The life of the traditional population of the Xikrin ethnic group in the face of the S11D project and the understanding of the inter-american court of human rights

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ABSTRACT
Brazil is a multiethnic and pluricultural country, from the beginning of its development to its sovereign state, having as its premise, to defend and value its heritage and its ethnic and regional diversity; caring for and promoting human rights in the various collectivities. In addition, as a legal support mechanism, international provisions such as the Inter-American Convention on Human Rights, which contemplates indigenous peoples and deals with the consolidation of the right to prior consultation in order to reduce the disparities in power relations present in the neoliberal state. The advent of this convention laid the foundation for the protection of the human rights of indigenous peoples. The main objective of this research is the legal discussion of the case of the Xikrin indigenous people in relation to the S11D project of the mining company Vale, in the State of Pará which, according to the lawsuits, has promoted social and environmental impacts to their villages, thus urging the need to promote specific studies; such as the Prior Consultation to ascertain the due violations of the legal mechanisms related to the stages of environmental licensing, as well as the discussion for the creation and implementation of a joint monitoring and follow-up committee between the Xikrin and the managers of the S11D enterprise, for the inspection and elaboration of public policies that respect the human rights of the Xikrin people.

Keywords: Prior consultation, Xikrin Community, S11D Development, Inter-American Court of Human Rights, Environmental Licensing.

1 INTRODUCTION

The international instruments for the protection of indigenous peoples aim to establish parameters for the protection and preservation of their physical and mental health, their way of life, respecting their good living, culture, religiosity, regulating access to biodiversity, respect for self-determination and the environment, thus guaranteeing their rights in a qualified manner in accordance with the law. promoting legal certainty.

In Brazil, it concerns the legal issue through the Federal Constitution of 1988, which had great importance as a national legal framework through the delimitation of their lands and the integration of indigenous communities with the rest of society. Assimilationist policies were abandoned, in search of greater communication with indigenous peoples, aiming at the recognition of their prerogatives and preservation of importance with a vision that included sociocultural diversity.

When analyzing the rights conquered by indigenous peoples and the reality they face in their daily lives, it is noted how much the Brazilian jurisdiction is still bureaucratic and little applied correctly when dealing with the creation and management of public policies aimed at traditional peoples.

In this sense, the Inter-American Court of Human Rights seeks to delimit guidelines to be obeyed by the Government and the Judiciary on the subject, always seeking solutions that recognize the rights of indigenous peoples over their lands.

To delimit this study, the Xikrin indigenous community in the southeastern region of Pará was chosen, given the importance of preserving their way of life and because it is a traditional indigenous population affected by mining activity, as it is a neighbor of the largest open-pit mine, the S11D mining enterprise, belonging to the Grande Carajás Program of the mining company Vale S.A.

For this reason, the paper proposes to answer: How can the rights of the indigenous people of the Xikrin ethnic group be ensured in the environmental licensing process of the S11D complex in Carajás, Pará, based on the parameters established by the Inter-American Court of Human Rights?

Initially, the section proposes an approach to the normative in the international sphere of the rights of indigenous peoples, relating to judgments of the Inter-American Court. Explaining the case of the Xurucu People and the case of the Members of the Indigenous Communities of the Lhaka *Honhat Association* (*nuestra terra*) vs. Argentina.

In a second moment, it will address the principle of jus cogens, confronting the reality of the community as it occurs with the Xikrin people and the *standards of* the Inter-American Court of Human Rights. In this understanding, we seek a way through the problem of environmental licensing and the impacts suffered in the community to ensure governance that meets the demands of the Xikrin community, through efficient public policies, respecting the content of *jus cogens norms*.

Thus, finally, there will be a cross-sectional study of the environmental licensing of the S11D project developed in the vicinity of the territory of the Xikrin community and the social and environmental violations experienced by the Xikrin people, resulting from the mining activity. In this scenario, there is an attack on the concept of the term prior, free and informed consultation, its legal support, the importance of obeying the standardization of this topic.

Guided by international bodies that recognize prior, free and informed consultation; through the Inter-American Court of Human Rights, to create a participatory monitoring committee as a means of remedying or mitigating negative externalities and to assist in the development of public policies that meet the legal parameters of indigenous protection.

The general objective is to ensure the rights of the Xikrin ethnic group in relation to the S11D mining project in Carajás, Pará, based on the rulings of the Inter-American Court of Human Rights, and to support public policies for the correct compliance with environmental licensing, in particular Free and Informed Prior Consultation and the Indigenous Component Study.

The specific objectives of the research are: to analyze the jurisprudence of the Inter-American Human Rights System on the protection of indigenous peoples. Clarify the importance of the principle of *jus congens*. Analyze the environmental licensing of the S11 D project and the importance of Free and Informed Prior Consultation.

For the research, the hypothetical deductive method was chosen, aiming to answer the problem question through the observation of the existing political and legal gaps, based on previous studies, in the reading of the existing theories of the subject addressed and bibliographic research, being carried out the hearing of leaders of the Xikrin community with the fulcrum of building the theoretical basis of the theme.

2 INTERNATIONAL PROTECTION OF INDIGENOUS PEOPLES

This section deals with the current international protection of the rights of indigenous peoples in the Inter-American Human Rights System, as well as the consolidation of their rights as *a norm jus cogens*, imperative norms of international law.

The most significant jurisprudence of the Inter-American Court of Human Rights (IACHR) regarding the rights of Indigenous Peoples will be discussed, such as the rulings in the cases of the case Xucuru People v. Brazil and with a more recent case of the Members of the Indigenous Communities of the Lhaka Honhat Association (our land) vs. Argentina.

The choice of these cases is due to the fact that there are aspects that most identify with the Xikrin People. The cases used as examples are common cases because they deal with indigenous peoples and the Inter-American Court of Human Rights is a reference in the debate on the guarantees of indigenous peoples. These are jurisprudences that the whole world takes as a reference, leading to

the parameters to be followed for the implementation of public policies that ensure the rights of the Xikrin people, through the observation of concrete cases.

2.1 THE INTERNATIONAL NORMS OF THE OAS AND THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS ON THE RIGHTS OF INDIGENOUS PEOPLES

In the view of the OAS Charter, respect for human rights by every member state of the organization legitimizes the existence of the regime of individual liberty and social justice through its proclamation. Article 1 of the OAS Charter states that the Organization shall establish an order of peace and justice in order to promote its solidarity, intensify its collaboration, and defend its sovereignty, territorial integrity, and independence.

The essential principles of the Organization of American States are: to ensure continental peace and security; promote and consolidate representative democracy, respecting the principle of non-intervention; organize their solidarity action in the event of aggression; to seek solutions to political, legal and economic problems that arise among member states; promote, through cooperative action, their economic, social and cultural development.

The OAS Charter has generally defended the duty of respect for human rights on the part of every member state of the organization. The American Declaration, on the other hand, highlighted the fundamental rights that must be guaranteed and observed by States.

The member states of the OAS are bound to comply with the rights mentioned in the American Declaration of the Rights and Duties of Man, considered the authentic interpretation of the generic provisions for the protection of human rights of the OAS Charter, as understood by the Inter-American Court of Human Rights.

In view of this, the formation of the American Declaration on Indigenous Peoples by the OAS stands out, which brought profound changes to the members, which allows for a multi-ethnic democracy and the participation of indigenous peoples within each of the States, being a document for the promotion and protection of the rights of indigenous peoples.

The Declaration reveals that the right to self-determination, lands, resources, social well-being and, above all, to the prior, free and informed consent of Indigenous Peoples on all issues involving them in their respective territories is recognized. In addition, it asserts the collective organization and the multicultural and multilingual character of indigenous peoples; the self-identification of people who consider themselves indigenous

Brazil, as a member of the Organization of American States, recognizes the duty to respect and comply with the provisions of the American Declaration on Indigenous Peoples. It should be noted, therefore, that this instrument recognizes that the rights of Indigenous Peoples constitute a fundamental aspect of historical importance for the present and future of the Americas.

