

# The United Nations Declaration on the Rights of Indigenous Peoples and the Protection of Indigenous Rights in Brazil

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## I. Introduction

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter UN Declaration) in September 2007<sup>1</sup> is the most recent and advanced result of the progressive efforts to establish an international regime for the protection of indigenous peoples in the last decades.<sup>2</sup>

Despite being nonbinding, the Declaration is intended to summarize the minimum standard of rights and principles, which are necessary to provide for indigenous peoples worldwide a life of physical and cultural integrity and autonomy. For this purpose, it combines established principles of international law, especially the ones already recognized in in-

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<sup>1</sup> A/RES/61/295 of 13 September 2007.

<sup>2</sup> For an overview of these endeavors see R. Wolfrum, *The Protection of Indigenous Peoples in International Law*, 1995.

ternational human rights instruments and in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO Convention No. 169),<sup>3</sup> with new formulas to better recognize the specific realities of indigenous peoples. One of the main innovations of the Declaration is the recognition of the legal personality of indigenous peoples, and the respective entitlement of collective and individual rights, as well as the right to self-determination. It is hoped that the Declaration will build the basis for a more “harmonious and cooperative” relation between states and their indigenous peoples in the accommodation of these peoples’ rights. Although there was a large consensus<sup>4</sup> on the general content of the Declaration, ensuring its implementation within the states will be the challenge for the next years.

One of the states which took an active part in the discussions and elaboration of the Declaration was Brazil. The establishment of international principles regarding indigenous peoples indeed concerns this country, whose population includes more than 460,000 indigenous people, gathered in 225 societies and speaking about 180 languages and dialects.<sup>5</sup> Until the adoption of the Brazilian Constitution of 1988, this population was officially treated from the perspective of its necessary assimilation and integration in the “developed” society. Indigenous groups’ conditions were so far only dealt with in the Statute of the Indian, a Federal Law enacted in 1973,<sup>6</sup> which ruled the progressive process of “civilization” under the tutelage of a specific federal organ, the National Foundation for Indigenous Affairs (FUNAI), until the final integration in the “developed” society.<sup>7</sup> This approach was officially abandoned in the Constitution of 1988, which recognizes the diversity within the national society and grants to indigenous groups and their members a variety of special individual and collective rights for the protection and promotion of their distinct identity and habitat.

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<sup>3</sup> *ILM* 28 (1989), 1382 et seq.

<sup>4</sup> The UN Declaration was adopted with 143 votes in favor, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa, Ukraine).

<sup>5</sup> Information provided by FUNAI see under <[www.funai.gov.br](http://www.funai.gov.br)>. The organ takes into account solely the individuals living in indigenous territories but stresses the existence of up to 190,000 indigenous living in the cities and other 62 references of isolated or not-contacted individuals and groups.

<sup>6</sup> Federal Law No. 6.001 of 19 December 1973.

<sup>7</sup> Especially in arts 1 to 11 of the Statute. For an overview on this tutelage, see H.G. Barreto, *Direitos Indígenas: Vetores Constitucionais*, 2004, 38-43.

Since then, policies regarding the indigenous population in Brazil have oscillated between the development of special measures for the guarantee of their constitutional rights, and compliance with national and private interests affected by the recognition of these rights.

In 2002, Brazil ratified the ILO Convention No. 169.<sup>8</sup> Five years later, just after the adoption of the Declaration by the General Assembly, Brazil announced the so-called “Social Agenda for the Indigenous Peoples in Brazil”<sup>9</sup> which will be implemented between the years 2008 and 2010. This initiative consists of inter-ministerial measures for the amelioration and enforcement of indigenous rights in the context of three central goals: protection of indigenous territories; general promotion of their cultures; improvement of their quality of life. The demarcation of about 127 indigenous territories and the proper accommodation of the non-indigenous population currently living therein is planned. Furthermore, there are also measures to combat environmental degradation in different areas (about 10.000 ha) that are considered to be of major importance for the life of indigenous communities. The general promotion of their cultures will entail the documentation and strengthening of indigenous languages, especially of the 20 or so native dialects which are in danger of extinction. It also embraces the delineation of further programs and activities aimed at the development of the self-sustainability of indigenous territories. Finally, the proposals regarding the improvement of the quality of life of indigenous peoples stress the improvement of access to and documentation of information on different aspects of the indigenous peoples’ living conditions, the extension of state’s social programs to urban indigenous populations, and several measures to provide better infra-structure in indigenous territories and its adjacent areas.<sup>10</sup>

The measures announced raise the question of the commitment of Brazil to the international body of rights and principles regarding indigenous peoples in general and the Declaration in particular. In this context, this article is intended to outline the position of the protection and promotion of indigenous peoples’ rights in Brazil. For this purpose, an overview of the main issues addressed in the Declaration as well as a description of their treatment under the Brazilian domestic le-

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<sup>8</sup> On 25 July 2002.

<sup>9</sup> <[http://www.presidencia.gov.br/noticias/ultimas\\_noticias/lula\\_indigena070921](http://www.presidencia.gov.br/noticias/ultimas_noticias/lula_indigena070921)>, *Agenda Social para os Povos Indígenas*.

<sup>10</sup> For example, improvement of the roads, in the water supply and sanitation for a general increase of the hygiene within the communities.

gal system and policy-making will be provided. The economic, political and social conflicts that arise from the recognition of indigenous rights in Brazil will then be highlighted. Finally an analysis of the Brazilian experience will provide examples of the challenges that may accompany the achievement and enforcement of the principles recognized in the Declaration which may also be encountered by other states.

## II. Indigenous Peoples and Individuals – Definition and Membership under the Declaration

The most leading and innovative notion of the UN Declaration is the recognition of the legal personality of indigenous peoples and the right to self-determination.<sup>11</sup> This is expressed in the preamble as well as in the text of the Declaration,<sup>12</sup> which sets the background against which the specific individual and collective framework rights accorded in the document must be interpreted and are to be implemented. The Declaration, however, does not offer a definition of the term “indigenous peoples”.<sup>13</sup> This question was indeed a contentious issue during the drafting of the text. The absence of a definition reflects on the one hand, the difficulties met in formulating a common, far-reaching and flexible notion, suitable to the different realities of the various indigenous com-

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<sup>11</sup> ILO Convention No. 169 also used the expression “peoples”, but does not stipulate a right to self-determination, see article 1, para. 3.

<sup>12</sup> Para. 2 of the Preamble 2 reads, “Affirming that indigenous peoples are equal to all other peoples ...”. Article 2 of the Declaration also states, “Indigenous peoples and individuals are free and equal to all other peoples and individuals ...”.

<sup>13</sup> In contrast, the ILO Convention No. 169 contains a definition of both tribal and indigenous peoples. According to it, tribal peoples are peoples “whose social, cultural and economic conditions distinguish them from other sectors of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations” (article 1, para. 1 lit. a.). Indigenous peoples are defined as “peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their social, economic, cultural and political institutions” (article 1, para. 1 lit. b.).

munities throughout the world.<sup>14</sup> On the other hand, the silence of the Declaration in this regard may be interpreted as a deliberate option and mark of respect for the criterion of self-identification<sup>15</sup> “as an essential aspect of individual and group freedom”,<sup>16</sup> an aspect of self-determination.

The self-identification perspective is highlighted in the Declaration by two different provisions and rights: the right of indigenous individuals and peoples to belong to an indigenous community,<sup>17</sup> and the parallel right of indigenous peoples to determine their own identity or membership, in accordance with their customs and traditions.<sup>18</sup> Together, these provisions suggest that the Declaration places the individual choice under the condition of a collective element, namely the necessary recognition of individual membership by the community. The somewhat “excessive” collective approach of the Declaration in this regard has been highlighted by representatives of various states and scholars<sup>19</sup> as a potential tool to foster group pressures or denial of individual rights.<sup>20</sup> Against this prognosis, article 1<sup>21</sup> could, nonetheless, represent a general guarantee of protection, as indigenous peoples have a right to the full enjoyment, collectively or as individuals, to all human rights

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<sup>14</sup> See B. Kingsbury, “‘Indigenous Peoples’ in International Law a constructivist approach to the Asian Controversy”, *AJIL* 92 (1998), 414 et seq. See also the Working Paper prepared by the Chairperson-Rapporteur, on the concept of indigenous peoples, Doc. E/CN.4/Sub.2/AC.4/1996/2, paras 9 and 72.

<sup>15</sup> The self-identification criterion has also been addressed in the ILO Convention No. 169 as a “fundamental criterion” (article 1, para. 2) and in different discussions within the Committee on the Elimination of Racial Discrimination (CERD).

<sup>16</sup> See P. Thornberry, *Indigenous Peoples and Human Rights*, 2002, 15.

<sup>17</sup> Article 9 of the Declaration.

<sup>18</sup> Article 33, para. 1, *ibid.*

<sup>19</sup> See A. Xanthaki, *Indigenous Rights and UN Standards*, 2007, 105.

<sup>20</sup> For an overview on the conflicts between group rights and individual protection, see N. Wenzel, *Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht*, 2008.

<sup>21</sup> Article 1 of the Declaration establishes, “Indigenous peoples have the right of full enjoyment, as a collective or as 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”.

recognized in the UN Charter, the Universal Declaration of Human Rights and international human rights law.

The absence of a definition which is followed by a more concrete identification of the bearers of the established rights does not, however, determine a complete openness of the document.<sup>22</sup> According to the system of the framework delineated in the Declaration, individuals and peoples are called to identify themselves as indigenous once they display “specific features as to their organization, political and economic institutions, culture, beliefs, customs and language, other than those of the dominant society,” and further share “a common experience of marginalization and discrimination deeply rooted in historical events”.<sup>23</sup> Furthermore, their cultural identity shall be based on traditional experiences and ways of life, and on the close linkage to traditional lands and resources, which is also a very central concept in the document.

This latter aspect of the intrinsic notion on “indigenous peoples” in the Declaration, namely the close relationship between traditional practices and habitat, requires some further clarification. The Declaration also expressly recognizes the indigenous peoples’ right to development, according to their own needs and interests.<sup>24</sup> Besides that, the text calls for minimum standards of dignity and equality in the exercise of ordinary extra-communal activities, which are also open to individual peoples and are a matter of choice.<sup>25</sup> In this sense, the Declaration also to

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<sup>22</sup> Thornberry, see note 16, 376. The openness could raise the possibility of a variety of peoples benefiting from its provisions.

<sup>23</sup> S. Errico, “The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview”, *Human Rights Law Review* 7 (2007), 741 et seq. (746).

