



# General Assembly

Distr.: General  
XX August 2024

English only

---

## Human Rights Council

Fifty-seventh session

9 September–9 October 2024

Agenda item 5

Human rights bodies and mechanisms

### **Joint written statement\* submitted by Coordenação das Organizações Indígenas da Amazônia Bras, a non-governmental organization in special consultative status, Indian Law Resource Centre**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[23 August 2024]

---

\* Issued as received, in the language of submission only.

## **New Law in Brazil Violates Indigenous Land Rights**

The Indian Law Resource Center and the Coordinating Group of Indigenous Organizations of the Brazilian Amazon ("COIAB"), offers this submission to inform the Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples and other relevant human rights bodies and mechanisms about a dangerous new law being considered by Brazil's Supreme Court that is already violating indigenous peoples' rights protected under international human rights law. This law, Law 14.701/2023, directly undermines indigenous peoples' land rights and other fundamental rights as distinct legal, social and political entities, including their right to exist as peoples, their right to self-determination and their right to maintain and strengthen their cultures, and their consultation rights under the ILO Convention 169 and the UN Declaration.

For many years, anti-indigenous activists in Brazil have sought to amend the Brazilian constitution to take away certain land rights from indigenous peoples. Specifically, they have sought to effectively annul or drastically alter Article 231 of Brazil's Constitution, adopted on October 5, 1988, which guarantees that "Indians shall have . . . their original rights over the lands they traditionally occupy [recognized], and it shall be incumbent upon the Union to demarcate, protect and enforce all their possessions". Article 231, Paragraph 1, follows and defines precisely which lands qualify for constitutional protection, stating that "The lands traditionally occupied by the Indians are those on which they live permanently, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and their physical and cultural reproduction, according to their uses, customs and traditions."

Although these provisions of the Constitution are clear and meet the relevant international standards in relation to indigenous land rights, anti-indigenous activists have invented a new legal theory called the "temporal milestone ("marco temporal") theory", which, in its most basic form, would limit Brazil's constitutional obligations to demarcate, protect and guarantee respect for all indigenous lands by applying the Constitution's recognition and protections only to lands on which indigenous peoples lived exactly on October 5, 1988, the date the Constitution was adopted.

This theory violates Brazil's Constitution, runs counter to decades of legal and political practice in Brazil and has already been ruled unconstitutional by Brazil's Supreme Court. It threatens indigenous peoples' tenure rights and other rights recognized in the UN and American Declarations on the Rights of Indigenous Peoples, Convention 169 of the International Labour Organization, and the jurisprudence of the Inter-American Human Rights System.

However, despite these overlapping fatal flaws, proponents continue to insist on this theory in order to take away the constitutional rights of indigenous peoples. Last year, Brazilian legislators approved a new version of the marco temporal, Law 14.701/2023. This law is now being analyzed by a Special Commission of the Supreme Court. The Commission is a constitutionally dubious body created by a single Supreme Court judge and tasked with conducting a legally dubious mediation procedure without any kind of clear, pre-defined rules. These procedural defects are discussed below, but even leaving these issues aside, the law is substantively unconstitutional, as the Supreme Court itself concluded last year.

In 2023, Brazil's Supreme Court analyzed an earlier effort to establish the marco temporal and ruled it unconstitutional. In that judgment, RE 1.017.365/SC, a 9-2 majority of the Court specifically concluded that "the constitutional protection of the original rights to the lands [that indigenous peoples] traditionally occupy does not depend on the existence of a marco temporal on October 5, 1988".

The marco temporal thesis is so threatening to indigenous rights in Brazil because it seeks to prevent indigenous peoples who, through no fault of their own, were dispossessed of their lands on the date the Constitution was adopted, from having their legitimate land rights recognized by the state. The victims of this law would include indigenous peoples who have

lost their land due to land theft, threats and attempts by the state to forcibly assimilate them. This approach would reward land grabbers and perpetuate human rights violations.

