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Mining and Indigenous Peoples' rights: an
analysis of the Brazilian Amazon from an
international human rights law perspective

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Summary

The present study seeks to understand the impacts of mining on Indigenous Peoples' rights in the Brazilian Amazon. For this purpose, after an introduction of the context of mining historically, socially, and geographically in Brazil, a framework of Indigenous Peoples' rights is described, and each right analyzed separately. All rights are interconnected and interdependent, but it becomes evident that for Indigenous Peoples in the Brazilian Amazon, the right to land, territories and natural resources is essential for guaranteeing all other rights. The author finds that all rights described are negatively impacted by mining, mainly by illegal gold mining. Indigenous Peoples' rights are strongly backed by Brazilian legislation, and the Brazilian State has committed to ratifying and signing the most important human rights treaties that cover the rights of Indigenous Peoples. Notwithstanding, there is a gap between the legal recognition and the practical realization of Indigenous Peoples' rights.

Currently, mining in Indigenous lands in Brazil is not legal. Thus, in the second part of this thesis, the proposed draft bill for regulating mining in Indigenous lands, PL 191/2020, is analyzed. Two of the main arguments for regulating mining in Indigenous lands are that it will bring socioeconomic development to the region and the country, and that it can be a solution to illegal mining. Firstly, the author presents a conceptual challenge of defining "development". Secondly, the author finds that although legal mining activity can bring positive outcomes, such as the contribution through mining royalties, it does not necessarily mean that regions benefit from it in the long term. This conclusion is backed by the review of studies carried out in the State of Pará and other regions in the Legal Amazon, where legal mining takes place. Finally, there is no guarantee that allowing legalized mining on Indigenous lands will be a successful measure to stop illegal mining operations on Indigenous lands. When it comes to Indigenous Peoples' rights, this research shows that draft bill 191/2020 does not respect Indigenous Peoples' rights under national and international human rights law – especially when it comes to the right to participation and consultation, and the principle of free, prior and informed consent.

Preface

This is the end of a wonderful chapter in my life. It was, indeed, a pleasure and a privilege to have been accepted to pursue the master's in International Human Rights Law at Lund University. I am grateful for all the professors, the Faculty of Law, the Raul Wallenberg Institute, and my classmates.

For my 'final act', it was my wish to use the knowledge acquired throughout the programme to contribute to my home country, Brazil. In the present study, the issues regarding Indigenous Peoples' rights in the Brazilian Amazon in relation to mining are addressed. I consider this a very important and delicate subject, and I hope the reader finds the topic as interesting as I did and enjoys the reading.

I would like to thank my supervisor, Lee Swepston, for guiding me throughout this process. Lee's extensive experience at the International Labour Organization and vast knowledge of Indigenous Peoples' rights is admirable. It was certainly an honor to be your student.

Cristina, Julia, Lui, Peng, Tany, and Tsiko. I will soon forget about the countless nights I spent alone writing exams and this thesis. I will, however, always remember and keep close to my heart the moments we spent together. Thank you for all the good memories.

Katja, Martin, Petra, Simon, and Tom. Thank you for making me feel home in Sweden.

Last, but not least, I would like to thank my mother, Adriana Janczur Picchi, and my father, Vitor Antonio Cappuccelli. Thank you for giving me the most valuable thing in the world: an education. Thank you for believing I can make this world maybe a tiny little better. I hope I made you proud. I love you, and I miss you.

Liliana Picchi Cappuccelli

Lund, September 1, 2022

Abbreviations

ANM	National Mining Agency
CIMI	Indigenous Missionary Council
FPIC	Free, Prior and Informed Consent
IBAMA	Brazilian Institute of Environment and Renewable Natural Resources
ICMBio	The Chico Mendes Institute for Biodiversity Conservation
ILO	International Labour Organization
MPF	Federal Public Ministry
NGO	Non-governmental Organization
OECD	Organisation for Economic Cooperation and Development
SDG	Sustainable Development Goal
UNDRIP	United Nations Declaration on The Rights of Indigenous People
UN-FAO	Food and Agriculture Organization of the United Nations

1. Introduction

The research and analysis of the present thesis concerns the impacts of mining on Indigenous Peoples' rights in the Brazilian Amazon, who all share similar struggles with facing extractivism. Almost half of the Indigenous lands in the Amazon are situated in the Brazilian basin and forest, and the Brazilian Amazon is home to more isolated Indigenous societies than any other region worldwide.¹ In addition, Indigenous lands in the Brazilian Amazon account for 98.5% of all Indigenous lands in the country, even though it holds less than 50% of the total of Indigenous people in Brazil.²

The Amazon has gained worldwide attention over the last years, with growing concerns over its fast-paced deforestation, and its importance in the context of climate change has been widely underlined. At the same time, the Brazilian Amazon presents great potential for future mining activity. The Brazilian Amazon is considered largely unknown, and a vast region of unexplored mineral areas. In practice, the optimistic prospect of mining in the Brazilian Amazon means that there are great interests from a range of actors to explore it, including companies and the government, as well as individuals. In addition to that, as a method of economic recovery *post 19-covid pandemic*, Governments are prioritizing mega-projects, including extractive industries such as mining on Indigenous lands.³ While these interests may be justified by legitimate reasons, they often come with actions that will endanger Indigenous Peoples' rights. Legally, these interests have two consequences: a) Indigenous Peoples' rights are often threatened under international human rights law and national law; b) there is both an external and internal pressure for mining in Indigenous lands to be regulated.

1.1. Purpose and research questions

The purpose of this study is to examine both illegal and legal mining in the Brazilian Amazon, and its consequences for the rights of Indigenous Peoples living in the areas or the surrounding areas of mining activity. To fulfil this purpose, the following research questions will be answered:

¹ Vallejos. et al., (2020), p. 6; Villén-Pérez et al., (2022), p. 1.

² Le Tourneau, François-Michel, (2015), p. 215.

³ United Nations, (2021), p. 6, para. 14.

1. What rights do Indigenous Peoples in the Brazilian Amazon have under international human rights law and Brazilian national law in relation to mining?
2. How does legal and illegal mining in the Brazilian Amazon affect those rights? Are they breached, and if so, how?
3. Can regulating mining be a solution to the current issues with Indigenous Peoples' rights violations in relation to mining in the Brazilian Amazon?
4. Does the proposed draft bill for regulating mining in Indigenous lands, PL 191/2020, respect Indigenous Peoples' rights under international human rights law?

1.2. Methodology and Material

Three categories of international law have the most relevance for mining: international human rights law, international investment treaties, and environmental conventions and treaties. For the purposes of this thesis, international human rights law are the main instruments referred to. Facts presented in this thesis were collected from reports elaborated by international organizations, NGOs, and media outlets.

To answer the first and second research questions of this thesis, Brazilian domestic law is analyzed, particularly the Constitution of the Federative Republic of Brazil from 1988, the supreme law of the land, which provides a framework under which all legislation and regulations should be made in pursuance to. In addition, both *hard law* and *soft law* are analyzed. Regarding the first, reference is made to the ratified ILO Convention 169, The American Convention on Human Rights (Pact of San José), as well as the United Nations Declaration on The Rights of Indigenous Peoples, a non-binding instrument which Brazil has also endorsed. Jurisprudence from the Inter-American Court of Human Rights and reports by the Inter-American Commission on Human Rights are also analyzed, since Brazil has ratified the American Convention on Human Rights and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, commonly known as the "Protocol of San Salvador".

To answer the third research question, instruments such as Declaration on the Right to Development and the Sustainable Development Goals are examined, as well as Brazilian legislation and data on mining royalties and human development indicators to assess socioeconomic development in connection to mining in the Brazilian Amazon region.

To answer the fourth and final question, ILO Convention n. 169 and the United Nations Declaration on The Rights of Indigenous Peoples and are the most relevant international instruments to assess PL 191/2020, the bill draft that seeks to regulate mining in Indigenous lands. However, reference is also made to the Brazilian Constitution and the Inter-American Court of Human Rights' jurisprudence.

1.3. Structure

The first chapter presents the introduction, purpose and research questions, methodology and material, the area of scope and the chosen terminology for this thesis. The second chapter aims to introduce the context of mining historically, socially, and geographically in Brazil, as well as the possible models of mining under Brazilian legislation. The third chapter aims to understand the definition of 'Indigenous Peoples' under international and national law and describe an Indigenous Peoples' human rights framework in order to uncover and identify how mining activity can impact them and the enjoyment of their rights in the Brazilian Amazon. The fourth chapter analyses regulating mining in Indigenous lands in Brazil, its main arguments and if the present draft Bill 191/2020 respects Indigenous Peoples' rights under international human rights law. Finally, after an ongoing analysis throughout the whole thesis, the fifth and final chapter presents the author's final conclusions.

1.4. Area of Scope

Considering the high demand on minerals across the world, in several sectors of society, the author has adopted the theory that mining will not stop in the foreseeable future – contrarily, it will increase. Therefore, taken as a fact that mining activity will go on, the author does not seek to dispute the real *necessity* of it, nor to contest cultural views on *materialism* and *consumerism*.

The present study concerns mining impacts solely in relation to Indigenous Peoples' rights in the Brazilian Amazon. Modern slavery and forced labour of Indigenous Peoples in connection to mining sites are not examined. The area of scope of this thesis has been delimited to the Brazilian Amazon for both legal and pragmatic reasons. The Amazon Rainforest covers several South American Countries, and the situation regarding mining can differ between those countries. The choice to delimit the area to the Brazilian Amazon means that the only domestic

law reviewed is Brazilian. The reason for this is that the paper does not allow a comprehensive study of all the relevant domestic laws, where the entirety of the Amazon is included. For the same reason, in terms of international human rights law, the focus is particularly on the ILO Convention n. 169, the United Nations Declaration on The Rights of Indigenous Peoples and the American Convention. Other human rights treaties, although mentioned, will not be examined in detail.

1.5. Terminology

Throughout this study, the term “Indigenous Peoples” is used when referring to Indigenous and tribal peoples, which is a term widely accepted in a global context and commonly used in international instruments. “Indigenous” is “used to refer to, or relating to, the people who originally lived in a place, rather than people who moved there from somewhere else”, in other words, those who settled in prior to a colonizing process.⁴ The singular form “Indigenous people” refers to a single Indigenous group. The plural “peoples” recognizes diversity and distinctions between different groups of Indigenous peoples. The capitalized “I” and “P” in Indigenous Peoples is a sign of respect, signifying cultural heterogeneity and political sovereignty of these groups.⁵

This thesis also references legislation containing the terms “Indian” or “Indians”. It should be noted, however, that those terms are outdated and inappropriate.⁶ In Brazil, colonizers regarded Indigenous Peoples as an inferior race, and the term Indian, coined by them, is linked to racist ideas of laziness, savagery, technological backwardness, and to a view that Indigenous Peoples own a lot of land and are an obstacle to Brazil’s socioeconomic development. The term “tribe” is associated with a pejorative idea of primitive societies, which did not develop over time.⁷ Thus, those terms are the remains of an offensive colonial usage, and the reader must bear the time when those laws were written in mind.⁸

It also should be underlined that preferences for terminology vary among Indigenous Peoples worldwide. Many terms referring to Indigenous Peoples are often used interchangeably

⁴ Cambridge Dictionary, (2022); Instituto Identidades do Brasil, (2022).

⁵ Bird, M. Y, (1999), p. 2.

⁶ Smithsonian National Museum of the American Indian, (2022).

⁷ G1. (2019). Translated from Portuguese to English by the author; Bird, M. Y. (1999), p. 3.

⁸ Indigenous Terminology Guide, (2022); The University of British Columbia, (2022).

in some regions.⁹ Ultimately, Indigenous Peoples ought to be the ones defining themselves from their own perspective.

⁹ For example, In Canada, Indigenous peoples refer to themselves as First Nations, First Peoples, or Aboriginal.

2. Contextualizing Mining: from Brazil to the World

2.1. Introduction

Before identifying, analyzing, and describing the impacts on Indigenous Peoples' rights in the Brazilian Amazon in the next chapter, it is helpful to first understand the historical, social, and economic contexts. Thus, this chapter has the objective to briefly provide more details of mining in the Brazilian Amazon and its historical relationship with Indigenous Peoples. The legal definition of the Brazilian Amazon and the relevance of mining, internationally and nationally, as well as the different models of mining will be presented. There will be a discussion regarding the identity and role in environmental management of Indigenous Peoples in the Brazilian Amazon. This is because, before entering the legal field, it is important to have a nuanced understanding of Indigenous Peoples and their relation to nature. Therefore, there will be a review of different conceptions of both Indigenous and non-Indigenous Peoples' cultures in connection with nature.

2.2. Historical Background on Indigenous Peoples' rights in Brazil

During the Brazilian military dictatorship in the 1960s, the government approved plans of developing and exploiting the resources of the Brazilian Amazon. The plans included building a highway through Yanomami territory in 1973, which affected around 12.000 Indigenous People of the Yanomami group who lived in the Brazilian Amazon territory near the Venezuelan border. Those plans led further to the discovery and exploitation of rich minerals deposits by companies and independent prospectors, resulting in an influx of farmer-settlers in the region. The project itself, alongside the mass influx of outsiders, had a massive impact on Yanomami people. This impact was felt both on a physical and psychological level, and its consequences included the “disintegration of their cultural and social organization, the introduction of prostitution among the women, begging, epidemics and deaths from infectious diseases (to name a few: influenza, tuberculosis, measles and venereal diseases), violence by miners and prospectors, as well as forced displacement from their traditional lands”¹⁰.

¹⁰ Inter-American Commission on Human Rights. Resolution n. 12/85. Case n. 7615, Brazil. March 5, 1985. para. 3a.

On behalf of the Yanomami Indigenous People, the case was brought to the Inter-American Commission of Human Rights in 1980 by a coalition of non-governmental organizations. In 1985, The Commission found that, by allowing such activities and, concurrently, by failing to ensure their safety and health, the Brazilian State failed to “take timely and effective measures to protect the Yanomami, their ancestral lands and the culture”. Under the American Declaration of the Rights and Duties of Man, the following rights were violated: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).

The Inter-American Commission’s report on the case contained several recommendations: it urged Brazil to take and adopt preventive and curative measures to protect the lives and health of Indigenous Peoples exposed to infectious or contagious diseases; to implement, in consultation with the Yanomami and experts, educational programmes, medical protection and social integration; to provide training in regards to Indigenous Peoples’ rights and non-discrimination to State officials; and, most importantly, it requested Brazil to demarcate the boundaries of Yanomami lands, which was the first time an inter-governmental organization made such proposal.¹¹

This case is emblematic. It demonstrates that issues regarding mining and Indigenous Peoples in the Brazilian Amazon are not unfamiliar. In 1992, Yanomami people’s land was finally demarcated as the “Yanomami Park”. However, Yanomami’s survival continues to be threatened by the presence of illegal gold prospectors on their lands, usually referred to as *garimpeiros* in Brazil. The Indigenous Leader Dário Kopenawa Yanomami fears history is repeating itself: “I grew up amid the invasion of 40,000 *garimpeiros*, who killed almost 20% of my people... we suffered so much. Our relatives were massacred. The *garimpeiros* killed a lot,” he said. He added: “It feels like we’re facing the same crisis today.”¹² As it will be shown further in this thesis, Yanomami Peoples are highly impacted by illegal mining, and mining companies also have a keen interest in Yanomamis’ lands.

2.2.1 Brazil and the Global Mining Context

¹¹ Hopkins, James., p. 135-136.

¹² The Guardian, (2021).

For decades, the Amazonian governments, including Brazil, have explicitly promoted and supported the exploitation of high-value minerals in its areas. Recently, however, mining is seen as a core element of their national development strategies. Mining activity is considered essential to the livelihoods of many people and is an integral part of the Brazilian economy. According to the World Mining Data, Brazil is the 9th largest producer of mineral fuels, iron, ferrous and non-ferrous metals, precious metals and industrial metals in the world, and it is the only Latin American country to rank within the top 10 large producers.¹³ Mining is also a key activity in terms of achieving and developing a low carbon economy, meaning that the clean energy transition will be significantly mineral intensive.¹⁴ When it comes to mineral-rich developing countries, Latin America is relatively strongly positioned to become a supplier for the global climate-friendly transition, with Brazil (alongside Chile, Argentina and Peru) being considered the best positioned countries for this goal. In practice, it means that governments and companies, as well as individuals, have great interest in mining in the Brazilian Amazon, including the lands inhabited by Indigenous Peoples.

2.2.2 The Brazilian Amazon

The territory of the Brazilian Amazon was legally defined in 1953 by Law No. 1.806, later redefined in 1966 by Law No. 5.173, and corresponds to the area formed by nine states: Acre, Amapá, Amazonas, Pará, Rondônia, Roraima, Tocantins, and partly by areas of Mato Grosso, Goiás and Maranhão.¹⁵ It has approximately an area of 5.217.423km², encompassing 61% of the Brazilian territory.¹⁶ The State of Pará needs to be highlighted. In 2017, it had the largest mineral production in Brazil, accounting for 92.15% of the mineral exportations from all the States in the Brazilian Amazon.¹⁷

In Brazil, *garimpo* accounts for the extraction of 10 major minerals: gold accounting for the biggest share of 86,1% and an area of 92756 ha, followed by tin (8,4% and 9098 ha), gravel, pebble, sand and other construction materials (2,1% and 2270 ha), gemstones (1,8% and 1980 ha), thallium (0,7% and 799 ha), manganese (0,4% and 435 ha), iron (0,13% and 166 ha), nickel (0,1% and 143 ha), aluminium (0,07% and 86 ha) and silicon (0,01% and 20 ha).¹⁸

¹³ World Mining Data, (2022), p. 46.

¹⁴ The World Bank, (2022).

¹⁵ Law No. 5.173, Art. 2.

¹⁶ Instituto Brasileiro de Geografia e Estatística, (2022).

¹⁷ Martins. et al., (2022), p. 2.

¹⁸ Mapbiomas, (2021).

According to MapBiomias¹⁹, 93.7% of all *garimpo* is concentrated in the Brazilian Amazon. It currently occupies an area larger than large-scale or industrial mining and although it has been underway for decades, in recent years it has rapidly advanced over Indigenous lands and conservation units²⁰ in the Brazilian Amazon. To illustrate, from 2010 to 2020, mining activity in Indigenous lands grew 495%, while the growth in conservation units was 301%. In 2020, 4.472 locations where illegal mining is carried out in the Amazon were registered, of which 2.576 are in the Brazilian Amazon.²¹ The largest areas of mining activity in Indigenous lands are taking place in Kayapó and Munduruku territory in Pará, and Yanomami lands in Amazonas and Roraima.²²

2.3. Artisanal and Small-Scale Mining vs. Large-Scale Mining

The Organisation for Economic Cooperation and Development (OECD) defines artisanal and small-scale mining as “formal or informal mining operations with predominantly simplified norms of exploration, extraction, processing and transportation”²³, and its explosive growth and expansion in recent years is linked to the rising value of minerals prices, especially gold, alongside limited livelihood opportunities. In this sense, artisanal and small-scale mining are indicated to be generally pursued as a route out of poverty or as a way to complement insufficient income, many times with the illusion of “getting-rich-quick”.²⁴ In addition, 70 to 80 per cent of all artisanal and small-scale mining are informal in many countries.²⁵ As an informal activity, it brings negative socioeconomic, health and environmental impacts. Informality means the lack of regulation and the exclusion from legal protection and support, which ends up trapping miners in cycles of poverty. According to the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, in 2017 an estimated of 40.5 million people were directly engaged with artisanal and small-scale mining, while only 7

¹⁹ MapBiomias is “an initiative of the Greenhouse Gas Emissions Estimation System (SEEG) from the Climate Observatory's and is produced by a collaborative network of co-creators made up of NGOs, universities and technology companies organized by biomes and cross-cutting themes”.

