

**Mandate of the Special Rapporteur on the rights of indigenous peoples**

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolution 42/20.

Under my mandate, I am tasked to “examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples”; “to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations and abuses of the rights of indigenous peoples”; “to develop a regular cooperative dialogue with all relevant actors, including Governments” on issues concerning indigenous peoples; and “to promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples” (A/HRC/RES/42/20). I undertake my work through the elaboration of thematic reports, dialogues with Governments and other actors, undertaking country visits and promoting good practices through technical cooperation and advice.

As part of the mandate entrusted to me, I continue to observe the human rights situation in Brazil. I, and my predecessor, have undertaken official country visits to Brazil, in 2016 and 2008 respectively,<sup>1</sup> and have also issued a number of communications and press releases regarding the situation of indigenous peoples in the country. A major point of attention for the mandate has been the effective legal recognition and protection of indigenous traditional lands by State institutions, including the Judiciary, from the standpoint of international human rights standards and commitments adhered to by the Brazilian State.

The examination by the Supreme Court of Brazil of the Extraordinary Appeal No. 1.01.365 is of great relevance to my mandate. I have been informed that the decision by the Supreme Court in relation to this case will inform the national legal understanding of the possession of lands that have traditionally been occupied by indigenous peoples.

I am aware that the resolution of this case by the Supreme Court will have a great effect on the domestic interpretation of the rights of indigenous peoples under international human rights instruments ratified or adhered by Brazil and that the decision will also be influential in the rest of Latin America and other regions. Given the importance of this case, I am respectfully submitting the present observations. My submission will cover the principal observations and recommendations contained in the country visit reports made by my mandate that are relevant to the current case.

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<sup>1</sup> Reports of the Special Rapporteur on the rights of indigenous peoples on the situation in Brazil, A/HRC/33/42/Add.1 (2016); A/HRC/12/34/Add.2 (2009)

Thereafter, I will address the concept of traditional indigenous lands and territories under current international human rights law which is a matter of great importance in this case. Lastly, I will present some conclusions.

*Observations and recommendations by the previous Special Rapporteur on indigenous peoples*

The report of the country visit in 2008 by the previous Special Rapporteur refers to the historically rooted patterns of discrimination against indigenous peoples which persist, and to various historic and ongoing factors, including diseases, forced displacement and violent confrontation which have led to a situation in which many of the surviving indigenous groups in the country no longer live in their traditional lands.<sup>2</sup>

The Special Rapporteur noted the progressive domestic legal framework on the rights of indigenous peoples set by the 1988 Brazilian Constitution, commenting that “[t]his Constitution was one of the first in the world to secure indigenous people’s rights within the framework of contemporary thinking on indigenous-State relations, and it remains one of the most progressive in this regard.”<sup>3</sup> Under the 1988 Constitution, indigenous peoples are entitled to the “permanent possession” of the lands they traditionally occupy and “have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein” (article 231), while at the same time the Constitution deems these lands to be inalienable property of the Union (article 20).

The Special Rapporteur considered that the provisions in article 231 of the Constitution on the demarcation and official registration of indigenous lands and natural resources are indispensable for securing indigenous rights. He furthermore noted that “indigenous land rights under the Constitution are deemed to be “original” – meaning they originate in the indigenous presence and not in a grant from the State - the acts of demarcation and registration are acts of recognition of the rights rather than being constitutive of them”.<sup>4</sup>

The Special Rapporteur also stressed that the constitutional provisions should be interpreted in light of relevant international standards, including article 27 of the United Nations Declaration on the Rights of Indigenous Peoples (adopted in 2007 by the UN General Assembly with a favorable vote by Brazil) and article 14 of the International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples, ratified by Brazil on 2004. In this regard, the Special Rapporteur expressed concern over the 19 conditions set forth by the Supreme Federal Court in the *Raposa-Serra do Sol* ruling<sup>5</sup>, and which apply to indigenous peoples using and managing their lands. The Special Rapporteur specifically underlined that:

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<sup>2</sup> A/HRC/12/34/Add.2, para 9.

<sup>3</sup> Ibid, para. 13.

<sup>4</sup> Ibid, para. 37.

<sup>5</sup> Petição 3388, Supremo Tribunal Federal.