<sup>24</sup> This right can be recognized mainly in article 3, which establishes the indigenous peoples’ right to “freely determine their political status and freely pursue their economic, social and cultural development”. Similar provisions are found in article 11 (“past, present and future manifestations of their cultures”), article 23 (“right to determine and develop priorities and strategies for exercising their right to development”), article 34 (right to “promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions”), e.g.

<sup>25</sup> For example, in article 15 (indigenous peoples’ right of dignity and diversity in the state’s education and public information system); article 17 (indigenous individuals’ and peoples’ right to enjoy the rights established under domestic labor law); article 21 (indigenous peoples’ right to the improvement of their economic and social conditions, in the areas of education, employment, (...) health and social security); article 6 (indigenous individual’s right to obtain citizenship of the states in which they live), e.g.

some extent embraces those individuals and groups who have undergone cultural developments or processes of deviation from their original backgrounds.<sup>26</sup> In other words, although the specific rights and guarantees established in the document broadly address the protection of indigenous traditional cultures and way of life, they may also be applied – in a manner compatible to their needs – to indigenous groups and individuals who, for some reason, do not share the traditional life anymore.<sup>27</sup>

The use of the terminology concerning indigenous peoples and the definition of these individuals is also a significant aspect of the treatment of their rights in Brazil. The expressions used in the respective documents reveal the evolving conceptual framework in which indigenous reality has been approached. The Brazilian Constitution does not refer to indigenous communities as “peoples”. It does recognize and highlight the special value of indigenous cultures, as well as their *original* right to traditional lands, and provides them with individual and collective rights, but always referring to them as “communities”,<sup>28</sup> “groups”<sup>29</sup> or simply “population”.<sup>30</sup> Reference to “peoples” in the Constitution of 1988 is mainly made in the context of article 4, which stipulates the principles that shall lead Brazil’s international relations: *inter alia*, the self-determination of the peoples.<sup>31</sup> The term “peoples” is, thus, still closely linked to the right to self-determination in the original context of sovereignty and decolonization and, therefore, it is not considered to apply to the indigenous reality. In line with this consideration, Brazil was one of the states that manifested hesitation as to the use of the term “indigenous peoples” in the drafting works of the UN Declaration.<sup>32</sup> Still the wording of the Constitution of 1988 does represent a significant step forward in the treatment of the indigenous

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<sup>26</sup> Amongst these individuals and groups, one can mention “groups undergoing processes of cultural adaptation or development” or others “who suffered cultural diffusion, acculturation, depletion on resources and habitat and who therefore may feel indigenous by self-identification rather than through attachment to a traditional community”, Thornberry, see note 16, 377.

<sup>27</sup> On this topic, *id.*, 376-378. See also Xanthaki, see note 19, 106.

<sup>28</sup> Article 210, para. 2 of the Constitution.

<sup>29</sup> Article 231, para. 5, *ibid.*

<sup>30</sup> Article 22, XIV and article 129, V, *ibid.*

<sup>31</sup> Article 4, III, *ibid.*

<sup>32</sup> See R.L. Barsch, “Indigenous Peoples and the UN Commission on Human Rights”, *HRQ* 18 (1996), 782 et seq. (796).

issue and in the recognition of their identity. It left behind former degrading constitutional expressions such as “wild”, “forest inhabitants” and “sylvan”<sup>33</sup> and, thereby, it laid the first basis for the overcoming of the evolutionist and integrationist approaches that characterized the former constitutional and legal documents in Brazil.

Like the UN Declaration, the Brazilian Constitution does not offer a definition of the individuals and groups entitled to the specific rights. A definition is only provided by the Statute of the Indian, which formally introduced the self-identification criterion.<sup>34</sup> In this document, self-identification is described in a very similar way as in the UN Declaration: the recognition of a person as *Índio* (beside the required “pre-Colombian ancestry”) shall be achieved through an individual self-declaration, accompanied by the collective recognition of the membership by the ethnic group concerned. Brazilian legislation and policies in regard to the indigenous population have been developed and implemented on the basis of this twofold self-identification. This is the official criterion used by FUNAI<sup>35</sup> when proceeding with the registration of these peoples, the recognition of indigenous communities, or the identification of traditional lands. Once registered and identified by FUNAI under this criterion, indigenous individuals may then have access to the specific state policies and to the specific rights provided to them. However, although the use of the self-identification momentum does not provoke controversy in Brazil, the manner in which it is employed leads to incoherence and to cases of factual denial of rights, since it binds (or submits) in a too strict manner the individual choice to the group perception.

Taking into account mainly the individuals who maintained a closer relation to their ethnic group and to a traditional way of life, FUNAI recognizes nowadays the existence of about 460,000 indigenous indi-

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<sup>33</sup> See, for example, The Constitution of 1934 (article 5, XIX, m., and 129), the Constitution of 1967 (article 8, VXII, o. and 186), the Constitution of 1969 (article 198 and article 4, IV).

<sup>34</sup> See article 3 of Federal Law 6.001 of 19 December 1973.

<sup>35</sup> This organ officially uses the definition expressed by the Brazilian anthropologist Darcy Ribeiro, according to which *Índio* is every individual who is recognized as a member by a pre-Colombian community that identifies itself as ethnically diverse from the national community. See under <[www.funai.gov.br](http://www.funai.gov.br)>.



viduals in Brazil<sup>36</sup> and restricts its policies to these individuals. In contrast, however, the last census of the Brazilian population of 2000 pointed to the existence of more than 730,000 indigenous individuals in Brazil,<sup>37</sup> a number that relies solely on the individual aspect of self-identification. It includes those individuals who left their traditional communities and migrated to the cities, looking for a better way of life.

This contrast reveals the two problems of the self-identification approach. On the one hand, self-declared indigenous individuals living in the city are often immediately rejected by the original communities, and since they do not rely on the group support and recognition, they are not included in administrative measures regarding the improvement of indigenous groups' lives in Brazil.<sup>38</sup> On the other hand, as the identification approach used by the state organs is strictly bound to indigenous life in traditional territories, the enjoyment of indigenous special constitutional rights has also been denied to entire indigenous groups which developed a communal life in urban areas.<sup>39</sup>

While the individual and communal self-identification criterion stressed by the UN Declaration and also by the Statute of the Indian in Brazil can be an important instrument for the preservation of indigenous peoples' identity, the domestic implementation of these principles must take into account the specific historical and social circumstances of each state and of the groups under consideration.<sup>40</sup>

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<sup>36</sup> Information see under <[www.funai.gov.br](http://www.funai.gov.br)>. The organ highlights that the number concerns those individuals living within their communities in their traditional lands.

<sup>37</sup> <[http://www.ibge.gov.br/home/estatistica/populacao/censo2000/populacao/cor\\_raca\\_Censo2000.pdf](http://www.ibge.gov.br/home/estatistica/populacao/censo2000/populacao/cor_raca_Censo2000.pdf)>.

<sup>38</sup> A detailed study shows the "double-exclusion" (exercised by the original groups, on the one hand, and also by the other national citizens in the cities, on the other hand) suffered by indigenous individuals of the groups Guarani and Kaiowá living in the cities in Mato Grosso do Sul and the consequent denial of the most basic rights to these individuals. See <[http://www.sociologia.ufsc.br/npms/jose\\_maria\\_trajano\\_vieira.pdf](http://www.sociologia.ufsc.br/npms/jose_maria_trajano_vieira.pdf)>.

<sup>39</sup> The same study addresses the situation of entire groups of indigenous Kaiowá and Guarani which for the sole reason of living in the cities, in the words of the official organs "outside of their lands", are not included in the assistance programs of the government, *ibid.*, 411.

<sup>40</sup> The tension between the preservation of the groups' identity and individual interests is well-known in the discussions within international bodies. Remarkable is the case *Sandra Lovelace v. Canada* addressed by the Human

### III. Indigenous Peoples' Right to Self-Determination under the Declaration

One of the most significant outcomes of the UN Declaration is the recognition of the right to self-determination. The inclusion of an express provision on this issue in the document was one of the main controversial items during the drafting process<sup>41</sup> since it touches upon very fundamental concepts for both indigenous communities and states.<sup>42</sup> Also the representative of Brazil expressed the problems of the government with a reference to the right to self-determination in the context of the draft Declaration.<sup>43</sup> Nevertheless, the final text of the Declaration assembles a variety of provisions, which, directly and indirectly, declare the indigenous peoples' right to self-determination and also delineate its scope.

The primary provision of this right – article 3<sup>44</sup> – offers merely the starting point for the comprehension of the content of “self-determination” under the Declaration. It establishes an “unqualified” right at first sight, which makes no reference to the principle of the state's territorial integrity or political unity, in contrast to other international instruments dealing with similar issues.<sup>45</sup> Nevertheless, article 46 clarifies its scope, determining a general interpretation principle, according to which:

“Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would *dismem-*

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Rights Committee, Communication No. 24/1997, *Yearbook of the Human Rights Committee 1981-1982*, Vol. II., Annex XVIII, 320 et seq.

<sup>41</sup> For an overview on this debate, see the reports of the Working Group on Indigenous Populations. Also Thornberry, see note 16, 382-385.

<sup>42</sup> See, for example, discussions on article 3 within the Working Group on Indigenous Populations on the Draft Declaration, Doc. E/CN.4/2004/81.

<sup>43</sup> See the report of the Working Group on Indigenous Populations, Doc. E/CN.4/1997/102 of 10 December 1996, para. 334.

<sup>44</sup> Article 3, “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

<sup>45</sup> Cf. also the wording of article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

*ber or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”*. (emphasis added)<sup>46</sup>

Irrespective of these clear statements, considered necessary by many states, a systematic analysis of the Declaration would lead to the conclusion that the exercise of the indigenous peoples’ right to self-determination, in the manner described in the document, presupposes the context of a life *within* the framework of a state.<sup>47</sup> No provision in the text suggests a right to secession, or the so-called right to external self-determination. The content of the specific indigenous peoples’ right to self-determination set by the Declaration<sup>48</sup> establishes, first, “qualitative standards”<sup>49</sup> to be achieved especially under two premises: indigenous peoples’ self-government and political participation. These are the notions that merge indigenous and states’ concerns into one convergent notion of self-determination, better understood against the problematic background of internal governance and coexistence of various (and equal) groups within the state.

The first facet of the exercise of self-determination in the Declaration – the indigenous peoples’ right to autonomy or self-government – is expressly established in article 4.<sup>50</sup> The content of this article is fur-

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<sup>46</sup> This provision was added just before the Declaration was adopted by the General Assembly. The President of the 61st Sess. appointed a “facilitator” entitled to lead further consultations on the draft Declaration (June 2007). The rationale of this provision is also expressed in the Preamble which reinforces the link between the right to self-determination in the Declaration and the framework of international law (see paras 16 and 17 of the Preamble).

