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Collective Economic, Social and Cultural Rights Approach to Indigenous Land Rights

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‘Nem tudo o que conta pode ser contado. Nem tudo o que pode ser contado conta.’
Albert Einstein

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Summary

The present study analyzes the right to land for indigenous peoples by emphasizing its multi-dimensional perspective and its collective economic, social and cultural aspects. A conceptual framework of collective economic, social and cultural rights (ESCR approach) to the indigenous peoples' right to land is proposed, supported by international human rights standards. The possible and actual positive changes of such collective ESCR approach to the right to land for indigenous peoples are explored. The situation of indigenous peoples' right to land in Brazil is reviewed with special attention to the international human rights' influence, and to the applicability of the proposed ESCR approach.

The research is divided in three parts. The first part (Chapter II) presents the development of collective economic, social and cultural rights aspects in the conception of indigenous peoples' right to land. Relevant practice within the UN and Inter-American Human Rights Systems, regarding the recognition of ESCR aspects in the indigenous land rights are presented as supporting the proposed approach. The second part (Chapter III) verifies the international human rights influences in the Brazilian legislation and public policies. The collective ESCR approach is asserted to be a tool to advance the case for indigenous people's land security and rights. Finally, the third part (Chapter IV) presents illustrative cases from Brazil. The tragic consequences of the past purely 'property rights approach' to indigenous land issues is highlighted. Also, the recent contributions from international human rights standards and, the current domestic difficulties to advance indigenous right's to land, as embracing collective ESCR aspects, are considered.

Research Question:

How does a collective economic, social and cultural rights approach to the indigenous peoples' right to land influence national legislation and public policies?

Preface

As a Latin-American in an international environment of human rights studies I was compelled to write about indigenous peoples rights. This is so because during the programme I realized the global concern with indigenous peoples, when referring to human rights in Latin America; but mostly because I felt ashamed to know so little about indigenous peoples rights. I knew some things about indigenous peoples culture and history. I also knew about some of the indigenous peoples struggles, and about most of their conflicts with the major society, which are often newspaper bloodshed headlines. However, indigenous issues were pictured in my mind from the point of view of the major society – sometimes sensitive, sometimes ignorant, but most times predominant. In that picture, there was no sound: indigenous peoples had no voice and the lenses of non-indigenous people filtered the reality, as we wished.

Then, I realized I was not alone in this. Although most Brazilian people are for indigenous peoples rights¹, indigenous issues far reach the most accessed social debates, and information about their rights is still of quite difficult access. Because the violations of human rights seem to be everywhere and in all grades in my country, there is a tendency to segment the human rights movement (women, children, elderly, afro-descendants, indigenous peoples, etc). By doing that, indigenous peoples' rights tend to be neglected. Therefore there is an extreme need for a transversal approach both in terms of groups and in terms of categories of rights when discussing violations and implementation of human rights. The present thesis is an exercise of transversal thinking and interrelational approach to human rights – proposed by a human rights lawyer - presenting multidisciplinary concerns to the question of the indigenous peoples' land and indigenous peoples' survival.

¹ Survey ISA/ IBOPE February 2000. Ricardo, C.A. (ed.) *Povos indígenas no Brasil: 1996-2000*, ISA – Instituto Socioambiental, São Paulo, 2000, pp.57-61

1. INTRODUCTION

Although there is an immense diversity of indigenous peoples around the world – more than 350 million members of at least five thousand groups, most of them living in remote areas² – the violations of rights and challenges faced by them are quite similar.³ Worryingly, in most parts of the world indigenous peoples suffer from the lack of security over land and natural resources. There are multiple obstacles that indigenous peoples face to secure their right to land: racism; social prejudices and entrenched forms of discrimination; assimilationist policies; lack of legal recognition of indigenous peoples' rights in national systems; inflexible or deficient land administration services; and lack of resources, capacity, political connections or awareness to take advantage of existing legal opportunities to their own benefit; among others.⁴ The lack of legal and administrative security over the land and the natural resources are the most often causes of indigenous communities endangerment and destruction⁵. Due to land conflicts, threats and deaths of individuals; spread of diseases and health problems; disappearances of whole communities; forced changes in cultural habits and in socio-economic relations; starvation and other indigenous peoples' human rights violations take place continuously in the world. Land is understood to be essential for indigenous life and community continuity. Therefore, tackling the problem of violation of the right to land is urged.

In order to sustain the assertion of the vital role of land to indigenous peoples, the study analyses the *indigenous peoples' right to*

²Instituto Socioambiental, (ISA) "Who, where, how many?", internet website visited in April 2005:

<http://www.socioambiental.org/pib/english/whwhhow/howmany/indexquai.shtm>
International Working Group for Indigenous Affairs, internet website visited in April 2005: www.iwgia.org

³ C. Cohen (ed.), *Human Rights of Indigenous Peoples*, 1998, Ardsley NY: Transnational Publishers.

⁴ M.Colchester, Tom Griffiths, Fergus MacKay and John Nelson, "Indigenous land tenure: challenges and possibilities" in *Land Reform*, 2004, Forest Peoples Programme, UK.

⁵ M. Colchester and L. Lohmann (eds.), *The struggle for land and the fate of the forests*, 1993, World Rainforest Movement and Zed Books, London.

land from the *collective economic, social and cultural rights* (ESCR) *perspectives*. The approach is also proposed in order to overcome some of the obstacles to indigenous peoples' land security, and to stress the human rights aspects of indigenous peoples' right to land. The human rights-based approach is founded on the dignity and well being of each and every human being - advancing the merely economic assets conception of indigenous land - and entails obligations from the part of governments. The normative ground for such obligations are International Human Rights Treaties and others standards set, plus National Constitutional Human Rights provisions. National governmental programmes concerning indigenous peoples land are presented as translations of international law and standards into practice. The use of contemporary International Law concepts considers its **dynamic and evolving process** and stresses the relevance of the advances of International Human Rights discourse in the development of a new international and domestic, political and juridical order to protect indigenous peoples' rights and to strengthen economic, social and cultural rights.

Protections of Indigenous peoples' rights were set as minimum standards in a number of human rights instruments. Some of the international human rights instruments⁶ recognized specific indigenous peoples' rights whereas others⁷ embodied the indigenous peoples' rights under the universal protection of human beings, based on the principle of non-discrimination and equal-rights. There is not much of international

⁶Indigenous an Tribal Peoples Convention (no. 169)/ ILO, 1989
Convention on the Rights of the Child/ UN, 1989
UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, 1992
Vienna World Conference on the Human Rights Declaration and Programme of Action / UN, 1993

⁷ Universal Declaration of Human Rights / UN, 1948
Convention of the Elimination of All Forms of Racial Discrimination / UN, 1965
International Convention on Civil and Political Rights / UN, 1966
International Convention on the Elimination of All Forms of Racial Discrimination/ UN, 1965
Convention on the Elimination of All Forms of Discrimination against Women / UN, 1979
(and other regional instruments).

legal instruments or mechanisms regarding collective economic social and cultural rights, and even less instruments specifically regarding the right to land for indigenous peoples as a collective ESCR. However, the UN Draft Declaration on Indigenous Peoples' Rights (1994), the ILO Convention No. 169 (1989), and the article 27 of International Covenant on Civil and Political Rights (1966) have contributed to the assertion that indigenous land rights protect a broad range of rights. Although the first document is still not legally binding, the second is not widely accepted, and the third is only one article of a Covenant named Civil and Political Rights, all the three instruments support somehow the relationship of indigenous peoples' land and ESCR to, as claimed in the present study. Similarly, but in a regional basis, the Proposed OAS Draft Declaration on the Rights of Indigenous Peoples (1997) follows the same rationale. Also the practice of the Inter-American Court and Commission on Human Rights has recognized that relationship between land and indigenous peoples' collective ESCR.

The study urges for more measures to consolidate **collective rights to indigenous peoples** and, for the establishment of the **intrinsic value of ESCR** as justiciable human rights in National and International Courts, especially in regard to the right to land. Finally, the use of a collective ESCR approach is argued to be of extreme relevance when defining governmental policies of indigenous peoples' land right since the approach embraces legal, social and anthropological concerns.

1.1 Purpose

The purpose of the work is to discuss the interdependence and interrelation among different categories of human rights (Civil, Political, Economic and Social Rights); among multidisciplinary concerns (anthropological, sociological, legal and environmental); and the positive consequences of these relations, in terms of promotion and protection of rights. Therefore the principal aim of the study is to verify to what

extension a collective ESCR approach to the right to land for indigenous peoples influence, or may influence, national laws, and public policies concerning indigenous peoples' rights.

In order to achieve that, answers for the following questions have been pursued:

- 1) Is the right to land for indigenous peoples also a collective economic, social and cultural right? Has International Law and National Legislations considered so?
- 2) How does International Human Rights standards contribute to the consolidation of collective ESCR and Indigenous Peoples' Rights regarding land?
- 3) Does the Brazilian protection of indigenous peoples' right to land encompass indigenous peoples' collective ESCR protection according to international human rights standards?

Brazil was chosen to be the case study because: a) there, indigenous peoples are a minority that still suffer from human rights violations related to their struggle for land⁸; b) it is considered⁹ to be a country of high-level commitment to indigenous rights, with a superior legal framework to protect indigenous peoples' land; c) international human rights standards shows signs of influence over the Brazilian legislation and public policies regarding indigenous' land; and d) public policies concerning indigenous peoples' rights are under the spotlight at the moment. In addition, a parallel can be traced between the struggle for land of indigenous peoples and other traditional groups, such as the Quilombolas (descendants of freed black slaves) in Brazil.

⁸ Ricardo, C.A. (ed.) *Povos indígenas no Brasil: 1996-2000*, ISA – Instituto Socioambiental, São Paulo, 2000

⁹ Ortega, R. R. "Models for Recognizing Indigenous Land's rights in Latin America", in *Biodiversity Series*, Paper N.99, The World Bank Environment Department, World Bank, 2004, p.02.

1.2 Structure

A brief presentation of the indigenous peoples' struggle for land is followed by the proposition of a collective economic, social and cultural rights approach to the protection of the indigenous peoples' right to land. The study examines the possible grounds, in the international human rights law and practice, for the proposed framework of a collective ESCR approach to the right to land. The role of international standards influencing national protection of indigenous peoples' rights according to the proposed framework is considered together with the review of the Brazilian state practice.

The thesis analyses three particular cases from Brazil: Guarani-Kaiowá, Yanomai and Raposa-Serra do Sol. The cases support, with facts, the assertion that the right to land for indigenous peoples encompasses economic, social and cultural rights, and thus should be nationally and internationally protected as a human right. The study concludes that a collective ESCR approach to the indigenous peoples' right to land contributes to the demarcation and protection of land in better accordance with indigenous peoples needs.

1.3 Scope and limitations

Fundamental economic, social and cultural aspects of the communal right to land for indigenous peoples were raised in order to propose a conceptual framework of collective ESCR to the right to land of indigenous peoples.

Within the international human rights law, ESCR's concept derive from the inherent dignity of the human person and are minimum conditions, together with civil and political rights (CPR), for the ideal of free human beings enjoying freedom from fear and want¹⁰. Both CPR and ESCR are essential for human dignity and development. The civil and political rights (CPR) aspects of the right to land are considered but

¹⁰ Preamble, UN International Covenant on Economic Social and Cultural Rights, 1966.

not explored in the present study. The preference to emphasize the ESCR aspects was due to the fact that ESCR, in comparison to CPR, have been neglected in all spheres of debate and actions within the human rights movement in the last decades.

Although enforceability of ESCR was claimed in the study, it did not deny the fact that litigations involving ESCR are not yet very developed. There is little international law concerning economic social and cultural rights and thus the punitive character of international human rights law was not particularly relevant to the present paper. Rather, the directive character of the international human rights discourse, in terms of guiding through standards and political pressure nationally, was stressed.

The Brazilian cases were studied as national cases because even though Brazil is composed by federal states, the indigenous public policy is regarded as national. Considering the Brazilian extension of territory and the location of indigenous communities, that are generally spread and sometimes not reachable, and the lack of organised compilation of data about indigenous rights, limitations may arise in the accuracy of those data. Although primary research sources were preferred, secondary sources were also used, especially because there was no possibility of field research.

2. COLLECTIVE ECONOMIC, SOCIAL AND CULTURAL RIGHTS APPROACH TO INDIGENOUS PEOPLES' RIGHT TO LAND

The use of the term 'indigenous peoples' has gained acceptance in the international context, rather than 'ethnic minority', 'natives', 'aborigines' or 'indigenous populations'. A broad part of the self-identified movement of people considers that the term 'indigenous peoples' better incorporate the consideration for their rights within the international human rights discourse and law. The discussions about an international definition of indigenous peoples' concept have taken into considerations aspects related to their relationship with territories and land; aspects of group identity; and aspects of communal rights, including collective economic, social and cultural rights. The acceptance of a general international definition or, of an agreement on some aspects of the concept of 'indigenous peoples', forms the basis for the proposed framework of a collective economic social and cultural rights (ESCR) approach to the indigenous peoples' right to land.

While there is no universally agreed definition of "indigenous", most international documents and practice rely on the one proposed in the 1986 report by José Martínez Cobo and, on the one acknowledged in 1989, by the ILO Convention No. 169¹¹. The Martínez Cobo report stated that indigenous communities, peoples and nations are those that have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, and those that consider themselves distinct from other sectors of the societies now prevailing in those territories. ILO Convention No. 169 stated that people are considered indigenous either because they are the descendants of those who lived in the land before colonization, or because they have maintained their own social,

¹¹ UN Doc. E/CN.4/Sub.2/1986/7; and Add.1-4, 'Cobo Report' ILO Indigenous and Tribal Peoples Convention (No. 169), 1989.

economic, cultural and political institutions since colonization and the establishment of new States. According to the Chairperson of the UN Working Group on Indigenous Populations, indigenous peoples tend to be those with close ties to their land or to a specific territory; that seek to maintain their own identity and cultural distinctiveness; and that have a past or current experience of subjugation or discrimination.¹²

The present thesis proposes an interrelated analysis of the right to land for indigenous peoples, considering all the fundamental aspects of economic, social and cultural rights that are specifically related to their way of life and identity as a distinct group. For that, I tried to develop a conceptual framework of a collective ESCR approach to the indigenous peoples' right to land based on international human rights standards and excerpts of existing international jurisprudence. I also tried to include sociological, anthropological and socio-environmental concerns in the legal framework. The study explored the possibility of a collective ESCR approach to strengthen indigenous peoples' right to land, and to improve indigenous peoples human rights' protection.

2.1 Justification of the collective ESCR Approach

The security of indigenous land is intrinsically dependant upon State measures. Security over land and natural resources should be provided by law, through the delimitation of rights concepts and sanctions, in case of violations. However, it is still not enough that a State recognizes in its laws that the indigenous peoples within its territory have the right to land, as a purely property right. The verification of the impact of land's right violations, contributing to the amount of ESCR threats and human rights violations, are of extreme relevance. Therefore, the inclusion of socio-cultural concerns on the right to land is needed and enables Sociology and Anthropology Sciences to take place within the legal recognition and administrative demarcations of indigenous peoples'

¹²E/CN.4/Sub.2/AC.4/1996/2/Add.1; Daes, 1996

land. International human rights laws and standards contribute offering guidance to the domestic legal definition, and judicial protection of indigenous peoples' right to land, since it is increasingly responding to indigenous peoples' genuine human rights' claims. A collective ESCR approach to the indigenous peoples' right to land – rather than simple 'property rights approach' - is thus fundamental for the effective security of land to indigenous peoples.

