LIGUE INTERNATIONALE POUR LES DROITS ET LA LIBERATION DES PEUPLES
INTERNATIONAL LEAGUE FOR THE RIGHTS AND LIBERATION OF PEOPLES
LIGA INTERNACIONAL POR LOS DERECHOS Y LA LIBERACION DE LOS PUEBLOS

THE SITUATION OF THE INDIANS IN BRAZIL

Historical and Political Aspects

Juridical Aspects

Document presented to the Working Group on
Indigenous Populations

Sub-Commission on Prevention of Discrimination
and Protection of Minorities
Thirty-seventh Session

Segr.: Via della Dogana Vecchia 5, 1400186 ROMA - Italie, Tel. 65 43 529 - 65 99 53

Historical outline

The first Brazilian Indians to be reached by the Whites in the 16th century where those from the East coast and from the South-east of the country; they were also the first to disappear: of the numerous and very populous Tupí tribes living on the Atlantic coast at the time of discovery, only the small group of Potiguara remains, at Paraiba.

In the following century, characterized by the "economic boom of sugar-cane", the gradual expansion of the Whites pushed the Indians ever further into the interior of the country, while the Portuguese government promoted occupation of Maranhão and Parã, and in the South, the Paulists began their armed slave-hunting expeditions for their plantations (the famous "bandeiras"). In the 18th century, the beginning of mining activity struck the populations of gold-bearing regions: in that period the Kayapõ in Goiàs vanished, while the land of the Timbira was being invaded by breeders, who continued their invasion throughout the next century in central Brazil, struggling to seize the leand from the remaining Xavante and Kayapò. The struggle continued in the 20th century: in Amazonia, during the "rubber boom" and in the South, with the construction of the railway to the Northwest.

The precise figures of tribes vanished since the discovery of Brazil to this day are not known; in 1900 there were still 230 indigenous groups, reduced to 143 in 1957. Not all the tribes were destroyed by war, slavery or hunger: many of the Indians were in fact decimated by diseases brought by Whites, against which they had no immunological defence: pneumonia, smallpox, tuberculosis, influenza, measles. From 6 to 7 million in the 16th century, Brazilian Indians are today reduced to less than 250.000 individuals, subdivided into groups within geographical areas:

RORAIMA-AMAZONAS	71.876
ACRE-RONDONIA	9.110

PARA'-AMAPA'	8.314
EAST-NORTHEAST	32.154
MATO GROSSO (North and South)	33.032
MARANHÃO-GOIÀS	9.648
SOUTH	14.405
DISPERSED GROUPS	15.000
DETRIBALIZED	30.000
total	223.539

Indigenist Policies

During the whole colonial period, Portuguese legislation regarding Indians always focused on the interests of the colonist, in need of indigenous labour and on those of the missionaries, seeking to convert the Indians and to 'integrate' them as soon as possible into civil society. This contradiction appears already in a document dated 1549 in which the Governor General recommends to favour peace-loving Indians and to punish their oppressors; the same document permitted to kill or imprison natives reluctant to accept such "peace". A rule dated 1758 granted the Indians freedom and defence of their rights, but reduced them to the juridical status of "minors". These laws remained valid until 1831 (period of Regency), when the Indians were put under the same legal protection extended to orphans. With the Republic and separation of the State and the Church, the government no longer cared about the missionary work, which nonetheless continued autonomously, also under the aegis of other churches than the Catholic. In 1910, following a movement of public opinion asking to stop massacres in the South, for the construction of the railway to the Northwest, the Service for the Protection of the Indians (SPI) was founded, on the initiative of Gen. Candido Rondon. In the sixties the sincerely humanitarian motives which had lead the officials of SPI in their labour of contact and pacifying hostile tribes ("Die if necessary, but never kill" was Rondon's slogan) gave in to bureaucratization, corruption, private interests. The organism was dissolved in 1967

under the grave accusation of genocide: an investigation revealed the responsibility of the officials in the massacre of entire groups of natives by the use of firearms, arsenic, clothing contaminated with smallpox. In lieu of the suppressed SPI, FUNAI (Fundaçao Nacional do Indio) a protection organism of Indians was created (i.e. they are defined as "not integrated", and subjected to a protection regime). Emanating from the Ministry of the Interior, FUNAI has caused a change in the direction of official indigenist policies, including the protection of the Indians in the program of national development: in this sense, it has promoted, since the first years - with a mentality of 'entrepreneur' - development projects in native areas.

