

THE AMERINDIANS AND INTERNATIONAL LAW: A BRAZILIAN PERSPECTIVE¹

OS AMERÍNDIOS E O DIREITO INTERNACIONAL: UMA PERSPECTIVA BRASILEIRA

*Paulo Borba Casella**

Resumo:

O artigo busca trazer uma perspectiva histórica do tratamento do ameríndio pelo direito internacional, desde o «descobrimento», passando pelos principais autores do período colonial americano, como Francisco de Vitoria e Bartolomé de las Casas, chegando à condição do indígena no Brasil, com a atual Constituição (1988) e com os esforços multilaterais internacionais em regular a matéria, seja via Assembleia Geral da ONU, seja via Parlamento Europeu.

Palavras-chave: Direito Internacional. Ameríndios. Indígenas no Brasil.

Abstract:

The paper strives to bring a historic perspective about the International Law treatment on Amerindians, from the «discovery», going through the renowned authors of the American colonial period, such as Francisco de Vitoria and Bartolomé de las Casas, to the present condition of the Amerindians in Brazil, within the Constitution (1988) and with the multilateral international efforts to regulate the subject, via the UN's General Assembly or via the European Parliament.

Keywords: International Law. Amerindians. Indians in Brazil.

Introduction

The need to adopt a historical perspective and to evaluate the changes occurred in international law, in general, is particularly true in the regulation of this matter. The purpose of this work is to draw the picture of the Amerindians, as regulated in some of the main international legal instruments on the matter, with references to Brazilian Constitution.

Like all human knowledge, law and specifically international law is always closely connected with the historical and cultural context, from which it has emerged. Such context implies the need to adopt a historical perspective, in order to understand and

¹ This paper is a compiled version of the lectures given by the author at the University of Hiroshima, Japan, on 7 August 2016 and at the Faculty of Social Sciences at the University of Ljubljana, Slovenia, on 23 May 2017. The author wishes to thank Felipe Nicolau Pimentel Alamino, Victor Antonio Del Vecchio, Maria Olívia Ferreira Silveira and Jacob C. Brown for the kind revision and updating of the original versions.

* Full Professor for Public International Law and Head of the International and Comparative Law Department of the University of São Paulo Law School.

evaluate the present status of the legal regulation of a certain international legal issue. A historical background is particularly necessary in a matter such as the Amerindians and international law, due to the relevant changes that have occurred.

1. Differing views on the ‘discovery’ of the American continent

Officially, in 1492 the Genoese Columbus ‘discovered’ the New world, on behalf of Spain when ships under his command reached the island he named ‘Hispaniola’ (which the ‘Indians’ called ‘Haiti’). Shortly thereafter, the Portuguese Pedro Álvares Cabral reached in April, 1500 the coast of Brazil. Nevertheless, the word ‘discovery’ neglects the Indians’ presence in the territory.

Neither of the two seemed to be intentionally set on such ‘discoveries’, as both the sovereigns of Spain and of Portugal had the intention of reaching the East and set up trade routes therewith, to consider the complex relations between the East and the West would be enough for another entire work, with controversies.

At the same time the Portuguese and the Spaniards invaded the Americas, same and other Europeans contacted Japan, at the end of the Muromachi and Momoyama, China was ruled under the Ming, India was in the Moghul era, the Ottoman Empire reached its maximum area in Europe, as the African kingdom of Guinea, the Mali Empire, the Mandi Mansa Empire, and the kingdom of Ethiopia – in a net of worldwide expansions of multiple and complex effects.

2. Differing views on the Amerindians

Soon there were substantial controversies and opposing views, as to how the peoples of the newly ‘discovered’ continent should be treated, and what could be the legal title to support the European expansion in the American continent, among which deserves to be remembered Francisco de Vitoria (1480-1546), in his theological lesson *De indis noviter inventis* questioned three issues: (a) under what law the Indians were placed under the domination of the Spaniards? (b) which rights were thus acquired over them in matters of law and government? (c) which rights the Roman Catholic Church could claim to have over the Amerindians in religious matters?

These questions required comprehensive answers, also including international law and international relations. Still, we should start our comprehensive analysis of Vitoria’s lessons with the idea of ‘jus gentium’ applied to the Amerindians.

