

INDIGENOUS LAND RIGHTS IN BRAZIL: A COMPARISON BETWEEN THE LETTER OF THE LAW AND ITS APPLICATION

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INTRODUCTION

For centuries, indigenous peoples have fought to protect their traditional lands, their cultures and their identities. Until well into the twentieth century, indigeneity was perceived as a temporary *condition* as opposed to a permanent *identity*. Eurocentric cultural evolutionary views assumed that all societies moved through an identical progression from ‘savagery’ to ‘barbarism’ to ‘civilization’¹.

It was not until the late 1980s that the indigenous peoples of Brazil saw some significant advances with respect to their rights, which were, very remarkably, written into the country’s highest legal order: the Constitution. Nevertheless, despite notable advances, the reality is that there is a stark contrast between the letter of the law and the way it is applied. As a result, indigenous people’s rights have yet to be fully realized.

The Inter-American Commission on Human Rights (IACHR) represents an important venue where indigenous peoples can denounce human rights abuses committed within States. In October of 2002, a petition was lodged with the IACHR on behalf of the Xucuru indigenous peoples and against the Federative Republic of Brazil for alleged violations of the

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¹ Olufunmilayo B. Arewa, “TRIPS and Traditional Knowledge: Local Communities, Local Knowledge and Global Intellectual Property Frameworks” (2006) 10 Marquette Intellectual Property Law Review 156at 160.

rights to property, to a fair trial, and to judicial protection guaranteed in the American Convention on Human Rights.

The present paper provides a contextual background to the case and examines the application of indigenous land rights in Brazil as they exist on paper. Part I of the paper provides a summary of the case. Part II provides the legal framework for the protection of indigenous land rights and explains the demarcation process of indigenous lands, including current developments. Part III contrasts the letter of the law with its actual application, and focuses on two obstacles to the full realization of indigenous people's rights to their traditional lands as they exist on paper: (i) non-indigenous occupation and invasion of indigenous lands; and (ii) the tension between the recognition of indigenous rights and economic development. Part IV provides a conclusion to the investigation.

1 Case summary: Xucuru Indigenous People

On October 16, 2002, the *Movimento Nacional de Direitos Humanos/Regional Nordeste* [National Human Rights Movement/Northeast Region], the *Gabinete de Assessoria Jurídica às Organizações Populares* (GAJOP) [Legal Advisory Office for Popular Organizations] and the *Conselho Indigenista Missionário* (CIMI) [Missionary Indigenist Council] lodged a petition with the Inter-American Commission on Human Rights against the Federative Republic of Brazil for alleged violations of the *rights to property, to a fair trial, and to judicial protection* guaranteed in *Articles 21, 8, and 25*, respectively, of the *American Convention on Human Rights*, in connection with the general obligations to respect the rights and adopt provisions in domestic law specified in Articles 1.1 and 2 of the same treaty, to the detriment of the Xucuru indigenous people and its members, in the city of Pesqueira, state of Pernambuco.

The petition alleges the denial of the right to property of the Xucuru indigenous people because of the delay in demarcation of their ancestral land, as well as, the lack of judicial protection to guarantee their right to property. Demarcation of Xucuru lands began in 1989 as a result of pressure from the Xucuru people. However, this process, which consists of the drawing of boundaries, marking, and titling of indigenous lands, remained unfinished to date, allegedly due to: (i) actions filed by third parties with support of the State; (ii) the delay of the executive and judicial branches in resolving the administrative and judicial appeals they filed; (iii) changes in

the rules and administrative procedures for demarcation in presidential decrees; and (iv) the ineffectiveness of the procedure for protecting the land rights of the indigenous peoples. The petitioners allege that, as a result of this delay, the Xucuru indigenous people occupied, as of date, less than half of their land – the rest remained occupied by non-indigenous, leading to frequent conflicts between the two groups.

In response, the State submitted that domestic remedies in this case had not been exhausted and, as such, that the petition was inadmissible for failure to satisfy Article 46.1 of the American Convention. Moreover, the State also submitted that the administrative demarcation procedure begun in 1989 had been progressing satisfactorily and within a reasonable period of time in light of its complexity (especially with regards to non-indigenous occupants, their compensation, and their removal pursuant to the legislation).

The administrative demarcation process involves five stages: a) identification and drawing of boundaries; b) response by interested third parties; c) decision of the Ministry of Justice; d) ratification by presidential decree; and e) registration of the indigenous land. The process also provides that if non-indigenous are present on the indigenous land after the decision of the Ministry of Justice, they will be removed expeditiously.

During the identification and drawing of boundaries stage (stage 1), the National Indigenous Foundation's (FUNAI) the technical group issued an identification report on September 6, 1989, which stated that the Xucurus had the right to 26,980 hectares. Stage 2² of the process was completed on May 29, 1992, with the publication of Ministerial Decision N° 259 of the Ministry of Justice. At that time, most of the Xucuru lands were occupied by non-indigenous; however, contrary to the rules then in force, the non-indigenous were not removed.

No progress was made in the demarcation process between 1992 and 1995 as a result of various administrative measures. In 1995, FUNAI repeated the identification and drawing of boundaries of the Xucuru indigenous land and concluded that the Xucurus had the right to an area of 27,555 hectares.

² At that time, the process of land demarcation was regulated by Decree 22/91, which did not include (b) above ('response by interested third parties'). As it will be explained, this right would be later introduced by Decree 1775 in 1996.

On January 8, 1996, the executive branch issued a new decree (1775/96) which introduced major changes to the process of demarcation of indigenous lands. More specifically, Article 2, paragraph 8, gave non-indigenous occupants the right to impugn the demarcation process. This resulted in third parties challenging the report on identification and drawing of boundaries. As a result, close to 270 challenges (*contestações*) were presented by non-indigenous persons interested in the land, all of which were thrown out by the Ministry of Justice in the administrative ruling of July 10, 1996. Subsequently, the non-indigenous filed a motion for an injunction (*mandado de segurança*) in the Supreme Court (STJ). The STJ ruled in favour of the non-indigenous, opening the way for new administrative challenges. All such challenges were rejected by the Ministry of Justice, which reaffirmed the need to complete the demarcation as called for in the 1992 ministerial decision.

The presidential decree (stage 4) that ratified the demarcation of Xucuru indigenous land was not issued until April 30, 2001, that is, 12 years after the start of the demarcation process. Nonetheless, despite this ratification, removal of the non-indigenous had still not taken place and they continued to occupy about 70% of Xucuru land. Immediately following the ratification (final stage), FUNAI tried to register the lands but was unable to do so because of an objection motion (*Ação de suscitação de dúvidas*) filed by the land registry officer of Pesqueira in the state courts. The case was later transfer to the federal courts, since this is an indigenous question, where it awaits a final decision.

