

LLM/MA IN: Master Theory and Practice of Human Rights

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DISSERTATION TITLE

Does the current policy adopted by the Brazilian Government regarding indigenous peoples violate their human rights? – an analysis of the law, political context and possible environmental consequences

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Supervisor: Julian Burger

DISSERTATION

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ABSTRACT:

This dissertation examines indigenous policy in Brazil in the first 9 months of 2019, particularly three measures adopted in regards to the National Indigenous Foundation [Fundação Nacional do Índio – FUNAI], in order to verify if it violates existing obligations of the state derived from the applicable national and international human rights law framework. Also, it will bring about some possible reasons for the adoption of such measures, briefly discussing the driving forces behind this policy, and possible wider implications it can bring about, especially regarding environmental issues and its potential impact on Brazil's commitment to protect biodiversity and contribute to the outcomes of the Paris climate agreement.

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1. PURPOSE OF THE DISSERTATION AND THE CONTEXT OF THE CURRENT BRAZILIAN GOVERNMENT

1.1. INTRODUCTION

This dissertation examines indigenous policy in Brazil in the first 9 months of 2019, aiming to verify if it violates the applicable national and international human rights law framework. For this purpose, this work takes into consideration three recent measures enacted by the government regarding this specific population, which have introduced great changes and therefore are quite illustrative of its current policy.

The structure of this work consists of 8 chapters. The present chapter (1) contains introductory dispositions, the purpose of the dissertation and presents some context of the current Brazilian government. Chapter 2 sets up the methodology adopted. The next section (chapter 3) provides a brief overview on the history of the indigenous peoples in Brazil since the colonisation period, tracing their fight for the recognition of their rights, centred on the right to land. Chapter 4 presents the three measures promulgated this year by the current government, which affect indigenous peoples directly, and provides an analysis of them through the light of the national applicable legal instruments, that are: the Brazilian Constitution and the ILO Convention No. 169. The next chapter (5) continues this analysis approaching the international instruments adopted by Brazil: The United Nations (UN) and Inter-American Declarations on the rights of indigenous peoples, reports from the UN and the IACHR, as well as a recent case study from the Inter-American Court of Human Rights. Chapter 6 evaluates the driving forces behind these measures and, finally, chapter 7 approaches possible consequences of this policy in regards to the environment and its potential impact on Brazil's commitment to protect biodiversity and contribute to the outcomes of the Paris climate agreement. In the final section (8), some final considerations are presented.

The relevance of subject of the present work relies, firstly, on the expressive population of indigenous peoples in Brazil, a population that, although not massive in absolute numbers, is present in a number of municipalities and has considerably grown in the last decade and, above all, has been historically harassed, marginalised and exterminated through genocide and other colonialist – and still on-going – destructive practices. As in many other countries, in Brazil, its original population has been one of the most cowardly harmed – a situation that is still, unfortunately, a vivid reality.

Secondly, the fact that most of them reside in the Amazon Forest and knowingly play an active role in protecting its natural resources and biodiversity represents another relevant aspect of this theme. That is to say, implementing and assuring their rights, specifically their right to land, means more than just protecting the property of a specific group of people, reflecting greatly in the assurance of the collective right to environment, which has countless subjects and a much broader outreach, a matter of concern that goes way beyond the frontiers of Brazil, and potentially affects more than just Brazilian nationals.

1.2. CONTEXT OF THE NEW BRAZILIAN GOVERNMENT

The current Brazilian president, Jair Bolsonaro, took office in the beginning of this year (2019) and, in less than eight months, has enacted a number of measures, which, I will argue, pose a threat to the environment and to the rights of indigenous peoples and, more concretely, to their very survival.

The violence against indigenous peoples has been rising for years and is closely related to the lack of implementation of their right to land, according to recent reports from the Missionary Indigenous Council [Conselho Indigenista Missionário – CIMI] that will be further presented (chapter 2). This year, until March 2019, at least 14 cases of illegal invasions in indigenous lands were documented across the country, mainly in the Amazon region, what represents a rise of 150% since Bolsonaro became president (Amazon Watch, 2019: 8). In the context of those invasions, some violent and regrettable events happened, such as the murder of the indigenous leader cacique Tukano, who was killed inside his house in front of his daughter and wife (Marques, 2019).

Representatives of indigenous movement link this rise with the “anti-indigenous and anti-environmental” discourse and agenda adopted by Bolsonaro. According to the Amazon Watch, *“recent attacks can be linked to the virulently anti-indigenous rhetoric used by him, signalling a much more serious and widespread assault on natives lands and lives in times to come. The impunity it implies is driving an explosion of invasions of indigenous lands”* (Amazon Watch, 2019: 8).

Moreover, the alarming numbers regarding the deforestation process of the Amazon forest make the necessity to implement indigenous rights, specifically the right to land, even more urgent, as it is not possible to untie these two topics when discussing this region’s issues. Speaking

through numbers, “*the titled territories of Brazil’s 305 distinct indigenous ethnicities comprise 23% of the Brazilian Amazon and are among the best-conserved forests in a mosaic of protected areas spanning the Amazon region*” (Costa, 2019). Indigenous lands rights are therefore intrinsically linked to the preservation of the biome. Conversely, the absence of policies that aim to guarantee this right, coupled with the undermining of environmental protection mechanisms, threatens the future of the rainforest (Amazon Watch, 2019).

As recent studies from the Brazilian National Institute of Space Researches [Instituto Nacional de Pesquisas Espaciais – INPE] indicate, the path of the deforestation in the Amazon has become faster in 2019, about 67% compared with last year (2018). The numbers of last June (2019) are alarming and show that the illegal deforestation was 88% higher when compared with the same month last year (June 2018). Clearance in July 2019 has hit 1,345 square km, 278% more than July 2018 and a third higher than the previous monthly recorded, according to the *Deter B* satellite monitoring system, which started to be used by INPE in 2015¹. Just to give an idea of the magnitude of these numbers, the area burned down in July roughly corresponds to the size of Greater London (Watts, 2019).

This alarming situation has recently drawn attention around the globe. Both the national and international media have been reporting the deforestation process of the Amazon and the rise of violence against indigenous peoples in the region. For instance, just in the last months (June to September 2019), the most important journals and magazines in the world have comprehensively reported it, including: The Guardian, BBC, The New York Times, The Economist, Le Monde and El País². Most of them directly associate these urgent issues to the current political context of the country, its political instability and the ascension of Bolsonaro, usually described a far-right-wing president with military roots and who has been expressing and adopting hostile policies regarding indigenous lands and the environment. The reports on the illegal fires in the Brazilian Amazon, in

¹ Data available at: <http://www.obt.inpe.br/OBT/assuntos/programas/amazonia> [accessed at 22th August 2019].

²For instance: <https://www.theguardian.com/environment/amazon-rainforest>; <https://www.bbc.co.uk/search?q=amazon+brazil>; <https://www.nytimes.com/2019/08/28/podcasts/the-daily/amazon-rainforest-fires-brazil.html>; <https://www.economist.com/leaders/2019/08/01/deathwatch-for-the-amazon>; <https://www.lemonde.fr/incendies-en-amazone/>; https://elpais.com/sociedad/2019/08/31/actualidad/1567273764_557825.html ; https://elpais.com/elpais/2019/08/27/opinion/1566921430_403449.html

particular, have touched the international community, which sees in the conservation of the rainforest, often referred to as 'the lungs of the world', an important mean to slow down the pace of global warming.

The increase of the deforestation has also been in the centre of recent important international political events. In the last four months (June to September 2019), Norway and Germany, after the surge in deforestation, suspended donations to the Brazilian government's Amazon Fund [Fundo Amazônia] due to concerns over the policies adopted by Bolsonaro (Boffey, 2019). The burnings also figured as a possible impeditive in the negotiations of a commercial agreement between the European Union and the Mercosur (BBC News, 2019), having France and Ireland affirmed they would not ratify the trade deal with South American nations unless Brazil increases its efforts to fight the forest's clearance. Besides that, after a G7 meeting to discuss the issue, the countries offered a donation to Brazil to combat the fires, which has not been accepted by the government yet and, as a consequence, generated diplomatic distress (Folha de S.Paulo, 2019).

Finally, the fires have also mobilised the United Nations and both the international and national civil society. For instance, the head of the UN's top biodiversity body has manifested concerns over the topic and has called countries, companies and consumers to build a new relationship with nature³. In Brazil, several demonstrations of the indigenous movement have taken place, highlighting a huge protest in the capital in August 2019: "The first march of indigenous women", whose slogan was "Territory: our body, our spirit"⁴ (Zaremba, 2019).

2. METHODOLOGY

Adopting qualitative methods of research, this dissertation has been elaborated by a comprehensive literature review, which included academic writings (articles and thesis), reports from International and Brazilian Non-Governmental Organizations (NGOs), documents, guidelines and reports from the UN and the Inter-American Commission of Human Rights (IACHR), books on the history of indigenous population of Brazil and the American continent, etc. In this sense, this work is primarily a library and Internet-based study, which means that the researcher worked from what other

³ <https://www.theguardian.com/world/2019/aug/30/amazon-fires-biodiversity-united-nations>

⁴ The original name of the march, in Portuguese, was: "Território: nosso corpo, nosso espírito".

researches and academics have already produced and, in order to answer the research question, those writings were deeply studied and analysed.

Relevant research concerning indigenous peoples and its connection with their lands they have traditionally occupied have been identified by searching Albert Sloman Library, academic journals, UN database, and independent publications made by relevant NGOs, social science databases. Throughout all the period of elaboration of this work, extensive consultations have been made to mainstream journals, newspapers and magazines websites, on a daily basis, aiming to follow the recent events regarding indigenous population and environmental issues in Brazil.

To ensure that no relevant research was missed, broad bibliographical terms have been adopted. They varied, but included, for example: “indigenous peoples in Brazil”, “Native peoples in America”, “Indigenous movement in South America”.

Databases included EBSCO, JSTOR, Journal Storage, and Project Muse, NGOs with relevant research reports, the Brazilian Government and the National Congress’ website, and reliable newspapers and magazines from Brazil and abroad (including The Guardian, New York Times, Le Monde, The Economist, Valor Econômico, Folha de São Paulo, Estado de São Paulo).