Being capable of reasoning, part of a general system of rules for the relations among peoples, and deserving to be recognized as human beings – which others denied at the time – Vitoria in his *De Indis*, argued that ‘natural law’ would be adequate to deal with the Amerindians, thus allowing ‘jurisdiction’ to be exercised.

The term ‘jus gentium’ – as seen by Vitoria – would rationally provide legitimacy to a system of communication (*jus communicationis*) and trade among peoples.

Accordingly, the Amerindians would be entitled to participate in this international trade system, as equals: Spaniards would bring them goods they did not have, while gold and silver, would be exported to Spain – in theory sounds adequate.

Another remarkable, although contradictory, lesson of Vitoria is the use of the ‘right to wage war’ against the Amerindians. Notwithstanding his Humanist views, as already expressed, the same Francisco de Vitoria in another academic year, in his chair for theology at the University of Salamanca, lectured on the *De jure belli hispanorum in barbaros*, whereby he claimed that the Amerindians could be forced to change with the ‘right to wage war’ against them by Spain: Indian resistance to conversion could be a ‘just’ cause to wage war, not because it violates divine law, but as being contrary to the ‘jus gentium’ – the law of nations, as administered by the Spanish sovereign – a statement which clearly entails a substantial change to his preceding views on the ‘equality’ of relations among Amerindians and Europeans.

a. Critics in the same controversy: the view of a contemporary

Bartolomé de las Casas (1474-1566) in his extensive *History of the Indies* (in three volumes) strongly criticized the mechanisms of European colonial conquest – he should be remembered for his innovative approach and criticism of the Western attitude, full of pride and prejudice, towards other peoples and civilizations.

According to las Casas: «all peoples in the world are humans» and, as such, are rational beings, and thereby «there is no nation today and there cannot be any, to such an extent barbarian, proud or depraved, that cannot be attracted to and converted to all political virtues and to share the humanity of rational beings.»

An amazing personality, Bartolomé de las Casas went to the New World already in 1502, where became a priest but nevertheless participated in the conquest of Cuba, for which he was awarded Indians and land. In 1514, he experienced a crisis and began to consider the treatment of Indians as unjust. Ultimately, he dedicated his life to defending the rights of the Indians, from the Spanish Court to Venezuela, to La Hispaniola, to Nicaragua, to Mexico and also as bishop at Chiapas.

b. Contrary points of view

Both Francisco de Vitoria and Bartolomé de las Casas are voices that maintained a certain level of criticism against European colonization of the Americas due to the way it was carried out. Both authors remain references of a Humanist approach.

Nevertheless, their views were a minority approach, among many authors defending the Spanish crown and the ‘colonial’ policies of violence, ‘ethnocide’ and occupation against the Indigenous peoples in the American continent.

In that sense, one may quote - and criticize - Juan Ginés de Sepulveda, another priest and theologian, who fully endorsed conquest, for the alleged propagation of the Christian ‘faith’ and not less for commercial interests, notwithstanding the destruction of existing life.

3. The Amerindians in Brazil

In broad lines, the «Amerindians» are the inhabitants autochthonous to the land that was to be named «Brazil» (word which means, in the general Indian language - ‘red wood’ coming from the tree, that was used by the Europeans to extract red colour for dyeing tissue fabric).

About to the census of 2010, Indians are 896,000 people, in a total population of more than 204 million Brazilians. The Indian communities have, at least in theory, legal title to ca. 12% of the national territory (of 8,511 million square kilometers, roughly 1 million square kilometers).

In practice, there are several problems and pending issues to be settled, both at the conceptual definition of the status of Amerindians as ‘peoples’ (opposed by Brazil) and the precise determination of their territories.

a. The Indians in the Brazilian Constitution (1988), arts. 20, 22, 109 and 129

Brazil is a three level federation, composed of Union, member States and Municipalities. The Indians have their ‘land’ protected by law (art. 20, par. XI) as ‘land of the Union’ – thus under the control of the Federal Government.

The Union legislates on Indians (art. 22, par. XIV), federal judges are to decide cases on Indian rights (art. 109, par. XI), assisted by federal prosecutors (art. 129, par. V) to defend the rights and interests of the Indian communities, and as such they are entitled to take part (art. 232) in all judicial procedures concerning their rights.

b. The Indians in the Brazilian Constitution (1988): art. 210 and the use of their languages

The national education system should encompass shared basic formation, observing the cultural and artistic values, both at national and regional levels (as stated by art. 210 and its par. 2).