In addition, Article VI of the Declaration asserts that Indigenous Peoples have the collective rights indispensable for their existence, well-being and integral development as peoples. For this reason, States recognize and respect the right of indigenous peoples to collective action and their legal, social, political and economic systems and institutions, in addition to promoting the full and effective participation of indigenous peoples, the harmonious coexistence of the rights and systems of population groups and cultures.

In this scenario, Article XXIII also states that States must obtain the "free, prior and informed consent" of indigenous peoples before adopting and applying legislative or administrative measures that affect them. This article is fundamental in the respect of the States for indigenous territories, especially with regard to the development of enterprises, in the study in question, mining activity, in areas that, in some way, affect the environment of the Indigenous People located there.

Of particular note are the provisions of the Declaration, the rights of indigenous peoples over the lands and resources they have traditionally used, as well as the recognition of the alternative forms of ownership, possession and dominion of lands provided for in Article XXV of the Declaration. This article is essential to the Inter-American Court's interpretation of the right to collective property of indigenous peoples and the perpetuation of the community.

In this way, the Heads of State and Government established mandates for the promotion of the rights of Indigenous Peoples in their territories, making a true commitment to the international community. For the organs of the Inter-American Human Rights System, the protection and respect for Indigenous Peoples brings special attention. In 1972, the Inter-American Commission on Human Rights (IACHR) held that, for historical, moral and humanitarian reasons, it is a sacred commitment of States to protect indigenous peoples in particular. For this reason, in 1990, it created the Office of the Special Rapporteur on the Rights of Indigenous Peoples, with the objective of giving special attention to the rights of indigenous peoples who are constantly subjected to human rights violations due to their situation of vulnerability.

In the specific case of Indigenous Peoples, the Inter-American Court of Human Rights points out that the right to free, prior and informed consultation is a fundamental right, so that sovereign States are responsible for ensuring the effective participation of Indigenous Peoples in all phases of the project's activity, in the processes of design, execution and evaluation of development projects carried out on their ancestral lands and territories. There may also be intervention after the installation and operation of the enterprise.

It is also essential that States carry out Environmental Impact Assessments (EIAs) from a human rights perspective, which must be developed by independent and technically capable entities, under state supervision, as established by the Inter-American Court of Human Rights.

In a Consultation on the Rights of the Indigenous Peoples of Pan-Amazonia, the Inter-American Commission received information that mining activity would be one of the main threats to the integrity of indigenous territories and the cultural survival of their inhabitants. This threat translates into deforestation, which is the cause of the elimination of surface vegetation that provides access to mineral resources, as well as the accumulation of waste on the surface and the contamination of rivers and groundwater (IACHR, 2018, p. 18).

On the other hand, in the OAS report entitled "Indigenous Peoples, Afro-descendant Communities, and Natural Resources: Protection of Human Rights in the Context of Extraction, Exploitation, and Development Activities" (IACHR COURT, 2016), the Organization reports that one of the main concerns of the Inter-American Commission on Human Rights regarding the duty to ensure restrictions on the use and enjoyment of the lands and natural resources of Indigenous Peoples is the fulfillment of the requirements for the granting of spaces for enterprises, so that the exploitation of natural resources does not cause serious violations of the ancestral mode of survival of Indigenous Peoples.

The situation is particularly worrisome when States authorize projects and grant concessions over the territories of indigenous peoples in voluntary isolation and/or initial contact, who, exercising their right to self-determination, have decided to avoid any kind of contact with the society involved.

With regard to the aforementioned right to free, prior and informed consultation, Article 6.1 of Convention No. 169 of the International Labour Organization provides that consultation must be carried out through appropriate procedures and in particular through its representative institutions, whenever legislative or administrative measures likely to directly affect Indigenous Peoples are in process.

The Inter-American Commission on Human Rights (IACHR) points out that, according to the inter-American system itself, individuals are obliged to comply with the duty to consult with States at all levels. From this perspective of human rights investigation, in addition to the protection contained in national legislation, but also in the international treaties adhered to by Brazil, analyzing the serious damage and violations of human guarantees, it is necessary to argue for protection at different levels in order to make human rights effective in various segments, including the promotion of human rights at various levels. (URUEÑA, 2014).

In this way, if a private agent acquires a state concession for the exploitation of natural resources that affects the indigenous territory, it is mandatory to comply with the free, prior and informed consent of the responsible State to the Peoples who will be directly or indirectly affected by the project.

The Inter-American Court of Human Rights asserts that the processes of socialization carried out by interested companies or third parties with indigenous peoples on certain projects should not be confused with the consultation processes that must be carried out by States. With this, the Court

explains that the obligation to consult is the responsibility of the State, so that the consultation process is not a duty that can be delegated to interested third parties of the private sector, even if it is the company itself that is interested in the exploitation of the resources of the indigenous territory (CORTE IACHR, 2012, para. 187).

The United Nations Declaration on the Rights of Indigenous Peoples reiterates the duty to consult in order to obtain consent, as observed in several articles of the instrument. Article 6.2 of Convention No. 169 of the International Labour Organization (ILO) states that consultations must be held with a view to reaching an agreement or obtaining consent on the proposed measures.

Ascerald (2009, p. 131) also recognizes that the State needs a greater understanding that the environmental issue is not an obstacle to development, but rather that it is a requirement for a participatory, inclusive, democratic and multi-ethnic development model.

It is understood, therefore, that the consultation is not limited to a mere formal or informative procedure in the administrative process of environmental licensing, and should be seen as a true instrument for the participation of indigenous peoples in economic activities that impact them directly or indirectly. Therefore, the consultation process must meet the objective of establishing a dialogue between the parties, as well as on sustainability, real socio-economic development for the region and for the affected communities.

2.2 JUDGMENTS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON INDIGENOUS PEOPLES

The decisions described below were selected because they are cases that resemble the case of the Xikrin people, as well as because of the absence of public policies to protect these peoples. These are cases that involve socio-environmental violations in indigenous territories, in which the negligence in the ethnic-cultural guarantee is latent and that has caused sentences that stem from factors linked to negative externalities, which are absorbed by the communities, generating the destruction of culture, worldview, self-determination, destruction of natural resources, social organization, sources of income, hunting and fishing in demarcated indigenous territories.

The cases are not restricted only to the issue of territorial demarcation, the main vector is the social and environmental violation, the non-compliance with the law and the ineffectiveness of government management related to the socio-environmental and economic preservation of the territory; cases that already relate the concept of contemporary justice; socio-environmental justice, which encompasses the right to life and a healthy environment as maintainers of several other fundamental rights.

Through the understanding that dialogue, prior consultation is linked to any democratic regime. In this vein, it is important to understand that citizens can postulate action internationally in search of

rights, in order to devastate discrimination, since the theme of human rights has been a matter of global interest, and the environmental issue fits into this approach, emphasizing that environmental impacts are the cause of socioeconomic impacts within the community.

In short, these are cases that report the State's legal negligence in the face of ethnic cultural conflicts and the interests of State capital, often on one side of the demand there is some traditional population, in the study in question the Xikrins indigenous people, showing how the interest of the State harms these social groupings, thus resulting in the loss of dignity, of integrity, of honor, where rights are disrespected, causing immeasurable material and immaterial losses to indigenous communities.

In the ISHR through the IACHR and the Inter-American Court of Human Rights, there are numerous judgments related to traditional indigenous peoples, in which the aim is to remedy the injustices and inequities experienced by indigenous peoples, which will be used as precedents for judicial and administrative conflicts.

Two cases were selected that will be explained in more detail in order to demonstrate the aspects that most resemble the conflict between the S11D enterprise and the Xikrin community, and especially the neglect of the State. The case of the Xucuru people, Xucuru people and their members vs. Brazil (2018), which was the first conviction of the Brazilian State related to indigenous peoples and ending with a more recent case of the Members of the Indigenous Communities of the Lhaka Honhat Association (our land) vs. Argentina (2020) which addresses violation of rights related to a healthy environment for collective property.