<sup>47</sup> Article 33 highlights the idea of indigenous peoples’ “citizenship” of the states in which they live. According to Errico, the right to self-determination would imply a “constitutional formula” to accommodate indigenous aspirations, see note 23, 749.

<sup>48</sup> See S.J. Anaya, *Indigenous Peoples in International Law*, 2004, 97-128. See also J. Gilbert, “Indigenous Rights in the Making: the United Nations Declaration on the Rights of Indigenous Peoples”, *International Journal on Minority and Group Rights* 14 (2007) 207 et seq. (219-220).

<sup>49</sup> See A. Quentin-Baxter’s commentary on S.J. Anaya’s position in “The UN Draft Declaration on the Rights of Indigenous Peoples – The International and Constitutional Law Contexts”, *Law Review/Victoria University of Wellington* 29 (1999), 1 et seq. (91).

<sup>50</sup> Article 4 reads, “Indigenous peoples in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”.

ther clarified by other provisions in the document. Accordingly, the right to autonomy entitles indigenous peoples to freely determine, “in matters relating to their internal and local affairs”,<sup>51</sup> the ways to maintain, develop and exercise the various features of their identity. For this purpose, indigenous peoples have the right to develop and enjoy their own political, legal, economic, social and cultural institutions,<sup>52</sup> and “ways and means for financing their autonomous functions”,<sup>53</sup> always “in accordance with international human rights standards”.<sup>54</sup> This right includes, the right “to establish and control their (indigenous) educational systems”,<sup>55</sup> the right “to maintain their health practices”,<sup>56</sup> the right “to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development”,<sup>57</sup> *inter alia*.<sup>58</sup> Practiced under these terms, indigenous peoples’ autonomy would be possible in the context of a “multicultural state”, where dialogue and negotiation, also required by the Declaration, would offer the solid ground for its development.<sup>59</sup>

The Declaration, however, does not intend to place indigenous peoples in social or political isolation and vulnerability.<sup>60</sup> On the contrary, besides being entitled to self-government, indigenous peoples enjoy the

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<sup>51</sup> Article 4 of the Declaration.

<sup>52</sup> Article 5, *ibid*.

<sup>53</sup> Article 4.

<sup>54</sup> Article 34, *ibid*.

<sup>55</sup> Article 14, *ibid*.

<sup>56</sup> Article 24, *ibid*.

<sup>57</sup> Article 20, para. 1, *ibid*.

<sup>58</sup> Although the concept of indigenous autonomy also includes a notion of cultural autonomy, these rights are better to understood in the broader concept of “cultural diversity” and of cultural rights.

<sup>59</sup> S. Errico reminds us that the concrete realization of “autonomy” can only be assessed in a case-by-case perspective. She mentions “the establishment of the Sami Parliaments in the Nordic countries, the arrangement for the *comarca* in Panama, the creation of the autonomous region of Nunavut in Canada and the self-governing territory of Greenland in Denmark”, see note 23, 749. See also E.A. Daes, “The Concept of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples”, *St. Thomas Law Review* 14 (2001), 259 et seq. (268); and S.J. Anaya, “International Human Rights and Indigenous Peoples: The Move toward the Multicultural State”, *Arizona Journal of International and Comparative Law* 21 (2004), 1 et seq. (13-61).

<sup>60</sup> See Daes, see above.

right to participate “fully, if they so choose, in the political, economic, social and cultural life of the State”.<sup>61</sup> This wording suggests that the self-government is not an imposition.<sup>62</sup> Indigenous groups might also determine the extent of their integration in the life of the state, taking into account the dynamism and the necessity of preservation of their own identity. This approach can play a significant role in countries like Brazil, where some indigenous groups still choose to live in isolation.<sup>63</sup>

As well as being protected from discrimination within the society of a state, indigenous peoples may, according to the Declaration, effectively participate in the decision-making process affecting their interests and rights.<sup>64</sup> This political participation constitutes the second aspect stemming from the right to self-determination. It might be exercised “through representatives chosen by themselves in accordance with their own procedures ...”.<sup>65</sup> Moreover, the political participation includes the indigenous peoples’ right to “free, prior and informed consent”, to be obtained by states “before adopting and implementing legislative or administrative measures that may affect them”.<sup>66</sup>

The hesitation of the Brazilian government in according such broad political rights to indigenous peoples was expressed by the formulations suggested by the representative of Brazil in order to guarantee participation “in the discussion of legislative and administrative measures that may affect them”.<sup>67</sup> Although participation in the decision-making and

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<sup>61</sup> Article 5 of the Declaration.

<sup>62</sup> It has been stressed, however, that the wording of the Declaration, as establishing for indigenous communities the possibility to participate in the framework of the state “if they so choose”, is weak and diminishes this right. For this kind of argumentation, see Errico, see note 23, 751.

<sup>63</sup> Nowadays there are references to about 63 indigenous groups living in isolation in Brazil. Further information see under <[www.funai.gov.br](http://www.funai.gov.br)>. One of these groups was discovered recently, in May 2008, living at the Brazilian border to Peru. Documentation and photographs were provided by officials of FUNAI.

<sup>64</sup> The issue of indigenous previous consent was also stressed by the Committee on the Elimination of Racial Discrimination in its General Recommendation XXIII on Indigenous Peoples, Doc. CERD/C/365 of 11 February 1999.

<sup>65</sup> Article 18 of the Declaration.

<sup>66</sup> Article 19, *ibid.*

<sup>67</sup> See the report of the Working Group on Indigenous Populations Doc. E/CN.4/1997/102, para. 214.

consultation appear in various provisions of the Declaration,<sup>68</sup> it is debatable whether they could really promote indigenous interests. Concern has been expressed in relation to states in which decisions are taken by a majority (and indigenous peoples constitute a minority), or where decisions are taken through imperfect democratic processes.<sup>69</sup> Nevertheless, the Declaration makes perfectly clear that policies or legislation adopted on the basis of mere consultation could no longer fulfill the international standards accorded in regard to indigenous peoples' rights.

Any discussion about the status of indigenous groups and individuals in Brazil must consider the fact that the Constitution of 1988 does not officially declare Brazil a multicultural state. Still some constitutional provisions address the diversity of the Brazilian population.<sup>70</sup> But a clear recognition of Brazil as a state constituted by different independent cultures and peoples, which are to live in autonomy and equality, cannot be found in the text. In this context, indigenous groups are treated as "ethnically differentiated groups within the national society",<sup>71</sup> which are entitled to special rights rooted in the history of deprivations suffered by them and in the correlated necessity of guaranteeing them the enjoyment of the most basic fundamental rights and physical and cultural integrity.

For a long time, the policies regarding indigenous rights were centralized by FUNAI, which developed national strategies and represented - whether judicially or extra-judicially - these peoples in all matters related to them.<sup>72</sup> It decided, in general, about the groups' way of life, development and integration in the evolving society. Since the adoption of the Constitution of 1988, the indigenous population is gradually managing to influence the delineation of its destiny. This process is the result of correlated aspects: the development of international parameters and principles regarding indigenous rights, the paral-

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<sup>68</sup> See arts 10, 11, 18, 19, 29, 32 of the Declaration. One should note that the majority of these provisions deals solely with the right to be consulted.

<sup>69</sup> In this regard, Quentin-Baxter, see note 49, 95.

<sup>70</sup> For example, article 215, para. 1 ("groups participating in the national civilization process") and para. 2 ("various national ethnic segments"), and article 216 ("various groups that form the Brazilian society").

<sup>71</sup> As stressed by the representative of Brazil during the discussions about indigenous land rights in the drafting works of the Declaration, see report of the Working Group on Indigenous Populations Doc. E/CN.4/Sub.2/1997/14, topic B, para. 2.

<sup>72</sup> Article 35 of the Statute of the Indian of 1973.

lel abandonment of the integrationist approach in the domestic legislation and the decentralization of the policies thereto, and the indigenous groups' progressive awareness of their rights, which has been supported by several national and international organizations. Nowadays, indigenous peoples in Brazil have achieved stronger levels of organization and participation in the debates on the recognition and implementation of their self-defined interests.<sup>73</sup> They have also exercised more and more their capacity recognized by the Constitution of 1988 to defend their rights before the national courts.<sup>74</sup>

Despite these developments, indigenous peoples remain subject to national legislation and policies that still incline to other forces and interests in power. The recognition of indigenous institutions, for example educational ones, has been set forth within the broader system defined by state authorities and according to state's federal and local strategies. Indigenous peoples internal organization and customs are generally recognized in the Constitution as elements of their identity, but innumerable interferences and limitations are still imposed in the name of "national interest". Thus as a result of their resistance indigenous interests are taken into consideration in the context but not on the basis of a concrete and equal political participation or autonomy. The legislative power does not count on a permanent representation of these peoples, which could be accessed for issues relating to them. Achievements can be observed in the public discussions with representatives of these groups, organized, however, as associations and organizations, not as representatives of the peoples.

The Social Agenda is another example of measures that are being conducted according to the state's unilateral interpretation of indigenous peoples' interests. The central critics of these initiatives expressed by indigenous communities stress exactly the lack of their participation

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<sup>73</sup> For an overview of the indigenous organizations in Brazil, see under <<http://www.socioambiental.org/pib/portugues/org/quadroorg.shtm>>.

<sup>74</sup> Article 232 of the Constitution establishes that, "The Indians, their communities and organizations have standing under the law to sue and to defend their rights and interests, the Public Prosecution intervening in all the procedural acts". For an overview of the protection of indigenous rights in the national tribunals, see A.V. Araújo (ed.), *A Defesa Dos Direitos Indígenas no Judiciário*, 1995. See also L.M. Maia, "Comunidades e Organizações Indígenas. Natureza Jurídica, Legitimidade Processual e Outros Aspectos", in: J. Santilli (ed.), *Os Direitos Indígenas e A Constituição*, 1993, 251-293.

in the definition of such strategies, which, in many cases, are not welcomed by the communities concerned.<sup>75</sup>

Recently e.g., the idea of the establishment of an indigenous parliament in Brazil has been discussed.<sup>76</sup> This parliament would have a similar power as the Houses of the National Congress and would work and decide in all matters regarding the broader indigenous interests. This still embryonic idea summarizes indigenous peoples' claims to autonomy and political participation in Brazil. It seems, however, that other questions regarding very basic rights, which even include the still dubious indigenous individuals' civil autonomy are still hampered by the tutelage imposed by the state for so many years,<sup>77</sup> and must be clarified

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<sup>75</sup> This criticism was evidenced in the words of the Yanomami leader Davi Kopenawa when the PAC Social was announced in the indigenous community of Sao Gabriel da Cachoeira. According to him, "the government didn't really explain the project, it is not clear to me. He [the President of the Republic] only talks about construction projects and we don't want constructions or buildings in our lands. The government didn't invite the indigenous peoples or institutions that work with us to discuss this project. That's why I am worried. This same project that wants to protect us knocks against the other project of Senator Romero Jucá, which wants to destroy our lands with mining activities". On the same occasion, the representative of the indigenous organization stressed, "What is not clear for us is how this program will be implemented, who will be the responsible, what kind of involvement we will have".