Teaching is to be done in Portuguese, with right of the Indian communities to have also their own languages and specific learning procedures observed (same provision).

Nowadays, there are 274 Indian languages among 305 ethnic groups registered by the FUNAI – the National Foundation for the Indians in Brazil.

c. The Indians in the Brazilian Constitution (1988): art. 215 and the cultural rights

According to the Constitution, the Brazilian State shall guarantee to all citizens the full exercise of the cultural rights and the access to sources of national culture: art. 215, first par., stipulates the governmental duty to protect all cultural expressions, with specific mention of the preservation of the specific features, stemming from the Indians and the Afro-brazilians as well as other groups in what is constitutionally called the «national civilizational process».

d. The Indians in the Brazilian Constitution (1988): art. 231 and the guarantee of rights and lands²

As a key provision, to the Indians are acknowledged the rights to their social organization, traditional knowledge, languages, beliefs and traditions the original rights for the Indians on the lands they have traditionally occupied are guaranteed, with duty of the Union to set limits and protect such lands, and to ensure that all the Indian properties are respected.

The «traditional Indian lands» are those inhabited in a permanent manner by them, as used for their productive activities, and to the extent required for the preservation of the natural resources and ‘reproduction’, needed for their well-being and maintenance (par. 1).

² The issue involving violations of collective property rights led the Inter-American Commission on Human Rights (IACHR) to file an application with the Inter-American Court of Human Rights, on March 16, 2016, in Case 12.728, Xucuru indigenous people and its members, Brazil. The case is the result of more than 16 years, between 1989 and 2005, in the administrative process of recognition, titling, demarcation and delimitation of their territory and ancestral lands and territories; as well as the delay in the total regularization of such territory and lands. The case remains pending before the Court. *See*: IACHR, Report No. 44/15, Case 12.728, Merits, Xucuru Indigenous People. Brazil. July 28, 2015.

- e. The Indians in the Brazilian Constitution (1988): art. 231 - the guarantee of rights and lands

The «lands traditionally occupied by the Indians» are to be kept free from others for their permanent occupation.

With benefit to the Indians, all resources are available in those lands, including the soil, the rivers and the lakes existing (art. 231, par. 2) while same cannot be sold nor transferred (art. 231, par. 4).

Also, water resources and energy, as well as mineral extraction can only be made in Indian lands with special government permission, with a share of the results for the Indians (art. 231, 3).

Indians cannot be removed from their lands, except under express authorization from National Congress, under art. 231, par. 5, in case of a ‘natural catastrophe’ or an ‘epidemic disease’, which might put at risk that same Indian population, or also for the protection of the sovereignty of the State, requiring approval to that effect from the National Congress, and with the right of the Indians to return to the original areas, as soon as the problems are solved.

- f. The Indians in the Brazilian Constitution (1988): art. 231 and the guarantee of rights and lands

All other occupation and activity made on Indian lands is considered as null and against the law, and therefore (according to art. 231, par. 6) will not entail ‘right of retention’ or ‘claims for compensation’ from those having made exploitation of natural resources in these lands.

It also grants for mineral extraction and ‘*cooperativas*’, i.e., community activities (as stipulated under art. 231, par. 7) shall not prevail over the constitutional rights granted to the Indians over their «traditional lands».

4. International law and the Amerindians

Although it was once an instrument of colonialism, international law is presently in marked contrast with legal and policy regimes of the past, which sought to do away with (suppress) or ‘assimilate’ the Amerindians (following the alleged «civilizational burden of the white man»).

International law has developed to support the resilient efforts of indigenous groups in the Americas and worldwide to survive and maintain their features as distinct peoples on their ancestral or traditional lands.

The purpose is good, albeit frequently falling short of its full attainment, both internationally in general and also specifically as it is within the Brazilian national context.

The contemporary international regime concerning the Amerindians (and indigenous peoples in general) has been set up within international law's human rights program, following the United Nations Charter, which has moved international law away from an exclusively state-centered practice and orientation towards the Human being as the centre of international law today.