The petitioners submit that non-indigenous are still present on Xucuru territory, and that legal actions filed by non-indigenous against the demarcation process are still pending. The first is a motion to regain possession (*Ação de Reintegração de Posse*) filed by a non-indigenous occupant, and a second seeks to annul the entire demarcation process carried out and permit the return of some non-indigenous who were already removed from the area. According to the petitioners, both cases are still awaiting a final decision.

Both the petitioners as well as the State acknowledge that the physical demarcation of the area sparked tension and violent incidents between indigenous and non-indigenous occupations of said lands. The petitioners allege that this situation resulted in the killing of three key indigenous leaders, including Xucuru Chief, *Cacique Xicão*. Xicão's son and successor, *Ca-*

cique Marquinhos, was later threatened in 2002 – along with his mother –, which led the IACHR to grant protective measures on October 29 of that same year. In February 2003, a failed assassination attempt against *Ca-cique* Marquinhos would leave two Xucurus dead.

This petition was rendered admissible by the Inter-American Commission on all three grounds on October 29, 2009, seven years after its initial submission.

1 Indigenous Land Rights in Brazil

1.1 The Indigenous Peoples of Brazil

According to Government statistics, indigenous people constitute approximately 0.43 percent of the Brazilian population, somewhere between 700,000 and 750,000 people³. They comprise 233 peoples speaking some 180 different languages throughout the country, living both on traditional indigenous lands as well as in urban centres. The states comprising the Amazon region have the greatest concentration of indigenous peoples and land in the country: between 150,000 and 200,000 indigenous inhabitants, residing in some 400 legally recognized indigenous lands (20.43% of the Amazon). In addition, there are still indigenous groups or individuals – mainly in the Amazon region – who either have had no contact with non-indigenous societies or who refuse to. They are officially referred to as “isolated Indians,” and are those with whom the Indigenous Affairs Agency (FUNAI) has not established contact. As such, no one knows for sure who they are, where they are, how many they are or what languages they speak⁴. Nevertheless, they are estimated at between three thousand and five thousand⁵.

The Xucuru comprise approximately 15,000 people in the city of Pesqueira in the Northeastern state of Pernambuco⁶.

³ The latest census, conducted in 2000 by the Brazilian Institute of Geography and Statistics (IBGE) estimated a total of 734,127 indigenous people in the country.

⁴ The few reports written about these groups sometimes show pictures of objects found in the area where they were sighted. Oral reports generally are made by other indigenous individuals or ‘whites’ from the region, who recount fortuitous encounters or simply reproduce information given by others about the existence of such groups.

⁵ Fundação Nacional do Índio (FUNAI), “Os Índios,” online: <<http://www.funai.gov.br/indios/conteudo.htm#ISOLADOS>>

1.2 Legal Framework

Brazil's domestic legal framework for the protection and promotion of the rights of indigenous peoples is based primarily on the 1988 Constitution. This Constitution "was one of the first in the world to secure indigenous peoples' rights within the framework of contemporary thinking on indigenous-State relations, and it remains one of the most progressive in this regard"⁷.

The 1988 Constitution broke paradigms and abandoned previous integrationist policies by establishing unprecedented social and land rights. Carlos Frederico Marés de Souza Filho notes that "[l]a Constitución brasileira de 1988 fue la primera en América Latina en admitir que los pueblos indígenas tienen derecho a ser un grupo diferenciado en la sociedad nacional, estableciendo con mucha propiedad y talento sus derechos sociales y territoriales"⁸. At last, indigenous peoples were no longer seen as a transitory 'condition' in a road that led to their final and 'successful' integration into a hegemonic non-indigenous society. Consequently, their rights, which had until then enjoyed only a 'temporary' status, gained a permanent character. In the words of Ana Valéria Araújo:

"À luz da Constituição em vigor, portanto, os povos indígenas deixaram de ser considerados culturas em extinção, fadadas à incorporação na assim denominada comunhão nacional, nos moldes do que sempre fora o espírito a reger a legislação brasileira desde os inícios do processo de colonização em nosso país. Toda legislação anterior continha referências expressas à integração ou assimilação inevitável e, por outro lado, desejável dos índios pela sociedade brasileira. A nova mentalidade assegura espaço para uma interação entre esses povos e a sociedade envolvente em condições de igualdade, pois se funda na garantia do direito à diferença"⁹.

⁶ Ministry of Justice (MJ), "Povos Indígenas," online: <<http://portal.mj.gov.br/data/Pages/MJA63EBC0EITEMIDA1FD45A30C6F47E0B8DC7B2D37BECB1BPTBRNN.htm>>

⁷ James Anaya, "Report on the Situation of Human Rights of Indigenous Peoples in Brazil," online: <<http://unsr.jamesanaya.org/country-reports/report-on-the-situation-of-human-rights-of-indigenous-peoples-in-brazil-2009>> at 6.

⁸ Carlos Frederico Marés de Souza Filho, "Derecho a Ser Pueblo" in Instituto Latinoamericano de Servicios Legales Alternativos, *Derecho y Estudios Socio-Ambientales en el Brasil* (Bogotá: Gente Nueva Editorial, 2008) at 99.

⁹ Juliana Santilli, *Socioambientalismo e Novos Direitos: Proteção Jurídica à Diversidade Biológica e Cultural* (São Paulo: Editora Peirópolis, 2007) at 84.

Chapter VIII of the 1988 Constitution represents “one of the most advanced positions in comparative legislation”¹⁰ and is exclusively devoted to the rights of indigenous peoples. It states that:

“*Art. 231.* São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens.

§ 1º - São terras tradicionalmente ocupadas pelos índios as por eles habitadas em caráter permanente, as utilizadas para suas atividades produtivas, as imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e as necessárias a sua reprodução física e cultural, segundo seus usos, costumes e tradições.

§ 2º - As terras tradicionalmente ocupadas pelos índios destinam-se a sua posse permanente, cabendo-lhes o usufruto exclusivo das riquezas do solo, dos rios e dos lagos nelas existentes.

§ 3º - O aproveitamento dos recursos hídricos, incluídos os potenciais energéticos, a pesquisa e a lavra das riquezas minerais em terras indígenas só podem ser efetivados com autorização do Congresso Nacional, ouvidas as comunidades afetadas, ficando-lhes assegurada participação nos resultados da lavra, na forma da lei.

§ 4º - As terras de que trata este artigo são inalienáveis e indisponíveis, e os direitos sobre elas, imprescritíveis.

§ 5º - É vedada a remoção dos grupos indígenas de suas terras, salvo, “ad referendum” do Congresso Nacional, em caso de catástrofe ou epidemia que ponha em risco sua população, ou no interesse da soberania do País, após deliberação do Congresso Nacional, garantido, em qualquer hipótese, o retorno imediato logo que cesse o risco.