Another part of the so-called security over land and land rights of indigenous peoples comes from the administrative actions when implementing the law. The legal recognition of the collective ESCR aspects to the right to land for indigenous peoples influences the protection of those lands. The elaboration of governmental programs of land's demarcation, agrarian reform, environmental protection, sustainable development and economic policies aimed at indigenous communities, complement land's security. The collective ESCR approach provides tools for indigenous peoples human rights' claims and, it supports the idea that States should not only recognize and demarcate indigenous peoples land but also re-establish indigenous peoples economic, social and cultural rights affected by the lack of security over their land.

Finally, the recognition of collective economic, social and cultural rights' aspects of the right to land for indigenous peoples adds international political and juridical tools for conferring indigenous land security nationally. The recognition of the real meaning of land to indigenous peoples reinforces the need for more suitable legal protections of their land and of their right to land. In addition, the proposed framework fill in some gaps that are left by the merely property rights protection of indigenous land.

2.2 Conceptual Framework

Despite the non-exhaustive definition of economic, social and cultural rights, some aspects of them are highlighted for the purpose of the present study. Generally, economic rights, such as the right to property, and to work - including the right to develop economic activities - are needed to ensure social rights. Economic and social rights are basis for freedom, as a key to development,¹³ through individual independence and social justice. Social rights basically embraces the right to an adequate standard of living¹⁴ implying that everyone shall enjoy, at least, the subsistence rights (health conditions, adequate food, clothing, and housing). Cultural rights¹⁵ encompass four elements¹⁶ and a more complex notion: 1) the right to take part in the cultural life, 2) the right to enjoy the benefits of scientific progress and its application, 3) the right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production as the author, and 4) the freedom indispensable for scientific research and creativity activity. The right to preserve the cultural identity of minority groups or indigenous peoples is a significant aspect of cultural rights and has implications for civil, political, economic and social rights.¹⁷

So, do the right to land for indigenous peoples encompasses collective economic, social and cultural rights?

COLLECTIVE ECONOMIC RIGHTS' ASPECTS

The International Covenant on Economic Social and Cultural Rights included economic development, economic freedom, and

¹³ A. Sen, *Development as Freedom*, 1999, Oxford University Press.

¹⁴ Article 25, UDHR and Article 11, ICESCR.

¹⁵ Article 27, UDHR and Article 14, ICESCR.

¹⁶ A. Eide, "Economic, Social and Cultural Rights as Human Rights", in: A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, 2001, Chapter 2, p.9-28, Kluwer Law International..

¹⁷ R. Stavenhagen, "Cultural Rights: A Social Science Perspective", in: A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, 2001, Chapter 5, pp.85-109, Kluwer Law International.

protection against economic exploitation, as rights to be protected. There is no clear definition of economic rights, neither it can be understood separately from social rights nor from cultural rights, especially concerning indigenous peoples. To indigenous peoples, economic rights are related to the right to land and that include property rights and traditional economic activities.

The *economic rights' aspect* of indigenous peoples' right to land resides strongly on the property rights facet of land tenure, which is generally of collective entitlement for the indigenous peoples. Land has a direct economic value for indigenous peoples that can be found in the status of property of land. Indigenous peoples make use of their properties and knowledge – in the market economy or not - in order to preserve their traditions and perpetuate their lives, which in many cases means freedom from poverty¹⁸. As a particular characteristic, the rights over the land belongs to the indigenous community and not to individuals, thus economic activities can only be developed in an indigenous land after the consent of the community, and if for collective benefit.

However, for indigenous peoples land is more than property because it is not simply a physical asset with economic and financial value, but an essential dimension to its existence as a cultural group. To indigenous peoples, the ends and uses of land are not necessarily material products neither can be a level of economic productivity¹⁹. Therefore to indigenous peoples, the protection of land is first of all a protection of a right and not of an economic good although it embraces aspects of this last one. The land provides shelter, subsistence means regarding food, medicine, health and leisure to indigenous peoples. Most of all, indigenous peoples in their traditional land can live according to their

¹⁸ R. Plant, *Issues in Indigenous Poverty and Development*, 1998, No. IND-105, Inter-American Development Bank.

¹⁹ A., Sfeir-Yournis, Foreword, in Ortiga, R. R. "Models for Recognizing Indigenous Land's rights in Latin America", in *Biodiversity Series*, Paper N.99, The World Bank Environment Department, World Bank, 2004, p.vi.

way of life, and profess their religion and beliefs as distinct peoples if they wish so.

Hence, the historical and contemporary dispossession of indigenous peoples from their lands represents violation of indigenous peoples human rights with strong economic impact, and implication for the freedom of indigenous peoples. The indigenous peoples' land is fundamental to their economic organization because it provides the necessary resources for self-development and autonomy, which are *per se* the means and ends of freedom. In this respect, collective ESCR linked to the indigenous peoples' right to land enhance the freedom of individuals by increasing – or at least keeping - their capabilities and their quality of life as members of a group. The exclusion of indigenous peoples from traditional economic activity related to their land is one of the expressions of the socio-economic disadvantage suffered by these peoples. Forced displacements from indigenous land fade indigenous peoples to extinction, or to be marginalized in the prevailing society, where they become victims of poverty, violent conflicts²⁰ and other social injustices.

Therefore, indigenous land rights embrace economic aspects of fundamental rights and its protection should be aimed at protection of subsistence means, of socio-cultural existence, and of natural wealth and resources besides collective property rights protection.

COLLECTIVE SOCIAL RIGHTS' ASPECTS

Social rights have no clear-cut definition although, for practical uses, they can be treated “as including an adequate standard of living, food, shelter, health and education”²¹. Examples are enumerated in Articles 11 to 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The processes of definition and recognition of social rights, as human rights, are dynamic and ongoing; they establish a

²⁰ R., Ortega, “Models for Recognizing Indigenous Land's rights in Latin America”, in *Biodiversity Series*, Paper N.99, The World Bank Environment Department, World Bank, 2004, p.vii.

²¹ P. Hunt, *Reclaiming Social Rights: International and Comparative perspectives*, 1996, Aldershot: Ashgate.

living and evolving conception of ESCR. Nevertheless, social rights embodies at least the right to health, to housing, to food and to work and they mean, respectively: guarantee of access to adequate health care, nutrition, sanitation, clean water and air; guarantee of access to a safe, habitable and affordable home; guarantee of the ability of people to feed themselves; and guarantee of opportunities to earn a living wage in a safe work environment, and freedom to organize and bargain collectively.²²

The *social rights' aspect* of the indigenous peoples' right to land is based on the assertion that land is multi-functional to indigenous peoples. The land is a social right as it provides material, symbolic and spiritual means for indigenous social life. From housing to the social network and familial organization, indigenous land plays a central role in the community according to the indigenous way of life. Also, the protection of land rights, including the prohibition of entrance and use of land by others than the members of the community is fundamental to guarantee other social rights such as: social security and welfare, education and development.

Traditional land and territories have a symbiotic importance to indigenous peoples from the social point of view. Regarding the right to education, indigenous peoples land is the *locus* and sometimes the object for the learning process. The land is also a safe place for living in community and according to the indigenous' own culture. The indigenous social organization and social relations are many times determined by the territorial occupation of the peoples. For instance, the fact that some indigenous groups share the habitat unity may represent the collective familial organisation – instead of mono-familiar homes – and, the location of each unity may define the political system of leadership, the

²² ESC Committee, General Comment No. 4 (1991)

ESC Committee, General Comment No. 7 (1997)

ESC Committee, General Comment No. 11 (1999)

ESC Committee, General Comment No. 12 (1999)

A. Eide, Report on the Right to Adequate food as Human Rights:

UN.Doc.E/CN.4/Sub.2/1987/23

Sachar, UN Final Report on the Human Right to Adequate Housing:

UN.Doc.E./CN.4/Sub.2/1995/12.

relationships of relatives, marriages and successory line, or even enemies. Forced changes in their location, or in the extension of indigenous land influence directly in the indigenous peoples' social organization imposing on them the need to create new manners of social relationship among the members and with the land, in order to secure the continuity of those people as peoples.

Expropriation, displacement, and removal of indigenous peoples from their ancestral land have shown to bring devastating impact on some indigenous groups, including on their survival. The lack of protection of indigenous peoples land can also generate migration movements, particularly to urban centres, which increase the problem of poverty and discrimination of these individuals²³. In this case, economic, social and cultural rights of indigenous peoples are affected by violation of their land's right. Health concerns also put in evidence the special relationship between social rights and the right to land. Indigenous land and natural resources such as medicinal plants, animals and minerals are fundamental to indigenous peoples full enjoyment of health and psychological well-being. The lack of land rights' protection has often amounted in mass destruction of indigenous groups due to diseases to which they had no immunity, or due to profound impact on their psychological well-being.

In sum, the right to land to indigenous peoples carries social aspects of the most varied range – health, education, social organization, familial relations, work, among others of interrelational character. Such interrelation calls the attention for the increase of awareness to the human right character of indigenous land rights' claims. Therefore protection of land should include protection of indigenous peoples' social rights.

COLLECTIVE CULTURAL RIGHTS' ASPECTS

Despite the lack of a rigorous definition of cultural rights²⁴, preservation of culture (cultural patrimony and heritage) and development

²³ UN. Doc. E./C.19/2004/5 (Report prepared by the Permanent Forum on Indigenous Issues)

²⁴ UNESCO, *Cultural Rights as Human Rights – Studies and Documents on Cultural Policies*, 1970, UNESCO.

of culture (ability to create, spread and access new cultures) are aimed because of their strong relevance of culture to human life. Culture makes each individual and each group of individuals unique and participant of the living process of humanity. Culture is, from the anthropological point of view, a human experience, a ‘total way of life’: “(...) the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups (...) a system of values, and symbols as well as a set of practices that a specific cultural group produces one time and which provides individuals with the required signposts and meanings for behavior and social relationships in everyday life.” as defined by Stavenhagen²⁵, to whom the indigenous peoples’ rights are essentially cultural rights²⁶. Examples of indigenous peoples cultural rights²⁷ are: the right to cultural identity; to the use of their language; to a multi-cultural education; to the protection of their intellectual property and cultural heritage, to the respect of their traditional social and political organization; to the control over their natural resources; and to their land.

The right to land is claimed to be a cultural right (as well as an economic, social, political and civil right) because land to indigenous peoples has this multiple meaning and relates everyday life and beliefs; present, past and future of indigenous peoples. The land for indigenous peoples enhances cultural rights in the sense that their land not only symbolizes indigenous peoples cultural patrimony but also enable indigenous peoples culture to develop. The Draft Declaration on

²⁵ R. Stavenhagen, “Cultural Rights: A Social Science Perspective”, in: A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, 2001, Chapter 5, pp.89, Kluwer Law International.

²⁶ Also recognized in the Article 2, UN Convention on the Prevention and Punishment of Crime of Genocide, 1948.

²⁷ Cultural right carries two aspects based on the definitions of culture: the wide definition and the narrow one. To the wide definition, culture is what makes human beings different from other beings. Therefore, all human activities are essentially related to culture. In a more restricted sense, the narrow definition, culture is the aspect of the term ‘civilization’ which ensures a given people or nation a heritage of its own, which can be a way of life, a collection of beliefs, etc. (UNESCO, *Cultural Rights as Human Rights – Studies and Documents on Cultural Policies*, 1970, UNESCO.)

Indigenous peoples' rights²⁸ recognizes the relationship between land and culture to indigenous peoples and protects both. The existence of indigenous peoples as distinct groups depends largely on the security of their land. Thus, the protection of indigenous land is also the protection of indigenous peoples and their way of life - protection of indigenous cultural identity and development. The safeguard of culture is therefore dependant on the realization of territorial rights and self-determination of indigenous peoples.²⁹

Besides its contribution to protect cultural identity, the relationship between land and culture is also primordial to guarantee indigenous practice of religions or spiritual rites. A religion or belief not only expresses the ethics and values of human group, but also provides substantive meaning for both the relationship between men and nature and among community members. For most indigenous peoples, a threat to the land is also a threat to their belief system and cultural existence. Therefore indigenous peoples' land deserves protection as a human right.

2.3 Legal Framework

International, including regional, Human Rights laws, institutions and discourse play a fundamental role in the protection of indigenous peoples' right to land. Although recognition of indigenous land is of States' competence, a discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing, including in relation to their right to land³⁰. The fundamental role of international institutions and laws is to establish human rights standards to be verified nationally.

²⁸ Article 7 Draft United Nations Declaration on the Rights of Indigenous Peoples.

²⁹ As reported by E. Daes: 'Traditional knowledge of values, autonomy or self-government, social organization, managing ecosystems, maintaining harmony among peoples and respecting the land is embedded in the arts, songs, poetry and literature which must be learned and renewed by each succeeding generation of indigenous children.' UN Doc. E/CN.4/Sub.2/1993/28, 1993, para.4.

³⁰ See S. James Anaya, *Indigenous Peoples in International Law* (1996) and *International Law and Indigenous Peoples* (2003)

S. Wiessner, "The rights and Status of Indigenous Peoples: A Global Comparative and International legal Analysis" 12 *Harvard Human Rights Journal*, 57 (1999).

The present thesis use the international human rights framework, considering its evolving characteristic and having faith that indigenous peoples' rights and genuine interests can be gradually and qualitatively embraced by the international human rights discourse and practice. Therefore, despite the limitations of international human rights law regarding collective ESCR and indigenous right to land, the collective ESCR approach to the right to land is supported by the International Human Rights System (laws and practice) and respect the sociological and anthropological concerns regarding indigenous land (See Section 2.3).

Within the International Human Rights System, the elaboration of new human rights standards concerning indigenous peoples' right to land and indigenous peoples economic, social and cultural rights is growing. The Organization of American States (OAS) General Assembly took initial steps towards the recognition of indigenous peoples as special subjects of international concern³¹. The International Labor Organization (ILO) followed that regional initiative through the adoption of the first multilateral treaty devoted specifically to the protection of indigenous peoples human rights, including the collective right to land: ILO Convention No.107 of 1957. The subsequent multilateral treaty – ILO Convention No. 169 of 1989 – substituted the previous one in order to avoid the assimilationist bias of the world 1950's mentality.

Fundamentally, the General Comment 23 on the Article 27 International Covenant on Civil and Political Rights, by the UN Human Rights Committee associates indigenous culture protection with indigenous land and resources. It provides a mechanism in the UN System of human rights to protect indigenous peoples' right to culture, meaning their right to exist, preserve and develop their way of life relating it with the right to land. The International Covenant on Economic, Social and Cultural Rights is also of some relevance. On the

³¹ Article 39 of the Inter-American Charter of Social Guarantees (1948). See J., Anaya, and R., Williams Jr., "The protection of Indigenous Peoples' Rights over Land and Natural Resources Under the Inter-American Human Rights System" in *Harvard Human Rights Journal*, vol.14, 2001, pp 33.

regional level, the Inter-American Human Rights System has shown applicability of the proposed framework interrelating protection of various ESCR and the indigenous right to land.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR) do not have specific dispositions to protect the right to land for indigenous peoples. However, the economic, cultural and social rights there established are a guideline for the recognition of the complex range of rights³², including those that the right to land for indigenous peoples encompasses. Because the ICESCR do not define a mechanism for jurisdiction and some of its rights are quite broadly defined, the Covenant serves to give ground to indigenous peoples claims but does not count with a satisfactory mean of enforcement. The monitoring body of the ICESCR is not competent to receive complaints.

INTERNATIONAL LABOR ORGANIZATION CONVENTION No. 169

Regarding indigenous peoples' right to land, The ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries presents some important advances on indigenous land as a collective right with strong aspects of economic, social and cultural rights. The ILO Convention No. 169 is the most comprehensive and up-to-date international instrument on the conditions of life and work of indigenous and tribal peoples. As an international treaty, it becomes legally binding once ratified by the State party.

