International Human Rights and Brazil's Legal Recognition of Indigenous Land

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Introduction

The State of Santa Catarina in Southern Brazil is home to some 7 million inhabitants. Among this population are indigenous people known as the Xokleng. The Xokleng were nearly exterminated through centuries of colonization[1] and have yet to regain their socio-cultural foothold despite legal recognition of their lands post-1988.[2] Making matters worse, Brazil has largely flouted its responsibility to extend human rights to its indigenous population that are afforded such protections under both Brazil's constitution and international initiatives that Brazil is part of. Unfortunately for the Xokleng, this pattern of disregard peaked in Brazil's recent legal attempt to lessen an essential indigenous human right, the legal recognition of their lands.

Recently, the Supreme Federal Court of Brazil weighed the argument in *Xokleng People v. The State of Santa Catarina* that the Xokleng lacked a legal claim to their land because they were not "occupying the land in October 1988, when Brazil's constitution was signed . . . ."[3] Unable to find common legal ground, the court has left the Xokleng's future on uncertain ground by postponing its rulings.[4] Because the dire consequences a future ruling could have for the legal recognition of indigenous land in Brazil, this report argues that the correct ruling under the Brazilian constitution is a ruling in favor of indigenous property rights.

The History of the Xokleng

The Xokleng currently live on the highlands of the State of Santa Catarina, located Northwest of Santa Catarina's capital, Florianopolis.[5] The Xokleng were originally harried from their ancestral lands, the Rio Grande do Soul, into their current location as they fled colonization.[6] In 1879, the Brazilian government supported a collective group of so called "Indian hunters" led by a man named Bugreios.[7] Under the guise of indigenous relocation, Bugreios and his butchers initiated the process of exterminating the Xokleng.[8]

Government sponsored oppression of the Xokleng people remains today, and the current outlook for the Xokleng is bleak. The Xokleng's already impoverished condition has worsened by legalized land incursion from "businesses and prospectors[] who wish to exploit the land's natural resources."[9] In addition, all forests on which they are currently situated in Ibrama-la Klãnõ were deforested in 1982.[10] These difficulties have resulted in the Xokleng struggling to "reproduce[e] themselves physically and socio-culturally."[11]

The Xokleng experienced a brief repose in 1997 from the continual incursion from logging companies through FUNAI, an official interdisciplinary organization tasked with

"redefin[ing] TIL's borders and return[ing] to the Xokleng their invaded areas."[12] However, as discussed further in this report, FUNAI's efforts for indigenous restitution have stalled in the face of management inefficiencies and competing business interests over Xokleng's land.[13]

International Human Rights Regimes and Respective Indigenous Land Rights

Various international organizations, each of which Brazil is a part of, exist to protect the exact indigenous property interests at stake in *Xokleng People v. The State of Santa Catarina*. For example, the Inter-American Commission on Human Rights, a Latin American human rights regime, has been a key player in acting to secure Brazilian indigenous rights. In 1988, the Commission helped amend the Brazilian constitution which ordered "states to take interim measures to protect the lives and physical integrity of the indigenous people as well as to protect their lands and public and natural resources,"[14] though this positive development has since been undermined by Brazil's policy of "demarcation and registration of Indian lands."[15]

Furthermore, in 1992 Brazil ratified the American Convention of Human Rights, of which Article 1 of the Convention states that nations have an ongoing "duty to ensure the exercise of human rights to all persons within their territory and jurisdiction."[16] Pursuant to Article 1, the Inter-American Court of Human Rights has held that states are required to provide the requisite "due diligence" to take "reasonable steps" to prevent human rights violations.[17]

ILO Convention No C169 ('ILO 169') was finalized in 1989 after a long and arduous process that began in 1958. ILO 169 began as a way to assimilate indigenous people and was amended to provide legal protection to indigenous lands in an attempt to provide independence to indigenous peoples.[18] Brazil ratified ILO 169 in 2002.[19] ILO 169 was subsequently adopted by the United Nations Declaration on the Rights of Indigenous Peoples.[20] In addition to ILO 169,

cultural land access is guaranteed by Article 27 of the International Covenant on Civil and Political Rights.[21]