§ 6º - São nulos e extintos, não produzindo efeitos jurídicos, os atos que tenham por objeto a ocupação, o domínio e a posse das terras a que se refere este artigo, ou a exploração das riquezas naturais do solo, dos rios e dos lagos nelas existentes, ressalvado relevante interesse público da União, segundo o que dispuser lei complementar, não gerando a nulidade e a extinção direito a inden-

¹⁰ Inter-American Commission on Human Rights, “Report on the Situation of the Indigenous Peoples in Brazil; Chapter VI: Human Rights of the Indigenous Peoples in Brazil,” online: <<http://www.cidh.oas.org/countryrep/brazil-eng/index%20-%20brazil.htm>> at para. 5.

zação ou a ações contra a União, salvo, na forma da lei, quanto às benfeitorias derivadas da ocupação de boa fé.

§ 7º - Não se aplica às terras indígenas o disposto no art. 174, § 3º e § 4º.

Art. 232. Os índios, suas comunidades e organizações são partes legítimas para ingressar em juízo em defesa de seus direitos e interesses, intervindo o Ministério Público em todos os atos do processo”.

As per Article 231 above, *the 1988 Constitution recognizes indigenous peoples’ “original rights to the land which they traditionally occupied.”* In other words, “these rights do not stem from an act or grant of the State, but from the historical status of occupancy and ancestral utilization of that land”¹¹. Recognition of such ‘original rights’, however, does not imply that indigenous peoples have *ownership* rights over ‘the lands they traditionally occupied’. Indeed, Article 20 of the Constitution explicitly states they are the property of the Union¹².

In addition to the 1988 Constitution, indigenous peoples and their rights are also subject to the Indian Statute of 1973 (Law 6001). Though this law was considered progressive at the time it was adopted, it has come to be widely criticised for being out of step with contemporary constitutional and international standards¹³, as it is modeled on the integrationist precepts of ILO Convention 107 and the old Brazilian Civil Code of 1916¹⁴. For instance, Article 3 of the Indian Statute defines as “Indian or *Silvícola* [forest dweller] any individual of pre-Colombian origin and ancestry who identifies himself and is identified as belonging to an ethnic group whose cultural characteristics distinguish him from the national society.” Article 4 subdivides indigenous persons into three categories: ‘isolated’, ‘in the process of integration,’ and ‘integrated.’ The Statue considers that ‘Indians’ are “integrated when they have been incorporated into the national community and are recognized as being entitled to the full exercise of civil rights, even when they retain the practices, customs and traditions characteristics of

¹¹ Supra note 10 at para. 25.

¹² Article 20, XI of the 1988 Constitution.

¹³ Supra note 7 at 7.

¹⁴ Supra note 10 at para. 9.

their culture.” (Article 4, III) In such cases, the ‘relative incapacity’ befitting a *silvícola* ceases to exist.

Implementation of the Indian Statute has been adjusted to reflect the standards of the 1988 Constitution, and since 1991 there have been debates in the Congress to replace the law with a new one, but those debates are ongoing. In 2002, Brazil enacted a new Civil Code¹⁵ which, in line with the 1988 Constitution, eliminates discriminatory restrictions on the exercise of civil rights by indigenous peoples that were contained in the former 1916 Civil Code. Previous to the enactment of this new code, indigenous peoples (*‘silvícolas’*) were categorized as ‘relatively incapable’ and effectively treated as ‘minors’ (i.e. persons between the ages of 16 and 21), with FUNAI in a guardianship position (*tutela*).

1.2.1 The Process of Land Demarcation

The State’s obligation to demarcate indigenous lands was first established in the Indian Statute (1973)¹⁶. Article 19 of the Statute states that “indigenous lands shall, by initiative and under the guidance of the indigenous affairs federal agency, be demarcated administratively, pursuant to process established by Executive Decree”¹⁷.

The administrative process of land demarcation was instituted three years later, in January 1976¹⁸, and has since then undergone several modifications¹⁹. Today, this process is regulated by Decree 1775/96²⁰, and comprises several stages: (1) identification and drawing of borders; (2) response by interested third parties (*Contestações*); (3) decision of the Ministry of Justice; (4) physical demarcation; (5) ratification by presidential decree; and (6) registration of the indigenous land. Once an indigenous land

¹⁵ Law 10.406, 10 January 2002.

¹⁶ Instituto Socioambiental, “Povos Indígenas no Brasil,” online:<<http://pib.socioambiental.org/pt/c/terras-indigenas/demarcacoes/introducao>>

¹⁷ Personal translation. Original text states that: “Art. 19. As terras indígenas, por iniciativa e sob orientação do órgão federal de assistência ao índio, serão administrativamente demarcadas, de acordo com o processo estabelecido em decreto do Poder Executivo.”

¹⁸ Executive Decree 76.999/76 (8 January 1976).

¹⁹ There have been five executive decrees in total since 1976, including the one in effect.

²⁰ Enacted on January 8, 1996.

is registered, it gains full legal recognition, with documentation equivalent to that of any legitimate piece of private property²¹.

The enactment of Decree 1775/96 was surrounded by heavy controversy, and it was denounced by many as an attack on the inherent rights of indigenous people, who had been struggling for decades to have those rights recognized²². Very significantly, the decree gave states and municipalities where the indigenous lands are located, as well as, private individuals, the right to impugn the demarcation process on the basis of Article 2, paragraph 8. In addition, it also established a 90-day period during which interested third parties could file suit with the Ministry of Justice to contest already-demarcated indigenous areas which had *not yet been registered* (Article 9).

The changes introduced by this new decree are largely connected to another case involving the *Guarani*, Brazil's largest indigenous group. In the 1970s, the Guaranis were violently forced off their traditional land by ranchers from *Sattin S/A Agropecuária e Imóveis*²³; it was not until the 1980s that the federal government took steps to recognize the Guaranis' territorial rights. *Sattin* brought suit to halt the physical demarcation in 1992, and complex legal battles raged until March 1994, when the Supreme Court upheld the Guaranis' right to occupy the area²⁴. The Court's decision, however, was procedural, and lawsuits by both ranchers and the Guaranis remained pending²⁵.

The strategy of *Sattin*'s lawyers was to attack the process of land demarcation – then regulated by Decree 22/91 –, arguing that it was unconstitutional because it denied the ranchers the right to contest government action, a right guaranteed in the Constitution²⁶. The Supreme Court, divided over the issue, put off making a decision. In the meantime, Justice Minister Nelson Jobim proposed revising the decree, alleging that if the Supreme Court found the procedure to be unconstitutional, the cases presented to its jurisdiction and all of the land that had been demarcated but not registered would be subject to that recourse.

²¹ Stephan Schwartzman et al, "The Legal Battle Over Indigenous Land Rights" (1996) 29:5 NACLA Report on the Americas 36 at 37.