According to the ILO Convention No.169, indigenous land should be conceived as the total environment of the areas that indigenous peoples occupy and use, therefore embracing collective aspects of economic, social and cultural nature. The ILO Convention No. 169 protects indigenous peoples land's rights and traditional economic activities, and proposes a collective aspect for the right to property. The

³² P. Thornberry, *Indigenous Peoples and Human Rights*, 2002, New York: Manchester University Press.

Convention emphasizes in its Article 14 and 15: the right of indigenous peoples to participate in the use, management – including control to access to their territories – and conservation; the right to be consulted and participate on issues related to their territories; and the right to compensation for removals in their traditional land or for damages. The Convention also recognizes that indigenous peoples have a special relationship with the land and that this is the basis of their cultural and economic survival³³. In this regard, it calls for a number of special measures of protection with respect to indigenous land rights, including the need to protect indigenous peoples from unauthorized intrusion or use of their land, and the need to protect those peoples from being removed or evicted from their land. Therefore, according to the ILO Convention, the right to property, in the case of indigenous peoples, need to be compatible with the right to land embracing social, cultural and economic aspects.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR), in its Article 27 states that: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". The Human Rights Committee interprets the right to culture in its broad sense, as the right of a minority or indigenous people to exist as such. The monitoring body also observes that culture manifest itself in many forms, including a particular way of life related to the use of land and resources. Therefore cases³⁴ concerning indigenous peoples and their right to land have been subjected to the Human Rights

³³ Article 13, ILO Convention 169, establishes the concept of land in its application. It recognizes the collective aspect of this property right and the relationship between land, culture and spiritual values.

³⁴ *Kitok v. Sweden* (UN Human Rights Committee 43rd session. Opinion approved on the 27th July 1988, Communication No. 197/1985); *Lubicon Lake Band v. Canada* (UN Human Rights Committee 45th session. Opinion approved on the 26th March 1990, Communication No. 167/1984); and *Ilmari Länsman vs. Finland* (UN Human Rights Committee 52nd session. Opinion approved on the 8th of November 1994, Communication No. 511/1992).

Committee under ICCPR Article 27, arguably aimed at the protection of diverse economic, social and cultural rights (BOX 1 and BOX 2).

Despite the fact that the rights expressed in the ICCPR are of individual entitlement, its Article 27 relates individual rights to collective and group rights. Cultural rights of indigenous peoples have been discussed by the monitoring body of the ICCPR as related to the collective right to exist as distinct peoples. Thus, the interpretation and application of Article 27 of the International Covenant on Civil and Political Rights by the UN Human Rights Committee makes the ICCPR the most expressive legal mechanism to protect indigenous peoples' right to land as collective economic, social and cultural rights before the UN System of Human Rights.

UNITED NATIONS HUMAN RIGHTS COMMITTEE

The United Nations Human rights Committee is the Monitoring Body for the International Covenant on Civil and Political Rights (ICCPR). The competence of the Human Rights Committee is established in Article 1 of the Additional Protocol I to the ICCPR. The UN Human Rights Committee, concerning indigenous peoples' land, natural resources and right to culture, commenting on the article 27 ICCPR, has stated that:

“culture manifest itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”³⁵

In the same general comment on article 27 ICCPR, the Committee found the need of some positive measures, by states, to protect the identity of a minority or indigenous peoples and the rights of its members to enjoy and develop their culture, which is applicable as rights of

³⁵ UN. Human Rights Committee General Comment N.23 (50), HRI/GEN/1/Rev.1 at38, adopted in 6th April 1994.

collective character. The UN Human Rights Committee has recognized the fundamental importance of the link between indigenous peoples economic and social activities and their traditional land, for indigenous cultural protection. The Committee has also concluded that under international law – under CERD and ICCPR - states have legal obligations to protect indigenous peoples’ cultural integrity and that necessarily includes the obligation to protect indigenous peoples land, resources and their property rights.

Therefore, although serving the International Covenant on Civil and Political Rights, the UN Human Rights committee has articulated economic, social and cultural rights with issues of indigenous peoples’ land. In addition, despite the fact that the UN Human Rights Committee has a consistent policy on accepting only individual-rights cases, its practice regarding indigenous peoples rights has been based on the protection of collective-rights. Thus discrepancy between what is said and done by the Committee is stressed. In sum, the jurisprudence of the UN Human Rights Committee on Article 27 of ICCPR has advanced both collective and ESC rights of indigenous peoples related to their land. Such interrelation of rights has shown to be primordial to the protection of indigenous peoples and their various human rights.

BOX 1: *Ilmari Länsman et al v. Finland*³⁶

The case was brought before the Human Rights Committee (HRC), under the Optional Protocol I of ICCPR, and timidly acknowledge the relationship between indigenous peoples’ land and economic, social and cultural rights.

The *claim* concerned to the adverse impacts on Saami reindeer herding caused by the Finnish Government’s approval of quarrying activities in traditional Saami territories. It was brought by individual members of the Muotkatunturi Herdsmen’s Committee and of the Angeli local community, based on Article 27 of ICCPR. Whereas Finland argued, for the recognition of State discretion concerning economic activities (quarrying) besides the non-applicability of Article 27 ICCPR; the authors limited the base of the claim in the terms of the said Article, specially for the right to enjoy their own culture (reindeer herding and spiritual relation to land).

The HRC *decided* that the State is entitled to undertake measures encouraging economic development that have a ‘certain limited impact’ on the way of life of persons belonging to a minority and which will not necessary amount to a denial of the rights under Article 27. In its view, there was no breach of the ICCPR due to the limited amount of quarrying activities in relation to reindeer breeding. The reasoning of the HRC decision did not make any reference to specific indigenous peoples rights, but concentrated on Article 27 of ICCPR and the status of the individual applicants as members of an ethnic

³⁶ *Ilmari Länsman v. Finland*, Communication No. 511/1992, Human Rights Committee 52nd session.

minority. It did not considered in deep the economic aspect of the dispute to the Saami people side either. However, further interpretations points out to the possibility of violation of Article 27 due to economic activities in indigenous land that would have a major impact on the collectivity and their way of life.

A *critical analysis* of the case reveals that the HRC decision did not consider the real impact of development activities (quarrying) on indigenous culture, which is incremental and therefore should not be seen as many isolated events but as a whole. Although recognizing that some economic activities in indigenous land could violate their collective cultural rights, the classical tradition of individual rights still prevailed in the decision. If the right to land for indigenous peoples was to be considered as a collective and economic, social and cultural right; and if indigenous norms were to be applied, such as ILO Convention No. 169, Article 7 (3), then the assessment of the impact and damages of quarrying to Saami people might have been different, meaning in better accordance with indigenous peoples conception of land and use of land.

BOX 2: Lubicon Lake Band v. Canada³⁷

The case, communication No. 167/1984, was brought before the UN Human Rights Committee based on Article 28 of the ICCPR, and its Optional Protocol I, and advanced the conception of indigenous land embracing collective economic, social and cultural rights aspects.

Chief B. Ominayak and the Lubicon Lake Band lodged a petition before the Committee alleging that the State of Canada violated the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. It was claimed that, despite laws and agreements (Indian Act of 1970 and Treaty 8 of 21 June 1899) recognizing the right of the original inhabitants of the northern Alberta area to continue their traditional way of life, the Canadian Government allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (leases for oil and gas exploration). Canada presented arguments for non-admissibility of the petition due to allegedly effective ongoing domestic procedures and due to issues of sovereignty (article 1 of ICCPR).

On the 22nd July 1987, the Human Rights Committee decided that the communication was admissible in so far as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained. After six years of deliberation, the United Nations Human Rights Committee charged Canada with a Human Rights Violation stating that, "recent developments threaten the way of life and culture of the Lubicon Lake Cree and constitute a violation of Article 27 of the International Covenant on Civil and Political Rights in its dealings so long as they continue." The Committee reaffirmed that the Lubicons could not achieve effective redress in Canada.

The analyses concerning the right to land and collective cultural rights of indigenous peoples, stresses that the UN Human Rights Committee has advanced the use of Article 27 ICCPR to protect socio-cultural rights of indigenous peoples related to land.

INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The Inter-American System of Human Rights is composed by the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights. On its task to report human rights

³⁷ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990). Human Rights Committee 45th session.

conditions of particular OAS member States, the Commission has frequently focused on the situation of indigenous peoples³⁸ in those countries. The Commission has also accepted important human rights complaints and carried significant investigations, such as in the *Awás Tingni v. Nicaragua* case (BOX.3), the first case ever heard by the Inter-American Court of Human Rights having as central issue questions of indigenous peoples collective rights to traditional land and natural resources. The Court's decision recognized the collective character of the right to land of the Awás Tingni indigenous peoples, as well as its relationship with their culture and spiritual life.

The American Convention on Human Rights and the American Declaration on the Rights and Duties of Man are the current instrumental legal frames for the Inter-American System of Human Rights. Although neither of those instruments mentioned indigenous peoples specifically, both included general human rights provisions that protect indigenous peoples' right to land. For instance, the *right to property* is affirmed by the Inter-American instruments (article 21 of the American Convention on Human Rights and article XXIII of the American Declaration on the Rights and Duties of Man) and interpreted, by the regional human rights system, in attachment to property regimes that derive from indigenous peoples' own customary or traditional systems of land tenure. The *right to physical well being* and to *cultural integrity* are interpreted as the linkage between the right to land and natural resources, and the means of subsistence, the ground for familial and social relations, religious practices and the very existence of indigenous communities as distinct cultural group. Anaya and Williams Jr.³⁹ argued that the Inter-American human rights system provides protection for the traditional land and natural resource tenure of indigenous peoples, and that it establishes for

³⁸ See the Inter-American Commission of Human Rights Reports on the Situation of Human Rights in different countries: Ecuador - OEA/Ser.L./V./II.96, doc.10 rev.1 (1997); Brazil - OEA/Ser.L./V./II. 97, doc.29 rev.1 (1997); Mexico - OEA/Ser.L./V./II.106, doc.59 (2000)

³⁹ J., Anaya, and R., Williams Jr., "The protection of Indigenous Peoples' Rights over Land and Natural Resources Under the Inter-American Human Rights System" in *Harvard Human Rights Journal*, vol.14, 2001, pp 31– 96.

states corresponding legal obligations. According to them, these protections of land rights are legally grounded on the *rights to property, physical well-being and cultural integrity*, extended to indigenous peoples due to the non-discriminatory principle.

Similarly to the UN human rights system's interpretation, the right to cultural integrity is also argued by the Inter-American Commission in the context of protection of minorities, and indigenous groups, as essential for the enjoyment of their diverse culture and group identity. The Commission has affirmed, in a number of its human rights reports, that the right to integrity of indigenous peoples' cultures covers the aspects linked to productive organization and that includes, among other things, the issue of communal ancestral land. It has also found that states owe "special legal protections" to indigenous people land for the preservation of their cultural identities⁴⁰. The human rights system of the Organization of American States has shown a more progressive practice recognizing indigenous rights to land and natural resources when compared to the UN Human Rights System due to its acceptance of the collective character of that right. Further progresses regarding ESCR aspects of indigenous peoples' land are expected to take place with the acceptance of the proposed American Declaration on the Rights of Indigenous Peoples by OAS States.

Nonetheless the possibility of legal protection in the regional sphere, the Inter-American Human Rights System alone is of little use to the indigenous rights promotion and effective protection. Protection of indigenous land still depends upon State's measures. Therefore the regional aspect of political influence has to be considered together with the legal enforceability aspect of that System. For instance, the developments of indigenous' rights concepts by the Inter-American System was a great contribution to the region and served in many cases as

⁴⁰ Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure, OEA/Ser.L/V/II.62, doc.26 (1983) at 76.

a guideline for State conducts toward indigenous peoples and their human rights.

BOX 3: *Comunidad Mayagna (Sumo) Awa Tingni v. Nicaragua*⁴¹

The case was brought before the Inter-American Court of Human Rights based on the petition no. 11.577, to the Inter-American Commission on Human Rights, dated from 2nd October 1995.

Jaime Castillo Felipe, leader of the Mayagna Community, acting in his own name and on behalf of the community lodged a petition before the Commission alleging that the State of Nicaragua failed to: demarcate the Awas Tingni Community's communal land, and to take the necessary measures to protect the community's property rights over its ancestral land and natural resources as well as to guarantee an effective remedy for the Community's claims. The claim was basically generated because of the governmental concession of logging activities, in ancestral land of Mayagna Awa Tingni Community, to a private company and dispute on title of ancestral land. In 1998 The Commission submitted the case to the Court, arguing among other things that: the concession given to the enterprise SOLCARSA threatened the economic interests, the survival and the cultural integrity of the Community and its members and therefore violated the right to property. (para. 140, K)

In its final judgment, the Court declared that Nicaragua State had violated the right to judicial protection, and the right to property to the detriment of the Mayagna Awas Tingni Community. The Court decided that the State had to adopt the necessary measures to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. The court, on the right to land, recognized its collective character and its relationship with indigenous cultures and spiritual life. Additionally the Court stated that to the indigenous communities the relationship with land is not merely a matter of possession and production but a material and spiritual element that they should be able to enjoy fully, including to preserve its culture and to transmit it to future generations. (para. 149)

The analyses concerning the right to land and cultural rights of indigenous peoples, stresses the importance of the decision – it is the first time that the Inter-American Court issues a judgment in favor of the rights of indigenous peoples – in the scenario of so many violations of the indigenous peoples right to their ancestral land in Latin America. The judgment also reveals the development of the concept of the right to land, going beyond the classical understanding of property rights, since it included references to economic, social and cultural rights. Finally, the cultural identity of indigenous peoples is raised as fundamental consideration to the respect of the principle of non-discrimination under the Inter-American system of human rights.

INTERNATIONAL HUMAN RIGHTS CONTRIBUTIONS AND LIMITATIONS

The international human rights discourse, institutions and laws contribute in at least two ways to the protection of indigenous peoples' rights, especially regarding the right to land: through legal enforcement and through political influence. International Human Rights Instruments (ICESCR, ICCPR and ILO Convention No. 169 mainly), debates (Draft Declarations and others manifestations at international level) and legal

⁴¹ Inter-American Court of Human Rights, Serie C 79, Final Judgment 31st August 2001.

practice (UN Human Rights Committee and Inter-American System of Human Rights) gives signs of support to the assertion that the indigenous peoples' right to land encompasses collective ESCR aspects.

However, the international human rights system presents limitations, especially those related to coerciveness of international law. The advanced texts regarding the indigenous peoples' right to land of the UN Draft Declaration on the Rights of Indigenous Peoples⁴² and the Proposed OAS Declaration on the Rights of Indigenous Peoples are not binding. The ILO Convention No. 169 is not largely accepted⁴³ nor does it count with a coercive mechanism. The specific Covenant on Economic, Social and Cultural Rights does not have yet a monitoring body empowered to deal with complaints, and the UN Special Rapporteur on Indigenous Issues has its activities restricted to country visits, communications and thematic research. At the United Nations level, enforceability of indigenous peoples' right to land as embracing collective economic social and cultural rights' aspects can basically be argued under the Article 27 of the International Covenant on Civil and Political Rights. And still, the ICCPR requires that States ratify its Protocol I in order to give competence to the UN Human Rights Committee to hear complaints.

At the regional level regarding Latin America, the Inter-American System of Human Rights practice acknowledges collective economic social and cultural rights' aspects related to indigenous peoples land rights. However it does not cover situations in all countries, neither all cases within countries. Besides enforcement by the Court, the Inter-American Commission plays in a more political level, with country reports and recommendations. There have been a number of cases concerning indigenous peoples' rights and their right to land with the

⁴² UN Doc. E/CN.4/Sub.2/1994/56. Article 25: 'Indigenous peoples have the rights to maintain and strengthen their distinctive spiritual and material relationship with the land, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.'

