

THE YANOMAMI IN BRAZIL: INTERNAL ORDER AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AS HUMANITARIAN CRISIS INDICATION

INDÍGENAS YANOMAMI NO BRASIL: ORDEM INTERNA E O SISTEMA INTERAMERICANO DE DIREITOS HUMANOS COMO INDICATIVO DE CRISE HUMANITÁRIA

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Abstract

This study evaluates the legal implications of the traditional occupation of land by the Yanomami people in Brazil, beginning from the construction of the highway BR-210 (Rodovia Perimetral Norte) in 1973, which corresponded to a large influx of non-indigenous people and several land conflicts. We seek to show—by analyzing the Brazilian Constitutions after 1967, the

Resumo

Este artigo trata das implicações jurídicas, no Brasil, da ocupação tradicional da terra pelos indígenas Yanomami, tendo como marco inicial construção da Rodovia Perimetral Norte em 1973, o que correspondeu a um grande afluxo de não indígenas e conflitos fundiários. Procura-se demonstrar, analisando as Constituições brasileiras posteriores a 1967, as normas infraconstitucionais recepcionadas, os



infraconstitutional law upheld by the constitution, the international treaties, and the inter-American jurisprudence—that the legal order in Brazil provides for the possession of indigenous lands, the usufruct of their natural resources, land demarcation, and the removal of intruders. However, the State systematically violates these rights, occasionally causing humanitarian crises. This serious phenomenon occurred twice. During the Brazilian dictatorship (specially from 1975 to 1990) and the Brazilian democracy crisis (beginning in 2014). Both mobilized the bodies of the inter-American human rights system. Although Indigenous rights are well developed in Brazil, their effectiveness remains a challenge due to the political opposition of certain social groups, culminating in periods of greater democratic fragility, humanitarian crises analyzed by the Inter-American Commission on Human Rights, and by the Inter-American Court of Human Rights, which has jurisdiction to respond to Brazil. **Keywords:** humanitarian crisis; indigenous rights; Inter-American Human Rights System; Yanomami.

Introduction

For centuries, the Yanomami lived in isolation from the non-Indigenous society. The geographical position of their lands (in the heart of the South American continent) set them quite far from the Iberian colonial administration. After the Brazilian independence, the governments (both monarchical and republican) lacked the mechanisms and structure to implement public policies in the region for almost a century, enabling the Yanomami to maintain control of their destiny, including their legal order. These two parallel orders never came in contact with each other.

This changes at the beginning of the 20th century, when the first contacts between the Yanomami and non-Indigenous peoples took place. The first frictions between the two orders/societies required an intersubjective articulation between

tratados internacionais e a jurisprudência interamericana, que a ordem jurídica no Brasil prevê a posse das terras indígenas, o usufruto de seus recursos naturais, a demarcação e a desintrusão. Contudo, o Estado viola sistematicamente esses direitos, causando eventualmente crises humanitárias. Esse grave fenômeno ocorreu duas vezes. Na Ditadura, especialmente de 1975 a 1990, e durante a crise da Democracia brasileira, a partir de 2014. Em ambos, os órgãos do sistema interamericano de direitos humanos foram provocados. Embora estejam bem desenvolvidos os direitos indígenas no Brasil, sua efetividade ainda é um desafio, em razão da oposição política de determinados grupos sociais, o que culmina, em períodos de maior fragilidade democrática, em crises humanitárias que são objeto de análise pela Comissão Interamericana de Direitos Humanos e pela Corte Interamericana de Direitos Humanos, que têm competência de agir face ao Brasil.

Palavras-chave: crise humanitária; direitos indígenas; Sistema Interamericano de Direitos Humanos; Yanomami.

its actors, giving rise to conflicts. At first, these contacts were not due to factual issues that demanded a common solution, thus failing to give rise to disputes over the authority over territory.

The borders between Brazil and Venezuela have been definitively fixed since 1905, leaving each nation to exercise their own territorial sovereignty without competition. However, the mere territorial delimitation between States failed to correspond to any effective transformation to territorial organization structures in the border areas. All remained as it always had. Brazil had set its territory in certain legal terms, but state agents were yet to reach its limits, maintaining the local context without external interventions. Likewise, the Yanomami remained in their lands, controlling the management of the space.

At the end of the 1960s, the millenary history of the Yanomami in Brazil began to face challenges and struggles regarding the ownership of their lands and the protection of their rights as an ethnic/indigenous group. By implementing a policy to effectively control its territory, the Brazilian State began to promote the occupation of those areas by non-Indigenous groups, pushing the Indigenous people to what is known as “demographic voids”.

The occupation by the non-Indigenous (especially miners) evidently clashed with the Indigenous’ possession of their lands, a legally relevant fact that demanded a uniform sovereign response characterized by the monopoly of force in a given geographical space. Based on the Brazilian constitutional law in force in 1973, a systemic State initiative and sponsorship started the non-Indigenous occupation of Yanomami lands.

Against this background, our first objective is to analyze the characteristics of the national strategy to occupy the Amazon and how it impacted the lives of the Yanomami. For this, we deal with the Brazilian legal order in force at that time and its constitutional and infraconstitutional laws and executive norms.

Having achieved this first objective, we can see that, despite the State terrorism under which the Brazilian society lived, the legal order expressly guaranteed the right of the Indigenous to own the lands they traditionally occupied and to exclusively explore their natural resources. We preliminarily conclude that all the problems the Yanomami faced stemmed from the non-Indigenous groups’ occupation of their lands from 1973 onward, resulting in illicit acts whose effects the State must fight as its first and foremost responsibility is that of maintaining its internal order.

Then, our second objective is to analyze the basis of the conflicts over the possession and usufruct of the lands the Yanomami have traditionally occupied

considering that they clearly have the right over them. In this second stage, we find a normative effectiveness issue, an overall common problem to the legal order.

In a third moment, we seek to understand why the rights of the Yanomami were never enforced. This study leads us to an ideological approach stemming from the implementation of a political conception by the social group that dictatorially controlled the Brazilian State for more than two decades. This despotic approach refused to recognize the subjectivity of the Yanomami, rendering legal or linguistic relationships impossible. This contempt for otherness culminates in actions or omissions that endanger the other's existence.

Thus, the growing conflicts from normative ineffectiveness due to the omission of the State lead the humanitarian crisis in Yanomami lands to its peak in the 1980s, provoking the Inter-American Commission on Human Rights to examine the case. This extremely important fact produced an Opinion from such Commission about the degree of disaggregation between the Brazilian State and the Yanomami. Since it is an extraordinary legal mechanism based on an international body and subsidiary to the Brazilian legal system, we believe that the inter-American human rights system ought to be understood as a mechanism to indicate a humanitarian crisis.

To confirm this hypothesis, we pose our question considering the crisis of the democratic State in Brazil from 2014 onward, when members of the social groups that controlled the State during the Brazilian dictatorship return to central power. In the 21st century, the worsening situation of the Yanomami due to the State's lack of interest in enforcing its Law led the humanitarian crisis in the Yanomami Indigenous Territory to a new peak at the end of the 2010s, which push again the inter-American human rights system to examine the case via both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

1 The Brazilian legal order and dictatorship: the Yanomami case

Despite their millennial presence¹ in the Amazon, the Yanomami first contacted the non-Indigenous² in the early 20th century, when scientific research was published regarding Otto Zerries' (Venezuela) and Hans Becher' (Brazil)

1 “[...] Researchers hypothesized that the Yanomami could be descendants of an ancient Amerindian group (“proto-Yanomami”) that dates back a thousand years and who lived in relative isolation over a very long period in the highlands of the upper Orinoco and the headwaters of the upper Rio Parima (Serra Parima)” (KOPENAWA; ALBERT, 2015, pp. 558-559).