²² Supra note 10 at para. 37.

²³ Supra note 22 at 41.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

Decree 1775/96 led to 1066 request for revision in 70 indigenous areas²⁷. The greatest number of land claims from non-indigenous persons occurred in the state of Roraima. FUNAI examined each claim and, in July of 1996, it referred those pertinent to 42 indigenous areas to the Ministry of Justice²⁸. Ninety days after the closing of the revision period, the Ministry announced that 8 of the 34 areas challenged would need to be redefined²⁹.

Indigenous organizations were quick to organize protests, and national organizations such as Cimi³⁰ and ISA (*Instituto Socioambiental*) published a series of articles in major newspapers harshly criticising the federal government. Moreover, international organizations such as Survival International, OXFAM, and Amnesty International also publicly condemned the decree. Less than a month after the enactment of the new decree, the Minister of Justice, Nelson Jobim, travelled to Europe to address concerns from the European Parliament and the funding of the G-7 Pilot Programme to conserve the Brazilian Rainforest³¹.

Going back to the Xucuru case, according to both the petitioners and the State, close to 270³² challenges (*contestações*) were filed by interested third parties, all of which were rejected by the Ministry of Justice via an administrative decision (*Despacho*)³³. As already mentioned, this ministerial decision would only be ratified by presidential decree five years later, in April 2001, as a result of new legal delays. Registration of Xucuru lands has still not taken place to this date due to two actions, filed by private parties, which are awaiting a final judgement by the Supreme Court. Thus, demarcation of Xucuru lands remains unfinished some twenty years after it began.

²⁷ Georgia Carvalho, "The Politics of Indigenous Land Rights in Brazil" (2000) 19 Bulletin of Latin American Research 461 at 473.

²⁸ Supra note 10 at para. 39.

²⁹ Supra note 28 at 473.

³⁰ Conselho Indigenista Missionário – one of the three organizations that lodged the petition to the Inter-American Commission on behalf of the Xucuru.

³¹ Ibid.

³² The petitioners submit that "non-indigenous persons interested in the land presented 272 challenges (*contestações*)," (para. 14) whereas the State submits that "there were 269 challenges filed by interested third parties" (para. 23).

³³ Despacho No. 32 of July 10, 1996.

1.2.1.1 Current Situation

The 1988 Constitution stipulated a period of five years for the demarcation of all indigenous lands³⁴. This deadline, however, was not met, and by 1993, only 291 of 559 indigenous lands had been demarcated³⁵. Since then, the process of land demarcation has stalled many times and/or proceeded at a very slow pace.

The following table shows the number of indigenous lands which have been ‘declared’ – a term which indicates that there has been a decision issued by the Ministry of Justice – or ‘ratified’ – by Presidential Decree – during the last 5 governments:

President [period]	Declared		Ratified	
	Nº	Extension	Nº	Extension
Luiz Inácio Lula da Silva [Jan/07 – Dec/10]	51	3.008.845	21	7.726.053
Luiz Inácio Lula da Silva [Jan/03 – Dec/06]	30	10.282.816	66	11.059.713
Fernando Henrique Cardoso [Jan/99 – Dec/02]	60	9.033.678	31	9.699.936
Fernando Henrique Cardoso [Jan/95 – Dec/98]	58	26.922.172	114	31.526.966
Itamar Franco [Oct/92 – Dec/94]	39	7.241.711	16	5.432.437
Fernando Collor [Mar/90 – Sept/92] <i>impeached</i>	58	25.794.263	112	26.405.219
José Sarney [Apr/85 – Mar/ 90]	39	9.786.170	67	14.370.486

*Source: Instituto Socioambiental*³⁶ (Last updated on February 24, 2011)

As it can be seen, the process of land demarcation slowed down during the Lula administration (2003-2006) in comparison to the previous administrations of Fernando Henrique Cardoso (1995-2003). Indeed, Lula ratified the creation of 87 indigenous lands covering an extension of 18.7 million hectares, whereas Cardoso ratified the creation of 145 indigenous lands (41 million hectares).

³⁴ Article 67, title X of the ADCT (Ato das Disposições Constitucionais Transitórias).

³⁵ Anthony Stocks, “Too Much for Too Few: Problems of Indigenous Land Rights in Latin America” (2005) 34 *Annu. Rev. Anthropol.* 85 at 92.

³⁶ Instituto Socioambiental, “Demarcação nos Últimos 5 governos,” online: <<http://pib.socioambiental.org/pt/c/0/1/2/demarcacoes-nos-ultimos-cinco-governos>>

Cimi denounces, in its 2009 report entitled “Violence Against the Indigenous Peoples of Brazil”³⁷, that all 44 ratifications carried out during Lula’s first two years in office had been prepared by the previous administration³⁸. The NGO also quotes the former president as saying, with respect to the 10 ratifications done in 2009, that “(...) *essa demarcação das terras indígenas que nós fizemos agora... Eu não ia fazer agora, Marcio [Meira, president of FUNAI], porque você me deve uma, que eu vou cobrar só no ano que vem, agora estamos com espírito de Natal, vamos deixar prá lá*”³⁹.

With regards to the number of indigenous lands in each stage of the demarcation process, there are discrepancies between the numbers reported by Funai, ISA and Cimi, and it is unclear whether such discrepancies are due to the time of reporting or to other reasons⁴⁰. Between 611 and 673 indigenous lands are said to either be ‘under study’⁴¹ (between 123 and 146) or to already have been identified by FUNAI as being traditionally indigenous. Thus, these numbers (611 to 673) account for all indigenous lands in the country.

The numbers reported by all three organizations seem to agree that some 398 indigenous lands have already been registered – that is, between 59 and 65 percent of all traditional lands identified as such. Thus, based on the above, between 213 and 275 indigenous lands would be at some stage of the process of land demarcation. In addition, Cimi also reports that indigenous peoples claim another 324 lands (on top of these 611-673 lands); however, these claims have yet to be verified by FUNAI⁴².

According to the official numbers (FUNAI’s), indigenous lands cover 105,673,003 hectares, or approximately 12.41 percent of the national territory⁴³. The vast majority of these lands (98 percent) are located in the Amazon region.

³⁷ Conselho Indigenista Missionário, “Relatório 2009: Violência Contra os Povos Indígenas do Brasil,” online: <http://www.cimi.org.br/pub/publicacoes/1280418665_Relatorio%20de%20Violencia%20contra%20os%20Povos%20Indigenas%20no%20Brasil%20-%202009.pdf>

³⁸ Ibid. at 36.

³⁹ Ibid. at 35.

⁴⁰ Cimi figures were reported in 2009. ISA’s and FUNAI’s are available on their websites, however, neither organization provide the date of their latest update.

