Revista Direito e Praxis

Self-determination or trusteeship? An analysis of the Xukuru case

Autodeterminação ou Tutela? Uma análise do Caso Xukuru

Sílvia Maria da Silveira Loureiro[1]

[1] Universidade do Estado do Amazonas, Manaus, Amazonas, Brasil. E-mail: silviamsloureiro@gmail.com. ORCID: https://orcid.org/0000-0002-2006-7910.

Dandara Viégas Dantas[2]

[2] Universidade do Estado do Amazonas, Manaus, Amazonas, Brasil. E-mail: dandaraviegas@hotmail.com. ORCID: https://orcid.org/0000-0001-8872-3315.

Jamilly Izabela de Brito Silva[3]

[3] Universidade do Estado do Amazonas, Manaus, Amazonas, Brasil. E-mail: jamilly.izabela@gmail.com. ORCID: https://orcid.org/0000-0002-7776-5357.

Article received in 31/01/2022 and accepted in 02/02/2022.

Abstract

The study seeks to contribute to the improvement of the inter-American process in contentious cases involving indigenous peoples, based on the effective application of the principle of peoples' self-determination regarding the realization of the right to ownership of their ancestral lands. Deductive and comparative methods were used, fostering the dialogue between Brazilian Constitutional Law and International Law of Indigenous Peoples.

Keywords: Self-determination. Territorial Rights. Inter-American Court of Human Rights.

Resumo

O estudo busca contribuir com o aprimoramento do processo interamericano nos casos contenciosos envolvendo povos indígenas, a partir da efetiva aplicação do princípio da autodeterminação dos povos quanto à realização do direito à titularidade de suas terras ancestrais. Foram utilizados o método dedutivo e o comparativo, fomentando o diálogo entre o Direito Constitucional brasileiro e o Direito Internacional dos Povos Indígenas.

Palavras-chave: Autodeterminação. Direitos territoriais. Corte Interamericana de Direitos Humanos.

Introduction[1]

There is no doubt that the judgments handed down by the Inter-American Court of Human Rights are binding for those states that have sovereignly declared to submit to its jurisdiction, as per article 62 of the American Convention on Human Rights (ACHR). Article 68.1 of the ACHR, in turn, provides that "the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties". This is a procedural obligation assumed by the States under jurisdiction, as a logical consequence of the final and unappealable nature of Inter-American sentences, conferred by article 67 of the ACHR, and under this obligation rests the fundamental *pacta sunt servanda* principle, the basis of International Law.

In contrast, it cannot be ignored that compliance with Inter-American sentences is one of the most complex stages of the process before the Inter-American System of Human Rights (IASHR). On the one hand, the decentralized nature of international law means that there is no direct coercion with the use of force against a recalcitrant State in complying with the orders issued by the Inter-American Court. The Court can only indicate cases in which a State has not complied with its judgments in an annual report submitted to the General Assembly of the Organization of American States (OAS) with pertinent recommendations, in accordance with article 65 of the ACHR.

On the other hand, the lack of internal legal and political mechanisms in most of the American States[2], hinders the internalization and prompt and full compliance with Inter-American sentences, especially with regard to non-indemnity reparations, such as victim rehabilitation measures, legislative changes, measures against impunity for public and private agents directly responsible for the violations recognized in the sentence, and the implementation of public policies to prevent the repetition of the same violations in future cases.

[1] Over time, the Xukuru People have been identified as Sukuru, Xucuru, Shucuru, Xacururu, and Xacurru. In this article, we use consonants "x" and "k" in the spelling of the name of this people, and of one of its main leaders, in reverence to their preferred way of self-identifying as "Xukuru" and "Xicão", respectively. The spelling with a "c" will only be used when expressly mentioning the sentence of the Inter-American Court of Human Rights.

[2] See, for example, the study by Marcos José Miranda Burgos, which examines the existing mechanisms in Peru, Colombia, Argentina, Mexico, Guatemala and Ecuador. Cf.: BURGOS (2014, p. 142 and following). An analysis of the resolutions on compliance with inter-American sentences reveals that reparations for damages and those related to the publicity of decisions are the most rapidly complied with by the States.

Thus, precisely in order to prepare its annual report, the Inter-American Court has developed - in its forensic practice - the stage of supervision of compliance with its own sentences (BURGOS, 2014, p. 137), to ensure, through a dialogical procedure between the parties to the case, the Inter-American Commission on Human Rights (IACHR) and *amici curiae*, the execution of its determinations, in periodic rounds of reporting on the resolutive points fulfilled or pending compliance by the State.

Following this practice, in the case of the Xucuru Indigenous People and its Members vs. Brazil, judged by the Inter-American Court on February 5, 2018, Resolutive point No. 12 consigned that the State should, within one year from the notification of the judgment, submit a report to the Court on the measures adopted for its compliance, determining in Resolutive point No. 13, that this case will be subject to supervision of compliance with the judgment by the Inter-American Court until the State fully complies with its provisions.

In observance of the above, in a Resolution dated November 22, 2019, the Court pronounced, as follows, in the first cycle of supervision of compliance with the judgment of the Case of the Xucuru Indigenous People and its Members *vs.* Brazil:

> 1. Declare, in accordance with the provisions of Considerations 5 to 7 of this Resolution, that the State has fully complied with the measures of disclosure and publication of the Judgment and its official summary (*resolutive point ten of the Judgment*).
> 2. Keep open the process of supervising compliance with the following remedies, which, as per the provisions of Consideration 3 of this Resolution, will be evaluated in a subsequent resolution:
> a) Guarantee, in an immediate and effective manner, the Xucuru Indigenous People's collective property right over their territory, so that they do not suffer any invasion, interference or damage, by third parties or State agents that might depreciate the existence, value, use or enjoyment of their territory *(resolutive point eight of the Judgment*);
> b) Complete the restructuring process of the Xucuru indigenous territory, with extreme diligence, make compensation payments for pending good faith improvements, and remove any type of obstacle or interference on the territory in question, in order to ensure the full and effective domain of the Xucuru people over their territory, within no more than 18 months *(resolutive point nine of the Judgment*);
> c) Pay the amounts established as compensation for immaterial damage *(resolutive point eleven of the Judgment*); and
> d) Pay the amounts established as costs *(resolutive point eleven of the Judgment*).

> 3. To provide that the State submit to the Inter-American Court of Human Rights, no later than February 21, 2020, a report on all measures pending compliance.
> To provide that the representatives of the victims and the Commission submit observations on the State's report mentioned in the resolutive point above, within four and six weeks, respectively, of receipt of the report.