²⁰ According to Bill n. 9.985/2000, Art. 2, I, a “Conservation Unit” is defined as a territorial space and its environmental resources, including jurisdictional waters, with relevant natural characteristics, legally established by the Government, with conservation objectives and defined limits, under a special administration regime, to which adequate guarantees of protection are applied.

²¹ RAISG, (2020), p. 38–39.

²² Mapbiomas, (2021).

²³ OECD, (2019), p. 14.

²⁴ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), (2017), p. iv.

²⁵ International Institute for Sustainable Development, (2018).

million people were working on large-scale or industrial mining in 2013.²⁶ In Brazil, following the worldwide trend, mixed causes such as the economic crises, unemployment, the rising of both dollar and gold prices alongside the lack of education and deplorable living conditions have pushed thousands of workers to illegal mining.²⁷

Garimpo generally refers to artisanal or small-scale mining. However, today, it might be inaccurate and simplistic to have the pre-conceived idea of *garimpeiro*, that is, the person, as an independent prospector of minerals, and *garimpos* as merely artisanal and small-scale mining. The issue with *garimpos* have become complex, as it is further explained below.

2.4. The consequences of the conceptual indeterminacy of “garimpeiro”

According to the Brazilian Mining Code, Art. 70, I, Art. 71 and 72, *garimpeiro* mining is defined as “the individual work of those who use rudimentary instruments, manual devices, or simple and portable machines, in the extraction of precious and semi-precious stones and valuable metallic and non-metallic minerals...”.²⁸ Established since the first Mining Code in 1934, the definition portrays the *garimpeiro* as a low-income and vulnerable worker, and was aimed to protect them – which could, at the time, reflect the reality of *garimpeiros*. The deposits in which such extraction happens are called *garimpos*. Notwithstanding, the Brazilian Mining Code was changed in 1989, and the legal definition of *garimpo* was expanded to what is called “*lavra garimpeira*”, referring not only to the rudimentary extraction of ores, but also including more harmful industrial techniques normally associated with mining companies. In addition, the *Garimpeiro Statute* (Law no. 11.685/2008) no longer defines *garimpeiro* mining as rudimentary. Thus, according to the Federal Prosecutor’s Office, the broad definitions of what is considered a *garimpo* and a *garimpeiro* can today lead to the practice of large-scale mining disguised as artisanal mining. The consequence is that *garimpeiros* will often operate in an industrial or near-industrial mining scale under a weaker regulatory framework, at the expense of the environment and the rights of Indigenous Peoples.²⁹

²⁶ Latest data available. Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), (2017), p. iv.

²⁷ Bispo, Fábio, (2022). InfoAmazonia,

²⁸ Translated from Portuguese to English by the author.

²⁹ Cozendey, G. et al., (2022).

Consequently, not every *garimpo* is illegal, however, *garimpo* as used in this thesis mostly refers to illegal mining, which will range from artisanal and small-scale mining to industrial or near-industrial scale mining, with the use of heavy machinery, such as rafts and suction dredgers, wheel loaders, tractors for crawler and hydraulic excavators.³⁰ Therefore, *garimpeiros*, or illegal miners, are the ones operating outside the law, making use of banned practice (such heavy machinery) and are often connected to or controlled by criminal organizations and armed militias.³¹ Thereby, the reader should avoid the idea that a *garimpeiro* is specifically a vulnerable and low-income worker that only carries out artisanal mining with rudimentary instruments and little environmental impact. In Brazil, *garimpo* has been historically associated with clandestinity, mobility and informality. *Garimpos* can be very profitable to its resourceful owners. To illustrate, in mechanized illegal *garimpos*, the owner of the machines will keep 60% or 70% of the gold mined and will be responsible for the expenses relating to food, accommodation, fuel and the maintenance of the machines.³² Not rarely, workers are exploited and found in slave-labour conditions, and it is often difficult for them to recognize precarious situations, since abuse has been normalized. As the Public Prosecutor Leonardo Juzinskis states, “subjection to degrading conditions is natural for them”.³³

When it comes to mining in the Brazilian Amazon, actors will range from *garimpeiros* to large international companies.³⁴ Tension between the competing groups, that is, artisanal and small-scale, industrial, and *garimpeiros*, are common.

2.5. The Controversies surrounding Decree n. 10966/2022 and Decree 10965/2022

Recently published in February of 2022, Decree n. 10966/2022 creates the Support Program for the Development of Artisanal and Small-Scale Mining (Pró-Mape), with the purpose of proposing public policies and stimulating the development of artisanal and small-scale mining, “with view to regional and national sustainable development”.³⁵ Although the

³⁰ Fábio, André Cabette., (2022), p. 42.

³¹ Bell, L. and Evers, D., (2021), p. 29.

³² Fábio, André Cabette., (2022), p. 49–50.

³³ Mongabay, (2021).

³⁴ Martins. et al., (2022), p. 8.

³⁵ Portuguese Original: Art. 1º Fica instituído o Programa de Apoio ao Desenvolvimento da Mineração Artesanal e em Pequena Escala - Pró-Mape, com a finalidade de propor políticas públicas e estimular o desenvolvimento da mineração artesanal e em pequena escala, com vistas ao desenvolvimento sustentável regional e nacional.

decree uses terms such as “sustainable development”, “best practices” and “health promotion”, it was highly criticized by civil society. As stated by Choices Institute (Instituto Escolhas)³⁶, the stimulus provided by Pró-Mape will increase the negative impacts of mining in the Brazilian Amazon. One of the objectives of the program is the “formalization of the activity”, which is argued that in practice will mean that mines operating illegally will be granted an “institutional framework”. Consequently, the Institute affirms that the Brazilian government, instead of inspecting and putting an end to illegal mining, is opening an institutional space for those activities (*garimpo*), to become legal.³⁷ Moreover, the Decree is condemned for reinforcing the wrong idea of “Artisanal and Small-Scale Mining”. The Institute asserts that the mining is carried out industrially, having adequate machinery and with a business structure. As mentioned before, “Artisanal and Small-Scale Mining” activity or *garimpos* is already larger than proper industrial mining, mostly in the Brazilian Amazon. The Decree is pointed out as giving more benefits to this activity, which is already considered facilitated and benefited by other laws. In its turn, Decree 10.965/2022 establishes a simplified criteria for the analysis of processes and grants of mining authorizations, mainly for *garimpo*, which raises concern for environmentalists, considering that this mining activity can be carried under a weaker framework for the protection of the environment and Indigenous Peoples in the Brazilian Amazon.

2.6. Indigenous Peoples involvement in environmental management: their role in the Brazilian Amazon

Historically, Indigenous Peoples have been seen as “exemplars of environmentally sustainable living”³⁸. In times of environmental crisis, Indigenous traditions are a hopeful source in terms of achieving a balanced life. As an example, the United Nations’ report “*Our Common Future*”, stated that: “these communities are the repositories of vast accumulations of traditional knowledge and experience, [and] larger society... could learn a great deal from their traditional skills in sustainably managing very complex ecological systems”. In the same way,

³⁶ Choices Institute (in Portuguese, Instituto Escolhas), is a non-profit association founded in 2015. Its mission is to “qualify the debate on sustainability through the numerical translation of the economic, social and environmental impacts of public and private decisions. Its objective is to produce studies, analysis and reports that support new interpretations and arguments capable of overcoming the ideological polarization of conflicting planning choices, allowing the construction of solutions to make sustainable development viable”. Translation from Portuguese to English by the Author. Instituto Escolhas.

³⁷ Instituto Escolhas, (2022), p. 2.

³⁸ J. Richardson, Benjamin, p. 337.

Principle 22 of the Rio Declaration on Environment and Development of 1992 states: “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development”. Therefore, it is worthwhile understanding the value that Indigenous Peoples could bring to such decision-making processes and the relationship between Indigenous Peoples and environmental governance. Borrowing the labels elaborated by Benjamin J. Richardson³⁹, and containing an array of arguments and ideas by various scholars, some theories and perspectives regarding Indigenous environmental values will be assessed:

a) Ecological Guardians: as mentioned above, it is commonly portrayed that Indigenous Peoples are the ‘guardians of the forests’, living harmoniously with nature, “without indulging in the profligacy associated with Western culture”. In this sense, Posey⁴⁰ underlines characteristics of Indigenous peoples’ livelihoods which contributes to environmental sustainability, such as: high levels of social co-operation, local-scale self-sufficiency, and concern for the well-being of next generations. Another contributor is the spiritual and ancestral relationships with their lands, which can underpin strict environmental rules to protect sacred sites. In addition, this perspective maintains the vision that Indigenous Peoples possess a traditional environmental knowledge (TEK)⁴¹, as the result of shared wisdom and collective expertise accumulated over the years about their lands.

In this context, and aligned to this perspective, a report published by the Food and Agriculture Organization of the United Nations (UN-FAO) in 2021 has affirmed that in the Latin American and the Caribbean region, forests in communally managed indigenous and tribal territories have been better conserved than other forests, pointing out, among others, that their productive systems are less harmful to forest ecosystems.⁴² The report also stresses, categorically, that “this is an empirical finding, based on data, not a naive ideological or romantic notion”. It mentions six factors to further explain this conclusion: i) cultural factors and traditional knowledge; ii) recognition of collective territorial rights; iii) forest incentive policies; iv) land use restrictions; v) limited accessibility and low profitability of agriculture

³⁹ Benjamin J. Richardson is “an international scholar of environmental law, with collateral, interdisciplinary research interests in philosophy, corporate social responsibility and Indigenous peoples”. Queen’s University.

⁴⁰ Posey was an American anthropologist and biologist who studied the traditional knowledge of Indigenous Peoples and folk populations in, among other countries, Brazil.

⁴¹ According to Berkes, TEK means the “experience acquired over thousands of years of direct human contact with the environment”.

⁴² Food and Agriculture Organization of the United Nations, (2022).

and; vi) limited access to capital and labour. Research has also shown that the average annual deforestation rates in tenure-secure indigenous forestlands in Brazil, from 2002 to 2012, were two to three times lower than in lands not managed by Indigenous Peoples.⁴³ The United Nations' Intergovernmental Panel on Climate Change 2019 has also recognized the critical role of Indigenous lands in climate mitigation.⁴⁴

b) Forsaken Environmentalists: in opposition to the forementioned theory, this perspective questions Indigenous Peoples' environmental values and holds that Indigenous Peoples, as other peoples, also engage in destructive forestry practices. It rejects the view that Indigenous Peoples possess some kind of "innate ecological wisdom etcher in their genes"⁴⁵. For example, some Indigenous Peoples have the belief that natural resources are infinite and hunt endangered species.⁴⁶ Animal conservationists will be more attentive to this topic. It has been found that "Indigenous Peoples hunting just for subsistence are capable of hunting at non-sustainable rates". While this should be analyzed on a case-by-case basis, this does not seem to be the case of Indigenous Peoples in the Brazilian Amazon – which, as demonstrated above, are internationally recognized for environmental conservation. Hunting and fishing, as well as gathering and planting, will be part of their livelihoods.⁴⁷ The right to hunt for subsistence is protected by Article 14 of the ILO Convention n. 169 and Article 26 of the UN Declaration of the Rights of Indigenous Peoples.

c) Environmental Victims: this perspective entails the understanding that Indigenous Peoples are primarily victims, and not perpetrators, of environmental harm. According to this theory, Indigenous Peoples will "sometimes partake in environmentally problematic developments only as a result of limited options", which is pointed out as the consequence of their traditional lands being stolen and Indigenous Peoples being denied a viable economic resource base. In this regard, when it comes to mining in the Brazilian Amazon, Indigenous Peoples will, indeed, occasionally engage with it. For instance, the Indigenous Peoples called "Comunidade Indigena Raposa II", located in the Indigenous land "Raposa Serra do Sol", in Normandia – Roraima, encompasses 56 families, making up a total of 151 people affected by illegal mining in the region. However, while some of them worry about the damaging effects mining causes to their lands and the community as a whole, others defend and see the mining of gold as a livelihood opportunity, as an accessible form of subsistence – even if it means

⁴³ Vallejos. et al., (2020), p. 24.

⁴⁴ Vallejos. et al., (2020), p. 24.

⁴⁵ J. Richardson, Benjamin, p. 347.

⁴⁶ J. Richardson, Benjamin, p. 348.

⁴⁷ Shepard, G., (2014).

contributing to environmental harm and putting their lives at risk working in precarious conditions.⁴⁸

Having said that, the assessment conducted in this thesis reaches the conclusion that Indigenous Peoples in the Brazilian Amazon fit into two of the theories presented above: that they are, simultaneously, currently primarily Ecological Guardians and Environmental Victims. It must be highlighted, however, that culture and knowledge are not static, they're constantly changing and evolving. Each Indigenous People are unique, and they must be seen through a pluralist and multicultural lens. Indigenous Peoples' contributions to environmental sustainability, which entails biodiversity conservation, should be accessed on a case-by-case basis. In addition, stereotypes such as the 'ecological guardians' can be overly romanticized, unrealistic, and harmful – causing the exclusion and invisibility of any Indigenous Peoples who do not fit into this concept. In the same way, it is counterproductive to analyze this matter from a dualistic world view. In other words, when comparing Indigenous Peoples' environmental values with those of non-Indigenous cultures, one should refrain from also stereotyping the latter. Non-indigenous traditions, cultures and philosophies are also diverse and include deep ecologism and animal liberation. Finally, governments should be able to develop and adopt a cross-cultural approach to resource management, combining both Indigenous Peoples' and non-Indigenous stakeholders' strengths towards responsible environmental management and sustainable development.⁴⁹

2.7. The Dismantling of environmental policies in Brazil

Brazilian federal environmental laws have improved over the last fifty years, and Brazil has been a worldwide protagonist and frontrunner in environmental diplomacy and climate change policy. However, the weakening of environmental policies in Brazil began in 2019, during Bolsonaro's administration. For example, in 2020, deforestation in the Amazon hit the highest percentage in the last 10 years. Among others, the dismantling includes the decrease of fines imposed by the Brazilian Environmental Agency (IBAMA) for environmental violations, as well as investment reductions for environmental monitoring bodies. In addition, many of IBAMA's staff have been fired (21 of 27 regional superintends), which were responsible for tackling deforestation. Top ranks of the Environmental Ministry, IBAMA and The Chico Mendes Institute for Biodiversity Conservation (ICMBio) were replaced by military.

⁴⁸ OECD, (2021).

⁴⁹ J. Richardson, Benjamin, p. 347.

The anti-environmentalists measures reflect not only in loss of biodiversity and ecosystems, but negatively impacts the rights of Indigenous Peoples. Thus, it is important to understand the connection and the compatibility of Indigenous Peoples' rights and the protection of the environment.

2.8. Compatibility of Indigenous Peoples' rights and the protection of the environment

In accordance with the above, The Inter-American Court of Human Rights has recognized the important role of Indigenous Peoples in environmental conservation. In the case *KALINA AND LOKONO PEOPLES V. SURINAME*, the Court acknowledges that respecting Indigenous Peoples' rights may have a positive impact on environmental conservation: "the indigenous peoples may play an important role in nature conservation, since certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies".⁵⁰ Consequently, respect for the rights of the Indigenous Peoples may have a positive impact on environmental conservation. On that note, the UN Special Rapporteur on the Rights of Indigenous Peoples at the time, Victoria Tauli-Corpuz, indicated to the Court that "International environmental law and international human rights law should be not considered separate, but rather interrelated and complementary, bodies of law".⁵¹ Hence, the Court underlines that the rights of the Indigenous Peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights. Indigenous Peoples' human rights are not separate from their lands and the environment, meaning that environmental laws and human rights should be fully integrated.

On one hand, the violations of environmental laws, and, presumably, environmentally friendly practices whether consecrated in law or not, will often imply the violation of Indigenous Peoples' rights in the Brazilian Amazon. On the other hand, when Indigenous Peoples' rights are violated, it often means that the environment is being harmed. Thus, in relation to mining, respect for Indigenous Peoples' rights is not only achieved through respect for international instruments that protect their rights, but also international instruments and national laws regarding the protection of the environment. For example, as Indigenous Peoples have an especial vulnerability in connection to their lands, the simplified criteria for the analysis

⁵⁰ Case of the *Kaliña and Lokono Peoples v. Suriname*, para. 173.

⁵¹ Case of the *Kaliña and Lokono Peoples v. Suriname*, para. 174.

of processes and grants of mining authorizations introduced by Decree 10.965/2022 might pose a threat to Indigenous Peoples' rights. Thus, the Brazilian government should recognize the interrelatedness of environmental laws and Indigenous Peoples' rights, and acknowledge their important role in terms of environmental conservation.

3. A human-rights framework of Indigenous Peoples in the Brazilian Amazon in connection to mining activity

The Inter-American Commission on Human Rights has reported many impacts on the rights of Indigenous Peoples related to the extractive sector, including mining. The main impacts of these projects include: “the reduction of the quantity and quality of water sources, the impoverishment of agricultural soils; the alteration of their own production systems; the decline of fish, fauna, flora and biodiversity in general; and the impact on the balance that constitutes the basis of the ethnic and cultural reproduction of the indigenous peoples”. This report states that impacts on the environment will affect the enjoyment of Indigenous Peoples’ rights.⁵² Therefore, due to its potential risks, mining requires periodic critical assessment.

Thus, this chapter has the objective of answering the first two research questions in this thesis: 1) What rights do Indigenous Peoples have under Brazilian national law, international human rights law and environmental law in relation to mining? and; 2) How does mining in the Brazilian Amazon affect those rights? Are they violated, and if so, how?

To do so, an Indigenous Peoples’ human-rights framework is described with the objective to understand and identify the impacts related to mining in the Brazilian Amazon. It should be noted that human rights are indivisible and interdependent.⁵³ Thus, the structure presented in this chapter has merely a practical view of facilitating the understanding of Indigenous Peoples’ rights and should not be seen as a hierarchy of rights. In this sense, the full enjoyment of all rights – both civil and political as well as economic, social and cultural rights – is only possible if they are all concurrently protected and promoted. As it will be shown, Indigenous Peoples’ rights are deeply interlinked, and while each of the rights will be analyzed individually, reference to other rights will inevitably be made. Each section contains both international and national legislation as well as facts demonstrating how, in practice, Indigenous Peoples’ rights might be violated in the Brazilian Amazon. The structure of Indigenous Peoples’ human-rights analyzed will be organized as follows: I) The Right to Free, Prior and Informed Consent and Participation; II) The Right to a Healthy Environment; III) The Right to Health; IV) The Right to Land, Territories and Natural Resources; V) The Right to Cultural Heritage; and, finally, VI) The Right to Life.

⁵² Organization of American States, (2015), p. 250.

⁵³ United Nations. *‘What are human rights?’*. United Nations Human Rights Office of the High Commissioner.