It should be mention that, due to a matter of methodology, this dissertation only analyses three of the recent government measures. Analysing all the measures enacted so far would result in a length of time and work not compatible with the requirements and limitations of this work. Thus, the reasons for choosing the three measures here analysed are (i) because they are official, in the sense that they are not mere rhetoric speeches, but materialise the wills of the current government towards the national indigenous population; (ii) because, even though two of these measures have not, despite the president’s will and efforts, become law yet, they represent the policy he is adopting regarding the human rights of indigenous peoples, so the analysis drawn here can be of some use for further analyses on future similar measures. In this sense, alongside with his formal proposals, I will bring about some of his intentions manifested in interviews and speeches, which are mainly expressed in the news of reliable national and international journals, as I am talking about an on-going process.

Naturally, flaws are present. This work would have led to a more reliable answer if the researcher could have done field investigation, interviewing representatives of the indigenous movement in Brazil and staff from FUNAI, what was not possible due to a lack of time and resources. Another issue is that reports take time to be produced, so some of the ones analysed are slightly out of date. For example, the last detailed Report on violence against indigenous peoples of Brazil, from the Indigenous Missionary Council [Conselho Indigenista Missionário – CIMI] was published last year (2018), with 2017 data. Until the conclusion of the present work, this year's report had not been published yet.

3. INDIGENOUS PEOPLES IN BRAZIL: HISTORY OF THE MOVEMENT, RECOGNITION OF RIGHTS AND CURRENT SITUATION

There are roughly 305 groups in Brazil that self-identify as indigenous peoples⁵. They speak over 274 different languages and totalize 816,917 persons in absolute numbers (IBGE, 2010). Although they represent only around 0.43 per cent of the country's population, indigenous peoples are present in 80 per cent of Brazilian municipalities, most of them in the Amazon region. A history of colonialism, genocide, ethnocide, catechism, and other practices that result in cultural erosion led to the massive decline of the native population from an estimated five million people⁶, prior to the European arrival, to less than one million, today (United Nations, 2016: 4; Vinodh Jaichand and Alexandre Andrade Sampaio, 2013: 426). Back to the 1980s, the prevision was that the indigenous people in Brazil would soon disappear (Tavares, 2018), so the vanishing of the native population was seen as a matter of time. Surprisingly, according to the 2010 national census from the Brazilian Institute of Geography and Statistics [Instituto de Geografia e Estatística – IBGE]⁷, the indigenous population is actually growing. Notwithstanding the causes are not really clear, the fact is that the

⁵ The criteria of self identification adopted by IBGE is in accordance with Article 1 (2) of the No 169 ILO Convention.

⁶ There is no complete and reliable data on the number of Indians in Brazil throughout its history. There are accounts that at the time the Portuguese arrived in 1500, there were roughly 1.1 million.' In modern times, the Census takes no special account of the indigenous population due to the difficulty of gathering information on isolated groups as well as on those who are in an advanced process of integration. Besides that, there is a great mobility of indigenous groups through the borders (Barroso, 1994: 648).

⁷ <https://censo2010.ibge.gov.br>

prevention of disappearance have not materialized and there is currently a demographic growth recovery of the indigenous population in Brazil (Gigoux and Samson, 2009: 50).

Some of the main speculations around this growth is that more indigenous are taking proud in self-identifying themselves as such (since the national census utilises a self-identification criteria) as well as that the birth rate is on rise and the mortality in decline as some indigenous' groups have been recovering themselves from a number of contagious diseases (Bicalho, 2010).

The situation of this population in Brazil, as in the rest of Latin America, remains deeply problematic and the challenges many of Brazil's indigenous peoples face are enormous. The origins of these challenges range from historically-based and deep discrimination patterns manifested in the contemporary neglect and denial of indigenous peoples' rights, to more recent developments regarding changes in the country's political landscape. Moreover, the concentration of economic and political has historically contributed to the exploitation of the lands and resources of indigenous peoples, without respect for their human rights (United Nations, 2016: 13).

Indigenous living in their territories are faced with extreme violence, which often assumes the form of *“forced displacements, food shortages, epidemics and environmental degradation as a result of armed conflicts, the intrusion of extractive industries, intensive farming and urban expansion”* (Gigoux and Samson, 2009: 50). In the Amazon region, indigenous groups are particularly vulnerable to those threats, mainly the ones in voluntary isolation (IACHR 2013). But in urban areas their situation is not easier: in the context of the delicate and countless issues regarding the metropolitan areas of Brazil, often a consequence of an extremely fast and non-planned urbanization process, indigenous peoples face high rates of discrimination, poverty and marginalisation (Gigoux and Samson, 2009: 50). As Becker (2010: 61) puts it, these patterns of marginalisation *“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 data of the IBGE, while 15.5 per cent of the Brazilian population lives in extreme poverty, amongst indigenous people this share reaches 38 per cent⁸. As one could expect,

⁸ <https://censo2010.ibge.gov.br>

the extreme poverty amongst indigenous implicates in a range of social ills that include poor health conditions, malnutrition, hungry, alcoholism and suicide, in a way that “(...) *indigenous peoples of Brazil rank low in all human development indicators, including access to health, education and justice*” (Becker, 2010: 61)

It is impossible to dissociate these issues from historical events that go back to the Portuguese colonisation, which led to the demographic decline of indigenous peoples because of enslavement, forced labour⁹ and epidemic diseases, leaving for the survivors and their descendants a vulnerable position in society. After the independence of the country, the cycle of violence and discrimination against indigenous peoples assumed new forms. In the Amazon region, for instance, forced prostitution and the enslavement of indigenous started in 1500, with the Portuguese arrival, and continued way beyond the twentieth century, even after African slavery had been abolished in 1888 (Gigoux and Samson, 2009).

It was only in the 1920s that Latin American intellectuals started to recognise indigenous peoples' cultures as a distinctive value of Latin American societies, creating a movement called *indigenismo*. But “*despite the positive sounding rhetoric, indigenismo was a paternalistic and assimilationist ideology, and it sought to assimilate them into mainstream society as a way of rescuing them from poverty and social exclusion*” (Gigoux and Samson, 2009: 53). After they have reached this certain level of recognition in the Brazilian society, indigenous peoples “(...) *have also had to contend with a different kind of violence; that entailed in recently implemented neoliberal policies centred on privatization, free trade and the development of an export-oriented economy*” (Gigoux and Samson, 2009: 53). These policies have dispossessed them of much of their territories and resulted in environmental degradation, contamination and destruction of the biodiversity used and protected by these people (Gigoux and Samson, 2009: 53-54).

⁹ It is worth mentioning that the King's Charter of 1537 gave permission for holding the Indians as slaves. This situation lasted until 1609, when they were declared free men under the guardianship of Jesuit priests. The first Act giving legal protection to Indian lands dates back to 1680. A law of 1755 confirmed the status of the Indians as free men, subject like anyone else to the King's authority and free to acquire and dispose of their assets." The situation did not suffer any major change with the arrival of the Republic in 1889. In 1910, the *Servico de Protecdo ao Indio*, The Indian Protective Service, was established as the first governmental authority created specifically to deal with the Indian (Barroso, 1994: 651).

Since the 80s, Amazon forest has witnessed invasions of non-native miners, loggers and fishermen. As an example, the invasion of around 45,000 miners or *garimpeiros* during Brazilian Gold Rush (late 1980s) had genocidal effects. The Survival International documented that 13 Yanomami villages had disappeared in just 2 years and 15 per cent of the Yanomami population had died. It also noted extreme violence, rape, and the spread of sickness (apud Gigoux and Samson, 2009: 53). The death toll from imported diseases is still an ongoing process in the region. According to Cunha (1994: 106), recent studies show that, with the spread of those diseases, indigenous peoples die, above all, of hunger and even thirst: as the entire population falls ill at the same time, nobody is able to take care of and feed the sick.

Recently, one of the most emblematic cases involving the tension between economic power and the human rights of indigenous people in the country was the construction of Belo Monte hydroelectric Power Plant (Becker, 2010: 67). The dam was built without properly hearing the indigenous peoples of the region, violating their right to consent and impacting greatly in their lives and rights. The hydroelectric altered the flow of Xingu river, which resulted in droughts and flooding, diving communities, impeding the access of some indigenous' communities to other villages, and bringing huge changes to the environment, bioecological balance, eating habits, social and cultural practices and to their health (Yamada, 2017: 6).

In this sense, Gigoux and Samson (2009: 53) states that colonial violence assumed the form of neoliberal economic expansion (2009: 53). Similarly, Darcy Ribeiro (1970: 371 *apud* Tavares, 2018: 162) has argued that "*the capitalist feature of the current economic system and its inherent socio-political framework puts the national society against the tribal ethnicities*"¹⁰.

Under Portuguese colonization, the ownership of indigenous lands belonged to the crown, and the laws were almost completely ineffective against the pressure of continual incursions of settlers. After the independence of Brazil, those lands were regarded as public property, and agribusiness and military interests in them merged around liberal ideas of progress. The Brazilian

¹⁰ Free translation. Original in Portuguese: 'Darcy Ribeiro pontifica: "[...] é o caráter capitalista do sistema econômico vigente e a ordenação sócio-política a ele correspondente que lança a sociedade nacional contra as etnias tribais"' (RIBEIRO, 1970, p. 371 *apud* Tavares, 2018: 162).

state saw the vast rainforest as just an economic and political asset (Gigoux and Samson, 2009).

As indigenous peoples lived in all these territories, the Brazilian government had to deal with this fact. The basic principle that guided the first governmental policies towards the Indians was based on the idea of their 'relative incompetence' for civil acts. The creation of the Indian Protection Service [Serviço de Proteção ao Índio – SPI] in 1910 adopted this principle by establishing a certain degree of protection to indigenous communities by creating Indian reserves, while implementing a strong assimilationist programme guided by *Indigenismo*, primarily based on education. Evidently, the long-term aim was to remove indigenous peoples from their territories. Ramos (2003: 409 apud Gigoux and Samson, 2009: 53-54) has concisely summarized this process:

The legislators fully recognized the Indians' historical rights to their lands, but in order to justify the exceptionality of collective possession – *not* property – of land by indigenous peoples, they placed them in the category of relatively incapable for some civil acts. In other words, the Indians had to be generally acknowledged as legally incapacitated if they were to enjoy the special protection bestowed on them by the state. It was only in this (in)capacity as wards (*tutelados*) that they were eligible to maintain their territories in permanent and exclusive usufruct.

Despite any policy implemented by the time, indigenous communities were constantly threatened by invasions of their territories, including those living in reserves. In 1967 the SPI was replaced by the National Indian's Foundation [Fundação Nacional do Índio – FUNAI], whose core mission since then has been promoting and protecting indigenous rights, in particular, their land rights. Like its predecessor, FUNAI at first largely operated under the paternalist assumption that indigenous peoples were 'relatively incapable', as the law stated. A few years after, in 1973, the Indian Statute was promulgated, and, among its main provisions, recognised indigenous territories and established an administrative process by which these territories had to be demarcated to protect against illegal invasions. Despite this important advancement, this law was also explicitly adopted an assimilationist approach and aimed at assimilating indigenous peoples into society (Gigoux and Samson, 2009).