As can be seen, the Brazilian State, without deviating from what generally occurs in other States of the region in terms of compliance with inter-American sentences (BURGOS, 2014) (ORTIZ, 2018), managed to quickly implement the measures for publicizing and disclosing the decision. As for the part referring to compensation, the indigenous people themselves resisted the establishment of a community development fund based on the payment of US$1,000,000.00 (one million dollars) as compensation for the immaterial damage suffered by the members of the Xukuru People, and the Inter-American Court agreed, in paragraphs 4 to 7 of the aforementioned resolution, that the State should make the payment directly to the association appointed by the Xukuru Indigenous People. According to the research of Franco Neto (2020, p.221) in the Transparency Portal of the Brazilian Federal Government, a first payment was identified as having been made on January 21, 2020, in the amount of R$4,117,871.00, and a second payment, on February 3, 2020, in the amount of R$65,498.12 referring to the complementary payment of the sentence and the costs of the case, totaling US$ 15,405.16.

In this context, this article proposes an in-depth analysis of the possible legal causes of the noncompliance with the Inter-American judgment in the Case of the Xukuru Indigenous People, focusing on the analysis of the obstacles of Brazilian domestic law in the face of the principle of self-determination and the right to collective ownership of indigenous territories established by the interpretation of Article 21 of the ACHR in the case law of the Inter-American Court.

To this end, in the first place, the need to improve the procedure for contentious cases before the Inter-American Court of Human Rights will be highlighted in order to guarantee a true protagonism for indigenous peoples without retrogressing to the protection of the Inter-American Commission of Human Rights in situations such as the

failure to present the Brief containing Pleadings, Motions, and Evidence (ESAP)[3]. Next, based on the obligation contained in Article 2 of the ACHR, it will be demonstrated that the Brazilian internal regulations are insufficient to ensure the enjoyment and exercise of the right to indigenous collective property within the framework of a simple, rapid and effective process, particularly with regard to FUNAI Normative Instruction No. 2/2012. Finally, the contradiction existing between resolutive point 9 of the sentence under analysis and the Brazilian constitutional provision for attributing ownership to indigenous lands as property of the Union and not of the indigenous people collectively, will be discussed.

To conduct this study, the main methods used will be deductive and comparative, fostering dialogue between Brazilian Constitutional Law and International Indigenous Peoples' Law. In addition, the procedure will be bibliographic-documentary and the approach strategy will be the selected case (Xucuru Indigenous People and its Members vs. Brazil).

From the proposed studies, contributions will be offered for the improvement of the Inter-American process in relation to contentious cases involving indigenous peoples and with greater effectiveness of the application of the principle of self-determination of the peoples regarding the right to ownership of their ancestral lands.

1. Indigenous peoples as protagonists in the Inter-American process: self-determination or trusteeship in the case of the Xukuru indigenous people?

Although ILO Convention 169[4] does not specifically refer to the right to self-determination[5] for indigenous and tribal peoples, the international treaty expressly

[3] Provided for in art. 40 of the Rules of Procedure of the Inter-American Court of Human Rights, which states: Upon notice of the presentation of the case to the alleged victim or his or her representatives, these shall have a non-renewable term of two months as of receipt of that brief and its annexes to autonomously submit to the Court the brief containing pleadings, motions, and evidence.

[4] Internalized into the Brazilian legal system through Legislative Decree No. 143, of June 20, 2002, and Presidential Decree No. 5.051, of April 19, 2004.

[5] ILO Convention 169 itself expressly states that "the use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights that may attach to that term in international law. According to Anjos Filho (2013, p. 594), "the strong historical resistance of States in general to recognizing that indigenous peoples are holders of the right to self-determination stems precisely from the fear that this right poses a serious threat to state territorial integrity, as often the strong cultural identity of indigenous peoples is viewed with suspicion and as a possible indication of the desire for secession."

provides that the interested peoples shall have "the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use", in addition to the rights to "exercise control, to the extent possible, over their own economic, social and cultural development", and to "participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly" (art. 7.1)[6].

Furthermore, the text of the ILO Convention 169 also guarantees the right of indigenous and tribal peoples to prior, free, informed and bona fide consultation whenever the State envisages measures that may affect them directly. Said consultation must occur "through appropriate procedures and in particular through their representative institutions", guaranteeing that the means are established through which the interested peoples can participate freely, to at least the same extent as other sectors of the population, and at all levels, as well as providing mechanisms for the "full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose" (Art. 6)[7].

In these terms, ILO Convention 169, unlike its predecessor, the integrationist ILO Convention 107[8], is based on the concept of the autonomy of indigenous peoples, which is easily visualized from three rights guaranteed in its text, namely: the right to self-identification, "in the sense that it is the indigenous people themselves who must assess their condition of being indigenous, without this being done in a heteronomous manner by other agents" (OLIVEIRA and ALEIXO, 2014, p. 4); the right to participation of

[6] Here, a caveat is in order. Although the text of article 7, item 1, of ILO Convention 169, contains the expression "right to choose" in the Portuguese translation attached to Decree 5.051/2004, the texts of the same article in the official versions in English ("right to decide"), Spanish ("derecho de decidir"), and French ("droit de décider") contain expressions analogous to the expression "right to decide". Such imprecision in the translation has relevant implications for the analysis of the scope of the right to autonomy and self-government guaranteed by the Convention.

[7] The provision contained in Art. 6 must be read in conjunction with the analogous provisions for consultation contained in Art. 7, item 1, already cited, and in Arts. 15 (right to consultation in relation to the exploitation of natural resources), 16 (right to consultation in relation to the removal/transfer of indigenous peoples from their lands), and 17 (right to consultation in relation to the transfer of lands)

[8] Oliveira and Aleixo (2014, p. 3-4) comment on the integrationist nature: "In addition to the idea that peoples had not completed the proper stage of development, which rested on the notion of integration, [in ILO Convention 107] there is also the issue of 'protection' for the populations [...] that [...] should be promoted by the signatory national States, even suggesting the creation of a specific body to deal with the matter. In Brazil, 'protection', based on ILO Convention 107 and the Civil Code of 1916, still in force at the time, took on the characteristics of trusteeship, which was later criticized by indigenous peoples and indigenous leaders [...]".

indigenous peoples in organs that deal with indigenous issues and, the right to prior consultation, free, informed and in good faith.

Therefore, the main parameters of ILO Convention 169 are associated with "the respect for indigenous peoples as communities of political subjects, promoting their rights on an equal basis with other members of the population of a given State, and ensuring the integrity of their traditional cultural practices" (DINO, 2014, p. 497-498).

