

## **Urgent Appeal**

### **Threat and prevention of demarcations of indigenous lands and approved territories, and the destruction of constitutional rights of indigenous peoples in Brazil**

July 6, 2021

**Submitted to the following special procedures of the United Nations and to the Special Rapporteurships of the Inter-American Commission on Human Rights:**

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## 1. Introduction

We submit this urgent appeal to demand attention regarding the **imminent risk of bills that are passing in the Brazilian National Congress and that will violate the rights of indigenous peoples in the country, preventing the demarcation of indigenous lands, threatening homologated territories and withdrawing constitutional rights that had been established by an entrenched clause in the Constitution of the Federative Republic of Brazil**, constituting one of the most severe contemporary threats to indigenous peoples in Brazil, particularly when considering the Substitute draft to Bill No. 490/2007 at the Lower House of Representatives.

The Substitute draft, presented to the Committee on Constitutional, Justice and Citizenship Affairs (CCJC) in 05.12.2021, as well as its attachments, proposes, in brief: i) changes to the legal system of indigenous land demarcation; ii) the adoption of the “marco temporal” criterion, according to which the physical presence of indigenous peoples on October 5, 1988, is required as a condition for indigenous land demarcation; iii) the internalizing of nineteen conditions determined in the judgment of the “Raposa Serra do Sol” case as a general rule for the demarcation of all indigenous lands in Brazil; iv) changes to the constitutional system regarding the exclusive usufruct of indigenous peoples; v) the insertion of new assumptions in the non-contact policy of indigenous peoples who live in isolation; vi) provisions on the opening of indigenous lands for the performance of economic activities that are not currently provided by law.

Furthermore, the intention of removing rights from those most vulnerable amidst the pandemic is grave – with said individuals having been repeatedly protected by the Federal Supreme Court. The

proposal will frustrate international agreements and investments that Brazil intends to obtain during its economic crisis. Parliament should demonstrate its commitment to human rights and the environment, which would presuppose rejecting the bill. However, were it to be approved, it would transmit an opposite message, of blatant and reiterated violation of said values on the part of the State.

In this regard, we are extremely concerned with the accelerated appraisal of the Substitute draft to Bill no. 490/2007 in the Lower House of Representatives and the realistic possibility that other similar bills could once again be passed without the due and necessary discussion, maturation, and effective analysis of their pertinence and compliance with human rights standards. In the current context – in which there are fewer possibilities of interacting with Congress due to the pandemic –, initiatives are advancing at all levels to reduce democratic spaces and rights of indigenous peoples. With the country paying attention to the generalized chaos caused by the tragic handling of the Covid-19 pandemic, the fact that this legislative agenda is moving forward is absolutely problematic. It is concerning that legislative bills with explicit threats to constitutional rights are negotiated in opposition of rights acknowledged by the Federal Supreme Court and by regional and international commitments.

With these considerations, we shall now analyze the main aspects that severely affect the bill under analysis.<sup>1</sup>

## **2. On the Substitute draft to Bill no. 490/2007 at the Lower House of Representatives**

The risks involved in the adoption of the Substitute draft to Bill no. 490/2007 can be divided into 8 axes, namely:

- a. Impossibility of a Law that tends to suppress individual rights and guarantees of indigenous peoples;
- b. Changes to the process of demarcation of Indigenous Lands;
- c. Possibility of forced removal of indigenous groups, which is at odds with the Federal Constitution;
- d. Limitations to the usufruct by indigenous peoples that are not provided in the Constitution –Unconstitutionality;
- e. Risks to the life, health, safety, dignity, uses, customs, and self-determination of indigenous peoples that live in isolation;
- f. Provision for compensation to non-indigenous individuals that are expressly prohibited by the Constitution;
- g. Absence of free, prior, and informed consultation – unconventionality;
- h. Violation of international treaties ratified by the Brazilian Government.

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<sup>1</sup> For a more in-depth analysis, we recommend reading the “Legal and technical note on the Substitute draft to Bill no. 490/2017, presented on 05.12.2021 to the Committee on Constitutional, Justice and Citizenship Affairs (CCJC), of the Lower House of Representatives”, prepared by Instituto Socioambiental, available at: [https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/nota\\_tecnico-juridica\\_pl\\_490\\_-\\_substitutivo\\_arthur\\_maia\\_ccj.pdf](https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/nota_tecnico-juridica_pl_490_-_substitutivo_arthur_maia_ccj.pdf).

**a. Impossibility of a Law that suppresses individual rights and guarantees of indigenous peoples**

The Substitute draft to the bill intends to change, by Law, the constitutional requirements for the demarcation of indigenous lands. An example of this is requiring the physical presence of the indigenous individuals on the land on October 5, 1988, which corresponds to the “marco temporal” thesis. Since the Federal Constitution cannot be modified by a statutory law, Bill no. 490/2007 is created with a formal unconstitutionality. Furthermore, the rights of indigenous peoples are part of an entrenched constitutional clause, so not even a Proposed Amendment to the Constitution could propose the changes contained in the bill.