Also today FUNAI's work is the subject of severe criticism by national and international native organizations: due to lack of allotment of land; investment of the so-called "indigenous income" in foreign and often harmful projects for the same Indians to put pessure on native leaderships; for uncontrolled establishing of the famous "negative certificates" (attesting absence of Indians in a certain area) in order to make it free for exploitation). What in fact is being accused is the same official concept of "integration" which gives FUNAI total free direction in defining the ethnic identity of a group by applying vague 'parameters of Indianity'.

Actually it is not for anthropologists, politicians or bureaucrats to define 'criteria of Indianity'. Only the Indians themselves can claim the right to define that they are Indians, through the unique criteria Ribeiro called "ethnic auto-identification"; a concept being used and restated firmly in the assembly of native delegates, which initiated the first organism entirely composed of Indians, the União das Naçoes Indigenas (UNI), in November 1981.

Brazilian Indians Today: The Question of the Land

The biggest concentration of native peoples in Brazil is located in the Northern regions (Area I). The groups are very different from

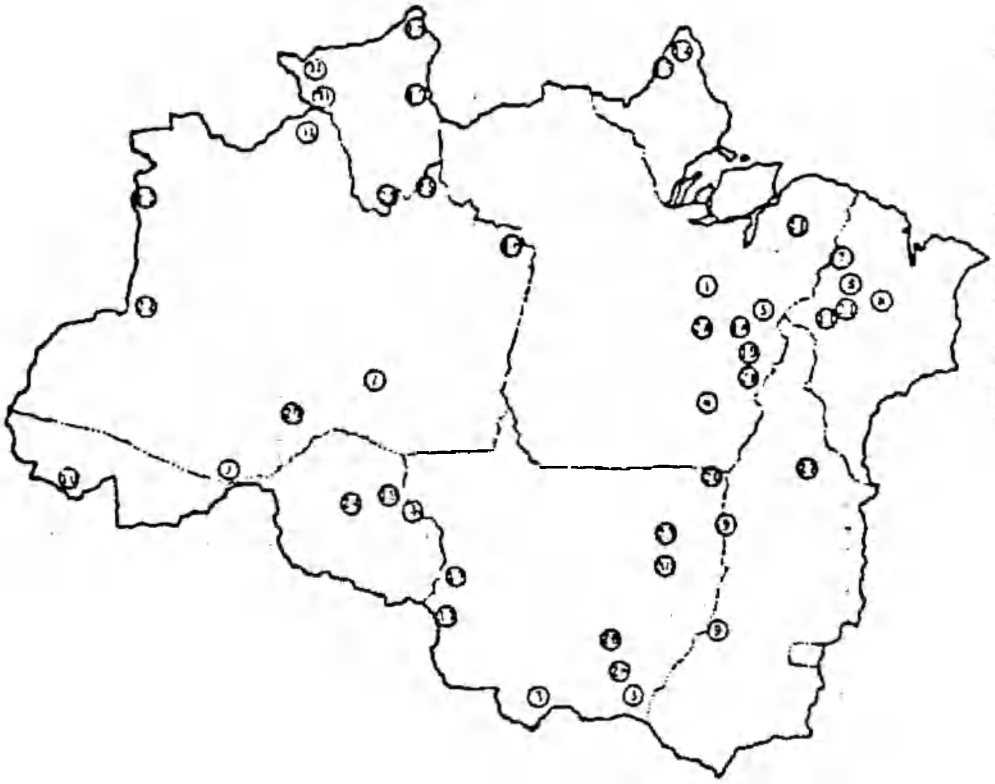
one another, from the cultural point of view as well as from the experience of contact with the Brazilian population. Besides groups which have been integrated for many years in the economic and social fabric (ex. Tikuna) we find in fact others substantially free of contact (ex. Yanomani).