3.1. Indigenous Peoples' rights: an international human rights law perspective

The Universal Declaration of Human Rights (UDHR), from 1948, was the first international instrument recognizing the need to protect Indigenous Peoples. However, as most international instruments of that time, it provides general rights, meaning that the document only addresses individual rights of Indigenous people. Also applicable to Indigenous Peoples, neither the International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain any articles referring specifically to Indigenous Peoples. In this sense, it is important to bear in mind that Indigenous Peoples are protected by general treaties, and that Indigenous Peoples' rights overlap with many other human rights instruments.⁵⁴ As such, the UNDRIP in its Article 1, establishes that "Indigenous peoples have the right to the full enjoyment, as a collective and individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law".

The ILO Convention n. 107 of 1957 was the first international document to address Indigenous Peoples' rights specifically. From 1973, it started to be heavily criticized due to its assimilationist character, and thus, was replaced in 1989 by ILO Convention n. 169.⁵⁵ To date, the most comprehensive worldwide international instrument on the rights of Indigenous Peoples is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007.⁵⁶ The UNDRIP finally codifies Indigenous Peoples' rights specifically, but as a Declaration. Regionally, adopted in 2016, The American Declaration on the Rights of Indigenous Peoples is more extensive than the UNDRIP. It reaffirms the obligations contained in the other instruments and adds four new themes, covered neither by the UNDRIP nor the ILO Convention n. 169, all of which are reflected in the Brazilian legislation. In addition, the American Convention on Human Rights has also played an important role in securing and advancing Indigenous Peoples' rights, allowing the Inter-American Court of Human Rights to set important precedents on the matter.

Below, the rights of Indigenous Peoples are examined through international instruments that specifically refer to Indigenous Peoples: namely the ILO Convention n. 169

⁵⁴ For instance, Indigenous peoples are also protected by general treaties such as: Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; etc.

⁵⁵ Chen, C., (2014), p. 5.

⁵⁶ United Nations, (2022a).

and the UNDRIP. Reference to the jurisprudence of the Inter-American Court of Human Rights and the American Convention of Human Rights, as well as the Brazilian Constitution, will also be made.

3.2. Who are Indigenous Peoples?

There is no official international definition of “Indigenous Peoples”. On one hand, over the years, Indigenous Peoples categorically rejected and opposed the inclusion of a definition for both principled as well as strategic reasons, and Indigenous representatives stated that arriving at a universal definition of ‘Indigenous Peoples’ was neither desirable nor necessary.⁵⁷ In this sense, many of them pointed out that in international law, the terms “minorities” and “peoples” have no definition, and thus, indigenous rights could also be implemented without a definition of “Indigenous Peoples”.

On the other hand, two significant reasons to legally conceptualize the category “Indigenous Peoples” are underlined. First, in terms of assessing the scope of application of the UNDRIP and other instruments containing the term “Indigenous Peoples”.⁵⁸ It is argued that a definition could be helpful to increase its effectiveness; and secondly, to prevent States from not complying with legislation regarding Indigenous Peoples. This is because the lack of conceptualization of Indigenous Peoples facilitates States to be ‘*de facto* free’ to determine who are or are not Indigenous Peoples, which could lead States to not apply Indigenous Peoples related legislation and jurisprudence, alleging that within their territory, there are no Indigenous communities to which it would be applicable.

In this sense, it is important to stress that while there is no official legal conceptualization of who counts as “Indigenous Peoples” at the international level, a set of key criteria has been developed within different international bodies. Therefore, the commonly

⁵⁷ "We, the Indigenous Peoples present at the Indigenous Peoples Preparatory Meeting on Saturday, 27 July 1996, at the World Council of Churches, have reached a consensus on the issue of defining Indigenous Peoples and have unanimously endorsed Sub-Commission resolution 1995/32. We categorically reject any attempts that Governments define Indigenous Peoples. We further endorse the Martínez Cobo report (E/CN.4/Sub.2/1986/Add.4) in regard to the concept of 'indigenous'. Also, we acknowledge the conclusions and recommendations by Chairperson-Rapporteur Madame Erica Daes in her working paper on the concept of indigenous peoples (E/CN.4/Sub.2/AC.4/1996/2)." E/CN.4/Sub.2/1996/21, para. 31, p. 15. Further, check Martínez Cobo's report (E/CN.4/Sub.2/1986/Add.4)

⁵⁸ “The observer for the International Labour Organization made references to the two relevant ILO Conventions, No. 107 and No. 169, in which the term “indigenous and tribal” is used in order to avoid the restricted literal sense of the word “indigenous”. He said that the term “indigenous and tribal” included all peoples in a similar situation, wherever they may be found and whether or not their ancestors inhabited an area before others did”. E/CN.4/Sub.2/1996/21, para. 38, p. 16.

referred “modern understanding”, laid down first in the ILO Conventions, includes the following characteristics: a) Self Identification: self-identification as both indigenous and as a people; b) Historical continuity: meaning that there is a common ancestry and historical continuity with pre-colonial and/or pre-settler societies; c) Special Relationship with Ancestral Territories: a special bond with lands occupied by their ancestors before colonial domination and surrounding natural resources. The special bond with their lands will usually characterize the identity and the cultural singularity of Indigenous Peoples; d) Distinctiveness: not only having a different language, culture, beliefs and customary law, but also living wholly or partly by different societal, economic or political rules; e) Non-dominance: they should be or form non-dominant groups within the current society; f) Perpetuation: perseverance to maintain and reproduce their ancestral environments, social, economic and legal systems as well as the practice and preservation of their cultural heritage as distinct peoples and communities.⁵⁹

At the Brazilian national level, The Indian Statute defines Indigenous Peoples in Article 3, I: “Indian or Forest-dweller – Any individual of pre-Columbian origin or ascent who identifies himself and is identified as belonging to an ethnic group, the cultural characteristics of which distinguish it from the national society; II – Indigenous Population or Tribal Group – A cluster of Indian families or communities, living either in a state of complete isolation from other sectors of the national community, or in intermittent or permanent contact therewith, but not integrated therein”. Considering that historically, Indigenous Peoples have suffered from definitions imposed by others, it is important to highlight the self-determination character of the Brazilian definition, in accordance with Article 33, I of the UNDRIP, which states that: “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live in”.⁶⁰

3.3. The Right to Participation and Consultation of Indigenous Peoples

Initially, it must be highlighted that the rights to freedom of expression and to participation should allow Indigenous Peoples to actively oppose extractive projects promoted by both the State or third-party businesses and thus to peacefully protest if they wish so.

⁵⁹ Magallanes, Catherine J. Iorns., (2012), p. 6–8.

⁶⁰ Daes, Erica-Irene A., (1995), p. 4.

However, not uncommonly, in such events Indigenous Peoples and individuals are heavily repressed, suffering acts of intimidation and violence which will often result in premeditated deaths.

The Indigenous and Tribal Peoples Convention, 1989 (No. 169), to which Brazil is a signatory, determines in its Article 6 how consultation and participation should be implemented in practice by governments. In that matter, Article 6(2) states: “The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”. When it comes to mining, Article 15(2) specifically determines that “In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands (...)”.

Furthermore, the principle of free, prior and informed consent (FPIC), is asserted in several provisions of the UNDRIP. According to this principle, in Article 19 of the UNDRIP, “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”. Moreover, Article and 32(2) of the UNDRIP establishes the same procedure “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with development, utilization or exploitation of mineral, water or other resources”. “Free” implies no coercion, intimidation or manipulation; “prior” implies that consent must be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of Indigenous consultation/consensus process and; “informed” implies that “information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail”.⁶¹

Finally, it is also stated in the Constitution of the Federative Republic of Brazil, which came to life as part of the re-democratization of the country in 1988 after more than 20 years of

⁶¹ United Nations Human Rights Office of the High Commissioner. Free, Prior and Informed Consent of Indigenous Peoples. September 2013. p. 2.

military dictatorship. It is marked by being the result of a vibrant participatory process which promoted political inclusion by involving all segments in society – such as political parties, social movements, and civil society organizations.⁶² The Brazilian Constitution has a chapter specifically aimed at “Indians”. Article 231, Paragraph 3, provides: “Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law”.

There is a logical reason for why this principle has been chosen to be the first analyzed. As affirmed by the Inter-American Court of Human Rights in the case *SARAMAKA V. SURINAME*⁶³, free, prior and informed consent is imperative to guarantee the self-determination of Indigenous Peoples. It ultimately functions as a safeguard of Indigenous Peoples’ fundamental rights that can be affected by the invasive nature of mainly industrial-scale extraction of natural resources, but also small-scale extraction. As pointed out by the Special Rapporteur on the rights of Indigenous Peoples, James Anaya, these primary substantive rights include, in particular: “the rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination”⁶⁴. Moreover, the right to free, prior and informed consent is not limited to obtaining a one-time consent before the start of a mining project. In that way, according to the World Commission on Dams, free, prior and informed consent “involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles”⁶⁵.

Therefore, as a general rule, extractive activities should only take place within Indigenous lands with their consultation and participation throughout the entire procedure. One must bear in mind, however, that the principle of free, prior and informed consent is contained only in the UNDRIP, which is a Declaration. As a Declaration, the UNDRIP has an authoritative moral force, but it is not legally binding. Notwithstanding, the Inter-American Court of Human Rights has underlined the importance of the FPIC to guarantee Indigenous Peoples’ the right to

⁵⁹ Pogrebinschi, Thamy., (2017).

⁶³ Case of *Saramaka v. Suriname*, para. 129-137.

⁶⁴ A/HRC/21/47, para. 50.

⁶⁵ World Commission on Dams (WCD) 2000, quoted in Buxton and Wilson (2013), p. 11.

self-determination and to safeguard other rights. Since Brazil has endorsed the UNDRIP, it should strive to respect it.

3.3.1. Do Indigenous Peoples have the right to veto?

Differences of the ILO Convention n. 169 and the UNDRIP in regard to “reaching agreement and consent” should be highlighted. First, it is important to bear in mind that the right to veto would have made the ILO Convention n. 169, adopted 16 years before the UNDRIP, unadoptable and unratifiable, as States would be unwilling to give up their sovereignty and guarantee Indigenous Peoples a decision-making power greater than that of the State itself. Thus, ILO Convention n. 169 does not provide the right to veto to Indigenous Peoples, as “obtaining the agreement or consent is the purpose of engaging in the consultation process, and is not an independent requirement”.⁶⁶ According to UN-FAO, on its “Free, Prior and Informed Consent Manual”, the FPIC process does not guarantee consent as a result. The Manual specifies that the FPIC process can result in the following outcomes: “consent from the Indigenous Peoples’ community on the proposed activity; consent after negotiation and change of the conditions under which the project will be planned, implemented, monitored and evaluated; or the withholding of consent”.⁶⁷ It also underlines that consent, once granted, can be withdrawn at any point. However, even when consultation processes have been concluded without agreement or consent, States must still uphold Indigenous Peoples’ rights, e.g. the right to land, territories and natural resources. It is also stressed that the importance of reaching an agreement and consent depends on the severity and potential consequences for the concerned Indigenous Peoples. For instance, when “the continued existence of an indigenous culture is at stake, the need for consent to proposed measures is more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences”.⁶⁸ As the right of property is not absolute (and in Brazil, the right to land, territories and natural resources of Indigenous Peoples’ might suffer restrictions as well), and although consent is not strictly required, any restrictions on Indigenous Peoples’ rights based on “public interest” should comply with standards of necessity and proportionality, and the State should consider the potential consequences for the concerned Indigenous Peoples in a case-by-case analysis.⁶⁹

⁶⁶ International Labour Organization (2013), p. 16.

⁶⁷ Food and Agriculture Organization of the United Nations, (2016), p. 13.

⁶⁸ International Labour Organization (2013), p. 16.

⁶⁹ This is further detailed under the topic of the right to land, territories and resources.

In its turn, the UNDRIP raises some controversy about the right to veto. Article 32 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”. From the author’s interpretation, therefore, the UNDRIP is adamant that consent must be obtained before any mining project takes place in Indigenous lands, and can also be withdrawn at any stage. However, while highly influential, the UNDRIP is a non-binding instrument, sometimes defined as “aspirational”. The UNDRIP does not define FPIC and does not mention “veto” in any part, leaving this provision to be interpreted by each nation in its own terms. For instance, in Canada, where mining is regulated in Indigenous lands, Bill C-15 provides framework to incorporate the UNDRIP at the domestic level. When elaborating the bill, the Canadian Government decided that Indigenous Peoples do not have a veto over government decision-making.⁷⁰ In Latin America, Colombia and Peru follow the same interpretation.

In Brazil, there are strong indications that the Federal Government will take the same approach towards not interpreting FPIC as granting the right to veto to Indigenous Peoples. For example, in 2010, the Federal Supreme Court’s Justice Barroso has highlighted in the case *Raposa Serra do Sol*, that “[...] as noted by Justice Gilmar Mendes, the relevance of consultation with indigenous communities ‘does not mean that decisions formally depend on the acceptance of indigenous communities as a validity requirement’. Indians must be heard and their interests must be honestly and seriously considered. It is not extracted from it, however, that the decision taken, in the end, can only be valid if it counts on their acquiescence. In a democracy, disagreements are normal and expected. No individual or social group has the subjective right to determine the decision of the State alone”. Marina Silva, former Minister of the Environment in Brazil, endorses the same interpretation. According to her, “the veto would distort the meaning of the ILO Convention n. 169” and should be rejected because the power to veto would already presuppose that a group is hierarchically placed higher in society as a whole. In its article, when addressing the power to veto, Eduardo Fortunato Bin⁷¹ brings an interesting

⁷⁰ “Both section 35 of Canada’s Constitution and the Declaration recognize that there are certain circumstances where the Government may be justified in proceeding with a decision that impacts Indigenous rights, provided meaningful engagement has occurred and efforts have been made to minimize those impacts. In many cases, government decisions are judicially reviewable, meaning Indigenous partners can ask a court to review the decision if they have concerns about the decision or how it was taken”. Government of Canada, (2021).

⁷¹ Eduardo Fortunato Bin is a doctoral candidate in State Law at University of São Paulo, professor at Faculties of Campinas and Federal Attorney.

discussion about the tyranny of the majority and the tyranny of minorities, emphasizing that democracy is majority ruled, but cannot crush minorities – just as minorities cannot invalidate decisions of public interest. Further, he underlines that “the absence of consent (that is, the right to veto) is consistent with democracy because a minority cannot decide for everyone”. In other words, it is argued that no segment of the population can veto policies that affect all society, and Indigenous Peoples, as part of the Brazilian population, might harm general interests if granted the right to veto.⁷²

3.3.2. Violations of the Right to Consultation and Participation of Indigenous Peoples in the Brazilian Amazon in connection to mining

Research indicates that there are systematic violations of the right to consultation and participation and the principle of free, prior, and informed consent of Indigenous Peoples in the Brazilian Amazon, most often linked to the right to land, territories, and natural resources. Indigenous Peoples in the Amazon are threatened for vocalizing disagreement and opposing mining activities on their lands – which curbs their participation in case their position is not convenient for miners. In this regard, the Special Rapporteur on the rights of Indigenous Peoples, Victoria Tauli-Corpuz, has since 2016 highlighted that Indigenous Peoples have been reporting threats to their rights in the context of large-scale or high-impact development projects, including mining, launched without no prior and no meaningful participation and consultation of Indigenous Peoples.⁷³ She further provides an example, explaining that “a licence was issued by the government of Pará for the Belo Sun gold mining project, which is in close proximity to the Belo Monte dam and which directly affects the Juruna community. This proceeded in the absence of consultations to obtain the free, prior and informed consent of the indigenous peoples concerned (...)”.⁷⁴

This right is also clearly violated when referring to illegal mining conducted by *garimpeiros*. From their side, there is no interest in respecting Indigenous Peoples’ rights whatsoever. In this regard, illegal mining has worsened over time. From 2010 to 2020, the area occupied by mining inside Indigenous lands increased 495%.⁷⁵ The Brazilian Constitution

⁷² Bim, Eduardo Fortunato, (2014).

⁷³ A/HRC/33/42/Add.1, para. 33–34.

⁷⁴ A/HRC/33/42/Add.1, para. 46.

⁷⁵ Mapbiomas, (2021).

enshrines in its Article 176 and Article 231 that mining activity in Indigenous lands are conditioned to the authorization of the National Congress, legislation specifying conditions of mining activity in the boundary zone or on Indigenous lands, and the consultation and participation of Indigenous Peoples. To this date, with no compliance of such requirements, it means that every mining activity in Indigenous lands is illegal – regardless of the mining model: artisanal, small-scale, and industrial.⁷⁶ The only way to ensure the respect of the right to consultation and participation, encompassing free, prior and informed consent of Indigenous Peoples, is through legal mining. In order to do so, the activity on Indigenous lands should be regulated, with effective measures to provide the full realization of the principle of free, prior and informed consent in relation to mining projects affecting their lands.

3.4. The Right to a Healthy Environment

Universal human rights treaties do not refer specifically to the right to a safe and healthy environment, however, the right to a healthy environment is enshrined in several international instruments across the globe, such as the African Charter on Human and Peoples' Rights, the ASEAN Human Rights Declaration, the Arab Charter on Human Rights, among others. Particularly relevant to Indigenous Peoples living in the Brazilian Amazon, the right to a healthy environment is explicitly recognized under the Inter-American human rights system, in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and in Article 19 of the American Declaration on the Rights of Indigenous Peoples. It is also stated in Article 225 of the Constitution of the Federative Republic of Brazil, meaning that the right to a healthy environment has also been recognized in the sphere of Brazilian domestic law. According to Article 11 of the Protocol of San Salvador: 1) Everyone should have the right to live in a healthy environment and to have access to basic public services, 2) The States Parties shall promote the protection, preservation, and improvement of the environment.

In addition, Article 225 of the Constitution of the Federative Republic of Brazil provides the following: “Everyone has the right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future

⁷⁶ The right to consultation and participation and the principle of free, prior and informed consent is also under analysis in connection to Bill 191/2020, which aims to regulate mining on Indigenous lands, in Chapter IV.

generations”. A more in-depth examination of the forementioned article also reveals the introduction of the concept of intergenerational equity, which is a core principle for the achievement of sustainable development.

The right to a clean, healthy, and sustainable environment also encompasses the right to live in a non-toxic environment, which entails components such as prevention of pollution and exposure to toxic substances, and the elimination of the use of toxic substances and the rehabilitation of contaminated areas.⁷⁷ Furthermore, there is a clear interrelationship between human rights and the environment. This undeniable relationship is recognized by the Inter-American Court of Human Rights, noting that environmental degradation and the adverse effects of climate change affect the full enjoyment of human rights.⁷⁸

The right to a healthy environment has both an *individual* and a *collective* character. Collectively, it constitutes a universal value that is owed to both present and future generations, individually, it represents the harm and impacts it may cause on an individual’s human rights, such as the right to life, personal integrity, and health.⁷⁹ While this right is presently introduced in connection to Indigenous Peoples in the Brazilian Amazon, it should be noted that the Inter-American Court of Human Rights understands it as an autonomous right. This means that it encompasses the protection of components of nature, such as forests, rivers and seas, as “legal interests in themselves”, regardless of certainty or evidence of risks to individuals. Thus, as an autonomous right, it does not necessarily arise from the protection of other rights, such as the right to life and the right to personal integrity.⁸⁰ However, the right to a healthy environment is primordial, as the full enjoyment of other rights depend on it.