[w]hatever the validity or ultimate disposition of the 19 conditions [...] administrative, legislative and military authorities should exercise their powers in relation to indigenous lands in a manner consistent with these international norms. Further, the enactment of domestic legislation or administrative regulations to implement these standards is desirable.<sup>6</sup>

Therefore, the Special Rapporteur recommended that:

[i]n exercising whatever powers they have with regard to indigenous lands, all public institutions and authorities, at both the federal and state levels, should be aware of and conform their conduct to the relevant provisions of Convention 169 and other applicable international instruments which provide protection of indigenous peoples' rights to lands and natural resources, and these protections should be strengthened by domestic legislation.<sup>7</sup>

During my mandate, I undertook an official visit to Brazil in 2016. In my country report, I expressed concerns about the information received from Government authorities regarding the difficulties they faced in terms of protecting indigenous peoples' rights and demarcating indigenous lands.<sup>8</sup> I noted the dire consequences of the inadequate recognition and protection of the rights of indigenous peoples and communities over their lands, territories and natural resources, including high levels of conflict and violence against them.<sup>9</sup>

I was particularly concerned about the consequences of the Supreme Court's interpretation of the Constitutional obligations in the *Raposa-Serra do Sol* ruling. In my report, I observed that:

[...] the *Raposa-Serra do Sol* ruling — which introduced the temporal framework requiring indigenous peoples to have been in possession of their lands or to have had claims in process when the Constitution was enacted, with no consideration given to how or why they were removed from their lands — imposes constraints on indigenous peoples' rights to possess and control their lands and natural resources and hinders land demarcation.<sup>10</sup>

I noted that, although the *Raposa-Serra do Sol* decision was not necessarily binding on other cases, it was being applied by lower courts as well as the Superior and Supreme Courts in ways that are not consistent with the land rights provisions of the Constitution.<sup>11</sup>

Moreover, I expressed concern about land demarcation processes that are routinely brought under the remit of the courts, in a context of significant barriers for

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<sup>6</sup> A/HRC/12/34/Add.2, para. 40.

<sup>7</sup> Ibid, para. 85.

<sup>8</sup> A/HRC/33/42/Add.1

<sup>9</sup> Ibid, paras. 69, 70.

<sup>10</sup> Ibid, para. 69.

<sup>11</sup> Ibid, para. 69.

indigenous peoples to access to justice, which has transformed the law into ‘an obstacle to, rather than enabler for, the realization of indigenous peoples’ rights.’<sup>12</sup>

In view of all these factors which have resulted in gross violations of the rights of indigenous peoples to their lands, territories and resources, including forced evictions, I addressed a recommendation to the Supreme Court that it should ‘ensure that future rulings concerning indigenous peoples’ rights are fully consistent with national and international human rights standards.’<sup>13</sup>

I consider it necessary to reiterate this recommendation in the current circumstances and wish to recall the importance that international human rights standards recognize indigenous peoples’ rights to their lands based on their traditional use and possession without temporal limitation.

*International standards on traditional indigenous lands*

I would like to draw attention to the concept of “traditional” indigenous lands. The Supreme Court has stated that through the Recurso Extraordinário 1.017.365 it will debate on the definition of the legal-constitutional status of tenure relations in areas of traditional indigenous occupation, in light of rules established by the Federal Constitution of 1988<sup>14</sup>. I would like to respectfully point out the need to incorporate the international understanding of indigenous traditional lands rights under international human rights law and avoid limitations that would result from the application of a temporal framework doctrine.

Under Article 14 of the ILO Convention No. 169, State parties are obligated to recognize “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy”. This also includes measures to “safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally has access for their subsistence and traditional activities” (art. 14.1). In this sense, the qualifier *traditional* is of importance as it does not limit indigenous land rights to simply the lands currently possessed by them. ILO Convention No. 169 establishes a broader understanding of indigenous land rights that includes respect of the special spiritual and cultural connection that indigenous peoples maintain with the lands or territories “which they occupy or otherwise use, and in particular the collective aspects of this relationship” (art. 13.1). As clarified by the Convention itself, the term *lands* includes “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use” (art. 13.2).

The understanding of indigenous peoples’ land rights that derives from traditional use and occupation, and the particular cultural and spiritual connection that they maintain with their lands, is a *conditio sine qua non* for them to enjoy their fundamental rights.