It was only in the late 1980s that Brazil abandoned its out-dated assimilationist policy and adopted legislation guaranteeing that indigenous distinctiveness must be respected, enshrining the

right to self-determination. The milestone of this shift was the approval of a new constitution in 1988, which, in its Article 231, guarantees the inalienable and indisposable' right of indigenous peoples to their territories and reaffirms the political duty of the state of demarcating these territories.

The approval of the final text of the Constitution, rather than the result of the benevolence of politicians, is the final outcome of a huge indigenous political effort. Considering that the territory is the base for all and any possibility of survival of indigenous peoples, as it carries all the cosmovision and the way of life of one community, as well as that the assault of their lands had always figured in the centre of all the historical conflicts, the fight for their territories assumed a huge importance within the indigenous movement all over Latin America during the period (Tavares, 2018: 163).

The protagonism of indigenous peoples in the fight for the recognition of their rights is a hallmark of the indigenous movement in Brazil, which started around the 1970s with the first indigenous assemblies, and became stronger during the negotiations around the new Constitution. This does not mean that there had never existed any kind of indigenous movement or resistance before the 1970s, as fights against evangelisation, slavery and other forms of western culture imposition had always existed, but that was the first time indigenous started articulating their demands and flags in a unified manner, even if at the time still deeply connected to religious (mainly catholic) institutions and NGOs (Bicalho, 2010: 25).

In this sense, even though the constitutional provisions are not perfect, they have incorporated several indigenous claims and demands and represent a huge achievement of their fight in the country's political landscape. In addition, the accomplishment of the 1988 Federal Constitution's final text contributed to empowering indigenous people as protagonists of their own history, what is clear in a number of different aspects, such as: the proliferation of indigenous organisations, emergence of indigenous political leaders, elaboration of projects and public policies, and dialogue with the government and other sectors of civil society (Bicalho, 2010: 25).

With the democratisation of the country in 1985, after roughly two decades of dictatorship, and the promulgation of the Constitution imposing the duty to demarcate indigenous lands, successive Brazilian governments have implemented the demarcation process in a certain

level and the indigenous movement in the country became stronger. Within this process, several cultural practices, such as language and other traditions, re-emerged, showing that they had not been forgotten, but had been just sleeping in their hearts and minds (Araújo and Leitão, 2002).

Today, there are around 722 indigenous territories that represent 13.8% per cent of the national territory claimed by the state. The majority of these lands (424 territories and 98.25% of the extension of all indigenous territories of the country summed up) are located in the Amazon region, representing 23% of this area¹¹. However, this demarcation process has been extremely slower than it should be.

The 1988 Constitution established a five-year period for the demarcation of all indigenous territories, which means that, by the year of 1993, all indigenous lands should have been demarcated. But the reality is that, more than 30 years later, the demarcation of these lands have not been completed yet, and in fact is far from reaching its end. The massive delay by its own clearly demonstrates that the executive branch has been completely negligent in fulfilling this constitutional obligation (Becker, 2010: 61). For instance, according to the data from the Indigenous Missionary Council [Conselho Indigenista Missionário – CIMI], there are still 13.42% of indigenous land to be identified, 20.92% to be registered and 40.86% that have not yet been subject to any measures by the state¹².

The survey conducted by CIMI and presented in its last report points to the existence of 847 indigenous lands awaiting some type of action by the Brazilian government. This number accounts for 64% of the total of 1,306 indigenous lands. Another 169 lands, or 20% of the total, were in the “pending identification” phase of the process, which is when FUNAI determines the creation of a Technical Working Group (WG) to verify if the area is indeed indigenous land (CIMI, 2018: 43).

In fact, since 2011 the final confirmation of the demarcation processes has come to a halt. Only a few demarcation processes have been ratified by successive governments since that year, while many others, although having fulfilled all legal and administrative procedures, have been

¹¹ Data from the Socio-environmental Institute [Instituto Socioambiental – ISA]. Available at: https://pib.socioambiental.org/pt/Localização_e_extensão_das_Tis.

¹² Data available at: <https://cimi.org.br/terras-indigenas/>

delayed due to pressure from agribusiness and corporations involved in large-scale projects such as hydroelectric dams, according to reports from the CIMI (CIMI 2014: 43; CIMI 2017). Between January 2011 and August 2016, under the presidency of Dilma Rouseff, only 21 indigenous lands have been demarcated, while in the period from August 2016 to December 2017, when Michel Temer took power, no process of demarcation has reached this final stage¹³. This year (2019), under the presidency of Jair Bolsonaro, no indigenous land was demarcated until September.

But even the indigenous groups that have already had their lands entirely demarcated still face continued dispossession, demonstrating that the recognition of the formal rights to their lands have not ended the violence and threats to their communities from illegal invasions by settlers, miners and state sponsored industrial projects, so that public policies must be implemented to protect those lands. Finally, the implementation of large development projects, such as the Belo Monte dam in the state of Pará, although executed outside demarcated areas still, had a major impact on indigenous peoples' environment and well-being' (UNHRC 2009: 17; Ulfstein 2004).

As history has shown, the main issue when we discuss the indigenous question is the right to land. It is not a coincidence that the organisation of their movement in Brazil was unified around this claim, or that the violence faced by these people still have as the central cause the dispute over their territories. That is precisely why the constitutional text, as well as the international legal instruments ratified by Brazil, put the right to land as a central one. Their territorial base, as Badin (2006: 128–129) teaches, is essential not only for their physical, but also for their cultural survival. It is not, therefore, a simple land-ownership matter. In a similar vein, Gouritin and Aguilari (2017: 294) claim that a better understanding of the relationship between indigenous peoples and their lands has displaced the "*archaic idea that such persons must be assimilated into more advanced societies*".

Having said that, it is not difficult to conclude that the enormous stall in the demarcation process greatly aggravates the situation of indigenous peoples in Brazil. Added to it, the reluctance of the state to enforce the integrity of demarcated areas, expressed in the lack of public policies and allocation of resources to protect the lands that have already been demarcated, makes the situation a

¹³ <https://cimi.org.br/terras-indigenas/>

disastrous. In this sense, CIMI¹⁴ has stated in several reports that commercial pressures on indigenous lands comprise the main cause of anti-indigenous violence. In this regard:

In summary, we may say that the violations of individual and collective rights operated against the indigenous (...) are linked to a government strategy that favors extractive activities in order to [stimulate] its politics of development. Thus, the exploration of indigenous lands gets promoted mainly by agribusiness in all regions of the country, as well as by the implementation of large scale electric energy projects, with the construction of dams, causing serious impact on the environment and the traditional populations; and by the exploration of timber in the Amazon, especially in Maranhão, Pará, Acre, Rondônia and Mato Grosso. (CIMI 2014: 17)

In its last Report on Violence Against Indigenous Peoples in Brazil, from last year (2018) with 2017 data, CIMI states that in that year there was an increase in 14 of the 19 types of violence documented and that indigenous lands are one of the main vectors of violence. In three types of violence, the number of cases reported was the same of the last year; and only two types of violence showed a decline as compared to 2016. However, as the pieces of data are partial, the number of cases may be higher, according to the Special Indigenous Health Secretariat [Secretaria Especial de Saúde Indígena – SESAI].

Moreover, the report shows that the number of suicides (128 cases), murders (110 cases), child mortality (702 cases), and violations associated with traditional land rights and their protection is still astonishing. It also stresses the increase in the three types of 'violence against heritage': omission and delays in land regularizations (847 cases), conflicts over territorial rights (20 cases), and possessory invasion, illegal exploitation of natural resources and other forms damage to heritage (96 cases reported).

The data illustrates a significant increase in invasions, theft of natural resources, illegal

¹⁴ CIMI annually publishes a Report on Violence against Indigenous Peoples in Brazil since 2003. The last one dates from August 2018 with data related to 2017. Its full content in English can be found in this link: https://cimi.org.br/wp-content/uploads/2018/12/Report-Violence-against-the-Indigenous-Peoples-in-Brazil_2017-Cimi.pdf. A summary of the Report can be find in this link: <https://cimi.org.br/2018/12/cimis-report-brazil-sees-a-systematic-and-continuous-increase-in-violence-against-indigenous-peoples/>

hunting and fishing, soil and water contamination by pesticides, and fires, among other criminal actions. In the previous year, 2016, 59 cases had been registered, which represents a 62 per cent increase in 2017. In addition to violations of indigenous peoples' rights to the exclusive usufruct of their lands and its resources, these crimes were committed by intimidation, threats and often physical acts of violence against indigenous people, including attacks on entire tribes.

Finally, in regards to violence against the person, there was a further deterioration in seven of the nine types of violence analysed: "*attempted murders (27 cases), involuntary manslaughter (19), death threats (14), various threats (18), aggravated battery (12), racism and ethnic-cultural discrimination (18), and sexual violence (16)*". As regards abuse of power, the number of cases equalled that registered in 2016: 8 cases" (CIMI, 2018).

4. THE MEASURES ADOPTED BY THE EXECUTIVE BRANCH AND THE DOMESTIC LAW

4.1. THE MEASURES

After a brief historical overview of the main aspects of the history of the indigenous peoples of Brazil and a contextualisation of their current situation, this chapter aims to analyse the policy that has been adopted by the Brazilian Government throughout this year (2019). As stated in chapter 1, the current President started his mandate on January 1st 2019. Over those 9 months, he enacted some measures in regards to the indigenous population and gave several speeches expressing his opinion and intentions on the future of these people and their lands under his presidency. As exposed in chapter 2, due to a matter of methodology, this section will analyse three of these measures.

4.1.1. Decree No. 9.711/2019 and the undermining and understaffing of FUNAI:

As briefly mentioned in the previous chapter, in the last years FUNAI has been operating understaff, with about one third of its workforce. This critical situation has been greatly aggravated by the decisions of the current government, in special by the Decree No. 9.711/2019¹⁵, that reduced the resources destined to the body in 90% in comparison to its budget established by the Federal Annual Budgetary Law.

¹⁵ The full text of the decree can be found here: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9711.htm. [Accessed in 16/08/2019].