The Inter-American Court of Human Rights considers some rights as particularly vulnerable to environmental impact, such as: the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property (land, territories and resources), and the right not to be forcibly displaced.⁸¹ In this sense, the Court recognizes that environmental degradation will have a greater impact on sectors of the population that are already in a vulnerable position, including Indigenous Peoples and “communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins (...).”⁸²

⁷⁷ OL BRA 4/2022, p. 3.

⁷⁸ Advisory Opinion OC-23/27, Series A No. 23. Inter-American Court of Human Rights, p. 66.

⁷⁹ Advisory Opinion OC-23/27, Series A No. 23. Inter-American Court of Human Rights, para. 26, 58.

⁸⁰ Advisory Opinion OC-23/27, Series A No. 23. Inter-American Court of Human Rights, para. 62–63.

⁸¹ Advisory Opinion OC-23/27, Series A No. 23. Inter-American Court of Human Rights, para. 66.

⁸² Advisory Opinion OC-23/27, Series A No. 23. Inter-American Court of Human Rights, para. 67.

3.4.1. Violations on the Right to a Healthy Environment

Illegal mining, especially of gold, is the third most important cause of deforestation, only after cattle-raising and logging. It is important to underline that mining causes deforestation both within and beyond lease boundaries. Within leases, forests are cleared for mineral extraction, processing, and infrastructure development. In its turn, off-lease impacts are potentially more extensive, entailing combined effects of land use displacement, urban expansion, development of commodity supply chains, mine waste discharge and spills.⁸³ Distressingly, a study has found that ‘mining-induced deforestation’ or off-lease impacts extended 70 km from mining leases, and it has been 12 times greater than deforestation within mining leases, causing 9% of all deforestation within the Brazilian Amazon since 2005. The same study points out to the flawed current impact assessment prescribed by Brazilian domestic law, which does not systematically consider off-lease, indirect or cumulative sources of deforestation resulting from mining.⁸⁴ The contamination and pollution of rivers and waterways by by-products and tailings have also been long documented in the Brazilian Amazon. Interestingly, in 2021, *garimpo* accounted for 8.023 ha of area deforested in Brazil, while industrial-scale mining has accounted for 1.442 ha. In other words, illegal mining causes more deforestation than legal mining.⁸⁵ On that note, Paulo Basta, an epidemiologist specializing in Indigenous health, estimates that “(...) in the entire Amazon region, approximately 90% of the contaminant mercury present in the environment comes from illegal mining activities”. For instance, illegal mining and mercury contamination along the Tapajos River basin in the Brazilian Amazon has long been documented.⁸⁶ In 2001, the Tapajos River region was defined as “the most important site of gold-mining activities in the Amazon basin”.⁸⁷ In 2021, illegal gold mining is still present in the region.⁸⁸ Thereby, the conclusion is that the right to a healthy environment of Indigenous Peoples in the Brazilian Amazon is violated by mining activity through deforestation, contamination, and pollution of rivers.⁸⁹

⁸³ Sonter, Laura J., et al., (2017).

⁸⁴ Sonter, Laura J., et al., (2017), p. 2.

⁸⁵ MapBiomass, (2022), p. 56.

⁸⁶ Zuker, Fabio., (2021).

⁸⁷ Harada et al., (2001), p. 286.

⁸⁸ Zuker, Fabio., (2021).

⁸⁹ Berzas Nevado, J. et al., (2010).

3.5. The Right to Land, Territories and Natural Resources

Many Indigenous Peoples have a deep spiritual, cultural, social and economic connection with their ancestral lands, territories and natural resources. This deep connection shapes their cultural identity and existence.⁹⁰ The ILO Convention n. 169 on Indigenous and Tribal Peoples, standing out as the only ratifiable Convention dealing with Indigenous Peoples' rights, prescribes in its Article 14:

- 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*
- 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.*
- 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.*

Moreover, the right to land, territories and natural resources is also enshrined in Article 26 of the UNDRIP, which states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”. In Brazil, it is important to underline that Article 20, IX and XI, of the Brazilian Constitution establish that both “the mineral resources, including those of the subsoil” and “the lands traditionally occupied by the Indians” are property of the Union. Nonetheless, the right to land, territories and natural resources of Indigenous Peoples' is constitutionally recognized in Brazil, as Article 231 of the Brazilian Constitution provides that Indigenous Peoples “shall have their [...] original rights to the lands they traditionally occupy, it being incumbent to the Union to demarcate them, protect and ensure respect for all of their property”, and Article 231, paragraph 2, establishes that “the lands traditionally occupied by Indians are intended for their permanent

⁹⁰ The United Nations Permanent Forum on Indigenous Issues, (2018), para. 4, p. 5.

possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein”.

When referring to ‘property’, it must be understood that Indigenous Peoples maintain a communitarian tradition of collective ownership of the land, as ownership of Indigenous lands is not centered on an individual, but rather on a group or community. This approach to property contrast with dominant models of individual ownership, privatization and development.⁹¹ In this regard, The Inter-American Court of Human Rights underlines that human rights treaties such as the American Convention are characterized by being living instruments, which are adaptable to the evolution of the times and current conditions. The Court, therefore, has taken an evolutionary approach to Article 21, which states that “everyone has the right to use and enjoyment of his property”, understanding that the protection to the right of property also entails the rights of Indigenous Peoples to ‘communal property’.⁹² On this note, the Court has also acknowledged that “as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title of property of the land to obtain official recognition of that property, and for consequent registration”.⁹³ Therefore, in the case *AWAS TINGNI V. NICARAGUA*, the Court has set an important precedent in which it confirmed that Indigenous Peoples’ communal land rights arise by virtue of traditional occupation despite the lack of official legal title.⁹⁴ In Brazil, pursuant to this understanding, the titling of Indigenous lands is declaratory in nature, meaning that the demarcation is an act of protection and not a creation of the right to collective property itself.⁹⁵ Thus, the demarcation process is intended to guarantee Indigenous Peoples’ the right to land, territories and natural resources, and to assure the protection of the demarcated area from invaders.

In the case *YAKYE AXA INDIGENOUS COMMUNITY V. PARAGUAY*, the Inter-American Court of Human Rights understood that the right to property encompasses not only the protection to Indigenous Peoples’ territories, but also “the natural resources these territories contain that are connected to their culture, as well as the intangible elements derived by them”⁹⁶. The Court has further indicated in the case *SARAMAKA PEOPLE V. SURINAME* that the right to the use and enjoyment of Indigenous Peoples’ territories is meaningless if it is not connected to the natural resources found in it. Thus, the right to communal property protect the resources

⁹¹ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149.

⁹² Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras. 148, 149 and 151.

⁹³ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 151.

⁹⁴ UN General Assembly (2016), p. 11.

⁹⁵ Case of the Xucuru Indigenous People and its members v. Brazil, para. 128.

⁹⁶ Case of the Yakye Axa Indigenous Community v. Paraguay, para. 137.

that Indigenous Peoples “have used traditionally and that are necessary for the very survival, development and continuity of their way of life”.⁹⁷ For this reason, any activity by the State or third parties that could impact the integrity of Indigenous Peoples’ lands and natural resources should respect a set of criteria that the State must guarantee: the effective participation of Indigenous Peoples, respecting their custom and traditions; their reasonable benefit; and the prior execution of social and environmental impact assessments.⁹⁸ In Brazil, as explained above, Indigenous Peoples have the right to permanent possession over Indigenous lands, that is, the right to land, territories and natural resources, but not the right to property. Nevertheless, the criteria pointed out by the Inter-American Court of Human Rights need to be complied for mining to take place in Indigenous lands in Brazil.

3.5.1 Limitations on the Right to Land, Territories and Natural Resources

The right to property under Article 21 of the American Convention is not protected in absolute terms and should not be interpreted strictly. While the Inter-American Court of Human Rights has recognized the interconnectedness between “the right of the members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival”, it also states that the right to property is subjected to certain limitations and restrictions. On this note, Article 21 states that: “(...) The law may subordinate such use and enjoyment to the interest of society”. According to the Inter-American Court of Human Rights, a State may impose restrictions to the right of property if restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society. In addition to the forementioned requirements, the Court understands that such restriction to the right to property should not deny the survival of Indigenous Peoples.⁹⁹

In Brazil, a parallel can be traced to the criteria specified by the Court in relation to Indigenous Peoples’ right to land, territories and natural resources. The first two, necessity and proportionality, are generally reasoned for the removal of Indigenous Peoples from their lands “in case of a catastrophe or an epidemic which represents a risk to their population, or in the interest of the sovereignty of the country, after decision by the National Congress, it being

⁹⁷ Case of the Saramaka People v. Suriname, paras. 121–122.

⁹⁸ Case of the Saramaka People v. Suriname, para. 129.

⁹⁹ Case of the Saramaka People v. Suriname, paras. 127–129.

guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases”, as stated in Article 231, paragraph 5. When it comes to mining in Indigenous lands, the Brazilian Constitution in its Article 231, paragraph 3, states that minerals riches in Indian “may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.”. In line with this, Article 176, paragraph 1: “The prospecting and mining of mineral resources and the utilization of the potentials mentioned in the head paragraph of this article may only take place with authorization or concession by the Union, in the national interest, by Brazilians or by a company organized under Brazilian laws and having its head-office and management in Brazil, in the manner set forth by law, which law shall establish specific conditions when such activities are to be conducted in the boundary zone or on Indian lands.” Therefore, criteria a) previously established by law (set forth by law) and d) with the aim of achieving a legitimate objective in a democratic society (in the national interest), are applied.

Since 1988, when the Brazilian Constitution was promulgated, the Brazilian legislation lacks regulation regarding this objective. Without i) legislation specifying conditions; ii) the National Congress authorization, and iii) the consultation and participation of Indigenous Peoples, mining in Indigenous lands is strictly forbidden. It should be noted that Indigenous Peoples in Brazil can exploit minerals in their lands only for subsistence, domestic, or customary purposes, without the need of authorization from the Government. Thus, Indigenous Peoples, as well as non-Indigenous Peoples, cannot conduct mining in Indigenous lands for commercial purposes currently.¹⁰⁰ Nonetheless, the Brazilian Federal Government is introducing a bill, PL 191/2020, setting conditions for mining in Indigenous lands which is still pending approval by the National Congress as of August 2022.

3.5.2 The current situation of mining in the Indigenous Lands of the Brazilian Amazon: a study based on Amazônia Minada (Mined Amazon)

According to Decree 10965/2022, Art. 5, “mining activity encompasses the prospecting, mining, mine development, processing, transport and commercializing of ores and

¹⁰⁰ Vallejos. et al., (2020), p. 57.

the use and storage of sterile and tailings”¹⁰¹. The analysis of the maps from Amazônia Minada (Mined Amazon) has a right-based approach, primarily to the right to land, territories and natural resources. In terms of legislation, the ILO n. 169 and the Brazilian Constitution are referred to, as well as a recent decision by the Federal Public Ministry (MPF) concerning the first step of mining activity, that is, projects to prospect in Indigenous lands. Amazonia Minada uses data from the National Mining Agency (ANM), the federal government agency responsible for authorizing and monitoring mining activity. On the website, the maps show requests filled with the National Mining Agency overlapping with Indigenous lands as well as Protected areas in the Brazilian Legal Amazon. Although, currently, mining activity on Indigenous lands are strictly forbidden due to the inexistence of a law regulating this activity on such areas, the expectation of the approval of PL 191/2020 has stimulated the filing of a high number of requests by mining companies. Thereby, the author of this thesis describes three main different circumstances in which those requests take place:

a) First, there are requirements to prospect inside Indigenous lands, directly affecting Indigenous Peoples living there. This situation is highly problematic, as it violates the right to land of Indigenous Peoples and the right to consultation and participation, as well the principle of free, prior and informed consent of Indigenous Peoples. This situation has been defined as unconstitutional by the Federal Public Ministry, disrespecting not only the Brazilian Constitution but also the ratified ILO n. 169, which requires the participation and consultation of Indigenous Peoples also on administrative matters which may affect them directly. Such requests are unconstitutional, since there is yet no law regulating legal mining on Indigenous lands. According to the decision by MPF, the unjustified and unreasonable delay in rejecting mining claims in Indigenous lands by the National Mining Agency leaves them pending for years (some of them have been pending since the 80s and 90s), which encourages the irregular expectation of “future preference”¹⁰² in case mining activity is regularized on Indigenous lands in the future.¹⁰³ This represents, further, a cascade effect, as this expectation also encourage more mining companies to file requests, as well as illegal miners who will become more inclined to invade Indigenous lands, backed up by the future possibility of regularizing its

¹⁰¹ Portuguese original: “A atividade de mineração abrange a pesquisa, a lavra, o desenvolvimento da mina, o beneficiamento, o transporte e a comercialização dos minérios e o aproveitamento e o armazenamento de estéréis e rejeitos”.

¹⁰² Described on Article 11 of the Brazilian Mining Code.

¹⁰³ Ministério Público Federal. (2022), p. 6.

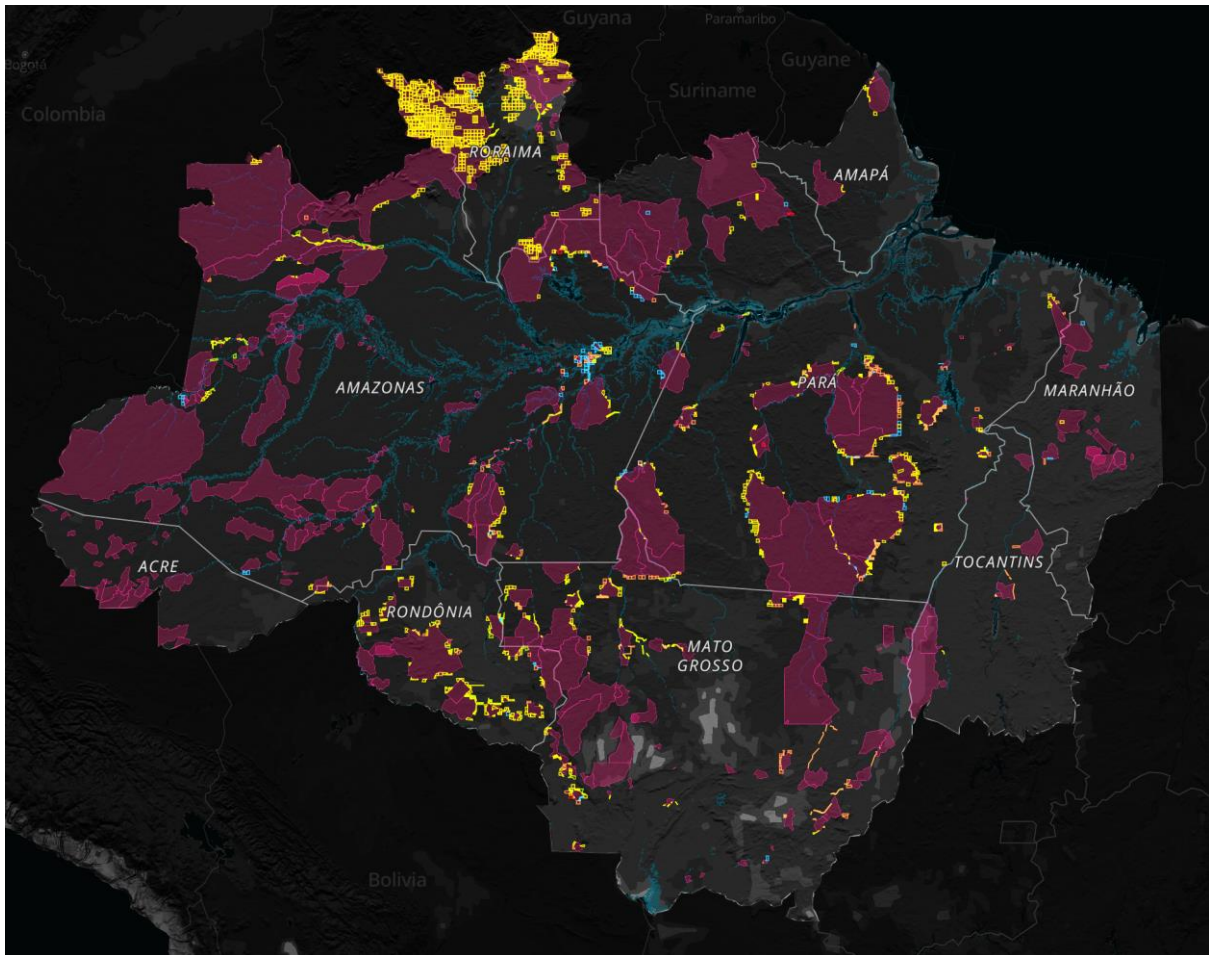
activity in case the law is approved. In turn, as underlined by MPF, this situation further hinders the State's duty to protect Indigenous Peoples' rights.¹⁰⁴

b) Secondly, there are requests in which Indigenous lands will be partially affected, meaning that it encompasses simultaneously Indigenous lands and non-Indigenous lands. In this case, legally, the National Mining Agency must reject those requests at least partially in order to protect the Indigenous lands, being able to allow mining prospects in the remaining areas after careful analysis. This situation represents the impacts on Indigenous Peoples' rights both directly and indirectly, since mining activity on Indigenous lands is currently illegal.

b) Thirdly, there are requirements to conduct mining research on the very-near surroundings of Indigenous lands, indirectly affecting Indigenous Peoples' rights. Under these circumstances, since it is outside of Indigenous lands, mining activity is legal both under international human rights law and Brazilian domestic law. It does not violate the right to land, territories and natural resources directly, but it still impacts it indirectly, as studies have shown that not uncommonly, mining activity will trespass to Indigenous lands. Additionally, research has shown that the impacts of mining cover an area bigger than the area in which it originally takes place. Considering the proximity to Indigenous lands, such activity will mostly likely impact to different extents the right to land, territories and natural resources of Indigenous Peoples, as well as other rights, such as the right to a healthy environment, the right to health, the right to cultural identity and so on. As Indigenous Peoples' rights have been observed to be deeply intertwined, the consequence of breaching the right to land, territories and natural resources generally means that the enjoyment of all other rights will also be affected.

To better understand such circumstances, the map below shows the Legal Amazon in the Brazilian territory. Purple areas are Indigenous lands, or in Portuguese, Terras Indígenas (TI), in accordance with the definition provided by Article 231 of the Brazilian Constitution. Yellow squares represent mining requests within or adjacent to Indigenous lands. As observed, some Indigenous Peoples, such as the Yanomami, are more exposed and vulnerable to mining prospects, with many requests inside their lands. Proportionally, they are also more affected by illegal mining.

¹⁰⁴ Ministério Público Federal. (2022), p. 6–7.



Source: *Amazônia Minada. InfoAmazonia.*

3.5.3 Violations of the Right to Land, Territories and Natural Resources

According to the Indigenous Missionary Council (CIMI)¹⁰⁵, today, there are 1296 Indigenous lands in Brazil, of which 401 are legally demarcated, 301 are under the procedure of demarcation, 65 fall under categories other than traditional lands, and the striking number of 560 have no State action in terms of providing the beginning of its demarcation.¹⁰⁶ Thus, nearly 2/3 of all Indigenous lands have not yet been demarcated, in spite of the requirement in ILO Convention n. 169 and the Brazilian Constitution to do so. Still, when it comes to territorial

¹⁰⁵ “CIMI – Indigenous Missionary Council (Conselho Indigenista Missionário) is an organization linked to the National Conference of Bishops of Brazil (CNBB), whose primary goal is to support indigenous peoples in their fight for recovery, demarcation and integrity of their territories. Recently, CIMI has obtained the consultative status with the UN’s Economic and Social Council (ECOSOC).”, UN’s Universal Periodic Review Mechanism: the human rights situation of indigenous peoples – focusing on access to justice, criminalization and legal barriers to effectively demarcating Brazilian indigenous peoples’ land (time frame), (2016).