2 Since this is not an anthropology study, we objectively deem the non-Indigenous as individuals who do not have Indigenous peoples' way of life, beliefs, and recognition of ethnic identity (CORREIA; MAIA, 2021).

mid-1950s expeditions. However, their notoriety only emerges in 1968, after N. A. Chagnon's *Yanomamö: The Fierce People* (KOPENAWA; ALBERT, 1995), during a time in which the Brazilian dictatorship widely and openly (GASPARI, 2002) persecuted and tortured its opponents, censored the press, and repressed partisan political activity (SARLET; MARINONI; MITIDIERO, 2014).

Art. 186 of the 1967 Brazilian Constitution provided that “Lands inhabited by forest-dwelling peoples are inalienable under the terms that federal law may establish; they shall have permanent possession of them, and their right to the exclusive usufruct of the natural resources and of all useful things therein existing is recognized” (BRASIL, 1967; our translation). At that time, the Yanomami already held property rights over the lands they had traditionally occupied.

This legal treatment was not new in Brazil as art. 129 of its 1934 Constitution provided that “The possession of lands of forest-dwelling peoples who are permanently located in them will be respected, thus, being forbidden to alienate them” (BRASIL, 1934; our translation). This article omits the usufruct of natural resources but guarantees Indigenous possession³, thus distinguishing it from the holder of the right of property. In fact, under the 1967 constitutional regime, “lands inhabited by forest-dwelling peoples” (BRASIL, 1967; our translation) configured Union assets under art. 4, IV.

According to this provision (whose wording was maintained by Constitutional Amendment no. 1/1969) and the head of art. 198 of the Constitution, “lands inhabited by forest-dwelling peoples” (BRASIL, 1969; our translation) were Union property assets. Indigenous peoples held the responsibility for their permanent possession and the Union recognized their exclusive usufruct of the natural wealth and assets in their lands. Moreover, the legal effects of acts to dominate, possess, or occupy Indigenous lands were rendered null, void, and without compensation to third parties, except for bona fide improvements.

In that period, the regular and permanent contact of the Yanomami with the non-Indigenous was limited to the work of collectors of forest products and the installation of indigenist and missionary posts. Such superficial interactions had prevented land conflicts that demanded an institutional response from the Brazilian State.

³ Art. 154 of the 1937 Constitution of the Republic: “The possession of lands of forest-dwelling peoples who are permanently located in them will be respected, thus, being forbidden to alienate them” (BRASIL, 1937; our translation). Art. 216 of the 1946 Constitution of the Republic: “Forest-dwelling aborigenes shall have the possession of the lands in which they are permanently located as long as they do not transfer it” (BRASIL, 1946; our translation).

1.1 The Plan for National Integration: land conflict in Yanomami lands in Brazil

The Government alters this situation by launching geopolitical projects to occupy the Brazilian Amazon. From 1968 onward, the State's perception of the Amazonian territory changes as it assumes a strategic role to deal with the country's underdevelopment (TOLEDO, 2012). The Brazilian Government creates the Plan for National Integration by Decree-Law no. 1.106/1970, founded on the construction of large infrastructure works (especially highways) (PEREIRA, 1971) and the installation of colonization projects on the fringes of the national territory (BECKER, 2015).

The construction of the *Perimetral Norte* highway (BR-210) began in 1973 under the Plan for National Integration. A part of it, which was immediately realized, followed a line parallel to the border between Brazil and Venezuela, a 235-km stretch that would cross the southern lands traditionally occupied by the Yanomami (KOPENAWA; ALBERT, 2015). Since then, land conflicts have arisen due to the most intense contacts between Indigenous and non-Indigenous peoples, beginning a period of degradation⁴ of the Yanomami's living conditions.

The *Radar da Amazônia* Project was also implemented in the region, which consisted of an official scientific inventory of potentially interesting natural resources (PINTO, 2002). The first wave of prospectors arrived in Yanomami lands after its completion in Roraima in 1975 (KOPENAWA; ALBERT, 2015). Driven to *Perimetral Norte* by the illusion of gold wealth, 50,000 miners passed through there in the following years (RAMOS, 2022).

The incisive presence of prospectors in Yanomami lands caused several sanitary, criminal, and environmental problems, mobilizing the national and international public opinion to defend Indigenous peoples (BARRETO, 1995). Even before the peak of illegal mining, Carlos Drummond de Andrade (1979, p. 40; our translation) warned: "The Yanomami are currently at great risk and in need of you. You don't have to fly there to help them".

Such aid referred to a project to protect the Yanomami (presented to the Brazilian Government days earlier), which took the form of the creation of the Yanomami Indigenous Park in an area in Roraima and Amazonas. According to Drummond, the Yanomami had been suffering the negative impacts of the

⁴ The historical colonization process changed the way of life and many of the characteristics of the ethnic groups throughout the Brazilian territory, acculturating and excluding them (CORREIA; MAIA, 2021).

economic expansion into the Brazilian Amazon since the beginning of the Perimetral Norte works. Thus, the solution entailed to demarcate an Indigenous land for them in accordance with art. 198 of the 1969 Constitution then in force.

A reaction held that “The demographic estimates on the press [...] intended [...] to demonstrate the need to create a Yanomami country independent of Brazil” (BARRETO, 1995, p. 18; our translation). This was based on the false premise that demarcating an Indigenous land would correspond to territorial secession. Although it mistakenly compared Indigenous lands to national territory, we can identify, for the first time, a real land conflict involving the Yanomami.

In an infra-constitutional context, federal Law no. 6.001/1973 (then called *the Indian Statute*) was already in force. Under its terms and in line with the Brazilian legal tradition since at least 1934, all Brazilian federative dimensions had to guarantee the Indigenous possession of the lands they traditionally occupied (although they belonged to the Union), recognizing their right to the exclusive usufruct (subject to charges or restrictions⁵) of their natural wealth and assets.

Although the legal-constitutional regime of the Brazilian dictatorship⁶ insisted on the verb “to inhabit”, when it referred to the protection of Indigenous rights of possession and use, instead of adopting the expression “permanently located” (BRASIL, 1934)—typical of the regime prior to the 1964 coup d’état and with a broader meaning—, art. 17 of Law no. 6.001/1973 defines Indigenous lands and recovers its original meaning by speaking of “lands occupied or inhabited by forest-dwelling peoples” (BRASIL, 1973b; our translation). Thus, inhabited lands or those in which Indigenous peoples are permanently located must configure lands they traditionally occupied regardless of demarcation according to art. 25 of Law no. 6.001/1973⁷. At the time of the conflicts over Yanomami land, the original character of Indigenous possession was already undoubtedly recognized in Brazil (ROCHA *et al.*, 2015).

More precisely, art. 23 of Law no. 6.001/1973 establishes that Indigenous

5 These restrictions are present, for example, in Law no. 6.001/1973, head of art. 18: “Indigenous lands may not be the object of lease or of any legal act or business that restricts the full exercise of direct possession by the Indigenous community or by forest-dwelling individuals” (BRASIL, 1973b; our translation).