After all, according to Cançado Trindade (2006, p. 143, apud LOUREIRO, 2012, p. 395), to affirm the legal personality of human beings and their full legal capacity at the international level for violations of their rights is to be faithful to the historical origins of international law itself – the rights of nations, making – if necessary, therefore, remove the old obstacles, reaffirmed throughout the twentieth century, in order to finally construct the subjectivity and capacity to act of the collective victims of human rights violations.

2.2.1 Xucuru Indigenous People and their members vs. Brazil – Judgment of February 5, 2018[1]

The Xucuru Indigenous People were chosen to emphasize that the Brazilian State has already suffered a condemnation for not properly exercising the rights of indigenous peoples. The Xucuru Indigenous People have historical references that date back to the sixteenth century in the State of Pernambuco.

[1] Topic written from the reading of the judgment Xucuru People and their members vs. Brazil, of February 5, 2018, of the Inter-American Court of Human Rights.

Several documents describe the areas occupied by the Xucuru Indigenous People throughout the eighteenth century, such as the Xucuru Indigenous People of Ororubá, which is made up of 2,354 families, who live in 2,265 houses. The Serra do Ororubá is composed of a mountain range with an approximate height of 1,125 meters. It is a region that has a privileged hydrography, with the presence of a large reservoir and rivers, such as the Ipanema and Ipojuca rivers, which intersect with the indigenous soil.

There are 7,726 indigenous people in the territory, distributed in 24 communities, in an area that comprises 27,555 hectares. In addition, it is located in the municipalities of Pesqueira and Poção, about 214 km from the capital of Pernambuco, Recife, geographically and politically divided into three regions: mountain, agreste and river. The People have their own organization, political and power structures, such as the Assembly, the Cacique and the Vice-Cacique, the Ororubá Indigenous Health Council, an internal commission for solving problems among the community, a Council of Leaders and a Shaman who is the spiritual leader of the community.

The economic base of the Xucuru People is based on animal husbandry and vegetable production, which supply the open market of Pesqueira, in addition to developing organic production. The culture of the Xucuru People is diverse, highlighting the material culture, based on handicrafts, and the symbolic culture, whose ritual reveals the shaman, the enchanted of light (SÁ, 2019). There was great miscegenation and influence of the external culture, causing the community to keep little memory of its old culture.

In 1980, with the appointment of Cacique Xicão, a great change began, as there was a better articulation of this people, resulting in the intensification of the struggle for land, education, health, among others. For a long time there have been conflicts between members of the Xucuru People, farmers and local politicians, but their intensification occurred especially with the beginning of the demarcation process of their lands in 1989.

In the nineteenth century, the invasions of the lands of the Xucurus increased, especially by the descendants of the traditional families of the region, aggravated by the issue of the promulgation of the Land Law of 1850. From there, the invasions pleaded for the extinction of the community, based on the fact that there were no more indigenous people. The pleas were answered in 1879, when the Imperial Government officially decreed the extinction of the village of Cimbres, favoring the local elite. For this reason, the Xucurus Indians, protecting themselves from persecution, dispersed throughout the region to live in other lands and on the outskirts of the cities.

In 1973, with the promulgation of the Statute of the Indian (BRASIL, 1973), the Xucuru Indigenous People began to articulate themselves to claim ownership of their lands, however, with the constant allegation that the Xucurus could no longer be considered indigenous, due to the miscegenation suffered by their members, considered caboclos or remnants.

The concept of the Indian Statute at the time is archaic, treating the indigenous as an inhabitant of the forest, isolated from the world and with wild characteristics. This concept, interpreted literally, does not represent the indigenous communities of Brazil, as it would disconstitute their cultural characteristics and the withdrawal of the right to their lands.

Since 1996, there has been a regulation of the administrative process of demarcation and titling of indigenous lands, coming from Decree No. 1,775 and by the Ordinance of the Ministry of Justice No. 14/96. The demarcation process consists of five stages, occurring on the initiative and under the guidance of the National Indian Foundation (FUNAI), but the final administrative act of demarcation is the exclusive responsibility of the Presidency of the Republic. The administrative process is initiated when FUNAI becomes aware of an indigenous land that must be demarcated, or at the request of the indigenous people themselves and their organizations or non-governmental organizations.

If the request for urgency for the demarcation is recognized, the public administration must initiate the process, but Decree No. 1,775/96 brought changes generating the right to be able to request compensation and changing the administrative process of demarcation, with which numerous objections were filed, delaying the territorial demarcation of the Xucuru people.

Cacique Xicão, chief of the Xucuru Indigenous People, was assassinated on May 21, 1998. The investigation determined that the mastermind of the homicide was the farmer José Cordeiro de Santana, known as "Zé de Riva", a non-indigenous occupant of the Xucuru territory. After incidents involving the accused and people related to the occupation of indigenous lands, the case was reassigned to the 16th Federal Court of Pernambuco and, in November 2004, the Jury Court sentenced Rivaldo Cavalcanti, hired by José Cordeiro de Siqueira, to 19 years in prison.

In view of this context, the Inter-American Court of Human Rights ruled in its judgment addressing the duty to protect property, which emanates from Article 21 of the American Convention on Human Rights, as well as from ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples in view of the obligation of States to comply with the provisions of the Convention.

As explained by the Court, the obligations set forth in Article 1.1 of the American Convention require the duty of the States Parties to organize the entire governmental apparatus and all the structures in which the exercise of public power is manifested in order to legally ensure the free and full exercise of human rights. As in this case, the obligation to ensure the necessary acts to guarantee the collective property of Indigenous Peoples.

It is important to make it clear that the Inter-American Court of Human Rights began its analysis of the right to collective property in the American Convention, emphasizing the need to go beyond the classic concept of property, enshrined in Article 21 of the treaty, in order to establish the scope of the rule.

Because of this, it based this conception on the protection of this right in a legal body of international instruments that guarantees the legal robustness to determine the imperativeness of the right to collective property of Indigenous Peoples. To this end, as mentioned in the ruling, the right to collective property of indigenous peoples is provided for in Article 21 of the ACHR, as well as in ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

On the other hand, its definition and content, as well as the scope of Article 21 of the ACHR, have elements that corroborate a jurisprudential construction based on the previous understandings of the Inter-American Court of Human Rights

It should be noted that the Court, as explained in paragraph 117, determines that the traditional possession of indigenous people over their lands has been equivalent to those of the title of full domain granted by the State, as well as granting indigenous people the right to demand official recognition of ownership and its registration.

It is the State's obligation, therefore, to guarantee the effective ownership of Indigenous Peoples, refraining from carrying out acts that may lead to agents of the State itself or third parties affecting the existence, value, use and enjoyment of their territory, according to paragraph 193.

This condemnation occurred in Brazil because, at the time, Brazil adopted the time frame thesis regarding the demarcation of indigenous lands. In this sense, Roraima, the largest rice producer in the Northern Region of Brazil, would also contribute to the supply of the cereal to neighboring states, even though it is a process with administrative vices and without any attention to a historical survey of land occupation by the Ingariló, Makuxi, Patamona, Taurepang and Wapixana indigenous groups.

In the decision, eighteen parameters or conditions were set for considering a land as traditional indigenous. Among the conditions, it is noteworthy that the thesis of the time frame, according to which the Constitution works with a certain date as a reference to verify the occupation of a certain geographical space by an aboriginal ethnicity, that is, for the recognition of original rights over lands that have traditionally been occupied by Indigenous Peoples.

Although the decision did not have binding effects, the thesis began to guide the hermeneutics of article 231 of the Federal Constitution, constituting a judicial precedent that, in such a condition, is influencing decisions of all instances of the Judiciary.

However, in the judgment that resulted in the annulment of the demarcation of the Limão Verde Indigenous Land, [2]by applying the thesis of the time frame, the Second Panel of the STF created a restrictive conception about how the proof of this "stubborn dispossession" should occur.