⁴³ So far, only 17 countries have ratified the ILO Convention No.169, revealing the difficulty for States to recognize fundamental rights to indigenous peoples.

most expressive outcome being the embarrassment and recommendations of measures to be taken in order to prevent further violations. Therefore, generally, the international coercive power is not enough by itself to protect and promote human rights effectively. In fact, the selective conduction of cases is many times unfairly aimed at developing countries and jeopardize the whole international human rights system. No doubt the small number of cases dealt by the international human rights systems have a significant weight as reference cases but the protection of indigenous peoples' right to land is required as an effective measure and not simply exemplary measures.

The lack of punishing mechanisms for violations of indigenous peoples' right to land can be interpreted as a weakness of the international system. In fact, the possibility of international liability for human rights violations seems far to be reached and in the case of indigenous peoples struggle for land may not even be desired. Despite non-enforceability, the international human rights system, as an evolving system, has contributed directly to the protection of indigenous peoples through its political power over the willingness of States to comply with human rights standards. While international enforceability is not fully implemented, legal pressure combined with political embarrassment is the tool for such an influence. Therefore the establishment of human rights standards and the progressive development of indigenous rights concepts – with the participation of indigenous peoples themselves in the international arena - are the main contributions of the international institutions and discourse.

2.4 Conclusion

Adopting the internationally agreed concept of Human Rights, and considering the socio-environmental aspects and the anthropological meaning of land to indigenous peoples, fundamental aspects of ESCR are proposed as a legal framework for the indigenous peoples' right to land to be nationally implemented. The existence of cultural, social and

economic rights on the right to land is the ground for the assertion that such right is a *fundamental collective right* to the indigenous peoples. Thus, protection of land goes far beyond protection of property rights to indigenous peoples. Bellow, a sum up of Sections 2.2 and 2.3 are applied in a model framework of collective ESCR approach to the right to land of indigenous peoples.

Meaning of indigenous land: conceptual basis

The indigenous peoples' right to land encompasses collective economic, social and cultural rights aspects. The economic rights' aspects of land to indigenous peoples are, among others: **property rights** (ownership and management of land and natural resources, and sustainability of their way of life, including to participate in the market economy and develop activities with non-indigenous partners if they wish so); and **traditional economic activities** (means of production for subsistence and for a satisfactory standard of living according to their way of life). The social rights' aspects of land to indigenous peoples include: **right to health**, because the land and natural resources have a direct impact over indigenous peoples health, healthcare and psychological well being; and **social organization**, since the land establish the social relations and organization. Therefore changes in the territorial rights of indigenous peoples affect their systems of hierarchy, social relations, participation, familial relations, etc, and threaten their cohesion as a group or people. The cultural rights' aspects of land to indigenous peoples are present in the importance of land to indigenous system of beliefs, and to the development of indigenous culture. Cultural right is perceived throughout economic and social rights classified as: **right to exist as a distinct people**.

International support: legal basis

The international human rights law and practice support the collective ESCR approach to the right to land of indigenous peoples. Culture protection is understood, by the UN Human Rights Committee

General Comment 23 on the International Covenant on Civil and Political Rights⁴⁴, Article 27, to be related to indigenous land and use of land by indigenous peoples and comprehend their particular way of life, survival and existence. Therefore the general relationship between cultural rights and indigenous land's protection is considered well established within the UN Human Rights Committee practice.

Further interpretations of the protection of indigenous culture and land, regarding economic and social rights have also been done. According to the UN Human Rights Committee General Comment 23, on the ICCPR Article 27, and its application in the cases⁴⁵, the right to culture has a broad meaning and embrace traditional economic activities, social organization and indigenous way of life. ILO Convention NO. 169 also links the protection of the right to land and the protection of indigenous economic rights, in its Articles 1, 2, 7, 22 and 23.

Regarding social rights, the same UN Human Rights Committee General Comment 23, connects the right to land with social rights, especially regarding to indigenous social identity and organization. In addition, ILO Convention NO. 169, Articles 1, 2 and 5, protects the right to land for indigenous peoples as a protection of social rights; and Article 13 interrelates social, cultural and economic rights of indigenous peoples with the right to land. The Inter-American System of Human Rights has also related indigenous peoples' right to land and their right to life and ESCR especially regarding the right to health and culture.

Contributions of the collective ESCR approach to the indigenous peoples' right to land

The primordial contribution of a collective economic social and cultural rights approach to indigenous peoples' land is that it strengthens the protection and promotion of the right to land for indigenous peoples. This is so because the said approach sustains the real meaning of land to indigenous peoples existence and survival. In other words, it adds aspects

⁴⁴ UN Doc. CCPR/C/21/Rev.1/Add.5, General Comment No. 23: The rights of minorities (Art. 27)

⁴⁵ BOX 1 and BOX 2.

of social and human concerns to be translated into rights. Considering its aspects of fundamental right, the right to land for indigenous peoples shall be treated in a more suitable way, thus avoiding the simplistic property rights approach. Therefore the right to land is to be conceived according to international human rights standards and to be translated into domestic legislation and public policies. The collective ECSR approach gives a more suitable weight to the meaning of indigenous land, especially when confronted with other interests such as commercialization of land and exploitation of land's resources.

Another contribution is that the ESCR approach supports the collective rights' aspect of the right to land for indigenous peoples. The protection of indigenous peoples' rights to land as a collective right is, by its turn, a sign of recognition of the inherent equality and dignity of all peoples to maintain their distinct socio-cultural organization, free from unwanted, external interference. Collective rights help to define more appropriated international legal terms of indigenous peoples cultural survival and future development because they aim to protect indigenous peoples' ways of life and cultures⁴⁶. The promotion of economic, social and cultural rights, including questions of resource management, poverty alleviation, community development and other rights and needs of indigenous peoples are embraced by the collective ESCR approach. It is further argued that Constitutional legal texts, domestic policies of land's demarcation, and effective land's security in accordance with the collective ESCR approach better acknowledge the socio-cultural importance of land to indigenous peoples. Therefore the proposed framework is of relevance for the indigenous peoples' human rights protection.

⁴⁶ R., Williams Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World", in *Duke Law Journal*, 1990.

3. INDIGENOUS PEOPLES' RIGHT TO LAND IN BRAZIL

Since the colonization period, on the XVI Century, the number of indigenous peoples in Brazil has significantly reduced; some indigenous customs, traditions and even culture were forced to disappear; and the issue of land loses has been identified as one of the major problems faced by them⁴⁷. Attempts to regulate indigenous land have been of the most different natures. The diverse time, political contexts and minds have been influencing public policies of indigenous land rights in different ways⁴⁸. International Human Rights standards, law and practice of monitoring bodies have had some impact on national initiatives to recognize the indigenous peoples' right to land. More recently has been the development of a concept of right to land including collective ESCR aspects.

The analyses of the Brazilian legislation and public policies support the idea that collective economic, social and cultural right aspects are present on the right to land for indigenous peoples and, that the application of a collective ESCR approach to that right is for the benefit of indigenous peoples' human rights. The cases (Chapter IV) exemplify that when the right to land is denied or treated as purely economic asset or property right, violations of other economic, social and cultural rights take place. Hence the collective ESCR approach to the right to land helps comprehending why it is necessary but not enough to confer property rights to indigenous peoples; and how indigenous peoples human rights can adequately be protected through land security and policies.

The presence or lack of presence of such ESCR considerations is closely related to the influences of the international human rights law, institutions and discourse within the Brazilian legislation and public

47 Instituto Socioambiental, "SOS Brasil 500 anos" in *Parabólicas* N.57, ISA, March 2000.

48 CEDI- Centro Ecumênico de Documentação e Informação, *Povos indígenas no Brasil 1987/ 88/ 89/ 90*, CEDI, São Paulo, 1991.

C. A., Ricardo (ed.), *Povos indígenas no Brasil: 1991- 1995* ISA – Instituto Sociambiental, São Paulo, 1996.

C. A., Ricardo (ed.), *Povos indígenas no Brasil: 1996-2000* ISA – Instituto Sociambiental, São Paulo, 2000.

policies. The applicability of the proposed approach in the review of the situation of indigenous peoples' land right in Brazil reveals some of the domestic obstacles and achievements in terms of indigenous peoples' human rights protection. The thesis highlights the positive advances of the current Brazilian constitutional text regarding indigenous peoples and their land, and incorporating collective ESCR considerations.

The study is also stresses that the historical injustices and violations of indigenous peoples rights were linked to the treatment dispensed to the indigenous peoples right to land in neglect to their collective ESCR. Indigenous peoples rights' realities around the Brazilian territory present historical disparities. Different recognition and pattern of awareness of indigenous land rights leads to different scenarios of ESCR. To exemplify some of those disparities and to point out the positive influence of international human rights standards, including the collective ESCR framework, Chapter IV presents three different cases of indigenous land's dispute and demarcation processes in Brazil.

3.1 Brazilian Legislation

Internationally, the Brazilian State is bound by the ILO Convention 169⁴⁹, by the International Covenant on Civil and Political Rights, by the International Covenant on Economic, Social and Cultural Rights⁵⁰, and by the Convention on the Elimination of All Forms of Racial Discrimination⁵¹, among others. However, the Brazilian State has not yet ratified the Additional Protocol I or II to the ICCPR and, therefore did not declare the competence of the UN Human Rights Committee to receive complaints.

⁴⁹ ILO Convention 169 was ratified by the Brazilian Government in 25th July 2002 and incorporated into domestic legislation by Decree 5.051 / 19th April 2004.

⁵⁰ Brazil is a member state to the UN and has accessed to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights in 24th April 1992.

⁵¹ Brazil ratified and recognized the competence of CERD (Committee on the Elimination of Racial Discrimination) by the International Convention on the Elimination of All Forms of Discrimination in 4th January 1969.

At the regional level, Brazil is a member state of the Organisation of American States, since its foundation on the 5th May 1948, and is bound by the OAS Charter⁵² and by the American Declaration of the Rights and Duties of Men. The State is also party to the Protocol of San Salvador⁵³, instrument for the Inter-American Region concerning economic, social and cultural rights, and to the Inter-American Convention of Human Rights⁵⁴. In 1996, the Brazilian Government gave jurisdiction for the Inter-American Court of Human Rights to hear complaints on human rights violations.

Nationally, there are basically two laws that regulate indigenous rights and, both were influenced by the international human rights standards at their times: the Indian Statute⁵⁵ from 1973, and the Federal Constitution of 1988. Federal Tribunals have already determined the importance of the 1988 constitutional text instead of private civil law text when deciding on disputes of indigenous land and property rights. The Federal Constitution⁵⁶ consecrated the idea that permanent possession of the lands and exclusive use of land's resources are essential to the

⁵² UN registration: 01/16/52 No. 1609, Vol. 119

⁵³ Brazil ratified the San Salvador Protocol on the 21st August 1996.

⁵⁴ UN registration: 08/27/79 No. 17955. Brazil is party to the Pacto San Jose da Costa Rica since 1992.

⁵⁵ Estatuto do Índio, Lei N. 6.001/1973 is an ordinary law that deals with the regulation of the juridical status of indigenous communities in Brazil. It was conceived while the country was dominated by an authoritarian regime. At that time the Brazilian Government was suffering intense critics from the international community for denounces of constant human rights violations against the indigenous peoples in the territory including massacre and genocide attack. Thus the Indian Statute was elaborated as an attempt to show to the international community that the Brazilian government had a compromise with the existent international human rights instruments and a national public police for indigenous people. However, the whole document has a tone of integration and assimilation of indigenous people in the major society. The rights established there are provisory: They would be valid only until indigenous people take part of the major society.

⁵⁶ Article 231 §1 of the Federal Constitution defines that indigenous land are those traditionally occupied by Indigenous peoples in the country, meaning those "permanently inhabited by them, used for their productive activities, indispensable to the preservation of the environmental resources necessary to their well-being, and those necessary to their physical and cultural reproduction, in accordance with their use, customs and traditions".

Article 231 §2 states that indigenous peoples are entitled to the permanent possession of indigenous land and to the exclusive use of the resources existing in the soil, rivers and lakes (exclusive usufructuary rights).

indigenous peoples' physical survival and continuity⁵⁷. The Brazilian Legislation recognises the right to land as a fundamental right to indigenous peoples with strong concerns to collective ESCR. Such innovative concept has regulated most of the recent land demarcations in the Amazon Region contributing to the recognition of continuous areas rather than punctual areas or “aldeias”.

THE BRAZILIAN FEDERAL CONSTITUTION OF 1988

Concerning the indigenous peoples' rights over the land, the Brazilian Federal Constitution of 1988 rules in its Article 231, using a collective rights approach⁵⁸, that the Union shall demarcate, and ensure protection to all the indigenous peoples land. The constitutional text defined indigenous peoples' right to land as an originary right and established the principle that indigenous peoples are the first and natural owners of Brazilian traditionally occupied land.⁵⁹ In Brazil, demarcation procedures do not give or take a right; it does not create an immemorial site or a traditional *habitat*; it only clarifies the extensions and limits of indigenous land necessary for their cultural survival. Demarcation of indigenous land corresponds to a legal declaration and a physical delimitation of the area.

With the Federal Constitution of 1988, for the first time in the Brazilian history, popular cultural values of the indigenous peoples, as individuals and collectivities, held juridical relevance⁶⁰. It was only then,

57 J. A., Silva, “Terras tradicionalmente ocupadas pelos índios”, in SANTILLI, Juliana (coord.) *Os Direitos Indígenas e a Constituição* NDI – Núcleo de Direitos Indígenas e Sergio Antonio Fabris Editor, Porto Alegre, 1993, p.49.

⁵⁸ Indigenous peoples' rights are the kind of rights that have as subject of law a group, in this case a people that is known to exist as such but does not require the identification of each member of the group.

⁵⁹ The Royal Act from 1st. of April 1680 already recognized the indigenous peoples as “the first to occupy and own these land”. In 1755 such principle was ratified, in accordance with the Bula do Papa Benedito XIV, through a Law stating that “to the land given to private individuals, it would always be reserved the right of indigenous peoples, who are the primary and natural owners of the land” (cited by F., Tourinho Neto, , “Os direitos originários dos índios sobre as terras que ocupam e suas consequências jurídicas” in J., Santilli (coord.) *Os Direitos Indígenas e a Constituição* NDI – Núcleo de Direitos Indígenas e Sergio Antonio Fabris Editor, Porto Alegre, 1993).

⁶⁰ C. F., Marés de Souza Filho, 1992 “A Protecção Jurídica dos Bens Culturais” cited by A. V. Araújo, “Direitos culturais dos povos indígenas – aspectos do seu

when the integrationalist mentality was vanished from the Brazilian legislation⁶¹. And the indigenous peoples were conferred partial ownership rights over the lands, since the Union detain property right. At the present moment, the status of partial property right, such as usufructuary and possessory rights, is not a major problem to the indigenous peoples' right to land since the main indigenous claims are so far restricted to land security.

Actually, the fact that the Union holds property right is arguably a way of conferring applicability to the indigenous right to land, as a special protection to vulnerable groups. State property right combined with perpetual usufruct, permanent occupation and participation in the management of the land and resources by indigenous people, well respond to the actual demand for indigenous peoples' land security. This is so because different economic and political interests still tend to prevail rather than the protection of indigenous peoples land. Therefore full property rights to indigenous peoples would not be an efficient manner to protect indigenous peoples collective rights in the current scenario. The indigenous peoples are still vulnerable to threats against their land, and to forced or non-aware assimilation.