<sup>76</sup> This idea was addressed, for example, in the Final Document elaborated by indigenous representatives on the occasion of the last National Conference of Indigenous Peoples, which took place in April 2006 (see No. 6 of the Final Document).

<sup>77</sup> The former Brazilian civil code of 1916 (Federal Law 3.071) classified indigenous individuals (the "sylvan") as incapable of contracting (article 6, III) and subjected them to the tutelage exercised by the federal Indian Organ, the FUNAI (article 6 and Law 6.001/1973 – Statute of the Indian – article 7, para. 2). According to this system, any legal act practiced by a non-integrated Indian without the assistance of FUNAI would be considered null and void (article 8 of the Statute of the Indian). The tutelage should be exercised until the total civilization of every indigenous individual and his integration in the Brazilian society. The Brazilian Civil Code of 1916 remained in force until 2003, when the Federal Law 10.406 of 2002 entered into force and revoked the former document. According to the current Brazilian Civil Code, the legal capacity of the indigenous shall be regulated in special legislation (article 4). This legislation, however, has not been adopted yet. All legislative projects regarding the elaboration of a new Indian Statute address the issue, but they remain in process of discussion in



before further achievements regarding the status of indigenous groups in Brazil can be properly assessed. Meanwhile, the protection and promotion of indigenous groups (and of their members) in Brazil is restricted to the recognition of specific rights.

#### IV. Indigenous Peoples' Specific Rights

Amongst the various rights recognized to indigenous peoples in the UN Declaration, the right to traditional lands and resources and cultural rights are the most significant ones as they include the broad concept of indigenous peoples' identity.

##### 1. Indigenous Peoples' Rights to Land and Resources

The UN Declaration's provisions regarding indigenous peoples' rights to land and resources reflect a certain consensus as to the special relationship of these peoples to the traditional lands. The text delineates a broad right,<sup>78</sup> which includes lands, territories and resources which indigenous peoples have traditionally owned, occupied or otherwise used or acquired (article 26). They have the right "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired".<sup>79</sup> No further definitions of the lands, territories and resources considered thereto are offered by the document. The only further reference is "that they possess by rea-

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the National Congress. It is worthy to highlight that the Statute of the Indian of 1973 has not yet been formally revoked. This brings uncertainties and insecurity as regards the scope of the recognition of indigenous individuals' legal capacity in the Brazilian legal system. See P.A. Silva, "Incapacidade civil relativa e tutela do índio", in: S. Coelho dos Santos (ed.), *O Índio perante o Direito*, Universidade Federal de Santa Catarina, 1987, 61-88.

<sup>78</sup> The right to traditional lands and resources is mainly established in arts 25 to 30 of the Declaration. But other provisions, like arts 8, 10, an 32 also stress and reinforce this right.

<sup>79</sup> Article 26, para. 2 of the UN Declaration.

son of traditional ownership or other traditional occupation or use”.<sup>80</sup> Nevertheless, significant principles have been set and shall guide the specific treatment of these rights at both the international and domestic level.

The Declaration covers the fundamental connection between traditional lands and resources and the enjoyment of other human rights and freedoms by indigenous peoples. The approach used in the document highlights the indispensability of land rights to the indigenous cultural autonomy and to the very existence of these peoples.<sup>81</sup> In this line of consideration, the land rights also encompass the right of environmental conservation and the exercise of (collective) environmental management, which shall be supported by state assistance programs in order to guarantee the rights of future generations.<sup>82</sup> The collective nature of the rights concerned is highlighted,<sup>83</sup> in accordance with the special mean-

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<sup>80</sup> Article 26, para. 2 of the UN Declaration. In this provision, the Declaration suggests that the right concerns the lands that indigenous peoples currently possess, cf. Thornberry, see note 16, 393.

<sup>81</sup> Many provisions of the Preamble as well as operational ones reflect this notion. Amongst the most significant ones, para. 7 of the Preamble defines the land rights as “inherent rights” of indigenous peoples, which have an essential relation to these peoples’ collective structures and to their cultures. Following the same concept, article 8 links the dispossession of traditional lands, territories or resources to the destruction of indigenous peoples’ culture. Finally, article 25 expressly addresses the “spiritual relationship” of indigenous peoples with their lands, territories and resources. Under this approach, indigenous lands rights could also be interpreted as an element of indigenous peoples’ self-determination. In this respect, see E. Gayim, *The UN Draft Declaration on Indigenous Peoples: Assessment of the Draft Prepared by the Working Group on Indigenous Populations*, 1994, 53. The deep spiritual relationship between indigenous peoples and their lands was stressed by the UN Special Rapporteur on the Problem of Discrimination against Indigenous Populations, José Martínez Cobo, in his first report, see Errico, see note 23, 753.

<sup>82</sup> Article 29 paras 1 and 2 of the UN Declaration.

<sup>83</sup> The recognition of collective rights on traditional lands was one of the controversial issues in the drafting works, mainly in regard to a consequent broader control by the natives over these lands and resources. See J. Gilbert, “Indigenous Rights in the Making: the United Nations Declaration on the Rights of Indigenous Peoples”, *International Journal on Minority and Group Rights* 14 (2007), 207 et seq. (223-226). The collective approach becomes clear in the wording of these rights, which are in all cases granted to “indigenous peoples” in the text of the Declaration.

ing of traditional lands for the well-being and the continuity of the indigenous groups as a whole. Regarding the implementation of the rights established in the Declaration, states are merely called upon to give “legal recognition and protection to these lands, territories and resources.”<sup>84</sup> The particular means of enforcement must respect the “customs, traditions and land tenure systems of the indigenous peoples concerned”<sup>85</sup> and the establishment of processes characterized by direct participation of these peoples.<sup>86</sup> Moreover, it is incumbent upon states to guarantee the (innovative) indigenous peoples’ right to redress,<sup>87</sup> which aims to rectify and to remediate historical deprivations.

Although the UN Declaration contributes not only to the enhancement but also to the further development of indigenous peoples’ rights to traditional lands and resources, some of its provisions reveal the still highly controversial character of these rights. For example, the weak formulation of article 32 raises concerns. According to this, there does exist the right to determine and develop priorities and strategies for the development or use of their lands or territories or their resources. But according to article 32, para. 2:

“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*”. (emphasis added)<sup>88</sup>

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<sup>84</sup> Article 26, para. 3 of the UN Declaration. Such a general request combines with the Preamble the assertion that each indigenous people and each country retain specific features, which must be taken into account (para. 23 of the Preamble). It is noteworthy that no provision in the Declaration stipulates the responsibility of states to define and demarcate the traditional lands.

<sup>85</sup> Article 26, para. 3 of the UN Declaration.

<sup>86</sup> Article 27, *ibid.*

<sup>87</sup> Article 28, *ibid.* The restitution of the traditional lands “which have been confiscated, taken, occupied, used or damaged” without prior consent is suggested as the first mechanism to achieve redress. When restitution is not possible, however, other ways of “fair and equitable compensation” are to be established (article 28, para. 1). See Gilbert in the sense that restitution is preferable because “land ownership is not merely a source of individual economic security but the core of indigenous cultures and religions”, see note 83, 228.

<sup>88</sup> See article 32, para. 2.

These regresses are corroborated by the rejection of certain formulations by states' representatives during the drafting process in order to avoid indigenous peoples' ownership rights. Clear examples of this are the exclusion of peoples express rights to sub-surface resources,<sup>89</sup> as well as the exclusion of the word "their" before "resources" in article 32, para. 2 from the draft.<sup>90</sup> The former allows the conclusion that only surface resources are covered when speaking of indigenous peoples' land rights.<sup>91</sup> This interpretation would be confirmed by the previously mentioned article 32.<sup>92</sup>

During the drafting process, Brazilian observers have outlined the protection of indigenous' land rights in the Constitution of 1988 and have expressed the government's intentions to pursue its constitutional commitments to protect indigenous peoples against acts of violence and to demarcate their lands.<sup>93</sup> The Brazilian experience, however, illustrates the challenges of conciliating indigenous peoples' rights with states' as well as individual interests when it comes to the economic value of certain goods.

- *The Protection of Indigenous Rights to Land and Resources in Brazil*

The Brazilian Constitution expressly recognizes the right to the land the indigenous traditionally occupy.<sup>94</sup> A definition of "traditionally occupied lands" is also provided and is based on four requirements regarding the use and the importance of these lands for the life of the groups: the use of the land for living on a permanent basis; the use for indigenous productive activities; its indispensability for the preservation of the environmental resources necessary for the well-being of the communities; its indispensability for the preservation of the environ-

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<sup>89</sup> See Concluding Observations of the Human Rights Committee, Colombia, Doc. CCPR/CO/80/COL, para. 33. Xanthaki, see note 19, 118.

<sup>90</sup> This modification was made at the UN General Assembly level, during the last consultations conducted by a "facilitator". See S. Errico, "The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview", *Human Rights Law Review* 7 (2007), 756 et seq. (758).

<sup>91</sup> See also Errico, see note 23, 754.

<sup>92</sup> See para. 2 of article 32 of the Declaration.

<sup>93</sup> See Report of the Working Group on Indigenous Populations on its 15th Sess. Geneva, 28 July-11 August 1997, Doc. E/CN.4/Sub.2/1997/14, topic B (Environment, Land and Sustainable Development), number 2.

<sup>94</sup> Article 231 of the Constitution.

mental resources necessary for the indigenous.<sup>95</sup> Only those lands characterized by all four of these aspects in a cumulative manner can be recognized as “traditionally occupied lands”.<sup>96</sup>

For protective reasons, the property of these identified traditional lands is assigned to the Union.<sup>97</sup> Changes in the ownership or deviations from its original scope or aim are expressly prohibited, based on the general constitutional guarantee that traditional lands are “inalienable and indisposable and the rights thereto are not subject to limitation”.<sup>98</sup> The recognition of indigenous rights in respect to land has two significant consequences.<sup>99</sup> First of all, the guarantee of permanent possession, which is reinforced by the prohibition of removal of indigenous communities from their lands.<sup>100</sup> Second, the recognition of an indigenous right to exclusive usufruct “of the riches of the soil, the rivers and the lakes existing therein”.<sup>101</sup> As a general guarantee, the Constitution determines any act aiming at or leading to a violation of the described rights, except in a case of relevant public interest of the Union null and void.<sup>102</sup> According to the constitutional provision, this excep-

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<sup>95</sup> Article 231, para.1, *ibid.*

<sup>96</sup> See J.A. da Silva, *Curso de Direito Constitucional Positivo*, 1987, 855.