6 Constitutions of the Republic, 1967 and 1969.

7 Law no. 6.001/1973, art. 25: “The recognition of the right of Indigenous and tribal groups to the permanent possession of the lands inhabited by them under the terms of article 198 of the Federal Constitution is independent of its demarcation and will be ensured by the federal agency of assistance to forest-dwelling peoples, meeting the current situation and the historical consensus on the seniority of their occupation without prejudice to the appropriate measures that, in the omission or error of said organ, any of the Powers of the Republic take” (BRASIL, 1973b).

possession is “[...] the effective occupation of the land that, according to tribal uses, customs, and traditions, they hold and inhabit or exercise the activities indispensable to their subsistence or economically useful ones” (BRASIL, 1973b; our translation). Indigenous possession configures a broader relationship than housing since the Indigenous’ way of life is often characterized by significant spatial displacements.

To protect the right of Indigenous possession as a condition of existence for these ethnic group as such, unlike the strict protection of their right, art. 18, § 1, of Law no. 6.001/1973 provides that, in Indigenous lands, “[...] it is forbidden for any person foreign to tribal groups or Indigenous communities the practice of hunting, fishing, or gathering fruits, as well as of agricultural or extractive activity” (BRASIL, 1973b; our translation). Not only are Indigenous lands defined as a *de facto* legal situation but their existence prevents third parties from using their natural resources, even in good faith.

In any case, under art. 19 of Law no. 6.001/1973, the State must demarcate the lands the Indigenous have traditionally occupied as a declaratory act for the legal security of the parties involved in managing the Brazilian Amazon. In its terms, “Indigenous lands, on the initiative and under the guidance of the federal agency of assistance to Indigenous peoples, shall be administratively demarcated in accordance with the process established in a decree⁸ of the Executive Branch” (BRASIL, 1973b; our translation).

When Drummond defended the creation of a Yanomami Indigenous Park in 1979, he did nothing more than reminding Brazil of its unfulfilled obligation to demarcate Yanomami lands and ensure their permanent possession and exclusive enjoyment of those lands and their natural resources. However, outside the law, the Brazilian Government contributed to the practice of acts that violated the rights of the Yanomami.

1.2 The Inter-American Commission on Human Rights in the face of the first Yanomami humanitarian crisis in Brazil

Since Brazil is a member⁹ of the Organization of American States (OAS), it is bound to the Inter-American Commission on Human Rights¹⁰ (IACHR). Its

8 See Decree no. 76,999, dated January 8, 1976; Decree no. 88,118, dated February 23, 1983; and Decree no. 94,945, dated September 23, 1987.

9 Brazil deposited an instrument to ratify the OAS Charter with the Pan American Union, in Washington D.C., United States, on March 13, 1950. It entered in force on December 13, 1951.

10 Art. Article 53, *e*, of the OAS Charter provides that “The Organization of American States accomplishes its purposes by means of: [...] the Inter-American Commission on Human Rights”.

main function is to promote respect for and defense of human rights within its member states and to serve as an advisory body to the OAS.

According to arts. 18 and 20 of its Statute, the IACHR may recommend that governments adopt measures to protect human rights under domestic and international norms and establish the appropriate provisions to see these rights respected¹¹. The IACHR must also pay special attention to the observance of the human rights provided for in the 1948 American Declaration of the Rights and Duties of Man (ADRDM), making recommendations to make human rights more effective within nations¹².

In 1980, the IACHR received a lawsuit against Brazil, alleging its internationally illicit acts against the Yanomami. The IACHR acted as an international monitoring body in those years, being able to neither act in accordance with arts. 44 to 51 of the American Convention on Human Rights (ACHR) nor to appear before the Inter-American Court of Human Rights (I/A Court H.R.)¹³ against Brazil. When news of the Yanomami humanitarian crisis reached the IACHR, Brazil began to explain the facts set forth by the petitioners¹⁴ based on international instruments that proclaim the “fundamental rights of the human person”¹⁵ (CIDH, 1948) as legal principles.

The Brazilian Government and Funai¹⁶ were denounced for rights violations due to the massive influx of strangers into lands traditionally occupied by the Yanomami, causing illnesses and deaths due to violence and lack of medical care. State omission compromised the safety and integrity of the Indigenous land, putting at risk the maintenance of the ethnic group’s culture, tradition, and customs (CIDH, 1985).

In response the Brazilian Government interdicted a continuous area spanning 7,700,000 hectares by MINTER/GM Ordinance no. 025, of March 9, 1982, limited to its northwest by the border between Brazil and Venezuela up to the meridian 66°20’00”W; to the south by the course of *Perimetral Norte*; and to

11 Art. 18, *b*, of the IACHR Statute.

12 Art. 20, *a*, of the IACHR Statute.

13 The Brazilian State would only sovereignly recognize the jurisdiction of the I/A Court H.R. much later, in 1998.

14 Tim Coulter (Indian Law Resource Center), Edward J. Lehman (American Anthropological Association), Barbara Bentley (Survival International), Shelton H. Davis (Anthropology Resource Center), George Krumbhaar (US Survival International), and others.

15 Art. 3, *l*, of the OAS Charter.

16 Created in 1967 to replace the Indian Protection Service (1910), the National Indigenous Foundation (Funai) is the official indigenist body of the Brazilian State.

the east, by the meridian 62°00'00W (BRASIL, 1989a; CIDH, 1985). Months later, on September 12, 1984, the Funai President sent a proposal to this inter-ministerial working group requesting the definition and delimitation of the future Yanomami Indigenous Park, which would span 9,419,108 hectares.

Although admittedly important, these measures failed to prevent the IACHR from issuing Resolution No. 12/1985 (case no. 7615) on March 5, 1985, which acknowledged the violations of Yanomami's human rights. After analyzing the background and evidence, the IACHR concluded that the omission of the Brazilian state prevented it from taking the necessary measures, thus violating the Yanomami's right to life, liberty, and health (art. I of the ADRDM), to residence and transit (art. VIII of the ADRDM), and to the preservation of their health and well-being (art. IX of the ADRDM).

The IACHR eventually recommended that the Brazilian Government continue to adopt preventive and amending sanitary measures to protect the Indigenous' life and health against infectious diseases and deemed the demarcation of the "Yanomami Indigenous Park" under the terms proposed by the Funai President in 1984 as appropriate (CIDH, 1985).

Given the international legal order in force, Brazil had to demarcate the Yanomami land and remove its intruders, reinforcing the provisions of the domestic legal order. Note that the Brazilian law gave rise to conflict with international human rights law. These violations are the embodiment of the State's normative ineffectiveness.

However, the gold rush in Roraima grew from 1987 onward, drawing even more attention from the international public opinion (VANHECKE, 1990; DORFMAN; MAIER, 1990) to the Yanomami drama, who died victims of epidemics or violence due to the arrival of thousands of illegal miners on their lands.

In view of both the growing of mining activities in lands traditionally occupied by the Yanomami and the IACHR recommendations, Brazil issued Decree no. 94.945/1987, which provided for the administrative process of Indigenous land demarcation and required the participation of a representative of the General Secretariat of the National Security Council during the demarcation of Indigenous lands on the border¹⁷, as was the case of the Yanomami (BRASIL, 1987).

Faced with the crisis of illegal mining threatening the rights of the Yanomami, the challenge was not in creating norms, but in implementing the existing legal order since it provided for the Indigenous right to possession and appointed the Brazilian State as responsible for its demarcation and protection. However,

¹⁷ Art. 2, § 3, of Decree No. 94.945/1987.

actualizing these Indigenous rights faced enormous resistance. The groups who had controlled the state unopposed during the Brazilian dictatorship did not see it as a crisis, but rather “[...] the smell of progress was felt in the air” (BARRETO, 1995, p. 161; our translation).