Since the seventies the occupation of Amazonia, has progressed with the use of national and multinational funds. The native populations have therefore suffered a true "invasion", so fast and wide-ranging as they have never known before. Most tribal groups have not been able to recover from the damage caused by the violent impact with "civilized" society (depopulation caused by epidemics, expropriation of the lands, building of roads and hydroelectric plants, mineral projects, etc.) The result is the rapid disintegration of native societies: Indians are often forced to work as salaried labour - with very low salary - in their own land (Acre and Southeast of Amazonia), or, completely destabilized, - they mingle with the marginal population of the big suburban areas (about 10.000 in Manaus alone).

The groups of the Eastern region (Area II) however show a secular experience of contact, a high level of racial merging and therefore, loss or modification of many elements of native culture. This has however not brought about the loss of native identity: those are exactly the groups today, the most active and conscious ones for recuperation and revitalization of the tribal cultural heritage, intended as an instrument of political cohesion and for the struggle of reappropriation of historical rights on earth. In the Southern region (Area III), which - beside the area of Mato Grosso do Sul - a region of consolidated colonization since the beginning of the century, many groups (Oti-Xavante, Ofaié Xavante, Xetà) have vanished in the course of this century, exterminated by diseases and by wars. The surviving Kaingang, Kokleng, Guaraní) have developed a movement of struggle for self-determination and land, which in this case also starts with its own traditions and from the new consciousness of "being Indian". Even if Brazilian legislation

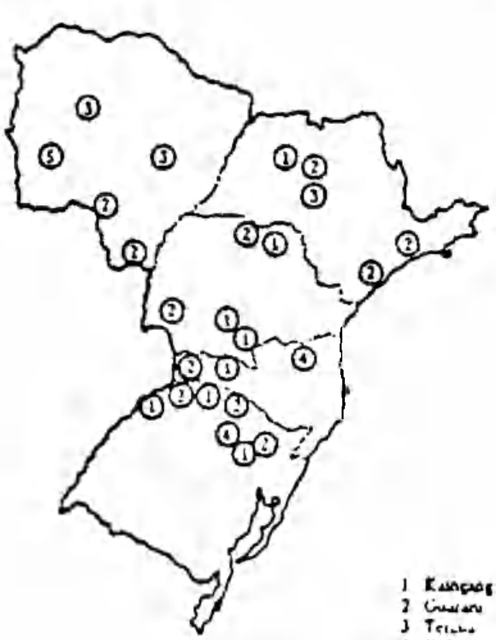
grants Indians part of the national territory (Parks of Xingu, Tumucumaque, Araguaia, Aripuana, as well as the "reserves and the "areas"), the fundamental problem of the Indians is still the land, or, the problem of occupation of their land which has not even preserved the Parks. This problem becomes even more dramatic because of the presence (and pressure) in Brazilian territory of big international interests (see figure). The matter has different aspects: lack of demarkation of native areas by FUNAI (cf. the case of the Wassu, Tingui-Botò, of Pankararà, who have no right to land because FUNAI does not recognize them as Indians), demarkation made without consulting Indians, according to private interests present in the areas (Pataxò, Xavantes, Krikati, Apurinã); the invasion of lands already demarked (Xikrin, Txucarramae, Suruí, Indians of Araguaia Park); threats of consecutive flooding or construction walls (Tuxà, Xoklengs, Asurini), construction of streets in native territory (Cintras-Largas, Waiasi), forced transfer (Nambikwara, Waimiri-Atroari), exclusion of management in FUNAI projects (Xukuru-Kariri, Pataxò, Kiriri), presided by police forces on the land (Potiguara). Dates from 1979 to 1981.