Article 231 of the Brazilian Federal Constitution also incorporates socio-cultural aspects in order to define indigenous land and to protect indigenous peoples' continuity. Regarding the collective economic, social and cultural rights' aspects of indigenous land, the constitutional text defines indigenous land as those "permanently inhabited by them, used for their productive activities, indispensable to the preservation of the environmental resources necessary to their well-being, and those necessary to their physical and cultural reproduction, in accordance with their use, customs and traditions". The definition of permanent habitation

reconhecimento" in J. Santilli (coord.) *Os Direitos Indígenas e a Constituição* NDI – Núcleo de Direitos Indígenas e Sergio Antonio Fabris Editor, Porto Alegre, 1993, p.228. 61 In addition, reforms of the Indian Statute were proposed and are still under revision by the Brazilian National Congress. See C. A., Ricardo (ed.) *Povos indígenas no Brasil: 1996-2000* ISA – Instituto Sociambiental, São Paulo, 2000, Section ACONTECEU, pp.105-106.

or productive activity or any other component of the concept is not to be established according to the capitalist or socialist model neither according to our understanding of well-being but following the indigenous way of life, the indigenous peoples cultures⁶².

The Brazilian Federal Constitution of 1988 significantly advanced including in its Article 216 the Brazilian cultural diversity. It therefore stressed the need to protect the references of identity, action and memories of the different groups of the Brazilian society, as part of the national cultural patrimony.

THE INDIAN STATUTE OF 1973⁶³ AND DECREE 1775 OF 1996

The other Brazilian law that regulates indigenous rights is the Federal Law N.6.001 from 1973, known as Indian Statute (Estatuto do Índio). That Law has not yet been completely abrogated by the Federal Constitution and in some parts even contradicts the new constitutional precepts. The most relevant aspects of the Indian Statute are its contributions to demarcation of indigenous peoples land⁶⁴; the requirement of an Administrative Decree for demarcation of land; and the recognition of indigenous groups or communities as subject of Law in litigations concerning indigenous land, though represented by the Ministério Público.

The demarcation procedure, established in the Decree 1775/96, is composed by 4 different major steps⁶⁵: first, an area is identified by a multidisciplinary group of experts, in accordance with the traditional use of the territory by an Indigenous people; secondly it is officially declared as an indigenous territory by the Minister of Justice; then, the area is physically demarcated by the federal indigenous agency (FUNAI); and

62 J. A., Silva, “Terras tradicionalmente ocupadas pelos índios”, in J. Santilli (coord.) Os Direitos Indígenas e a Constituição NDI – Núcleo de Direitos Indígenas e Sergio Antonio Fabris Editor, Porto Alegre, 1993, p.47.

63 Federal Law N. 6.001 from 19th December 1973.

64 Estatuto do Índio, Article 19 “As terras indígenas, por iniciativa e sob orientação do órgão federal de assistência ao índio, serão administrativamente demarcadas, de acordo com o processo estabelecido em decreto do Poder Executivo.”

65 Decreto 1775/96, Article 2.

finally homologated by the President of the country. The process can sometimes be complicated, long, and subject to a lot of political pressure likewise the Raposa-Serra do Sol case further presented. And that is why, in my view, international human rights standards and bodies play an important role influencing national initiatives to protect indigenous peoples rights.

The current administrative regulatory decree for demarcation of indigenous land in Brazil followed the previous decrees - with additional administrative grievance procedure⁶⁶. The document verses about the need for an initial juridical and anthropological study of the land and of the indigenous people, as well of the situation of other occupations like real estate, residence and business. The anthropological study is made by a multidisciplinary group of sociologist, anthropologist, environmentalist and others that do field research in order to better define the meaning of land for that specific group. It is then suggested that demarcations of land take place in order to cover indigenous' needs for survival and continuing existence.

Social, cultural and economic aspects of the land to indigenous peoples are therefore seriously considered to achieve a reasonable protection of land's rights, which goes beyond property rights. The tendency of recognition and demarcation of continuous areas is increasing and points out the acknowledgment of the broad meaning of land, encompassing collective ESCR aspects, to indigenous peoples. Such human rights approach also tends to give directions to national indigenous policies concerning land's management and indigenous peoples physical and ethno-cultural continuation.

⁶⁶ The Decree 1775 replaced the Decree 22 and added a civil administrative grievance procedure and a 90-day period of contention, during which non-indigenous individuals can challenge the identification and delimitation of indigenous land. National and international indigenous rights NGOs protested, particularly because the Decree was considered retroactive and because of the concerns that already delimited land would be reduced in size. Despite the protests, the vast majority of claims against existing indigenous land have been dismissed to date. Indigenous rights to their land primacy have been upheld.

3.2 Brazilian Political Scenario

Approximately 345.000 native Brazilian citizens⁶⁷, indigenous people, which corresponds to roughly 0,2% of the country's total population are found scattered throughout the country. Indigenous people belonging to about 220 different indigenous peoples and speaking more than 180 different languages, live nowadays in Brazil⁶⁸. The great majority of Indigenous communities live on collective land and 98,61% of the Brazilian indigenous populations land are located in the area known as the Legal Amazon (encompassing the states of Amazonas, Acre, Amapá, Pará, Rondônia, Roraima, Tocantins, Mato Grosso, and the Western part of Maranhão)⁶⁹. According to the Brazilian agency of demographic studies, IBGE, the number of people identified as being indigenous peoples in Brazil, is raised to 734.127 if included those living in urban areas⁷⁰. Much of the indigenous peoples' struggle for land has led to forced changes of indigenous life style, including migration to urban centres threatening their existence as distinct peoples.

Struggle for land includes threats to indigenous peoples' ownerships and/or, threats to the indigenous peoples effective possession of land and exclusive use of natural resources. Constantly, violations of indigenous peoples land rights happen by invasion and unlawful intrusion for the purpose of mining, limbering, agricultural operations and cattle ranching. Besides, State development of public projects like non-

⁶⁷ "Since there is no indigenous census in Brazil, global computations have been made - either by the government agencies (FUNAI or FUNASA), by the Catholic Church (CIMI) or by the ISA - that are based on different information which points to global estimates varying between 350 and more than 550 thousand indians. " (M., Azevedo, "Different estimates", Instituto Socioambiental, at:

<http://www.socioambiental.org/pib/english/whwhhow/howmany/difesti.shtm>)

According to FUNAI (Indigenous Peoples Assistance National Foundation), there are 345.000 indigenous people recognized as such and living within indigenous peoples community and land. (at: <http://www.funai.gov.br/indios/conteudo.htm#HOJE>)

⁶⁸ ISA, *Lista de Povos Indígenas no Brasil Contemporâneo*, Banco de Dados Povos Indígenas do Brasil, Instituto Socioambiental, last updated in September 2003. (at: <http://www.socioambiental.org/pib/portugues/quonqua/quadro.asp>)

⁶⁹ ISA, *Location and Extension of Indigenous Land*, Instituto Socioambiental, last updated on the 29th March 2005.

(<http://www.socioambiental.org/pib/portugues/quonqua/ondeestao/locext.asp>)

⁷⁰ IBGE Demographics Studies, Censo 2000.

indigenous settlements, building roads and energy infrastructures without the consent of the indigenous population were a common practice and also constituted violation to constitutional provision and international obligations towards indigenous peoples' right to land and their ESCR. To combat violations of indigenous peoples' right to land, legislation; awareness; and protective measures that embrace both aspects of property rights and aspects of ESCR of indigenous land are necessary.

Brazilian indigenous peoples claim legal rights to 12,3% of the national territory and so far have obtained significant recognition⁷¹ of that claim through identification, demarcation, and registry of the land in accordance with the 1988 Constitutional text. However, the implementation of the advanced constitutional provisions still faces obstacles related to the interests over indigenous land and conceptions of those lands as economic assets rather than as a fundamental right. In addition, past demarcations' processes disregarding the collective ESCR aspects of land to indigenous peoples have amounted to violations of indigenous peoples human rights. The collective ESCR approach to the right to land for indigenous peoples helps to overcome human rights violations; contributing to the recognition of past violations; and offering keys for future protection of indigenous peoples.

Arguments against indigenous peoples land embracing ESCR

There are disagreeing voices concerning the right, size and demarcation of indigenous land in Brazil. Some believe that there is much land for few indigenous people, especially in the regions where indigenous peoples are entitled of continuous areas rather than punctual parcels of land – 'aldeias'. But such arguments disregard the meaning of land for indigenous peoples and therefore the proposed collective ESCR approach (Chapter II) is of relevance in terms of advancing the conception of indigenous peoples' land and rights. The defendants of that type of critics have the western civilization society as their standard. They

⁷¹ ISA, *Juridical and Administrative Situation of Indigenous Land*, 2000, in C. A., Ricardo^(ed.), *Povos indígenas no Brasil: 1996-2000* ISA – Instituto Socioambiental, São Paulo, 2000, p.165

do not consider that indigenous peoples live off their land and are distinct peoples. For instance, arguments such as: it is too much land for too “little people”; too valuable land and resources for too “primitive people”⁷² were held even though cultural diversity is a constitutional right; even though it is known that indigenous peoples culture is based on a totally different relationship with land; or worst, even though in Brazil about 44% of the land is owned by 1% of the population, farmers; and even though 10% of the population concentrates 53% of the Brazilian capital⁷³.

Other arguments like: that indigenous peoples destroy the natural environment; that the indigenous peoples do not have legal individual title over the land; and that because they have relations with non-indigenous, their activities cannot be called as traditional also finds grounds in the Brazilian society. Those arguments reveal the still ongoing influence of an assimilationist mentality, “civilized and non-civilized” divisions and discriminatory behaviour against indigenous peoples culture. Acceptance of ethno-cultural diversity shall respect indigenous peoples’ way of life and its own path of development especially regarding the use of land, which non-rarely includes new economic relations with non-indigenous partners.

Overcoming the discussion on whether indigenous peoples have the right to land or not (considering that they have), the argument that land is a mere individual property right determined by the Civil Law is also often raised. However, indigenous peoples do not simply occupy the land for exploitation but, land are indigenous peoples’ *habitat* in the ecologic sense of interaction among natural and cultural elements that set aside a more balanced development of human life.

72 Both arguments defended by most of the National Congress Members, except from the left wing, as revealed in a survey by Folha de São Paulo Newspaper, 10th October 1993.

73 Data Folha from June 1993.

3.3 Conclusion

Generally, the Brazilian federal legislation and the current federal position of the government seem to be in accordance to the international human rights discourse for indigenous peoples' rights. Especially regarding the right to land; protection provided by the Federal Constitution and regulatory framework seem to follow an appropriated path of evolution embracing human rights concerns. In the present context the permanent occupation and usufruct of the land⁷⁴ seem to be enough and in complete accordance with the ILO Convention No. 169, to which ownership rights (meaning different rights of ownership and not necessarily exclusive property right) should be conferred to indigenous peoples in order to guarantee indigenous peoples survival through the protection of their economic, social and cultural rights.

Brazil – together with Bolivia, Colombia, Costa Rica, Panama, Paraguay and Peru – has a high level commitment and, advanced legal framework concerning indigenous peoples' right to land⁷⁵. The criteria proposed for the legal framework comprehend: land tenure regime (property rights to protect indigenous culture); territorial recognition (recognition of indigenous land as defined by the ILO Convention No.160); natural resources rights (ownership, use and administration of natural resources as consequence of land's rights); tenure security (decree of security of land title); autonomy (amount of autonomy to manage their own affairs, including the use of their traditional legal systems and justice systems); and legal recourse (legal actions to which they have recourse to defend their land and land's rights)⁷⁶.

Though extremely contested by some state governments together with industries and private interests defendants, the demarcation of indigenous peoples land determined by the Brazilian Federal Constitution

⁷⁴ Article 231 Brazilian Federal Constitution, 1988.

⁷⁵ R., Ortega, "Models for Recognizing Indigenous Land's rights in Latin America", in *Biodiversity Series*, Paper N.99, The World Bank Environment Department, World Bank, 2004

⁷⁶ R., Ortega, "Models for Recognizing Indigenous Land's rights in Latin America", in *Biodiversity Series*, Paper N.99, The World Bank Environment Department, World Bank, 2004.

is being applied according to the high level legal framework criteria and consonant with the International Covenant on Economic, Social and Cultural Rights and with the International Covenant on Civil and Political Rights (as interpreted the Article 27 by the UN Human Rights Committee). The advances of the Brazilian federal legislation reveals the influence and contributions of the proposed collective ESCR approach to the right to land and gives sign to the improvement of indigenous peoples protection of rights through the protection of their right to land. The recognition of land rights protects indigenous peoples' right to culture, which means protection of indigenous peoples' right to exist, to preserve and to develop their way of life.

However, it is necessary but not enough that the right to land for indigenous peoples is protected by legislation. In fact, the establishment of a right by the Federal Constitution cannot be regarded as protected if there is no other appraisal for that right. The application of the constitutional precepts has shown to be fundamental. The new standards of land's demarcation that includes anthropological studies and socio-cultural concerns preferring demarcation of continuous areas ought to become an established practice. In addition, land's security after demarcation must also be provided.

For the occasion of the homologation of indigenous land, on the Indian Day in 2005, the President Lula recognized that demarcation is not enough. He said that programmes to combat poverty and to promote sustainability, health and education for indigenous peoples are to be implemented and improved in those demarcated land.⁷⁷ It is now hoped that the ESCR approach can also be of use to the effective implementation of indigenous peoples land's rights, beyond demarcation procedures. After all, human rights are to be realized and not only agreed.

⁷⁷ ISA, Instituto Socioambiental News of 19th of April, 2005, internet webpage visited on the 20th April 2005 at: <http://www.socioambiental.org/nsa/detalhe?id=1974>

4. CASES FROM BRAZIL

In Brazil, as in most Latin-American countries, the situation of indigenous peoples human rights have been affected by the treatment dispensed to the indigenous peoples' right to land. The assimilationist mentality and the purely property rights' approach to land as an economic asset provoked a great variety of economic, social and cultural rights violations to indigenous peoples. Also, they contributed to the current difficulties in practice to advance indigenous peoples' right to land as embracing collective ESCR aspects. In order to balance the indigenous peoples' right to land with human rights concern, and to and advance its protection, the situation in Brazil is reviewed through the application of the collective ESCR approach. The cases illustrate the difficulties, in practice, to protect indigenous peoples' right to land as embracing collective ESCR

The first illustrative case is the Guarani-Kaiowá indigenous people's case. The Guarani-Kaiowá's struggles for land date from colonial time, in the XVI century. Extreme poverty, lack of basic living conditions, high rate of sub-nutrition⁷⁸ among children and suicide among adults have been calling the attention for Guarani-Kaiowá indigenous land issues related to land's rights and policies. It is a sad example of land policy – previous to the 1988 Federal Constitution - that did not consider indigenous peoples as distinct people neither considered their economic socio-cultural relation to their land.

The second case is the Yanomami case in Brazil. The Yanomami people have suffered serious threats against their survival and existence. Causes for the gradual disappearances of indigenous peoples were the spread of diseases, such as malaria; lack of health assistance; and a number of violent attacks against Yanomami people. An important particularity of the Yanomami people case was its international

⁷⁸ According to Folha de São Paulo Agency News the indigenous infant mortality rate in Mato Grosso do Sul increased 25% between 2003 and 2004 reaching 60 deaths for every 1000 born, whereas the Brazilian general rate is 24 for every 1000.

repercussion and national mobilisation contributing to inclusion of indigenous peoples' rights in the Brazilian Constitutional process of 1988. The Yanomami is presented here as a quite positive example of outcome. It was a landmark case before the Inter-American Human Rights System, entering a new era of forwarding indigenous peoples' rights under the principle of the right to cultural diversity. The socio-cultural concept of indigenous land defined in the Brazilian constitutional text allowed a very different process of recognition and demarcation of indigenous peoples' land embracing concerns of economic, social and cultural rights' aspects.