Scarcity of budget and personnel resources of FUNAI aggravated by the Decree rapidly affected all branches of the foundation, but the situation got even worse in the decentralised structures, such as the Local Technical Coordinations and the Ethnicity-environment Protection Fronts [Coordenações Técnicas Locais (CTLs) and Frentes de Proteção Etnoambiental (FPEs)], the ones most far from the metropolitan centres that act close to the indigenous communities. Currently, in regions of intense land disputes, it is not rare that the office force consists of only a single employee. For instance, in the state of Mato Grosso do Sul, stage of intense conflicts between farmers and the Guarani-Kaiowá indigenous tribe, only one FUNAI employee, who has been working inside a vehicle due to the lack of structure, stands for 10,000 Indians (Barros, 2019).

During this year, when the Foundation was under the umbrella of the Ministry of Women, Family and Human Rights, within the budget envisaged to the regularisation, demarcation and monitoring of indigenous lands, that is, R\$ 22,822,252 for 2019, only 14.61% was committed to it (R\$ 3,333,516), while R\$ 1,206,677 (5.29%) was liquated and just R\$ 982,971 was actually paid (4.31%)¹⁶

In its official website, FUNAI stated that they are currently are under a budget allocation absolutely insufficient to accomplishing its institutional mission, as well as that its budget represents only 3,3 per cent of the total budget of the Ministry of Justice (under which umbrella the foundation is now allocated). In the last years, the budget approved has been stalled at around R\$ 175 million, with a limit for execution of R\$ 150,0 million, what represents a 25 per cent cutting of the approved budget, despite the high rate of execution of FUNAI (average of 97 per cent)¹⁷.

As a consequence of a scarce budget, FUNAI has only succeeded in maintaining the minimal functioning of its administrative units, reaching an unfortunate condition of assisting just emergencies, without any chance of expansion or significant advancement in policy-oriented results throughout new actions and initiatives. It is worth to mention that FUNAI has also stressed that resources allocated to its investments represent only 14 per cent of the total available to the expenses

¹⁶ Data available at: <http://www.portaldatransparencia.gov.br/orgaos/30202-fundacao-nacional-do-indio> [Accessed 05/09/2019].

¹⁷ Data available at: <http://www.funai.gov.br/index.php/nossas-acoas/politica-indigenista?start=22> [Accessed 06/09/2019].

of the machinery, amount not sufficient to even cover the depreciation of the machinery and therefore derisory for any investment on it¹⁸

All these cuts mean the continuous reduction of the installed capital of FUNAI, limiting drastically the fulfilling of its legal and constitutional obligations. Therefore, FUNAI claims that, to overcome this catastrophic scenario, it is crucial to allocate more resources in order to modernise and restructure its administrative units – what includes improvements in the information technology, vehicles, new offices, and so on – and increase its reach and efficacy on the guarantee and advancement of the rights of indigenous peoples¹⁹.

4.1.2. Decree No. 870/2019, the reallocation of FUNAI and the withdraw of its power to demarcate indigenous Territories:

In his very first day as president, Bolsonaro issued a presidential decree [medida provisória – MP], the MP No. 870/2019²⁰, which established, in short, the basic organisation of the bodies, entities and ministries of his presidency and, among other things, removed FUNAI from the Justice Ministry, to which the foundation had always been linked, transferring it to the Ministry of the Family, Women and Human Rights, a body that had been just created. Moreover, the decree also handed over the responsibility of demarcating traditional indigenous lands to the Ministry of Agriculture. Analysts viewed this move as a drastic conflict of interest, since the latter Ministry has long been heavily influenced by agribusiness representatives seeking to explore indigenous lands, known as *ruralistas*, and currently has in its head office a person connected to them²¹.

¹⁸ Same link from footnote 23.

¹⁹ <https://mobilizacaoanacionalindigena.wordpress.com/tag/funai>

²⁰ The complete and official text in Portuguese can be found on the Brazilian Congress website: <https://www.congressonacional.leg.br/materias/medidas-provisorias/-/mpv/135064>.

²¹ Another two deeply controversial provisions of MP No. 870 established mechanisms of monitoring and supervising NGOs and suppressed the Food and Nutrition Security Council [Conselho Nacional de Segurança Alimentar], which was a matter of concern in this UN Report: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24339>.

A MP is an exclusive and provisory act issued by the president, which, according to the Brazilian Constitution (Article 62), has immediate effects and must be analysed and ratified by the National Congress within 60 days in order to become law. If after these 60 days the National Congress does not ratify it, the decree expires and loses its effects. It is an exceptional instrument and should be used with caution and exceptionally, since, typically, the primary competency of the Executive Power is not legislating, and therefore its overuse can lead to an imbalance between the powers, infringing the principle of the constitutional principle of separation of powers. In this sense, the excessive adoption of this legal measure, created during the dictatorship period in Brazil, often indicates an authoritarian vein of the Executive Power.

It was the first time in the history of the modern indigenous policy since the creation of the former Indian Protection Service [Serviço de Proteção ao Índio – SPI] in 1910, the predecessor of FUNAI, that the competency for demarcating indigenous territories was removed from the institution. Demarcating indigenous lands is one of the main competencies of the agency and one of the reasons why it has been created. Therefore, FUNAI concentrates the know-how, developed throughout years of experience by its body of specialists, to adequately conduct the demarcation processes.

If the adoption of an urgent measure in the first day of the government aiming to change a competency that has been, for more than 100 years, allocated to an institution specially created to protect indigenous peoples might be surprising, it is not surprising at all that indigenous representatives immediately started to protest against the decree, which was viewed as a huge backlash on indigenous peoples rights. Fortunately, a few months later, in a decision vociferously celebrated by the indigenous movement, the National Congress voted to overrule the MP No. 870/2019. Thus, in May 2019, FUNAI returned to the Justice Ministry and took back its authority for the demarcation of indigenous land (Spezia, 2019a).

4.1.3. Decree No. 886/2019, the reallocation of FUNAI and the withdraw of its authority to demarcate indigenous territories (again)

On the 18th June, around two months later the MP No. 870/2019 was overruled, the president took the country by surprise and issued a new, and unprecedented, presidential decree (MP

886/2019²²), which challenged the May congressional vote and contained the exact same dispositions of his previous decree regarding FUNAI, i.e. removing the Foundation once again from the Justice Ministry and handing over the responsibility of demarcating traditional indigenous lands to the Ministry of Agriculture.

Many legal authorities immediately affirmed that Bolsonaro's decision to issue the new MP No 886/2019 infringed the principle of the separation of powers, as the president confronted a very recent parliamentary decision (Holanda, 2019). Moreover, it was claimed that the measure clearly violated the Federal Constitution, which expressly prohibits a presidential decree to be issued more than once in the same legislative session (Article 62, § 10).

Based on this line of reasoning, the measure was taken by some parties to the Federal Supreme Court of Brazil and, at first, a primary injunction was granted by the judge drawn as the rapporteur of the case to suspend the disposition that established the devolution of the competency to demarcate the indigenous territories to the Ministry of Agriculture. Once again, FUNAI, linked to the Ministry of Justice, regained its authority to demarcate indigenous lands. The justification was precisely that the Congress had already decided to reject the disposition, so the debate could not be reopened via a new presidential decree, what would infringe the principle of separation between powers. The judge also raised concerns over the danger of delaying even more the demarcation processes of indigenous land since uncertainty regarding the authority to demarcate them had been lasting for months, stressing that the instability generated could, in itself, frustrate the indigenous right to land recognised by the Federal Constitution.

In the 1st of August of 2019, the Federal Supreme Court confirmed the primary injunction and, unanimously, ruled in a definitive decision that FUNAI should maintain its authority to demarcate indigenous territories and stay tied to the Ministry of Justice (Batista and Souza, 2019; Mota, 2019; Spezia, 2019b).

4.2. THE DOMESTIC LAW

²² Full text available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/Mpv/mpv889.htm [Accessed 05/09/2019].

4.2.1. The Federal Constitution:

Brazil's domestic legal framework for the protection and promotion of the rights of indigenous peoples is based primarily on the 1988 Constitution. The Federal Constitution of 1988, drafted two years after the end of the military dictatorship that had ruled since 1964, contains some exemplary provisions for the protection and promotion of indigenous peoples' rights (United Nations, 2016: 5). This Constitution was one of the first in the world to secure indigenous peoples' rights within the contemporary vision on indigenous-state relations, and it remains one of the most progressive in this regard (Becker, 2010: 53).

The 1988 Constitution broke paradigms and abandoned and revoked previous integrationist policies and laws by establishing unprecedented social and land rights (Barroso, 1994). It means that, above all, indigenous peoples were no longer seen as "people in a provisory status", that would later be integrated into a hegemonic non-indigenous society. As a consequence, their rights, which had until then enjoyed only a temporary status, gained a permanent character (Barroso, 1994).

Likewise, Araújo and Leitão (2002) argue that the Constitution shifted the vision that indigenous peoples were seen as cultures in extinction, destined to be incorporated to the 'national society', what has been the mentality since the beginning of the colonization process. While all the previous legislation expressly stated the integration or assimilation of indigenous peoples, the Constitution established a new view, assuring the space for an interaction between these peoples and the society in conditions of equality, giving recognition to the country's cultural diversity and guaranteeing the right to be different, or the right of self-determination.

Two articles in the Constitution address indigenous peoples' rights. Article 231 provides that indigenous peoples shall have "*their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy*"²³. It also recognises protection for these rights, especially in relation to the exploitation of natural resources on indigenous lands, protects indigenous peoples against dispossession of or forced removal from their lands, and places a duty upon the federal branch to demarcate the lands traditionally occupied by

²³Full text available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm [Accessed 05/09/2019]

indigenous peoples and “to protect and ensure respect for all their property”. Article 232, in its turn, provides indigenous peoples and their organisations juridical personality, that is, legal status to defend their rights in the courts, and authorises the Public Prosecutor to intervene on their behalf of indigenous peoples when pertinent (United Nations, 2016: 5).

In dealing with the specific status of indigenous land rights, the Constitution defines and characterises indigenous land in a very different way from other forms of public or private entitlement, as defined by article 231. In giving recognition to indigenous “original rights to the lands they traditionally occupy” upon areas previously defined as Federal property, Article 231 defines land rights in a way that originally transcends the public-private dichotomy, typically adopted in the modern property model (Lauriola, 2013: 160–161). According to Lauriola (2013: 161), Brazil’s Constitution introduced indigenous land as an atypical, exceptional category, within the classical public-private dichotomy of law and of property regimes, fitting it perfectly into the category of collective or “*common property*”.