2 The Brazilian legal order and democracy: the Yanomami Case

The Brazilian State showed a clear disorientation. Its redemocratization process sought a solution that could uphold Indigenous rights while considering its own economic development and territorial integrity. Thus, we must understand the issue of the demarcation of Indigenous lands by moving from the resistance of population sectors justified by the immediate economic and military objectives.

This context is symbolized by the following excerpt from a work that portrays well such an ideologically fascist bias¹⁸: “It was thought that many problems would end with communism. But agitators only changed the color of their shirts from red to green. Before, they fought the dictatorship, then they defended the Indigenous, and now they want to save the forest [...]” (BARRETO, 1995, p. 111; our translation).

This statement shows an impressive oversimplification, but it is important as it portrays an authoritarian logic that dominated the Brazilian State in that period, claiming that all those who acted to achieve Indigenous rights were (and, to a certain extent, still are) seen as representatives of foreign interests that continuously sabotage patriotic aspirations.

Along these lines¹⁹, on August 9, 1987, the newspaper *O Estado de S. Paulo* published an article entitled *A conspiração contra o Brasil* (The conspiracy against Brazil), which claimed that the Missionary Council for Indigenous Peoples belonged to a plot to restrict Brazilian sovereignty and hand over the mineral resources in Indigenous lands to foreign companies²⁰.

Hence the unsurprising statement “[...] FUNAI itself is contaminated by the internationalist thesis”²¹ (BARRETO, 1995, p. 12; our translation). The author continues:

18 For an analysis of this fascist bias, see, e.g., Boito Jr. (2020).

19 This conspiracy theory represented more a lobby with the Constituent National Assembly in favor of certain economic agents (who benefitted from exploiting the mineral resources in traditionally occupied Indigenous lands) than actual nationalism.

20 The report of the Joint Parliamentary Commission of Inquiry, created to investigate such accusations, found the claim to be false (FERNANDES, 2015).

21 In a preface written by Major General Carlos de Meira Mattos.

How to claim political control of a Brazilian territory spanning 94,191 km² (similar to the area of Santa Catarina and three times that of Belgium) for a tribe of 5,000 Indigenous people (at most) that inhabits it and lives up to this today in the lowest stage of ignorance and primitivism?" (BARRETO, 1995, p. 11; our translation).

The answer is legal, rather than political. Law no. 6,001/1973 provides for the demarcation process, that is a measure to enforce the right of Indigenous possession expressly provided for by the Brazilian State in the exercise of its sovereignty and giving it constitutional stature since at least 1934. This internal measure was reinforced by the inter-American human rights system, in which Brazil sovereignly decided to participate by being an OAS member and thus being subject to the control and supervision of the IACHR. As part of the ACHR, it falls subject to the contentious jurisdiction of the I/A Court H.R.

A common mistake equates the legal notion of sovereignty with that of property. State sovereignty corresponds precisely to the effective power to exclusively determine what configures the facts, acts, and legal transactions carried out on a given spatial basis. When the Brazilian State, by a legal norm established in the exercise of its legislative function, provides, for example, that the economic order observes the principle of private property²², it offers no disposition or weakening of its sovereignty.

On the contrary, by establishing the legal possibility of the exercise of rights to natural persons or legal entities governed by private law, the State, rather than alienating its sovereignty, enforces it! Thus, the guarantee of Indigenous possession over part of the national territory and the usufruct of their natural resources in no way affects the integrity of the Brazilian State. Moreover, "the Indigenous peoples never represented any kind of problem for the borders, they were very valuable collaborators of the demarcation commissions" (RICUPERO, 2009, p. 147). There are no record of Yanomami manifestation defending their secession from the Brazilian territory to constitute a sovereign state based on the peoples' right to self-determination.

During the Yanomami humanitarian crisis, the Brazilian National Constituent Assembly met to build the new State legal bases after the end of the dictatorship. As it debated various rights, the Armed Forces closely followed the process of its elaboration²³. In the specific case of Indigenous rights, the military tried to

22 Art. 170, II, of the Constitution of the Republic of 1988.

23 Although no Indigenous candidate was elected to the National Constituent Assembly, in the debates on the new Constitution of the Republic, Indigenous movements were represented by the Union of Indigenous Nations and supported by the Brazilian Association of Anthropology, the Pro-Indian Commission of São Paulo, and the Missionary Council for Indigenous Peoples, presenting a proposal for a popular amendment (PE-40) to the National Coordination of Geologists and the Brazilian Society for the Advancement of Science (FERNANDES, 2015).

maintain the integrationist policy in line with the doctrine of national security (FERNANDES, 2015).

The Brazilian organized society took both advantage of the action of social movements and an important step toward Brazil constituting a democratic state based on the rule of law by directly electing its constituent members in an irresistible wave of democratic aspirations.

Regarding the specific case of Indigenous rights, “We went to Congress mobilizing the public opinion and with the intense participation of Indigenous leaders throughout the country, which enabled us to approve our text. Nothing we put in our text has been suppressed” (KRENAK, 2015, p. 103; our translation).

Once in force, the head of art. 231 of the 1988 Constitution broadly reaffirmed²⁴ the Indigenous’ original rights over the lands they traditionally occupy and that the Union must demarcate, protect, and ensure respect for all their assets. In Brazilian legal order, the concept that Indigenous people hold original property rights has remained, regardless of any State constitutive legal act.

In any case, supported by the 1988 Constitution, Law no. 6.001/1973 obliges the State to carry out the demarcation in view of legal security²⁵, which must be done immediately. Art. 65 of that law provides that “The Executive Power will make, within five years²⁶ [*sic*] the demarcation of Indigenous lands not yet demarcated” (BRASIL, 1988; our translation). Likewise, the 1988 Constitution reaffirmed, in its art. 20, XI, that the Union owned Indigenous lands regardless of their demarcation as it precedes²⁷ any act of the State; a constitutional innovation since Indigenous lands depended on the express recognition from the Public Power in previous Constitutions (SOUZA FILHO, 2013). Thus, the Indigenous’ original and imprescriptible rights²⁸ correspond to actual rights in favor of the Union. While the latter has the right of ownership of those lands, the Indigenous

²⁴ Art. 231, § 1, of the 1988 Constitution: – Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their wellbeing and for their physical and cultural reproduction, according to their uses, customs and traditions (BRASIL, 1988).

²⁵ The Brazilian real estate registration system, which registers and publicizes real rights over real estate, includes demarcation (CENEVIVA, 2009). Regarding Indigenous lands, real estate registry is merely declaratory but important to protect the Indigenous’ possession and enjoyment rights.

²⁶ This is the same deadline for the demarcation of all Indigenous lands provided for in art. 67 of the Transitional Provisions of the 1988 Constitution, also ignored by the Brazilian State.

²⁷ The Yanomami already occupied their lands centuries before the arrival of Portuguese navigators in South America in 1500, from which originated, centuries later, the Brazilian State, which, under the terms of the law in force, exercises its sovereignty over such lands.

²⁸ Art. 231, § 4, of the 1988 Constitution.

have, according to art. 231, § 2, of the 1988 Constitution, the right of its permanent possession and the exclusive usufruct of the riches of their soil, rivers, and lakes.

Under art. 231, § 6, of the 1988 Constitution, the actual rights over Indigenous lands nullifies third parties' acts aiming to occupy, dominate, and possess these lands or use their natural resources and the incentives²⁹ to mining cooperatives.

