other rights of indigenous peoples are dependent[49], and seeks to protect inter alia indigenous peoples' self-identification. This right is supplemented by a right of indigenous peoples to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned (Article 9) and the right to determine their own identity or membership in accordance with their customs and traditions (Article 33).

48. Under the Brazilian Constitution, indigenous peoples, referred to as "Indians" are recognised with standing before the law, and their land and cultural rights are protected.[50]

Right to physical and mental health and to clean water

49. The right of indigenous peoples to the enjoyment of the highest attainable standard of physical and mental health without discrimination is specifically recognized in the International Covenant on Economic, Social and Cultural Rights (art. 12), which Brazil has ratified. Article 21 of the UNDRIP [51], the adoption of which Brazil supported in 2007, has an explicit reference to indigenous peoples' rights to health, which is restated in article 24 confirming that it covers physical and mental health. The American Declaration on the Rights of Indigenous Peoples, also supported by Brazil, recognizes both the collective and the individual right of indigenous peoples to enjoy the highest level of physical, mental and spiritual health (art. XVIII). Article 12 (2) of the International Covenant on Economic, Social and Cultural Rights specifies that the right to health includes steps necessary for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases".

50. The rights to water and to sanitation are part of the right to an adequate standard of living and "integrally related, among other Covenant rights, to the right to health"[52], set out in articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

[49] A/HRC/12/34 and A/HRC/EMRIP/2019/2
[50] Article 215, 231 and 232 of the Constitution.
[51] Article 21 1.Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.
[52] General Comment - https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

The right to water is also recognised in other human rights treaties including article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 24, paragraph 2, of the Convention on the Rights of the Child. The right to water is also essential for indigenous peoples to realise other rights, like the right to life, and enjoyment of their own cultural[53] (articles 6 and 27 of the International Covenant on Civil and Political Rights).

Right to access to healthcare

51. All human rights instruments including the UNDRIP (Art. 2) highlight the right to be free from any kind of discrimination. (UNDRIP, Article 2, ILO C169, Art. 3). The Committee on Economic, Social and Cultural Rights also emphasizes the requirements of non-discrimination, under articles 2 and 3 of the Covenant.[54] Article 24 of the UNDRIP[55] explicitly recognises indigenous peoples' right to access all social and health services without discrimination. Articles 24 and 25 of ILO C169 also grants access to health care services and social protection measures.

52. Non-discrimination is not enough and States should also adopt effective and where appropriate special measures to ensure improvement in indigenous peoples' conditions. Thus, States cannot merely offer the same health services to indigenous peoples in the same way as everyone else but must adapt their services to the health-related characteristics, specificities, cultural and otherwise, and needs of indigenous peoples. For example, the Committee on Economic, Social and Cultural Rights considered that "indigenous peoples have the right to specific measures to improve their access to health services and care", entailing, among other things, that "health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines", that "States should provide resources for indigenous peoples to design, deliver and control such services" and that "vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected". In that regard, the Committee considered that "development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and

[53] CCPR/C/95/D/1457/2006, Poma Poma v. Peru, Human Rights Committee.
[54] See Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 18. Equal access for indigenous peoples is also provided for by United Nations Declaration on the Rights of indigenous peoples (art. 24) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 20. States must also ensure employers provide safe and healthy working conditions without discrimination (International Covenant on Economic, Social and Cultural Rights, art. 7; and Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 20).
[55] Article 24 -1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2.Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

breaking their symbiotic relationship with their lands, has a deleterious effect on their health".[56] On 23 October 2017, the High Commissioner for Human Rights wrote to Brazil in the context of the UPR process highlighting the need to "strengthen efforts aimed to provide inclusive, quality and accessible health and hospital services with emphasis on vulnerable groups."

Right to maintain their own health systems and their traditional practices and medicines

53. Article 23 of the UNDRIP[57] specifically provides for the right of indigenous peoples to be actively involved in developing, determining and administering health programmes through their own institutions. The American Declaration on the Rights of Indigenous Peoples also recognizes the right of indigenous peoples to maintain their own health systems (art. XVIII). Article 24 demonstrates that health is a key determinant of social well-being and focuses on the cultural aspects of health in granting them the right to their traditional practices and medicines. The UNDRIP, the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child all capture the interconnection of cultural, social, and economic aspects of health rights of indigenous peoples. The Convention on the Rights of the Child in its General Comment on the Rights of Indigenous Children speak of the bridge created by health care workers and medical staff from indigenous peoples communities, between traditional and conventional medicine. Thus, reinforcing the complementarity between indigenous and conventional health systems.