Thus, based on this international treaty, applicable to the Inter-American system of human rights protection, under the terms of art. 29, "b" of the ACHR[9], both a "self-determination as a choice of future", which is not to be confused with the right to constitute themselves as a State, and the right "to be consulted whenever any measure, act or action of the hegemonic society may interfere with their social being or their territoriality" (SOUZA FILHO, 2019, p. 22) are consolidated, in favor of indigenous and tribal peoples.

Moreover, with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (2007) and the American Declaration on the Rights of Indigenous Peoples (2016), the right to free determination was expressly guaranteed in Article 3 of both instruments and in Article 4 of the United Nations Declaration, *in verbis*:

> American Declaration. Art. III. Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development; [...]
>
> United Nations Declaration. Art. 3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. [...]
> Art. 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

With these considerations, and after analyzing the case of the Xukuru Indigenous People before the Inter-American Court of Human Rights, we can identify at

[9] Article 29. Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: [...] b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

least three situations that can be characterized as violations of the right to self-determination, especially since, in this case, the Xukuru Indigenous People - as collective subjects - must be considered victims.

First of all, no formalities are required to access the Inter-American human rights protection system. Any person or group of persons, or legally recognized non-governmental entity in one or more OAS member states, can submit petitions to the Commission on their own behalf or on behalf of a third party regarding an alleged violation of a human right recognized in the international treaties, which make up the Inter-American human rights protection system (art. 23 of the Inter-American Commission Rules)[10]. The presentation of a petition can even be done via e-mail. In addition, the Inter-American Court has already taken a position in Chapter VI of Advisory Opinion No. 22 on the right of indigenous and tribal peoples, as collective subjects, to petition the Inter-American System (Inter-American Court, 2016, pp. 27-29).

The same flexibility, however, is not applied when, as occurred in the case of the Xukuru Indigenous People, there is no submission of a written petition, arguments, and evidence (ESAP). It is true that the Rules of Procedure of the Inter-American Court expressly provide that (1) when submitting the case to the Court, the Commission must indicate "the names, address, telephone number, electronic address, and facsimile number of the representatives of the alleged victims, if applicable" (art. 35.1, "b") and; (2) when notified of the submission of the case, the representatives of the alleged victims must confirm the address at which the relevant communications will be considered officially received (art. 39.5).

However, in the event that the victims or their representatives fail to appear or refrain from acting, the only provision contained in the regulation states that "the Court shall, on its own motion, take the measures necessary to conduct the proceedings to their completion" (art. 29.1) and further, that the parties who appear late, " shall participate in the proceedings at that stage " (29.2)[11].

[10] An analogous provision can be found in art. 44 of the American Convention on Human Rights: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

[11] Article 29. Default Procedure. 1. When the Commission; the victims, alleged victims, or their representatives; the respondent State; or, if applicable, the petitioning State fail to appear in or pursue a matter, the Court shall, on its own motion, take the measures necessary to conduct the proceedings to their completion. 2. When victims, alleged victims, or their representatives; the respondent State; or, if applicable,

In the case of the Xukuru Indigenous People, the Inter-American Court, with the failure of the representatives of the victims to present an ESAP, a fact that obviously causes enormous damage to their participation, in an autonomous manner, throughout the process, as assured by its regulations (art. 25.1)[12], limited itself to noting that the representatives did not present their writing, despite having informed that the Global Justice organization would act as a co-plaintiff in the case (see paragraph 7 of the sentence).

Therefore, due to merely procedural aspects that could easily be corrected, either by personally summoning the victims - and not only their previously accredited representatives - or by appointing an Inter-American defender[13], measures that could make up for the lack of sufficiency of the victims, the Inter-American Court conducted the entire procedure under its jurisdiction, considering exclusively the arguments and recommendations brought by the Inter-American Commission during the presentation of its Merit Report.

In short, making a comparison with Brazilian procedural law, it is as if the case that went before the Inter-American Court had been decided without the presentation of an initial petition by the victims, and no steps were taken to ensure that the main interested parties (the Xukuru Indigenous People) were effectively participating in the process.

However, in the case of the Brazilian Code of Civil Procedure (CPC/2015), a declaration of default (a situation equivalent to the provision for late entry in the proceedings in which "they shall participate in the proceedings at that stage" in Article 29.2 of the Court Rules) only occurs when the defendant, and not the plaintiff, summoned in person, fails to present a defense. Even so, the effects of such procedure, which, again, only occurs in relation to the defendant, do not manifest themselves when the litigation concerns unavailable rights (articles 344, 345, II and 346)[14].

---

the petitioning State enter a case at a later stage in the proceedings, they shall participate in the proceedings at that stage.

[12] Article 25. Participation of the Alleged Victims or their Representatives 1. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings.

[13] Article 37. Inter-American Defender. In cases where alleged victims are acting without duly accredited legal representation, the Tribunal may, on its own motion, appoint an Inter-American defender to represent them during the processing of the case.

[14] **Article 344**. If the defendant doesn't contest the action, he or she will be considered a defaulter and the factual allegations made by the plaintiff will be considered true. **Article 345**. A default shall not produce the

Therefore, the procedure adopted by the Inter-American Court in continuing with the case without the presentation of the ESAP, and without providing for the appointment of at least one curator for the victims, a role that could be assumed by the Inter-American Defender's Office, represents a contradiction in terms of its own actions on several occasions, when it made use of the principle of *iura novit curia* or even when based its decision-making on the search for the real truth carrying out effective diligence.

In fact, by limiting itself to continuing the process without ensuring the direct participation of the Xukuru Indigenous People, the Inter-American Court violates the right to self-determination already recognized by the Inter-American System itself, failing to guarantee the autonomy and self-government of these people in matters related to their distinct way of life.

The Xukuru Indigenous People, who, according to the Court's Rules of Procedure, have the right to participate actively and autonomously in the proceedings of the case, were merely protected by the IACHR because they did not submit an ESAP, and because they were not represented by an accredited representative or an Inter-American defender. This fact, in addition to demonstrating the dissonance of the processing of the case with the *rationale* that guided the amendments to the Court's Rules of Procedure to allow the direct and autonomous participation of victims, has a particular impact on the case of victims who are indigenous peoples.

It was only during the public hearing and the presentation of their closing arguments that the Xukuru Indigenous People were able to bring their arguments and evidence to the Court, related to the need to adapt Brazilian legislation to the precepts of the ACHR, specifically with regard to the right to property guaranteed to indigenous peoples, and also to the violations of the physical and psychological integrity of the Xukuru People due to the assassination of Chief Xicão, and the assassination attempts on Chief Marquinhos.