The substantial change in the contents and approach towards our subject may be stated under the 'post-modern' approach to international law – as I have been working along the latest decade – which shows an effort to move the main focus of international law from interstate relations to the humankind.

a. Relevant developments

Over the last twenty years, many relevant developments have occurred in the international legal regime for the protection of indigenous peoples, including the establishment of the United Nations Permanent Forum on Indigenous Issues, several decisions on this matter by U.N. treaty monitoring bodies, International Labour Organization committees & conventions, the Interamerican Commission on Human Rights and the Interamerican Court on Human Rights and on-going efforts within both the UNO and OAS to articulate declarations on indigenous rights.

All of these confirm the normative and institutional trends, towards protection of the humankind, through international law, in general and of the indigenous peoples in particular. However, the matter is far from being consolidated.

Recognition of indigenous nations

As stated in art. 1 of the Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere (Geneva, 1977 – developed and circulated by indigenous participants at the Non-Governmental Organization Conference on Discrimination Against Indigenous Populations – reprinted as U.N. Doc. E/CN.4/Sub.2/476/Add.5, Annex 4 (1981)), they shall be recognized following these definitions:

«Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental requirements of nationhood, namely:

- (a) having a permanent population
- (b) having a defined territory

- (c) having a government
- (d) having the ability to enter into relations with other states»

Indigenous peoples: identity and self-determination

As stated by article 1 of the Declaration of Principles on Indigenous Rights (adopted by the Fourth General Assembly of the World Council of Indigenous Peoples, held in Panama, 1984, reprinted as U.N. Doc. E/CN.4/1985/22, Annex 2 (1985)), it can be extracted that:

«All indigenous peoples have the right of self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development.».

Right to self-determination

As stated in articles 1 and 2 of the Declaration of Principles on the Rights of Indigenous Peoples (Geneva, 1985 – reprinted as U.N. Doc. E/CN.4/Sub. 2/1987/22, Annex 5 (1987)):

«Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination and aggression.».

«All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference».

The risk of ‘*ethnocide*’

In response to the demand, UNESCO organized an international meeting on ‘ethnocide’ and ‘ethno-development’ in Latin America, in collaboration with FLACSO, held in December 1981 in San José, Costa Rica – see UNESCO Doc. FS 82/WF.32 (1982). From this meeting we shall extract the following aspects of ‘ethnocide’:

«Increasing concern has been expressed at various international forums over the problems of the loss of cultural identity among the Indian populations of Latin America. This complex process, which has historical, social, political and economic roots, has been termed *ethnocide*.».

«*Ethnocide* means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular,

the right of ethnic groups to respect for their cultural identity, as established by numerous declarations, covenants and agreements of the United Nations and its specialized agencies.».

I.L.O. Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989, in force 1991)

Noting the international standards stated in the Indigenous and Tribal Populations Convention and Recommendation (1957), with partial revision of ILO Convention 107 on Indigenous and Tribal Populations (1957).

Recalling the terms of the Universal Declaration of Human Rights (1948), the U.N. International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), and the many international instruments on the prevention of discrimination (...)

Noting that the provisions of ILO Convention 169 have been framed with the cooperation of the UNO, FAO, UNESCO, WHO and the Interamerican Indian Institute.

The ILO Convention 169 defines that «indigenous» or «tribal»³ peoples in independent countries are those whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations – as stated by art. 1.1. (a) of ILO Convention 169, followed by art. 1.1. (b) of same:

«regarded as indigenous on account of their descent from the populations which inhabited the country (...), at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.».

³ The Inter-American Court of Human Rights explored the question of the definition of tribal peoples and their differences with respect to indigenous peoples in *Saramaka people v. Suriname* (CIDH, Judgment of November 28, 2007) ruling that: “First of all, the Court observes that the Saramaka people are not indigenous to the region they inhabit; they were instead brought to what is now known as Suriname during the colonization period (infra, para. 80). Therefore, they are asserting their rights as alleged tribal peoples, that is, not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.”

Agenda 21, chapter 26 on ‘the role of indigenous peoples and their communities’

Adopted by the U.N.O. Conference on Environment and Development, held at Rio de Janeiro, June 1992 (U.N.Doc. A/CONF.151/26 (v. 3) at 16, Annex 2-92) ‘Programme Area’ / ‘Basis for Action’ (26.1):

«Indigenous peoples and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands.».

«They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.».

«Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.».