In this context, in dealing with the Xucuru people, the Inter-American Court of Human Rights found that there were sufficient elements to recognize the excessive slowness of the administrative process, contrary to Brazil's poor understanding of the demarcation and protection of indigenous lands,

[2] Supreme Court. Second Class. ARE n° 803.462-AgR/MS. Rapporteur: Minister Teori Zawascki. Dje: 12/02/2015.

seeking to expedite the ratification and titling of the Xucuru territory. Therefore, the passage of time for the removal of non-indigenous people is unsustainable, which demonstrates an offense to the right to a judicial guarantee of a reasonable time, present in Article 8.1 of the ACHR.

Thus, both the IACHR and the Inter-American Court of Human Rights have held that Indigenous Peoples, in accordance with Article 21 of the ACHR, have the right to own and maintain the land and resources they have historically occupied and, therefore, have the right to be legally recognized as owners of their territories, in order to obtain legal title to the lands and have these titles duly registered.

The Inter-American Court of Human Rights ordered Brazil, as a form of reparation, among others, to immediately and effectively guarantee the collective property rights of the Xucuru Indigenous People over their territory, so that they do not suffer invasion, interference or damage by third parties or agents of the State; the conclusion of the process of dismantling the Xucuru indigenous territory, with extreme diligence, making the payments of compensation for pending bona fide improvements and removing any type of obstacle or interference on the territory and the payment of compensation as moral damages.

The case of the Xucuru Indigenous People and their members vs. Brazil represents a milestone in the jurisprudence of the Inter-American Court of Human Rights regarding Brazil's condemnations regarding the rights of Indigenous Peoples. The redefinition of the concept of collective property and the analysis of the violations of the State in the course of the administrative and judicial procedures demonstrate that the country may suffer a new condemnation by the Court in a similar case.

Based on what has already been explained, the Xikrins, as carried out by the S11D project, maintain a constant struggle for compliance with the Prior, Free and Informed Consultation and the inclusion of mitigating measures in the licenses granted in the environmental licensing.

The similarity of the occurrence with the Xucuru People and the Xikrin Indigenous People is also due to the fact that they already had an unsuccessful administrative claim, resulting in a lawsuit that was filed in the Federal Regional Court of the 1st region. The lack of compliance with the right to Free, Prior and Informed Consultation, as well as the necessary participation of the Xikrin in the legal processes that triggered the exploitation of natural resources in regions very close to their lands, and that the impacts pass through the demarcation areas, reveals the present violation of the Brazilian State in the care of the Indigenous People who suffer from the absorption of negative externalities according to the continuity of mining activities.

The jurisprudence of the Inter-American Court of Human Rights and international and national norms on the rights of Indigenous Peoples express the urgency of complying with the prior consultation, as this requirement is essential to understanding the particularities of social, economic

and environmental impacts, determining the best forms of access to resources, in addition to complying with international standards in the protection of the rights of Indigenous Peoples.

In addition, as previously explained, environmental licensing is an administrative process, describing the compatibility of mining activity with the protection of the environment. In this sense, it is the duty of the State to guarantee the right to judicial protection, allowing the affected Indigenous People to express all the particularities and needs in the face of the damage that will be caused by the mining activity to their way of life and daily life.

It is interesting to correlate the fact that the Xikrin Indigenous People suffer from the State's omission of the right to collective property and the evident lack of compliance with the right to free, prior and informed consultation in mining activities authorized by the State that directly impact the lives of indigenous people in the region.

It can be inferred, therefore, that both Peoples, Xikrin and Xucuru, have their rights to collective property violated, and, in view of the failure of the Brazilian State to comply with the rights to prior, free and informed consultation, allowing land-related activities to be carried out with negative impacts absorbed by Indigenous Peoples in their way of living and relating to the land.

2.2.2 Case of the Members of the Indigenous Communities of the Lhaka *Honhat Association* (*nuestra terra*) vs. Argentina – Judgment of February 6, 2020[3]

The sentence related to the members of the Indigenous Communities of the Lhaka Honhat Association entails an evolutionary innovation for the rights and guarantees regarding environmental violations, which highlights the obligations of States and companies in relation to the violation of human rights arising from the impacts on the environment and is totally correlated to the case of the people of the Xikrin ethnic group. Because the negative externalities from mining activity reduce the quality of the environment, where rivers are being polluted, hunting is far away, constant noises of explosions in the mines take away peace in the community, among others.

The Case of the Members of the Indigenous Communities of the Lhaka Hhonhat Association is formed by the indigenous communities of the Wichi (Mataco), Komlek (Toba), Tapyý (Tapiete) and Ivjwaja (Chorote) ethnic groups, together they hold a territorial area in the province of Salta in Argentina, border area of Bolivia and Paraguay, occupants of this land since the seventeenth century.

On January 26, 2012, it indicated a smaller number of communities, however, the Court decided to encompass several plots of land and thus reach 132 communities. The indigenous claim took 28 years, in this period there were some changes in the state policy in relation to the property claimed, but nothing that complied with all the rights and guarantees of traditional peoples.

[3] Topic written from the reading of the judgment Case of the Members of the Indigenous Communities of the Lhaka Honhat Association (*nuestra terra*) vs. Argentina, of February 6, 2020, of the Inter-American Court of Human Rights.

Among the changes, on December 15, 1991, Salta unified the indigenous land lots, in 1992 the *Lhaka Honhat Aboriginal Communities Association* was constituted. The following year, the Consultative Commission was created to assist in decisions between the government and communities.

In 1995 the construction of a bridge took place, which was peacefully occupied by the indigenous communities with the promise of the governor at the time to award the lands that were not yet contemplated in the lots, which were not yet demarcated as indigenous lands, which did not occur. In December 2000, a proposal was made for the delivery of fractions of lots, a proposal that was rejected by Lhaka Honhat because it did not include all the members and even few the indigenous lands.

After 3 years, in 1998, they claimed before the International System that even though their lands were demarcated and recognized by the State, they were not properly delivered, which harmed communal property. This was due to the failure of attempts to negotiate with the "*criollos*" (non-indigenous people), a struggle that had also dragged on since the last century.

The criolos were responsible for environmental degradation, through illegal logging, the cultivation of pasture for cattle raising, as well as the installation of fences to separate indigenous families from their herds. Such attitudes caused a great loss in the diversity of natural resources, as well as in the scarcity of essential inputs for the community, depriving the members of various indigenous ethnicities from living according to their social, cultural, economic and especially environmental customs and practices.

For successive years, with the issuance of Decrees, the State sought to circumvent the total surrender of indigenous territories and the removal of Creole families, even with the installation of a technical team in 2008 designated for the distribution of lots and the giving up of part of the territory by the Lhaka Honhat members, they were not enough to contemplate the international guarantees of the 132 communities. It is important to remember that during this period of legal insecurity in the community, logging, cattle ranching, and the decrease in forest resources continued to haunt the people of the ethnic groups that formed the Lhaka Honhat Association.

In view of this, the Court set an unprecedented precedent, where it declared Argentina's international responsibility for the violation of several rights violated in 132 indigenous communities, recognizing the vulnerability and communal ownership, respecting the social, economic, cultural and environmental rights of that people. Subsequently, it was called Economic, Social, Cultural and Environmental Rights (DESCA), according to Zambrano (2020). Thus, reaffirming the legal security of indigenous lands against the action of third parties and the interests of the capitalist State.

The decision promulgated on February 6, 2020, condemned Argentina for having violated its obligation to respect and guarantee the rights enshrined in Article 1 of the ACHR related to Human Rights, and was also based on Article 21 of the aforementioned Convention, which mentions the right

to property and its protection, as well as the use and enjoyment of property belonging thereto in the social interest.

In this new guise, we can observe the destruction of the environment, which in the Lhaka Honhat case generated a direct violation of the healthy environment, and many other damages arising from it, since it is through the healthy environment that the community achieves healthy food, drinking water, the guarantee of its way of life and cultural identity. These aspects were the ones that brought innovation to this sentence through the lack of applicability of state measures to repress such violations.