Thus, the procedure adopted by the Inter-American Court made it impossible to analyze the violations related to articles 2 and 5.1, of the American Convention on Human Rights, in addition to encountering expressed resistance to the manner of effecting the

effect mentioned in Article 344 if [II - the dispute concerns inalienable rights; [...] **Article 346**. The deadlines against a defaulting party who doesn't have a lawyer in the case record, will run from the date of publication of the decision in the official journal. **Sole Paragraph**. A defaulting party may intervene in the proceedings at any stage, receiving them as they stand.

payment of compensation granted as immaterial damages, through a community development fund that may be successful in several Latin American countries, but has not found acceptance by the Xukuru People, who already have an established association.

In particular, this study will demonstrate, in the following sections that, by not listening to the voice of the Xukuru Indigenous People, and by denying them the opportunity to present their Written Document for Requests, Arguments and Evidence, the Inter-American Court brought upon itself the enormous risk of passing judgment without knowing the particularities of Brazil in terms of indigenous territorial rights. On the one hand, the Inter-American Court did not have the elements to delve into crucial issues, such as the normative impediments of the process of restructuring (or disintrusion) of Brazilian indigenous lands. On the other hand, the Inter-American Court limited itself to applying its case law on the interpretation of Article 21 of the ACHR, without confronting the Brazilian constitutional antinomy, which despite recognizing the indigenous peoples' original rights, does not grant them collective ownership of the lands they traditionally occupy.

2. The insufficiency of FUNAI NI no. 02/2012 regarding the disintrusion of indigenous territories

The Inter-American Court of Human Rights ruled that the administrative process of ownership, demarcation, and disintrusion[15] of the Xukuru territory was partially ineffective, especially with regard to the violation of the right to judicial guarantee of reasonable time, as well as the right to judicial protection, and the right to collective property provided, respectively, in articles 1.1, 25, and 21 of the American Convention on Human Rights[16] (ACHR).

[15] Within the Inter-American System of Human Rights, disintrusion is known as "restructuring", a term seen with some frequency in the decisions of the IACHR. For this reason, both are used synonymously in this study.
[16] **Article 1. Obligation to Respect Rights.** 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. **Article 25. Right to Judicial Protection**. 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined

Although the Court recognized the partial ineffectiveness of this process, it understood that Brazil has not violated article 2 of the American Convention on Human Rights, which provides the following:

> Article 2. Domestic Legal Effects
> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

This is because, as said earlier, the representatives of the Xukuru failed to present their ESAP, extemporaneously claiming in their final allegations that internal rules would suffer from vices, such as the lack of deadline for the conclusion of the stages of the process of demarcation, recognition and entitlement, except with regard to the deadline of 30 days for the registration of the property title in the Real Estate Registry, causing the lack of legal certainty and the delay in the administrative process of demarcation of the indigenous territory.

The Court observed that neither the Inter-American Commission nor the representatives of the victims pointed out, in a precise manner, which norms were allegedly violated, or the omission, that would be incompatible with the American Convention, nor was it pointed out in what sense this norm should be modified to comply with the provisions of art. 2 of the ACHR.

This scenario reinforces the idea of the need to improve the procedure of contentious cases before the Court, so that there are no setbacks to guarantee an effective protagonism for indigenous peoples in situations such as the failure to present the ESAP.

A powerful example of violation of art. 2 of the ACHR, in the case in question, concerns the insufficiency of Brazilian legislation regulating the process of disintrusion from indigenous lands, corresponding to the stage that aims to effectively assure these

---

by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted. **Article 21. Right to Property**. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

peoples the enjoyment and exercise of the right to collective property, provided for in art. 21 of the American Convention on Human Rights.

The demarcation of traditional territories is insufficient without accompanying it with an effective process of disintrusion, because even if the land is already demarcated and registered, the indigenous people cannot obtain full possession of the area.

Disintrusion or restructuring can be conceptualized as follows (TORUÑO, 2013, p.7):

> "Restructuring is the obligation that the State and the competent institutions have to resolve, legally and/or administratively, the situation of third parties, natural or legal, distinct from the communities, who claim property rights and who are legally or illegally settled in an indigenous or Afro-descendant territory" (free translation)

The fact that an indigenous land is already registered in the name of the Union does not relieve the State of its disintrusion obligation, and does not deprive the indigenous community of its right to request the State to carry out the disintrusion of the territory (TORUÑO, 2015, p. 164).

It is worth noting that the lack of disintrusion creates many cases of "paper lands," since the areas are recognized by the Executive Branch, but remain for years in the hands of third parties while the indigenous people continue to suffer all kinds of losses (CAVALCANTE, 2013, pp. 49-50).

The restructuring must be carried out in harmony with the democratic will of the members of the communities, which make up the territory where the disintrusion is to take place. This parameter is in line with the United Nations Declaration on the Rights of Indigenous Peoples, of September 13, 2007, which states that indigenous peoples have the right to free determination, autonomy, and self-government in matters relating to their internal and local affairs, as stated in its Articles 3 and 4.

In this same sense, as already registered, the 2016 American Declaration on the Rights of Indigenous Peoples guarantees, in its article 3, the right of indigenous peoples to free determination, and that by virtue of it, freely define their political status and pursue their economic, social and cultural development.

In Brazil, FUNAI Normative Instruction No. 02, of February 3, 2012 (FUNAI NI No. 02/2012) is currently in force, which regulates the disintrusion of third parties from indigenous lands, providing for the payment of compensation for the improvements, and

also stipulating that once the payment of the amounts has been approved, personal notification must be provided for each occupant to receive it and leave the area within 30 (thirty) days.

With regard to the disintrusion of the Xukuru indigenous territory, Brazil informed the Inter-American Commission on Human Rights (OAS, 2015, p. 5) that the survey of non-indigenous occupations was concluded in 2007, indicating the existence of 624 (six hundred and twenty-four) occupations. The State also informed that between 2001 and 2005, FUNAI had paid compensation to 296 (two hundred and ninety-six) non-indigenous occupants. Brazil also pointed out that by mid-2010, 90% of the non-indigenous occupants had already been indemnified and removed from the area.

As to the number of areas still occupied by non-indigenous people, the Court's judgment in the case of the Xukuru People (OEA, 2018, p. 21), dated February 5, 2018, states that 45 (forty-five) former non-indigenous occupants had not yet been compensated and that, according to the Brazilian State, they were in contact with the authorities in order to receive payment for their improvements made in good-faith. In addition, 6 (six) non-indigenous families remained within the indigenous land, totaling an area of 160.43 hectares.