¹⁰⁶ Conselho Indigenista Missionário, (2022).

rights, Indigenous Peoples in the Amazon are pointed out to be a step ahead of other Indigenous Peoples across Brazil. Indigenous lands in the Brazilian Amazon account for 98.5% of all Indigenous lands in the country, even though it holds less than 50% of the total of Indigenous Peoples in Brazil.¹⁰⁷ While the Brazilian Constitution recognizes the “inherent original right” to traditionally lands occupied by Indigenous Peoples, the five-year limit for demarcating all Indigenous lands set out in Article 67 of the Temporary Constitutional Provisions Act, has not been respected.¹⁰⁸ Therefore, the inertia of the public authorities, added to the government’s lack of interest in the matter of demarcation of Indigenous lands already indicates the negligence and violation of this right.¹⁰⁹

In addition, in 2016, of the 44.911 mining projects undertaken in the Brazilian Amazon, 17.509 overwhelmingly or partially affected Indigenous lands and protected areas, and 4.181 took place on Indigenous lands.¹¹⁰ Accordingly, gold prospect projects make up to 70% of the total projects. As mentioned above, currently, without the National Congress’ authorization, legislation specifying conditions when mining is to be conducted in the boundary zone or on Indigenous lands, and the consultation and participation of Indigenous Peoples, all mining activity in Indigenous lands is illegal and violates Indigenous Peoples’ right to land, territories and natural resources. Moreover, it is important to stress that mining activity outside of Indigenous lands might still affect Indigenous Peoples’ enjoyment of the right to land, territories and natural resources, as off-lease impacts might also negatively affect Indigenous lands. Finally, the right to land, territories and natural resources is violated when illegal mining takes place inside Indigenous lands, but also when government authorities fail to protect this right. The study based on Amazonia Minada demonstrates how this right is further violated when mining requests on Indigenous lands are not declined, as the omissive behavior of the National Mining Agency promotes illegal mining and the consequent degradation of Indigenous lands.

3.6. The Right to Health

¹⁰⁷ Le Tourneau, François-Michel, (2015), p. 215.

¹⁰⁸ Article 67 of the Transitory Constitutional Provisions Act of the 1988 Constitution: “The Union shall conclude the demarcation of the Indian lands within five years of the promulgation of the Constitution.”

¹⁰⁹ During his campaign, current Brazilian President Bolsonaro said that “not one centimeter of land will be demarcated for indigenous reserves or quilombolas”. Mendes, Karla., Pontes, Nadia., (2018).

¹¹⁰ Inter-American Commission on Human Rights, (2021), para. 76.

The Right to Health is an inclusive right. This means that it encompasses a range of factors that contribute to living a healthy life, called “underlying determinants of health”. Thus, it includes safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environmental conditions, health-related education and information and gender equality. Furthermore, the right to health also contains entitlements, such as the right to prevention, treatment, and control of diseases.

There are two points of importance when assessing the Right to Health in relation to Indigenous Peoples in the Brazilian Amazon. First, the concept of health and well-being for Indigenous Peoples is generally broader and more holistic than that of mainstream society.¹¹¹ It often entails spiritual, emotional, cultural and social dimensions – going beyond mere physical integrity. In other words, The Right to Health entails not only the right to physical integrity, but also the right to mental well-being. Health is understood as both an individual and collective right, which is characterized by strong ties with their land, the natural environment and community. According to the Permanent Forum on Indigenous Issues, the right to health “materializes through the well-being of an individual as well as the social, emotional, spiritual and cultural well-being of the whole community”. In other words, for Indigenous Peoples, the health of the individual is often linked to the health of the community and has a collective dimension.¹¹² Furthermore, Indigenous Peoples’ mental and emotional well-being is closely tied to their cultural traditions, which in turn are deeply rooted in ancestral lands.

Secondly, Indigenous Peoples are extremely vulnerable. Indigenous Peoples worldwide, including Brazil, have suffered the impacts of colonization and assimilation policies, and as a result, they face social disadvantages and health disparities that still remains.¹¹³ Some Indigenous Peoples’ immune systems are more fragile than the rest of the population’s, for example, “cases of mass deaths for indigenous peoples in voluntary isolation have occurred previously and have been caused by diseases such as influenza or measles, for which they have no immunity.” In such cases, the death rate was massive entire populations were devastated.¹¹⁴ Added to that, many Indigenous Peoples experience difficulties in accessing the health system.¹¹⁵ Moreover, Indigenous Peoples across the world often suffer higher suicide rates than the majority population.¹¹⁶ Even in wealthy nations, Indigenous Peoples are indicated

¹¹¹ A/HRC/33/57, para. 4.

¹¹² Office of the High Commissioner for Human Rights, (2000), para. 27.

¹¹³ Pollock et al., (2018), p. 2.

¹¹⁴ Praeli, Y. S., (2022).

¹¹⁵ Power et al., (2020).

¹¹⁶ United Nations, (2009).

to have an alarming health disadvantage when compared to non-Indigenous Peoples.¹¹⁷ Thus, Indigenous Peoples worldwide “experience higher rates of health risks, poorer health and greater unmet needs in respect of health care than their non-indigenous counterparts”.¹¹⁸

In the Brazilian Constitution, the right to health is enshrined in Article 6, in the Chapter of Social Rights: “Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution”. In the Additional Protocol to the American Convention on Human in the Area of Economic, Social and Cultural Rights, the Right to Health is enshrined in Article 10(1): “Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being”. Finally, in the UNDRIP, Article 24 affirms the right of Indigenous Peoples “to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals”, and “Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health”.

3.6.1 Violations of the Right to Health

Artisanal and small-scale gold mining is responsible for 40% of global mercury emissions and the pollution of soil, air and watercourses.¹¹⁹ One of the main impacts of mining activity is the contamination of rivers and waterways by by-products and tailings. As a result of intense gold mining, the contamination of mercury is widespread throughout the Brazilian Amazon, and Amazonian people, including Indigenous Peoples, are among the most exposed to mercury in the world and have reported severe health issues.¹²⁰ The closer and more affected by mining activity an Indigenous land is, the higher the concentration of mercury in the Indigenous People living there will be found.¹²¹ According to the World Health Organization, the side effects of mercury exposure commonly include respiratory and digestive diseases, skin rashes, neurological diseases, fetus malformation and effects on abortion.

To protect the environment and human health from the adverse effects of mercury, the Minamata Convention entered into force in 2017. According to Article 7.3 of the Minamata Convention: “Each party shall notify the Secretariat if at any time the Party determines that

¹¹⁷ United Nations, State of the World’s Indigenous Peoples, Volume II, Health, p. 3.

¹¹⁸ A/HRC/33/57, para. 5.

¹¹⁹ World Gold Council, (2020), p. 25.

¹²⁰ Villén-Pérez et al., (2022), p. 2.

¹²¹ Basta, Paulo Cesar & Hacon, Sandra de Souza (2020). p. 44.

artisanal and small-scale gold mining and processing in its territory is more than insignificant. If it so determines the Party shall: a) Develop and implement a national action plan in accordance with Annex C; b) Submit its national plan to the Secretariat no later than three years after entry into force of the Convention for it or three years after the notification to the Secretariat, whichever is later; and c) Thereafter, provide a review every three years of the progress made in meeting its obligations under this Article and include such reviews in its reports submitted pursuant to Article 21". Although Brazil has ratified the Minamata Convention, it only notified the Secretariat that artisanal and small-scale gold mining processing in its territory was more than insignificant in November of 2019.¹²² To the present date, August of 2022, Brazil has not yet submitted a national action plan, which should be submitted no later than November of 2022. According to Annex C of the forementioned Convention, the national action plan should include a public health strategy on the exposure of artisanal and small-scale gold miners and their communities to mercury, as well as strategies to prevent the exposure of vulnerable populations, particularly children and women of child-bearing age, especially pregnant women, to mercury used in artisanal and small-scale mining.

Moreover, the poisoning of fish and the environmental degradation will result in higher rates of malnutrition among Indigenous Peoples. On that note, since hunting and fishing gets difficult, Indigenous Peoples will often replace their traditional eating habits with industrialized food, which in turns increases the risks of diabetes and obesity.¹²³ Furthermore, research has suggested that there is a large positive causal effect of illegal mining on malaria incidence.¹²⁴ According to Rachel Lowe of the London School of Hygiene, illegal gold mining creates the perfect conditions for the malaria-carrying *Anopheles* mosquito to reproduce. In the State of Pará, where most of the illegal gold mining takes place, the rate of malaria transmission in mining sites was up to 17.8 percent during the first semester of 2020, a number that could be higher considering unreported cases. Broadly, mosquito-borne illnesses have increased with 32% in the region of Tapajós from 2019 to the same period in 2020, and with 46.7% on Indigenous Lands.¹²⁵

During the Covid-19 pandemic, the Brazilian government declared mining an “essential activity”, thus being allowed to continue operating normally. While the pandemic affected Brazil’s economy as a whole, Indigenous Peoples were – and still are – particularly

¹²² Notification on Article 7.3 can be found at: <https://www.mercuryconvention.org/en/documents/brazil-notification-article-73>

¹²³ Fábio, André Cabette., (2022), p. 178-179.

¹²⁴ Rozo, Sandra V., (2020).

¹²⁵ Langlois, Jill., (2020).

vulnerable. Furthermore, it has also been shown that Indigenous Peoples were contaminated with Covid-19 to a greater extent in areas in which illegal mining activities were identified.¹²⁶ Such a situation demonstrates how the Brazilian government, by failing to address and stop illegal mining in the Brazilian region, implicitly allowed diseases to spread quickly in Indigenous lands, violating their right to health. As a minority within a minority, isolated Indigenous Peoples are even more vulnerable. Isolated Indigenous Peoples' immune system is not as the majority of society's, meaning that outside contact can provoke a demographic catastrophe. The invasion of Indigenous lands by non-Indigenous Peoples, including *garimpeiros*, can bring diseases capable of decimating Indigenous populations.

It is also important to underline a gender-based and intersectional approach to the right of health of Indigenous Peoples. A recent report, released in April 2022, shows that from the perspective of Indigenous women, *garimpeiros* represent a terrible threat. They are described as “lustful and violent”, and they create an atmosphere of terror and permanent anguish in Indigenous villages.¹²⁷ In the Yanomami Indigenous Lands, there are several cases of rape and harassment of children and women. Indigenous People in the region have reported no longer resisting abuse and harassment, because *garimpeiros* carry guns, and they are afraid of being attacked or suffering retaliation. The case of an “arranged marriage” between a *garimpeiro* and an Indigenous adolescent has also been reported, in which a payment was expected from the *garimpeiro*, but was never fulfilled.¹²⁸ *Garimpeiros* are also reported of offering food in exchange for sex with Indigenous adolescent women, as well as using alcohol as a strategy to entice and abuse them.¹²⁹ Consequently, sexual violence against Indigenous women is also linked to sexually transmitted diseases (STDs).¹³⁰ According to the report, three Indigenous adolescent women around 13 years old died in 2020, after contracting STDs from *garimpeiros*. Therefore, according to the reports, illegal mining and *garimpeiros* are causing indigenous women distress, affecting their mental well-being, as well as damaging their physical healthy. In extreme cases, not only the Right to Health is affected, but the Right to Life itself.

3.7. The Right to Culture

¹²⁶ Inter-American Commission on Human Rights, (2020), p. 3–4.

¹²⁷ Instituto Socioambiental, (2022), p. 88.

¹²⁸ Instituto Socioambiental, (2022), p. 96.

¹²⁹ Instituto Socioambiental, (2022), p. 86–87.

¹³⁰ Instituto Socioambiental, (2022), p. 88.

The ILO Convention n. 169 recognizes the right to culture and cultural identity in several articles. For instance, Article 2(1) and Article 2(2b) establish that: “Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. Such action shall include measures for: (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions”. On this matter, Article 231 of the Constitution of the Federative Republic of Brazil provides that “Indians shall have their social organization, customs, languages, creeds and traditions recognized [...]”. In its turn, the UNDRIP, Article 31 establishes that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts”. Additionally, it also affirms that Indigenous Peoples “have the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.

For many Indigenous Peoples, land is a cultural matter, meaning that cultural identity is generally tied to their ancestral lands.¹³¹ In this sense, according to Paragraph 1 of the forementioned Article, the lands traditionally occupied by Indigenous Peoples are those “indispensable to the preservation of the environment resources necessary for their well-being, and for their physical and cultural reproduction, according to their uses, customs and traditions”. The close ties of Indigenous Peoples to their traditional lands are not only the fundamental basis of their integrity and economic survival, but also the fundamental basis of their culture and spiritual life. As an example, the Guaraní say that “their land is not their land” but rather “the place where we are what we are”. Therefore, it is crucial to acknowledge that for many Indigenous Peoples, the relations to land go beyond possession and production, consisting also of a material and spiritual element which must be preserved in order to transmit their cultural legacy to future generations.¹³² Consequently, forced displacement and loss of lands means the denial of cultural space, and thus the violation of the right to cultural identity and the cultural heritage to be passed on to new generations of Indigenous Peoples.¹³³

¹³¹ Case of the Yakye Axa Indigenous Community v. Paraguay, (2005), para. 18.

¹³² Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149.

¹³³ Case of the Yakye Axa Indigenous Community v. Paraguay, (2005), p. 20, “f”.

3.7.1 Violations of the Right to Culture

Mercury contaminating rivers is one example of how environmental degradation will reflect negatively on the right of culture of Indigenous Peoples'. According to Chief Arakuã and Vice-Chief Sucupira: "We have a sacred relationship with the rivers, with Txopai, the father of the waters...Before the leak, we took purification baths almost daily in the waters of the Paraopeba, in honor of Txopai, in a sacred ritual to strengthen the spirit. In the month of October, we hold the Festival of the Waters, bringing together relatives in one of the most important rituals of our culture, held to celebrate the arrival of the rains and thank the protector of the waters, Txopai, and Niamissu (God), for the abundance of food. We can no longer use the waters of the Paraopeba River for bathing, leisure, or farming... causing irreversible effects on the reproduction of our practices, our cosmology and well-being."¹³⁴

Another example is the case of the Indigenous Peoples Yanomami and Ye'kuana, living in the Yanomami Indigenous lands in the Brazilian Amazon. As mentioned above in "the right to health", during the Covid-19 pandemic, illegal miners in the region were vectors of Covid-19, spreading the disease to Indigenous Peoples who already suffer from the lack of health infrastructure in the region. Three women and their babies of the Sanöma, a Yanomami group, were taken to hospitals in Boa Vista, the capital of Roraima, to treat what they suspected was pneumonia. During their stay, the babies were allegedly contaminated by Covid-19, and there they died. As a sanitary and preventive measure, the babies were buried in a cemetery outside the traditional Indigenous lands in which they were born.¹³⁵

For Indigenous Peoples of the Yanomami group, burials are unacceptable. Instead, bodies are cremated, followed by a long ritual so the dead can 'die' for themselves and for the community. Death rituals can take months and years to be completed. The last act of the ritual consists of mixing the ashes of the dead in banana porridge, symbolizing the dissipation of the dead in everyone's body.¹³⁶ As Eliane Brum¹³⁷ explains: "The ritual makes the dead also die as a memory, so that the living can live. If the ritual is not carried out, the dead person cannot be

¹³⁴ Complicity in Destruction IV: How Mining Companies and International Investors Drive Indigenous Rights Violations and Threaten the Future of the Amazon, (2022), p. 27.

¹³⁵ Eliane Brum, (2020).

¹³⁶ Eliane Brum, (2020).

¹³⁷ Eliane Brum "is a writer, journalist, and documentary filmmaker, and the author of five books of nonfiction and the novel One Two. She has won over forty journalism prizes and honors, is a columnist for El País, and collaborates with The Guardian". Source: National Book Foundation's website.

forgotten or allowed to be forgotten, which causes great harm to their relatives and the entire community. The Yanomami death ritual is extremely complex and wise in its symbology”.¹³⁸

Burying the bodies, especially without their consent, disrespects the spiritual beliefs and ancestral traditions of Yanomamis towards death and grief. Whether the violation of the right to culture of Indigenous Peoples could be deemed as reasonable and proportionate considering the particularities of a pandemic, it is incontestable that the right to culture itself was, indeed, violated. The pandemic also took the lives of elderly Indigenous Peoples who were ‘true guardians of the culture, history and knowledge of their peoples’, which represents an inestimable cultural loss.¹³⁹ Thus, the Brazilian Government failed in its duty to protect Indigenous Peoples twice: first by not stopping illegal miners of invading Indigenous lands. The consequence of this failure then leads to the second failure, through the government’s health capacities, which neglected Indigenous Peoples’ special conditions and disregarded their culture and traditions.

Finally, the right to cultural heritage is linked to the right to participation and consultation. In other words, Indigenous Peoples should be able to actively participate in decision-making processes that regards them, and that will impact their cultural identity and ancestral traditions. As mentioned above, culture is constantly changing and evolving, and Indigenous Peoples should be able and capable to decide what to preserve and what to let go. As noted by Amartya Sen “there is no compulsion to preserve every departing lifestyle even at heavy cost, but there is a real need for social justice, for people to be able to take part in these social decisions, if they so choose”¹⁴⁰. At the same time, this “cultural transformation” can be the result of strong assimilation by dominant societies, leading to cultural hegemony. The disappearance of cultures is regrettable and there is a great effort to preserve different cultures. We must, however, distance ourselves from a paternalist approach. A paternalistic view on this matter disregards the autonomy and agency of Indigenous Peoples, and in the long run is counterproductive. Thus, considering the marginalized position and vulnerability of Indigenous Peoples, the final aim is to empower Indigenous Peoples to take part in decisions, so they can be fully capable of deciding for themselves the fate of their traditions and lifestyle, and to overcome the power imbalance between parties when negotiating mining in Indigenous lands.

¹³⁸ Eliane Brum, (2020).

¹³⁹ Conselho Indígena Missionário, (2021).

¹⁴⁰ Sen, Amartya., (2000), p. 242.

3.8. The Right to Life

The right to life is a basic human right, necessary for the enjoyment of all human rights, and it belongs to the domain of *jus cogens*.¹⁴¹ As it entails all the human rights analyzed above, it is the last one under examination.

The right to life is a fundamental and non-derogable right, recognized in various international instruments. In the Brazilian Constitution, Article 5 states that: “All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property [...]”. In the UNDRIP, Article 7.1 establishes: “Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person”. Under the American Convention, the right to life is prescribed by its Article 4, “4.1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” It requires not only a *negative* measure from the State to not arbitrarily deprive life, but also demands *positive* measures by States to guarantee its full realization. Thus, there is a positive obligation to guarantee the necessary conditions that would allow Indigenous Peoples to live a decent life.¹⁴²

In the cases of JUAN HUMBERTO SÁNCHEZ AND 19 MERCHANTS, The Inter-American Court of Human Rights has affirmed that “The right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights. When the right to life is not respected, all other rights lack meaning [...]”.¹⁴³ When it comes to Indigenous Peoples in the Brazilian Amazon, the right to life needs to be interpreted in connection to the right to communal lands. In this sense, the protection of the right to lands, territories and natural resources is essential for the safeguard of Indigenous Peoples physical and cultural survival. Therefore, the protection of Indigenous lands is indispensable for the preservation of cultural identity and survival of Indigenous Peoples, but also for the enjoyment of a *dignified* standard of living. Consequently, when Indigenous Peoples are deprived of their lands, it is their own right to life that is at stake.¹⁴⁴ Thus, the right to land, territories and natural resources is

¹⁴¹ Case of the Yakye Axa Indigenous Community v. Paraguay, (2005), p. 157, a; Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala, Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli, para 2.