While the enforceability of the preceding international agreements is not set in stone,[22] each agreement is predicated on the notion that indigenous land rights exist outside of state legislatures.[23] Moreover, the Inter-American Court of Human Rights has stated a nexus exists between the general "right to property guaranteed in Article 21 of the American Convention on Human Rights (ACHR)" and "indigenous peoples' lands."[24] Despite the non-binding nature of these frameworks[25] —and substantial political pushback to an enforceable human bill of rights[26]— these frameworks have encouraged consultation with indigenous populations "whose land might be infringed by state intrusion."[27] Though the treaties may be non-binding, indigenous property rights are clearly spelled out in ILO 169, UNDRIP, the IAC, and various articles of the ACHR. Thus, the fact that Brazil is a signatory to these treaties suggests the Brazil intended to recognize indigenous property rights in some important respects.

Brazilian Constitutional Developments

The varying political regimes throughout Brazil's history have produced constitutions — a total of seven— that generally track the objectives laid out in the aforementioned international treaties. For example, the 1967 constitution:

> . . . granted Indigenous peoples the exclusive right to access natural resources on their lands, which gave them (at least legislative) protection against the onslaught of farmers and mining companies interested in exploiting such resources; 3) paradoxically annulled all judicial acts that caused seizures of Indigenous lands; and 4) did not award indemnity to those who would benefit from the judicial acts by extending their territorial dominium.[28]

In wake of Brazil's frequent constitutional reform, Brazil's current constitution has landed on the notion for providing inalienable rights to "lands traditionally occupied by

Indians."[29] This protection provides for "identification, delimitation, demarcation, ratification and registration of lands," and is administered by the state agency FUNAI.[30] While this language mirrors the essence of the international agreements discussed previously, roadblocks in the way of political failings that favor land developer interests have stayed the constitutional command consistent with these international human rights regimes. Once again following a familiar theme, "Brazilian Indians have been violently driven off their land by those seeking to claim its wealth for themselves" by way of "reducing and limit[ing] Indian territories in border areas."[31]

FUNAI itself has been inefficient in its mission to assist indigenous populations. For example, the Xokleng have yet to be fully compensated for land lost in the 1980s from the construction of a dam.[32] Rather than being paid, Xokleng's claims brought before FUNAI have been decade long disappointments brought on by "underfunding, corruption and internal problems" that prevent the Xokleng from being reimbursed for their lost land.[33] While blame for the current predicament can be historically shared across the Brazilian political spectrum,[34] the recent election of President Jair Bolsonaro and his anti-indigenous policies has exacerbated these structural inefficiencies.[35] Riding on this anti-indigenous theme, the State of Santa Catarina's court ruling that refused to extend legal recognition to the Xokleng's land depended on a particular "timeframe" theory. This theory relies on a Federal Supreme Court decision in 2009 that held indigenous territory handed over to an indigenous population was appropriate because "they were occupying this land on the day when the 1988 federal constitution was enacted,"[36] thus establishing a timeframe for when legal recognition of indigenous land is provided.

Bolsonaro has essentially adopted an anti-indigenous plan following the Santa Catarina court ruling believing that indigenous people hold far greater percentage of land than they should.[37] Moreover, Bolsonaro supports a congressional movement to codify 1988 as the cutoff

date for indigenous land recognition.[38] Adding further uncertainty to the Xokleng's future is the role international human rights is to play in the Supreme Court's future decision. A feature of international law is that it is a "soft law" that typically lacks binding force and enforcement mechanisms.[39] A legal mechanism lacking in enforceability, however, does not make it irrelevant.[40] Indeed, many factors weigh favorably in the direction of the Federal Supreme Court importing the tenants of international human rights into its legal analysis.