Thus, the Court decided that, despite the limited number of non-indigenous occupants at the time of the decision, the State should immediately and effectively guarantee the collective property rights of the Xukuru People over their territory, so that they would not suffer any invasion, interference or damage by third parties or agents of the State that may depreciate the existence, value, use and enjoyment of their territory, as well as, that the disintrusion of the portion of the areas that remain in possession of third parties, be carried out and the outstanding payments of compensation for good faith improvements be made (OAS, 2018, p. 49).

It is stated in the Resolution of the Inter-American Court of Human Rights, dated November 22, 2019, referring to the supervision of compliance with the sentence, that the supervision process is still open as to the measure of reparation pertinent to the restructuring of the Xukuru territory, payment of compensation and removal of any obstacles over the area in question, in a period not exceeding 18 months, ending on September 12, 2019, which reinforces the extreme relevance of the present analysis.

Before the advent of FUNAI NI No. 02/2012, disintrusion was governed by the FUNAI Ordinances No. 69/89 and 165/89, the latter having established a permanent

committee to analyze the improvements, both of which are now revoked by the new normative instrument. The point in common between them is the fact that they provide for the right of indemnification of thirdparty occupants of indigenous lands for useful and necessary improvements made in good faith.

The procedure instituted for this is provided for in art. 8 of FUNAI NI No. 02/2012, and provides that it will be carried out in the following order: (a) inspection of the occupations and improvements; (b) evaluation; (c) preliminary technical analysis; (d) deliberation; (e) appeal; (f) judgment; and finally, (h) payment.

In the inspection phase, the owner of the improvements subject to indemnity must present proof of their implementation, acquisition, or construction, in addition to the authorization from the competent bodies, when required by law, plus proof of payment of the pertinent social charges, whenever required by the social security legislation.

Subsequently, for each inspection report, an evaluation report is prepared by the General Coordination of Land Issues. Another innovation brought by the current NI concerns the payment of the improvements at their market value. And when it is not possible to make the payment in this way, the method of re-editing the improvements will be used, which is the calculation of the value by the material used for its construction, depreciated according to the state of conservation. In addition, FUNAI will not pay for loss of profits or expectation of valuation (FUNAI, 2012, p.1).

The next step is to submit the procedure to preliminary analysis by a technician from the Board of Territorial Protection, designated by the Permanent Commission for the Analysis of Improvements, in order to prepare a report instructed by the documentation and information provided by the FUNAI'S land and anthropological sectors.

The technical report to be prepared must contain a summary of the identification and delimitation process of the indigenous territories, the history of the non-indigenous occupation, the land survey and conclusive information about its time frame for the consideration of good faith. The improvements susceptible to indemnity should also be indicated, as well as the suggestion of eventual complementary measures.

The process is then forwarded, for deliberation, to the Permanent Commission of Improvement Analysis, whose decisions are made by majority vote of its members, who

may request a reevaluation, determine queries, technical or legal analysis, or agree with the evaluation previously carried out.

Once the deliberation is concluded, the Board of Territorial Protection will issue a resolution with a summary of the decision, which must be published in the Official Gazette of The Federal Government and forwarded to the municipal governments where the property is located, with the recommendation of wide dissemination.

FUNAI NI No. 12/2012 innovates by establishing a phase of appeals, providing a period of 30 (thirty) days for its presentation after the deliberation of the Permanent Commission for the Analysis of Improvements. This deadline was not provided for in previous regulations.

Before being submitted to the consideration of the Presidency of the indigenous body, the procedure must be forwarded to the Specialized Federal Attorney's Office with FUNAI, in order to manifest itself conclusively as to the procedural regularity and any appeals filed. After that, the Presidency will decide about the compensation for the improvements and any appeals that may have been filed, authorizing their payment or returning the procedure to the Permanent Commission for the Analysis of Improvements, in order to reassess the values or take other steps that it deems necessary.

After the payment of the compensation is approved by the President, or if there are occupants who are not entitled to compensation, the Board of Territorial Protection must personally notify each occupant and they must leave the area within 30 (thirty) days. If the deadline expires without the withdrawal of these third parties, the Board of Territorial Protection will adopt the necessary measures for eviction, and may request assistance from the Federal Police.

It is important to note that the improvements will only be compensated if they still exist at the time of payment, and in the state of conservation in which they are found. Furthermore, FUNAI NI No. 02/2012 provides that priority must be given to compensation for improvements of lower value and that are part of the subsistence assets of the owner, and to improvements that are located in areas of permanent social tension, as well as those in which the occupants are over 60 years old, and those with disabilities or serious illnesses.

At this point, it should be noted that in the case of the Xukuru People, the payment of compensation started with the improvements of lowest value. The indigenous people requested that the order be inverted, so that those of greater value would be paid

as a priority, in view of the fact that the occupants were the main obstacle to the Xukuru using the land.

The NI No. 02/2012 explicitly provides for the indemnification and eviction of areas occupied by third parties as a way of carrying out the disintrusion of traditionally occupied lands, notwithstanding the possibility of adopting other measures that FUNAI deems appropriate.

Despite the provision of these mechanisms for restructuring these indigenous lands, FUNAI NI No. 02/2012 does not set deadlines for the completion of its stages, with the exception of the deadline for third parties to vacate after being notified, and for the submission of appeals after the decision of the Commission for the Evaluation of Improvements, which means that the disintrusion is dragged out for years on end, at the discretion of FUNAI, prolonging the indigenous people's situation of not being able to effectively enjoy their original rights over their lands.

From the analysis carried out herein, it is clear that the internal regulations that regulate the disintrusion of indigenous lands are in conflict with art. 21 of the ACHR, since they are insufficient to guarantee the right to collective property provided for in the latter, and the Brazilian State has committed a violation of art. 2 of the American Convention of Human Rights, with respect to the need to adopt legislative or other measures, which are necessary to implement the rights provided for in the San José Treaty, which reinforces the need to improve the procedure for contentious cases before the Court, in order to prevent setbacks and to implement the rights of indigenous peoples.

3. Indigenous peoples' collective property rights and the Brazilian constitutional framework.

The end of Resolutive point No. 9 of the sentence under analysis, after establishing the duty of the Brazilian State to do the restructuring of the indigenous territory of the Xukuru, adds that this process of removal of non-indigenous must be carried out in such a way as to ensure the full and effective domain of the Xukuru People over their territory, within a period not exceeding 18 months, under the terms of paragraphs 194 to 196 of the Sentence.