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<sup>12</sup> Ibid, para. 79.

<sup>13</sup> Ibid, para. 97 (d).

<sup>14</sup> STF - Repercussão Geral no Recurso Extraordinário 1.017.365 (Santa Catarina), p. 4.



From this, follows the obligation of States under the ILO Convention No. 169 “to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession” (art. 14.2).

The concept of traditional indigenous land rights is further exemplified in the UN Declaration on the Rights of Indigenous Peoples which reflects a wide consensus at the global level on the minimum content of the rights of indigenous peoples. Article 26.2 of the Declaration provides for the right of indigenous peoples “to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use”. States shall legally recognize and protect said lands, territories and resources “with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned” (art. 26.3).

The current international understanding of the qualifier *traditional* with respect to indigenous land rights also provides a basis by which human rights violations and corresponding remedies can be determined in instances where indigenous peoples have involuntarily lost possession of their lands. The Declaration, for example, asserts the right of indigenous peoples “to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent” (art. 28.1).

In this regard, the UN Committee on the Elimination of Racial Discrimination, has underscored the need for States parties of the International Convention against all Forms of Racial Discrimination, including Brazil, “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories”.<sup>15</sup>

The jurisprudence of the Inter-American Court of Human Rights is also of relevance in this case. The Inter-American Court has developed an extensive jurisprudence on the subject of indigenous peoples land rights which has established that:

- “1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title;
- 2) traditional possession entitles indigenous people to demand official recognition and registration of property title;
- 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and

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<sup>15</sup> CERD, General Recommendation No. 23: Indigenous Peoples, 18/08/97, para. 5.

4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.”<sup>16</sup>

The above jurisprudence along with other elements of States’ obligations to recognize and protect indigenous land rights under the American Convention on Human Rights was reaffirmed by the Inter-American Court in the case of the *Xucuru Indigenous Peoples v. Brazil*.<sup>17</sup> The case reaffirms the obligations of the Brazilian State under current international human rights law and jurisprudence to recognize and protect the indigenous lands traditionally used and occupied by them. It also reinforces the understanding that indigenous peoples do not forfeit the right to the use of the lands they traditionally use in case of involuntary dispossession.

In view of the above, I consider that the application of a temporal framework doctrine would be inconsistent with the understanding of indigenous land rights under international human rights standards and result in significant denial of the rights of indigenous peoples in Brazil who have sought regularization of their lands since 1988. As noted earlier, indigenous peoples have faced historical factors that have led them to be involuntarily dispossessed of their lands and many would not be able to meet the temporal limits imposed in the *Raposa-Serra do Sol* ruling. In my report, I noted that numerous indigenous peoples seek to reclaim their lands, resist evictions and protect their territories from illegal activities, which in turn has placed them in conflictive situations.<sup>18</sup> It is my concern that application of a temporal framework doctrine will result in the denial of justice for many indigenous peoples seeking the recognition of their traditional land rights.

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<sup>16</sup> IA Court HR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of March 29, 2006, Series C No. 146, para. 128.

<sup>17</sup> See, IA Court HR, *Case of the Xucuru Indigenous People and its members v. Brazil*, Judgment of February 5, 2018, Series C No. 346, para. 117.

<sup>18</sup> See for example, A/HRC/33/42/Add.1, para. 22.

### *Conclusion*

The Extraordinary Appeal No. 1.01.365 presents an important occasion to ensure the effective observance of Brazil's international human rights obligations with regards to indigenous peoples. It is an opportunity to exercise a control of conventionality that includes the obligations under the American Convention on Human Rights and especially the Inter-American Court's jurisprudence on indigenous peoples, as reflected in the *Case of the Xucuru Indigneous People vs. Brazil*. I respectfully wish to recall the importance to use as a frame of reference and interpretation the provisions of the UN Declaration on the Rights of Indigenous Peoples on the recognition and indigenous peoples' traditional lands, territories and natural resources and encourage consideration of the observations and recommendations issued to Brazil by the mandate of the Special Rapporteur on the rights of indigenous peoples.

As it is my responsibility, under the mandate entrusted to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide updated information about the current status of the Extraordinary Appeal No. 1.01.365 by the Supreme Court of Brazil.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Victoria Lucia Tauli-Corpuz  
Special Rapporteur on the rights of indigenous peoples