2.1 The democratic State in the face of the recommendations of the Inter-American Commission on Human Rights on the Yanomami in Brazil

Brazil produced a new regulation to the administrative process of demarcation of Indigenous lands, repealing Decree no. 94.945/1987 by Decree no. 22/1991 of February 4, 1991³⁰. Since the entry into force of Law no. 6.001/1973, Decree no. 22 was the fourth decree³¹ regulating this administrative procedure, standing out as its art. 2º, § 2, guaranteed the participation of Indigenous groups in all phases of the demarcation, putting the Brazilian legislation in line with the Convention no. 169 of the International Labour Organization, adopted in 1989 and internationally in force³² since 1991. It is worth noting the absence of any specific determination about borders, which directly influenced the demarcation of Yanomami lands.

On May 25, 1992, in accordance with Resolution no. 12/1985 of the IA-CHR, following art. 231 of the 1988 Constitution and complying with the provisions of Decree no. 22/1991, the administrative demarcation of the Yanomami Indigenous Land (YIL) that Funai had promoted was finally approved. The YIL spans 9,664,975.48 hectares, has a 3,370-km perimeter³³, and totals the dimensions of the Portuguese State territory.

29 Art. 231, § 7, together with art. 174, § 3, and art. 174, § 4, of the 1988 Constitution.

30 Repealed by Decree no. 22/1991, Decree no. 94.945/1987 had repealed Decree no. 88.118/1983, which had, in turn, repealed Decree no. 76.999/1976, the first regulation of art. 19 of Law no. 6.001/1973.

31 After the demarcation of the Yanomami Indigenous Land, Decree no. 1.775/1996, of January 8, 1996, provided for the administrative process of demarcation of Indigenous lands in Brazil (BRASIL, 1996).

32 Convention no. 169 of the ILO on Indigenous and Tribal Peoples, adopted in Geneva on 27 June 1989; approved by Legislative Decree no. 143, dated June 20, 2002; ratification instrument deposit with the Executive Director of the ILO on 25 July 2002; in international force on September 5, 1991, and in Brazil, on July 25, 2003, pursuant to its art. 38; and promulgated on April 19, 2004.

33 Art. 1 of the Decree of May 25, 1992, signed by President Fernando Collor, which approved the administrative demarcation of YIL in Roraima and Amazonas (BRASIL, 1992b).

During a visit to Brazil in 1995, the IACHR confirmed the existence of state health and surveillance posts at YIL and the efficient protection of its territory and defense against miners' clandestine incursions, which was at no more than 330, less than 1% of the number during the 1987 crisis (CIDH, 1997).

In the context of the protection of Indigenous rights in Brazil, art. 49, XVI of the 1988 Constitution provides that “It is exclusively the competence of the National Congress: [...] – to authorize, in indigenous lands, the exploitation and use of hydric resources and the prospecting and mining of mineral resources” (BRASIL, 1988). Such authorization is due only for non-Indigenous third parties' use or to channel production to markets in a different technological context under art. 231, § 2, of the 1988 Constitution, which already provided for the exclusive Indigenous enjoyment (SOUZA FILHO, 2013).

However, the authorization of the National Congress, under art. 231, § 3, of the 1988 Constitution, will take place “in the form of the law” (BRASIL, 1988), which is yet to exist, considering that Law no. 13,575/2017—which created a National Mining Agency³⁴ (ANM) instead of a National Department of Mineral Research—fails to regulate mining on Indigenous lands. Likewise, Decree-Law no. 227/1967 (Mining Code) not only provides for nothing regarding non-Indigenous people researching or mining on lands traditionally occupied by Indigenous peoples, considering that such activities are absolutely prohibited. A constitutionally provided activity cannot be carried out in the absence of a federal regulatory law, thus inexorably casting all mining initiatives on Indigenous lands into criminality (BRASIL, 2020b).

On the other hand, traditional mining (BRASIL, 2013) activities are allowed if carried out exclusively by Indigenous people under art. 44 of Law no. 6.001/1973, according to which “The riches of the soil in Indigenous areas can only be exploited by forest-dwelling peoples and they are responsible for exclusively exercising mining, prospecting, and gathering in the referred areas” (BRASIL, 1973b). The sovereign consent of the Brazilian State is expressly given by the Indigenous' constitutional right of exclusive and perpetual usufruct. Indigenous peoples can exploit and use these resources exclusively or in partnership with non-Indigenous third parties, always under the supervision of the Brazilian State,

³⁴ The National Gold Association, chaired, since 2013, by Dirceu Santos Frederico Sobrinho, who is the main owner of Mineradora Ouro Roxo Ltda., D'Gold Purificadora de Metais Preciosas and FD Gold DTVM. According to the association president, clandestine gold is a part of the 35 tons prospectors annually removed and it is incorporated into the annual production by the ANM. Leaving the mining areas, passing by the cities in mining zones as currency, illegal gold inserts itself into the formal economy after large financial institutions purchase it, becoming part of the Brazilian foreign exchange reserves (QUADROS, 2020).

which must protect the assets of Indigenous lands and the very existence of these ethnic groups (SOUZA FILHO, 2013).

However, the absence of a federal law regulating mining in Indigenous lands failed to prevent public, private, national, and multinational companies³⁵ from registering hundreds of concessions or mining prospecting requests with the ANM, which in tandem involved almost 55% of YIL in the early 2010s (KOPENAWA; ALBERT, 2015) despite no traces or legal production of gold in the Amazonian Roraima (SALOMÃO, 2023). This is due to the opening of art. 4, § 1, of Decree no. 88.985/1983³⁶, which enabled Funai and ANM to authorize (unconstitutionally, in the light of the 1988 regime) research and mining permits on Indigenous lands to private companies (BRASIL, 1983a).

This phenomenon is connected to the mining permit regimes created by Law no. 7.805/1989, which states that the characteristics of the mining would allow the State to issue a more flexible authorization of the activity (BRASIL, 1989c). However, art. 23, *a*, expressly prohibits mining on Indigenous lands, corroborating the conclusion that the absence of a federal law regulating authorization by the National Congress renders the emission of mining permits on Indigenous lands impossible³⁷.

2.2 The Inter-American Court of Human Rights: the right to collective property

Although the ACHR was adopted in 1969 and enacted in 1978, Brazil only deposited its letter of accession on September 25, 1992 (four months after approving the YIL), continuing the process of political-legal opening begun in 1985³⁸, consolidated in 1988,³⁹ and internationalized in 1992⁴⁰. Once Brazil became part

35 See Rolla and Ricardo (2013).

36 Decree no. 88.985/1983 regulates arts. 44 and 45 of Law no. 6.001/1973.

37 In 2020, the Brazilian Government presented to the National Congress the Bill of Law no. 191/2020, which regulates art. 176, § 1, and art. 231, § 3 of the 1988 Constitution, establishing the specific conditions for research and mining of mineral resources and hydrocarbons, for the use of water resources to generate electricity on Indigenous lands, and compensation for the restriction of enjoyment of Indigenous lands. Note that the text of the controversial Bill no. 191/2020 expressly repeals art. 44 of Law no. 6.001/1973 and art. 23, *a*, of Law no. 7.805/1989 mentioned above (BRASIL, 2020a).

38 On January 15, 1985, Tancredo Neves was indirectly elected as Head of the Brazilian State, ending a 21-year period of military rule.

39 On October 5, 1988, the democratic Constitution of the Federative Republic of Brazil was promulgated, ending 24 years of legal-dictatorial regime.