On the Amerindians is further stated in the Agenda 21 that:

«Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature.».

«In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.».

International Decade for the World’s Indigenous People (commencing on 10 Dec. 1994)

The UNGA Res. 45/64 (1990) presented a timely opportunity to mobilize further international, technical and financial cooperation on issues related to Indigenous people worldwide, which was followed by a General Recommendation (XXIII) concerning indigenous peoples, adopted by the U.N. Committee on the Elimination of Racial Discrimination at its 1235th. meeting, on 18 Aug. 1997 (U.N. Doc. CERD/C/51/misc. 13/Rev. 4 (1997)) whereby the Committee (par. 2) «noting that the GA proclaimed the International Decade of the World’s Indigenous People commencing on 10 Dec. 1994, reaffirms the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples.».

Draft U.N. Declaration on the rights of Indigenous peoples (1994)

Adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities by its Resolution 45/1994 (printed as U.N. Doc. E/CN.4/1995/2.E/CN.4/ Sub.2/1994/56, at 105 (1994)).

«*Affirming* that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such».

«*Affirming* also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind» [...]

«*Reaffirming* also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind.».

The European Parliament on indigenous peoples

The Resolution on action required internationally to provide effective protection for indigenous peoples (it was adopted by the European Parliament in its Plenary Session, Strasbourg, 9 Feb. 1994 – Eur. Parl. Doc. PV 58 (II) (1994)) about the «implementation of effective international legislation on the environment and the rights of indigenous peoples in the world, in order to protect our planet and all its inhabitants».

A former Resolution had been adopted by the European Parliament on the same matter, under the title ‘1992, indigenous peoples and the quincentenary’ (dated 12 March 1992, publ. OJ C 94, 13.5.1992, p. 268) for the 500 years of ‘discovery’ of the Americas by COLUMBUS.

Proposed Interamerican Declaration on the rights of indigenous peoples

The adoption of a declaration regarding indigenous rights in inter-american context was discussed over 17 years. The Proposed Declaration was approved by the Interamerican Commission on Human Rights on 26 Feb. 1997 at its 133rd. session, 95th. regular session (O.A.S. Doc. OEA/Ser.L/V/II.95, Doc. 7, rev. (1996)) whereby the member states of the Organization of American States:

«Recalling that the indigenous peoples of the Americas constitute an organized, distinctive and integral segment of their population and are entitled to be part of the national identities of the countries of the Americas, and have a special role to play in strengthening the institutions of the state and in establishing national unity based on democratic principles» and also «recalling the need to develop their national juridical systems to consolidate the pluricultural nature of our societies».

The declaration was finally adopted on June 15, 2016, at the 46th General Assembly of the OAS held in Santo Domingo. The Declaration reaffirms the right to self-determination, also included in the UN Declaration on the Rights of Indigenous Peoples and, especially recognizes that the progress in promoting and effectively protecting the rights of the indigenous peoples of the Americas is a priority for the OAS.

Racial discrimination and indigenous peoples⁴

A General Recommendation (XXIII) on indigenous peoples was adopted by the U.N. Committee on the Elimination of Racial Discrimination at its 1235th. meeting, on 18 Aug. 1997 (U.N. Doc. CERD/C/51/misc. 13/Rev. 4 (1997)) its par. 1 noted that «in the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of states parties under art. 9 of the International Convention on the elimination of all forms of racial discrimination, the situation of indigenous peoples has always been a matter of close attention and concern» also stressing that «discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination».

Conclusion

Few fields of international law are as dynamic, in terms of historical inquiry and the application of historical analysis in the courtroom, as the study of Indigenous-European legal encounter and the legal regime applicable thereon.

Scholars, theologians and jurists have for centuries – since Francisco de Vitoria and Bartolomé de las Casas in the 16th. century onwards – inquired on the nature of the legal character of such relations and the legal rights and duties of the colonial powers, the legal status of the indigenous peoples and the adequate legal framework for the relations between indigenous peoples, the colonizers, and the European fragment colonies in the New world – as a kind of ‘vision of paradise on earth’.