⁴¹ Stage 1 of the process of land demarcation.

⁴² Supra note 38 at 36.

⁴³ FUNAI, “Índios do Brasil,” online: <<http://www.funai.gov.br/>>

1.2.1.2 Supreme Court Decision (Raposa Serra do Sol)

In March of 2009, an important and controversial Supreme Court decision was issued concerning the case of the indigenous communities of *Raposa Serra do Sol* in the state of Roraima. This decision articulated 19 conditions which, in the view of the majority of the justices of the high court, shape the content of the constitutional recognition and protection of indigenous lands, including demarcated and registered lands⁴⁴.

These conditions have been criticised by some as going far beyond the wording of the Constitution or of any application legislation – the federal Attorney General, for instance, deemed it a questionable exercise of the court’s authority as a judicial, rather than a legislative, organ⁴⁵. Some of the conditions confirm protections for indigenous lands, whereas others limit constitutional protections by specifying State powers over indigenous lands on the assumption of ultimate State ownership. For instance, a number of them affirm the authority of the Union to control natural resource extraction on indigenous lands, install public projects, and establish police or military presence in these lands without having to consult the indigenous groups concerned.

2 Obstacles to the Full Realization of Indigenous Land Rights

Though the 1988 Constitution “remains one of the most progressive”⁴⁶ with respect to indigenous rights, and in spite of Brazil’s support of international legal instruments such as ILO Convention 169⁴⁷ and the United Nations Declaration on the Rights of Indigenous Peoples, the reality is that indigenous peoples’ human rights have yet to be fully realized.⁴⁸ Alejandra Pascual notes that:

“a pesar de la protección constitucional, la realidad de los pueblos indígenas es bien diferente: cuanto más ‘integrados’ a la sociedad blanca, cuanto más asimilados a sus valores, mayores serán las posibilidades de realización y de desarrollo personal de sus integrantes, lo que los lleva a sentirse tentados a abandonar sus

⁴⁴ Supra note 7 at para. 39.

⁴⁵ Ibid.

⁴⁶ Supra note 7 para. 13.

⁴⁷ Brazil ratified the Convention on July 25, 2002.

⁴⁸ Supra note 7 at para. 21.

propios valores, su cultura, su identidad, para ‘incorporarse’ a la sociedad dominante. Es sabido que ‘permanecer indio’ significa, generalmente, pertenecer a un grupo segregado y víctima de las más diversas formas de violencia y de discriminación”⁴⁹.

Similarly, James Anaya posits that:

“Despite Government policies that now favour indigenous peoples, historically rooted patterns of discrimination against them persist and are pervasive in many spheres of social and political life, the most recurrent manifestations of which are lack of participation in decision-making, threats to cultural integrity, poor living conditions and, all too often, violence.[...] According to the Brazilian Institute of Geography and Statistics (IBGE), while 15.5 per cent of the Brazilian population lives in extreme poverty, among indigenous people the figure reaches 38 per cent”⁵⁰.

Such high levels of extreme poverty amongst indigenous groups go hand in hand with a range of social ills that includes poor health conditions, cases of malnutrition and starvation, and alarming rates of alcoholism and suicide. Indeed, the “[i]ndigenous peoples of Brazil rank low in all human development indicators, including access to health, education and justice”⁵¹.

Such degrading conditions are often tied to precarious land tenure situations⁵². To be sure, though indigenous people have an ‘original right’ to the lands they traditionally occupy and are guaranteed permanent possession of said lands in the 1988 Constitution, these rights are constantly and routinely infringed upon. The Xucuru case is a great example and unfortunately not an isolated incident.

There are a range of obstacles to the full realization of indigenous people’s rights to their traditional lands as they exist on paper. The following subsections focus on two in particular: (i) non-indigenous occupation and invasion of indigenous lands; and (ii) the tension between the recognition of indigenous rights and economic development.

⁴⁹ Instituto Latinoamericano de Servicios Legales Alternativos (ILSA), *Derecho y Estudios Socio-Ambientales en el Brasil* (Bogotá: ILSA, 2008) at 13.

⁵⁰ *Supra* note 7 at para. 9.

⁵¹ *Ibid.* at para. 76.

⁵² *Ibid.* at para. 63.

2.1 Non-indigenous occupation and invasion of indigenous lands

Non-indigenous occupation and/or invasion of indigenous lands, as observed in the case of the Xucuru, are rather common occurrences. Indeed, between 80-85 percent of indigenous lands suffers some form of invasion by loggers, miners, ranchers, small farmers and landless peasants, or is infringed upon by roads, dams, power lines and railroads⁵³. This includes lands which have already been demarcated and registered as indigenous.

Nowhere in the country is this situation more rampant than in Mato Grosso do Sul, the state with the largest indigenous population outside the Amazon region, where heavy non-indigenous settlement and land use have displaced indigenous peoples from their traditional lands. Unlike the Amazon region, the rural areas of Mato Grosso do Sul have been mostly parcelled out to non-indigenous farmers, many of them engaged in large-scale agribusiness. This is a result of an aggressive Government policy of tilting land to private individuals in the last century, well prior to the 1988 Constitution and its recognition of indigenous rights. Indigenous peoples were forced off their land, or left with only small plots within their larger traditional use areas, thereby being deprived of adequate means of subsistence and cultural continuity⁵⁴. As a result, extreme poverty and a range of social ills, including malnutrition and starvation, now plague the indigenous peoples of Mato Grosso do Sul. The state has the highest rate of indigenous children's death due to precarious conditions of health and access to water and food related to lack of lands⁵⁵.

The presence of non-indigenous occupants, whether legal or illegal, is a recurrent impediment to securing indigenous lands. From a land demarcation stand point and in light of Decree 1775/96, such presence complicates and slows down considerably the administrative process. Cimi notes that there is a growing tendency to contest judicially every step of the demarcation process, including presidential ratifications⁵⁶. As a result, numerous cases drag on for years, if not decades. The most emblematic of such cases is that of the Pataxó Hã Hã Hãe in southern Bahia, which has been awaiting a decision by the Supreme Court since 1982. What is worse, many communities which have been forced off their lands, whether

⁵³ Supra note 22 at 40. See also Supra note 28 at 127.

⁵⁴ Supra note 7 at para. 46.

⁵⁵ Ibid.

⁵⁶ Supra note 38 at 35.

demarcated or not, await a final judicial decision or some government action while camping by the side of roads, under the most precarious and sub-human conditions. According to Cimi, there are groups that have lived – or perhaps the appropriate verb here would be ‘survived’ – under this condition for 20, 30, or even 40 years⁵⁷.