The third and last case presents the struggle for land of the indigenous peoples in the Raposa-Serra do Sol area. This is a more recent and still contested – or unfinished - case of indigenous land demarcation that presents strong political influences: internationally, in favour of indigenous peoples and their economic, social and cultural rights. Locally, it has been mostly in favour of other interests such as agro-business industries and some mining interests. Constant, and many times unpunished, violent conflicts take place in the region, basically grounded on the argument that those lands are economic assets and should not be “granted” to indigenous peoples. In spite of private interests, there has also been a formal public attempt to apply the Constitutional precepts of Raposa-Serra do Sol indigenous land rights as a socio-cultural right. The case demonstrates a real long lasting struggle for land due to the clash between recognition of indigenous peoples' right to land as from before, and after the Federal Constitution of 1988. In other words, the Raposa-Serra do Sol case illustrates that the lack of recognition of ESCR related to land's rights for indigenous peoples give space to the dispute of land as ordinary property and, to the dominance of economic interests over the land. The merely property rights approach land's right does not attend indigenous peoples claims for human rights protection and generates violent conflicts.

The starvation and sub-nutrition of Guarani-Kaiowá children is not only a question of lack of food or money for food. Similarly, the hundreds of Yanomami who died in the 1980's – victims of epidemiological diseases to which indigenous peoples were not immune – was not only a question of vaccination. Neither were just cases of police the crimes practiced in the Raposa-Serra do Sol indigenous area. The illustrative facts are deeply related to land's rights and to the ESCR aspects of indigenous' land. How does the State relate the issue of land protection with other collective economic, social and cultural rights protection, is an important question to be answered.

4.1 CASE 1: The Guarani-Kaiowá people in Dourados, Mato Grosso do Sul

Guarani –Kaiowá People and their land

In Brazil, there are around 34.000 Guarani⁷⁹, making them the country's most numerous tribe⁸⁰. They were one of the first peoples contacted after the European arrivals in South America, around 500 years ago. Despite the existence of different sub-groups of Guarani, they all share a religion that emphasises land above all. According to the Guaranis, the land is the origin of all life, and is the gift of the 'great father', Ñande Ru.

The Guarani Kaiowá particular relation to the land is based on a feeling of “belonging” to the land, that is comprehended not as property but as a natural element to which the indigenous people form part: where they were born, where their ancestors are buried, where their descendants will live. This feeling is the base for the notion of *tekoha* “the place where we realize our way of being”. According to Instituto Sociambiental, *tekoha* is thus the physical place – land, forest, field, waters, animals, plants, remedies, etc. – where the *teko*, or “way of being”, or the Guarani state of life, is realized⁸¹. Ideally, *Tekoha* would comprehend an area of equilibrium that offers good water supply and cultivable land for the plantings of gardens, building of houses, raising of animals and practice of religion. The forest space is also an important element in the construction of cosmology, because it is the scene for mythological narratives and the dwelling of numerous spirits for the Guaranis.⁸²

79 ISA, *Lista de Povos Indígenas no Brasil Contemporâneo*, Banco de Dados Povos Indígenas do Brasil, Instituto Socioambiental, last updated September 2003, internet webpage: <http://www.socioambiental.org/pib/portugues/quonqua/quadro.asp>

80 International Survival, “About Guarani”, at: <http://www.survival-international.org/guarani.htm>

81 ISA, Enciclopédia, Guarani, Kaiowá and Ñandeva, “Location and Tekoha”, internet webpage: http://www.socioambiental.org/pib/epienglish/guarani_kaiowa/loc.shtm

82 Ibid.

Facts and problems

Since the arrivals of the Europeans in Brazil, in the XVI century, the Guarani peoples, including the Guarani Kaiowá people, have suffered from land losses. As a result, a number of them were killed in conflicts for land and innumerable Guarani groups migrated from the coast to the interior of Brazil. The land's policy from the time of occupation for colonization until before the promulgation of the 1988 Federal Constitution was based on the belief that, in time, indigenous people would integrate the major society organization and leave behind their traditional way of life, uses and customs. Also, that kind of policy - called 'aldeamento' – and assimilationist mentality served to facilitate the "liberation" of the land for the establishment of farms and agro industry. The lack of control in terms of conferring security to the right to land of indigenous peoples amounted in illegal invasions and unjust outcomes against indigenous peoples' rights.

According to the 'aldeamento' policy, the indigenous people were agglomerated in small and punctual areas (reserves) where it was said to be enough for them to have a house and develop agriculture, but not according to their traditional economic activities. Dourados is a typical case of 'aldeamento' policy, because in an area of about 3.600 hectares⁸³ around 11 thousand indigenous Guarani-Kaiowá people live or survive. Since colonial time, the Guarani-Kaiowá people have been losing traditional land to new occupiers or invaders: farmers and agro-industry have grown in the region in the last two decades⁸⁴. In such reduced and unsecured piece of land, the indigenous people cannot cultivate enough for living or live according to their way of life. Families of the Guarani society were also forced to live with other families that they would probably not live with if they could choose and also forced to participate in an economic regime that they were not used, neither willing to have.

83 1 hectare (1ha) corresponds to 10.000 m².

84Amnesty International, Press Release, "Brazil: safety and survival of indigenous peoples at risk.", 30th March 2005, internet webpage: <http://web.amnesty.org/library/index/engamr190092005>

Historical injustices regarding indigenous peoples and their land contributed to problems of economic, social and cultural nature suffered by the Guarani-Kaiowá nowadays: starvation, sub nutrition, prostitution, alcohol addiction, violence, suicide, among others. The intense contact with the urban society, together with the land losses, also affected their lives; most of the young indigenous people work in the sugar cane plantation under sub-human conditions but as their only way of survival. The indigenous land have been contested, from both sides due to the inadequate land policy applied in the region, previously to the Federal Constitution of 1988 that confined indigenous peoples in ‘aldeias’ – instead of continuous areas – and conferred land title to non-indigenous occupiers of the land around the ‘aldeias’.

The demarcation of indigenous land as ‘aldeias’ revealed the non-recognition of indigenous peoples’ land as a fundamental right with aspects of economic, social and cultural rights, and generated a pattern of indigenous rights violation that are difficult to revert now. Political interests over the land prevailed instead of the law of public interest; illegal occupations (of farmers and agro-industries) of indigenous land remained just as they were; or encroached more territories, whereas the Guarani people were marginalized in their own land. The imposed changes in the Guarani social, political and economic organizations related to their land became a threat to their survival.

Changes and challenges

In the end of the 1970’s, FUNAI Technical Groups works and anthropological reports contributed to the increase of the knowledge about the conception of Guarani space, demystifying the saying from the XX century that “indigenous peoples did not need any more land”⁸⁵. However, the formal achievements did not coincide with substantial governmental changes in land policies for indigenous peoples, especially in order to revert situations previous to the Constitution of 1988. The assimilationist mentality was still prevailing, formally supported by land

85 R. T., Almeida, “A ‘entrada’ no Tekoha” in C. A., Ricardo (ed.) Povos indígenas no Brasil: 1996-2000 ISA – Instituto Sociambiental, São Paulo, 2000, p. 745-751.

titles previously conferred to private individuals. Thus, conflicts became more violent and, when not solved, put the fragility of democratic institutions in evidence. During the 1990's and early 2000's, the claims for the protection and enlargement of land by the Guarani-Kaiowá and the Nandeva people in Mato Grosso do Sul became critical. Since then, alarming cases of suicide and infant death among Guarani peoples have been calling the attention to the issue of indigenous land rights and its relationship with other human rights, especially ESCR.

Application of the collective ESCR approach

The land policy – known as ‘aldeamento’ - generated overpopulation in the small indigenous area in Dourados and is a threat to the Guarani-Kaiowá's survival. Because the protection of land influence directly in the protection of indigenous peoples' ESCR, a collective ESCR approach to the right to land is needed.

Nonetheless the ‘aldeamento’ policy conferred the right to land for indigenous peoples, it was done in a provisory basis – until indigenous peoples would integrate the major society – and grounded on concept of land as property right or as a purely economic asset. Human rights standards were not considered and therefore ESCR aspects of the right to land were disregarded. As a consequence of that land's policy, thousands of Guaranis now live crowded onto tiny plots of land increasingly hemmed in by ranches and plantations, suffering from various human rights abuses, including exploitation as cheap labour force by ranchers, plantation owners and agricultural business.

To indigenous peoples organisations, the presence of other non-indigenous occupants is a violation of the indigenous constitutional rights to land⁸⁶ and a threat to their economic, social and cultural rights. According to NGO Survival International⁸⁷, the Guarani-Kaiowá in

⁸⁶ On the 30th of March, 2005 the Brazilian Federal Government homologated the indigenous land Nande Ru Marangatu for Guarani-Kaiowá in Mato Grosso do Sul, comprehending 9.317 hectares, one of the most claimed land in that state. (Instituto Socioambiental News from March: www.socioambiental.org.br).

⁸⁷ Survival International, “Guarani – about”, internet webpage visited in March 2005: <http://www.survival-international.org/guarani.htm>

Brazil is suffering terribly from the theft of almost all their land. The Guarani-Kaiowá people experience this theft as an offence against their religion as well as a destruction of their way of life and livelihood. Sadly, three hundred and twenty Guarani-Kaiowá committed suicide between 1986 and the beginning of 2000. Also, the infant mortality rate among the Guarani-Kaiowá people increased more than 20% in the last five years and now is much higher⁸⁸ than the national rate. Until April 2005, 18 indigenous Guarani-Kaiowá children died due to sub nutrition and pneumonia, only this year, in Mato Grosso do Sul⁸⁹.

Although the Guarani-Kaiowá people from Dourados receive from the Federal Government food (cesta básica) or the money for basic food, it is not a satisfactory solution to the problem⁹⁰. As indigenous peoples, the Guarani are used to a different living environment, different customs and uses, including different dietary. Guarani-Kaiowá's health, social organization, activities and beliefs – what gives meaning to life - were drastically shaken by the changes in their territory. Therefore, in addition to land's rights; claims of collective economic, social and cultural rights violations are also urged. The use of a collective ESCR approach to the right to land could contribute as a key, based on international human rights standards, to the prevalence and application of the constitutional precepts of Article 231 even in cases where the previous and new legislation clashes.

Additionally, in order to overcome historical injustices and violations of rights and alter the Guarani-Kaiowá case; the proposed approach could link the right to health and food with the right to land and coordinate land reform programmes with emergencial social programmes. Much weight can be added to the question of land when it is dealt as a question of human rights, not only because of its conception as a broad

88 Data Folha, January 2005: 64,33 infant deaths for each 1000 people is the Guarani rate in Dourados.

89 Newspapers: OESP, 5th April; O Globo, 5th April.

90 According to indigenous peoples interviewed, the food that should be enough for a month last no more than 10 days. Newspaper Folha de São Paulo, 22nd February.

fundamental right but also because of its support and protection in the international human rights systems.

4.2 CASE 2: The Yanomami people in Roraima

Yanomami People and their land

The Yanomami have a population of about 27.000 people, one of the most numerous forest dwelling peoples in South America, within the borders of the Brazilian and the Venezuelan territories in the Amazon region.⁹¹ The Yanomami are deeply spiritual people, they summon shamanic spirits and believe that these spirits reside in the mountains, wind, thunder and darkness, and that they help to cure forest diseases, control the weather and “keep an eye in the world”.⁹² On the top of the hills the images of animals-ancestors live in the form of shamanic spirits and they look after the human beings⁹³. Therefore the Yanomami peoples do not inhabit the mountains within their territories. The Yanomami people live in communal houses, sharing up to 400 individuals from different groups, and provide for themselves by hunting, gathering, fishing, and growing crops, for food and medicine, in large gardens cleared from the forest. Because the Amazonian soil is not very fertile, a new garden is cleared every second or third year. Therefore they use large extensions of land to produce according to their customs uses and beliefs.

In Yanomami language *urihi* means the forest and the soil, it also means territory. The expression *ipa urihi* (my land or my territory) refers to the place where the speaker was born or where they live. *Urihi*, the forest-land, to the Yanomami people is not a mere inert space for economic exploration (of what we call 'nature')⁹⁴. It is a living entity, part of a complex cosmological dynamic of exchanges between humans and non-humans. To the Yanomami people the forest and the land are places given by *Omama* spirit for them to live generation after generation. Yanomami people believe that the land and its resources are part of a living body, which carries powers of protection and fertility.

Facts and problems

Until the end of XIX century, the Yanomami people was in contact only with its indigenous neighbourhood. In Brazil, Yanomami's first contact with “outsiders” happened due to the encounter with extractivist representatives, hunters and soldiers from the border of the

⁹¹ Survival International, “Yanomami”, internet webpage visited in January 2005: http://survival-international.org/tribes.php?tribe_id=54

⁹² Comissão Pró-Yanomami, Os Yanomami, “Os Yanomami e sua terra”, internet website at: http://www.proyanomami.org.br/v0904/index.asp?pag=htm&url=http://www.proyanomami.org.br/base_ini.htm#1

⁹³ Ibid.

⁹⁴ B., Albert, “Urihi : terra, economia e saúde Yanomami.”, *Série Antropologia*, 119 Brasília : UnB, 1991. p.45.

country. In the XX Century, between 1940's and 1960's, catholic and evangelic missions established permanent channels of contact with the Yanomami people. In the 1970's and 1980's the contact with non-indigenous people was highly increased and the Yanomami suffered with the invasion of gold miners and cattle-ranchers in their land⁹⁵. They had their villages destroyed and were exposed to diseases to which they had no immunity.

The advancement of mineral exploitations activities, mainly gold extraction, combined with corrupted interests of the local government threatened indigenous peoples land as well as their health, social organization and traditional activities, among other ESCR, and ultimately killed⁹⁶ many Yanomami people. Confined to a much smaller area than the one they occupied before, the Yanomami people was considered faded to destruction⁹⁷ in the 1980's.

Changes and challenges

In 1985, a landmark declaration from the Inter-American Commission on Human Rights, in the *Yanomami v FUNAI* case (BOX 4) recommended that the Brazilian state delimit and demarcate the Yanomami Area. The Commission found, due to Brazil's failure to take "timely measures" to protect the Yanomami land from intrusions, that violations of the right to life⁹⁸ took place. The Inter-American

⁹⁵ According to Pro Yanomami Commission (CCPY), 20% of Yanomami population was wiped out in only 7 years. (Comissão Pró-Yanomami, Os Yanomami, "Os Yanomami e sua terra", internet website at: http://www.proyanomami.org.br/v0904/index.asp?pag=htm&url=http://www.proyanomami.org.br/base_ini.htm#1)

⁹⁶ It was estimated that 1500 Yanomami people died between 1987 and 1992. M. A., Pelegrini "O lugar dos Yanomami doentes no Sistema Único de Saúde" in C. A., Ricardo (ed.) *Povos indígenas no Brasil: 1991- 1995* ISA – Instituto Sociambiental, São Paulo, 1996, p.211.

⁹⁷ In 1994 the general rate of mortality was higher than the general rate of birth in the Yanomami area. C.E., Oliveira and D. A., Francisco. "Projeto de saúde Yanomami no Demini, Tootobi e Balawaú", in C. A., Ricardo (ed.) *Povos indígenas no Brasil: 1991- 1995* ISA – Instituto Sociambiental, São Paulo, 1996, p.213.