54. Indigenous peoples' health rights can be well ensured within the framework of indigenous systems of self-government and autonomy, under the right to self-determination recognised in article 3 of the UNDRIP and the same article in the American Declaration on the Rights of Indigenous Peoples.

Right to information

55. Under article 19 of the International Covenant Civil and Political Rights, the right to freedom of expression, includes "a right to seek, receive and impart information of all kinds, regardless of frontiers". The Committee on Economic, Social and Cultural Rights regards as a "core obligation" providing "education and access to information concerning the main health problems in the community, including methods of preventing and controlling them."[58] Article 30 of ILO C169, also recognises the requirement to ensure access to information on the pandemic, its consequences and the measures to respond to the crisis through the use of adequate and effective means of communications in a language indigenous peoples are able to understand.

[56] See Committee on Economic, Social and Cultural Rights, general comment No. 14, para. 27.
[57] Article 23 - Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
[58] CESCR General Comment 14, para. 44.

Rights to Participation, Consultation, and free, prior and informed consent

56. Both the UNDRIP (Arts. 18, 19 and 32) and ILO C196 (Art. 6) [59] recognise the rights of indigenous peoples to be consulted and to participate in decision-making in relation to measures that may affect them, including relating to their health. This is to ensure that their rights, diversity and circumstances are taken into account. The right to participate in decision-making includes the right to affect the outcome of decision-making processes, not just simply to participate in the process. Under the UN Declaration on the Rights of indigenous peoples, in certain circumstances, the right of indigenous peoples to participate in and be consulted in decision-making on measures affecting them will not be sufficient and thus indigenous peoples ' free, prior and informed consent may be required[60]. Indigenous women, youth, elders and persons with disabilities, must be included in decision-making processes. Several treaty bodies have also addressed these rights[61]. On 23 October 2017, the High Commissioner for Human Rights wrote to Brazil in the context of the UPR process highlighting the need to "Establish effective consultation with indigenous peoples in all legislative and administrative measures affecting them.."

Right to Land, Territories and Resources

57. Articles 25 to 28 of the UN Declaration on the Rights of Indigenous Peoples recognize indigenous peoples ' right to own, use, develop and control their lands, territories and resources. This right covers indigenous peoples' traditional lands, as well as lands that indigenous peoples acquired more recently, including by forcible relocation. States should give legal recognition to indigenous peoples' ownership of these lands, often done through demarcation. They should work with indigenous peoples to develop a process to identify and protect indigenous peoples' lands, this includes during a pandemic. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources, including during times of crisis. The Declaration calls on States to establish and implement assistance programmes for indigenous peoples for such conservation and protection. Indigenous peoples' have the right to determine development priorities and strategies for the use of their lands. States should consult and cooperate with indigenous peoples to obtain their free, prior and informed consent prior to the approval of projects to develop their lands.[62]

58. On 23 October 2017, the High Commissioner for Human Rights wrote to Brazil in the context of the UPR process highlighting the need to, "adopt an effective plan of action for the

[59] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/normes/documents/genericdocument/wcms_739937.pdf)
[60] Free, prior and informed consent:- Annual study of the EMRIP on the Rights of indigenous peoples (A/HRC/39/62). For further information on the right to participation and free, prior and informed consent see A/HRC/39/62 at https://undocs.org/A/HRC/39/62
[61] Ibid
[62] For a more in-depth analysis of the right to land see Right to Iand under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus – Study of the EMRIP on the Rights of Indigenous Peoples (A/HRC/45/38).

demarcation and protection of indigenous lands, and provide the necessary financial resources to ensure a policy for the protection of the rights of indigenous peoples and to prevent related conflicts.