ÁREA I



ÁREA

ÁREA III



Bibliography

Aconteceu, April 1981

Boletim, No. 8, March-April 1982

Bruce, Albert: "Yanomani Kaingang: la question des terres indiennes au Brésil", in Indianité, ethocide, indigenisme en Amérique Latine, Paris, 1982

Cadernos da Comissão pro Indio No. 1: "A questão da emancipação, São Paulo, 1978

Cadernos da Comissão pro Indio No. 2: "A questão da terra", São Paulo, 1981

Cadernos da Comissão pro Indio No. 3: "Indios, direitos historicos", São Paulo, 1982

Cardoso de Oliveira, Roberto: Movimiento Indigena e Indigenismo en Brasil, in "America Indigena", vol. XLI No. 3 Mexico 1981

Comissão pro Indio: O indio e a cidadania, São Paulo, 1983

Melatti, Julio Cesar: Indios do Brasil, São Paulo 1983

Ribeiro, Darçy: Fronteras indigenas de la civilización, Mexico 1971

Shelton, Davis, Vitimas do milagre, Rio de Janeiro 1978

Suess, Paulo: Os povos indigenas e a situação das suas terras no Brasil, cicl. CIMI, Brasilia 1981

1. The Inadequacy of Brazilian Legislation for the Protection of Indians

Indian populations of Brazil do not enjoy adequate protection as far as prescribing rules are concerned. Reference for evaluation of internal juridical regulation consists in many texts of international conventions on the rights of minorities and texts adopted by the United Nations on the subject of self-determination of peoples. Among such prescribing instruments, the ILO Convention on tribal and semi-tribal aboriginal populations in independent countries, adopted in 1957, refers particularly to the question of Indians, establishing an obligation to States to protect them by abstaining from applying or introducing discriminatory measures against them. Even though it is elaborated by an organization operating within a Western context and therefore alien to native culture, this convention can be adopted as a model which States must use for their own legislation on Indians. This convention expresses the fundamental principle of self-determination of peoples, also to be applied to native minorities.

Having ratified said convention (in 1965) Brazil is obliged to adopt legislative provisions conforming to the principles stated therein and to adapt the conduct of its own executive bodies, in order to guarantee Indians fundamental rights (non-discrimination, utilization of resources of the territories on which they live, professional training, extension to them of the social security regime in force for the other citizens, health assistance).

Upon examination of the legislation in force and the conduct of competent bodies whose activity is liable to affect the situation of Indians considerable differences appear regarding obligations assumed on the basis of ILO Convention No. 107.

Particularly law No. 6001 of December 19, 1973 (Estatuto do Indio) which statutes on the organization of the treatment of members of native communities, is marked by a more limited perspective than

that of the ILO Convention. The same definition of native population to which this Convention refers, is so wide as to be applied to any kind of community living a part from the rest of the population of the country, without any necessity for such condition to be accompanied by the common ethnic descent of its members from the original inhabitant of that territory at the time of conquest or of colonialization of the country (cf. art. I Convention). Law No. 6001 contains, however, a more restrictive meaning of the term "native", corresponding to its ethymological sense: individuals having ethnic links with the inhabitants of regions marked out in Pre-Colombian times (cf. art. 3 of law No. 6001).

2. The Private Dimension of the Protection of the Indian Pursuant to Legislation in Force in Brazil

If tribal or aboriginal groups considered on the whole, are a steadfast reference point of the provisions contained in ILO Convention No. 107, the Statute of the Indian is set up according to a fundamentally individualizing perspective being essentially individuals, as members of native communities, grantees of protection by the legislator. Therefore the provisions relating to the quality of Indian are rather integrations to the norms stipulated in the Civil Code than part of an innovative and more advanced discipline.