¹⁴² Fuentes, A., (2017), p. 235.

¹⁴³ Case of Juan Humberto Sánchez v. Honduras (2003), para. 110; Case of the 19 Tradesmen v. Colombia (2004), para. 153.

¹⁴⁴ Fuentes, A., (2017), p. 234–235.

especially significant as it is directly linked to the full enjoyment of the right to life, encompassing the necessary conditions for a *decent life*.

Furthermore, The Inter-American Court of Human Rights has asserted in the case *YAKYE AXA INDIGENOUS COMMUNITY V. PARAGUAY* that “in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water”. Thus, when Indigenous lands are threatened by extractive industries, such as mining, there are major impacts on the right to a decent existence and basic conditions to exercise other human rights, such as the right to health and the right to cultural identity.¹⁴⁵ Moreover, cultural identity is closely tied to Indigenous Peoples’ relation to ancestral lands. On this note, Judges Cançado Trindade and M.E. Ventura Robles, in their separate dissenting opinion, emphasized that “cultural identity is a component or is attached to the right to life *lato sensu*; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitably suffers”.¹⁴⁶

The right to life should also not be interpreted restrictively, as it encompasses more than the protection of the prohibition of the arbitrary deprivation of physical life. In the Joint concurring opinion of Judges Cançado Trindade and Abreu-Burelli, they state that there are distinct ways to deprive one of the right to life. For instance, when a death is provoked directly by the unlawful act of homicide, but also when circumstances are not avoided which likewise lead to the death of a person.¹⁴⁷ The right of life entails the right of living a life with dignity, to create and pursue a project of life, and seek meaning for its existence according to each one’s traditions, worldviews, and own concepts of dignity. Bearing this in mind, the right to life belongs, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights – denoting the interrelatedness and indivisibility of human rights. The protection of all the rights explained in this section are intrinsically related to living a life with dignity, and therefore an integral part of the right to life.

Based on the above considerations, the Inter-American Court of Human Rights understands that the violation of Indigenous Peoples’ right to property and their traditional lands amounts not only to a violation of Article 21 of the American Convention, but to a breach of the right to life itself, in Article 4(1), in accordance with Article 1(1) – according to the specificities of each case.

¹⁴⁵ Case of the Yakye Axa Indigenous Community v. Paraguay, p. 167.

¹⁴⁶ Case of the Yakye Axa Indigenous Community v. Paraguay, dissenting opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, p. 20.

¹⁴⁷ Case of the "Street Children " (Villagran-Morales et al.) v. Guatemala, joint concurring opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, para. 3.

3.8.1 Violations of the Right to Life

This section will be divided into two parts: First, cases in which the right to life has been deprived in its most basic form are highlighted. That is, when Indigenous Peoples in the Brazilian Amazon have been arbitrarily deprived of physical life because of mining activity. Next, cases in which the Brazilian State has failed in terms of positive obligations for the protection of a dignified life, in order to guarantee the full realization of the right to life in its broader aspect are underlined.

Illegal economic activities, such as illegal gold mining, are associated with higher levels of violent crimes. In 2018, mining was for the first time considered the world's deadliest sector for environmental activists, which include Indigenous Peoples defending their lands. In the same year, at least 164 environmental activists were murdered across the world. More than half of those murders took place in Latin America, considered the worst-affected continent since 2012, having Brazil (as well as Colombia, Mexico and Guatemala) at or near the top of the list. In 2020, Global Witness recorded 227 land and environmental defenders murdered. Almost 3 in 4 of the attacks recorded took place in the Americas. In both Brazil and Peru, nearly three quarters of those murders happened in the Amazon region. To put into perspective, Indigenous Peoples were the target of 5 of the 7 mass killings recorded in 2020, and they account for a third of all fatal attacks, despite making up only 5% of the world's population – making it clear how disproportionate violence is against them.¹⁴⁸ In Brazil, there were 182 murders of Indigenous people in 2020, compared to 113 murders in 2019, which amounts to a 61 percentage surge in killings. Not only the Brazilian Government has been pointed out as failing in its duty to protect Indigenous Peoples and their traditional lands, but another reason stressed is the fact that new legislation is being pushed with the objective of opening Indigenous lands to commercial mining, as well as to oil and gas exploration and the building of hydroelectric dams.¹⁴⁹ Illegal miners are also responsible for a series of attacks and the killing of Indigenous Peoples with shotguns.¹⁵⁰

When it comes to the broader aspect of the right to life – the right to life *lato sensu* – which entails the guarantee of necessary conditions to a decent existence and a dignified life, all the examples of violations of rights mentioned previously in this chapter, can also be

¹⁴⁸ Global Witness, (2021), p. 12.

¹⁴⁹ Reuters, (2021).

¹⁵⁰ Reuters, (2020); United Nations, (2021a).

considered a breach to the right to life of Indigenous Peoples in the Brazilian Amazon. As demonstrated, human rights are interconnected and interdependent. When one of the rights are violated, it ends up impacting the other rights as well. With respect to Indigenous Peoples in the Brazilian Amazon, the most notable example is in relation to their ancestral lands. When deprived of their lands, they are at the same time deprived of all the elements that this land provides them – not just materially, but spiritually. For example, when the right to a healthy environment is violated, the right to health of Indigenous Peoples is seriously compromised. It is a well-known fact that many Indigenous Peoples living in the Brazilian Amazon depend on the fauna and the rivers for their own subsistence and the obtaining of food. The contamination and pollution of the environment in which Indigenous Peoples are present not only affects the right to health, but in turn, also the right to culture and the right to cultural identity. This is because their traditions and ancestry are deeply connected to their lands. And as observed above, the violation to the right to culture means the violation of the very right to life.

3.9. Conclusions

In the beginning of this chapter, reference to international human rights treaties in relation to Indigenous Peoples was briefly made. Several important human rights treaties, even ones not mentioning specifically Indigenous Peoples in its body of law, are individually applicable to Indigenous people. For Indigenous Peoples in the Brazilian Amazon, collectively, the importance of the following instruments was highlighted: the ILO Convention n. 169, the UNDRIP, the American Convention and the Brazilian Constitution. The first two specifically refer to Indigenous Peoples; the American Convention is important, firstly, because Brazil has ratified it, and secondly, because this Convention is the basis of the jurisprudence of the Inter-American Court of Human Rights used in this chapter; and finally, the Brazilian Constitution, which is in harmony with the aforementioned treaties and provides comprehensive protection for Indigenous Peoples.

Subsequently, a legal background on Indigenous Peoples' identity was provided. Internationally, there is no official legal definition on who counts as Indigenous Peoples. However, a set of key criteria have been developed to identify Indigenous Peoples, with self-determination being one of its cornerstones. In Brazil, the Indian Statute includes self-determination in its definition, conforming with Article 33, I, of the UNDRIP. It is important to note that although Indigenous Peoples have been insistent on not being defined and were

strongly against the limitation of a single definition, a legal definition is argued to be important for the effective protection of Indigenous Peoples' rights.

Two points must be raised in this conclusion so that it is clear: First, that the right of participation and consultation of Indigenous Peoples is upheld both by international human rights law and Brazilian domestic law. This right is prescribed in ILO Convention n. 169, The Brazilian Constitution and the UNDRIP. The principle of free, prior and informed consent, however, is only contained in the UNDRIP, which raises a debate to whether the principle of free, prior and informed consent grants the “right to veto” for Indigenous Peoples. In Brazil, currently, there are solid indications to believe that the principle of free, prior and informed consent will not be understood as encompassing the “right to veto” in case a bill regulating mining in Indigenous lands (PL 191/2020) is approved by the National Congress. Secondly, In Brazil, Indigenous Peoples do not have the right to property over their lands. Nonetheless, they have the right to land, territories and natural resources, which is established both in the ILO Convention n. 169, Brazilian Constitution and the UNDRIP. In other words, Indigenous Peoples, as well as non-Indigenous Peoples, are not allowed to conduct mining commercially in Indigenous lands. However, the right to land, territories and natural resources allows Indigenous Peoples to exploit minerals for their subsistence, domestic or customary purposes. Furthermore, while declaratory in nature, the demarcation of Indigenous lands in Brazil is essential to guarantee the protection of Indigenous Peoples' rights broadly and also against both legal and illegal mining. The definition of the limits of Indigenous lands is essential so that the government can monitor the condition of these lands, protect them from land conflicts, against invaders and prospectors.

Evidence gathered in this chapter points out to illegal mining in the Brazilian Amazon negatively impacting all the human rights examined above: I) The Right to Consultation and Participation; II) The Right to a Healthy Environment; III) The Right to Health; IV) The Right to Land, Territories and Natural Resources; V) The Right to Cultural Heritage; and, finally, VI) The Right to Life. Again, even though these right have been analyzed separately, they are deeply interconnected and the impact on one generally contributes to the impact on other rights, like a domino effect. It should be underlined that within Indigenous groups, Indigenous People will experience negative impacts on their rights caused by mining activity in different ways and to different extents. The intersection of distinct components of a person's identity will shape their experience and perceptions of the world, and also how suffering is felt. Thus, it is worth noting that because of their special vulnerabilities, women, elderly, and children are, overall, more severely impacted. For instance, it has been shown in this chapter that mining activity will

increase the spreading of diseases in Indigenous lands, which affects the elderly to a most severe degree. Moreover, illegal mining and the presence of *garimpeiros* are a threat to women's safety, as it has been documented that Indigenous women have been suffering sexual violence in their lands. When it comes to children, the concern over mercury contamination is greater. This is because it directly affects the central nervous system, which is still in phase of development in those under the age of five, and the brain of fetuses when they are still forming in their mother's womb.¹⁵¹

Human rights violations are also linked to forced displacement and are identified as the root causes of migration to urban settings, compelling Indigenous Peoples to leave their lands and territories in the search for better conditions. However, once in urban cities, Indigenous Peoples will face new challenges to the fulfillment of their rights, which includes access to housing, safe water and sanitation. In addition, Indigenous Peoples are likely to establish themselves in informal settlements, suffering from the increased risks from extreme weather events.¹⁵² In accordance with that, the President of the "Indian State Foundation", Raimundo Atoari, has highlighted that despite seeking better conditions in urban cities due to food shortages, deforestation, and the advance of cities over forests, most Indigenous Peoples live in poverty and face difficulties in finding a job. Indigenous Peoples will be found in the informal sector, without a formal contract, and their main income will come from handicrafts.¹⁵³ That is, the increase in deforestation in the Brazilian Amazon, which also comes from unsustainable and illegal mining, and the effects generated by it, such as climate change, not only threaten the lives of Indigenous Peoples in their ancestral lands. Once their rights are violated, Indigenous Peoples find themselves in a new position of vulnerability and fragility when forced displaced to urban cities. This scenario demonstrates that the negative impacts of mining might trigger new ways in which Indigenous Peoples' rights will be impacted in urban settings in the future.

Finally, it can be concluded that Indigenous Peoples in the Brazilian Amazon are protected, at least in theory, by a thick layer of legislation. In terms of legislation, the Brazilian State has committed to ratifying and signing the most important human rights treaties that cover the rights of Indigenous Peoples. Furthermore, the Brazilian Constitution of 1988, marked by its democratic and participatory process, has deeply promoted advancements with regards to Indigenous Peoples' rights and is in line with international conventions. Despite that, all

¹⁵¹ Élidea Cristo, (2021).

¹⁵² A/HRC/27/66, para. 44.

¹⁵³ P., Bianca & Heinen, M., (2017).

Indigenous Peoples' rights examined in this chapter have been negatively impacted by mining activity, particularly that conducted illegally. This makes explicit that there is a gap between the legal recognition and the practical realization of Indigenous Peoples' rights in the Brazilian Amazon. Legislation, although robust, becomes ineffective if it lacks enforcement under the authority of a negligent government, with weak monitoring institutions. Thereby, in Brazil, there is no lack of formal rights for Indigenous Peoples. There are, in fact, insufficient measures, conflict of interests, and lack of political will to ensure the effective protection of Indigenous Peoples' rights.

4. Regulating mining on Indigenous lands in Brazil

4.1. Introduction

Chapter II has provided context, providing both information on the Brazilian Amazon and its importance both internationally and nationally, on who are the Indigenous Peoples referred to in this thesis and their role in the Brazilian Amazon and, finally, it has demonstrated historically how the Indigenous Peoples in the Brazilian Amazon have been impacted by illegal mining activity.

Chapter III has developed a human-rights based approach to the impacts on Indigenous Peoples in the Brazilian Amazon. Notwithstanding its interdependence and interrelatedness, it provides the construction of a human-rights framework to analyze each right individually. The research conducted has revealed that, to various extents, all rights of the Indigenous Peoples in the Brazilian Amazon have been negatively impacted – majorly by illegal gold mining activity.

The present Chapter IV seeks to answer whether regulating mining on Indigenous lands can be a solution to the current issue with Indigenous Peoples' rights violations in relation to mining activity in the Brazilian Amazon. To do so, the arguments in favor of regulating mining activity on Indigenous lands will be analyzed, as well as if the proposed law (PL 191/2020) respects international human rights law regarding Indigenous Peoples' rights.

4.2. Bill 191/2020 – Regulating Mining on Indigenous Lands

Mining activity on Indigenous lands can only happen legally through the regulation of Articles 176, § 1, and 231, § 3, of the Brazilian Constitution, in compliance with Indigenous Peoples' rights prescribed both in the Brazilian Constitution and in international conventions and instruments ratified by the country. Over the years, dozens of bills and amendments to the Brazilian Constitution have been drafted with the aim of regulating mining operations on Indigenous lands. Most of them were put together into two separate bills: PL 4.916/1990, bringing together 13 propositions, and PL 1610/1996, which encompasses 6 other propositions. These drafts were all unsuccessful. More recently and with the same goal, bill 191/2020 has been drafted as a new effort to allow mining, among other activities¹⁵⁴, to take place on

¹⁵⁴ The draft also deals with plantations of transgenics, extraction of hydrocarbons, and the generation of energy through hydroelectrics in Indigenous lands.

Indigenous lands. At the time this thesis is finalized (August 2022), the bill is still in the Chamber of Deputies for discussion.

According to the letter sent by the Government to the Congress regarding Bill 191/2020, the current state of non-regulation of Articles 176, § 1, and 231, § 3, of the Brazilian Constitution is argued to bring legal uncertainty, as well as harmful consequences to the country, as it “prevents the generation of geological knowledge, identifying potential energy sources, creating additional employment and income opportunities, eradicating illegal mining, collecting taxes, and mitigating risks to life and health, social organization, customs and traditions of Indigenous Peoples; conflicts between entrepreneurs and Indigenous Peoples”.¹⁵⁵ Especially when it comes to mining in Indigenous lands, the two strongest arguments that are pushed forward by those who want to regulate mining on Indigenous lands are: 1) mining brings socioeconomic development to the region, thus, it would benefit both Indigenous Peoples and communities; 2) PL 191/2020 could be the solution to illegal mining (especially of gold) in the Brazilian Amazon.

4.3. Mining activity and the Right to Sustainable Development

The advancement of the industrial revolution and the emergence of capitalism shaped a western ‘development’ way of thinking, and economic growth became equivalent to progress and reflected the idea of a higher level of civilization.¹⁵⁶ However, ‘development’ may also be thought of as something broader than merely economic growth and the accumulation of wealth. As Aristotle noted, the maximization of income or wealth is just “useful and for the sake of something else”. In this sense, Amartya Sen indicates that the core meaning of development is precisely the concern on enhancing the lives we lead and the freedom we enjoy. The right to development can only take place in a society committed to democratic values, in which vulnerable minorities will be guaranteed to participate. According to the General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights: “Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world’s population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched and contemporary forms of discrimination”¹⁵⁷. Through a human-rights based

¹⁵⁵ Draft Bill 191/2020, para. 4 (translation from Portuguese to English by the author).

¹⁵⁶ Abuiyada, R., (2018), p. 115–116.

¹⁵⁷ United Nations, (2009), para. 1.

approach, Article 2 of Declaration on the Right to Development acknowledges that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development”.

Proclaimed in the Declaration on the Right to Development, adopted in 1986 by the United Nations General Assembly in its resolution 41/128, the right to development is also recognized in other international instruments, such as the 1992 Rio Declaration on the Environment and Development and the 2007 Declaration on the Rights of Indigenous Peoples. According to Article 1.1 of the Declaration on the Right to Development: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.

Flavia Piovesan¹⁵⁸ and Melina Girardi Fachin¹⁵⁹ summarize four key elements of the right to development as following: a) social justice: through inclusion, equality and non-discrimination, having a human-centered approach to development and bearing in mind the unprivileged and vulnerable; b) participation, accountability and transparency: through free, active and meaningful participation, empowering the non-dominant class and vulnerable groups; c) sustainability: understood as sustainable development, containing three main pillars – economic, environmental, and social. In this regard, when addressing sustainable development, the 1987 Brundtland Commission Report, also known as “Our common future”, defined it as “the development that meets the needs of the present without compromising the ability of future generations to meet their own needs”¹⁶⁰; d) international cooperation: as the right to development is considered a solidarity-based right; e) respect for the right to self-determination.¹⁶¹

Moreover, the Declaration on the Right to Development establishes in Article 1.2 that “the human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all

¹⁵⁸ Flavia Piovesan is a professor of Constitutional Law and Human Rights at the Catholic University of São Paulo and in the Human Rights post-graduate programs of the Catholic University of São Paulo and the Catholic University of Paraná. From 2018 to 2021 she was elected by the Organization of American States (OAS) to serve as a Commissioner of the Inter-American Commission on Human Rights. Washington College of Law.

¹⁵⁹ Visiting researcher at Harvard Law School and professor at the Law School of Universidade Federal do Paraná, Brazil.

¹⁶⁰ United Nations, (1987), para. 27.

¹⁶¹ Piovesan, Flavia., & Fachin, Melina Girardi., p. 3.

their natural wealth and resources”. In accordance with this, Article 3 of the UNDRIP states that Indigenous Peoples have the right to self-determination, and therefore they are rightly free to determine their political status, and freely pursue their economic, social, and cultural development. Moreover, the UNDRIP addresses the right of development of Indigenous Peoples, stating in Article 23 that “Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions”.

The former chairman of the UN Permanent Forum on Indigenous Issues, Ole Henrik Magga, has affirmed that Indigenous Peoples are not against development, but “for too long they have been victims of development and now demand to be participants in – and to benefit from – a development that is sustainable”¹⁶². Importantly, the ILO Convention n. 169 in its Article 7(1), defines that “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy (...) and “they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”. Therefore, it is essential to recognize cultural diversity in development processes and to promote the full participation of Indigenous Peoples in all matters that may affect them.