The court established reparation measures, based on vulnerability and the DESCA, sentencing the formulation of an action plan to repair environmental losses, the conclusion of delimitation and demarcation actions, the granting of a title that recognizes the indigenous communities in their territory.

In addition, the Court has ordered the State of Argentina to refrain from carrying out projects on indigenous lands that may harm the lives of the communities involved, and in the event that a grant is granted, to carry out a free and informed prior consultation.

Conducting a study that identifies the conditions of water and food and a recovery plan, conservation and avoiding future contamination. The plan must prevent the loss of forest resources and thus ensure a healthy and adequate cultural diet. The creation of a community development fund for the good of the community. Ending with the adoption of legislative measures to ensure legal certainty.

The point of similarity to be highlighted is the environmental violation, as it is the same violation that happens with the Xikrin Indigenous Land, in the face of the action of the mining company S11D, where there is an invasion in the territory of negative externalities on a daily basis. The negative impacts that destroy the community's way of life, affecting its entire cultural, social and economic organization, disrupting a healthy environment for the consumption of water and food. Polluted rivers, devastation of the forest, loss of fruit trees, distancing from hunting, destruction of ancestral cemeteries, difficulty of access between villages, the drop in the sale of nuts, are problems faced by the Xikrin community on a daily basis.

In this vein, it is considerable that the remedies within the Brazilian State before the Judiciary tend to be exhausted because there is already litigation in favor of environmental reparation and compensation arising from material and immaterial losses arising from environmental degradation on the lands of the Xikrin Indigenous Land; the original case is ACP 0001254-18.2016.4.01.3901 in the 2nd Federal Court of the Subsection of Marabá – PA, there are also in the TRF 1st, in the 6th Panel, Rapporteur Federal Judge Daniel Paes Ribeiro, the following Interlocutory Appeals; 1- AI 0005755-44.2017.4.01.0000, 2 - AI 0030445-40.2017.4.01.0000, 3 - AI 1011113-36.2018.4.01.0000, 4- AI 1011739-55.2018.4.01.0000, 5 - AI 1037453-46.2020.4.01.0000.

The Xikrins tirelessly implore the Brazilian Judiciary in all its spheres to respect and comply with their guarantees, but the struggle is arduous and lasts for years, in addition there is also a request in the Special Court, rapporteur Federal Judge Ângela Catão, MS 1012307-71.2018.4.01.0000, in the Superior Court of Justice, rapporteur Minister Geraldo Og Nicéas Marques Fernandes of the 2nd Panel, TP 3053/ PA and in the Brazilian Supreme Court, STF, through the rapporteur Minister Marco Aurélio Mello PET 9246, all processes are available in electronic form, through the PJE system (TRF1, 1st and 2nd degree) and ST/STF (own systems).

It is noteworthy that Article 46(2)(c) of the American Convention on Human Rights provides that it does not take too long without a final decision, not exceeding a reasonable time, and that it complies with the requirements for the non-termination of Brazil's domestic remedies; the complexity of the matter, the petitioner's position, and the measures adopted by the State to comply with the recommendations, making it clear that there is a possibility for the Xikrins to petition the IACHR and the IACHR to forward the complaint to the Inter-American Court of Human Rights.

However, the Xikrin people can resort to the American System to claim their rights in the violations of human rights, communal property, the guarantee of legal security and environmental violations, making it clear that international issues are vectors to improve public policies aimed at indigenous peoples, which assert the multiracial, multicultural, multiethnic democracy of the Brazilian Democratic State of Law.

2.3 THE *JUS COGENS CHARACTER OF* NORMS FOR THE PROTECTION OF INDIGENOUS COMMUNITIES

Initially, in addition to the norms of general international law, formed by rules of customary content, accepted and recognized by conventional international society, which are norms established by means of international treaties or conventions, the Vienna Convention on the Law of Treaties mentions a third set of mandatory non-conventional rules, called *jus cogens*, which override the autonomy of will of States and cannot be derogated from by treaties or customs or even by general principles of international law.

In this vein, first of all, to understand a confrontation of dominance and dominated and the European "conquest" of the American continent, it is known that the right needs to be interpreted in the same way as dominion *(dominus*), since to have a right (*jus*) over something (or even to another in a condition of inferiority) means *formaliter,* i.e., the same as to exercise dominion over this something or someone (MONTES D'OCA, 2012, p. 179), so the Spanish philosopher, theologian and jurist Francisco da Vitória understood the indigenous people as bearers of rights over their lives and lands, which were taken by the Europeans for their own use and, for this purpose, authorized by the Spanish Catholic monarchs and even by the pope himself (MONTES D'OCA, 2012, p. 175).

Along these lines, some authors consider that the recognition of the right to protection of indigenous peoples, with regard to property, began with the theoretical formation of the imperative norms of international law, as pointed out by Ferreira Júnior and Bentes (2019), who consider that Francisco de Vitória created conditions for the defense of the validity of *jus cogens* when speaking of Natural Law, which he considers immutable, which enjoys external obligation, and which has an imperative nature.

According to Machado (2013, p.142), jus cogens norms do not admit any unilateral denial by States, even in the face of international treaties. In this sense, imperative norms generate erga omnes obligations, even if not every erga omnes obligation is necessarily a jus cogens, because not all erga omnes obligations have the characteristic of being an imperative right of greater hierarchical-normative dignity.

That said, the *jus cogens* norm, as previously stated, does not depend on ratification, through its imperative aspect, hence the importance of knowing what these rules are, because they, evidently, do not follow the same criterion of validity as treaties, including, according to Baptista (1997, p. 491) it is technically and legally incorrect to speak of invalidity in the scope of application of a norm of this nature, for it is not a question of a nullity, but of a repeal, in which a new norm jus cogens replaces the former and ceases to be in force. Thus, such a rule can be amended only by means of a subsequent rule of general international law of the same nature

According to Bentes (2021), *jus cogens* norms have three characteristics; imperativeness, which limits the autonomy of the State's will in relation to human groups and international society, universality because it is recognized in the scenario of the international community of States, and finally, non-derogation, which characterizes such norms because they cannot be abrogated by the will of States, since they come from a global acceptance and recognition.

Natália Bentes (2021, p. 80) states that "There is a minimum consensus that there are imperative norms in International Law, mainly referring to values essential to the international community."

The aforementioned author Bentes (2018) also reports that the majority doctrine understands that acceptance by all members of the international community is not necessary, but by the majority. The *jus cogens norms* deal with issues of equality, integrity, maintenance of peace and security, peaceful coexistence, self-determination of peoples, prohibition of genocide, slavery, torture and any and all acts that may hurt, denigrate, or depreciate humanity.

Bentes and Alves (2018) emphasize that *jus cogens norms* have an evolutionary and dynamic nature, which predisposes changes or alterations according to the wishes of the international community, always seeking better benefits for humanity. It is reasonable to understand that certain norms (customs or principles) have an imperative nature (*jus cogens*) precisely because they are essential to guarantee and protect the most substantial interests of the international community.

The doctrinaire (MAZZUOLI, 2015) teaches that "the emergence of the notion of *jus cogens* comes from the late 1960s, as a result of pressure from socialist countries in the process of development to establish the idea that some fundamental norms, formed by custom, should be situated in a hierarchically superior position to conventional norms, rendering null and void treaties that contrast with them".

To affirm that *jus cogens* is an imperative norm does not mean to say that its precepts are only binding, since even those derived from positive law are also binding, but it does mean that they are not susceptible to derogation by the will of the parties. This, in fact, is its basis of validity: non-derogation.

Thus, being in the highest hierarchical position of the normative scale, even in the face of treaties and conventions prior to its creation in the Vienna Convention on the Law of Treaties of 1969, it does not have explicit examples in the document. However, according to Mazzuoli (2018, p. 114), " international *jus cogens* would include norms prohibiting discrimination, (norms) that ensure the self-determination of peoples, as well as the principles of international humanitarian law".

It is possible to affirm, therefore, that the Universal Declaration of Human Rights of 1948, with its perfect formation and framing in the concept of Article 53 of the Vienna Convention of 1969, has *a jus cogens character.* This document was the inspiration for the formation of the American Declaration on the Rights of Indigenous Peoples.