As in other areas of knowledge, there is always a need to find a balance between the laudatory ‘apology’ and excessive criticism in international law and relations. No one can possibly defend ‘colonial conquest’ as it was carried by the Europeans in other

⁴ Recently, the African Court of Human and Peoples Rights delivered its first judgment regarding indigenous rights. The case was referred to the Court in 2012 by the African Commission, pursuant to Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights. In 2009, Kenya issued eviction notices to the Ogiek people – and other settlers – living in the Mau Forest. They alleged that the forced eviction conducted by Kenya violates their rights to life, property, natural resources, development, religion, and culture, which is protected under the African Charter on Human and Peoples’ Rights. On its judgment, the African Court held that Kenya violated innumerable rights of the Ogiek People, namely: the right to property (Article 14 of the African Charter); the right to be free from discrimination (Article 2); the right to freedom to practice religion (Article 8); the right to culture under Article 17(2) and (3); the right to freely dispose of wealth and natural resources (Article 21). Also, the Court found a violation of Article 1 of the African Charter by not implementing legislation or other measures to give effect to the rights enshrined in the articles that the African Court found the State was in violation of: Article 2, 8, 14, 17(2) and (3), 21, and 22. See: *AfCHPR, African Commission on Human and Peoples’ Rights v. Kenya, App. no. 006/2012, Judgment of 26 May 2017*.

continents, with all the violence, the suppression of entire peoples, languages and cultures forever lost – ‘*ethnocide*’ is not a light word.

However, at the same time, notwithstanding these criticisms, it is necessary to acknowledge that the interaction brought about the civilizations that have been developed in the Americas, along these five centuries, with all the variety that stems from the various peoples and cultures that were mixed together contributing to the present condition of the entire continent, from Alaska to Patagonia.

In case of Brazil, at least theoretically, the Brazilian Constitution (1988, as amended) seems to provide adequate legal framework for the Indians, stating their right to the legal protection of their identities, their languages, cultural heritage and traditions.

Their lands are formally kept under a specific regime of legal protection by the Brazilian state with preferential treatment in regard to other activities by non-Indians. Nevertheless, it is necessary to remember that there are serious problems and pending issues, for ensuring the effective protection and the maintenance of the life, the culture and the identity of these ethnic Indian groups within the entire national community of Brazilians.

Some of the controversial aspects and pending problems were pointed out in several recommendations to Brazil from 26 states during the Permanent Revision Procedure carried out in connection with the protection of Human rights (in April – May 2017) is evidence that there is still a long way to go.

São Paulo, julho de 2017.

References

ANAYA, S. James. *Indigenous peoples in international law*. 2. ed. New York: Oxford University Press, 2004.

ANGHIE, Anthony. Francisco de Vitoria and the colonial origins of international law. In: ANGHIE, Anthony. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2007. p. 13-31.

BARBOSA, Luiz Bueno Horta. *Pelo índio e pela sua proteção oficial*. Rio de Janeiro: Imprensa Nacional, 1947.

BARBOSA, Marco Antonio. *Autodeterminação: direito à diferença*. Prefácio de Dalmo de Abreu Dallari. São Paulo: Plêiade: FAPESP, 2001.

_____. *Direitos dos povos indígenas no plano internacional e frente aos estados*. 1999. Tese (Doutorado) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 1999.

CARRASCO, Enrique et al. Multiple visions of international law's future. *Proceedings of the American Society of International Law*, Washington D.C. n. 1/4, p. 92-106, Apr. 1998.

CASAS, Bartolomé de las. *Historia de las Indias*. 3 reimp. México: Fondo de Cultura Económica, 1992. 3 v.

CASELLA, Paulo Borba. *Direito internacional no tempo medieval e moderno até Vitória*. São Paulo: Atlas, 2012.

_____. Presença de Francisco de Vitória. *Revista da Faculdade de Direito da Universidade de São Paulo*, São Paulo, v. 80, p. 355-369, jan./dez. 1985.

CASELLA, Paulo Borba; NASCIMENTO, Guilherme Figueiredo. Direitos dos povos indígenas: releitura de Francisco de Vitória enfatizando os 500 anos do descobrimento. *Revista da Faculdade de Direito da Universidade de São Paulo*, São Paulo, v. 95, p. 121-128, jan./dez. 2000.

CASTAÑEDA OROZCO, Moisés. *El indio americano y la unidad de la especie humana: ensayo documentado y crítico*. Quito: M. O. Calle, 1938.