**b. Changes to the process of demarcation of Indigenous Lands**

The Substitute draft to Bill no. 490/2007 presents a series of changes to the process of indigenous land demarcation, mostly seeking procedural disruptions and, as a result, attempting to prevent indigenous land demarcations. The bill under analysis seems to intend to create eternal and unsurmountable obstacles to demarcation processes in order to render them unfeasible, impossible to perform and endless, which is why these obstacles go against Article 231 of the Constitution of the Federative Republic of Brazil (which obligates the Federal Union to demarcate indigenous lands and ensure respect towards all of their assets) and directly contradict the basic pillars of public administration, presented in Article 37 of the Constitution. Besides, the Supreme Federal Court considers that the current rules guarantee the right to full defense and due legal process.

**c. Possibility of forced removal of indigenous groups, which is at odds with the Federal Constitution**

Article 16, § 4, I and II, of the Substitute draft, **establishes the possibility of having the Federal Government take back reserved indigenous lands if there is a “change to the cultural traces of the community”**. The provision is based on a wrongful assumption that is not present in the Constitution (that of assimilation and integration of indigenous peoples to national society), which would cause the extinction of their territorial rights, the removal of indigenous peoples from their land, and the consequent possibility of forced assimilation. Articles 16 § 4, I and II, as well as Article 18, § 1 of the Substitute draft, contradict Article 231, head provision, §§4, 5, and 6 of the Brazilian Constitution.

**d. Limitations to the usufruct by indigenous peoples that are not provided in the Constitution –Unconstitutionality**

The Substitute draft creates several limitations to the exclusive usufruct of indigenous peoples.

**Article 20, III, of the Substitute draft determines that the usufruct by indigenous peoples does not encompass “mining and panning, with permission being obtained from the local mining facilities in such cases”**. This provision allows mining activities in indigenous lands, which is prohibited by Article 231, § 7, of the Constitution, which determined that the provisions of Article 174, § 3 and 4 (which determined the possibility of the Federal Union creating areas for panning in national territory and allowed the work of panning cooperatives) do not apply to indigenous lands.

**Article 20, IV, in turn, determines that the usufruct of indigenous peoples does not encompass “areas where the occupation serves a relevant public interest for the Federal Union”.** At no point did the Constitution exclude “areas of relevant public interest for the Federal Union” from the exclusive usufruct of indigenous peoples. The highly exceptional hypothesis of relevant public interest for the Federal Union provided by the Constitution requires the promulgation of a Complementary Law and justified public interest in highly exceptional cases.

**Article 27, head provision, § 2 and item II, allows the conclusion of “contracts that seek cooperation between indigenous and non-indigenous persons for the performance of economic activities, including agricultural, forestry and animal husbandry activities, in indigenous lands”.** The performance of activities by the indigenous peoples themselves, through their autonomy of will, is not prohibited by the Constitution, which expressly determines that this usufruct is exclusive. **The text in the Substitute draft, however, enables the possibility of “cooperative contracts for the performance of economic activities”, creating a vague and generic concept that does not establish a definite transaction and that could authorize activities that are not compatible with permanent land possession by indigenous peoples.**

**e. Risks to the life, health, safety, dignity, uses, customs, and self-determination of indigenous peoples that live in isolation**

Ever since the return of democracy in Brazil, the Brazilian government has established a decisive policy of not making contact with indigenous peoples that live in voluntary isolation. **Article 29, §§1 and 2 of the Substitute draft, converts the non-contact policy into an “avoided contact” policy and creates the possibility of contacting isolated peoples “in order to intermediate state actions of public utility”,** a new and excessively broad hypothesis that could lead to threats to isolated indigenous peoples and forced contact.

**f. Provision for compensation to non-indigenous individuals that are expressly prohibited by the Constitution**

**Article 11 of the Substitute draft blatantly contradicts Article 231, § 6, of the Federal Constitution, by establishing that non-indigenous individuals that hold “fair rights to ownership or possession” may be compensated.** The provision will even allow the payment of compensation to invaders who lack documents proving ownership over the land. **Article 231, § 6 of the Constitution establishes that no compensation is owed in acts or legal transactions practiced by third parties involving indigenous lands, with the exception of improvements in good faith.**

**g. Absence of free, prior, and informed consultation – unconventionality**

**Articles 21 and 22 of the Substitute draft** establish possibilities of activities that may be performed in indigenous lands without a Free, Prior and Informed Consultation, in violation of multiple

international treaties<sup>2</sup> ratified by Brazil, whereas the legal stature of these treaties exceeds that of federal statutory laws – as such, these treaties cannot be overruled by statutory laws. Besides, the proposal, as a whole, is also unconventional, since the indigenous peoples have not been consulted on the bill and its attachments through their representative instances.

#### **h. Violation of international treaties ratified by the Brazilian Government**

Violence against indigenous peoples and in indigenous lands is notable throughout the history of the Brazilian government, having become more intense in the last few years. Brazilian public authorities should take a stance against this violence, in consonance with the rules, recommendations, and precedents within international human rights law. This diagnosis is coherent with the stance of multiple international bodies. In a report<sup>3</sup>, published in 2007 and sent to the UN Human Rights Council, the Special Rapporteur of Indigenous Peoples' Rights attested that, to a great extent, the ineffectiveness of indigenous peoples' rights is related to discrimination and racism.