From this, it is possible to perceive the evident formation of jurisprudence around the right to collective property of Indigenous Peoples, as in the sentences of the case of the Xucuru Indigenous People and their members vs. Brazil; as Article 21 of the American Convention on Human Rights provides for the due protection and fulfillment that States must have with respect to this right.

According to the intrinsic relationship that these peoples have with the land they have traditionally occupied for centuries, property is something sacred, which determines their identity and their way of life. In this sense, as Ferreira Júnior (2018, p. 26) argues, indigenous peoples have the right to collective property repeatedly affirmed by international and national jurisprudence, with the characteristic of being imperative norms, *jus cogens.*

In the above-mentioned S11D project, by serving the interests of the mining company, the State becomes an agent of the socio-environmental problems that the mining activity generates, aggravated by the absence of public policies that serve the Xikrin indigenous peoples.

In view of this, related to the right to collective property of indigenous peoples, in the case of the Xikrin Indigenous People, the need to respect and comply with the right to collective property is evident. In this sense, it is legally determinable that the institution of Prior Consultation be urgently complied with by the Brazilian State regarding the Xikrins, since the Inter-American Court of Human Rights itself defends it as an essential instrument to guarantee the human rights of indigenous peoples.

According to Bentes, Pereira and Assunção (2021, p. 31519), "when mining projects are established, the main effects are the loss of traditional territories and lands; eviction; migration and possible resettlement; depletion of resources necessary for physical and cultural subsistence, destruction and contamination of the traditional environment, social disorganization, as well as, in the community, long-term negative impacts on health and nutrition and, in some cases, abuse and violence."

Thus, the human rights of the Xikrin people, such as collective property and all others related to territory and social organization, must be performed as an imperative norm of international law, rights that are intrinsically related to the fulfillment of the right to prior consultation.

3 BRIEF ANALYSIS OF ENVIRONMENTAL LICENSING AND THE NEED FOR FREE AND INFORMED PRIOR CONSULTATION FOR THE XIKRIN INDIGENOUS PEOPLE

This section seeks to understand the process of installation of the mining activity of the S11D project – belonging to the Carajás Iron Project – PFC, executed by the company Vale in the southeastern region of Pará. Going through the steps required by Law, related to the Operating License 1361/2016, the Installation License 947/2013 and the Preliminary License 436/2012, they must all respect the prior consultation.

In this context, it is important to show that CPLI is a legal requirement for an adequate and healthy environmental licensing, based on the framework of the Federal Constitution of 1988 and on the Treaties of international norms that deal with the human protection of indigenous peoples of traditional peoples and their role in the multi-ethnic democracy of the Brazilian State.

3.1 ENVIRONMENTAL LICENSING OF S11D – CARAJÁS IRON PROJECT

Environmental licensing is required for activities that are potentially polluting, in accordance with LC 140/2011, which makes it clear that environmental licensing is the institute that supports enterprises that cause or will cause environmental impacts in the location of the activity, being a potential polluter, generating environmental degradation by the activity developed. (BRAZIL, 2011).

It is an administrative proceeding; It is the means used to describe the compatibility of mining activity with the protection of the environment. Is a procedure through which the competent environmental agency allows the installation of imminently polluting activities, or those that, in any way, may cause degradation to the healthy and balanced environment. As a preventive instrument, licensing is essential to ensure the preservation of environmental quality, a broad concept that covers aspects ranging from public health issues to, for example, the preservation of biodiversity and traditional populations; "the peoples of the forest", with economic development.

Thus, according to Silva (2015), environmental licensing is a legal process of fundamental importance, as it is through it that it is possible to identify in whole or in part the harmful environmental effects of the enterprise, whether they can be controlled and how to contain them. The result of the analysis of the deleterious effects and the mechanisms to subtract the harms or even mitigate them must be placed in the licenses, in the so-called conditions of the licensing of environmental licensing.

In the words of Carmem Figueiredo (2011, p. 6), environmental licensing is a legal provision through which "the competent environmental agency licenses the location, installation, expansion and operation of enterprises and activities that use natural resources", and may entail either "an administrative act of a binding legal nature (environmental license) or, when relevant, a legal act of a discretionary nature, with a precarious character (environmental authorization)" (BRASIL, 2016, p. 48).

According to article 8 of Conama Resolution No. 237/1997, these environmental licenses are: the Preliminary License (LP), Installation License (LI) and Operating License (LO), which characterizes environmental licensing as three-phase, where each stage must carry out a detailed and specific environmental study (BRASIL, 1997).

Initially, the Preliminary License is obtained in the preliminary phase of planning, verifying the environmental feasibility, the location, analysis of the region, disciplined by article 8, I of Resolution 237/97 of CONAMA. In this license, an authorization is granted for the mining activity to be initiated.

The second license to be granted is the Installation License, which, according to article 8, II of CONAMA Resolution No. 237/97, grants the installation to start the construction of the structure of the mining enterprise, following the specifications of the duly approved projects, which must include means of environmental control and other conditions. At this moment, the implementation of the conditions that are decisive for the installation of the company takes place, as well as for the other conditions that will come in the operation phase.

Subsequently, the Operating License is granted, in which agreement is reached to start operating, authorizing the operation of the enterprise, governed by article 8, III of CONAMA Resolution 237/97, after verification of the requirements requested in the previous licenses (LP and LI). It is at this moment that the machinery begins to work and control pollution and demonstrate in practice whether the environmental control requirements are being met (BRASIL, 1997).

In the absence of compliance with some requirements, the LO may be partially granted until the gaps in environmental protection and control are remedied, as well as any requirement that is not being respected (BRASIL, 1997).

The licenses follow the parameters of temporal permissiveness, since modifications, suspensions or cancellations are allowed in the event of non-compliance with conditions, especially

those related to environmental risks or traditional populations. This practice aims for the entrepreneur to be attentive, monitoring and taking care of environmental issues.

In the present study, it was noticed that the granting of the three licenses; LP, LI and LO took place without a complete Environmental Impact Report, a Basic Environmental Plan and an Environmental Control Plan, in line with the Xikrin indigenous peoples who have their territory in the region neighboring the S11D project, where the institute of free and informed prior consultation did not respect the specificities of the Land of the Xikrins.

According to Santos (2017, p. 72), the Ferro Carajás project "covers one of the largest mining exploration areas in the world and is linked to the activities of Vale[4], which is the largest iron ore mining company on the planet, becoming a private company around 1998". In search of manganese, in 1967, in the Serra dos Carajás, geologists found iron in the area where the project is now located (VALE, 2018).

Vale has more than three decades of mining activity in the Amazon region, especially in the state of Pará, and the municipality of Parauapebas is home to the largest mineral reserve in the world: Serra dos Carajás, where the mining company Vale operates. It is bordered by Marabá to the north, Curionópolis to the east, Canaã dos Carajás and Água Azul do Norte to the south, and São Félix do Xingu to the west (VALE, 2016). The company maintains operations and projects for iron ore, copper and nickel in these municipalities.

The Carajás Iron Project explores ore reserves with high iron content, as well as other metals such as manganese, copper, nickel, gold, bauxite and cassiterite. In addition, "the project encompasses 900,000 km², covering an extensive area of Brazilian territory, which is crossed by the Xingu, Tocantins, and Araguaia rivers, and includes lands in Pará, Tocantins, and Maranhão" (SANTOS, 2017, p. 72).

The study by Lopes, Santos and Cruz (2018) identified that there was a territorial reorganization in the municipality of Canãa dos Carajás with the implementation of the S11D iron project due to the private appropriation of public lands perpetrated by Vale. This practice is a source of conflicts with regard to the context in which it occurs, in addition to generating a destructuring in the local way of life.

An example of the social impacts caused by the project occurred with the implementation of S11D, starting in 2010, when Vale purchased approximately 15,000 hectares of land, which led to the dismantling of a village with 120 families, called Mozartinópolis village, also known as Racha Placa, which had been built by residents since 1978. (LOPES, SANTOS AND CRUZ, 2018).