For the purposes of the analysis proposed for this section, we highlight what the Inter-American Court of Human Rights stated in its paragraphs 195 and 196:

> 195. With respect to the sentence of repossession favorable to Milton do Rego Barros Didier and Maria Edite Barros Didier, if the ongoing negotiation informed by the State, in order for them to receive compensation for good faith improvements [...] does not succeed, according to the case law of the Court, the State should evaluate the possibility of their purchase or the expropriation of these lands, for reasons of public utility or social interest.
> 196. In the event that, for objective and well-founded reasons, it is not definitively, materially, and legally possible to reintegrate all or part of this specific territory, the State shall, on an exceptional basis, offer the Xucuru Indigenous People alternative lands, of the same or better physical quality, which shall be contiguous to their territory, free of any material or formal defect, and duly in their ownership. The State shall hand over the lands, chosen by consensus with the Xucuru Indigenous People, in accordance with their own forms of consultation and decision-making, values, uses and customs. Once the above is agreed upon, this measure must be effectively carried out within one year from notification of the will of the Xucuru Indigenous People. The State shall bear the expenses resulting from said process as well as the respective expenses for loss or damage they may suffer as a result of the granting of these alternative lands.

The Inter-American Court, in the case of an impasse between private interests and the recognized right over the ancestral territories of the Xukuru Indigenous People, proposed three alternatives: a) purchase, b) expropriation for reasons of public utility or social interest, and c) exceptional offer of alternative lands of the same or better physical quality, which should be contiguous to their entitled territory, free of any material or formal defect and duly entitled in their favor.

These alternatives proposed by the Inter-American Court were built throughout its case law on cases of indigenous and tribal peoples in Latin American and Caribbean countries, with legal regimes different from the one adopted by Brazil in relation to the process of demarcation and ownership of land as indigenous, the granting of ownership to the Union, and the recognition of the vital importance of these territories for the physical and spiritual survival of these traditional societies.

With regard to the first aspect, which has already been extensively dealt with in the previous section of this study, it is only fitting at this point, to reflect on whether the purchase or expropriation, for reasons of public utility or social interest, would be viable

solutions in light of Brazilian reality. Firstly, both purchase and expropriation run into the same budgetary problem of payment for improvements, which is recurring in the demarcation of indigenous lands. Expropriation, in the form proposed by the Inter-American Court, specifically requires a fair and prior cash indemnification, in the terms of Article 5, XXIV of the Federal Constitution of 1988 (FC/1988), namely:

> Art. 5. (*omissis*)
> XXIV – the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution;

It must be emphasized that, for this type of expropriation to take place, whose hypotheses are foreseen in law No. 4.132, of September 10, 1962, the compensation must be paid to the expropriated party in advance, fairly and in cash, unless the hypothesis is framed in a property that does not comply with the urban policy or the agrarian and land policy constitutionally established, when the compensation will be made in public debt or agrarian bonds, respectively, in the form of articles 182, §4, III[17] and 184[18] of FC/1988.

In this sense, the adoption of a more severe normative for the disintrusion of indigenous lands, in the case of large unproductive properties, would include expropriation for public interest, in which the non-indigenous third party would discuss the value of his compensation, in agrarian debt bonds, outside the expropriated area. However, it should be remembered that small and medium rural properties are not subject to expropriation for agrarian reform purposes (Article 185, II of the FC/1988). In these cases of small settlers, an agreement could be signed with the National Institute of Colonization and Agrarian Reform - INCRA, in order to make areas available for the resettlement of these families.

[17] Article 182, § 4, III provides: "The municipal government may, by means of a specific law, for an area included in the master plan, demand, according to federal law, that the owner of unbuilt, underused or unused urban soil provide for adequate use thereof, subject, sucessively, to: [...] III - expropriation with payment in public debt bonds issued with the prior approval of the Federal Senate, redeemable within up to ten years, in equal and successive annual installments, ensuring the real value of the compensation and the legal interest."

[18] Article 184 provides: " It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue, and the use of which shall be defined in the law. § 1 Useful and necessary improvements shall be compensated in cash."

Even so, the advantage of the expropriation procedure proposed by the Inter-American Court is in the celerity that would be given to the process of disintrusion from demarcated indigenous land, since the Union, as the expropriating public entity, could request immediate provisional vesting in possession, and the discussion about the fairness of the compensation value previously deposited could be done judicially by the expropriated private party, after the event, ensuring the indigenous people's possession of their previously demarcated territory[19].

Regarding the second aspect, i.e. the collective ownership of indigenous lands, there is an irreconcilable condition between the determination of the Inter-American Court and the constitutional provision of Article 231 of the Federal Constitution of 1988. Article 20, XI of the Constitution establishes that "those lands traditionally occupied by the Indians" are property of the Union. Paragraph 2 of Article 231 states that "the lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein".

For this reason, in the case of the Xukuru, the final part of the above-mentioned Resolution No. 9 is perplexing, since, if the resistance of non-Indian third parties persists, this would be the hypothesis of an indigenous land transcribed in a land registry office for the benefit of the people themselves and not of the Union. This excerpt is a demonstration of the profound contradiction between the case law of the Court of San Jose, aligned with the provisions of Article 14(1)[20] of ILO Convention 169, and the constitutional regime of property ownership of indigenous territories in Brazil. Despite the fact that the *caput of* Article 231 of the 1988 Constitution recognizes indigenous people's original rights over the lands that they traditionally occupy, it does not confer its domain to indigenous peoples.

According to Silva, the constitutional regime of granting the lands traditionally occupied by Indigenous peoples as Union property is justified as follows:

[19] See article 15 of Decree-Law No. 3.365, of June 21, 1941.

[20] Article 14(1) states: " The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect".

> "The constitutional grant of these lands to the Union's domain aims precisely to preserve them and maintain the link that is embedded in the rule, when it says that the lands traditionally occupied by the Indians are the Union's property, i.e., it creates a *bound property* or *reserved property* with the purpose of guaranteeing the Indigenous peoples' rights over it. Therefore, they are *inalienable* and *indispensable* lands, and the rights over it are *inviolable*. (emphasis in the original) (SILVA, 1993, P. 46)

Despite the protective intent explained by Silva, in a certain way, the placement of the lands traditionally occupied by indigenous peoples as Union property (Article 20, XI of FC/1988) is a legacy inherited from the 1967 Constitution (Article 4, IV) and Constitutional Amendment 01 of 1969 (Article 4, IV), which tainted the institute of *indigenism*, also defended by SILVA (1993, pp. 45-50) as being the root and substratum of the acknowledgement of the original rights of indigenous peoples contained in the *caput of* Article 231, therefore, according to the cited author:

> "The constitutional provisions regarding the relationship between the Indigenous peoples and their lands, and the acknowledgement of their original rights over them, did nothing more than consecrate and consolidate the *indigenism*, an old and traditional Luso-Brazilian legal institution that has its roots in the early days of the Colony, when the charter of April 1, 1680, confirmed by the law of June 6, 1755, established the principle that, on lands granted to private individuals, the *rights of the Indigenous peoples, the primary and natural lords of the* lands, would always be preserved.[21] (emphasis in the original) (SILVA, 2007, p. 858)