Art. 5 of the Statute of the Indian recalls in fact the fundamental limitation of the capacity of the Indian to contract commercial agreements with foreign individuals alien to his community, already ratified in art. 6 of the Civil Code. Such agreements, in order to be valid, need a prior authorization of the responsible assistance organism of Indians, the National Indian Foundation (FUNAI) (art. 7 and 8). This limitation serves to safeguard protection of the Indians from abuse foreigners might carry out by taking advantage of the situation of inferiority of the aborigine, whether of economic or cultural nature: they might not be sufficiently aware of the juridical causes of the documents stating their own rights. This

limitation, however, is to end as soon as the Indian proves he has the requirements of law No. 6001 (cf. art. 9) and is able to be assimilated to the rest of the population of the country.

The privatistic objective in which the discipline of the Statute of the Indian is set does not appear qualified to ensure effective protection of the interests of the members of aboriginal communities: it must be finalized in fact not only for juridical integration with the rest of the population insofar as the Indian so desires, but also for socio-economic integration in the life of the country. This objective is stated in art. 3 of the ILO Convention and many other provisions on measures that States must adopt for the well-being of the natives. In the absence of such measures, emancipation of the Indians, according to procedures and conditions set out in art. 9 of the Statute of the Indian, will result in the economic and social uprooting of the original community, without corresponding, however, to an actual progress of the situation of the persons emancipated.

With regard to the procedure in art. 9 of the Statute of the Indian, it seems preferable to emancipate entire tribal groups according to procedure in art. 11 of that law, because it does not imply annulment of their social and cultural identity, as long as the integrity of those populations of the rights on the territories they live on is safeguarded.

3. Land Legislation

The section in which major evidence is shown of the non-fulfillment by the Brazilian government of the obligations deriving from ILO Convention No. 107 is that referring to the legislation of the land. The importance of this regulation derives from the fact that territory is a fundamental element of physical identification and economic survival of native communities.

The right of ownership of the Indians over the land finds recognition in the Statute of the Indian (art. 33). This circumstance, however, is not yet definitely relevant: it is sufficient to consider that the right of ownership in the 'civilistic' western sense, is very seldom found in native tradition. Art. 198 of the Constitution and art. 22 of the Statute of the Indian grant Indians the right to occupy permanently the lands they live on and to enjoy usufruct exclusively of the natural resources and of the income originating therefrom. Such right, were it truly granted, would be sufficient protection of the territorial situation of the native populations.

One must emphasize that Brazilian legislation limits in various manners the rights granted aboriginal populations. In this sense violation of obligations imposed by art. 11 and 12 of the ILO Convention 107 and of the Brazilian Constitution is evident.

The first limitation can be attributed to the fact that law No. 6001 of 1973 subordinates recognition of the right of occupation and usufruct of natural resources, by the competent administrative authority to a provision of limitation of territories which, according to art. 65 of the Statute of the Indian should have been complied with within 5 years from the date of the same Statute. The delay of the administration in providing in turn vast territories, is in fact to be interpreted in the non application of Convention No. 107 as well as of the constitutional provision. The uncertainty deriving from the inactivity of the governing authority has encouraged groups alien to Indians to occupy abusively native land, as if it were land "nullius".

The non-fulfillment by the Brazilian government was denounced by the expert Commission of the ILO for examination of the extent of application of Convention No. 107. In its report presented to the International Labour Conference at its 70th session (1984) it declared it was "préoccupée par la lenteur de la délimitation des terres indiennes et par l'invasion continue de ces terres par des non-Indiens".

The second fact list limiting effective enjoyment of the rights of Indians of the lands they live on, consists in the intervention performed on them directly by the government and authorized by it. The power of intervention is stipulated by law No. 6001 consenting too many delays to the right of exclusive usufruct granted Indians. Art. 20 of the Statute of the Indian lists in fact a series of "exceptional" cases in which the President of the Republic can authorize interventions in native regions. These are provisions expressed very vaguely, to subordinate, in practice, the exercise of the rights of the Indian to the discretion of the executive. It is sufficient to recall, to mention one of the arguments which lawfully legitimize interventions, applications having obtained in practice the principle of "national security", invoked to justify offence committed by police forces against fundamental human rights.