[4] Created on June 1, 1942 by then-President Getúlio Vargas as the state-owned Companhia Vale do Rio Doce, Vale is now a private company that is among the largest global mining companies, with operations carried out by the company in about 30 countries (VALE, 2021).

According to Coelho's understanding (2015, p. 65), the EFC will reach the communities that are located 500 meters from the railroad, and the exploration project already has negative externalities in the communities of Canaã dos Carajás.

In this guise, Loureiro (2009) explains that all this high profitability is fictitious, because these calculations do not include the burned forest or the social ills and the great human misery surrounding large projects.

Therefore, the environmental license is the way to diagnose environmental feasibility, being the administrative act that will license enterprises that use natural resources and with possible impacts; positive and negative and environmental degradation. In this aspect, conditions related to environmental impacts are imposed, and in cases of environmental impacts that cause harmful effects on the social life of traditional populations, the inclusion of conditions is accepted in the environmental licensing stage, justified through studies and hearing through the CPLI of the affected populations.

3.2 XIKRIN PEOPLE

In the case of the Brazilian State, traditional peoples are considered to be indigenous, quilombolas, traditional communities of African origin or terreiro, extractivists, riverside dwellers, caboclos, artisanal fishermen, among others. These peoples, almost always, do not enjoy the same opportunities as other members of society, precisely because they live in places far from the big centers or simply because they have no interest in being part of the "globalized stereotype", in order not to want to lose their roots, as is observed in countless indigenous communities.

It is important to emphasize that traditional peoples and communities are differentiated groups from the rest of the population, as recognized and conceptualized by Decree No. 6040/2000, in its article 3, which states that traditional peoples and communities are culturally differentiated groups, because they live under a respective social organization, living in territories enjoying natural resources with the aim of reproducing culture, religion, environmental management and all practices related to the continuation of their way of life.

The Xikrins are a people of the northern Jê linguistic trunk, and, like the Kayapó, they are nicknamed Mebêngôkre, that is, "people who came out of the water hole" (MANTOVANELLI, 2016, p. 164). Even though they have already been considered extinct, they are currently occupying the Cateté Indigenous Lands, in the Carajás region, and the Trincheira-Bacajá Indigenous Land, in the Altamira region, in the Pará Amazon (MANTOVANELLI, 2016, p. 164).

This autochthonous self-denomination presents similar cultural aspects, such as, for example, body graphics, mythology, rituals, metaphysics, patterns of naming transmission and socio-organizational forms of the villages (MANTOVANELLI, 2016, p. 164), although the parental ramifications are not considered equal, as they fragmented in a historical/mythical moment, which

influenced sociocultural distinctions (TURNER, 1992). To better preserve their traditions, they speak only Xikrin, learning Brazilian in village schools to communicate with non-Xikrin. However, women of the ethnic group do not communicate in a language other than their mother's own. The term arose in allusion to the proximity of the rivers whose lands they occupied, the Kateté and the Bacajá (COSTA, 2019, p.57).

Souza Filho (2019, p. 20) reports that, recognizing that peoples have the right to be peoples, that is, that they continue to be groups differentiated from the hegemonic society and that they are governed by its laws without any need for integration, guaranteeing the right to exist as a people and to maintain their social organization, enjoying the territory to be able to cultivate their way of life and thus ensure self-determination as a choice for the future.

In this way, it is necessary to understand that traditional communities, especially indigenous communities, have a strong sense of identity with the land and the environment, emphasizing the need for the public sector to devote greater attention to public policies specific to the interests of indigenous populations.

According to Richelly de Nazaré Lima da Costa (COSTA, 2019, p. 55), the territorial extension where the Xikrin reside has approximately 430 thousand hectares, with three villages, each with an autonomous political organization: Kateté, with the largest population; the Dju-djekô, created from the split of the Kateté village; and Ô-odjã, it is, with a smaller demographic quantity.

The indigenous territory is located between the Itacaiúnas, Tapirapé Aquiri and Carajás National Forests, which are surrounded by agricultural activities that have a direct impact on the vegetation disposition (COSTA, 2019, p. 57).

According to the legal definition given by Convention No. 169, the category of "Tribal Peoples" can be classified as those established in independent countries with social, cultural and economic characteristics that differentiate them from other segments of national society. Their social relations must be governed in whole or in part by their own customs or traditions, or by a set of special laws (ILO, 2011).

According to the authors Bentes, Pereira, and Assunção (2021), the area where the Xikrins traditionally carry out hunting and fishing activities was not considered when their territory was delimited, which causes great indignation to the community since they are in constant interaction with these lands, which are in the vicinity of the Carajás S11D Iron Project.

3.3 THE RIGHT TO FREE AND INFORMED PRIOR CONSULTATION

Prior, Free and Informed Consultation is a right of traditional peoples and communities provided for in ILO Convention 169, the Inter-American Convention on Human Rights (IACHR) and Articles 231 and 232 of the 1988 Federal Constitution. On the one hand, those responsible for the

project to be installed, on the other, the affected communities. As mentioned by Oliveira and Yamada (2013), in the FUNAI booklet, on the convention of the International Labor Organization (ILO) and the Right to Prior, Free and Informed Consultation.

Consultation is an act of dialogicity, which must be done in good faith and with the effective participation of peoples who are deeply concerned with cultural particularities, their way and their plans for life and the future. Consent is the means for governments to make decisions and plan policies that consider and respect ethnic diversity.

Oliveira and Yamada (2013) teach that throughout history, indigenous people have always been separated from decision-making processes, and Consultation and Consent are a way for them to get closer, participate, influence decisions and monitor everything before harm happens.

It is necessary to emphasize that consultation is not only a requirement for the purpose of informing the communities affected by the project of its existence. Its purpose is to mediate communication between the parties, and reach a consensus on the possible implementation of the project. To this end, it is necessary to follow basic parameters for the implementation of the consultation, the renowned authors Oliveira and Yamada (2013), explain that indigenous peoples should be informed of attitudes regarding the possible project that will be developed on their lands with a timely analysis of this project and define a position on it, in a documented way and reaching all members of the community.

The prior consultation procedure is intrinsically linked to the relationship of Indigenous and Tribal Peoples with their lands and territories. Such procedure must occur to the extent that a business project or of an extractive nature/exploitation of natural resources affects or impacts the territory, or the relationship of the peoples with it. (GARAVITO et al., 2010, p. 42).

The prior, free and informed consultation must include all the peoples affected by the project to be developed, since it is the responsibility of the State to supply possible resources necessary to carry out this consultation. In this way, the consultation should not be carried out as a simple meeting, as this process should be organized in stages aiming at completion in a period of time fair for both parties. The consultation must also be carried out in a clear manner with the peoples involved, that is, take into account the particularities of each group, its culture, religion, language used for communication, etc.

It is known that the company responsible for the projects has an interest in them being started as soon as possible, however, the consultation should not suffer any type of pressure from external forces, taking into account that a predetermined period of time for the consultation to be carried out, where the affected community itself prepares reports informing the possible impacts that the projects can bring to daily life, And the government will have the role of assisting in an impartial manner.

The act of consultation by the State must be materialized through an administrative process, and its nature is hybrid, and it must study the norms shown, in this case by the indigenous community according to its wishes. Thus, there is also a duty to observe the assumptions of validity and legitimacy, before making a decision and carrying out the special administrative process of consultation and consent.

At the same time, it establishes three elements of the fundamental right to Consultation and Consent, namely: Prior, Free and Informed, which must be observed in the process that affirms this right.

In the view of (CASTRO, 2012), it is intended that there is a rupture with the construction of a colonial imaginary, which forms a hegemonic thought in Amazonian society, which does not contemplate the culture and identity of ethnically differentiated peoples as presuppositions of the legal norm.