Further, Law 14.701/2023 would drastically limit any additional indigenous land claims by imposing a radical new test for establishing which lands are "traditionally occupied lands" and therefore eligible for demarcation and titling. This new test would allow land claims only on lands that are simultaneously 1) permanently inhabited, 2) used for productive activities, 3) essential for the preservation of the environmental resources necessary for their well-being and 4) necessary for their physical and cultural reproduction in accordance with their uses, customs and traditions.

Although the Constitution recognizes that land that meets any of these four elements must be protected by the state, Law 14.701/2023 proposes a reinterpretation of the Constitution that is both so vague in its definition and so strict in its simultaneity requirement that it will prevent almost all new land claims from moving forward. Opponents of indigenous communities seeking to establish their land rights will predictably use this four-part test, especially elements 3 and 4, to challenge indigenous land claims, and it is unclear how many land claims could be proven in court to simultaneously satisfy all four elements.

Brazil's Supreme Court is using new legal procedures to try to uphold this law, and these unfair procedures violate indigenous peoples' rights to equality before the law. These procedural defects are as follows.

This case has been assigned to a new judge, although the question of the constitutionality of the marco temporal was decided last year by another Supreme Court judge and Brazilian legal procedure requires that closely related cases be dealt with by a single judge.

The Court is attempting to impose a form of binding arbitration on a constitutional question and assigning the work to a special ad hoc committee. However, there is little precedent for the creation of such special committees, and there is no reason to believe that the Supreme Court has the power to delegate decision-making authority on constitutional issues; that authority is vested in the Supreme Court by the Constitution.

Furthermore, the Court is arbitrarily refusing to adhere to its own 2023 ruling that the marco temporal thesis is unconstitutional. No arguments have been presented that demonstrate a change in facts or circumstances to justify this sudden reconsideration of an established legal issue.

The Federal Senate passed this new law in 2023 just six days after the Supreme Court ruled that the marco temporal theory was unconstitutional. That the Senate simply re-adopted a law whose legal basis had just been overturned by the Supreme Court shows grave disrespect for the Brazilian constitutional order.

Together, these procedural defects demonstrate flagrant disregard for legal procedure and constitutional norms; they are evidence of systematic prejudice against indigenous people and they violate indigenous peoples' right to equal treatment before the law.

Substantively, this law will violate indigenous peoples' land rights recognized in the UN Declaration on the Rights of Indigenous Peoples. The imposition of an arbitrary and previously unknown statute of limitations on land claims will reward violations of Article 10, which prohibits forced removal or relocation of indigenous peoples from their lands without free, prior and informed consent. This deadline is intended lead to the denial of otherwise valid land claims and prevent indigenous peoples from revitalizing their cultural traditions and customs linked to their lands, in violation of Article 11.

Law 14.701/2023 would also violate Article 26, which states that indigenous peoples have the right to the lands, territories and resources they traditionally own, occupy or otherwise use or acquire. This is because Law 14.701/2023 would impose a severely restrictive

definition of traditionally owned indigenous lands that would invalidate the protections recognized by the UN Declaration.

This law would also violate Article 27 of the Declaration, which recognizes the State's obligation to "establish and implement, in conjunction with the indigenous peoples concerned, a fair, independent, impartial, open and transparent process... to recognize and adjudicate the rights of indigenous peoples to their lands, territories and resources, including those that were traditionally owned or otherwise occupied or used". The text of Article 27 clearly states that it applies to lands whose ownership or occupation has been discontinuous - "including those [lands] that were traditionally owned or otherwise occupied or used". Furthermore, this article offers protection to all indigenous peoples' lands, territories and resources in an open and expansive sense, in direct contrast to the overly limited definition of indigenous lands found in Law 14.701/2023.

Indigenous peoples' land rights are essential to virtually all of their collective rights, including their rights to self-determination and self-government, as well as their religious, cultural, economic and social rights. The law proposed by Brazil seeks to prevent almost all land claims made by indigenous peoples and represents a terrible threat to the rights of indigenous peoples enumerated in the UN Declaration, rights which together form the minimum standards for the survival, dignity and well-being of indigenous peoples.

---