The Constitution acknowledges the obligation of recovering the historical debt with the indigenous peoples of Brazil (Badin, 2006: 128–129), recognising the profound connection indigenous have with their lands, which impacts on their unique rights to self-determination, property and culture (Vinodh Jaichand and Alexandre Andrade Sampaio, 2013: 409), and placing the right to land as “a prerequisite for the guarantee of all their other rights” (Araújo and Leitão, 2002). In other words, the right to land, “*On the one hand, (...) serves as a basis for entitlements which can ensure an adequate standard of living, while on the other hand it is a basis of independence and therefore of freedom*” (Araújo and Leitão, 2002).

The Brazilian Constitution carries at its core the protection of indigenous lands, recognising it, as Gilbert (2016: 116-117) says, not only “*...as a right to access to the means of livelihood and the minimum standard for sustenance*”, but also “*as protection of a particular way of life; [and] (...) as means of cultural protection*”. In a similar vein, Lisa Valenta states that: “*...land is at the centre of the distinct cultures of Brazil’s indigenous peoples. Land provides not only a means of physical survival, but it also forms the basis of a cultural and social identity*”.

For Jaichand and Sampaio (2013: 427), the Brazilian Federal Constitution seems to be in

compliance with international standards and also guarantees indigenous peoples' collective right to land property and, by emphasizing the original character of the right, the domestic legislation aims to redress the historical injustices committed against these peoples and seeks to preserve the richness of their cultural diversity.

Finally, transitory constitutional provision No. 67 of the Federal Constitution establishes the deadline of 5 years for the Federal State to carry out indigenous lands demarcation, showing the urgency recognized by constituents to recognize indigenous land rights. Borrowing Barroso's words (1994: 652), "*within Brazil's best tradition of good intentions and little effectiveness*", more than 30 years later, lands demarcation have not come to an end. Not even this deadline was not met in 1993, but there are still hundreds of lands waiting to be demarcated in 2019. Since 1993, the process of land demarcation has stalled many times and/or proceeded at a very slow pace.

4.2.2. The ILO Convention No. 169:

Brazil ratified the 1989 International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (No. 169)²⁴ in 2002, after years pending in the Congress, and it was promulgated two years later through the Decree No. 5.051 of 19/04/2004. (Vincenzo M. Lauriola, 2013: 158). According to the Brazilian jurisprudence, the Convention is to be ranked above domestic laws (United Nations, 2016: 5).

As Araújo e Leitão (2002: 27) teach, the Convention No. 169 was the first international legal instrument that has addressed with dignity the collective rights of indigenous peoples, establishing minimum standards to be followed by the States and definitely abandoning an assimilationist approach towards this group. The rights to consult and to participate in decision-making process constitute the cornerstone of Convention No. 169 and the basis for applying the broader set of rights enshrined in this instrument (International Labour Organization, 2011).

The reason is that, given the enormous challenges indigenous peoples face today, including the regularization of their land titles, access to health and education, and the increasing

²⁴ Full text of the Convention can be found in English in this link: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

exploitation of natural resources, their involvement in these and other areas which affect them directly, is essential. That is to say, consultation constitutes an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue. It can and should be an instrument of genuine dialogue, social cohesion and, most importantly, be instrumental in the prevention and resolution of conflicts (International Labour Organization, 2011).

The general requirement to consult with indigenous peoples is enshrined in Article 6 (1) of Convention No. 169²⁵, it is imposed a general obligation under the Convention, whenever legislative or administrative measures affect these people directly. Such measures could, for instance, concern the elaboration of national legislation, the construction of road infrastructure on the lands of a specific indigenous community. Moreover, *“the Convention particularly emphasizes the need to consult under certain circumstances, including prior to exploration or exploitation of sub-surface resources and prior to relocation and land alienation”* (International Labour Organization, 2011).

Further, Article 6(2) of the Convention specifies that *“consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”*. Therefore, pro forma consultations or mere notification or information do not meet the requirements stated in the Convention.

It is worth to mention that Brazil's own Constitution, in Article 231, paragraph 3, not only recognizes such right as an independent one, but also establishes that consultation process must be conducted by the National Congress in order to be valid.

The procedural right derives from all the other rights stated in the Convention. First, indigenous peoples' right to self-determination obliges the government to at least engage in a significant dialogue with them, allowing these people to take part in the decision-making processes of the policies under consideration. Second, in the case of Brazil, indigenous peoples right to property, when looked at through the social function that their lands need to fulfil, demands that a particularly

²⁵ Article 6(1) stipulates that governments should: “Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.

strong participatory right be recognized, if real equality and democratic legitimacy are to be respected by the government (International Labour Organization, 2011).

Among the other rights recognised in this Convention, it is also worth to stress the right to land, regulated by Articles 13 to 19. Article 13 determines the governments should respect the importance for the cultures and spiritual values of indigenous peoples of their relationship with the lands and territories, in applying the Convention. Also, Article 15 establishes that rights of the indigenous peoples concerned to the natural resources of their lands shall be specially safeguarded, what includes the use, management and conservation of resources.

4.3. DO THE MEASURES VIOLATE THE RIGHTS ENTAILED IN THE CONSTITUTION AND IN THE ILO CONVENTION No. 169?

Having said that, it is easy to see that the three measures listed above are not compatible with applicable national legal framework, that is, a strong and detailed Constitution which provides great protection in their provisions regarding indigenous peoples, nor with the ILO Convention No. 169, that was incorporated in the Brazil Law with a supra-legal status.

First, the undermining of FUNAI and the instability generated within the Foundation (by placing and replacing it from one Ministry to another and taking and retaking one of its core mission of demarcating indigenous territories) clearly confront the statements of the Constitution regarding the right to land and the urgency to demarcate these territories, which counts with almost three decades of delay. As a clear consequence of these measures, despite the number of lands that are still waiting to be demarcated, in 9 months of Government (what represents almost quarter of the mandate) no indigenous territory has been demarcated. As already discussed in this work, the violation of the right to land implies the violation of several other indigenous rights.

Another crucial point is that the right to prior, free and informed consent has been completely violated in all the three measures, as no procedure of consultancy of indigenous peoples has been carried out, neither regarding the decree that reduced the budget of FUNAI, nor in relation to the attempts to move the foundation to another Ministry and withdraw its authority to demarcate indigenous land, even if all the three decrees could generate – and actually have generated – great

impacts on indigenous peoples rights. In this sense, the measures also violate both the Constitution and the ILO Convention No. 169 in regards to their provisions on the right to consent.

5. THE HUMAN RIGHTS INTERNATIONAL LAW

Treaties and other constructive agreements set up between indigenous peoples and states are a relatively recent subject of work in the United Nations context, which was underpinned by the indigenous movement (Thornberry, 2002: 85). Even though indigenous forms of resistance date from the period of colonisation between the 16th and 18th centuries, it is only in the early 1970s that the advent of an organic international indigenous movement, which brings up its claims by using the language of human rights, can be traced. In the 1970s, indigenous groups, by their own or supported by advocacy organisations, started to articulate themselves, build networks, and formally pave their path into international political organisations (United Nations, 2009).

5.1. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP):

The most remarkable achievement of this international indigenous movement was the United Nations proclamation of the Declaration on the Rights of Indigenous Peoples (UNDRIP), in September 2007, after almost three decades of intensive discussions and negotiations among independent human rights experts, state members of the United Nations, and indigenous peoples' representatives. According to Morgan (2009), the instrument adopted the right of indigenous peoples to self-determination, substantially reflecting the aspirations of members of the global indigenous movement who took part in its confection. Despite opposition from some States, and its limitations (such as the possibility of states vetoes), the UNDRIP is an important achievement, a huge step for the creation of an international legal framework for the recognition of the rights of Indigenous populations (Morgan, 2009).

The Declaration is comprehensive in substance and extensive in scope, recognising, among other rights: the right to self-determination, land and resources, restitution, separate political institutions and systems, participate in governmental decision-making processes that affect them (including the right to prior, free and informed consent), cultural and intellectual property rights, and

the right to development. Further, by those rights, the Declaration has strengthened the concept of collective rights and many of its dispositions determine how individual and collective rights interrelate in order to fully protect and promote indigenous distinctiveness and identities (Allen and Xanthaki, 2011: 122).

Although, as a declaration, is not legally binding and does not have a treaty body, it is still a vital source for guidance as it is, at the very least, the outcome of many year's discussion and therefore represents a consolidation of the law concerning indigenous peoples in a universal framework. Thus, it has unparalleled legitimacy as the main reference for litigations concerning indigenous peoples (Allen and Xanthaki, 2011: 122).

5.2. THE AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

More recently, the American Declaration on the rights of indigenous peoples (ADRIP), took 17 years to be elaborated and was promulgated on 2016.

This declaration shares several similarities with the UNDRIP. Among the rights recognised in these both instruments, it is worth to mention the right to traditional lands (Article 26, UNDRIP and Article XXV, 2, ADRIP), the right to self-determination (Article 3, UNDRIP and article III and XXI, ADRIP), the right to consultant and prior, free and informed consent (Article 19, 32.2 UNDRIP and Article XXIII, 2, XXVIII, 3 e XXIX, 4, ADRIP), and the right to peace, security, and protection (Article 7, 2, UNDRIP and XXX, ADRIP).

According to the Brazilian Ministry of International relations, the American Declaration is about 30% more extensive than the UNDRIP and addresses new topics that are not present neither in the UNDRIP nor in the ILO Convention No 169. Thus, the ADRIP goes further and innovates the indigenous human rights framework in establishing the following set of rights (*Funai*, 2019):

- Article II recognizes the multicultural and multilingual character of indigenous peoples as an integral part of societies, which is related to the dispositions of Article 209 § 2º, 215 § 1º, 231 of the Brazilian Constitution.
- Article IX establishes juridical personality to indigenous peoples, as well as to their forms of organization, right also addressed in Articles 231 and 232 of the Federal Constitution.

- Article XVII assures the right to preserve, maintain, and promote their own family, as well that states shall recognize, respect and protect the various indigenous forms of family, matrimonial union, filiation, descent, and names. This specific set of right shares similarities with the dispositions of the Domestic Law, namely Article 6 of Indigenous Statute (Law 6,003/73) and some dispositions of the Childhood and Adolescence Statute (Law 8,096/90).

- Finally, in regards to indigenous peoples in voluntary isolation or initial contact, a crucial theme in America, the Declaration sets their right to remain in that condition and to live freely according with their cultures. Article XXVI also establishes that 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.

5.3. THE XUCURUS vs. BRAZIL, A CASE RULED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS (IACtHR):

The jurisprudence of the Inter-American Court, on several occasions, such as in the remarkable case *Saramaka People vs. Suriname*²⁶, ruled in the 28th of November 2007, recognised that the lack of demarcation of indigenous lands implicates in the violation of the right to life, personal integrity, collective property and to the protections established in the Articles 4, 5, 21, 8.1 e 25.1 of the American Convention on Human Rights²⁷.