59. Indigenous rights to land are protected under the Constitution of Brazil and the EMRIP is aware that there is currently an appeal before the Supreme Court Case No. 1,017,365[63] on the interpretation of the legal framework of the traditional right of indigenous peoples over their lands. The former UN Special Rapporteur on the Rights of Indigenous peoples advised that the application of a temporal framework doctrine would be inconsistent with the understanding of land rights under international human rights standards and result in the significant denial of rights of indigenous peoples in Brazil who has sought regularization of their lands since 1988. [64] FUNAI indicated that the outcome of this case will invariably affect the demarcation process, and according to FUNAI for this reason demarcation procedures have been suspended in Brazil since 2019.[65]

Right to Life

60. Article 7 of the UNDRIP[66] recognises the right to life of indigenous peoples. The same right as protected under article 6 of the International Covenant on Civil and Political Rights, obliges States to respect and ensure the right to life to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[67] The Human Rights Committee has held this to include general conditions such as "degradation of the environment", "deprivation of indigenous peoples' land, territories and resources" and "the prevalence of life-threatening diseases". [68]Measures required can include access without delay to food, water, shelter, health care, electricity, sanitation and effective emergency health services, as well as contingency plans and disaster management plans to prepare for and address life-threatening disasters, whether of natural or human origin.[69] The Committee has emphasized that "the right to life must be respected and ensured without distinction of any kind", including "membership of an indigenous group".[70]

[63] It involves the Xokleng, Kaingang and Guarani peoples of TI Xokleng La Klaño, in the state of Santa Catarina.
[64] https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25062 and reply by the State https://agencia.fiocruz.br/sites/agencia.fiocruz.br/files/u91/relatorios_tecnicos_-_COVID-19_procc-emap-enspCOVID-19-report4_20200419-indigenas.pdf
[65] Meeting 9 March 2021.
[66] Article 7: 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.
[67] See Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 7.
[68] Ibid., para. 26.
[69] Ibid., para. 26.
[70] Ibid., para. 61.

Specific protection of indigenous peoples in voluntary isolation and initial contact and their right to self-determination [71]

61. While all of the rights referred to above also apply to indigenous peoples in voluntary isolation or initial contact, article 8 of the UNDRIP recognises that "Indigenous peoples have the right not to be subjected to forced assimilation." Under Art. 26 of the American Declaration on the Rights of Indigenous Peoples, indigenous peoples in voluntary isolation or initial contact: have the right to remain in that condition and to live freely and in accordance with their cultures and States shall, with the knowledge and participation of indigenous peoples and organizations, adopt appropriate policies and measures to recognize, respect, and protect the lands, territories, environment, and cultures of these peoples as well as their life, and individual and collective integrity.[72] This is an expression of their right to self-determination as expressed in article 3 of the UNDRIP as well as the twin Covenants. The right to self-determination should be understood as the guarantee of respect for their decision to remain in isolation the "no-contact principle". In other words, isolation is a strategy of collective preservation, allowing them to maintain their own systems of thought, their cultures, their languages and traditions, as well as to survive the threats caused by any forced contact with the outside world.[73] United Nations Guidelines,[74] indicate that States must prevent the transmission of diseases to isolated tribes, through the prohibition or limitation of activities of outsiders within their lands, and must ensure their access and use of traditional biomedicine. Articles 14 and 18 of ILO C169 also provides specific protection of indigenous peoples in voluntary isolation.

62. On 17 July 2020, the Inter-American Commission on Human Rights (IACHR) granted precautionary protection measures (resolution 35/2020) in favour of members of the Yanomami and Ye'kwana indigenous peoples. The Commission considered that they faced a serious, urgent risk of suffering irreparable damage to their rights to life, personal integrity, and health. The resolution was adopted following an action requesting that the Brazilian government be urged to remove illegal prospectors from the Yanomami Indigenous Land (Roraima) and implement other measures necessary to prevent the spread of COVID-19.[75]

[71] Summary of meeting, jointly prepared by the Special Rapporteur on the Rights of Indigenous Peoples of the United Nations and the Rapporteur on the Rights of Indigenous Peoples of the Inter-American Commission on Human Rights: Working meeting on the rules of international law relating to the human rights of indigenous peoples in voluntary isolation and initial contact in the Amazon and Gran Chaco https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/192/73/PDF/G1819273.pdf?OpenElement

[72] In its resolution No. 1/2020 of 10 April 2020, the Inter-American Commission on Human Rights recalled the need for States to respect, promote, and protect the right to live in voluntary isolation and the principle of no contact. https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf

[73] The International Working Group on indigenous peoples Living in Voluntary Isolation or in Initial Contact in the Amazon and Gran Chaco (PIACI IW)