Indigenous peoples have often attempted to regain traditional lands that are under the control of non-indigenous occupants. In a number of instances, indigenous groups have simply reoccupied places within their traditional territories that are titled to non-indigenous farmers. Such efforts have led to numerous tensions and have often erupted into violence. For instance, the 2009 Cimi Report (“Violence Against the Indigenous Peoples of Brazil”) denounces that:

In September of that year [2009] the *Guarani Kaiowá* community of *Laranjeira Nanderu* was attacked by a group of men, hooded and armed, who expelled them from the place, burning their belongings and killing even their domestic animals. Only 4 days later, 10 men attacked the *Guarani Kaiowá* community of *Apyka’i*, which lives on a camp by the BR-483 [road]. At the time, a 62 year-old indigenous man was shot and several *barracos* [shack] burned⁵⁸.

In October, some *Guarani Kaiowá* families re-occupied a parcel of its traditional lands, today occupied by the farm *Triunfo*, in the city of *Paranhos*. Again a group of men, armed and hooded, went into the camp, violently attacked and expelled them from the area. Two young teachers who also participated in the reoccupation...were dragged by the hair and kidnapped by the aggressors⁵⁹.

151 murders of indigenous people were reported in the state of Mato Grosso do Sul alone between 2005 and 2008⁶⁰. In 2009, there were 33 murders (53 percent of all national incidents), 9 attempted murders, 3 death threats and 24 victims of bodily harm with intent⁶¹. Thus, it is not difficult to understand how indigenous people’s life expectancy is only 45.6 years – considerably less than that of the average population⁶².

⁵⁷ Ibid.

⁵⁸ Ibid. at 19.

⁵⁹ Ibid.

⁶⁰ Ibid. at 18.

⁶¹ Ibid. at 18.

⁶² Supra note 10 at para. 23.

The invasion of traditional lands which have remained or are in possession of indigenous peoples, including lands that have already been demarcated and registered, has also led to numerous conflicts and episodes of violence. Cases which have received a great deal of public attention include the Yanomamis in the states of Amazonas and Roraima; the Xucurus in the state of Pernambuco; and the indigenous groups of Raposa Serra do Sol in the state of Roraima.

As mentioned in the Xucuru report, the Inter-American Commission granted precautionary measures to protect the life and person of the chief of the Xucuru indigenous people, *Cacique* Marquinhos and his mother on October 29, 2002 as both had received death threats. A few months later, in February 2003, an attempt at the life of the *cacique* left him hurt and two other Xucurus dead. The perpetrator was also a Xucuru, Louro Frazão, who was allegedly connected to local land owners⁶³. The incident erupted into violence, and the Xucurus of *Ororubá* set five houses and four cars – belonging to Xucurus of *Cimbre* – on fire. The situation was only contained once several government officials, including the president of FUNAI and the minister to the Special Secretariat for Human Rights (*Secretaria Especial de Direitos Humanos*), visited the area⁶⁴. Louro Frazão was murdered in August 2010; the police have no leads or suspects⁶⁵.

Also disquieting is the fact that such invasions and/or occupations often take place with the support and connivance of local civil authorities⁶⁶. James Anaya writes that during his visit to Brazil as the Special Rapporteur, he “heard reports of violent clashes between local police forces and indigenous peoples, and accounts of harassment by local police forces. He also received reports of violent confrontations between private armed guards, allegedly hired by non-indigenous farmers, and indigenous groups that have re-occupied land to which the farmers claim title”⁶⁷. Similarly, Cimi

⁶³ Ambientebrasil, “Acordo com índios Xucuru deve pôr fim a conflitos em Pesqueira, “February 8, 2003. Online: <<http://noticias.ambientebrasil.com.br/clipping/2003/02/08/9645-nilmario-miranda-diz-que-acordo-com-indios-xucuru-deve-por-fim-a-conflitos-em-pesqueira.html>>

⁶⁴ Ibid.

⁶⁵ Pernambuco violento, “Índio Xucuru é morto a tiros em Pesqueira, “August 23, 2010. Online: <<http://pernambucoviolento.blogspot.com/2010/08/indio-xucuru-e-morto-tiros-em-pesqueira.html>>

⁶⁶ Supra note 10 at para. 44.

⁶⁷ Supra note 7 at para. 49.

denounces a specific case in its 2009 report, writing that “[f]ollowing an official decision by the Federal Regional Tribunal [*Tribunal Regional Federal, 3a. Região*] that the Terena would be allowed to remain in the lands until the case was ruled, the farmers [*fazendeiros*] decided to act on their own accord and were able to count on 50 military police officers [*policiais militares*] to aid in their illegal removal”⁶⁸.

Finally, a new problem which superimposes itself on the lack of demarcation and the invasions of indigenous lands is the creation of municipalities that lie in part or in their entirety within the lands claimed and/or demarcated as indigenous areas. An example includes the creation of two municipalities headquartered in *Raposa Serra do Sol* and *São Marcos* district within the indigenous areas of the Macuxi.

2.2 Indigenous Land Rights vs. Economic Development

Despite the positive advances brought forth by the 1988 Constitution, there is still an apparent tension between the recognition of indigenous rights, on one hand, and economic development, on the other. The view that indigenous groups represent an obstacle to progress was clearly evident during Brazil’s military regime⁶⁹ and can still be felt today.

Throughout the authoritarian period, the formation of indigenous policy in Brazil reflected a predominance of strategic, security and economic interests⁷⁰. The military saw the Amazon as a demographic vacuum, an area vulnerable to foreign interests which needed to be integrated both socially and economically to the country⁷¹.

As late as 1987, the military formulated, with the support of President José Sarney, the *Calha Norte* Plan, which sought: (i) the reduction of large continuous indigenous areas; (ii) restrictions on demarcations within 62 km of national borders; (iii) the encirclement of indigenous land with national forests to smooth the way for logging and mineral concessions; and (iv) the classification of indigenous people into ‘*silvícolas*’ (forest dwellers) or ‘acculturated Indians,’ with different land rights applying to each category.⁷²

⁶⁸ Supra note 38 at 20.

⁶⁹ Brazil’s military regime lasted from 1961-1985.

⁷⁰ Supra note 28 at 465.

⁷¹ Ibid.

⁷² Supra note 22 at 39.

The State's obligations with respect to the 'acculturated' indigenous population either disappeared or were sharply reduced⁷³. Between 1987 and 1990, under the *Calha Norte*, for instance, the Yanomami's 23.5 million acre territory was reduced by 70 percent and subdivided into 19 islands⁷⁴. Two-thirds of the territory was thrown open to mineral exploitation. Thousands of *garimpeiros* (wildcat miners) penetrated their lands in search of gold and precious metals. In 1987, their number was estimated at roughly 45,000⁷⁵, that is, more than four times the estimated population of Yanomamis (10,000 people).