Despite the deeply problematic issues related to the demarcation of indigenous lands in Brazil, which have lasted for centuries, it was only in 2018 that the country has been condemned for violating indigenous rights, especially the right to land. In March 2018, the IACtHR published a decision in which it holds the Brazilian State accountable for the violation of several rights of the

²⁶ http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

²⁷ Note that, at the time, the American Declaration on the Rights of Indigenous Peoples had not been promulgated yet.

Xukuru people, including the failure to demarcate traditional territories, offer legal protection, and rapidly ensure legal remedies²⁸.

The Xukuru tribe comprises approximately 2,200 people and 24 communities that live in the state of Pernambuco, in addition to another 4 thousand in the municipality of Pesqueira, where the land claimed is located. On October 16th, 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 Indigenous Council] submitted a petition to 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 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, in the detriment of the Xucuru tribe²⁹

The petition alleged the denial of the right to property of these people due to the massive delay in demarcating their land, as well as the lack of judicial protection to guarantee this right. The demarcation of Xucuru's lands began in 1989 after huge pressure from the tribe, however, it remained unfinished for more than a decade, due to, according to what was alleged in the petition: (i) actions took by third parties with support of the state; (ii) the delay of the executive and judicial branches in solving administrative and judicial appeals intended; (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. As a result, the petitioners alleged that the Xucuru tribe possessed, at the time of the submission of the petition, less than half of their ancestral land, as the rest was occupied by non-indigenous people, what led frequent conflicts.

The IACtHR held the Brazilian State accountable for the violation of several rights of the Xukuru people, including the failure to demarcate their traditional territory, offer legal protection, and ensure rapid legal proceedings when necessary. It classified the land demarcation process in the

²⁸ The full case and summary can be found [https://www.mdh.gov.br/navegue-por-temas/atuacao-internacional/editais-2018-](https://www.mdh.gov.br/navegue-por-temas/atuacao-internacional/editais-2018-1/sentenca_xucuru.pdf)

[1/sentenca_xucuru.pdf](http://www.corteidh.or.cr/docs/casos/articulos/resumen_346_por.pdf)http://www.corteidh.or.cr/docs/casos/articulos/resumen_346_por.pdf

²⁹ http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

town of Pesqueira as extremely slow and determined that the government should ensure the Xukuru people's right to property by implementing several measures, such as the payment of the amount of 1 million US dollars in compensation and the removal of ranchers from the territory. The court has set an 18-month deadline for implementation of its decision and has established that the federal government should present a report with details on the progress of the measures adopted.

5.4. LAST UN REPORT ON THE HUMAN RIGHTS SITUATION IN BRAZIL:

In a similar vein, in regards to the situation of indigenous peoples in Brazil, the last Report of the UN Special Rapporteur on the Rights of Indigenous peoples on her mission to Brazil, occurred in 2016, emphatically stressed the urgent need to complete the land demarcation processes in the country, as this is fundamental to the fulfilment of all their other rights.

She has also identified a stagnation of land demarcation processes and attributes it to a combination of factors, including: (i) the debilitation and understaffing of FUNAI; (ii) the lack of political will to conclude demarcation procedures; (iii) a poor understanding of indigenous peoples' distinctiveness; (iv) administrative delays and excessive judicialization of the processes by vested interests; (v) efforts from the Legislative power to reform demarcation processes and modify environmental legislation in order to facilitate resource exploitation in indigenous lands; (vi) failure to recognise the compatibility of indigenous lands and conservation units and the role that respect for indigenous peoples' land rights can play in environmental conservation and sustainable development (United Nations, 2016: 7-8).

Furthermore, it states that urgency for land demarcation is aggravated by deforestation, destruction of rivers and depletion of soil quality due to intensive monocropping and mining activities, what makes land and water inadequate for sustaining indigenous peoples' lives. The inadequacy of the State's response to these threats has prompted indigenous peoples to protect their territories and natural resources themselves and put their lives at risk.

Specifically regarding the issues surrounding FUNAI, central subject to this work, the Special Rapporteur received information from indigenous peoples from different corners of the country regarding the importance of the role played by the foundation in the protection of their rights.

She also received information from governmental agencies and ministries on the importance of FUNAI to realise their actions and programmes for indigenous peoples. It was also stressed that the capacity and local presence of the foundation were being extremely debilitated to the point where it may soon no longer be able to fulfil its mandate. Concerns were also raised regarding the political, rather than technical basis of the nomination of the President of FUNAI and the implications for the foundation's autonomy (United Nations, 2016: 7–8).

Additionally, the Special Rapporteur considered that the failure of the state to protect indigenous peoples' lands from illegal activities, in particular, mining and logging, is a matter of grave concern. Even where indigenous peoples have demarcated territories, such as in the Amazon region, they lack effective control over their resources owing to increasing invasions associated with illegal activities (United Nations, 2016: 15).

In this sense, she concludes that proposed measures to reduce FUNAI's budget and staff run completely counter to the current demands of indigenous peoples in Brazil and prevents the foundation from entirely fulfilling its obligations concerning the protection of indigenous peoples' rights. She concludes that, despite its challenges, the foundation appears to have made progress in its efforts to overcome paternalistic postures, however, unless FUNAI is properly supported, this progress is likely to suffer setbacks.

As discriminatory views appear to continue to inform law-making, policymaking and judicial decisions in the country, she sees the weakening of FUNAI as symptomatic of the state's resistance to fully transit to new relationships with indigenous peoples, based on self-determination (United Nations, 2016: 16). Taking all of these into consideration, it is worth to mention that the Special Rapporteur recommended that the Brazilian Government should, among other things:

- Redouble efforts to overcome the impasse concerning land demarcation, what means that the executive should develop, in collaboration with indigenous peoples, proactive proposals to respect and fulfill their rights to land, including approaches to address the judicialization of demarcation processes and the settlement of fair compensation regarding lands repossession;
- Complete all demarcation processes pending at FUNAI, the Ministry of Justice and the Presidency, particularly the ones affect by development projects, agribusiness expansion, and

natural resource extraction activities;

- Develop concrete and prioritised actions to guarantee environmental protection of indigenous lands and their natural resources and to prevent illegal activities, with consideration to indigenous peoples' forms of organisation and their special relationship with their lands;

- In collaboration with representatives of indigenous peoples and respecting their right to self-determination, develop a national action plan for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, keeping with Brazil's commitment at the World Conference on Indigenous Peoples;

- Truly implement the state duty to consult indigenous peoples regarding projects, policies and legislative and administrative measures that have an impact on their rights, in the terms of the dispositions of ILO Convention No. 169;

- Acknowledge and support the proactive measures taken by indigenous peoples to realise their rights, including the right to self-determination;

- Ensure full respect for the human rights of indigenous peoples in the specific situation of voluntary isolation.

5.5. THE LAST UNIVERSAL PERIODIC RECOMMENDATIONS TO BRAZIL IN REGARDS TO INDIGENOUS RIGHTS:

Following the Report on the Human Rights situation of Brazil, in the last Universal Periodic Review, which took place on May 2017, several recommendations have been made regarding the necessity of the Brazilian State to improve the protection mechanisms of indigenous rights, specially regarding the demarcation of their lands and the destination of resources to FUNAI. In September 2017, Brazil agreed on and committed itself to several recommendations³⁰, among which stand out the following:

136.51 Develop a national action plan on business and human rights in order to prevent development projects from violating the rights of traditional populations, indigenous peoples and workers and causing damage to the environment, and in order to ensure an effective

³⁰ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/259/78/PDF/G1725978.pdf?OpenElement>

remedy with meaningful consultations with the affected communities (Netherlands);

(...)

136.223 Guarantee the constitutional rights of Indigenous peoples including by ensuring the National Indian Foundation has the necessary resources to carry out its work, particularly relating to the demarcation of Indigenous lands, and take measures to conclude investigations into all killings of Indigenous Peoples (Canada);

(...)

136.230 Guarantee adequate consultation and full participation of indigenous peoples in all legislative and administrative measures affecting them, protect indigenous people including indigenous human rights defenders from threats and attacks, and protect their land rights, in particular by strengthening protection programmers, completing pending land demarcation processes and providing adequate funding and capacity to the Indian National Foundation (FUNAI) (Germany);

(...)

136.236 Adopt an effective plan of action for the demarcation of indigenous lands and provide the necessary financial resources to ensure an effective policy for the protection of the rights of indigenous peoples and to prevent land- related conflicts (Switzerland);

136.237 Continue its process of demarcation of indigenous lands (Peru); ^[17]_{SEP}

136.238 Take necessary measures to resolve and prevent conflicts related to ^[17]_{SEP} and issues and to complete the land demarcation processes deriving from Article 231 of the 1988 Constitution (France);

136.239 Speed up through executive action the processes of demarcation and protection of the lands of indigenous peoples and protect their respective rights (Cabo Verde)" ³¹.

5.6. LAST VISIT OF THE INTER AMERICAN COMMISSION OF HUMAN RIGHTS TO BRAZIL

More recently, the Inter American Commission of Human Rights realised its second visit to Brazil in November 2018. Among its main observations, as one could expect, was the current situation of the indigenous population, in which the commission has adopted a similar tone to the UN Report from 2 years before.

³¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/194/15/PDF/G1719415.pdf?OpenElement>

It stated that the historic discrimination and the wealth concentration resulted in the exclusion of certain groups in the Brazilian society, such as indigenous peoples, so that the extremely unequal land division led to land conflicts and human rights violations of these peoples (IACHR, 2018). In addition, the IACHR observed that, in the past few years, the country has been implementing a development model based on huge enterprises, infrastructure projects, and other large scale commercial activities, such as monoculture, extensive livestock, mining and hydroelectric. In this sense, it has also received information on about 13 projects that have generated negative impacts on minorities' rights.

Like the UN report, the commission emphasized that indigenous rights carry huge structural issues, which require urgent attention concerning the lack of delimitation and demarcation of indigenous lands, a situation that has been aggravated by the progressively undermining of FUNAI. As a result, the main issues regarding indigenous peoples in the country are constant assaults, threats and attacks against its leaders, defenders and tribes. It also stresses the extreme vulnerability in which the isolated indigenous groups in the Amazon are exposed with the presence of people related to external activities of the extractive industry, which disturb their way of life, world vision and sociocultural representation, not to mention the rise of the risks of contagious diseases to which these groups do not have immunity.