[74] United Nations Guidelines for Protection of indigenous peoples in Isolation and Initial Contact of the Amazon Region, Gran Chaco and Oriental Region of Paraguay

[75] http://www.oas.org/en/iachr/media_center/PReleases/2020/168.asp

63. On 11 December 2020, the IACHR granted precautionary measures (resolution 94/2020) in favour of the members of the Muduruku indigenous peoples. The petitioners alleged that the beneficiaries are at risk from the COVID-19 pandemic, especially in view of their particular vulnerability, shortfalls in health care, and the presence of unauthorized third parties in their territory.[76] On 4 January 2021, the IACHR granted precautionary measures (resolution 1/2021), in favour of the members of the Guajajara and Awá indigenous peoples of the Araribóia Indigenous Land. The IACHR took into account the fact that the alleged events have taken place in a specific context that is characterized not only by the COVID-19 pandemic but also by the fact that the Guajajara and Awá (who live in voluntary isolation) have allegedly suffered long-standing discrimination due to their efforts to defend their rights, have suffered murders over the years, at least five of which took place recently and are particularly vulnerable due to the presence of large numbers of people conducting illegal activities in their territories.[77]

64. Under the precautionary measure procedure in these cases, the IACHR asked the Brazilian State to: a) adopt the necessary measures to protect the rights to health, life, and the personal integrity of the members of these peoples, implementing measures to prevent the spread of COVID-19 through a culturally appropriate perspective, and in addition, providing adequate medical care with respect to availability, accessibility, acceptability and quality, in accordance with the applicable international standards; b) agree on the measures to be taken with the beneficiaries and their representatives; and c) report the actions taken to investigate the facts that led to the adoption of these precautionary measure and, thus, avoid repetition.

6. EMRIP's advice on how Brazil can ensure indigenous peoples' rights during and in the aftermath of the pandemic

65. While the requester of this advice is COIAB, EMRIP welcomed the opportunity to meet with different organs of the federal State and appreciates the time that the State representatives gave to them. EMRIP is mindful of the challenges all States are experiencing during the COVID-19 crisis. It welcomes the work being undertaken by FUNAI and SESAI,[78] in the protection of indigenous peoples, often in difficult and challenging circumstances, including in remote areas. This advice is provided to COIAB within the terms of reference agreed between the EMRIP and COIAB (Annex). Brazil, as the State, is the primary party responsible for implementing human rights in Brazil, in this context the human rights of indigenous peoples. COIAB and Brazil may wish to view this advice as a contribution towards the implementation of the UN Declaration on the Rights of Indigenous Peoples, including through the full implementation of Law No. 14.021 and the Supreme Court Decision ADPF 709.

[76] http://www.oas.org/en/iachr/media_center/PReleases/2020/302.asp
[77] https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2021/009.asp
[78] https://saudeindigena.saude.gov.br/corona

66. The EMRIP notes that Brazil was considered during the third cycle of the UPR procedure of the UN Human Rights Council in 2017, and that 242 of the 246 recommendations were supported by Brazil including all of the recommendations relating to indigenous peoples. [79] Some of the suggestions below reflect these recommendations. [80]

EMRIP's general understanding grounding the advice

67. The EMRIP notes that in its Constitution, Brazil specifically recognizes the right to land and territories of indigenous peoples, a duty to demarcate lands traditionally occupied by indigenous peoples in accordance with their traditions and forms of social organization, a commitment to foster an appreciation and protection of multi-cultural expression and to educate all Brazilians on the contribution of different ethnic groups to the history of Brazil, and recognition of indigenous peoples as persons before the law. [81] Brazil has developed plans of territorial management (*planos de gestão territorial)* within its national environmental policy to implement these rights.

68. The EMRIP notes that the outcome of the appeal in Case No. 1,017,365[82] before the Supreme Court will have an invariable impact on indigenous peoples' right to land and shares the view of the former Special Rapporteur on the Rights of Indigenous Peoples, Tauli-Corpuz, abovementioned (para. 59), that the application of a temporal framework doctrine would be inconsistent with the understanding of land rights under international human rights standards and result in a significant denial of rights of indigenous peoples in Brazil who have sought regularization of their lands since 1988.