⁹⁸ See, also, Rodriguez 1993, 26-7. With regard to access to resources and subsistence needs, Rapporteur Rodriguez states that: "A trend has been observed to consider the right to life as a broader more general concept, characterized not only by the fact of being the legal basis of all rights, but also by forming an integral part of all the rights that are essential for guaranteeing access for all human beings to all goods, including legal possession of same, necessary for the development of their physical, moral and

Commission recommended, inter alia, that programs of education, medical protection and social integration be carried out for the Yanomami people, in consultation with the indigenous populations affected, take place in addition to land's security measures. The case had an important impact on the Brazilian legislation and public policies towards indigenous peoples' land rights and general demarcation procedures.

The Yanomami case is believed to have contributed to the Brazilian government efforts to respect indigenous rights, through the adoption of the advanced text of Article 231 in the Federal Constitution of 1988. The international mobilisation, specially the case before the Inter American Commission on Human Rights, influenced the Brazilian Government to start with demarcation procedures of the Yanomami Park; to consider socio-cultural aspects of indigenous land; and to expel the gold miners from Yanomami land. In 1991 a continuous area of 9.4 millions of hectares was recognized⁹⁹ as Yanomami indigenous area, despite the local pressure against such recognition¹⁰⁰. Finally, in May 1992 the Yanomami area was homologated, finalizing thus the demarcation procedures. However, the protection of the Yanomami land's rights is not considered completely achieved. The interests of Mineral Resource industry persist in the Yanomami indigenous land. According to Commission Pro Yanomami almost 60% of Yanomami territory have had title required by private and public, national and international extractive companies. Therefore land's security is still required.

The demarcation of the Yanomami land was influenced by international human rights standards and advanced the discussion of

spiritual existence. Moreover, deprivation of this legal possession . . . jeopardizes the right to life." (Ibid) The right to life is non-derogable and a peremptory norm of international law or jus cogens. The IACHR has noted previously that the right to life of Indigenous and Tribal peoples is seriously compromised by conditions that make it difficult to resist the encroachments of colonists and others who occupy their land and territories. (IACHR 1973, 27).

99 Portaria MJ N.580 homologated by the Presidente Fernando Collor de Melo on the 25th May 1992.

100 C. A., Ricardo (ed.) *Povos indígenas no Brasil: 1991- 1995* ISA – Instituto Sociambiental, São Paulo, 1996, Section ACONTECEU pp.218-238.

indigenous peoples' right to land in terms of recognition of collective economic, social and cultural aspects of. In practice, the demarcation of a continuous area based on anthropological and sociological concerns contributed to the rise of a new, and more suitable, indigenous land's policy in Brazil.

Application of the collective ESCR approach

Fundamental aspects of the proposed collective ESCR approach to the right to land for indigenous peoples can be perceived in the new land's policy grounded on the Federal Constitution of 1988, which was first applied in the Yanomami case. The effective domestic protection of the Yanomami's right to land related to collective ESCR, especially the right to health, was influenced by international human rights standards.

In addition to the 1985 case before the Inter-American Commission on Human Rights, in 1994, the same Commission from the Organization of American States asked permission from the Brazilian Government to investigate the case Yanomami, documented in the OAS 1997 Report on the situation of Human Rights in Brazil.¹⁰¹ According to that report: "significant progress has been made in recognizing, demarcating, and granting territorial land to the Indian peoples. Nonetheless, there are some cases, especially in the state of Roraima, where the Commission was able to confirm that action had been taken by the state to erode the human rights of the Indian population"¹⁰². It was found that despite full recognition of land's rights to Yanomami people, their integrity as people and as individuals were under constant attack due to pressures and invasions of the Yanomami's land. The recommendations pointed out the concerns to the economic, social and cultural aspects of indigenous land's protection.

As a result, the Brazilian government took further steps in order to respond to the international recommendations through national policies

101 OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997, Chapter VI, G.

102 Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, J(d), 1997. (<http://www.cidh.oas.org/countryrep/brazil-eng/chapter%206-1.htm>)

and legislation establishing the right to land; policy of land's protection; and economic, social and cultural activities to strengthen land security for the Yanomami people. For instance, health programmes and educational programmes, both aimed at indigenous peoples cultural rights respect, advanced the issue of land as a fundamental collective right. The participation of national and international NGOs were fundamental for the awareness of ESCR concerns when defining public policies for the establishment of indigenous peoples' human rights, and for realization of the newborn constitutional rights.

The Yanomami people now run their own health and education projects – but still with help from local and international NGOs - and in 2004 they formed a Yanomami association¹⁰³. The Yanomami people have incorporated some western medicine for treating diseases brought in from outside but also kept their own medicines for diseases and problems that they had before contact with non-indigenous peoples. Their medicinal treatment is done in consultation with their shamans and other leaders so it does not undermine their own practices and their own leaders. The Yanomami have also chosen to acquire literacy in their own language and in Portuguese, so they have bilingual education programmes developed with the governmental institutions.

The Yanomami case indicates that international human rights standards were incorporated in the definition of indigenous land by the Brazilian Federal Constitution, and ruled the demarcation procedure of Yanomami land, resulting in a better response to the indigenous peoples' struggle for land in the region. Also, the socio-cultural concept of indigenous land contributed to a more positive outcome of indigenous peoples' economic, social and cultural rights protection and realization. Therefore in comparison to the Guarani-Kaiowá case, the Yanomami people have their human rights better protected through the advances of their land's protection. The proposed framework is believed to offer further contributions to the advancement of the Yanomami people's

¹⁰³ CCPY – Comissão Pró-Yanomami, *Boletim nº 55*, December 2004

rights protection and realization. For instance, claims against the restriction of the constitutional right to land regarding full ownership rights to indigenous peoples start to be raised. Therefore the collective ESCR approach can be of use to identify adequate response to those claims too.

BOX 4 Yanomami v. Brazilian Government and FUNAI¹⁰⁴

Individuals (members of various NGOs) acting on behalf of the Yanomami Indians collectively brought the case 7615/1985 before the Inter-American Commission on Human Rights, against the Brazilian Government.

The claim concerned the breach of fundamental individual rights to life, liberty and personal security, to residence and movement, to property, to health and well being, resulted from the government's construction of the road through the Yanomami's ancestral land and the uncontrolled invasion of the land by gold prospectors and others. The authors presented individual claims and alleged the many consequences of the violation of the right to land through invasion, dispossession and other means.

The Commission noted in its findings that the government of Brazil was responsible for the violation of several rights, including the right to preservation of health and well-being, and it recommended that the government adopt preventive and curative health measures to protect the life and health of the indigenous peoples. The Commission recommended that the government should delimit and demarcate ancestral land and adopt measures land against invasions. The decision also underscores the responsibility of the Brazilian state for failing to adopt measures in a timely and effective manner to protect the human rights of the Yanomami. Fundamentally, the Commission decided in terms of indigenous collective rights and for the preservation of their cultural identity and health.

The analysis of the decision reveals that the Commission went beyond the rights established in the American Convention and American Declaration of Rights and Duties of Men suggesting a collective dimension of indigenous peoples claims and recognizing the interrelationship of different categories of rights. On linking the violation of the human rights of the Yanomami directly to the violation of the right to land, the Commission took an important step towards the recognition of the right of indigenous peoples to their traditional land, as an intrinsic element of the international norms. Fundamentally, the Commission adopted a view of interrelation and interdependence of rights, giving a more effective character to its decision.

In 1988 the new Federal Constitution recognized indigenous peoples and their rights including the right to land. Started then a new era for indigenous peoples struggle for land.

4.3 CASE 3: The Indigenous Peoples in the Raposa-Serra do Sol Area

Macuxi People and their land

The Macuxi people live in familial shelters of about 100 to 200 individuals. The "houses" are located according to the social organisation of the Macuxi people,

104 Inter-American Commission on Human Rights, Coulter et al., Resolution No. 12/85, Case 7615, Brazil, 5 March 5 1985, OAS/Ser.L/V/II.66, doc.10 rev 1, 1 October 1985, 4-34.

united in groups – ‘parentelas’ – that correspond to the familial relationship they hold. The Macuxi territorial organisation is based on one or many ‘parentelas’ that interrelate to each other through marriages. The familial relations and territorial occupation of land also define the leadership of the social organisation.

The Macuxi universe is composed of three stages superposed in one single horizontal space: the superficial ground – where we live – is the intermediate stage between the subsoil – where the Wanabaricon live -, and under the Kapragon – where many different beings live. To the Macuxi people, all beings live similarly to the human beings (growing crops for subsistence, fishing and hunting), but the indigenous people do not have any relationship with those other beings. However, in the superficial ground, the Macuxi do not live alone but share their land with Orná:kon and Makoi beings, who are believed to cause diseases and deaths to a Macuxi individual that has its soul imprisoned by them.

Facts and problems

There are about 15.000 indigenous from the Macuxi, Ingarikó, Wapixana, Patamona and Tauperang peoples, in the indigenous area of Raposa-Serra do Sol - an area that has been claimed for 30 years and only recently recognized as a continuous area¹⁰⁵ comprehending an extension of 1.678.800 ha¹⁰⁶ in the borders of the Brazilian and the Guiana territories.

The Raposa-Serra do Sol area, in Roraima, presents an extremely high dispute of interests due to the installation of gold extraction activities and other mineral and natural resources uses; and due to cattle ranching farms¹⁰⁷ already established in the region since the end of the XIX century. The huge growth of “garimpeiros” working in the area, since the end of the 1980’s - the last golden boom of Brazil, increased the intensity of conflicts in the region. Land’s right protection, or lack of protection, played an important role for the increase pf conflicts. This was so because with the protection of the Yanomami area as indigenous land, the “garimpeiros” migrated from there to the Brazilian frontiers with the Guiana; in the Raposa-Serra do Sol area, largely supported by the local authorities. This area was clearly more vulnerable because at that time it was not yet identified, although claimed, as an indigenous area. In

105 Portaria N.820, Diário Oficial da União 11th December 1998.

106 Instituto Socioambiental, *Mapa da Amazonia Brasileira 2004*, ISA, 2004.

¹⁰⁷ Out of the 193 farms located in the indigenous area, only 8 of them, according to Serpro, would present legal entitlement, provided by local authorities, by its owners. However, according to the constitutional text, state governments cannot conceive titles within indigenous land because it is a matter of federal jurisdiction.

addition, throughout the XX century, the installation of agro-business for export increased, such as the rice producers, building up a situation of conflicts that became evident in the 1990's.

Together with extractivist and agro-business activities, local authorities supported the establishment of state projects, like the Hydroelectric in the Cotingo River, as an attempt to occupy the area with non-indigenous people, and with economic activities strange to the indigenous peoples traditional way of life. The local state government, of Roraima, is said to be historically opponent to the demarcation of indigenous land; to stimulate illegal invasions; and to invest in infrastructure or the extractivist centres within or near indigenous land – including the construction of roads. The Roraima government has also implemented a colonial strategy; installing new municipalities in the indigenous land Raposa-Serra do Sol, like the new “city” Uiramutã that does not have even an own economical sustainability to exist.¹⁰⁸ The intent of such occupation was to avoid the recognition of continuous areas for indigenous peoples and maintain exploitation economic activities in the area, alleging “social crises”. All those attempts were in completely violation of the constitutional right to land established in the Article 231 of the Brazilian federal Constitution.

The federal government delay to proceed with demarcation of the indigenous area; the involvement of the public institutions in negotiations with farm owners – offering to accelerate the demarcation process if the indigenous community give up on a part of their land to farmers -; the coverage of the media usually in favor of farmers - treating the indigenous peoples as invasors to their own land and denying their rights and ethnic identity-; conflicts between state and federal judicial and administrative organs; and political interests also contributed to the scenario of countless violations of indigenous peoples human rights in the Raposa-Serra do Sol area.

108 M., Santilli, "Facada na Raposa" in C. A., Ricardo (ed.) Povos indígenas no Brasil: 1996-2000 ISA – Instituto Sociambiental, São Paulo, 2000.

Changes and challenges

The Raposa-Serra do Sol case had its outcome legally based on the 1988 Federal Constitution. Therefore, aspects of socio, cultural and economic rights related to the indigenous peoples right to land were incorporated in the land's recognition. The constitutional texts allowed the recognition of a significant continuous area to attend the survival and development needs of the indigenous peoples that inhabit the region. However, the legal constitutional advance faced practical obstacles to its implementation. Other interests over the land prevailed for decades, rather than indigenous peoples' human rights protection. The clash between the conception of indigenous land from before and after the Federal Constitution of 1988 was observed during the whole land's demarcation procedures.

In 1993 the Indigenous Area Raposa-Serra do Sol was identified and approved by the competent organisms of FUNAI, after more than 20 years since the initial procedure¹⁰⁹. However, the declarative act depended upon the decision of the Ministry of Justice, and upon the formal act of homologation by the President of the Republic. There were delays of all kinds, including based on questions of national security (because the area would comprehend boarder areas) serving as an excuse in favour of interests other than the protection of indigenous peoples rights. However, the discussion on whether there could be demarcation or not is not pertinent at all, since the Federal Constitution when conferring land rights to indigenous peoples does not differentiate those occupying land in frontier lines or not. Political pressure against the demarcation of the land revealed the disparities in terms of protection of interests and, in terms of establishment of rights before and after 1988. The presence of human rights concerns and avoidance of assimilationist approach is perceived only on the latest constitutional provisions. Therefore delays were provoked, preventing the demarcation process to reach an end as much as it could.

109 The administrative procedure of recognition of Indigenous Area started in 1977 with the Procedure BSB/3233/77

In 1997 the Inter-American Commission on Human Rights, in its report of the Human Rights situation in Brazil¹¹⁰, stressed that the procrastination and difficulties in recognizing the integrity of the Makuxi people and full ownership of their land – Raposa-Serra do Sol area - weakens traditional indigenous leadership and structure¹¹¹. The Commission recommended that the Brazilian Government homologated the Raposa-Serra do Sol indigenous area, in order to protect the Macuxi indigenous peoples and their culture. However, the Federal Government could not advance the question of recognition of land's right and other local interests still prevailed impeding the demarcation procedure of declaration of indigenous land.

In 2004 the Inter-American Human Rights Commission on Human Rights considered again the Raposa-Serra do Sol case¹¹² and required provisional measures from the Brazilian Government regarding the protection of indigenous peoples within the indigenous area. The Commission considered land security and cultural survival as interrelated issues. The right to move and live in the indigenous land, free from violence and aggression or violation of rights, was required as well as investigation and judicial measures to punish the violators of indigenous rights. The case had a significant international public impact in the image of the President Lula mandate concerning indigenous peoples, human rights and international relations¹¹³. The homologation of the continuous area¹¹⁴ took place on 14th of April 2005, with the presidential formal

¹¹⁰ ISA, Instituto Socioambiental News, from 8th December 2004, visited in April 2005, at internet website <http://www.socioambiental.org/nsa/detalhe?id=1874>

¹¹¹ Inter-American Commission on Human Rights IACH-OAS, Report on the Situation of Human Rights in Brazil, J(e), 1997. (<http://www.cidh.oas.org/countryrep/brazil-eng/chapter%206-1.htm>)

¹¹² Conselho Indígena de Roraima (CIR) and Rainforest Foundation-US co-filled a petition to the Inter-American Commission on Human Rights regarding demarcation of the Raposa-Serra do Sol area.

¹¹³ ISA, Instituto Socioambiental News, from 15th April 2005, at internet website: <http://www.socioambiental.org/nsa/detalhe?id=1969>

¹¹⁴ The President Lula homologates the Raposa-Serra do Sol Indigenous land with an extension of 1.743.000 hectares, on 14th of April 2005. ISA, Instituto Socioambiental News, from 15th April 2005, at internet website: <http://www.socioambiental.org/nsa/detalhe?id=1969>

act¹¹⁵ concluding the demarcation process. However, the demarcation of indigenous land is not enough to grant indigenous peoples land and human rights' security in a scenario of unbalanced powers and historically divergent interests. Therefore the proposed collective ESCR approach is believed to offer some contribution to further protections of indigenous peoples human rights related to indigenous land.