4.4. ‘Sustainable Mining’ and the Sustainable Development Goals

Essentially, mining is not a sustainable activity. The extraction of finite resources can be severely damaging to the environment, some of them irreversible. However, today, the path to sustainable development has provided valuable tools so that mining can be conducted sustainably – that is, bearing in mind not only economic, but also *social* and *environmental* aspects of it. While harmful as an activity *per se*, both international law and domestic laws have progressed in order to regulate and guide both companies and governments to avoid and mitigate negative impacts on the environment, local communities, and Indigenous Peoples. Thus, sustainable mining is “the mitigation of negative environmental, social and economic impacts associated with mining and its related processing activities while limiting extraction

¹⁶² Magga, O.H. (2004).

and use of minerals to rates that do not exceed capabilities to establish new sources, substitutes, or recycle any particular material in order to safeguard and not compromise the needs of future generations”.¹⁶³

According to a report elaborated jointly by the UN Development Programme, the World Economic Forum, the Columbia Center on Sustainable Investment and the Sustainable Development Solutions Network, mining has historically contributed to environmental degradation, displacement of populations, aggravating socioeconomic inequalities, gender-based violence, armed conflicts, tax evasion and corruption, increased health risks, and generally to the violation of human rights.¹⁶⁴ Some of the negative impacts affecting Indigenous Peoples in the Brazilian Amazon were illustrated in Chapter III. However, when mining activity is conducted responsibly, it has the potential to positively contribute to all 17 Sustainable Development Goals (SDGs) – both providing *positive* contribution as well as *preventing* or *mitigating* negative impacts on the SDGs. Adopted by the United Nations in 2015, the Sustainable Development Goals, also known as the Global Goals, call for an universal action to end poverty, protect the planet, and ensure that by 2030 peace and prosperity are enjoyed by all people.¹⁶⁵ It should be noted, however, that according to the World Gold Council, it is currently difficult to assess the contributions of Artisanal and Small-Scale Mining (ASGM) to the delivery of SDGs due to the absence of data on the impact of ASGM, as well as its connection to negative social and environmental impacts.¹⁶⁶ Therefore, the positive impacts of mining explored below are in connection to legal, industrial-scale mining.

All the 17 SDGs are integrated, meaning that action in one area affects outcomes in others. The SDGs related to Environmental Sustainability, Social Inclusion and Economic Development are indicated as a useful starting point for companies who seek to operate responsibly. Moreover, to maximize its positive effects, local, regional, and national governments can develop policies, regulations and funding in connection to the SDGs. In order to assess the initial viability of mining activity, the mitigation of negative impacts and the potential benefits of mining are listed accordingly:

Environmental Sustainability: SDG6 – Clean Water and Sanitation, and SDG 15 – Life on Land: mining requires access to both land and water. Adverse impacts on land and natural

¹⁶³ Allan, R., (1995), p. 4.

¹⁶⁴ United Nations Development Programme, (2016), p. 3.

¹⁶⁵ United Nations Development Programme, (2022).

¹⁶⁶ World Gold Council, (2020), p. 25.

resources can be mitigated or avoided; SDG7 – Energy Access and Sustainability and SDG13 – Climate Action: mining activity is energy and emission intensive. It presents opportunities for greater efficiency and to expand access to energy.

Social Inclusion: SDG1 – End Poverty, SDG5 – Gender Equality and SDG10 – Reduce Inequalities: Mining creates jobs and produces opportunities for business locally, as well as generates significant revenues through taxes, royalties and dividends, by which in return governments can invest in economic and social development. By taking an inclusive approach, mining companies can work with communities, such as Indigenous Peoples, to understand the mines’ potential impacts, both positive and negative ones. On this note, companies can strengthen participatory local decision-making processes in regard to mining operations, the equitable allocation of benefits and the grievance mechanisms. Moreover, mining companies can identify and expand opportunities to strengthen participation of marginalized groups, to amplify the voice of women (including Indigenous women), in order to reduce inequalities, rather than reinforce it by economic opportunities mining can bring to a region; SDG16 – Peace, Justice and Strong Institutions: mining companies can contribute to peace and the rule of law by preventing and remedying conflicts between the company and communities; by respecting and ensuring human rights and Indigenous Peoples’ rights, combating corruption by avoiding illegal transfers of funds to public officials and other people, and instituting strong governance by ensuring transparency when reporting revenue flows, and finally, supporting the representative decision-making of citizens and communities in extractive development.

Economic Development: SDG8 – Decent Work and Economic Growth: Mining has the potential to generate new economic opportunities to citizens and local communities, such as jobs, training, the development of business and local economies relating to or linked to mining, as well as service providers; SDG9 – Infrastructure, Innovation and Industrialization and SDG12 – Responsible Consumption and Production: Mining can drive economic development on a local, regional and national level and bring diversification through direct and indirect economic benefits. For instance, mining operations prompt the construction of new infrastructure for transport, communications, water and energy. Mining companies can also go beyond their legal obligations and make their own projects that benefits society. For example, there are case of mining companies which have constructed schools.¹⁶⁷ Mining is also critical

¹⁶⁷ Cakata, L., (2022); South African Business, (2022).

for the provision of minerals and materials essential for the green transition – that is – for renewable energy. Collaborations between mining companies and its supply chains also have the potential of minimizing waste, reusing and recycling material.

Indigenous Peoples are among the people who most suffer from the direct environmental and social costs of extractive projects, and they will often be faced by an imbalance of costs and benefits of those projects – including mining. While the SDGs unquestionably provide a helpful framework to mining companies to operate more sustainably, when it comes to Indigenous Peoples, some points are conflicting, both culturally and practically. For instance, the construction of new infrastructure for transport, communications, water and energy next to Indigenous lands will often be unwanted, as it means the degradation and deforestation of the environment they are surrounded by or live in. Thus, the ‘urbanization’ brought by mining companies, which is considered a positive impact by the SDGs, will often be unwelcomed by Indigenous Peoples in the Brazilian Amazon – especially by those who live in voluntary isolation, and who do not wish for any contact from the outside world.¹⁶⁸

Indigenous Peoples also frequently fail to benefit from the “ripple effect” of revenue distribution and job creation. When it comes to the generation of jobs, for every industrial-mining job, two to five jobs will be created due to this new demand. However, many companies will bring skilled workers from outside and only leave low-skilled jobs to local communities or migrants, with little opportunity for learning and advancement.¹⁶⁹ Local workers and businesses may lack the skills required, or they will lack the desire to compete in this new market.¹⁷⁰ In theory, other points might also offer great potential to benefit both Indigenous Peoples and other local communities, such as the generation of revenue through mining royalties and benefits in the results, which will be further analyze below. To truly benefit Indigenous Peoples, the right to consultation and participation should be respected to guarantee the necessary engagement to find out the needs and the particular ways in which each Indigenous Peoples can be or wish to be benefited by mining activity in their lands. When consultation and participation is done in good faith, there is a possibility that mutually beneficial agreements can be reached.

¹⁶⁸ An example is provided by the following article concerning a mining railway and its impacts on communities In Brazil’s State of Maranhão: <https://news.mongabay.com/2022/06/for-brazil-communities-along-a-mining-railway-impacts-outweigh-any-benefits/amp/>.

¹⁶⁹ Vallejos. et al., (2020), p. 25.

¹⁷⁰ Wilson, E. (2019), p. 2.

4.4.1 Mining Royalties – CFEM

As highlighted by SDGs 1, 5 and 10 (End Poverty, Gender Equality and Reduced Inequalities, respectively), mining operations have the capacity to contribute to social development through taxes, royalties and dividends. On this note, the Financial Compensation for the Exploitation of Mineral Resources (CFEM – *Compensação Financeira pela Extração Mineral*), was instituted under the Brazilian Constitution by Bill No. 7.990/1989, and constitutes mining royal payments. It obliges the payment of taxes when mineral resources are exploited for economic purposes, and it is shared among Municipalities (60%), States (15%), the Federal District (15%) and agencies of the Federal Government by the Union.¹⁷¹ Among them, 0.2% of the CFEM will be destined to the Brazilian Institute of Environment and Renewable Natural Sources (IBAMA), for environmental protection activities in regions impacted by mining. The CFEM has different rates according to the mineral extracted, as well as a set of rules regarding the party liable and its calculation.¹⁷²

Mining royalties, however, have not been able to generate socioeconomic development. On that note, CFEM has been pointed out as presenting flaws and weaknesses. One flaw would be that CFEM is not binding to any expenditure. A normative binding between revenue and expenditure forces public entities to apply at least a minimum percentage of resources for the purposes established in law. To illustrate, Article 166, IV of the Brazilian Constitution requires that Federal States are obliged to spend a specific amount of their tax revenue on education and health care. Enacted in 2017, Bill 13.540 encourages that at least 20% of the CFEM revenue should be allocated, “preferably”, to activities related to economic diversification, sustainable mineral development, and scientific and technological development. Vaguely worded and open to broad interpretation, the forementioned 20% does not define mandatory investments of any sorts. Added to the lack of provisions regulating the allocation of CFEM, there is no prior establishment of penalties in case of misuse.

As a consequence, CFEM paid by mining companies will often be used unwisely by city halls, and supervisory bodies do not effectively exercise the control over the expenditure of these resources. In a study from April 2021, Brazilian researches have shown that “despite having rules encouraging better application of these royalties and requiring transparency on its allocation, in general, the population is not sure about how these resources are being applied by

¹⁷¹ Deffenti, Fabiano.

¹⁷² Bill No. 8.001/1990.

city halls” and highlighted that, “three years have passed since this bill came into force, and according to the case studies developed in this research, we found that municipalities did not clearly present how this feature has been used”.¹⁷³ Therefore, ultimately, to address the needs of local communities and Indigenous Peoples, participation in decision-making processes on the allocation of these royalties should be established, as well as the improvement of transparency in order to allow citizens to supervise the responsible allocation of such resources.

Finally, the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) should be given special attention. IBAMA is Brazil’s main environmental enforcement agency. Its funding is primordial to the exercise of environmental monitoring and control, the assessment of environment quality, authorization and supervision of natural resources, the grant of permits, among other subsidiary actions. The fact that only 0.2% of CFEM is destined to IBAMA could very well be interpreted as a disregard and a lack of commitment regarding the need of protection activities in areas impacted by mining operations.

4.5. Does mining brings development to the Brazilian Amazon and its communities? The Example of Pará

One of the main arguments for regulating mining on Indigenous lands is that it will bring socioeconomic development to the region and the country. In 1975, the governor of the state of Roraima in northern Brazil stated: “an area as rich as this, with gold, diamonds and uranium, cannot afford the luxury of preserving half a dozen Indians tribes which are holding up development”¹⁷⁴. The tone has slightly changed, and now the government asserts that Indigenous Peoples themselves will benefit from mining on their lands. The “socioeconomic development” argument, when true, can be very attractive and one which for many could end up counterbalancing the negative externalities of mining activity. Thus, it is important to understand, in practice, the real contribution of mining to the communities in the regions of the Brazilian Amazon so far, where mining has taken place. Evidence analyzed can attest, or at least indicate, whether the intended mining in Indigenous lands will in fact contribute to the socioeconomic development of the region and be positive for Indigenous Peoples.

The State of Pará currently has the largest concentration of illegal mining in Indigenous lands, mainly gold mining. Pará is also Brazil’s largest ore exporter. Unfortunately,

¹⁷³ Reginato, Ana Carolina., & Wanderley, Luiz Jardim., (2022), p. 4. (Translation from Portuguese to English by the author).

¹⁷⁴ Gomez, Gail Goodwin., (1998), p. 187.

there is no correlation between mining and socioeconomic development in the region. Evidence shows the lack of improvements for the region and that local populations do not significantly benefit from the large export of minerals. For instance, the State of Pará ranks 23rd in the Basic Education Development Index (IDEB) and 24th in the Human Development Index (HDI) in Brazil.¹⁷⁵ In addition, tax incentives and lower electricity consumption rates granted to the mining sector are also pointed out as factors which end up reducing the value of royalties for municipalities. Ultimately, there is no guarantee of infrastructure improvement and social development due to “divergent political interests, corruption, and the use of resources in bureaucratic and inefficient way”.¹⁷⁶ The presence of weak institutions is the main reason explaining the lack of capacity to effectively invest tax revenues from mining and promoting sustainable development. Sadly, Pará does not seem to be an isolated case, as “most studies of natural resources effects on development show that well-resourced regions around the world often fail to promote socioeconomic development”.¹⁷⁷

In accordance with the example of Pará, research conducted by the Choices Institute (Instituto Escolhas) has found that, broadly, the mining of gold and diamonds does not bring significant advances to the population of the municipalities located in the Legal Amazon. Positive impacts on indicators such as health, education and GDP per capita are only temporary and cease to exist between three and five years, not creating permanent or long-term socioeconomic developments in the regions.¹⁷⁸

4.6. Is regularization the solution to illegal gold mining in the Brazilian Amazon?

Regularization means that companies legally registered would have to comply with the law. In theory, this means that there will be accountability in terms of environmental law and human rights. If there is negligence and violation in this regard, companies can be held legally liable to repair damages and compensate communities that have suffered such damages. In this sense, legality would bring benefits to Indigenous Peoples. Moreover, only through regularization can society benefit, for example, from mining royalties such as the CFEM.

¹⁷⁵ Martins et al., (2022), p. 2.

¹⁷⁶ Martins et al., (2022), p. 2.

¹⁷⁷ Araujo, R., & Bragança, A., (2022), p. 1.

¹⁷⁸ Instituto Escolhas, (2021), p. 4.

Against this background, the regularization of mining introduced by PL 191/2020 has been presented as a solution to end illegal mining in Indigenous lands and, thus, the transition of mining activity to operate under an adequate legal framework. However, this claim has no empirical evidence, as regularization *per se* and the presence of mining companies does not exclude nor stop the existence of illegal mining – that is, both could still coexist.¹⁷⁹ Illegal mining areas often overlap with large-scale mining, and it might also happen in the Brazilian Amazon.¹⁸⁰ In addition, one could think that illegal mining areas would always coincide with official mining requests, however, this is not a generalized pattern. As an example, the Vale do Javari Indigenous land, which is home to 16 isolated Indigenous Peoples, has no record of official mining requests despite being frequently invaded by illegal miners.¹⁸¹ One explanation provided is that illegal miners focus on a smaller set of minerals in comparison to industrial mining, thus, they do not necessarily overlap. Nevertheless, it should be noted that there are, indeed, cases of official mining requests overlapping with illegal mining on Indigenous lands.

As noted, PL 191/2020 is not a “one size fits all” solution in terms of illegal mining on Indigenous lands, and analysis must be carried on a case-by-case basis. Regularization should not be intended to replace policing approaches to crack down illegal mining operations. At the same time, the shutting down of illegal mining operations also raises the concerns about its sufficiency and efficacy in the long-term. For example, the “Operation Mercurio”¹⁸² in Peru might have only pushed the illegal miners to other regions – which just moves the problem geographically, and does not necessarily put an end to it.¹⁸³

4.7. Does Bill 191/2020 respect Indigenous Peoples’ rights under international human rights law?

In Chapter III, it was observed how mining in the Brazilian Amazon frequently violate Indigenous Peoples’ rights. The aim of this section is to identify if Indigenous Peoples’ rights are or could potentially be undermined by the current Bill 191/2020, which seeks to regulate mining on Indigenous lands. At this point, two rights can be analyzed: a) the right to

¹⁷⁹ Reginato, Ana Carolina., & Wanderley, Luiz Jardim., (2022), p. 10.

¹⁸⁰ Vallejos. et al., (2020), p. 35.

¹⁸¹ Villén-Pérez et al., (2022), p. 9.

¹⁸² Including 1.200 Peruvian police, 300 soldiers and 70 prosecutors, the operation aimed at removing an estimated of 6.000 illegal miners from the La Pampa area of Madre de Dios and to establish a semi-permanent government presence in the area to prevent their return. Riehl, Chris., (2020).

¹⁸³ OECD, (2022), p. 27.

participation and consultation of Indigenous Peoples along with the principle of free, prior and informed consent; and b) the right to land, territories and resources. Again, each right will be analyzed separately, however, when a right is not respected, the probability that other rights are also being negatively impacted will increase.

The right to participation and consultation and the principle of free, prior and informed consent (FPIC) of Indigenous Peoples: as previously observed, ILO Convention 169, Article 6 and 15, and UNDRIP, Article 19, and the Brazilian Constitution, Article 231, paragraph 3, all establish that Indigenous Peoples' have the right to consultation and participation in measures that may affect them, legislative or administrative. In addition, the principle of free, prior and informed consent (FPIC) should also be observed. The right to consultation and participation must be ensured throughout the entire process, step by step. On that note, both civil society and government authorities have indicated that the Federal Government disregarded this right.

For instance, the draft was elaborated without any consultation and participation of Indigenous Peoples, which already constitutes a breach of the right to consultation and participation of Indigenous Peoples. This, alone, leads to other issues in the law that might constitute a breach of this right. In this regard, while Bill 191/2020 is the most detailed draft on the compensation of Indigenous Peoples for the exploitation of their lands, all compensation and benefits in the results of mining activity on Indigenous lands established in the draft was the result of an autonomous, paternalistic decision on part of the Government. In a letter addressed to the Brazilian Government and signed by several UN Special Rapporteurs concerning Bill 191/2020, it is highlighted that “this bill foresees very low percentages of benefits for indigenous peoples” adding that the “possibility of low percentages of benefits for indigenous peoples derived from extractive industries would compromise their rights to an equitable distribution of benefits”. In turn, this scenario denotes the unbalance power in a resource development model that is controlled by the State and economic players, and further underlines the lack of influence of Indigenous Peoples over legislative measures that might affect them, such as PL 191/2020, resulting in a less than equitable benefit-sharing outcomes.

Moreover, in the case *SARAMAKA VS. SURINAME*, the Inter-American Court of Human Rights has recognized that “(...) to date, no large-scale mining operations have taken place within traditional Saramaka territory. Nevertheless, the State failed to comply with the three safeguards when it issued small-scale gold mining concessions within traditional Saramaka territory. That is, such concessions were issued without performing prior environmental and social impact assessments, and without consulting with the Saramaka people in accordance with

their traditions, or guaranteeing their members a reasonable share in the benefits of the project. As such, the State violated the members of the Saramaka peoples' right to property under Article 21 of the Convention, in conjunction with Article 1(1) of such instrument".¹⁸⁴ In line with this decision, the unfair and inequitable benefits provided by Bill 191/2020 for Indigenous Peoples demonstrates how the right to consultation and participation is not being upheld in good faith by the Brazilian Government, which must ensure Indigenous Peoples fair compensation and an equitable share of the benefits. Consequently, it also results in the violation of the right to land, territories and natural resources of Indigenous Peoples.

The scenario changes when it comes to the controversial "power to veto". According to Article 14 of Bill 191/2020, the President will be authorized to submit a request for authorization to conduct activities regardless of Indigenous Peoples' consent. Thus, while the draft itself provides for the participation and consultation of Indigenous Peoples, it does not provide them the "power to veto" mining operations in their lands.¹⁸⁵ The draft further establishes that even if Indigenous Peoples refuse to accept the compensation for the exploitation of their lands, entrepreneurs could deposit the amount to an account destined for the "Indigenous Heritage", thus fulfilling its Constitutional obligation to compensate Indigenous Peoples when such activities take place in their lands. Highly criticized by many, especially by Indigenous Peoples themselves, Indigenous representatives and NGOs for the protection of the environment, the absence of the "power to veto" might be problematic and lead to further conflict when consent is not obtained. It cannot be argued, however, that this is illegal, neither under national nor international law. PL 191/2020 does not violate the right to participation and consultation and free, prior and informed consent (FPIC) by not granting Indigenous Peoples the power to veto.