First, the Federal Supreme court, like any legal body, can draw from a wide variety of persuasive authority outside of binding precedent to promote policy objectives that are constitutionally compelled. Thus, international law can (and should) be a key source in promoting the Xokleng's legal claim to their land. Secondly, invoking these international prerogatives would comport with the Brazilian constitution. The context under which constitutional reforms develop are relevant to interpreting the meaning of these reforms. Since international human rights regimes to which Brazil participates were a driving force in establishing specific constitutional language, ignoring international human rights regimes and their demands would be to ignore the very constitutional language they aided in establishing. Critics argue that an unfavorable ruling for the Xokleng will provide certainty regarding property law.[41] While such a ruling may provide clarity that favors business interests, it would deny Brazil's constitutional history that must acknowledge certain Brazilian constitutional reforms embody the soul of international treaties designed to protect indigenous lands.

Conclusion

If international human rights are to be given forceful recognition, then the Brazilian Supreme Court must rule in favor of indigenous populations. To do otherwise would not only undercut the credibility of Brazil on the international stage, but would fail to accurately interpret

the Brazilian Constitution's promise to provide indigenous populations the protection they deserve.

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[1] Flavio Brauce Wilk, *Xokleng*, Povos Indigenas No Brasil, (1999) https://pib.socioambiental.org/en/Povo:Xokleng [https://pib.socioambiental.org/en/Povo:Xokleng].
[2] *Id.*
[3] Débora Álvares, David Biller, *Brazil's Indigenous March to Pressure Court on Land Ruling*, 96 The Palm Beach Daily Business Review, 2021.
[4] Manny Tejeda-Moreno, *Brazil high court suspends Indigenous land rights case*, The Wild Hunt (September 26, 2021), https://wildhunt.org/2021/09/brazil-high-court-suspends-indigenous-land-rights-case.html [https://perma.cc/8A9A-NZ4J].
[5] Wilk, *supra* note 1.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Brazil:"Foreigners in our own Country"*: *Indigenous Peoples in Brazil*, Amnesty International, 2 (2005), https://www.amnesty.org/en/documents/amr19/002/2005/en/ [https://perma.cc/P79N-YXM7].
[10] Wilk, *supra* note 1.
[11] *Id.*
[12] *Id.*
[13] Wilk, *supra* note 1.
[14] Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 Hum. Rts. L.R., 281 (2006).
[15] Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 Queen's L.J. 348, 380 (2004).
[16] *Supra*, note 9 at 29.
[17] *Id.*
[18] Yorick Diergarten, *Indigenous or Out of Scope? Large-scale Land Acquisitions in Developing Countries*, International Human Rights Law and the Current Deficiencies in Land Rights Protection
19. Hum. Rts. L.R. 37 (2019).
[19] Ratifications for Brazil, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102571
[20] Diergarten, *Supra* note 18.
[21] *Id.*
[22] Kristy Gover, Settler-State Political Theory, ′CANZUS′ and the UN Declaration on the Rights of Indigenous Peoples, 26 Eur J Int Law 345 (2015).
[23] Diegarten, *Supra* note 18.
[24] Diegarten*, supra* note 18.
[25] Pasqualucci, *supra* note 18.
[26] Rett R. Ludwikowksi, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis* , 33 Ga. J. Int'l & Comp. L. 1, 4 (2004).
[27] Diergarten, *Supra* note 18.
[28] Mauro Barelli, *The Role Of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 Int. and Compar. L., 957 (2009).
[29] *Supra*, note 9, at 6.
[30] *Id.*
[31] *Id.* at 2.
[32] Wilk, *supra* note 1.
[33] *Id.* at 8
[34] Salo de Carvalho, David R. Goyes, Antonio Nario, Kristian Augustus, Valeria Vegh Weis, *Politics and Indigenous Victimization: The Case of Brazil*, 61 Br J Crim. 251 (2021).
[35] *See* Fabricio Tel et al., *Land and Transitional Justice in Brazil*, 15 IJTJ 190 (2021).

[36] *Id.* at n.65.
[37] Biller, *supra* note 3.
[38] *Id.*
[39] Barelli, *supra* note 28.
[40] Diergarten, *supra* note 18.
[41] Biller, *supra* note 3.