Application of the collective ESCR approach

Economic, social and cultural rights of indigenous peoples have been affected with the violations of the indigenous peoples right to land in the Raposa-Serra do Sol area. The Indigenous Council of Roraima argued¹¹⁶ in 1993 that the gold extraction activity developed illegally in the Raposa-Serra do Sol area was bringing negative consequences to the indigenous people such as: prostitution, alcoholism, pollution of rivers, destruction of river benches and a number of diseases. The organization also stressed that the delay on the recognition of indigenous land by the authorities was causing violent conflicts and a number of deaths, among indigenous and gold prospectors, in the region. The inertia of the federal government¹¹⁷ especially concerning recognition of indigenous areas, prosecution of crimes against indigenous peoples, and lack of availability of health assistance to those people was highlighted. The case was followed by international organizations of human rights and indigenous peoples' rights, and showed signs of support to the assertion of right to land encompassing collective ESCR aspects.

The Raposa-Serra do Sol case illustrates the fundamental role of legislation conferring right to land to indigenous peoples, and the need of political and administrative measures. It also stresses the contributions of international human rights system in the implementation of standards

¹¹⁵ ISA, Instituto Socioambiental, News, from 15th April 2005, at internet website: <http://www.socioambiental.org/nsa/detalhe?id=1969>

¹¹⁶ E., Pereira, "Roraima: um estado de violência institucionalizada" in Inter-American Commission on Human Rights (ed.) *Povos indígenas no Brasil: 1991- 1995* ISA – Instituto Sociambiental, São Paulo, 1996, pp. 166-168.

¹¹⁷ Editors, "AI Raposa/Serra do Sol: a longa espera dos Macuxi e Ingarakó" in Inter-American Commission on Human Rights (ed.) *Povos indígenas no Brasil: 1991- 1995* ISA – Instituto Sociambiental, São Paulo, 1996, pp. 161-165.

through domestic measures. The impact of land's rights on economic, social and cultural rights of indigenous peoples is particularly highlighted both through the analysis of the consequences towards ESCR due to the delay on the conclusion of demarcation procedures; and through the possibility of ESCR protection after land security. The case shows that collective ESCR of indigenous peoples can be threatened by the non-recognition of indigenous land's rights but also by the inertia of administrative bodies in implementing and protecting those rights. It also calls the attention for further measures regarding land management and protection, in order to guarantee economic social and cultural rights of those peoples. By endorsing the collective ESCR aspects of indigenous land and putting into practice the constitutional precepts established in Article 231, the protection of indigenous peoples human rights is increased rather than given up to other private interests.

4.4 Conclusion

The three Brazilian cases illustrate the assertion that there is a fundamental interrelation between collective ESCR and the right to land for indigenous peoples because of the especial relationship that indigenous peoples have with their land. Therefore the treatment dispensed to indigenous land ought to go beyond the economic asset aspect of land. In all cases, the right to exist as a group based on the non-discrimination principle was stressed.

The Guarani-Kaiowá in Mato Grosso do Sul, the Yanomami and, the Raposa-Serra do Sol cases' highlighted the national and international human rights influence on different political scenarios and legislations regarding indigenous land demarcation and ESCR protection. Particular weight was given to the collective economic, social and cultural rights that are threatened due to the violations of the indigenous land right. The advances of the Federal Constitution of 1988 - recognizing the indigenous right to land as a socio-cultural right – highlights the proposition that land for indigenous peoples are fundamental rights, according to international

human rights discourse. Therefore, public policies of land, management and collective development with collective ESCR focus are also needed in order to ensure security. The cases also point out some possible use of the collective ESCR approach to the right to indigenous peoples' right to land to repair historical injustices against indigenous peoples; to tackle economic, social and cultural rights that are currently being violated; and to and to strengthen the human rights aspects of the right to land through the implementation of the Brazilian Federal Constitution.

The Guarani-Kaiowá indigenous peoples had their land demarcated, in "aldeias", before the Federal Constitution of 1988 and therefore the current situation of that people denounce the influences of the neglect of land's rights as embracing ESCR aspects in the violations of indigenous peoples human rights. The concept of indigenous land applied to the Guarani-Kaiowá people was based on the assimilationist approach and influenced a general discriminatory pattern against indigenous peoples and in favor of local private interests such as the agriculture business and cattle ranching farmers. It was conveniently believed that the indigenous people just needed a piece of land to build their houses and have their crops and that lead to a situation of difficult change. In order to restore ESCR to the Guarani people, the Brazilian State Government would have to review land titling and demarcation in the region, applying the constitutional precepts. According to the 1988 Federal Constitution, it would be no more acceptable that the titles conferred to private individuals over indigenous land are valid. Because such measure would oppose well-established economic activities developed in the area, it is said to be of difficult or impossible the reversion of that situation. Therefore a collective ESCR approach could contribute balancing the weights between indigenous peoples survival interest and private economic interests over the land in Mato Grosso do Sul in order to remedy historical violations of rights. That could be by providing for equal opportunities to indigenous peoples in the dispute for land. The framework stresses the link between land policies, poverty, sub-nutrition, and other degrading conditions of livelihood.

In the Yanomami case, the demarcation of a continuous area; the organization of the Yanomami people; and the establishment of a health system and educational programmes aimed at the reality of the community give signs of a quite positive influence of ESCR protection through land's rights protection. However, except from the administrative procedure of demarcation, much of the economic, social and cultural rights advance was dependant on NGO's initiatives. This was so because the Federal Constitution was newly promulgated and yet not very strong to be put into practice. Actually, the influence of international human rights institutions and discourse played a fundamental role in this case, and in terms of advancing the concept of the right to land as embracing socio-cultural aspects.

Despite the fact that there has still been threats of invasion and use of natural resources by "garimpeiros" and mining companies, the past recognition process of indigenous land's rights and demarcation of the Yanomami territory – with great political mobilization, civil society participation and governmental commitment – gave place to a strong possibility for the realization of indigenous peoples' rights resistant to retrocede. The participation of national and international institutions has demonstrated to contribute to the monitoring of States obligations regarding all aspects related to indigenous land. The use of the proposed collective ESCR approach may contribute to advance other issues such as the collective management of land and natural resources.

Finally, the Raposa-Serra do Sol case presented the political difficulties to implement the legal right to land of indigenous peoples. Despite late, due to economic interests of the local state government, mineral companies and farmers against the recognition of the continuous area as indigenous land, the demarcation procedure reached an end according to the Federal Constitution 1988's advanced text, considering socio-cultural aspects of land. The collective ESCR approach timidly helped to overcome the clash of interests and protections previous and after the Brazilian Federal Constitution of 1988. There have been positive

signs that the Federal Constitution is on its way to be considered a well-established democratic instrument of considerable applicability. However, to guarantee effective enjoyment of that constitutional right, legislation proved not to be enough in the Raposa-Serra do Sol case. The recognition, protection and enjoyment of indigenous land's rights depend also on the political will and governmental policies to translate human rights standards into practice. In this sense, international human rights discourse and institutions also play an important role by politically influencing implementation of national legislation in favor of indigenous peoples. Therefore the pertinence of the proposed collective ESCR approach to the right to land of indigenous peoples. The framework establishes a human rights concept – like the one defined in the Brazilian Federal Constitution -, and enables political pressures to implement that. In addition, the proposed approach is believed to provide important tools for future challenges to be faced by indigenous peoples regarding their land rights, ESCR and development.

In other words, the application of the proposed framework of collective ESCR contributes to solve violent conflicts; to tackle the problems of economic, social and cultural nature related to land's invasions; and to strengthen human rights protection of indigenous peoples and their land. Some of the possible contributions of the framework are: demarcation of land as continuous areas and attending economic, social and cultural concerns of indigenous peoples survival and development as distinct peoples; follow up programmes and public policies for indigenous land management and security according to their way of life; and strengthening of the constitutional human rights provisions.

5. FINAL CONSIDERATIONS

International Human Rights Standards influence domestic protection of indigenous peoples' rights.

Human Rights can be considered as an evolving process of awareness, recognition and protection of universal rights that are fundamental to human existence. International human rights standards have proven to contribute to such process in different ways. Although an efficient legal instrument is not yet provided for all cases in the international arena, international human rights standards (international law and practice) have been influencing positive changes within States. A new paradigm of rights, based on the indigenous peoples' own advocacy funded on their way of life, needs and expectations, is being established internationally. National changes towards indigenous peoples' rights protection are also taking place. For instance, the right to land for indigenous peoples has become less and less controversial among States, gaining more protection, at least in the formally. Nevertheless, the realization in practice of such right still depends largely on implementation through public policies.

The considerations for the human rights aspects of the indigenous peoples' right to land contribute supporting the legislation for land's right and advancing the implementation of land's security policies. The collective ESCR approach to the right to land of indigenous peoples gives the dimension and profoundness of the concept of land and land's right to indigenous peoples, as a human right. Therefore the proposed collective ESCR approach finds its applicability within national protection of indigenous peoples' lands. Finally, the acceptance of ILO Convention N.169 by more states and the international adoption of the proposed UN and OAS Draft Declarations on indigenous rights could be a remarkable sign of contribution of the XXI century to a better picture of domestic advances towards indigenous peoples' rights protection, especially land's rights protection.

Indigenous Peoples Right to Land encompasses aspects of Collective Economic, Social and Cultural Rights.

According to indigenous peoples themselves; to anthropological studies; to indigenous organizations; to advocates; and to human rights lawyers and scholars, land to indigenous peoples comprehends fundamental aspects of collective economic, social and cultural rights – in addition to property rights, and other civil and political rights. Indigenous land therefore is to be understood as the concept of territory proposed by the ILO Convention No.169, and as a fundamental right to indigenous peoples. The rights to health, social organisation, maintenance and development of culture and traditions, and alleviation of poverty are also considered within the discussion of the right to land of indigenous peoples. In addition, the collective-rights character of indigenous land is of relevance to tackle the violations of human rights, especially of economic, social and cultural nature, generated by laws and public policies that have disregarded the broad significance of land to indigenous peoples.

ILO Convention, practice of the Inter-American System of Human Rights, and UN Human Rights Committee cover ESCR aspects of the right to land for indigenous peoples.

Even though justiciability of ESCR is of high dispute and controversy, the study concluded that the ILO Convention No.169 and the International Covenant on Civil and Political Rights, Article 27 are important judicial grounds for protection of indigenous peoples ESCR, linked to their right to land. This is so because they support, in their jurisprudence, the interrelation and interdependence of universal economic, social, cultural, civil and political rights. According to those international instruments, the protection of right to land for indigenous peoples is also the protection of their way of life and of their right to exist as peoples. Fundamentally, the UN Human Rights Committee recognized that the indigenous peoples' right to land is not a simple question of granting title, but involves addressing a more complex set of interrelated

legal, social, economic, cultural and political issues in order to be effective and secure.

On the regional level, the practice and jurisprudence of the Inter-American Court and Commission of Human Rights have advanced the issue of land's protection as a collective protection of indigenous peoples health, religion and cultural existence. Therefore national demarcation, titling and other administrative and judicial measures are influenced by those international standards and required to better responded to indigenous peoples human rights' claims.

Brazil: legal protection of indigenous peoples' right to land

Innovative in its concept, the 1988 Brazilian Federal Constitution included indigenous peoples economic, social and cultural rights concerns related to their right to land. Despite the fact that the State held property rights, the Federal Constitution and the regulatory framework recognized and formalized indigenous peoples' rights guaranteeing their perpetual usufruct and permanent occupation of the tradition lands. The introduction of socio-cultural aspects in the concept of indigenous land within the Brazilian legislation (Federal Constitution Article 231) has been contributing to the demarcation of continuous areas, as indigenous land, instead of fragmented "aldeias. The Brazilian cases show that legal systems more strongly support indigenous land's rights when they take into account not only ownership rights, but also security of that ownership. Also, whether it applies the collective ESCR approach, recognising the meaning of an indigenous territory, and its importance to indigenous existence as distinct people. However, despite the legal advances, indigenous peoples' land and their security still have to challenge economic and political interests against the implementation of that right by the administrative authorities.

Brazil: administrative measures and international influences to the protection of indigenous peoples' right to land

The practice at the regional level – before the Inter-American human rights system - and the national political, legislative and

administrative efforts towards indigenous peoples' rights protection, especially in the last two decades, are of relevance in terms of evaluating the administrative compliance of the Brazilian government regarding protection of indigenous peoples' land. The Brazilian Government has showed interest to prove its engagement for human rights and reply to the human rights violations' denounces. Nonetheless the Brazilian neglect for international human rights system of law, when a case is brought before an international body, the Brazilian Government tries to show that it can well respond through national initiatives and in accordance with international human rights standards.

It is now expected that the Brazilian Government, with the participation of indigenous organizations, conclude the demarcation processes of all the indigenous lands in the Brazilian territory and implement sustainability and protective programmes in those areas - including management of the natural resources, alleviation of poverty, health and education access - in order to protect indigenous peoples' collective ESCR and their right to land. In the international sphere, it is urged that the Brazilian Government ratify the Additional Protocol of the ICCPR and, that its current recognition of indigenous peoples' right do not mean to "freeze" indigenous peoples' rights and lives in the future. This is in regard to the limitations that are currently argued to be necessary for the recognition of indigenous peoples' land as territories such as not full ownership rights to indigenous peoples. There is a fear that in the future, it will mean over protection of the state that violates indigenous peoples freedom of culture and development.

Other relations

At last, the collective ESCR approach to land's right can be useful for a parallel of situation to Quilombolas communities¹¹⁸ in Brazil. The

¹¹⁸ In Brazil, there are 743 Quilombola communities and their quest for land's rights has been intrinsically connected to their survival as culturally distinct groups, against the discrimination and attempts to assimilationist approaches. The quilombola communities were identified in 2003 by the Fundação Cultural Palmares, for the project of identification and demarcation of land. UNDP Project 2003. (http://www.pnud.org.br/projetos/pobreza_desigualdade/visualiza.php?id07=211)

Quilombolas¹¹⁹ communities were established by freed slaves, generally in forest areas of restrict access and communication with the major society, safe from slavery. In those spaces, the Africans and their descendants - Afro-Brazilians - developed their own way of life with a strong territorial influence. A brief overview of the Brazilian legislation indicates that Quilombola groups have been neglected in their rights since their very existence in the XVI century until 1988, with an impact on economic, social and cultural problems. Article 216, §5 of the Federal Constitution of 1988 and the regulatory instruments¹²⁰ recognize especial territorial rights to the Quilombolas' members. Quilombola land or territories are defined as those occupied, and used to the guarantee of the physics, social, economic and cultural reproduction of the Quilombola community¹²¹, clearly inspired by the national definition and international acceptance of indigenous peoples' land as a socio-cultural concept.

In Brazil, the importance of land protection to cultural preservation - meaning the continuity and development of a distinct ethnic and cultural group - can be applied both to indigenous peoples and to other minorities such as the quilombolas communities. Thus, the collective ESCR approach to land ought to be considered within the Brazilian agrarian reform context for those groups. I therefore suggest the need for further studies regarding land rights and the meaning of land to Quilombola communities and other traditional peoples, focusing on its impact in their economic, social and cultural rights.

¹¹⁹ The definition of quilombolas is proposed in the Decree 4887/2003 as ethnic-racial groups, according to the self-identification principle, with their own history, holding special relationship with their territories, and presumption of black ancestrally related to the resistance against the historical oppression suffered

¹²⁰ Decreto 4.887/2003

Art.68 Ato das Disposições Constitucionais Transitórias

¹²¹ Decreto 4.887/2003

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