COSTA, Renato Eliseu. *Direitos humanos e saúde intercultural: análise da estrutura do sistema de saúde boliviano e brasileiro para os povos indígenas*. 2011. Dissertação (Mestrado) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2011.

CUNHA, Manuela Carneiro da. *Os direitos do índio: ensaios e documentos*. São Paulo: Brasiliense, 1987.

CUNHA, Manuela Carneiro da (Org.); LUZ, Mara Manzoni; PERRONE-MOISÉS, Beatriz. *Legislação indigenista no século XIX: uma compilação, 1808-1889*. São Paulo: Comissão Pró-Índio de São Paulo: Edusp, 1992.

DALLARI, Dalmo de Abreu. O índio, humano e brasileiro. In: MEDINA, Cremilda (Org.). *O primeiro habitante*. São Paulo: Editora USP, ECA e CJE, p. 243-244, 1992.

_____. A auto-sustentação dos povos indígenas: debate. *Porantim: em defesa da causa indígena*, Brasília-DF, ano 20, n. 208, p. 3, set. 1998.

_____. O Século XXI para os índios do Brasil. *Porantim: em defesa da causa indígena*, Brasília-DF, ano 21, n. 222, p. 3, jan./fev. 2000.

_____. Portaria AGU 303. Advocacia e ilegalidade anti-índio. *Revista Índio*, São Paulo, ano 2, n. 1, p.14-15, 2012. Disponível em: <<https://revistaindio.files.wordpress.com/2013/07/revista-indio-5c2ba-edic3a7c3a3o-blog-dupla.pdf>>.

FIRESTONE, Jeremy; LILLEY, Jonathan; NORONHA, Isabel Torres. Cultural diversity, human rights, and the emergence of the indigenous peoples in international and comparative environmental law. *American University International Law Review*, Washington DC., v. 20, n. 2, p. 219-292, 2005.

GRABNER, Maria Luiza. *Conhecimentos tradicionais: proteção jurídica e diálogo intercultural*. 2009. Dissertação (Mestrado) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2009.

HANKE, Lewis. *Aristóteles e os índios americanos*. Tradução de Maria Lucia Galvão Carneiro. São Paulo: Martins, [1962?].

KAYSER, Hartmut-Emanuel. *Os direitos dos povos indígenas do Brasil: desenvolvimento histórico e estágio atual*. Tradução Maria da Glória Lacerda Rurack, Klaus-Peter Rurack. Porto Alegre: safE, 2010.

MACEDO, Paulo Emílio Vauthier Borges de. O mito de Francisco de Vitória: defensor dos direitos dos índios ou patriota espanhol? *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, v. 98. n. 119/124. p. 90-110. ago./dez. 2013.

MARCHINI, Rodrigo Sérgio Meirelles. *A proteção constitucional das terras indígenas brasileiras no período republicano: evolução e estagnação*. 2011. Dissertação (Mestrado) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2011.

MENDES JÚNIOR, João. *Os indígenas do Brasil, seus direitos individuais e políticos*. São Paulo: Typ. Hennies Irmãos, 1912.

OCTAVIO, Rodrigo. *Os selvagens americanos perante o direito*. Tradução do francês por Rui Albertino Nunes da Rocha. São Paulo: Companhia Editora Nacional, 1946.

RUIZ, Rafael. *Francisco de Vitoria e os direitos dos índios americanos: a evolução da legislação indígena espanhol no século XVI*. Porto Alegre: EDIPUCRS, 2002.

SEPÚLVEDA, Juan Ginés de. *Tratado sobre las justas causas de la guerra contra los indios*. 3. reimpr. Con una adv. de Marcelino Menéndez y Pelayo e un estudio por Manuel García-Pelayo. México: Fondo de Cultura Económica, 1996.

SILVA, Paulo Thadeu Gomes da. *Os direitos dos índios: fundamentalidade, paradoxos e colonialidades*. São Paulo: Café com Lei, 2015.

STAVENHAGEN, Rodolfo. Los derechos indígenas en el sistema internacional: un sujeto en construcción. *Revista IIDH - Instituto Interamericano de Derechos Humanos*, San José, n. 26, p. 81-103, jul./dic. 1997.

TOSI, Giuseppe. Guerra e direito no debate sobre a conquista da América (século XVI). *Verba Juris*: Anuário de Pós-Graduação em Direito, João Pessoa. v. 5, n. 5. p. 277-320, 2006.