Another sign of the dismissal of the right to consultation and participation, and the principle of free, prior and informed consent (FPIC) of Indigenous Peoples by the Brazilian Government is in connection with the approval of a measure to fast-track PL 191/2020 as a matter of urgency. The move was intended to force a quick approval of Bill 191/2020 without public debate. To justify such measure, a possible shortage of fertilizers from Russia due to the war in Ukraine was used as false pretense. It was argued that passing Bill 191/2020 was the solution, as Brazil "could find the potassium it needs to produce its own fertilizers on Indigenous lands". However, more than two-thirds of Brazil's potassium reserves are found

¹⁸⁴ Case of Saramaka v. Suriname, para. 156.

¹⁸⁵ According to Article 14, § 2º, the authorization request may be forwarded with contrary manifestation of the affected Indigenous communities, provided that reasoned.

outside of the Amazon rainforest, and inside it, only 11% of the reserves are located on Indigenous lands.¹⁸⁶ Overall, as it is introduced by Bill 191/2020, the right to consultation and participation and the principle of free, prior and informed consent (FPIC) is mischaracterized by the Government and reduced to a mere formality – just as a means to display an appearance of legality. As initially clued by the draft of Bill 191/2020, which was done with no consultation and participation of Indigenous Peoples, currently, there seems to be no genuine intention of safeguarding Indigenous Peoples’ right to real and meaningful consultation and participation in the decision-making process when it comes to mining on their lands. As highlighted previously in this thesis, the violation of the right to consultation and participation and the principle of free, prior and informed consent (FPIC) of Indigenous Peoples is critical, as it can trigger a domino effect on the violation of all other Indigenous Peoples’ rights.

The rights to land, territories and natural resources: research has shown that if Bill 191/2020 passes, more than 10 million hectares in 25 indigenous lands and home to 43 isolated groups will be impacted by mining activity.¹⁸⁷ As previously stated, In Brazil, the titling of Indigenous lands is declaratory in nature. It means that demarcation is an act of protection, and not a creation of the right to collective property itself.¹⁸⁸ However, Bill 191/2020 introduces two different regimes for demarcated and not demarcated Indigenous lands that are not foreseen by the Brazilian Constitution. In its Article 37, the bill states that mining licenses that have been regularly granted prior to the approval of the Indigenous land demarcation process must be authorized by the National Congress within a period of four years, counting from the act of homologation of the demarcation process and after hearing the communities affected Indigenous People. Consequently, Indigenous Peoples living in those Indigenous lands that have not yet been officially demarcated will be more vulnerable to negative impacts relating to the right to land, territories and natural resources. Indigenous Peoples living in voluntary isolation, particularly, will be more affected than others, as demarcation processes have not been initiated yet precisely because of the voluntary isolation in which they live.¹⁸⁹

Another point considered problematic is that Bill 191/2020 lacks specific upper limits on occupation of Indigenous lands by mining operations. In this regard, medium-sized Indigenous lands such as Xikrin do Rio Catete or Báu are reported to have over ca. 80% of the

¹⁸⁶ McCoy, Terrence & Sá Pessoa, Gabriela., (2022); Amazon Watch, (2022).

¹⁸⁷ Villén-Pérez et al., (2022), p. 8.

¹⁸⁸ Case of the Xucuru Indigenous People and its members v. Brazil, para. 128.

¹⁸⁹ OL BRA 4/2022, p. 5.

area aimed by mining interests. In this case, if the Bill 191/2020 is approved by the National Congress and mining licenses are granted, this would mean that almost the entirety of the Indigenous lands would be under mining operations. It is difficult to imagine how such a large amount of mined area could be reconciled with the protection of Indigenous Peoples' rights, especially in regard to the right to land, territories and natural resources.

4.8. Bill 191/2020 and the stance of Mining Companies in the Brazilian Amazon

Proposed rules allowing mining on Indigenous lands are considered too lax even by the mining sector itself – specifically by large-scale miners. For instance, Vale, a Brazilian multinational which is the world's largest producer of iron ore, pellets and nickel, released a statement on the Bill 191/2020, stating that “Vale considers that the Bill 191/2020 does not meet the objective of regulating the constitutional provision that includes the possibility of economic activities, including mining, on indigenous lands in Brazil”¹⁹⁰. It has also stated that their performance is guided by the respect for Indigenous Peoples' rights and underlined that the company acknowledges that mining on Indigenous lands may only take place with the free, prior and informed consent (FPIC) of Indigenous Peoples themselves and in the light of a regulatory framework that contemplates Indigenous Peoples' participation and autonomy.

Moreover, the Brazilian Mining Institute (IBRAM), a group that represents the largest mining companies operating in the country, encompassing more than 120 firms responsible for 85% of mining production in Brazil, including members such as Anglo-American, Rio Tinto and Vale, has publicly taken a stand against Bill 191/2020. According to the statement released to the press, IBRAM condemns Bill 191/2020 as inappropriate and calls for a broad debate on the bill, including Indigenous Peoples. IBRAM highlights that “in the case of mining on Indigenous lands, when regulated, the free, prior and informed consent (FPIC) of the Indigenous Peoples is essential. FPIC is a principle set out in ILO 169 and in a series of other international directives, which defines that each Indigenous People, considering their autonomy and self-determination, can establish their own consultation to authorize activities that impact their lands and their ways of life”. In addition, IBRAM has also condemned all illegal *garimpo* activity on

¹⁹⁰ Vale, (2022); Vale's Statement on the Bill 191/2020, (2022).

Indigenous Lands, believing that it “must be fought rigorously and its sponsors brought to justice”.¹⁹¹

The stance of large mining companies portrayed above resonates with research and theory in the field of economics regarding corporate and other economic actors’ behavior. In this sense, different actors have distinct degree of risk aversion, and this relates to the type of risk and the size of the company that is considering a venture. On one hand, large companies are less willing to take major risks that could compromise their reputation and, consequently, the companies’ profits. For example, according to a 2014 Deloitte’s survey of executives, among companies that had experienced “a negative reputation event”, 41 percent reported loss of brand value, and the same number (41 percent) experienced loss of revenue.¹⁹² On another hand, *garimpeiros* are simply not concerned about reputational risks. Thus, findings suggest the consistency of the reputational risk aversion, as mining companies are hesitant to invest in lands with confirmed presence of isolated groups. Data demonstrates that “applications are significantly less likely to be filed for indigenous areas with well-known isolated groups than in areas either without isolated groups or that lack reliable information on these groups”¹⁹³.

As showed in this section, large companies that deal with mining in Brazil are distancing themselves from the PL 191/2020 and publicly criticizing it. Nevertheless, those large companies are not completely opposed to mining in Indigenous lands – they are against it merely on the terms that has been proposed by PL 191/2020. This means that those large companies, most likely, will endorse future bills regulating mining on Indigenous lands if deemed appropriate.

4.8.1. The Swiss Refiners, ILO Convention n. 169 and Bill 191/2020

Switzerland is the world’s second largest buyer of Brazilian gold, standing only behind Canada. It is also home to some of the world’s leading gold refineries. Gold refiners play a critical role in ensuring gold tainted by human rights violations do not make its way into the global market – since they buy gold from many countries around the globe before mixing it in the refining process.¹⁹⁴ In this context, on June 27, 2022, the Swiss refiners published a position statement alongside the Swiss Association of Precious Metals Manufacturers and Traders. The

¹⁹¹ G1, (2022). Translation from Portuguese to English by the author.; France24, (2022).

¹⁹² Deloitte, (2014), p. 12.

¹⁹³ Villén-Pérez et al., (2022), p. 8.

¹⁹⁴ Human Rights Watch, (2022).

statement was the result of a meeting with the Amazon delegation independent from the Brazilian government, composed by Indigenous and traditional leaders, lawyers and researchers. At the meeting, they emphasized how the refiners “play a crucial role in an illicit gold supply chain”, that leads to the deforestation of the Brazilian Amazon and adverse impacts on Indigenous Peoples’ rights.¹⁹⁵

In the statement, all illegal mining is condemned, including the one in Indigenous areas of the Amazon; they called for the stop of the uncontrolled use of mercury due to its destructiveness; urged the Brazilian government to protect the Indigenous Peoples as well as the environment and ensure that violence against Indigenous Peoples by illegal mine operations to be stopped; and acknowledged that Indigenous and traditional communities must have the right to free, prior and informed consultation and consent on projects that affect their territory, their environment, their economic, social and cultural rights, and their customs.¹⁹⁶

In the statement, the signatories also pointed out their awareness about PL 191/2020 as following: “the signatories are also aware about popular and Indigenous opposition to the PL 191/2020 bill that would open up indigenous lands to mining and other commercial activities”. Then, they confirm their “commitment to not deal with gold from indigenous territories of the Brazilian Amazon, and to take the necessary technical and humanly possible measures in order not to take, import or refine illegal gold including the one from Brazil by tracing and identifying this gold; condemning and rejecting any mining activity linked to the protect areas of the Amazon without the free, prior and good faith informed consent of the impacted communities; and their critical assessment and fundamental concerns regarding negative effects of the PL 191/2020.¹⁹⁷

4.9. Conclusion

Regularization through PL 191/2020, presented both as a solution to illegal mining and portrayed as imperative for the socioeconomic development of the region and the country, could be defined, at the very least, as insufficient and unreliable. The issue is, firstly, conceptual. There is often a disagreement on the very concept and meaning of development between Indigenous Peoples and non-Indigenous Peoples. Secondly, the argument of using mining for the sustainable development of the region and the country might be valid as

¹⁹⁵ ASFCMP, (2022).

¹⁹⁶ ASFCMP, (2022).

¹⁹⁷ ASFCMP, (2022).

demonstrated by the potential of mining in relation to the SGDs. Nevertheless, the research carried out in this section highlights that although legal mining activity can bring positive outcomes, such as the contribution through mining royalties, it does not necessarily mean that the region will benefit from it in the long term – as showcased by the State of Pará and other regions in the Legal Amazon. Finally, there is no guarantee that allowing legalized mining on Indigenous lands will be a successful measure by itself to stop illegal mining operations.

5. Final Conclusions

The first part of this thesis has sought to analyze which are the rights of Indigenous Peoples under international human rights law and the Brazilian legislation, and how those rights are impacted by mining in the Brazilian Amazon. To do so, each Indigenous Peoples' right was analyzed separately. Indigenous Peoples' rights, however, are deeply interconnected and the impact on one generally contributes to the impact on other rights. Importantly, the connection beyond ownership and possession that the Indigenous Peoples in the Brazilian Amazon have with their lands demonstrates how the right to land, territories and natural resources is a primordial right for the guarantee of all the others. The author found that all Indigenous Peoples' rights analyzed, that is: I) The Right to Consultation and Participation; II) The Right to a Healthy Environment; III) The Right to Health; IV) The Right to Land, Territories and Natural Resources; V) The Right to Cultural Heritage; and, finally, VI) The Right to Life, are negatively impacted by mining activity in the Brazilian Amazon, mainly by illegal gold mining. The harmful effects of mining on Indigenous lands are not a recent phenomenon. The unbridled prospect of gold in the Brazilian Amazon has demonstrated for years how Indigenous Peoples are affected by illegal mining. It is alarming, however, the intensity with which Indigenous Peoples' rights are degraded by the exponential increase in illegal mining in the Brazilian Amazon in recent years. From an intersectional perspective, the author also finds that Indigenous women, children, and elderly are more severely impacted by the negative effects of mining.

Following these findings, in the second part of this thesis, two research questions are answered: can regulating mining be a solution to the current issues with Indigenous Peoples' rights violations in relation to mining in the Brazilian Amazon? And does the proposed draft bill for regulating mining in Indigenous lands, PL 191/2020, respect Indigenous Peoples' rights under international human rights law? Accordingly, two main arguments for regulating mining on Indigenous lands were analyzed: that is, that legal mining brings socioeconomic development to the region and the country, and that regulating mining on Indigenous lands can be a solution to illegal mining. To start with, the purpose of this research was not to demonize mining activity. The author recognizes the value of mining, and how it is essential for numerous activities and technologies intended for future sustainability. It also provides a livelihood for many, which is even more significant in developing countries, such as Brazil. In fact, as observed in relation to the SDGs, mining as a legal activity has, at least in theory, the potential to bring socioeconomic

development to the region – including to Indigenous Peoples. However, Indigenous Peoples in the Brazilian Amazon have a connection with their lands that transcends ownership, and the very idea of development they have often differs from the idea of development adopted by the State or non-Indigenous Peoples. Moreover, many of the mentioned benefits of mining, such as the creation of jobs and infrastructure, do not necessarily benefit Indigenous Peoples. Finally, and unfortunately, legal mining does not keep the promise of socioeconomic development in the long-term in Pará and other municipalities of the Brazilian Amazon currently. To reach this conclusion, research was reviewed to evaluate the use of mining royalty called “CFEM”, as well as human development indicators in the region. It is difficult, then, to imagine that allowing mining on Indigenous lands would result in benefits to region, and to Indigenous Peoples themselves. It must be highlighted that the majority of Indigenous Peoples in Brazil are strongly against mining on their lands. An opinion that is backed by the Brazilian population itself, as 86% of Brazilian citizens are against allowing mining on Indigenous lands. When it comes to the largest mining companies operating in Brazil, there is a consensus and awareness that draft Bill 191/2020 is so inconsistent with the demands of the existing laws and international treaties regarding Indigenous Peoples’ rights that one can conclude that it has not been elaborated in good faith and in line with the right to consultation and participation, and the principle of free, prior and informed consent of Indigenous Peoples. This conclusion has also been drawn internationally, as showed by the example of Swiss refiners. Thus, due to the intense backlash it has suffered, by Indigenous Peoples themselves, civil society, and companies, it is highly unlikely that Bill 191/2020 will pass. As such, the proposal of draft bill 191/2020 allowing mining on Indigenous lands, without proper participation and consultation of Indigenous Peoples, does not appear to contribute positively to sustainable development in Brazil, and has not sought to benefit or compensate Indigenous Peoples fairly. Considering the above arguments, the author of this thesis takes a stand against the approval of draft Bill 191/2020.

Moreover, the decision to regulate mining on Indigenous lands is not just an economic decision, but a political one, which also must be thought in a global context of climate change. On that note, in the case *KALINA AND LOKONO PEOPLES V. SURINAME*, the Inter-American Court of Human Rights has explicitly recognized the important role of Indigenous Peoples in environmental conservation. Furthermore, Principle 22 of the Rio Declaration on Environment and Development of 1992 has also recognized the vital role of Indigenous Peoples in environmental management and development. Backing these statements, from 2002 to 2012, the average annual deforestation rates in tenure-secure indigenous forestlands in Brazil, were two to three times lower than in lands not managed by Indigenous Peoples. Against a dualist

world view, the author believes that the development and adoption of a cross-cultural approach to resource management, combining both Indigenous Peoples' and non-Indigenous stakeholders' strengths towards responsible environmental management and sustainable development is imperative to mitigate climate change. Sustainable development must be achieved with the active participation and consultation of Indigenous Peoples.

When it comes to illegal mining, especially to illegal gold mining, which is historically a substantial challenge in Indigenous lands in the Brazilian Amazon, regulating mining in Indigenous lands alone is not a successful measure to curb illegal mining. This is an ineffective measure, especially regarding Indigenous Peoples living in voluntary isolation, as companies generally avoid these areas, but *garimpeiros* will still invade and conduct illegal mining in these lands. A comprehensive response to illegal mining in the Brazilian Amazon would have to consist of a complementary set of strategies. Laws must be complementary and consistent with each other in order to set up a firm net of protection against illegal mining. Environmental laws and international human rights law must be understood as complementary, as the weakening of environmental laws will often, in turn, affect the enjoyment of Indigenous Peoples' rights. Moreover, not only it is necessary to strengthen monitoring bodies which have suffered dismantlement in recent years, such as IBAMA, but the Brazilian State must also urgently resume the demarcation of all Indigenous lands as a measure of protection against invaders and prospectors.

Notwithstanding, the issue of illegal mining is much more complex than what this paper has allowed to present. An effective fight against illegal mining must go beyond environmental laws and international human rights laws. Today, in Brazil, there are permissive and flawed laws regarding the sale and purchase of gold, which allows the illegal gold market to operate successfully. On that note, Bill 12.844/2013 has been pointed out as a contribution to boosting illegal mining in Brazil by facilitating gold laundering and weakening the Brazilian government's capacity to trace illegal gold mining. While there are many actors involved in illegal mining, the contribution of supply chains is crucial to turn illegal gold into legal gold – thus allowing the origin of the gold to be, from that moment on, untraceable. Due to the great difficulty in keeping track of the origin of the mineral throughout the whole supply chain cycle, supply chains are, today, one of the biggest challenges to address in the area of responsible gold sourcing. When it comes to the gold supply chain, key actors such as gold refiners, traders, jewelers, as well as other companies connected to the gold market, should proactively check their supply chains thoroughly for human rights risks. While the Brazilian government has the duty to protect Indigenous Peoples' rights, one must take into account the responsibility and

accountability of companies, both national and international, that buy illegal gold and contribute to the demand of a market that violates the rights of Indigenous Peoples in the Brazilian Amazon.

Is, then, the Brazilian Government ready to authorize mining on Indigenous lands? Considering the research conducted in this thesis and all the issues presented, the author considers that the Brazilian government is not prepared to take the big step of legalizing mining on Indigenous lands. The authorization of mining on Indigenous lands requires a strong government, with strong institutions, committed to guaranteeing Indigenous Peoples' rights and to the strict enforcement of environmental laws. A strong government will keep its supervisory bodies functioning effectively, with sufficient qualified staff and available budget for monitoring activities – which encompasses the enforcement of environmental laws. A government committed to the rights of Indigenous Peoples' will take into account all the rights listed in this thesis, with special attention paid to the right of consultation and participation of Indigenous Peoples in all matters that may affect them. Importantly, Indigenous Peoples living in voluntary isolation must not be ignored, and appropriate consultation methods must be developed so that the rights of these peoples are respected. Finally, the Brazilian government must uphold strict environmental laws and guarantee Indigenous Peoples' rights. It is only from the fulfillment of these requirements that a serious and good-faith debate can be taken further on mining on Indigenous lands in the Brazilian Amazon.

This thesis will remain relevant and current as long as there is interest on the part of the government, companies, as well as individuals, to conduct mining on Indigenous lands. Which, in the author's eyes, is an interest that has always existed and always will. An interest sometimes dormant, but at times flourishing with governments prone to this idea. Accordingly, Bill 191/2020 was not the first, nor will it be the last attempt to regulate mining on Indigenous lands in Brazil. The framework of Indigenous Peoples' rights can be consulted and assessed from time to time, to check how and which rights are still being impacted. It can also help in formulating measures for improvement of environmental policies in Brazil and the strengthening of Indigenous Peoples' rights. The analysis of draft bill 191/2020 made in this thesis, in its turn, may support the analysis of future bills with the aim of legalizing mining on Indigenous lands. What will be the arguments used to pass this hypothetical bill in the future? Will they be backed by science and data? By then, will Brazil have a government with strong institutions, committed to strict environmental laws and Indigenous Peoples' rights in practice, and not only in theory? The debate over mining on Indigenous lands in Brazil is far from over.

Anyone concerned with Indigenous Peoples' rights, environmental conservation and mitigation of climate change should continue paying close attention to this matter.

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