40 From June 3 to 14, 1992, the United Nations Conference on Environment and Development was

of the ACHR under art. 19 of its Statute, the IACHR was enabled to act on petitions and other communications, in accordance with arts. 44 to 51 of the ACHR⁴¹, requiring the I/A Court H.R. to hold the State accountable; including requesting it to adopt provisional measures in grave and urgent cases to avoid irreparable damage to individuals.

On December 10, 1998, six years after joining the ACHR, Brazil deposited a note of sovereign recognition of the contentious⁴² jurisdiction of the I/A Court H.R. Since then, the I/A Court H.R. has been able to judge the merit of cases under the interpretation and application of the ACHR involving the Brazilian State (ROSATO; CORREIA, 2011).

According to the I/A Court H.R. jurisprudence, a State can only restrict Indigenous rights to traditionally occupied lands in case of legality, necessity, proportionality, and democratic legitimacy (CTIDH, 2005). Moreover, if the identity survival of an Indigenous group is at stake, the State must restrict the exercise of individual non-Indigenous rights to benefit the exercise of Indigenous collective rights (CTIDH, 2007), guaranteeing them the right to live freely and in line with their traditions (CTIDH, 2015).

Evidently, the State exercise of its sovereignty does not give it the right to deny the existence of Indigenous peoples in their traditional lands (CTIDH, 2012). Thus, Indigenous peoples have the legal right to live freely, which implies doing so according to their own culture, spiritual and material needs, and aspirations, going beyond the strict limits of real/property rights, especially the right to property, provided for in art. 21 of the ACHR (DI BENEDETTO, 2016).

Since the beginning of the 21st century, the jurisprudential development of the notion of collective property related to the existence of Indigenous peoples in the inter-American legal context has enabled a more adequate approach to the achievement of universally recognized values associated with the protection of human dignity (TOLEDO, 2019).

Brazil became an international defendant of an action the IACHR submitted to the I/A Court H.R. in 2016, referring to the Xucuru's collective right to

held in Brazil, when the Rio Declaration on Environment and Development, the Forest Principles, the Convention on Biological Diversity, the Framework Convention on Climate Change, and Agenda 21 were adopted, constituting the basis of support for International Environmental Law.

41 Arts. 44 to 51 make up Section 3 of Chapter VII of the ACHR, which is dedicated to its competences.

42 The I/A Court H.R. may also adopt advisory opinions on the interpretation of the ACHR or another American human rights treaty if requested by a member of the OAS. Moreover, any ACHR State party may request an advisory opinion from the I/A Court H.R. on the conventionality of domestic law norms.

property over their traditionally occupied lands. The case basically stemmed from the absent demarcation and the permanence of intruders on Indigenous lands. In a judgment proffered in 2018, the I/A Court H.R. merit recognized that the State must obey the prevalence of the right to collective property to the detriment of private property, thus dispensing legislative adaptations (CARRA, 2017).

In the Xucuru's case, despite the consolidation of the right to Indigenous possession and the duty to demarcate Indigenous lands, Brazil failed to comply with this obligation, violating art. 21 of the ACHR. As a development of the right to collective property, the State fails to comply to the right to judicial guarantees and protection⁴³ as it fails to remove intruders from Indigenous lands, being forced to compensate third parties for any improvements made in good faith in the property (CTIDH, 2018).

The I/A Court H.R. jurisprudence indicates that Indigenous property rights must be understood in a new light (CTIDH, 2010), going beyond the strict parameters of contractual relations. The I/A Court H.R. finds that the right to collective property must also cover cultural heritage, configuring a close relationship between the Indigenous and the lands they traditionally occupy, including the immaterial elements resulting from the historical use of their natural resources, i.e., their "associated traditional knowledge" (CTIDH, 2010).

Indigenous peoples' possession of their traditionally occupied lands must have the same legal effects as the full title granted by the State (CTIDH, 2001; 2006), corresponding to the original existence of these rights, despite the practice of acts by the State. The fact that Indigenous people have traditionally occupied those lands implies property rights existing prior to the formation of the State.

By considering more broadly the historic context, the European invasion wave of overseas territories as a strategy to overcome the impasses of mercantilist doctrines resulted in a colonization process that brought important changes to international legal categories. Colonizing States in the Americas forcibly annexed Indigenous peoples' territories, reducing them to enslavement by state agents in compliance with the domestic and international legal order.

As former colonies became sovereign independent states (as was the case of Brazil in 1822), this failed to substantially alter the living conditions of the Indigenous peoples in their territory. Whether in the colonizing or in the newly independent state, Indigenous peoples were unable to recover the original condition they maintained with the land.

Against this historical background, in recognizing the violence of the State,

⁴³ Arts. 8 and 25 of the ACHR.

the I/A Court H.R. determined, after entry into the ACHR, that the participating State ought to recognize the Indigenous collective property over their traditional lands. Indigenous lands and national territory are not contradictory.

Thus, Indigenous peoples have the right that the State refrain, until official recognition of their possession, from acts that may lead State or non-Indigenous agents to compromise the existence or enjoyment of collective property rights. Therefore, the State violates international law when it grants (even in good faith) third parties the use of lands, and its resources, traditionally occupied by Indigenous peoples (CTIDH, 2001).

Accordingly, art. 8, § 2, b of the United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007, provides that “States shall provide effective mechanisms for prevention of, and redress for [...] (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources” (UN, 2007). Likewise, art. 26, § 3 provides that “States shall give legal recognition and protection of these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned” (ONU, 2007; CTIDH, 2014).

3 The Brazilian legal order and democratic crisis: the case of the Yanomami

As the I/A Court H.R. condemned Brazil in the Xucuru’s case, Brazil elected Jair Bolsonaro as President of the Republic, who represented a definitive return to the Brazilian Government of the political current⁴⁴ that had supported and commanded the State during its dictatorship. Bolsonaro succeeded Michel Temer, who was in the presidency for almost two and a half years to complete Dilma Rousseff’s term, who had been democratically elected at the end of 2014 after narrowly defeating the opposition candidate Aécio Neves and had suffered a controversial impeachment⁴⁵ on August 31, 2016.

The United Nations Special Rapporteur on the Rights of Indigenous Peoples

44 Bolsonaro’s support of dictatorship crimes is notorious. In 1999, he openly defended the torture and execution of Brazilians in a television interview, as can be seen in the video available on Bolsonaro... (2017). In 2016, in a speech to the National Congress, the then Federal Deputy paid tribute to Colonel Carlos Alberto Brilhante Ustra, a recognized torturer. The inauguration speech can be seen in Bolsonaro exalta... (2016).

45 Beginning on January 1, 2015, Rousseff’s second term in office was marked by significant legal and political tribulations, starting with opposition politicians’ intention to recount votes, the action of impeachment of that slate before the Superior Electoral Court, and the law bills voted to make it even more difficult for the Government to meet its fiscal target. Although provided for in the democratic order of Brazil, impeachment has, as a legal condition, the undisputed proof of an intentional crime of responsibility during a mandate.

Victoria Tauli-Corpuz (on a mission to Brazil from March 7 to 17, 2016⁴⁶ that coincided with the worsening of the political crisis in the country), deemed the significant political upheaval of that period as a risk factor for the interruption of state measures toward Indigenous peoples' well-being, survival, "and their enjoyment of land and cultural rights" (NATIONS UNIES, 2016, p. 3).