Regarding the third aspect pointed out, as SILVA (1993, p. 47) teaches, the basis of the concept of "traditionally occupied lands" is based on four conditions, "all necessary and none being sufficient on its own", which underlie the acknowledgement of the intrinsic relationship between indigenous peoples and their territory, namely:

> "1st) to be *inhabited* by them on a *permanent basis*; 2nd) to be *used, by them, for their productive activities*; 3rd) to be *indispensable for the preservation of the environmental resources necessary for their well-being*; 4th.) to be *necessary for their physical and cultural reproduction,* all according to their uses, customs, and traditions, in such a way that there will be no attempt to define what is permanent dwelling, mode of use, productive activity, or any of the conditions or terms that compose them, according to the civilized view, the view of the capitalist or socialist mode of production, the view of the well-

[21] SILVA, José Afonso da. Ob. cit. p. 858.

> being of our taste, but according to their way of seeing, of their culture." (emphasis in the original) (SILVA, 1993, p. 47)

For these reasons, the offer of alternative lands should be viewed with great caution, because no matter how much the Inter-American Court surrounds itself with conditions, such as consulting with the affected indigenous people, its implementation means the severance of the indigenous people's traditional ties to their territory, which collides with the interpretation of Article 21 of the ACHR established by the Court in the Mayagna (Sumo) Awas Tingni case (Inter-American Court, 2001).

Conclusion

The struggle of the international indigenous movement, which began in the 1970s, obtained, as its main result, the approval of ILO Convention 169, an international treaty that, by focusing on the concept of autonomy and self-government of indigenous and tribal peoples, ensures that these peoples, as epistemic subjects, defend the legal protection of their worldviews and reaffirm their self-determination, grafting the Western referential of International Human Rights Law with doses of diversity coming from the "Other" that had been silenced up to then.

The right to self-determination for indigenous peoples has also been duly acknowledged by the Inter-American Court of Human Rights, which, using the provisions of ILO Convention 169, in accordance with art. 29, "b" of the ACHR, constructed an inventive interpretation of art. 21 to ensure the right to communal property for the original peoples of Abya Yala[22].

It is certain, however, that for merely procedural reasons related to the handling of the case before the Inter-American Court, this right to self-determination may not be duly guaranteed. As we have seen in the case of the Xukuru Indigenous People, the absence of an ESAP and, especially, the lack of proactive action by the Inter-American Court, based on the search for the real truth through effective diligence, in addition to making the autonomous participation of the victims less of a protagonist, has resulted in the failure

[22] The use of the expression Abya Yala is made in opposition to the name America, and aims to highlight the construction of a feeling of unity and belonging among the original peoples. Cf. PORTO-GONÇALVES, 2009.

to confront various violations of the CADH, which are crucial to the case in question, and to the thousands of cases that could use the strength of interpretation that could have been made by the Inter-American Court.

An example of this is the Brazilian regulation that governs the procedure for disintrusion from indigenous lands (FUNAI NI No. 02/2012), since it does not set deadlines for the fulfillment of its stages, with the exception of the 30-day period for third parties to vacate after being notified, and the period for the presentation of appeals after the decision of the Committee for the Evaluation of Improvements, which means that the restructuring of the territory can take many years, according to the interests of the State.

That said, FUNAI NI No. 02/2012 is insufficient to guarantee the right to collective property provided for in art. 21 of the ACHR, and the Brazilian State has incurred a violation of art. 2 of the ACHR, with respect to the need to adopt legislative or other measures necessary to make the rights, provided for in the San José Treaty, effective.

However, this violation was not recognized in the case of the Xukuru People, which can be attributed to the absence of the ESAP or the Court's own lack of diligent action, as we have already mentioned. Thus, the need to improve the procedure for contentious cases before the Inter-American Court is reinforced, with the aim of preventing setbacks and realizing the rights of indigenous peoples.

Finally, with the restriction imposed on the broad discussion of the case of the Xukuru People before the Inter-American Court, reparatory measures were dictated by the San José Court, which are difficult for the Brazilian State to implement, due to the internal differences between the legal regime of indigenous land ownership in Brazilian law in relation to several Latin American countries that admit collective ownership of indigenous territories, which cannot even be delved into the concrete case.

It is necessary, therefore, to give indigenous and tribal peoples an effective voice in the Inter-American Human Rights System, so that they can autonomously express their independent arguments, produce their evidence, and deduce their reparation claims, according to their particular ways of being and living.

References

ANJOS FILHO, Robério Nunes dos. “O direito à autodeterminação dos povos indígenas: entre a secessão e o autogoverno”. In: ANJOS FILHO (org.). Direitos Humanos e Direitos Fundamentais: diálogos contemporâneos. Salvador: Juspodivm, 2013.

BRASIL. Código de Processo Civil. Lei nº 13.105, de 16 de março de 2015. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Acesso em: 16 mai. 2021.

_____. Constituição da República Federativa do Brasil de 1967. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm. Acesso em: Acesso em: 16 mai. 2021.

_____. Constituição Federal da República Federativa do Brasil de 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 16 mai. 2021.

_____. Emenda Constitucional n.º 1, de 17 de outubro de 1969. Available at: http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm. Acesso em: 16 mai. 2021.

_____. Fundação Nacional do Índio. Instrução Normativa n.º 02, de 3 de fevereiro de 2012. Brasília, 2012.

_____. Lei n.º 4.132, de 10 de setembro de 1962. Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=717565. Acesso em: 16 mai. 2021.

BURGOS, Marcos José Miranda. “La Ejecución de sentencias de la Corte Interamericana de Derechos Humanos en el ordenamiento jurídico interno”. In: Revista del Instituto Interamericano de Derechos Humanos. Vol. 60. 2014. Pp. 128-155.

CAVALCANTE, Thiago Leandro Vieira. Colonialismo, território e territorialidade: a luta pela terra dos Guarani e Kaiowa em Mato Grosso do Sul. Tese (Doutorado em História) – Faculdade de Ciências e Letras de Assis da Universidade Estadual Paulista, Assis, 2013.

DINO, Natália Albuquerque. Entre a Constituição e a Convenção n. 169 da OIT: o direito dos povos indígenas à participação social e à consulta prévia como uma exigência democrática. In: Boletim Científico – Escola Superior do Ministério Público da União (ESMPU) (Semestral). Brasília: ESMPU, ano 13, n. 42-43, jan./dez., 2014, p. 497-498. ISSN 1676-4781.