After its considerations, the IACHR recommended Brazil to, in regards to its indigenous peoples: (i) approach the structural causes of the land conflicts; (ii) guarantee that indigenous peoples can make use of the territories they have historically occupied, by demarcating them through special procedures with their participation; (iii) execute and conclude the demarcation processes, specifically the ones related to territories affected by big projects and large-scale business activities; (iv) ensure the right to free, previous and informed consent, according to the American standards and respecting the particularities and customs of the indigenous peoples involved; (v) guarantee the complete respect to the human rights of indigenous peoples voluntary isolated and in initial contact, establishing effective mechanisms of protection in order to prevent and eliminate the access of third parties to their lands; (vi) set up specific strategies and targets to reduce the number of murders and violent crimes in rural areas, particularly regarding indigenous population, diminishing the impunity and avoid reoccurrences; and (vii) strengthen programmes that address the demands and solution-oriented

practices to land conflicts.

5.7. DO THE MEASURES VIOLATE THE INTERNATIONAL OBLIGATIONS OF THE COUNTRY REGARDING INDIGENOUS RIGHTS?

All the analysis of the Conventions, Reports, Universal Periodic review and the case-study demonstrate that the recent measures adopted by the Brazilian government are running in the opposite direction of its international commitments, especially in regards to the demarcation of the lands, the weakening of the FUNAI and consultation procedures.

Thus, just as they violate the Constitution and the ILO Convention No. 169, they infringe both the UNDRIP and the ADRIP, specifically regarding Articles 26 (UNDRIP) and Article XXV, 2 (ADRIP) and Article 19, 32.2 (UNDRIP) and Articles XXIII, 2, XXVIII, 3 e XXIX, 4, (ADRIP), which enshrine, respectively, the right of indigenous peoples to their traditional lands and the right to consultant and prior, free and informed consent.

Furthermore, the Xucuru vs. Brazil case, ruled by the Inter-American Court of Human Rights, is an important precedent as the country was recently condemned for violating, among others, the right to land of the tribe due to the delay in demarcating their territory. Thus, considering the expressive number of lands that still wait to be demarcated, and that the measures adopted by the government have caused an even bigger delay on these processes, Brazil is likeable to be taken again to the IACtHR, on the same basis, regarding other indigenous tribes.

Finally, the situation of FUNAI has been a matter of concern both within the UN and the IACHR context, so there are also several statements on the undermining of foundation, what is present in the two Reports (both from the UN and the IACHR) and in a number of recommendations accepted by Brazil after the Universal Periodic review, all of them prior to Bolsonaro's government. This shows that, regardless of all the international awareness on the topic and the commitments of the country, the current government has solemnly ignored all the recommendations related to guaranteeing resources to the foundation.

In this sense, the tendency, at the time, of diminishing the funding of FUNAI, has been greatly aggravated by the new government. Coupled with it, the instability generated by moving the foundation resulted in the critical situation that, in 9 months of government, no indigenous land has

been demarcated and the numbers related to the violence against indigenous peoples have been on rise.

6. THE DRIVING FORCES BEHIND THE GOVERNMENT POLICY ON INDIGENOUS PEOPLES RIGHTS

The measures examined in the previous chapters (4 and 5) represent a larger policy. When analysing them together with the declarations of the current president on topics related to environmental and indigenous issues, it becomes clear that the government's policy implies an understating of the land focused uniquely on the exploration of its resources aiming to profit, without considerations of any kind regarding sustainability and indigenous rights. If this vision and policy are not innovative, as they share a number of similarities with the dictatorship period's mentality described in chapter 3, the forces behind the institutional political framework also do not represent a new trend in the history of the country, and are strongly pushed by agribusiness representatives, a segment of Brazilian society that has always been heavily represented in the National Congress.

That is to say, the driving forces of this policy are connected to the agribusiness, which historically, in Brazil, has endorsed a neoliberal development model based on huge enterprises and large-scale activities aimed to exportation, what has been stressed in both reports from the United Nations and the Inter-American Commission of Human Rights. In this sense, it is no accident that in the two occasions in which the Executive Power tried to remove the authority of FUNAI to demarcate indigenous lands, it straight transferred this competency to the Ministry of Agriculture, Livestock and Supplies, currently run by a representative of the agribusiness.

The Ministry of Agriculture, historically, has held the responsibility of running the public policies regarding the livestock sector, promoting the Agribusiness and the regularization of the services related to them. So, determining that this Ministry, which neither has the expertise nor a body of specialists for demarcating indigenous lands, should replace FUNAI in that task could seem, at first, absolutely odd, especially considering all the recommendations made by the UN and IACHR regarding the foundation.

However, considering the larger political context and the fact that agribusiness representatives have historically pushed, mainly inside the National Congress, their interests in the

detriment of indigenous rights, especially in the region of the Amazon, attempts to link the demarcation of indigenous lands to the Ministry of Agriculture is not surprising and are basically just efforts to institutionally subordinate indigenous rights and interests to the wills of agribusiness representatives.

Different civil society actors that advocate for indigenous and environmental rights have continuously denounced that the conservative faction of the country's powerful agro-industrial sector, known as the "*ruralistas*", is highly influencing Bolsonaro's Amazon agenda. For instance, Amazon Watch has stated that "*working from within Bolsonaro's government, industry representatives are stripping protections for forests and land rights in order to gain unfettered access to areas currently safeguarded from industrial activity*" (Amazon Watch, 2019: 3). The full implementation of their wills, therefore, would be a disaster for the Amazon rainforest and indigenous peoples who live there and would also worsen the global environmental crisis (Amazon Watch, 2019: 3). Under Bolsonaro's presidency, deforestation has spiked while conservative actors within Brazil's powerful agribusiness sector have played a central role in pushing policies to facilitate the expansion of industries into protected areas, including via law projects (Amazon Watch, 2019).

But this policy does not serve only the interests of large national companies. As the agribusiness sector in Brazil relies on the export of commodities and on foreign investment, "*the actors operating in the Brazilian Amazon - which have documented links to illegal deforestation, corruption, slave labour - openly trade with and receive financing from a range of international companies, notably in Europe and North America*" (Amazon Watch, 2019: 3-5). In this regard, a recent report launched by Amazon Watch (2019) has analysed "*56 Brazilian companies that were fined for environmental crimes in the Amazon since 2017*" and identified "*a range of northern commercial interests that do business with them*", demonstrating the complicity of global actors with harmful practices in the region (Amazon Watch, 2019: 5).

The perspective that drives the government policy is not only expressed in the measures previously analysed, but also in the content of the President discourse. Thus, analysing his discourse can lead to a better understanding of the political moves connected to this topic. In fact, just the pronouncements of the president themselves have been a matter of grave concern and protests

within indigenous movements, which often argue that his discourse has functioned as a boost for invasions of their lands and physical violence against them.

For instance, in more than one occasion the President has affirmed that he would not demarcate a single indigenous land during his mandate, often stressing that this is not his obligation. In the last public declaration, he added that “*Indians cannot remain poor on rich lands*” and that there are areas in the country that you cannot produce anything, as there is no linear path to sell or export without reaching an indigenous land. His main argument is that indigenous populations already own 14% of the Brazilian territory, what would be enough. He claimed that the demarcation process has been irresponsibly carried out by his predecessors, in a way that “*the Indian was used to undermine the progress of the Amazon region*” (Putti, 2019; Vargas, 2019). In this sense, he proclaimed that, if the demarcation process keep going and the rest of the lands claimed by indigenous communities be recognised, the share would go over 20% of the country’s territory, a percentage too excessive or, in his exact words: “*too much land for a few Indians*”.

The content of those statements demonstrates that, according to his understanding, demarcating indigenous land is a matter of political choice, rather than a right recognised in the Constitution and in the several international instruments ratified by the country. This political choice would be primarily based on whether the current president decides a certain amount of land is enough or not for indigenous peoples considered as a whole, essentialising an entire population, and considering them as a mere category and not as singular groups, living in different parts of a continental country, and speaking diverse languages and carrying on completely distinctive ways of living. That is to say, if the number were considered already enough for the Executive leader, the rest of indigenous groups whose lands have not been demarcated yet would simply have the demarcation of their territory at a stall.

Bolsonaro’s discourse also demonstrates that the attempts to transfer land demarcation matters to the Ministry of Agriculture were, above all, intended to guarantee that FUNAI would not proceed with the already delayed process, or, in other words, materialise his promise that no indigenous land would be demarcated over his mandate. One way or another, all these moves have certainly destabilised the work of the foundation, which even had his president exonerated by Bolsonaro in June due to pressures from agribusiness representatives, over this year (2019). When

he left the office, the former president of FUNAI, Franklin Ribeiro, affirmed that the Bolsonaro has been terribly bad advised on the conduction of the indigenous policy, stressing that the main presidential assessor on the issue propagates hatred towards indigenous peoples (Valente, 2019).

Furthermore, the understating of land implicit in the current government's policy directly conflicts with the vision of indigenous peoples on their territories – that is, their deep connection with the land, central to multiple aspects of their lives and well being, such as identity, ancestrally, medicine, traditional and sustainable agriculture, etc. A view that, as discussed in the last two chapters of this work, has been widely recognised by the international human rights law and by the Brazilian law framework.

More than polemic speeches, the policy has been marked by the continuous denial to dialogue with indigenous groups of Brazil, despite the international instruments and the Constitution establishing the duty to include them in decision-making processes. As a result, indigenous peoples have intensively manifested themselves against the government's policy towards their people and the environment. As the most notorious example of this tension is the fact that the president has not accepted to receive and talk with *cacique* Raoni Metuktire, the Brazilian indigenous leader with biggest international reach, stressing that he does not recognise the *cacique* as an authority. Nonetheless, Raoni has been in a number of meetings with other international leaders from other countries throughout the year of 2019 and has manifested the indigenous peoples' concerns over Bolsonaro's policy, affirming that the declarations of the president on environmental issues prompt violence against his people, deforestation and fires in the Amazon region (Marin, 2019).

In a nutshell, this clearly demonstrates that the government, once again in the history of the country, is seeing indigenous peoples as an obstacle to economic development, the latter, of course, exclusively considered on a neoliberal basis. Borrowing Becker's (2010: 63) words, "*The view that indigenous groups represent an obstacle to progress was clearly evident during Brazil's military regime and can still be felt today*". I would add that this vision has been getting stronger throughout the last year (2019). But more than that, the current government has no understanding of the fact that the country owes a historical debt to its indigenous peoples who have been pushed off their lands, suffered marginalization and discrimination since the formation of the state, and, despite the

adversities they have faced, “remain firm in their fight to preserve their lands, culture, and to determine their own futures” (United Nations, 2016: 20).