The same document noted the stagnation of the demarcation processes of Indigenous lands in Brazil, whose causes could be especially found in the lack of ministerial and presidential will, which, combined with the weakening of Funai, allowed for the State to comply with its obligation (NATIONS UNIES, 2016). Tauli-Corpuz highlighted the sophistication of the Brazilian legislation on Indigenous rights, recognizing that the State had a leading role in the demarcation of Indigenous lands. However, she found a worrying lack of progress in implementing the recommendations of the former Special Rapporteur and resolving long-standing Indigenous impasses since 2008. In fact, information pointed to setbacks in the protection of Indigenous rights in Brazil, which was even more serious under a political crisis (NATIONS UNIES, 2016).

In 2016, Tauli-Corpuz reported that Brazil failed to protect the YIL from illegal activities (especially mining and logging). Attention was drawn to the fact that even such demarcated lands lacked effective state control, thus impacting the local health, culture, and territory management (NATIONS UNIES, 2016).

Reacting to it, in 2017, the Brazilian Government, by Ordinance no. 68/2017 of its Minister of Justice⁴⁷, tried to change the system of demarcation of Indigenous lands⁴⁸, "incorporating theses dear to agribusiness entities and the ruralist caucus in Congress" (VALENTE, 2017; our translation). According to this ordinance, the Ministry of Justice could now re-examine Funai administrative phases, weakening its role and strengthening the performance of ruralist pressure groups. After strong criticism, the Minister revoked the ordinance the next day, creating strong distrust in State actions regarding the demarcation of Indigenous lands (YAMADA, 2017).

Two years later, in a speech to the United Nations General Assembly in his exercise of the presidential mandate, Bolsonaro showed his intention to no longer

46 The United Nations Special Rapporteur visited Brazil five months before the conclusion of Rousseff's impeachment process, which took place 23 days after the publication of the Report.

47 Alexandre de Moraes would become a minister of the Federal Supreme Court, Brazil's constitutional court, on March 22, 2017, after Temer's appointment, two months after signing that ordinance as Minister of Justice.

48 Decree no. 1.775/1996, of January 8, 1996, which repealed Decree no. 22/1991, in force at the time of the approval of the YIL demarcation (BRASIL, 1996).

demarcate Indigenous lands, thus reinforcing the setback of Indigenous rights in Brazil and violating art. 19 of Law no. 6.001/1973, art. 21 of the ACHR, and art. 231 of the 1988 Constitution. At the time, he stated that: “[...] Brazil will not increase 20% its area already demarcated as Indigenous land, as some heads of state would like to happen” (VERDÉLIO, 2019a).

Then, on the already demarcated Indigenous lands, he added: “The Indian does not want to be a poor landowner on rich land. Especially on the richest lands in the world. This is the case of the Yanomami and Raposa Serra do Sol reserves. In these reserves, there is great abundance of gold, diamond, uranium, niobium, and rare earths, among others” (VERDÉLIO, 2019b).

This ideological positioning was nothing new to those who knew him. As Federal Deputy for Rio de Janeiro, Bolsonaro presented the Legislative Decree Project (*projeto de decreto legislativo* – PDL) no. 365, of October 7, 1993, which aimed to render ineffective the Decree of May 25, 1992, which had approved the YIL demarcation. This archived PDL warned of the political significance of so-called “demographic voids” as a national security problem encouraging occupation as a defense strategy (RAMOS, 1993): “Occupy so as to not surrender” (SANTANA, 2009, p. 3; our translation). The fundamental question was: how can 25,000 Indigenous people have been legally guaranteed the original and perpetual possession of almost 10 million hectares rich in natural resources? “This is the case of measures that are supposedly legal but that are nothing more than flagrant arbitrariness and attacks on democracy, such as the creation of gigantic Indigenous reserves, to meet excused foreign interests without consulting the Brazilian society” (BARRETO, 1995, p. 150; our translation).

Indigenous possession effectively corresponds to a legal barrier to the appropriation, exploration, and exploitation of those lands. More than a challenge to the defense of the territorial integrity of Brazil in the absence of controversies with Venezuela or any other state, the opposition to the demarcation of Indigenous lands and removal of their intruders refers more to defending the interests of economic agents⁴⁹ to the detriment of human dignity and the environment. Economic interests are obviously legitimate, especially those of States that still struggle against underdevelopment, provided that they are in legal compliance.

49 “Most of the gold that circulates in the country ends up becoming a financial asset because taxation is lower. Thus, it must be sold by a financial institution authorized by the Central Bank of Brazil. The financial institution does not have to officially check the veracity of the PLG [Mining Permit]. At least 30% of the gold traded in Brazil from January 2021 to June 2022 shows indications of irregular provenance. In Pará, for example, 48% of the gold has evidence of irregularities” (SALOMÃO, 2023, p. A16; our translation).

Before Bolsonaro's arrival to the Presidency of Brazil, Funai still counted 5,000 miners in YIL in 2016, a much higher number than the one IACHR found in 1995 (RAMOS; OLIVEIRA, 2020). By 2020, the number had already risen to 20,000, reflecting the growth of gold exploration in Roraima. Some people count a 3,350% increase in mining in YIL from 2016 to 2020 (HAY; SEDUUME, 2022), occupying 1,557 hectares (SALOMÃO, 2023), an undisputed fact by the Brazilian State (CIDH, 2020a).

Funai documents point to a close relation between Brazilian military personnel and YIL miners, claiming that the military had neither confronted illegal mining activities nor adopted sufficient measures to confront them on at least seven occasions, thus boosting mining on Indigenous land (GABRIEL, 2023). In 2022, out of three cycles to remove operations from seven Indigenous lands prospectors had taken (including the YIL), only one included a military aircraft to support the Federal Police in compliance with the decision of the Brazilian Federal Supreme Court, an equipment lacking in Roraima. The Government also ignored requests to monitor the YIL airspace as a strategy to combat miners (SASSINE, 2023).

Regarding the Yanomami's health, Funai banned members of the Oswaldo Cruz Foundation team members from accessing the YIL in 2021 by claiming that they were carriers the new coronavirus (COVID-19). Following all medical protocols, the team would provide medical care to Indigenous people suffering from malaria and malnutrition (PODCAST FIOCRUZ, 2021).

Regarding malnutrition, data since 2015 indicate that the frequency of underweight has grown in Yanomami children from 49.3% to 56.5% in 2021 (BRAZIL, 2023). In 2022, the low weight of pregnant women reached 46.9% (BRASIL, 2023). "Hunger is evident and often mentioned, it is said that it was generated by various factors such as changes in the climate and the consequences of illegal mining" (BRASIL, 2023, p. 24), thus evincing the continuous epidemic outbreaks in the YIL and the state neglect toward these people's health (GONÇALVES; SOUSA; LUTAIF, 2020).

Of course, the challenges of de-intrusion, environmental preservation, and protection of Indigenous health are nothing new in Brazil. Third parties have illegally entered Yanomami lands since 1973. However, the last decade has seen the confluence between political instability (in a context of weakness of the mechanisms of democratic participation in Brazil) and a setback in the actualization of Indigenous rights. Since state institutions are unable to implement Indigenous rights, a response against a humanitarian crisis is again sought in international institutions.

3.1 The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in the face of the second the humanitarian crisis in Brazil

The setback to the achievement of Indigenous rights in Brazil may cause severe social stress, identifying a humanitarian crisis. At the end of the 1970s, the violation of Yanomami rights to the lands they traditionally occupied worsened, leading to Resolution no. 12/1985 of the IACHR. Its international impact represented both the identification of the humanitarian crisis that this people had been experiencing and the beginning of a process to change the conjuncture of the Brazilian political forces that lied at the basis of the violations of Yanomami's rights.