69. The EMRIP notes that prior to the COVID-19 crisis, indigenous peoples were among the most vulnerable groups within the Brazilian population demonstrated by indicators on income, child mortality, malnutrition, health, schooling and access to

[79] https://www.ohchr.org/EN/HRBodies/UPR/Pages/BRIndex.aspx
[80] These include: addressing indigenous child mortality, protection from discrimination, threats attacks, violence and forced eviction; completing land demarcation processes; guaranteeing consultation and free prior and informed consent; guaranteeing necessary resources to FUNAI; ensuring food, health services, and access to sanitary services and reduction in social and economic inequality; and ensuring respect for the environment and bio-diversity in development activities.
[81]https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf Constitution - Article 215. The State shall ensure to all the full exercise of the cultural rights and access to the sources of national culture and shall support and foster the appreciation and diffusion of cultural expressions. (CA No. 48, 2005) Paragraph 1. The State shall protect the expressions of popular, Indian and Afro-Brazilian cultures, as well as those of other groups participating in the national civilization process. Article 242. The principle of article 206, IV, shall not apply to the official educational institutions created by state or municipal law and in existence on the date of the promulgation of this Constitution, which are not totally or predominantly maintained with public funds. Paragraph 1. The teaching of Brazilian History shall take into account the contribution of the different cultures and ethnic groups to the formation of the Brazilian people
[82] It involves the Xokleng, Kaingang and Guarani peoples of TI Xokleng La Klaño, in the State of Santa Catarina.

sanitation.[83] The COVID-19 crisis is magnifying the challenges to Brazil's indigenous peoples. In light of the rapid spread of COVID-19 among indigenous peoples, it is said to pose a "high risk of physical and cultural extinction" for indigenous peoples in the Amazon, particularly those in voluntary isolation.[84]

70. The EMRIP notes that indigenous peoples have a particular vulnerability to COVID-19 in comparison to the rest of the population, particularly those living in voluntary isolation or initial contact.[85] The virus will weaken their immune systems and render them even more vulnerable to bacterial infections, including pneumonia and staph. Indigenous peoples in Brazil, especially those in indigenous territories, experience serious geographic and epidemiological vulnerability. This follows the pattern of indigenous peoples globally.[86]

71. The EMRIP notes that despite action plans undertaken by the State through its relevant agencies (FUNAI and SESAI) from the beginning of the crisis in April/May 2020, the adoption of legislation (Law 14.021) in July 2020, and the plans of territorial management (*planos de gestão territorial)*, on 5 August 2020, in a historic lawsuit, the Supreme Court ordered the government to take emergency action to protect indigenous peoples. The EMRIP notes that this decision has not yet been implemented in its entirety. It also notes that by a decision in April 2020, the Federal Civil and Criminal Trial Court of Tabatinga/AM had banned missionaries trying to make contact with indigenous peoples in voluntary isolation in the Javari valley.

72. Several interlocutors have suggested that many of the problems associated with indigenous peoples' differential vulnerability in confronting the COVID-19 crisis is a consequence of poor land distribution, land policies, and the halt to all demarcation processes since 1 January 2019, as well as the complexity, cost, burdensome nature and length of demarcation procedures. While FUNAI has indicated that demarcation has halted because of Supreme Court Case No. 1,017,365[87], the EMRIP notes that the provisional orders in this case were made by the Supreme Court in May of 2020 and

[83] National Report Submitted by Brazil 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/046/89/PDF/G1704689.pdf?OpenElement also https://www.paho.org/es/documentos/acuerdo-para-respuesta-pandemia-COVID-19-organizaciones-pueblos-nacionalidades-amazonia

[84] UN Human Rights and IACHR on 4 June 2020: http://www.oas.org/en/iachr/media_center/PReleases/2020/126.asp

[85] On April 18, 2020, the Center for Analytical Methods for Public Health Surveillance and the Working Group on Sociodemographic and Epidemiological Vulnerability of indigenous peoples in Brazil to the COVID-19 Pandemic, both from Fundação Oswaldo Cruz (Fiocruz), published the report " Risk of spread of COVID-19 in indigenous populations: preliminary considerations on geographic and sociodemographic vulnerability". And Law No. 14.021, of 7 July 2020, on protecting vulnerable groups from COVID-19. https://www.in.gov.br/en/web/dou/-/lei-n-14.021-de-7-de-julho-de-2020-265632745