FRANCO NETO, Laércio Dias. Meios de Garantir o Cumprimento às Sentenças da CorteIDH: Uma Análise a partir das Condenações do Estado Brasileiro. Tese (doutorado). Universidade Federal do Pará. Belém, 2020.

KAYSER, Hartmut-Emanuel. Os Direitos dos Povos Indígenas do Brasil: desenvolvimento histórico e estado atual. Tradução de Maria da Glória Lacerda Rurack e Klaus-Peter Rurack. Porto Alegre: Sergio Antonio Fabris Ed., 2010.

MENDES JÚNIOR, João. Os Indígenas do Brazil, seus direitos individuaes e políticos. São Paulo: Typ. Hennies Irmãos, 1912.

OLIVEIRA, Rodrigo Magalhães de; ALEIXO, Mariah Torres. "Convenção 169 da OIT em disputa: consulta prévia, pensamento descolonial e autodeterminação dos povos indígenas". In: 29ª Reunião Brasileira de Antropologia, realizada entre os dias 03 e 06 de agosto de 2014, Natal/RN, GT.48 - Implicações e desafios da participação dos sujeitos de direito na regulamentação da 169, realidade brasileira e américa latina. Available at: http://www.29rba.abant.org.br/resources/anais/1/1402003900_ARQUIVO_Oliveira&Aleixo29RBA-GT.48.pdf. Acesso em: 16 mai. 2021.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Declaração das Nações Unidas sobre os Direitos dos Povos Indígenas. Rio de Janeiro: UNIC, 2008.

ORGANIZAÇÃO DOS ESTADOS AMERICANOS. Comissão Interamericana de Direitos Humanos. Relatório de Mérito n.º 44/2015. Caso n.º 12. 728 – Povo Indígena Xucuru Vs. Brasil. San José, 2015.

_____. Convenção Americana de Direitos Humanos - Pacto de San José da Costa Rica. San José, 1969. Available at: https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm. Acesso em: 16 mai. 2021.

_____. Declaração Americana sobre o direito dos povos indígenas. San Domingo: Organização dos Estados Americanos, 2016.

_____. Corte Interamericana de Direitos Humanos. Caso Povo Xucuru e seus membros Vs. Brasil. Sentença de 5 de fevereiro de 2018 (exceções preliminares, mérito, reparações e custas). Costa Rica, 2018.

_____. _____. Caso da Comunidade Mayagna (Sumo) Awas Tingni Vs. Nicarágua. Sentença de 31 de agosto de 2011 (mérito, reparações e custas). Costa Rica, 2001.

_____._____. Regulamento da Corte Interamericana de Direitos Humanos, aprovado pela Corte no seu LXXXV Período Ordinário de Sessões celebrado de 16 a 28 de novembro de 2009. Available at: https://www.corteidh.or.cr/sitios/reglamento/nov_2009_por.pdf. Acesso em: 16 mai. 2021.

_____._____. Supervisão de Cumprimento de Sentença - Caso do Povo Indígena Xucuru e seus membros vs. Brasil. Resolução da Corte Interamericana de Direitos Humanos de 22 de novembro de 2019. Costa Rica, 2019.

_____._____. Titularidade de direitos das pessoas jurídicas no Sistema Interamericano de Direitos Humanos (Interpretação e alcance do artigo 1(2), em relação com os artigos 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46, e 62(3) da Convenção Americana sobre Direitos Humanos, assim como do artigo 8.1 A e B do Protocolo de San Salvador). Opinião Consultiva OC-22/16 de 26 de fevereiro de 2016 (2016a). Série A, n. 22.

ORGANIZAÇÃO INTERNACIONAL DO TRABALHO. Convenção n.º 169 da OIT, de 07 de junho de 1989. Available at: http://www.mpf.mp.br/atuacao-tematica/ccr6/documentos-e-publicacoes/legislacao/legislacao-docs/convencoes-internacionais/convecao169.pdf/view. Acesso em: 16 mai. 2021.

ORTIZ TORRICOS, Marcela Rita. "Cumplimiento e incumplimiento de las sentencias de la Corte IDH en Bolivia". In: Anuario de Derecho Constitucional Latinoamericano, Bogotá, 2018, Available at: https://revistas-colaboracion.juridicas.unam.mx/index.php/anuario-derecho-constitucional/article/view/36893/33813, acesso em 16 mai. 2021.

PORTO-GONÇALVES, Carlos Walter. "Entre América e Abya Yala – tensões de territorialidades". In: Revista Desenvolvimento e Meio Ambiente, n. 20, p. 25-30, jul./dez. 2009. Editora UFPR. Available at: https://revistas.ufpr.br/made/article/view/16231. Acesso em: 16 mai. 2021.

SILVA, José Afonso da. Curso de Direito Constitucional Positivo. São Paulo: Malheiros, 2007.

_____. "Terras tradicionalmente ocupadas". In: SANTILLI, Juliana (coord.). *Os Direitos Indígenas e a Constituição*. Porto Alegre: Sérgio Antonio Fabris, 1993. ps. 45-50.

SOUZA FILHO, Carlos Frederico Marés. "A força vinculante do protocolo de consulta". In: GLASS, Verena (org.). Protocolos de consulta prévia e o direito à livre determinação. São Paulo: Fundação Rosa Luxemburgo, CEPEDIS, 2019.

TORUÑO, Wolfgang Alejandro Bonilla. Factibilidade de la etapa de saneamiento de los territorios indígenas de Bosawás y de la RRAN. Managua: Ford Foundation, 2010.

_____. Diagnóstico sobre el Saneamiento de los Territorios Indígenas y étnicos de la RAAN. Nicaragua: Ford Foundation, 2013.

_____. Derechos de los pueblos originarios Mayangna y Mískitu a la propriedade comunal y a la justicia (tese de doutorado). Granada: Universidade de Granada, 2015.

About the authors

Sílvia Maria da Silveira Loureiro[1]
[1] Universidade do Estado do Amazonas, Manaus, Amazonas, Brasil. E-mail: silviamsloureiro@gmail.com. ORCID: https://orcid.org/0000-0002-2006-7910.

Dandara Viégas Dantas[2]
[2] Universidade do Estado do Amazonas, Manaus, Amazonas, Brasil. E-mail: dandaraviegas@hotmail.com. ORCID: https://orcid.org/0000-0001-8872-3315.

Jamilly Izabela de Brito Silva[3]
[3] Universidade do Estado do Amazonas, Manaus, Amazonas, Brasil. E-mail: jamilly.izabela@gmail.com. ORCID: https://orcid.org/0000-0002-7776-5357.

The authors equally contributed to the writing of the article.