VILLARES, Luiz Fernando. *Estado pluralista?: O reconhecimento da organização social e jurídica dos povos indígenas no Brasil*. 2013. Tese (Doutoramento) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2013.

VITORIA, Francisco de. *Relectiones: sobre os índios e sobre o poder civil*. Organização e Apresentação: José Carlos Brandi Aleixo. Prefácio: Antônio Augusto Cançado Trindade, Brasília: Universidade de Brasília, Fundação Alexandre de Gusmão, 2016.

WILLIAMS JR., Robert A. *The American Indian in western legal thought: the discourse of conquest*. Oxford: Oxford University Press, 1990.

Documents

AFRICAN UNION. African Court of Human and Peoples' Rights. *African Commission on Human and Peoples' rights v. Republic of Kenya*. Judgment of 26 May 2017. Available in: <<http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>>. Accessed in: 30 jun. 2017.

EUROPEAN PARLIAMENT. Plenary Session, Strasbourg, 9 Feb. 1994 – Eur. Parl. Doc. PV 58 (II), 1994.

INTERNATIONAL LABOUR ORGANIZATION. *Convention concerning indigenous and tribal peoples in independent countries*. Available in: <http://www.ilo.org/dyn/normlex/en/f?p=NORML EXPUB:12100:0::NO::P12100_ILO_CODE:C169>. Accessed in: 30 jun. 2017.

MINISTÉRIO DA EDUCAÇÃO. Documento Final da I Conferência de educação escolar indígena. Luiziânia-GO, de 16 a 20/11/2009. Disponível em: <http://www.educadores.diaadia.pr.gov.br/arquivos/File/pdf/deliberacoes_coneei.pdf>.

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Resolution 45/1994*. Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women. Available in: <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1994-45.doc>. Accessed in: 30 jun. 2017.

ORGANIZATION OF AMERICAN STATES. *American declaration on the rights of indigenous peoples*. Approved in June 15, 2016. Available in: <<http://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf>>. Accessed in: 30 jun. 2017.

_____. *Inter-American Court of Human Rights*. Case of the Saramaka people v. Suriname. Judgment of November 28, 2007. Available in: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf>. Accessed in: 30 jun. 2017.

_____. *Inter-American Commission on Human Rights* (26 Febr. 1997 - 133rd. session, 95th. regular session). O.A.S. Doc. OEA/Ser.L/V/II.95, Doc. 7, rev., 1996.

_____. *Report No. 44/15, Case 12.728*. Report on the merits. Xucuru indigenous people: Brazil. July 28, 2015. Available in: <<https://www.oas.org/en/iachr/decisions/court/2016/12728FondoEn.pdf>>. Accessed in: 30 jun. 2017.

UNITED NATIONS. *Declaration of principles on indigenous rights* (adopted by the Fourth General Assembly of the World Council of Indigenous Peoples, held in Panama, 1984). Reprinted as U.N. Doc. E/CN.4/1985/22, Annex 2, 1985.

UNITED NATIONS. *Declaration of principles on the rights of indigenous peoples* (Geneva, 1985). Reprinted as U.N. Doc. E/CN.4/Sub. 2/1987/22, Annex 5, 1987.

UNITED NATIONS. *Draft declaration of principles for the defense of the indigenous nations and peoples of the Western Hemisphere* (Geneva, 1977). Reprinted as U.N. Doc. E/CN.4/Sub.2/476/Add.5, Annex 4, 1981.

_____. *Resolution 45/64 (1990)*. Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects. Available in: <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/45/64>. Accessed in: 30 jun. 2017.

_____. *United Nations conference on environment and development: Rio de Janeiro, Brazil, 3 to 14 June 1992: Agenda 21*. June 1992. - 'Programme Area' / 'Basis for Action'. Available in: <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>>. Accessed in: 30 jun. 2017.

_____. *Committee on the elimination of racial discrimination*. 1235th. meeting. 18 Aug. 1997 (U.N. Doc. CERD/C/51/misc. 13/Rev. 4, 1997).

UNESCO Meeting of Experts on Ethno-Development and Ethnocide in Latin America, San José, 11 December 1981. UNESCO Doc. FS 82/WF.32, 1982.