[86] http://www.oas.org/es/cidh/prensa/comunicados/2020/103.asp

[87] It involves the Xokleng, Kaingang and Guarani peoples of TI Xokleng La Klaño, in the state of Santa Catarina.

that other interlocutors are not of the view that these orders amounted to a widespread suspension of all demarcation procedures.[88] The suspension of demarcations is compounded by the view, expressed by several interlocutors that only indigenous peoples located on demarcated lands will benefit from their full rights as indigenous peoples. Thereby excluding indigenous peoples outside their territories and in urban areas as well as indigenous migrants. It has also been suggested, that as indigenous peoples grow in numbers needing more physical space this issue is likely to become more acute if remedial measures are not taken. In light of all of the information at its disposal, the EMRIP recommendations the following.

SHORT TERM RECOMMENDATIONS

- **Implement all aspects of the Supreme Court's decision of 5 August 2020, including on the establishment of an effective Plan to combat COVID-19.**
- **Ensure appropriate participation, consultation and, when required, the free, prior and informed consent, of indigenous peoples in the development of all laws and policies relating to them, including measures designed to protect indigenous peoples from COVID-19 by, inter alia, re-establishing civil society dialogues.[89]**
- **Ensure that all measures taken to combat COVID-19 are for <u>all</u> indigenous peoples in Brazil regardless of where they are located, as set out in the Law on protecting vulnerable groups, including indigenous peoples, during the COVID-19 crisis (Law No. 14.021). This includes vaccination for the entire indigenous population in Brazil without discrimination, including indigenous peoples and indigenous migrants in rural and urban areas, and on indigenous land that is not yet demarcated, as well as those on demarcated land, on a priority basis as part of a national vaccination plan.**
- **Ensure that indigenous peoples' rights to self-determination, to belong to an indigenous community, and to determine their own identity or membership in accordance with their customs and traditions, through self-identification and recognition as indigenous peoples, is realized.**
- **Ensure access to and dissemination of accurate, reliable, timely information in plain language consistent with human rights principles on COVID-19 and its corresponding vaccines. This is important for addressing false and misleading information. Coherent and consistent messaging by governmental officials and institutions is paramount. All information about COVID-19 and its corresponding vaccines should be accessible and available in indigenous**

[88] It would appear that the Supreme Court made a provisional order, suspending the effects of the Opinion n.º 001/2017/GAB/CGU/AGU, in which the Attorney-General had imposed on all federal administrations several restrictions on the demarcation of indigenous territory procedures, especially the understanding that *only* the land effectively occupied by indigenous people by the promulgation of the Constitution (Oct 5th, 1988) could be the object of demarcation. In the same case, due to the COVID-19 pandemic, the Supreme Court also suspended all possessory cases and all cases in which there is a declaration that a demarcation procedure is null and void, except for those cases presented to recognize indigenous rights. Public Defender of Human Rights.
[89] See EMRIP Report A/39/62.

languages and for indigenous persons with disabilities. As suggested by the SESAI, COIAB may wish to assist them with this strategy.

- **Ensure access to adequate food, sufficient hygienic supplies, including personal protective equipment, disinfectant, soap, drinking water, free distribution of hygiene products and the distribution of cleaning and disinfection materials to indigenous communities, the emergency provision of more hospital beds and intensive care units (ICUs) for indigenous people, acquisition of ventilators and blood oxygenation machines.**
- **Provide emergency funds for indigenous people's healthcare, and establishment of mobile medical units with adequate equipment and access to qualitative medical care.**
- **Take into account indigenous peoples' distinctive concepts of health, including their traditional medicine and traditional practices.**
- **Approach the COVID-19 crisis as a public health and indigenous issue rather than a security issue, avoid deploying military and law enforcement to alleviate the crisis, which experience has shown often leads to suffering and displacement of indigenous communities. [90]**
- **Adopt the necessary measures for the effective removal of non-indigenous settlers, miners, loggers, ranchers, farmers and others unlawfully on indigenous lands and place measures of control over the entry of any person on the territories of indigenous peoples in voluntary isolation to protect their right to self-determination, in particular establishing effective sanitary barriers (as ordered by Supreme Court Decision ADPF 709). [91] All measure should be taken in consultation and cooperation with the indigenous peoples concerned, through their representative institutions recognizing the leadership of the indigenous authorities and their own forms of organization and grant indigenous peoples the right to introduce their own protection and healthcare measures.**
- **Step up efforts to protect indigenous peoples against all invasions onto their lands, including for resource exploitation like mining and logging or intrusion of missionaries, by inter alia intensifying surveillance measures and put an end to official statements that might be perceived as encouraging such invasions.**
- **Ensure timely and effective investigations of any killings of indigenous persons on indigenous lands, as referred to by the Inter-American Commission[92], and all illegal acts on indigenous lands, including burning of indigenous forests, and ensure that perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that victims are adequately compensated.**
- **Refrain from promoting or authorizing development projects (extractives, forestry, development etc.) in or around indigenous territories during the**