Regarding exploitation of the land on which Indians live, for the purpose of utilization of mineral and hydraulic resources or for the development of the country, the Government authorized many interventions of this kind without Brazilian legislation providing prescribing instruments to legitimize them. Art. 44 and 45 of the Statute of the Indian restrict the right of usufruct of the Indians to the resources of the surface of the soil, conferring to the State or the persons authorized by it, the faculty to carry out exploring or extracting activity in the subsoil. These are provisions evidently contrasting with the Constitution in force. The latter, in fact, does not provide for the State's power to limit the right of the natives to exclusive exploitation of the natural resources of the land they live on. Nor is it possible to apply for such purpose the distinction in art. 168 of the Constitution, between bare ownership and State monopoly of extraction activities. Indians are granted a right for usufruct (of a specific kind, paved down to the basics of survival) and which is not a right of ownership. Even if art. 33 of the Statute of the Indian was applied, consenting acquisition of the right of ownership after a 10-year period of occupation of a territory smaller than 50 hectares, it would be a right to bare physical, economic and cultural survival

of the members of the native communities whose identity can be irreparably harmed by the utilization of the lands for purposes different from the traditional ones.

With regard to the activities involving exploitation of the resources of the surface of the soil, it is not provided how the State could turn to the act of expropriation, contained in art. 161 of the Constitution, of land possessed by Indians for permanent occupation.

4. Management of Native Heritage

Until now we have only spoken of limitations encountered by the protection of the right of natives to usufruct of the lands they live on because of omissions by the administrative authorities or interventions performed or authorized by the Government. Even if none of these hypotheses applies, Brazilian legislation does not safeguard the freedom of native populations to decide autonomously regarding the formalities of the use of the lands occupied by them and the destination of the resources.

From this standpoint ILO Convention No. 107 does not propose an adequate model of legislation: art. 27, in fact merely establishes the obligation of the States to confer to appropriate institutions the task of planning and coordinating finalized measures for the development of populations concerned. Law No. 5371 of December 5, 1967 by which Brazilian legislators have prescribed art. 27 of the ILO Convention instituting FUNAI, conferring to the latter the management of goods relating to native heritage, comprising lands and usufruct (one tenth goes to FUNAI to cover expenditures and costs of management). FUNAI is also entrusted with the task of promoting valorization of the lands, according to principles defined in the law of 1967 and further elaborated in decree No. 84.638 of April 16, 1980, which brought some changes to the previous regulations.

These norms are finalized for the protection of the native heritage, until the day the latter are able to exercize consciously their own rights. This however does not justify the range of discretional powers the above mentioned laws ensure to FUNAI regarding the formality of utilization of the yield of the goods: FUNAI regulations, adopted by the Minstry of the Interior by an agreement dated July 21, 1972 only stipulates that a share of the native heritage must be used for the benefits of the development of the community which occupies the lands. Equally vague and general are the provisions contained in the Statute of the Indian (cf. art. 43, para. 1) and in the decree of 1980 already mentioned.

The tenor of these provisions shows how the legislator has adopted the capitalistic model of exploitation of resources in order to obtain a maximum economic profit: FUNAI has to comply with this procedure in its functions (cf. art. 43 of the Statute of the Indian and art. 24 of Decree No. 84.638). This is in conformity with the choice made on a general political level by the Brazilian government, of which FUNAI, though appearing as a private entity, can be considered a direct emanation: it is sufficient to consider the powers attributed to the Ministry of the Interior in order to nominate the components of the various bodies in which FUNAI operates, and approval of the internal regulations of its financial report.

The laws herein referred to do not provide in any way for participation of native populations, through their own representatives, in the management of FUNAI. As long as such exclusion lasts it seems very unlikely that a different model of management from the one marked by the activity carried out by FUNAI can be set up.