More recently, in 2007, former president Luiz Inácio Lula da Silva announced the Programme to Accelerate Development (PAC), a large investment package to spur economic growth in the country. This would include a US\$50.9 billion investment in infrastructure and energy projects in the Amazon and elsewhere, many of them to be developed on or near indigenous lands⁷⁶. According to James Anaya, representatives of indigenous peoples have raised concerns about the lack of participation in the planning and execution of the projects affecting them, and an absence of clear safeguards to protect indigenous peoples' rights as part of the PAC initiative⁷⁷.

Article 231, paragraph 3, of the 1988 Constitution clearly states that:

O aproveitamento dos recursos hídricos, incluídos os potenciais energéticos, a pesquisa e a lavra das riquezas minerais em terras indígenas só podem ser efetivados com autorização do Congresso Nacional, ouvidas as comunidades afetadas, ficando-lhes assegurada participação nos resultados da lavra, na forma da lei.

Paragraph 6 further establishes that the "exploitation of the natural riches of the soil, rivers or lakes existing on [indigenous] lands" shall only take place when there is "relevant public interest of the Union as provided in the complementary law"⁷⁸. However, the reality is that projects are often undertaken illegally and in the absence of such laws, and without the prior and informed consent of affected communities as mandated by ILO

⁷³ Supra note 10 at para. 4.

⁷⁴ Supra note 22 at 39.

⁷⁵ Supra note 10 at para. 69.

⁷⁶ Supra note 7 para. 56.

⁷⁷ Ibid.

⁷⁸ Article 231, paragraph 6.

Convention 169. In the end of 2009, FUNAI released a list of 426 projects being undertaken in indigenous lands⁷⁹. The majority relates to the utilization of water resources (144), followed by the distribution and transmission of electric energy (65), and road paving (62)⁸⁰.

The Monte Belo hydroelectric dam is a contemporary and perhaps the most emblematic example of the tension between the recognition of indigenous rights and economic development. The ‘battle’ began over 20 years ago with the decision to build the dam as well as a series of hydroelectric power plants along the Xingu river, in the heart of the Amazon. Indigenous communities and non-governmental organizations have been fighting against it since then. The polemic has turned into an ugly legal battle, and the government itself remains internally divided over the issue. In addition, numerous accusations of corruption as well as direct and heavy pressure from the president have emerged.

Monte Belo represents the largest project in the federal government’s PAC (Programme to Accelerate Development), estimated at around \$20 billion⁸¹. It has been scaled down from its original design – from 1,200 Km² to 512 Km² – in response to severe criticism from indigenous communities, indigenous and environmental organizations, and international actors. Estimates concerning its direct and indirect impacts vary considerably, and likely reflect the methodology employed.

Indigenous communities in the region have been vehemently opposed to the project and claim that their prior and informed consent has not been obtained. On February 8, 2011, hundreds of indigenous people took part in a protest in Brasília and handed over a petition containing 600 thousand signatures demanding that the Monte Belo project be cancelled⁸². Just ten days later, the president of the Brazilian public company EPE – which is responsible for the planning of electric power projects –, Maurício Tolmasquim, declared that just a “small minority that does not accept any form of hydroelectric power” is against the building of Monte Belo⁸³.

⁷⁹ Supra note 38 at 21.

⁸⁰ Ibid.

⁸¹ Instituto Socioambiental, “Especial Belo Monte: Cronologia,” online: <<http://www.socioambiental.org/esp/bm/hist.asp>>

⁸² Gustavo Faleiros, “Brazilian government claims only a ‘small minority’ oppose Belo Monte dam,” Guardian Environmental Network, 18 February 2011. Online: <<http://www.guardian.co.uk/environment/2011/feb/18/brazil-belo-monte-dam>>

⁸³ Ibid.

According to *Folha de São Paulo*, however, Brazil's largest newspaper, 52 percent of the country supports the project⁸⁴. Tomalsquim insisted that all interested parties were heard, claiming that "four technical seminars were conducted in Belém [capital of the state of Pará, where the dam would be build], 30 meetings were held with villages of indigenous people"⁸⁵. Indigenous and pro-indigenous organizations, including ISA, denounce several irregularities in the way the seminars were conducted.

CONCLUSION

Though the constitutional provisions on the rights of indigenous peoples are considered to this day as "one of the most advanced normative positions in comparative legislation"⁸⁶, indigenous rights have yet to be fully realized as they exist on paper. Indeed, historically-rooted patterns of discrimination against indigenous peoples persist, and they remain, in effect, socially, economically and politically marginalized.

As this paper demonstrates, indigenous land rights are routinely infringed upon, often with the support and connivance of local authorities. The invasion of indigenous lands brings with it brutal violence and a range of social ills that place indigenous peoples at the bottom of human development indicators. Moreover, there continues to be an apparent tension between economic development and recognition of indigenous rights, which has led to several attempts to not only limit, but also reverse some indigenous rights with respect to land and resources. Such attempts include the 19 conditions imposed by the Supreme Court on its decision concerning the case of *Raposa Serra do Sol*, as well as, several bills which have been introduced in the National Congress to limit or reverse already-established indigenous rights. Constitutional and legislative consolidation of indigenous rights is an accomplishment of giant proportions; however, their enforcement is equally essential. Brazil is on the right path with respect to the former; the country must now to step up to the challenges which come with the latter.

⁸⁴ Kenneth Rapoza, "Belo Monte and Brazil's Pandora," In These Times, 14 February 2011. Online: <http://www.inthesetimes.com/article/6929/belo_monte_and_brazils_pandora/>

⁸⁵ Supra note 83.

⁸⁶ Supra note 10 at para. 5.

REFERÊNCIAS

Books

INSTITUTO LATINOAMERICANO DE SERVICIOS LEGALES ALTERNATIVOS (ILSA). *Derecho y Estudios Socio-Ambientales en el Brasil* (Bogotá: ILSA, 2008).

RICHARDSON, Benjamin J. and Shin Imai, eds. *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, Oregon: Hart Publishing, 2009).

SANTILLI, Juliana. *Socioambientalismo e Novos Direitos: Proteção Jurídica à Diversidade Biológica e Cultural* (São Paulo: Editora Peirópolis, 2007)

Articles from Journals

AREWA, Olufunmilayo B. "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge and Global Intellectual Property Frameworks" (2006) 10 *Marquette Intellectual Property Law Review* 156.

CUNHA, Manuela Carneiro da Cunha. "O Futuro da Questão Indígena" (1994) 8:20 *Estudos Avançados* 121.

CARVALHO, Georgia. "The Politics of Indigenous Land Rights in Brazil" (2000) 19 *Bulletin of Latin American Research* 461.

PIRES-O'BRIEN, Joaquina. "Indian Land Rights and Land Conflicts in Brazil" (1999) *Contemporary Review* 113.