More than ever, as stated by Jaichand and Sampaio (2013: 446), “Brazil seems to be going back to a colonization policy of obliterating natives' rights for what it deems to be the interest of society—an unfortunate step backward on the road to a peaceful and multicultural world”. They add that the Brazilian government, in its path towards digression, makes it clear that neither international organs nor national movements will stay in its way.

Rather than being seen as a burden to the state or an obstacle to national development, indigenous contributions to Brazilian society should be widely recognized and preserved (United Nations, 2016: 20). In fact, the protection of the rights of indigenous peoples should be in the broader interest of Brazilian society, and “the continued occupation of their land by them regarded as a necessary social function of such land” (Jaichand and Sampaio 2013: 446).

In this sense, this policy also ignores indigenous land’s “efficiency and sustainability potential, with such results obtained through low public spending” (Lauriola 2006b quoted by (Gouritin and Aguilar, 2017: 294). Today, in the context of global environmental change, concrete opportunities have emerged to support indigenous peoples and other traditional populations in their direct and indirect contributions to conserving biodiversity-rich areas, which provide a range of ecological services to local, regional, national and global communities (Gouritin and Aguilar, 2017: 294), as is the case of indigenous groups living in the Amazon. As *Cunha (1994: 105)* teaches it, indigenous right to land should be understood as a prerequisite to the preservation of the biodiversity. What should be sought, therefore, is to enable conditions to preserve this richness, converging indigenous rights with the interests of the entire society.

7. WIDER IMPLICATIONS OF THE POLICY AND ITS POTENTIAL IMPACT ON BRAZIL'S COMMITMENT TO PROTECT BIODIVERSITY AND CONTRIBUTE TO THE OUTCOMES OF THE PARIS CLIMATE AGREEMENT

The Brazilian Amazon is an extensive area of 5.5 million square kilometres in the northern part of the country. As the world’s largest rainforest, the Amazon provides 20% of our

oxygen, houses 10% of the planet's biodiversity, and helps to stabilize the global climate³² (Amazon Watch, 2019: 5). It is one of the richest forests of the world in terms of biodiversity and, as indigenous lands comprise an expressive parcel of its territory, a policy that threatens the protection of these peoples and their lands, automatically threatens the protection of the biodiversity (Barroso, 1994: 661). In other words, the active role played by indigenous people in protecting and preserving the rainforest is “(...) *threatened by the range of exogenous and endogenous pressures that are driven by a development model through market forces and predatory demands that institutional and juridical barriers are often unable to withstand*” (Lauriola, 2013: 167).

As Gouritin and Aguilar (2017: 294) teach, this triple dimension “human rights, environment protection and indigenous peoples” is particularly relevant in the context of the American continent that is, simultaneously, rich in terms of biodiversity and multiculturalism. Considering that two-thirds of Amazon are located within Brazil's borders, the country plays a critical role in the future of planet's climate and, therefore, has not only the potential, but also the responsibility to offer environmental leadership by rigorously protecting its irreplaceable rainforest and the indigenous who call it home (Amazon Watch, 2019).

That is precisely why concerns over the current government administration's policies regarding the conservation of the Amazon forest have spiked since June 2019. When Brazil's National Institute for Space Research (INPE) first realised the data showing that deforestation rates from April through June had increased considerably compared with the same period in the previous year, rather than taking immediate actions against it, Bolsonaro questioned the veracity of the numbers and later suggested that his administration should have the right to approve the agency's data before they are released to the public. In response, INPE's director at the time, Ricardo Galvão, accused the president of cowardice for publicly attacking the institute, what led to his exoneration a few weeks later. Scientists have defended INPE, saying that it has the most comprehensive deforestation monitoring system in the world and guarantee its data is 95% accurate (Tollefson, 2019).

³² <https://www.conservation.org/places/amazonia>

These events, together with the fact that, under Bolsonaro, Brazil's Environmental Ministry (MMA) has suffered devastating cuts (Amazon Watch, 2019: 9), have led environmental and indigenous activists to blame the current president for the situation of the fires in the Amazon. Since then, as already contextualised in chapter 3, the rise of the fires has been a central concern of the international media and a matter of discussion in diplomacy. The common point is the fear of the possible consequences Bolsonaro's policy can bring about to the future of indigenous peoples and to the environment. These international concerns are linked to a number of events and discussions surrounding climate change and the preservation of biodiversity that have taken place over the world since the mid-1980s and which have led to substantial advancements in the international environmental law.

After the Convention on Biological Diversity (CBD)³³ was signed at the Rio de Janeiro Earth Summit in 1992, a new paradigm slowly emerged and spread: that of sustainable development. *“Under this new paradigm, policies would aim not only at environmental protection per se, but that conservation was now seen as functional to people’s well-being, thus helping to ensure environmental quality for present and future generations”* (Lauriola, 2013: 158).

In this sense, the CBD officialises the new discourse that *“local peoples know and manage their environment sustainably”* (Lauriola, 2013: 158). According to Lauriola (2013: 158), this discourse encompasses the idea that indigenous peoples enable the maintenance and enhancement of the biodiversity. That is, the globalisation of environmental issues has reshaped the idea ‘the local’, *“as local practices started to be qualified (from agriculture and forestry to biodiversity management) as holding multiple virtues”* (Lauriola, 2013: 158).

Another outcome of the 1992 Rio Conference was the United Nations Framework Convention on Climate Change (UNFCCC)³⁴, which entered into force on 21 March 1994 and, today, has near-universal membership: 197 countries have ratified it. The ultimate objective of this Convention is to stabilize greenhouse gas concentrations *“at a level that would prevent dangerous*

³³ Full text available at: <https://www.cbd.int/convention/text/> [Accessed 05/09/2019].

³⁴Full text available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf [Accessed 02/09/2019].

anthropogenic (human induced) interference with the climate system". It states that "such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner" (UNFCCC, 1994).

At COP 21 in Paris, which took place on the 12 December 2015, Parties to the UNFCCC settled an agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future. The Paris Agreement builds upon the UNFCCC and sets states to make great efforts to combat climate change in a cooperative way, so that developed economies must support developing countries to achieve it. As deforestation is responsible for a considerable part of global greenhouse effect emissions, forest conservation's importance in mitigating climate change was a topic of agreement between developed and developing nations. In this sense, there was an appeal for developing countries to reduce their deforestation and degradation, and that developed nations should pay compensation. Thus, for Paris Agreement to succeed forest countries need to develop policies and institutions to reduce and possibly stop deforestation and forest degradation (United Nations, 2018).

Considering that Brazil has ratified both conventions and also took part in the Paris Agreement, its environmental policies have fairly figured as a matter of concerns around the world. In fact, the cut of resources destined to combat fires in the rainforest (Amazon Watch, 2019), and the subsequent sharp increase in the fires, with the scepticism of the president towards the related statistics, make the situation catastrophic and often has been classified as a political and environmental crisis.

Therefore, if new policies are not implemented, in a way that strengthens environmental and indigenous protection in the country, everything indicates that this crisis will only be aggravated, boosting the pace of the deforestation of the Amazon, what, besides breaking Brazil's environmental commitments, could lead the Amazon ecosystems to decline to a point of no return, eradicating its biodiversity and worsening the ongoing process of global warming.

8. FINAL REMARKS

The policy that has been adopted by the current Brazilian Federal government throughout 2019 greatly affects the demarcation of indigenous peoples land and violate both the national and international human rights law framework, as discussed in chapter 4 and 5. In violating their right to land it also harms other human rights of indigenous peoples that can only be fully guaranteed through the implementation of the former, such as the right to self-determination.

This policy is well illustrated through the recent measures regarding the FUNAI, the foundation historically destined to protecting indigenous rights and conducting the demarcation process of their lands. Under Bolsonaro's administration, FUNAI has been greatly undermined as cuttings in its budget have reached a critical situation. In addition, it suffered two attempts to loose its authority over the demarcation of indigenous lands, which, to say the least, creates a sense of political instability and, as a result, no demarcation process has been concluded between January and September 2019, almost a quarter of Bolsonaro's mandate.

This scenario is aligned with the willingness manifested by Bolsonaro in regard to the future of indigenous peoples, as he often declares that his government will not demarcate a single indigenous territory. However, it runs absolutely counter the Federal Constitution of Brazil, the dispositions of the ILO Convention No. 169, the UNDRIP, the ADRIP, the jurisprudence of the IACHRC and the recommendations made to and later accept by Brazil in the last UN Universal Periodic Review.

The indigenous right to land, rather than a political choice, is recognized by the Federal Constitution, the ILO Convention No. 169, the UNDRIP and the ADRIP. Moreover, recent reports from the United Nations and the IACHRC, as well as the Periodic Review recommendations, emphatically state that the demarcation processes of indigenous lands in Brazil should be concluded in order to guarantee indigenous rights and honor the country's commitments, and that FUNAI should be provided with sufficient resources to truly carry out its duties on the protection of these people.

Thus, these measures reflect a political will that collides frontally with indigenous rights. Even though two of these measures are not officially valid anymore, as a formal manifestation of the current government's policy towards indigenous people, together with statements and pronouncements of the president on the topic, make room for the raise of violence against indigenous

peoples and the deforestation of large areas, some of them in their lands, a widely reported phenomenon during 2019.

This policy reflects some driving forces in the Brazilian political context and a specific model of development that confronts the indigenous peoples vision regarding their own lands. In doing so, it poses a threat to the future of indigenous peoples of Brazil and the Amazon forest. As indigenous lands represent a significant part of the Amazon, areas that are ranked as the most conserved and rich in terms of biodiversity, the urgency for land demarcation is exacerbated by the risk of increasing deforestation, destruction of rivers and depletion of soil quality due to intensive monocropping and mining activities. That is, indigenous lands rights are intrinsically linked to the preservation of the rainforest. Conversely, the absence of their rights, coupled with the undermining of environmental policies on other protected areas, can lead to drastic costs (Amazon Watch, 2019).

In this sense, the current government's vision and policy can lead to wider and irreversible consequences, as the displacement of indigenous peoples and the deforestation of the largest tropical forest of the world, which would bear great impacts to the global warming, jeopardising the country's commitment to protect biodiversity and contribute to the outcomes of the Paris climate agreement.

The present research has been inherently constrained by the fact that the phenomenon under analysis is contemporaneous to the time of writing. Due to the extreme social and environmental importance of the subject, further academic and non-academic studies are required to clarify the roots and possible consequences of the ongoing process. Most importantly, Bolsonaro's government willingness to negligent environmental preservation and indigenous rights to please a narrow set of private interests should be closely monitored by the civil society, as the consequences can reach a point of no return.

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