<sup>97</sup> Article 20, XI of the Constitution. This classification is intended to guarantee a better protection of the lands and to avoid pressures or threats against indigenous peoples.

<sup>98</sup> Article 231, para. 4 of the Constitution.

<sup>99</sup> For an overview, see F.C.T. Neto, “Os Direitos Originários dos Índios sobre as Terras que Ocupam e suas Consequências Jurídicas”, in: Santilli, see note 74, 9-43.

<sup>100</sup> Article 231, paras 2 and 5 of the Constitution. This provision, however, encompasses two exceptions, which would then allow a provisory displacement of determined indigenous groups. First of all, the outbreak of a catastrophe or an epidemic, representing a risk to the population thereto. In this case, the decision of the President of the Republic must be followed by the compliance of the National Congress *ad referendum*. Apart from that, a removal can be ordered at any time “in the interest of the sovereignty of the country”. This quite broad exception must be first agreed by the Congress in a previous authoritative decision. Once the reasons for the provisory removal are settled, the return of the population to their lands shall be, in both cases, immediately secured.

<sup>101</sup> Article 231, prara. 2 of the Constitution.

<sup>102</sup> Article 231, para. 6 of the Constitution. Therefore, former titles of property based on eventual private registers or documents concerning these lands are considered without effect and do not give any right to indemnity,

tion must be carried out by a supplementary law, which, however, has not yet been enacted.<sup>103</sup>

If it is true that the protection provided in the Constitution of 1988 represents a step forward in the treatment of indigenous land rights in Brazil, its implementation has been hampered though by reasons of a different nature. The difficulties concern the guarantee of both, the indigenous possession of traditional lands as well as indigenous exclusive usufruct of the riches of the land.

*- Demarcation of Traditional Lands in Brazil*

A very clear responsibility of the Union in regard to the protection of indigenous rights in Brazil is the demarcation of the identified traditional lands. This is defined in article 231 of the Constitution. The administrative act of demarcation does not create the rights concerned, which are considered to be “original”, being prior to the existence of the state itself.<sup>104</sup> Nevertheless, this declaratory measure enables a more concrete approach and exercise of land rights, as it defines the exact boundaries of the lands and puts an (potential) end to any legal uncertainty or conflict regarding the property.

Since the enactment of the Statute of the Indian in 1973, the demarcation follows a certain administrative procedure,<sup>105</sup> which is regulated by Decree 1775/1996.<sup>106</sup> According to it, the demarcation conducted by FUNAI<sup>107</sup> begins with an anthropological study of identification of the land and of its population.<sup>108</sup> The results of this study must be presented to FUNAI in a detailed report.<sup>109</sup> After approval and publication of this report by FUNAI,<sup>110</sup> within a term of ninety days any objection

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except when improvements have been made in the context of an occupation in good faith.

<sup>103</sup> Article 231, para. 6 of the Constitution.

<sup>104</sup> See da Silva, see note 96, who summarizes the general understanding on this topic on pages 854-855.

<sup>105</sup> Article 19 of the Statute.

<sup>106</sup> Decree 1775 of January 1996, which revoked the former ones.

<sup>107</sup> Article 1 of Decree 1775/1996.

<sup>108</sup> Article 2 of Decree 1775/1996.

<sup>109</sup> Article 2, para. 6 of Decree 1775/1996. FUNAI's internal act No. 14 of 1996 establishes rules about the elaboration of this report and determines the obligatory information to be provided in it.

<sup>110</sup> Article 2, para. 7 of Decree 1775/1996.

or claim pertaining to the land concerned may be sustained.<sup>111</sup> After that the Ministry of Justice,<sup>112</sup> defines the concrete boundaries of the land, and orders the demarcation of the territory by FUNAI.<sup>113</sup> The demarcation has finally to be approved by the President of the Republic<sup>114</sup> and ends with the actual registering of the land.<sup>115</sup>

According to the data provided by FUNAI, there are 398 indigenous traditional lands currently registered in Brazil.<sup>116</sup> Ninety identified territories still lack demarcation and 123 still await studies of identification. The process of demarcation of indigenous territories in Brazil is far from a satisfactory conclusion which should originally have been reached within five years after the promulgation of the Constitution of 1988.<sup>117</sup> Besides the dimensions of the Brazilian territory, the complexity of the procedure described in the Decree and the increasing number of indigenous peoples claiming recognition in Brazil, the obstacles stem from the economic and social impacts of the recognition of indigenous lands which create serious impasses.

The demarcation of the indigenous territory “Raposa-Serra do Sol” (the most recent and prominent example in Brazil) is very illustrative in this respect. It reveals the complexity of the problems inherent in the enforcement of indigenous land rights in Brazil. The indigenous territory “Raposa-Serra do Sol” was first identified by FUNAI in 1984.<sup>118</sup> It consists of a territory of about 1.7 million hectares situated in the northeast of the federal state Roraima (North of Brazil). Besides its essential value for the physical and cultural survival of the more than 15,000 indigenous of 5 different ethnic groups who live there in a tradi-

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<sup>111</sup> Article 2, para. 8 of Decree 1775/1996. Actually the Decree allows any claimant – federal states, municipalities or private persons – to provide evidence to sustain his or her claim since the beginning of the demarcation procedure.

<sup>112</sup> Article 2, para. 10 of Decree 1775/1996. If necessary, the Minister of Justice can request further diligences or even disapprove the identification, sending the acts back to FUNAI under justification.

<sup>113</sup> Article 3 of Decree 1775/1996.

<sup>114</sup> Article 5, *ibid.*

<sup>115</sup> Article 6, *ibid.*

<sup>116</sup> See under <[www.funai.gov.br](http://www.funai.gov.br)>.

<sup>117</sup> Cf. article 67 of the Temporary Constitutional Provisions Act, which is part of the Constitution of 1988.

<sup>118</sup> It was a preliminary identification. The official report was first published in May 1993.

tional manner,<sup>119</sup> the region is well-known for the abundance of its mineral richness,<sup>120</sup> for its environmental diversity and furthermore, for the prosperous development of agricultural activities on it.<sup>121</sup> Finally, it is considered to be a strategic zone.<sup>122</sup> This constellation led to the involvement of highly diverse and numerous interested parties in the process of demarcation. Since the first identification by FUNAI, indigenous communities, NGOs, military authorities,<sup>123</sup> and mining companies, have expressed their concerns. After two unsuccessful statements by two Ministers of Justice<sup>124</sup> regarding the scope of the territory and the criteria for its delimitation,<sup>125</sup> a third statement was made (seven years after the previous one) in April 2005<sup>126</sup> and inaugurated one of the most serious political, juridical and socio-economical im-

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<sup>119</sup> The ethnic groups are Macuxi, Taurepang, Wapixana, Patamona and Ingarikó.

<sup>120</sup> The “Instituto de Terras e Colonizacão de Roraima” – (Institute for Land and Colonization of Roraima) states the existence of diamonds and radioactive material in the territory. Besides, it points to the presence of e.g. gold and copper.

<sup>121</sup> In the state of Roraima, there are about 40 rice producers, who cultivate 25.000 ha of land within the territory. They are responsible for a production of 6.000 kilo per hectare on average. This performance beats, for example, the whole cereal production in the federal state of Rio Grande do Sul (south of Brazil).

<sup>122</sup> The boundary zone is defined as the “strip of land up to a hundred and fifty kilometers in width alongside the terrestrial boundaries (...) considered essential to the defense of the national territory and its occupation and utilization shall be regulated by law”, article 20, para. 2 of the Constitution of 1988.

<sup>123</sup> The main concern of the military authorities is their forced removal from the area in case of its demarcation as indigenous land, the consequent vulnerability of the Brazilian territory in this boundary zone and the even more precarious vigilance of the Amazon.

<sup>124</sup> The first one was the statement No. 80 of December 1996 ordering a reduction of the territory identified by FUNAI. Published in DOU in December 1996. The second writ – Portaria No. 820 – was published in December 1998 (DOU) ordering the return of the demarcation to the former proportions set by FUNAI.

<sup>125</sup> The main discussion is whether the demarcation should be continuous or should preserve the infra-structure created in the region and villages and areas of strategic importance for economic activities in the state of Roraima and exploitation of resources by third parties.

<sup>126</sup> Portaria (writ) No. 534 of April 2005 (in DOU of 15 April 2005).



passes in Brazil. Besides stipulating the scope of the area, the decision determined, for example, the removal of the whole non-indigenous population from the area concerned.<sup>127</sup> The demarcation under these terms was ratified by the Brazilian President in 2005 (twenty-one years after the first identification of the land by FUNAI). Irrespective of the immediate protests and pressures against it, the President ordered, at the end of 2007, the evacuation of the region.<sup>128</sup> Since January 2008, access to the territory has been frequently blocked by the local population and the constant conflict with the police led to deaths and to a permanent threat to the indigenous communities.<sup>129</sup> In April 2008 the activities of the police were suspended by the Supreme Court<sup>130</sup> and the impasse remains unresolved.

Apart from the socio-economic dimension of this problem, some comments on the situation in Raposa-Serra do Sol circulated in the media also reveal a certain arbitrariness in the interpretation of constitutional indigenous land rights and in the perception of these rights in Brazil. It has been stressed that the demarcation adopted “transforms the Indian into a privileged citizen” and the government, in its former interpretations about indigenous land rights, “has actually never considered that the land belonged to the Indians in the past”.<sup>131</sup> This pronouncement ignores the clear definition of indigenous land rights as “original” rights in the Constitution of 1988 and disregards the notion of equality *de facto* which, in the case of indigenous peoples, requires special promotional and protective measures. Another argument was brought forward by the Brazilian Defense Minister. He also considered the demarcation conducted by the government a mistake, which was

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<sup>127</sup> The statement excluded from the Raposa-Serra do Sol the Municipality Uiramuta, public installations, like schools and energy conducting cables/lines, the installations of the army’s 6th Special Boundary Commando and the roads situated in the region.

<sup>128</sup> These operations are called “Upatakon”. In April 2008, the Upatakon 3 was put forward.

<sup>129</sup> For an overview of reports about the conflicts, see under <[www.folha.uol.com.br](http://www.folha.uol.com.br)>, in Raposa-Serra do Sol, in the period of January-April 2008.

<sup>130</sup> The decision of 9 April 2008 was provoked by the government of Roraima. The intention was to suspend the operations of the police in the state until the different claims brought before the Supreme Court in regard to the demarcation of Raposa-Serra do Sol had been decided.