These forces have reorganized themselves in the recent past, stiffening the gears for the achievement of Indigenous rights in Brazil. More recently, the legal model adopted at the end of the Brazilian dictatorship (during the reestablishment of a democratic state) began to be deconstructed at an accelerated pace due to the implementation of a government project ideologically based on premises that jeopardize its foundations: human, social, and environmental rights.

This configures the perfect conjuncture to increase illegal pressure on Indigenous peoples, environmentalists, and human rights defenders, resembling the *modus operandi* of the Brazilian dictatorship and reaching a second peak of socio-environmental stress for the Yanomami. In the absence of effective means to domestically defend Indigenous rights (as in 1980), the organs of the inter-American human rights system are again mobilized, attesting to the second Yanomami humanitarian crisis.

Due to health care failures and the presence of third parties on Indigenous lands, the IACHR received in 2020 a request for precautionary measures⁵⁰ in favor of the Yanomami and Ye'kwana⁵¹, to push Brazil to adopt measures to protect their life and personal integrity during the COVID-19 pandemic, given their great vulnerability.

Applicants claimed a specific risk for Indigenous people to COVID-19 due to comorbidities and failures in the Indigenous health system, negatively highlighting the Yanomami Special Indigenous Health District as one of the most critical in Brazil. The Yanomami and Ye'kwana were also dangerously exposed to

50 The mechanism of the precautionary measures is the responsibility of the IACHR as it monitors compliance with legal obligations, provided for in Article 2. 106 of the OAS Charter, art. 41, *b*, of the ACHR, and art. 18, *b*, of the IACHR Statute.

51 According to the IACHR, a population of about 25,000 and 700 Yanomami and Ye'kwana inhabit the YIL, respectively, in 321 villages.

the disease and mercury pollution due to growing mining and lack of diligence from the Brazilian State to prevent illegal activities.

IACHR Resolution no. 35/2020 claimed that international law provides for the duty of the State to provide special protection to Indigenous peoples, ensuring their equality with the rest of the population since these peoples have been historically marginalized and discriminated against (CIDH, 2020a). The IACHR especially recognized the Yanomami state of permanent threat by non-Indigenous third parties invading the YIL, estimating the presence of 20,000 miners (CIDH, 2020a) and finding the lack of confrontational measures by the Brazilian government (CIDH, 2020a). It also noted that the presence of non-Indigenous people in the YIL has brought hostility and violence against Indigenous peoples for years, compromising the quality of the provision of medical services (CIDH, 2020a).

Thus, the IACHR decided for precautionary measures, requesting that Brazil adopt the necessary acts to protect the Yanomami and Ye'kwana's health, life, and personal integrity, implementing preventive measures against the spread of COVID-19 and providing them with adequate medical care under appropriate and culturally pertinent conditions (CIDH, 2020a).

In 2022, the IACHR submitted a request for provisional measures to the I/A Court H.R. that stemmed from the precautionary measures adopted by the IACHR Resolution no. 35/2020 in favor of the Yanomami and Ye'kwana YIL. Such request aimed at Brazil adopting the necessary measures to protect the Yanomami, Ye'kwana, and Munduruku's life, personal integrity, and health⁵².

The I/A Court H.R. recognized that the Yanomami, Ye'kwana, and Munduruku were subject to the progress of mining on their Indigenous lands by unauthorized third parties, which had caused the homicide of Indigenous adults and children; deaths due to mining activities; sexual violence against Indigenous women and children; threats to Indigenous leaders; non-voluntary displacements of Indigenous communities; the spread of diseases in a population with great immunological vulnerability; and the contamination of rivers and deforestation, significantly impacting Indigenous people's health and food security (CTIDH, 2022). According to the information obtained by the I/A Court H.R., these facts remained despite the adoption of precautionary measures by the IACHR and several Brazilian judicial decisions, including its Supreme Court (CTIDH, 2022).

⁵² According to the IACHR, the Munduruku would total about 14,000 people living on the banks of the Tapajós River and its tributaries in the State of Pará, Brazil, spread over seven lands: Munduruku, Sai Cinza, Kayabi, the Praia do Índio and Praia do Mangue Reserves, Sawré Muybu, and Sawré Bapin, spanning 178,173 hectares. In December 2020, the IACHR adopted precautionary measures in favor of the Munduruku pursuant to Resolution No. 94/2020.

Thus, the I/A Court H.R. unanimously decided to request that Brazil adopt the necessary measures to effectively protect the Yanomami, Ye'kwana, and Munduruku's life, personal integrity, health, and access to food and drinking water; to prevent sexual exploitation and violence against Indigenous women and children; and provide culturally appropriate measures to prevent and mitigate the spread of diseases, offering Indigenous people adequate medical attention.

Conclusion

For centuries, the Yanomami have constituted an ethnic group inhabiting the Amazon, traditionally occupying the borders between Brazil and Venezuela. They are one of the most numerous Indigenous peoples in South America, with an estimated population of about 25,000 people. They have a rich and complex culture with strong connections with the land and its natural resources and are known for their skills in agriculture, hunting, fishing, and forest gathering.

Brazil has guaranteed the right of Indigenous peoples' possession over their lands since at least 1934. Such right remains a characteristic of the contemporary Brazilian legal order, which also recognizes their right to the exclusive enjoyment of the natural resources in their lands.

However, this regulation has failed to prevent the Yanomami from suffering the impact of decades of land conflicts with non-Indigenous people supported by the Brazilian state, including the illegal exploitation of natural resources, conflicts with prospectors, and construction of works on their lands. Nevertheless, the Yanomami have acted to preserve their culture and their relationship with the land.

A useful action strategy would be to demand compliance with the law and conclude the demarcation of Indigenous lands (which consists of a declaratory act of their original possession). This is what Law no. 6.001/1973 establishes, complementing the provisions of the Constitution. Although not a legal fact, the demarcation gives the Indigenous security in the face of illegal occupations.

However, the historical omission of the Brazilian State in demarcating Indigenous lands due to the prevalence of contradictory political conceptions has worsened land conflicts, which are characterized by invasions by land grabbers, prospectors, and loggers, causing damage to the Indigenous population. The accumulation of violence can, in certain cases, culminate in humanitarian crises. This is what happened to the Yanomami during the 1980s and from the end of the 2010s onward.

In 1980, during the Brazilian dictatorship, the IACHR took a stand against Brazil based on the OAS Charter and the ADRDM. In 2020 and 2022, during a government composed by supporters of dictatorship, the IACHR and the I/A Court H.R. positioned themselves against Brazil, this time because of the competences guaranteed and ratified in 1992 by the ACHR, months after the demarcation of the YIL. In both cases, the issue stemmed from the failure of the State to comply with its duty to guarantee Yanomami life, personal integrity, and culture, including protecting their Indigenous land under the terms of the jurisprudence on art. 21 of the ACHR.

In the case of the Yanomami, from 1973 (when the construction of Perimetral Norte began) onward, although Indigenous rights were well consolidated in the Brazilian legal order, the challenge of their actualization remains due to the prevalence of political forces that controlled the Brazilian State during its dictatorship and the crisis of democracy from 2014 onward. In these two periods, the growing pressure on the Yanomami culminated in the IACHR and the I/A Court H.R. deeming it a series of humanitarian crises. In 1985, the IACHR Resolution represented the beginning of an era of greater protection of the rights of the Yanomami in Brazil. In 2020-2022, the IACHR and CTH Resolutions may produce the same result.

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