[90] Ms. Tauli-Corpuz, Panel discussion IHRD, HRC September 2020
[91] The International Working Group on Indigenous Peoples Living in Voluntary Isolation or in Initial Contact in the Amazon and Gran Chaco (PIACI IW) has issued several public recommendations on this topic.
[92] https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2021/009.asp

pandemic, given the current impossibility of conducting free, prior, and informed consultation processes.[93]

- **Resume the demarcation of indigenous lands as required under the Constitution and the international human rights instruments and ensure that demarcation processes are finalised before approving or granting any interest in land to private parties, including under Normative Instruction No. 9 as described in para. 14 above.**

LONG TERM RECOMMENDATIONS

- **Ensure that all indigenous peoples regardless of location can avail of all of their rights without discrimination.**
- **Ensure rapid availability of accurate, disaggregated data on indigenous peoples, including on differing rates of infection, economic impacts, differential care burden, deaths etc.**
- **Ensure that indigenous peoples are consulted, participate in decision-making, and provide their free, prior and informed consent when required[94], on measures and laws that may affect them, including relating to their health and land rights such as with respect to the adoption of draft law No. 191/20 on the exploration of natural resources on indigenous lands, as highlighted in EMRIP's Study on the right to land in 2020[95].**
- **Reconsider and review draft law 2633 from April 2020, in light of concerns raised in para. 14 above that it would facilitate legalization of illegally occupied government land, give settler landholders an advantage over indigenous communities with respect to land title, and encourage land grabbing and deforestation[96] and ensure that any version of this law is in line with the UN Declaration on the Rights of Indigenous Peoples.**
- **Take steps to accelerate and conclude all demarcation processes in compliance with internal legislation.**
- **Address underlying structural conditions that have been highlighted by the COVID-19 pandemic affecting indigenous peoples' access to health care, including sufficient funding of the agencies supporting indigenous peoples, FUNAI, in particular in its work on land demarcation, SESAI, the Brazilian**

[93] IACHR : https://www.oas.org/en/iachr/media_center/PReleases/2020/103.asp
[94] A/HRC/39/62
[95]See http://apib.info/2020/02/12/statement-in-condemnation-of-draft-law-no-19120-on-the-exploration-of-natural-resources-on-indigenous-lands/?lang=en – and https://undocs.org/A/HRC/45/38 and https://www.wwf.org.br/?75122/Federal-Government-bill-tightens-the-siege-on-indigenous-peoples-in-Brazil and submission by Brazil
[96] https://nordsip.com/2020/06/23/investors-warn-brazil-against-deforestation-law/

Institute of Environment and Renewable Natural Resources (IBAMA) and the Office of the Public Defender.[97]

- **Combat discrimination against and stereotyping of indigenous peoples through education, as expressed in the Constitution, as well as the commitment to teach the contribution of different ethnic groups in the history of Brazil and understanding of indigenous peoples and their culture to foster the appreciation, diffusion and protection of multi-cultural expression.**
- **Promote the participation of indigenous peoples in monitoring the well-being of indigenous peoples in voluntary isolation and initial contact, as the ones who know where those in voluntary isolation or recent contact are located and are best able to determine their state of wellbeing. The governmental authorities should monitor the epidemiological conditions of the surrounding populations (indigenous and non-indigenous) in these territories.**
- **Take the necessary measures to ensure that the Conselho Nacional De Direitos Humanos (CNDH) is in a position to comply with the Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.**

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[97] In the UPR process, and High Commissioner's follow-up letter to Brazil of 23 October 2017 highlighted the need to "provide the necessary financial resources to ensure a policy for the protection of the rights of indigenous peoples and to prevent related conflicts."