<sup>131</sup> <<http://www1.folha.uol.com.br/brasil/ult96u393279.shtml>>.

caused by “ignorance of the national legal system” and by the “influences of the North-American culture”.

“They [the indigenous peoples] constitute nations and the indigenous lands belong to these nations. In Brazil, indigenous land is Union’s property, for a lifelong usufruct by the Indians. They do not own the property of these lands, which are also subject to all of the constitutional norms.”<sup>132</sup>

The Minister did not take into account that the Union’s property over traditional lands is a qualified one; it exists with the purpose of protecting and implementing indigenous rights to these lands and is bound by this purpose.<sup>133</sup> It is the Union (and its property) that is conditioned by the fulfillment and protection of indigenous rights; not the other way round. In April 2008, the elaboration of an intermediate proposal of demarcation by the government was announced.<sup>134</sup> Suffice to say that the conflicts in Raposa-Serra do Sol offer just one example of an indigenous territory in Brazil, which 24 years after its first identification by FUNAI, has not even be demarcated. No guarantees or rights have been or can be ensured to the indigenous communities living therein.

*- Indigenous Groups’ Exclusive Usufruct of Resources in Traditional Lands and Exploitation by Non-Indigenous in Brazil*

In the configuration of indigenous communities’ rights to their traditional lands in Brazil, the right to permanent possession of these lands is complemented, as mentioned above, by the “exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein”.<sup>135</sup> According to the Statute of the Indian, this right entails the use and exploitation of the natural richness and of all utilities of the land, as well as the access

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<sup>132</sup> This observation was made in response to critics against the policies of the government in regard to indigenous peoples in Brazil.

<sup>133</sup> See da Silva, see note 96, 854.

<sup>134</sup> In April 2008 the elaboration of an intermediate proposal of demarcation by the government, which will be presented to the Supreme Court was announced. The proposal will suggest the determination of four strategic areas in the Raposa-Serra do Sol, called “development islands” (*ilhas de desenvolvimento*).

<sup>135</sup> Para. 2 of article 231 of the Constitution.

to the products of their economic exploitation.<sup>136</sup> Thus, irrespective of the nature and of the purpose of the use concerned, for the group's immediate subsistence or aiming at economic gains,<sup>137</sup> indigenous communities are recognized as the sole (collective) bearers of this right.

One of the immediate concerns regarding the use of resources in traditional lands is its environmental impact. This problem encompasses the harmonization of broader rights of use and exploitation on the one hand, with the preservation of the biological diversity in these territories on the other. The most coherent approach regarding the principles established in the UN Declaration of 2007 seems to be a direct involvement of the communities in the delineation of protective measures of sustainable self-management of the resources, in order to enable collective and continuous enjoyment. Such an approach, however, is not found in the Brazilian legal system, which still links environmental protection with the factual denial of indigenous usufruct of resources in some territories.<sup>138</sup>

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<sup>136</sup> Article 24 of the Statute of the Indian. This provision expressly mentions the indigenous' exclusive exercise of fishing and hunting in the traditional lands, para. 2.

<sup>137</sup> In the case of economic exploitation of the resources by indigenous communities, these activities must observe the common legislation thereto, especially the environmental one, and its benefits must be enjoyed by the whole collectivity. The usufruct of resources for the direct subsistence of the group also allows the extraction and use of resources in forest areas, with observance of their sustainable management in accordance with the environmental requirements of Law No. 4771/65 and of Decree 2.788/1998 (this kind of traditional exploitation was expressly allowed by the provisory act No. 1956-55/2000, which included a specific provision in this regard in the Law and in the Decree mentioned): the preservation of the structure of the forest and of its functions, the conservation of the biological diversity, the socio-economic development of the region (arts 1 and 2 of the Decree 2.788/98). Compliance with these requirements, which must be attested in a project presented by the interested indigenous groups, shall be controlled by both the federal environmental organ and the indigenous foundation (IBAMA and FUNAI respectively).

<sup>138</sup> The main discussion of this point concerns the Law No. 9.985/2000, which created the so-called "National System of Unities of Conservation of the Nature". These "Unities of Conservation" are areas of Environmental Protection with severe restrictions to the use of natural resources. Many of these areas coincide with the area of indigenous territories and the limitations (in some cases, real denial) in respect of the indigenous usufruct are

Regarding the exclusiveness of the usufruct and the related inalienability<sup>139</sup> of this right, the challenge in Brazil does not lie in the enforcement of a necessarily direct enjoyment of these rights by the indigenous communities, but rather on the elimination of an unauthorized exploitation of indigenous resources by non-indigenous groups and individuals. The rise of illegal exploitation activities in traditional territories supported by a lack of effective legislation represents a further violation of indigenous groups' land rights. Regarding this topic, the legal and administrative treatment of mining activities and the exploitation of genetic resources in indigenous lands in Brazil require closer consideration.

#### - Mining Activities in Traditional Lands<sup>140</sup>

Concerning mining activities in traditional lands, two situations must be distinguished under Brazilian law: the activities of individuals working on their own account (mainly gold prospectors) and the ones conducted by mining companies. The Brazilian Constitution of 1988 expressly forbids the activities of gold prospectors in indigenous territory.<sup>141</sup> Article 231, however, allows the exploitation of mineral resources by mining companies in indigenous lands.<sup>142</sup> This is a clear concession to the pressure exercised by these companies. Article 231 must be read together with article 176 of the Constitution. According to the later, mineral resources in Brazil belong to the Union, irrespective of the holder of the propriety over the soil. They constitute, thus, a separate legal object. In general, the exploitation of mineral resources may only be performed by Brazilian companies<sup>143</sup> and under three conditions: the existence of a national interest; an authorization or concession

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considered unconstitutional. For an overview, see F. Ricardo, *Terras Indígenas e Unidades de Conservação: O desafio da sobreposição*, 2005.

<sup>139</sup> Article 231, para. 4 of the Constitution.

<sup>140</sup> For an overview on this topic, see J. Santilli, "Aspectos Jurídicos da Mineração e do Garimpo em Terras Indígenas", in: Santilli, see note 74, 145-160.

<sup>141</sup> Article 231, para. 7 of the Constitution. This norm is reinforced by the Federal Law No. 7805 of 18 July 1989, article 23.

<sup>142</sup> Para. 3 of article 231, which also allows the non-indigenous exploitation of hydro resources, including energetic potentials.

<sup>143</sup> For this purpose, a Brazilian company is the one "organized under Brazilian laws and having its head-office and management in Brazil", article 176, para. 1.

by the Union (National Congress); the observance of specific norms set out by law. In case of their location in indigenous lands, however, other specific conditions may also apply.<sup>144</sup> Two of these specific conditions are already determined in general terms in article 231 para. 3 of the Constitution. The first one is the hearing of the indigenous communities involved, which shall be prior to an authorization by the National Congress. The second one is the guarantee of the communities' participation in the economic revenues of the mining. The scope of these requirements and the ways for their concrete realization, however, lack any further clarification.

Since 1991, different legislative projects pursuing the regulation of mining activities in Brazil have been presented and discussed in the National Congress. As to the specific exploitation of mineral resources in indigenous lands, the most controversial initiative is the one proposed in 1996 (Legislative Project No. 1610/1996), which has been strongly criticized and objected by various indigenous communities and organizations.<sup>145</sup> Especially worrying seems to be the secondary role given to the hearing of indigenous communities which is superficially mentioned in article 10 of the Legislative Project. Also, the open and largely discretionary criterion for the selection of the company, which shall conduct the mining activities, defined merely as "the one which best complies with the requirements"<sup>146</sup> raises concerns. Besides this project, the initiatives aiming at the elaboration of a new "Statute" for the indigenous (or the reformulation of the old one) also contain significant provisions regarding the regulation of mining activities in traditional lands. The most prominent ones are the three projects, which run together under the denomination "Statute of the Indigenous Peoples."<sup>147</sup> Amongst them, the project No. 2.619/1992 grants the most effective

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<sup>144</sup> Last sentence of the same article 176. Activities in boundary zones are also subject to these further conditions.

<sup>145</sup> For example, on the occasion of the announcement of the measures of PAC Social by President Lula. See different opinions of indigenous leaders and indigenous organizations representatives under <<http://www.socioambiental.org/nsa/detalhe?id=2532>>.

<sup>146</sup> Article 9 of the Legislative Project 1610/96.

<sup>147</sup> These are: the legislative project No. 2.057/1991 about the Statute of the Indigenous Societies (*Estatuto do Sociedades Indígenas*), i.a. legislative project No. 2.160/1991 about the Indian's Statute (*Estatuto do Índio*) and the legislative project No. 2.619/1992 about the Statute of the Indigenous Peoples (*Estatuto dos Povos Indígenas*).

protection.<sup>148</sup> It stipulates, for example, a more equitable participation of the communities in the earned profits, “irrespective of other payments agreed among the parties”,<sup>149</sup> and guarantees, in different provisions, the involvement of the communities in the whole process of authorization and of monitoring mining activities in their lands.<sup>150</sup> Finally, this initiative also addresses environmental concerns.<sup>151</sup>

The National Department for Mineral Production<sup>152</sup> states a current amount of more than 5,643 requests of authorization for mineral exploitation in indigenous lands in Brazil,<sup>153</sup> which demand proper legal regulation. The absence of systematic rules thereto, still hampers the effective monitoring of the exploitation of indigenous lands. Traditional mineral resources remain exposed to intensive unauthorized mining and conflicts with miners in indigenous lands represent an additional threat to the communities’ rights and integrity.<sup>154</sup>

#### - Unauthorized Exploitation of Genetic Resources in Traditional Lands

The third-party use of natural resources in indigenous lands in respect of research, collection, exportation, and exploitation of genetic material of plants and animals constitutes another serious obstacle to the enjoyment of indigenous land rights in Brazil. The Brazilian Constitution of 1988 contains a general provision stressing the responsibility of the government towards the so-called “national genetic patrimony”. According to article 225, it is incumbent upon the government to “preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in the research and manipula-

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<sup>148</sup> On the other hand, the project presented by the Executive (PL N. 2.160/1991) contains only five quite simply formulated provisions regarding the exploitation of mineral resources in indigenous territories and does not add much to the constitutional norms.

<sup>149</sup> Article 61, III of the legislative project No. 2.619/1992.

<sup>150</sup> For example, in arts 51, 52, 53, 61, II and IV of the legislative project No. 2.619/1992.

<sup>151</sup> Article 62 of legislative project No. 2.619/1992.

<sup>152</sup> *Departamento Nacional de Producao Mineral* (DNPM).

<sup>153</sup> The information was given by the General-Director of DNPM on 18 March 2008, “Notícias” under <<http://www.dnpm.gov.br>, 19/03/ 2008>.