In 2016, during a visit to Brazil, Victoria Tauli-Corpuz, who was the UN Special Rapporteur on Indigenous Peoples' Rights, highlighted that the situation of indigenous peoples was even worse compared to her visit in 2009, with structural discrimination having increased and indigenous rights having become weaker due to institutional changes.<sup>4</sup> The Rapporteur indicated the urgent need for land demarcation. In view of the long delay in demarcation processes, she warned of the effects of the controversial enforcement of the "*marco temporal*".

Furthermore, in the last few years, Brazil has ratified international treaties and normative instruments with the United Nations (UN), entering undertakings that would be disrespected, in view of the "timeframe thesis" and the changes proposed in the Substitute draft, namely:

- **Declaration of the United Nations on Indigenous Peoples' Rights**, signed by Brazil in 2007 before the General Assembly of the United Nations; particularly articles 25 and 26;
- **Convention no. 169 of the ILO (International Labor Organization) on Indigenous and Tribal Peoples**, adopted by Brazil in 2004 and consolidated in Decree no. 10.088/2019;
- **International Covenant on Civil and Political Rights**, adopted by Brazil through Decree no. 592/1992, particularly, article 27, clarified in CCPR/C/21/Rev.1/Add.5.
- **International Covenant on Economic, Social, and Cultural Rights**, internalized by Brazil through Decree no. 591/1992, particularly, article 1 and clarification on E/C.12/GC/21;

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<sup>2</sup> The right to consultation is a result of international treaties ratified by Brazil, such as Convention No. 169 of the International Labor Organization (ILO), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, and the Convention to Eliminate all forms of Racial Discrimination. It is also expressly provided in the United Nations Declaration on Indigenous Peoples' Rights and in the American Declaration on Indigenous Peoples' Rights.

<sup>3</sup> United Nations Human Rights Council, Report on the situation of human rights and fundamental freedoms of indigenous peoples, by Special Rapporteur Rodolfo Stavenhagen. Paragraph 89. (40<sup>th</sup> session). UN. Doc. A/HRC/4/32, February 27, 2007. Available at: <https://undocs.org/A/HRC/4/32>. Accessed on 06/29/2021.

<sup>4</sup> United Nations Human Rights Council, Report on the rights of indigenous peoples, in the Brazilian mission of Special Rapporteur Victoria Tauli-Corpuz, Paragraph 54. (33<sup>rd</sup> session). UN. Doc. A/HRC/33/42, August 8, 2016. Available at: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/33/42/Add.1](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/33/42/Add.1). Accessed on 06/29/2021.

- **International Convention on the Elimination of All Forms of Racial Discrimination**, adopted by Brazil through Legislative Decree no. 65.810/196;
- **General Recommendation XXIII on indigenous peoples' rights**, in document A/52/18, annex V, paragraph 5;

Finally, according to the Inter-American Human Rights Court and the Inter-American Human Rights Commission, the American Convention on Human Rights protects the rights of indigenous peoples to the lands that they traditionally occupy. The determination of which lands are traditionally occupied should be performed on a case-by-case basis by verifying the existence of a specific relationship of the indigenous community with the claimed land.

### 3. Urgent Appeal

We have presented information in this urgent appeal to the special procedures of the United Nations and the Special Rapporteurship of the Inter-American Commission on Human Rights in order to request the investigation and the demanding of immediate measures from Brazilian authorities on the irresponsible passing of legislation, particularly the Substitute draft to Bill no. 490/2007, at the Lower House of Representatives, that **will violate the rights of indigenous peoples in Brazil, preventing indigenous land demarcations, threatening homologated territories and withdrawing constitutional rights**, which are also incompatible with the international obligations adhered to by Brazil when it comes to human rights.

In view of the facts presented, the Brazilian civil society organizations that sign this document request the special procedures of the UN and the rapporteurships of the Inter-American Commission on Human Rights, through communications sent to the competent bodies, to require Brazilian authorities, particularly the Speaker of the Lower House of Representatives and the President of the Federal Senate, to:

- a. acknowledge that the Substitute draft presents notable defects in terms of constitutionality and conventionality, as well as characterizing an inarguable societal regression, so that they may decide to reject and dismiss the proposal in a definitive capacity;
- b. assure that Bill no. 490/2007 does not continue to pass during the COVID-19 pandemic;
- c. refraining from proposing or supporting bills that allow, under any pretense, the violation or weakening of rights and territories of indigenous peoples;
- d. not include any such bill in the Legislative Agenda and, if such a bill is already included, to reject said bill due to the disregard towards human rights, especially in the current moment in which efforts are being made to fight the COVID-19 pandemic.
- e. ensure that all any bill that could have the abovementioned negative consequences may be submitted to broad and detailed democratic discussions, without undue efforts for it to pass into legislation, especially with free and prior consultations;

Finally, we also ask that the special procedures to issue a joint press release shedding light on the severity of the situation and expressing the opinion of the rapporteurs on how incompatible this legislation is with international human rights standards.

**Signed by:**

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