ANNEX

TERMS OF REFERENCE

Expert Mechanism on the Rights of indigenous peoples (EMRIP)

Country engagement - COIAB

Terms of Reference, as at 18 August 2020

I) Mandate

A. Country engagement mandate:

Pursuant to paragraph 2 of Human Rights Council resolution 33/25, the EMRIP should:

(a) Upon request, assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples , as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes.

B. Terms of reference under resolution 33/25:

In according with the EMRIP's methods of work (A/HRC/36/57, Annex 1), terms of reference should be agreed for every country engagement activity in light of the mandate of the Expert Mechanism. Modalities of engagement, timelines and the types of activity envisioned, as well as the expected final product, should be prepared by the Expert Mechanism in consultation with the requester and other relevant stakeholders. The terms of reference should also include modalities for the disclosure of information, in agreement with the requester and other stakeholders.

II) Requester

The Coordination of Indigenous Organizations of the Brazilian Amazon (COIAB), with legal and other assistance provided by the Indian Law Resource Center.

III) EMRIP TEAM

Megan Davis, Vice- Chair of the EMRIP and team lead, Kristen Carpenter, Member of the EMRIP.

IV) Purpose

1. Consistent with its mandate, the EMRIP intends to focus engagement on advising the requester on how to ensure the promotion and protection of indigenous peoples rights and

prevention of violations of their rights, in accordance with the UN Declaration on the Rights of indigenous peoples and other relevant international instruments, including the human rights treaties, during and in the aftermath of the current COVID-19 pandemic. This advice will take into account not only human rights but also WHO expertise and guidelines in the area of health and COVID-19.

2. The technical advice provided should ultimately be of assist to the requester, in their advocacy and strategic litigation work relating to the COVID-19 pandemic and its aftermath. This technical advice should also potentially be of assistance to the Member State.

3. If requested, the EMRIP may provide comments and advice on any proposed new national law/policy on indigenous peoples and COVID-19, in particular to the Parliamentary Front for the Defence of the Rights of indigenous peoples, Federal Public Defender, or Federal Public Ministry. The aim of this advice would be to ensure that new legislation meets the minimum standards of the United Nations Declaration on the Rights of indigenous peoples, especially rights related to health.

VI) Activities

Given the current context of limited travel due to COVID-19 all engagement will be undertaken remotely, orally (virtually and by phone), and in writing through email exchanges etc.

The country engagement will consist of the following activities:

- EMRIP to attend a High-Level meeting organised by the WHO, with all Ministers of Health in October 2020, including the Minster of Health of Brazil.
- Encourage and establish a dialogue between the EMRIP, the World Health Organisation and the requester;
- Engage bilaterally through virtual meeting/s between the EMRIP and the requester.;
- Engage bilaterally through virtual meeting/s between the EMRIP and the WHO. One preliminary meeting took place on 3 August 2020, with the Secretariat, on an introduction to the request;
- Virtual meeting/s with all parties together, the requester, the EMRIP and the WHO;
- Meetings with other stakeholders, including State authorities if agreeable;
- Collection of good practices, lessons learned challenges and testimonies from indigenous peoples in different regions experiencing the COVID-19 crisis for the purpose of the technical advice.

VII) Outputs

The EMRIP will submit an advisory note to the requester on how to ensure the promotion and protection of indigenous peoples rights and prevention of violations of their rights, in accordance with the UN Declaration on the Rights of indigenous peoples and other relevant international instruments, including the human rights treaties, during and in the aftermath of the current COVID-19 pandemic. It will include the identification of emerging good practices, and lessons learned, on the topic.

If requested, the EMRIP will provide written independent advice and recommendations on draft domestic legislation on COVID-19 and indigenous peoples to the requester or other stakeholders upon request.

VIII) Follow-up and disclosure:

The Advisory Note will be made public thereby making it of general use to other indigenous peoples.

The EMRIP's annual session in July 2021 will include an Agenda Item on country engagement with a view to offering the requester and the State, if it wishes, an opportunity to share their experiences.

Upon request, and depending on the EMRIP's assessment of future developments and the availability of resources, the EMRIP may undertake future follow-up with the requester.

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