<sup>154</sup> The conflicts in the indigenous territory “Cinta Larga” provide good examples for the dimension of this problem. For an overview see H.E. Kayser, “Die Rechte der indigenen Völker Brasiliens”, 2005, 474-480.

tion of genetic material.”<sup>155</sup> As no express exception is made in the Constitution with regard to genetic resources (like, for example, in the case of mineral exploitation), the challenge in Brazil lies in the definition of strategies able to merge state responsibility with the effective guarantee for indigenous exclusive rights.<sup>156</sup>

The only available regulation is the provisional act<sup>157</sup> No. 2.186-16/2001.<sup>158</sup> According to the act, access to the “genetic patrimony” in Brazil for purposes of scientific research, exploitation and technological development is subject to the authorization of the Union.<sup>159</sup> In case of resources located in indigenous lands, the norm requires previous consent of the indigenous community involved<sup>160</sup> and also previously accorded “fair and equitable” sharing of the potential benefits with the indigenous communities.<sup>161</sup> A specific organ was created for the implementation of these rules and for deciding upon the authorizations con-

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<sup>155</sup> Para.1, II of article 225 of the Constitution of 1988.

<sup>156</sup> Guaranteed in article 231, para. 2 of the Constitution and in arts 22 and 18 of the Statute of the Indian.

<sup>157</sup> Provisional acts (“medidas provisórias”) are provisory norms (measures) that may be elaborated and adopted by the President of the Republic in important and urgent cases. Once in force, they must be immediately submitted to the National Congress for its conversion into law within 60 days, extendable once for the same period of time. If not converted into law in this period, these measures shall loose efficacy, and revert to the issuing date, see article 62 of the Brazilian Constitution.

<sup>158</sup> Regulated by the Decrees No. 3945/01 and No. 4946/2003. The act regulates article 225 paras 1, 2 and 4 of the Constitution of 1988, and arts 1, 8, 10, 15 and 16 of the Convention on Biological Diversity. This act was first edited as provisional act 2.052/200. (in DOU of 30 June 2000). The first act had the clear intent to protect and legalize an agreement between the multinational *Novartis Pharma* and the Brazilian (Social) Organization *Bioamazônia* for the prospection of bacteria and fungi in the Amazon Forest. According to article 10 of the former act, the continuation of the economic use of traditional knowledge conducted “in good faith” was allowed as far as this use had been first set before 30 June 2000. This act was reenacted with minimal changes 15 times. In 2001 it was replaced by the current provisional act No. 2. 186-16.

<sup>159</sup> Article 1 of the provisional act No. 2.186-16/2001.

<sup>160</sup> Through the hearing of the official indigenous organ, article 16, para. 9, I of the provisional act No. 2.186-16/2001. Some directives were established for obtaining this assent. These are Resolutions 05/2003, 06/2003, 09/2003 and 12/2003 of CGEN, available at <[www.mma.gov.br/port/cgen](http://www.mma.gov.br/port/cgen)>.

<sup>161</sup> In arts 24 and 25.

cerned.<sup>162</sup> This norm does not expressly offer ways for the indigenous communities to veto the exploitation of their lands.<sup>163</sup> Even more critical is that access is granted without the consent of the indigenous communities in cases of “relevant public interest”.<sup>164</sup> Even the composition of the conducting organ raises concerns since only government members have a vote in the final decisions.<sup>165</sup> Finally, the provisional act imposed difficulties on the development of scientific research in Brazil.<sup>166</sup>

The clear ineffectiveness of the treatment of this problem in Brazil is demonstrated by the various reports on illegal activities involving the exploitation of genetic resources in indigenous lands.<sup>167</sup> Since 1995, different legislative projects have been discussed in the National Congress, aiming at a more systematic and effective regulation.<sup>168</sup> Amongst the issues concerned, a clear definition of “biopiracy” and the stipulation of stricter sanctions are being addressed.<sup>169</sup> So far no proper regulation is agreed on.

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<sup>162</sup> This is the “Conselho de Gestão do Patrimônio Genético” (Council for the Management of the Genetic Patrimony), created in article 10 of the act. The Council first started its work in April 2002. For general information about its structure and functioning see <[www.mma.gov.br/port/cgen](http://www.mma.gov.br/port/cgen)>.

<sup>163</sup> Article 16, para. 9 refers solely to the “assent” (“anuência”) of indigenous communities.

<sup>164</sup> Article 17 of the provisional act No. 2.186-16/2001. Para. 1 determines that, in these cases, the indigenous community must be previously informed.

<sup>165</sup> Beside representatives of different ministries and national organs, the Council hears so called convidados permanentes. They, however, don’t have a right to vote.

<sup>166</sup> Just after CGEN started its work, it received formal complaints of different academic sectors, highlighting the difficulties originated from the provisional act No. 2.169-16/2001 for research activities in Brazil.

<sup>167</sup> See under <[www.mma.gov.br/biopirataria](http://www.mma.gov.br/biopirataria)>.

<sup>168</sup> As to date 6 projects are discussed in both Houses of the National Congress. The first one was presented to the Senate by Senator Marina da Silva (PL 0036/95). These projects have currently the following numbers: PL 4.842/1998 (Senator Marina da Silva), PL 4.579/1998 (Mr. Jacques Wagner), PL 1.953/1999 (Mr. Silas Câmara), PL 2.360/2003 (Mr. Mário Negromonte), PL 5.078/2005 (Mr. Eduardo Valverde), PL 287/2007 (Mrs. Janete Capiberibe), PL 3.170/2008 (Mr. Takayama).

<sup>169</sup> The only sanctions are the administrative ones established in Chapter VIII of the provisional act 2.186-16/2001 (fine, retention of the material collected, embargo of the activity conducted, cancel of authorization, prohibition of future contracts with the public administration) and the ones estab-



## 2. Indigenous Peoples' Cultural Rights

The Declaration starts from the assumption that all peoples have the right to be different, to consider themselves different and to be respected as such.<sup>170</sup> Under this premise, it affirms that indigenous peoples are “equal to all other peoples”.<sup>171</sup> Many of the operational provisions in the Declaration go back to this central notion, promoting, on the one hand, these peoples' distinguished cultural identity and reinforcing, on the other hand, the right of indigenous groups to exist and to be protected from every kind of discrimination. This approach becomes clear, for example, in the recognition of the indigenous peoples' right contained in article 5 to “participate fully, if they so choose, in the political, economic, social and cultural life of the State”, beside the right provided in article 12 to “manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies”. The Declaration reflects, thus, a concept of equality that considers and values the differences in the societies and correlates indigenous peoples' cultural identity with integrity.<sup>172</sup>

Article 6 grants every indigenous individual the right to a nationality. Further, many provisions guarantee the right to participate in the political, economic, social and cultural life of the state.<sup>173</sup> Other articles concern the promotion of the indigenous peoples' identity. It is intended to guarantee the full enjoyment (“manifestation”, “practice”, “revitalization”, “use”) of indigenous peoples' practices, customs, traditions, their symbols, ceremonies and objects.<sup>174</sup> Further the perpetuation of the specific cultural features is ensured. In this context, arts 12 and 13 expressly address the right to “teach” and to “transmit” practices and beliefs to future generations. Finally, the development of the indigenous identity according to its specific characteristics and to the peoples' own requirements is also guaranteed. Together, these provisions address the different aspects of indigenous peoples' cultural iden-

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lished in the Law No. 9.605/1998, covering general crimes against the environment.

<sup>170</sup> Para. 2 of the Preamble.

<sup>171</sup> Para. 2 of the Preamble.

<sup>172</sup> See article 8, para. 2 (a). See S.J. Anaya, “Keynote Address: Indigenous Peoples and their Mark on the International Legal System”, *American Indian Law Review* 31 (2006/2007), 257 et seq. (269).

<sup>173</sup> E.g. arts 5, 14, 15, 16, 17.

<sup>174</sup> For example, in arts 11 and 12 of the Declaration.

tity. Special attention is given to the protection and promotion of indigenous languages.<sup>175</sup>

The Declaration also establishes, in an innovative manner, the duty of states to provide redress with respect to “cultural, intellectual, religious and spiritual property”, taken without the indigenous peoples’ consent or in violation of their laws, traditions and customs.<sup>176</sup> Article 31, stresses indigenous peoples control over their “cultural heritage, traditional knowledge and traditional cultural expressions”, avoiding the words “property” or the idea of ownership.<sup>177</sup> In this manner, the Declaration reflects the consolidated notions of material and immaterial property especially in the domestic legal systems.<sup>178</sup> Possible conflicts thereto were also highlighted by the Brazilian representative during the drafting process of the Declaration.<sup>179</sup>

Officially leaving aside the approach of the former documents, the Brazilian Constitution of 1988 recognized the value of indigenous culture and provided for its respect, protection and promotion. Being Brazilian nationals, indigenous individuals (and their groups) are entitled to the fundamental rights and guarantees recognized in article 5 of the Constitution, which stipulates equality and non-discrimination. Irrespective of this general guarantee, however, the Brazilian Constitution contains specific provisions concerning indigenous culture and identity, aiming at its special protection and enhancement.

Article 231 of the Constitution sets as the leading principle that “Indians shall have their social organization, customs, languages, creeds and traditions recognized” and lays the basis for the special respect to the different features of indigenous culture in the country. This stipulation is complemented by the state’s duty to protect “all indigenous

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<sup>175</sup> Article 14, para. 1 of the Declaration. See also article 16, para. 1 (right to establish their own media in their own languages) and article 13, which encompasses the right to transmit their languages to future generations.

<sup>176</sup> Article 11, para. 2 of the Declaration includes within the manifestations of indigenous peoples’ cultures archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

<sup>177</sup> Also article 24 reflects this hesitation in regard to indigenous peoples’ traditional medicines.

<sup>178</sup> See Thornberry, see note 16, 389-392.

<sup>179</sup> See the Report of the Working Group on Indigenous Populations Doc. E/CN.4/1997/102 of 10 December 1996, para. 66.

goods”<sup>180</sup> as well as “the expressions of Indian cultures”.<sup>181</sup> Finally, the promotion of indigenous culture is also addressed by the “valorization of ethnical and regional diversity” in the National Plan of Culture<sup>182</sup> and the “establishment of commemorative dates of high significance for the various national ethnic segments”.<sup>183</sup>

The development of national policies and legislation regarding indigenous cultural rights in Brazil is again conducted mainly by FUNAI. In general, the programs underway involve the realization of research studies and debates,<sup>184</sup> the dissemination of indigenous culture,<sup>185</sup> general support of cultural production and cultural expressions.<sup>186</sup>

Products and the manifestations of indigenous culture are defined as national cultural heritage.<sup>187</sup> The Institute of Historical and Artistic National Heritage (IPHAN)<sup>188</sup> is the organ assigned with this function.<sup>189</sup>

Since 2000, the Institute has conducted the implementation of the so-called National Program of Immaterial Heritage, which was intro-

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<sup>180</sup> Article 231.