SCHWARTZMAN, Stephan, Ana Valéria Araújo and Paulo Pankararú. "The Legal Battle Over Indigenous Land Rights" (1996) 29:5 *NACLA Report on the Americas* 36.

Stocks, Anthony. "Too Much for Too Few: Problems of Indigenous Land Rights in Latin America" (2005) 34 *Annu. Rev. Anthropology* 85.

Statutes and Legislation

1988 Brazilian Constitution Indian Statute (Law 6001)

Decree 1775/96 ("Lei de Terras Indígenas")

Electronic Sources

Reports:

ANAYA, James. "Report on the Situation of Human Rights of Indigenous Peoples in Brazil," online: <<http://unsr.jamesanaya.org/country-reports/report-on-the-situation-of-human-rights-of-indigenous-peoples-in-brazil-2009>>

CONSELHO INDIGENISTA MISSIONÁRIO, “Relatório 2009: Violência Contra Os Povos Indígenas no Brasil,” online: <http://www.cimi.org.br/pub/publicacoes/1280418665_Relatorio%20de%20Violencia%20contra%20os%20Povos%20Indigenas-%20no%20Brasil%20-%202009.pdf>

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, “Report on the Situation of the Indigenous Peoples in Brazil/Chapter VI: Human Rights of the Indigenous Peoples in Brazil,” online: <<http://www.cidh.oas.org/countryrep/brazil-eng/index%20-%20brazil.htm>> at para. 5. Turner, Terence. “Report to the AAA Commission for Human Rights: Brazil’s Giant Step Backward on Indigenous Rights,” online: <<http://www.aaanet.org/committees/cfhr/rptbrazil.htm>>

Miscellaneous:

AMBIENTEBRASIL, “Acordo com índios Xucuru deve pôr fim a conflitos em Pesqueira,” February 8, 2003. Online: <<http://noticias.ambientebrasil.com.br/clipping/2003/02/08/9645-nilmario-miranda-diz-que-acordo-com-indios-xucuru-deve-por-fim-a-conflitos-em-pesqueira.html>> Conselho Missionário Indigenista (CIMI). Online: <<http://www.cimi.org.br/>>

FALEIROS, Gustavo. “Brazilian government claims only a ‘small minority’ oppose Belo Monte dam,” *Guardian Environmental Network*, 18 February 2011. Online: <<http://www.guardian.co.uk/environment/2011/feb/18/brazil-belo-monte-dam>>

FOREST PEOPLES PROGRAMME, “Press Release: Inter-American Commission on Human Rights Agrees to Hear Case of Indigenous Peoples in Raposa Serra do Sol, Brazil,” November 15, 2010. Online: <<http://www.forestpeoples.org/topics/inter-american-human-rights-system/news/2010/11/press-release-inter-american-commission-human>>

FUNDAÇÃO NACIONAL DO ÍNDIO (FUNAI), “Povos Indígenas,” online: <<http://www.funai.gov.br/>> Instituto Socioambiental (ISA), “Especial Belo Monte,” online: <<http://www.socioambiental.org/esp/bm/isa.asp>>

INSTITUTO SOCIOAMBIENTAL (ISA), “Povos Indígenas no Brasil,” online: <<http://pib.socioambiental.org/pt/c/terras-indigenas/demarcacoes/como-e-feita-a-demarcacao-hoje>>

INSTITUTO SOCIOAMBIENTAL (ISA), “Terra Indígena Raposa Serra do Sol,” online: <<http://www.socioambiental.org/inst/esp/raposa/?q=documentos>> Ministry of Justice, “Povos Indígenas,” online: <<http://portal.mj.gov.br/data/Pages/MJA63EBC0EITEMIDA1FD45A30C6F47E0B8DC7B2D37BECB1BPTBRNN.htm>>

ORTIZ, Fabíola. “Creation of Indigenous Reserves Slowed Down Under Lula,” *Inter Press Service News Agency*, 13 January 2011. Online: <<http://www.ipsnews.net/news.asp?idnews=54120>> Pernambuco violento, “Índio Xucuru é morto a tiros em Pesqueira,” August 23, 2010. Online: <<http://pernambucoviolento.blogspot.com/2010/08/indio-xucuru-e-morto-tiros-em-pesqueira.html>>

RAPOZA, Kenneth. "Belo Monte and Brazil's Pandora," *In These Times*, 14 February 2011. Online: <http://www.inthesetimes.com/article/6929/belo_monte_and_brazils_pandora/> Rota Brasil Oeste, "Acordo com índios Xucuru deve pôr fim a conflitos em Pernambuco," 10 February 2003. Online: <http://www.brasil Oeste.com.br/noticia/457/>

RESUMO

A Comissão Interamericana de Direitos Humanos (CIDH) é um importante órgão do Sistema Interamericano através do qual comunidades indígenas podem denunciar abusos cometidos por Estados contra seus direitos humanos. Em outubro de 2002, a CIDH recebeu uma denúncia contra a República Federativa do Brasil por supostas violações ao direito à propriedade e às garantias e proteção judiciais consagrados na Convenção Americana sobre Direitos Humanos e em prejuízo do povo indígena Xucuru e seus membros, na cidade de Pesqueira, PE. O presente artigo coloca referido caso em contexto e investiga a aplicação dos direitos indígenas a seus territórios na prática. Parte I contém um breve resumo do caso. Parte II introduz o leitor aos direitos indígenas na legislação brasileira e explica o processo de demarcação de terras. Parte III contrasta a legislação com a maneira como ela é aplicada na prática, focalizando em: (1) ocupações e invasões de terras indígenas e (2) a tensão entre reconhecimento dos direitos indígenas e desenvolvimento econômico. Parte IV conclui o artigo.

PALAVRAS-CHAVE: Comunidades indígenas. Direitos humanos. Processo de demarcação de terras.

ABSTRACT

The Inter-American Commission on Human Rights (IACHR) represents an important venue where indigenous peoples can denounce human rights abuses committed within States. In October of 2002, a petition was lodged with the IACHR on behalf of the Xucuru indigenous peoples and against the Federative Republic of Brazil for alleged violations of the rights to property, to a fair trial, and to judicial protection guaranteed in the American Convention on Human Rights. The present paper provides a contextual background to the case and examines the application of indigenous land rights in Brazil as they exist on paper. Part I of the paper provides a summary of the case. Part II provides the legal framework for the protection of indigenous land rights and explains the demarcation process of indigenous lands, including current developments. Part III contrasts the letter of the law with its actual application, and focuses on two obstacles to the full realization of indigenous people's rights to their traditional lands as they exist on paper: (i) non-indigenous occupation and invasion of indigenous lands; and (ii) the tension between the recognition of indigenous rights and economic development. Part IV provides a conclusion to the investigation.

KEYWORDS: Indigenous peoples. Human rights. Land demarcation.