<sup>181</sup> Article 215.

<sup>182</sup> Article 215, para. 3, V.

<sup>183</sup> Article 215, para. 2.

<sup>184</sup> FUNAI has organized national as well as local indigenous peoples’ conferences for the discussion of indigenous’ interests and rights.

<sup>185</sup> For that purpose, FUNAI maintains the Museum of the Indian, which provides various information about these peoples and has also developed various projects.

<sup>186</sup> For example, the projects PPTAL and Kahô.

<sup>187</sup> The Constitution uses the word “national cultural patrimony” article 216 of the Constitution, “the assets of a material and immaterial nature, taken individually or as a whole, which bear reference to the identity, action and memory of the various groups that form the Brazilian society”. It includes, not only in regard to the indigenous culture, forms of expression, ways of creating, making and living, scientific, artistic and technological creations, works, objects, documents, buildings and other spaces intended for artistic and cultural expressions, urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value.

<sup>188</sup> Instituto do Patrimônio Histórico e Artístico Nacional, which was created by Decree No. 25 of 30 November 1937 and is affiliated to the Ministry of Culture.

<sup>189</sup> Since its creation in 1930, it has promoted the registration and protection of more than 20.000 buildings, 83 urban centers and areas, 12.517 archaeological sites and more than 1 million objects.

duced in Brazil by Decree No. 3551 of 4 August 2000.<sup>190</sup> This program aims at the protection and promotion of the various forms of cultural expressions and knowledge in Brazil.<sup>191</sup> The identification and registration of the national immaterial heritage related to indigenous communities is expected to provide a better protection.

One aspect of the national immaterial cultural heritage related to indigenous communities,<sup>192</sup> however, still lacks proper protection in Brazil, namely the indigenous traditional knowledge associated with biological diversity and its uses. Its unauthorized appropriation represents an even more serious threat to the enjoyment of indigenous rights in Brazil than the unauthorized access and exploitation of genetic resources in traditional lands itself, as the dynamic and open character of indigenous knowledge makes its detection and protection a very difficult task. Provisional Act No. 2.186-16/2001 is the relevant regulation and the same criticisms addressed earlier in this article apply here as well.<sup>193</sup> The norm recognizes the indigenous communities rights to decide upon the use of their traditional knowledge, including the right to share the benefits arising from the direct or indirect economic exploitation.<sup>194</sup> Nevertheless, it does not elaborate practical ways of the effective indigenous control of the use of their knowledge. Furthermore, no attention is paid to the collective – and frequently inter-communal – nature of indigenous knowledge and the necessary compensation to be

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<sup>190</sup> Regulated by Resolution No. 001/2006. This program aims at the identification, recognition, preservation and promotion of the immaterial dimension of cultural heritage. It is a promotional program based on the partnership among governmental institutions, universities, non-governmental organizations, development agencies and private organizations.

<sup>191</sup> Protection and promotion may be guaranteed and enforced, first of all, by administrative measures, which include the inventory and register of the material identified by governmental organs or by the civil societies (article 2, IV of Decree 3551/01) and also projects for the improvement of the transmission and reproduction of this material. Juridical (and also extra-judicial measures) can be adopted by Federal Prosecutors for the preservation and promotion of Brazilian cultural patrimony in general (article 129, III of the 1988 Constitution).

<sup>192</sup> Expressly declared as such in article 8, para. 4 of the provisional act No. 2.186-16/2001.

<sup>193</sup> See the discussions on the protection of genetic resources in indigenous lands in Brazil.

<sup>194</sup> Mainly in Chapter III. of the act.

granted to the groups. The legislative projects being underway in the National Congress since 1995<sup>195</sup> are without any results so far.

Special attention has been granted to indigenous educational and linguistic rights in Brazil. According to the Constitution of 1988, the national educational system has to pay respect to national and regional cultural values<sup>196</sup> and has to guarantee the use of indigenous languages.<sup>197</sup> In 1999,<sup>198</sup> the category “indigenous school” was introduced in the Brazilian educational system which aims at “the full valorization of the indigenous peoples cultures and [at] the affirmation and preservation of their ethnic diversity”.<sup>199</sup> General requirements for the organization, structure and functioning of these schools are the localization in areas inhabited by indigenous communities, exclusive attendance by these communities, education in both Portuguese and the native language, and autonomous organization, with the participation of the indigenous community concerned.<sup>200</sup> Financial and technical support is provided by the Union.<sup>201</sup>

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<sup>195</sup> Projects mentioned earlier in this article, in the discussions about the protection of genetic resources in indigenous lands in Brazil, namely: PL 4.842/1998 (Senator Marina da Silva), PL 4.579/1998 (Mr. Jacques Wagner), PL 1.953/1999 (Mr. Silas Câmara), PL 2.360/2003 (Sr. Mário Negromonte), PL 5.078/2005 (Mr. Eduardo Valverde), PL 287/2007 (Mrs. Janete Capiberibe), PL 3.170/2008 (Sr. Takayama), see note 168.

<sup>196</sup> Article 210 of the Constitution.

<sup>197</sup> Article 210, para. 2 of the Constitution.

<sup>198</sup> Report (Parecer) 14 and Resolution 03 of the National Educational Council (Conselho Nacional de Educacao). Both documents followed the principles established in the Federal Law No. 9.394 of 20 December 1996 (Guidelines and Bases of National Educational System) – hereinafter LDB – and in the National Plan of Education (Federal Law No. 10.172 of 9 January 2001), which determined the development of a differentiated, intercultural and multilingual educational system for indigenous communities in Brazil, see article 79 LDB.

<sup>199</sup> Article 1, Resolution CEB 03 of 1999.

<sup>200</sup> Arts 2 and 3 of Resolution CEB 03 of 1999. The project of indigenous schools is conducted by the Ministry of Education, which develops training-programs for the formation of specialized teachers, specific curricula and differentiated didactic material, reflecting the indigenous culture concerned.

<sup>201</sup> Financial and technical support is provided by the Union, article 79 LDB.

## V. Conclusion

There are many reasons to consider the United Nations Declaration on the Rights of Indigenous Peoples a landmark document. Irrespective of its nonbinding nature, the document develops a specific thematic area of international law and at the same time offers principles for a more coherent application of existing international human rights instruments to the indigenous differentiated reality. Regarding the peoples, the path to equality in the framework of cultural diversity has been defined: protection, conservation and (free) development of all aspects of their identity, which shall be defined and conducted by their own institutions (autonomy); full participation, free from discrimination, in the public life of the state, particularly participation in the decision-making processes regarding their interests (political participation). The Declaration itself left to the states the task and the challenge to determine the specific ways to pursue its goals, according to the peculiarities of each country and of each indigenous community.

The considerations in this article permit the conclusion that the main gap in Brazil in relation to the principles listed in the Declaration lies in the non-recognition of the status of “Peoples” to the indigenous communities living in Brazil. Accordingly, the concept of autonomy and participation of these groups within the national society is given a much more limited scope than the one delineated in the United Nations document. This gap is reflected in the fragmentary and unilateral legal treatment of indigenous rights in Brazil and is reinforced by the defective administrative measures thereto. In this context, compliance with the Declaration would require, in Brazil, a completely new and updated approach.

Regarding the content of the specific rights, the Brazilian Constitution could be, to some extent, considered an advanced legal instrument, since it recognizes the indigenous groups’ identity, their customs and organizations, the essential value of their lands for their physical and cultural survival and supports this recognition with various special individual and collective rights and guarantees. Nevertheless, the enforcement of this framework has been hampered by the absence of further legislative clarification and by incoherent administrative measures.

The concrete identification of the specific bearers of these rights in Brazil, which is based on a debatable method of employment of the self-identification criterion, requires adaptation. As shown earlier, the UN Declaration itself recognizes the indigenous peoples’ right to development and opens ways for the inclusion of indigenous individuals

or groups which do not live according to the traditional manner anymore. The specific outcomes of the Brazilian history regarding indigenous peoples, namely their migration to the urban areas, and the dynamism of some indigenous cultures in Brazil should, thus, be addressed in a more proper and effective manner in order to avoid a further deprivation of rights.

As to indigenous rights to lands, first of all, no guarantees or rights can be enforced whilst the demarcation of these territories is unclear. This is a central obstacle to the achievement of the Declaration's goals in Brazil as the duration and the characteristics of the demarcation proceedings are still highly influenced by third-party interests in these lands. The still unconcluded process of demarcation of Raposa-Serra do Sol provides an enlightening example of this. Regarding indigenous groups' usufruct of natural resources and of the potentialities of their lands, it has been shown that indigenous communities in Brazil do not enjoy rights similar to the ones accorded in the Declaration, even if these rights are summarized in a very subtle manner in article 32 para. 1 of that document, namely as rights to "determine and develop priorities and strategies".

In the case of mining activities in traditional lands, it would be necessary to develop a system of authorizations based on indigenous peoples' concrete concerns. The exploitation of genetic resources in indigenous territories, on the other hand, would require effective mechanisms of indigenous groups' conscious control, including the right to veto, over all the projects developed within their territories, as the Brazilian Constitution does not determine any exception to the general indigenous communities' exclusive usufruct in relation to genetic resources. Both of these most common and serious limitations to indigenous peoples' rights to natural resources in Brazil are based not only on administrative, but also on legal lapses in the treatment of these rights.

Concerning indigenous peoples' cultural rights, maybe the most special challenge is represented by the protection of the immaterial dimension of indigenous cultural identity. On the one hand, the introduction of a National Program committed *inter alia* for the protection and preservation of this aspect of indigenous cultures is to be praised; on the other hand, however, the specific protection of traditional knowledge associated with biological diversity demands further endeavors mainly for the establishment of clear legal definitions of (indigenous groups) collective and (non-indigenous) individual properties which are touched upon in this context, as well as clear guidelines for the treatment of the interface between these rights. It must be noted, however,

that this challenge also confronts the international level and lacks appropriate treatment here.

The episode of the demarcation of the territory Raposa-Serra do Sol raises other concerns about the promotion of indigenous peoples cultural identity in Brazil. Radical measures like the forced removal of non-indigenous persons from the territory after years of tacit permission can produce the opposite impact on the perception of the national society about the value and the necessity of protection of indigenous identity. As the example showed, this measure was seen by some Brazilian citizens as granting indigenous groups a privileged position within the national society. As a result, these groups become even more isolated and vulnerable.

Indisputably, the promotion and protection of indigenous identity in Brazil require continuity and, once again, the participation of the communities involved in the development of strategies.