In addition, it is necessary for the government to accompany and assist indigenous peoples in this process, and this can be done by maintaining communication whenever possible with the communities involved in the process, or at least with the opinion makers of these peoples who have been duly indicated by the communities, as cited by Oliveira and Yamada (2013, p. 19) in the FUNAI booklet in which they explain that "The consultation processes on government decisions are responsibility of the State in dialogue with indigenous and tribal peoples. They will be carried out by decision-makers, with monitoring by Funai and the Federal Public Prosecutor's Office."

Also according to the understanding of Oliveira and Yamada (2013, p. 17) is that ethnically differentiated peoples have effective participation in all phases of decision-making, since the right to CPLI is a cornerstone of Convention 169.

Consultation is an instrument of great merit that makes it possible to climb the paths of a society governed by the paradigm of interculturality and plurinationality, only with democratic processes that encompass the various forms of citizenship. Consultation can be a way of affronting the current system, which is based on the statements defended by the international financial system and on a homogeneous culture.

In view of what the prior, free and informed consultation is about, establishing that it is a somewhat robust mechanism for the protection of traditional peoples and communities, because after analyzing the points explained, it is understood that the entire movement of communication between the party interested in the exploitation of the lands; be it forestry or mineral, and the communities concerned should be done in a friendly and transparent way.

Or The institution of prior consultation has the legal nature of a fundamental right, being defined as "a process by which governments consult their citizens on political or other proposals" (TOMEI; SWEPSTON, 1996. p. V, free translation)

It is visible that there are currently several international organizations with the objective of In order to listen to indigenous peoples, we can cite the International Labor Organization (ILO), the Inter-American Commission and Court of Human Rights, and the United Nations Declaration on the Rights of Indigenous Peoples.

The CPLI aims to allow the affected communities to freely decide their development model, it also has the right to participate in all legislative and administrative stages and consent when there is an imminent risk to fundamental rights. The applicability of the CPLI must be specific, paying attention to each scenario, in this case, the way of life of the traditional population, seeking to meet the interests of the communities, respecting the peculiarities, such parameters are guidelines to avoid possible deleterious actions to the peoples.

For Moreira (2018) it is a fundamental right of origin of the Human Rights of ethnically differentiated peoples, not referring to "rights that require any regulation for their implementation, on the contrary, they are current, immediate and ready to be demanded". Stressing that for the implementation of the CPLI it cannot be subject to complementary measures for it to be carried out, it is the duty of the States to comply.

However, it is noted that the lack of interest of the State added to the illegal practices, especially of large companies interested in installing mega projects and that generate high monetary values, end up developing serious socio-environmental problems in the affected localities, and numerous social ills which contribute to a reality that is far from ideal and contemplate sustainable development.

4 FINAL THOUGHTS

In this study, it was observed the existing imprecision in dealing with the rights of the Xikrin indigenous people in relation to the S11D mining enterprise, pointing out that the representatives of large companies always find a way to circumvent the current legislation that contemplates the original peoples, with the consent of the State, sometimes taking advantage of their lack of information. The absence of the State as a mediator of social conflicts, acquiescing to the violations of rights inherent to the Xikrin people and their territories.

In this way, the need for more present participation of this community in the decisions that concern them is visible, seeking greater independence and also enabling means for listening to the community, avoiding damage and changes in its social organization.

For indigenous peoples, essentially the Xikrin ethnic group, what has to be valued is the existence of biodiversity, the perpetuation of sociodiversity; Man and nature as something unique, there is no way to disentangle the existence of both. The environment and the human environment are something unique, fortifying a balanced development model.

The use and enjoyment of natural resources in a rational manner, a healthy environment, as well as the preservation of customs, beliefs, worldview of the native peoples, generate security for future generations, while also respecting sustainable development, based on the premise of socio-environmental justice, based on the principle that Brazil is a multiethnic country and that everyone should have their rights respected.

From the knowledge and understanding of indigenous rights, pertinent to the history of the Amazon, one can see a mythical effort of these peoples to be respected, like any autonomous and self-aware individual in the world; Indigenous peoples of Brazil in the Amazon - Xikrin indigenous people, free not to accept that third parties or any external factor may negatively modify their lives or that they speak of their names, interests, territories and identities.

In this way, build the elaboration of a participatory committee, with the mining company Vale, the people involved in the S11D project, the members of the Xikrin TI and all those directly or indirectly involved in the impacts, acting as an external control, as a means of collaborating with the State and in its public policies. Indigenous participation in the construction of public policies differs from other social groups in that it is representative of a collectivity that is distinguished from the majority of national society.

In view of this, fostering the process of participation of Indigenous Peoples in order to enable the discussion of their rights and guarantees is a way to create a public policy to comply with international and national requirements on the rights of this community, as intervention measures in order to impact the local reality of the Xikrin Indigenous Land.

In the case of the Xikrin indigenous people, a people who are originally from the lands where iron ore is exploited in their vicinity, through the activities of the S11D project belonging to the mining company Vale S.A., it is evident that the State has not complied with all the legal requirements of the environmental licensing process under international standards for the protection of the rights of indigenous peoples by failing to properly comply with the CPLI institute.

The guidelines of the Inter-American Court of Human Rights are totally appropriate to the problems experienced by the Xikrin people, because despite having their lands demarcated, they suffer daily from the internalization of negative externalities, due to explosions in the vicinity of their lands, resulting in economic, social, cultural and environmental violations, due to the destruction of natural resources on their communal property. enduring a climate of total legal uncertainty regarding their rights and the challenging maintenance of their practices such as hunting, fishing, harvesting fruits and nuts that are fundamental for the survival of the Xikrin community.

By making an analogy to the Xikrin people, it is evident that the State is not able to fulfill its function of maintaining the peculiar way of life of the Xikrin ethnic group, such as the use and enjoyment of the natural resources of the Xikrin indigenous land, which has been silently destroyed

with the dispersion of hunting and fishing, as well as the ruin of the soil. causing a shortage of planting and harvesting.

The guidelines from the judgments of the Inter-American Court of Human Rights can help in the construction of inclusive, democratic public policies, parameterizing the national and international scope, in an effective way with regard to human rights, especially of the Xikrins. Emphasizing that prior consultation is a legal institute linked to political issues of interest to the State.

For this reason, the government management, as a way to mitigate future negative externalities and greater environmental violations, or even more socio-economic impacts, should create a specific Monitoring Committee for the S11D project in the region of the lands of the Xikrin Indigenous People funded by Vale, carrying out the Indigenous Component Study in order to mitigate the negative externalities caused by mining activities. being a vector to generate probable solutions in the medium and long term, presenting the flaws of the environmental licensing process, not with the intention of punishing the mining company Vale or the Brazilian State, but rather to bring the international elements, based on the parameters established in the judgments of the Inter-American Court of Human Rights, to raise governance instruments, remedying and preventing violations from continuing.

The creation of a Participatory Monitoring Committee for the Xikrin Community and the enterprise, funded by Vale and based on the analysis of the decisions of the Inter-American Court of Human Rights, is an affirmation of the rights of the Xikrin people, also as a body capable of assisting in the elaboration of indigenous policies using as a parameter the vast jurisprudence of the Inter-American Court of Human Rights. with regard to human, environmental and social rights, valuing the non-violation of the right to a judicial guarantee of a reasonable time, to judicial protection and to collective property.

The Inter-American System for the Protection of Human Rights can indicate a guide for the creation of a Participatory Monitoring Committee, following the molds of the mechanisms of experts on the Rights of Indigenous Peoples, improves the practice of dialogicity, by being able to reach all phases of an enterprise and monitor the useful life of the mining activity, establishing a permanent dialogue leading to greater participation in accordance with changes in the environment and of the changes related to the national and international legal field, thus providing better results in the realization of human rights for the Xikrin ethnic group and the applicability of active protection and active governance.

Acting with a permanent dialogue, causing a greater participation of the Xikrins indigenous people according to the changes in the environment and the changes related to the national and international legal field, thus providing better results in the realization of human rights for them, generating a more effective applicability of the protection of the rights of indigenous peoples.

Respect for the rights of Indigenous Peoples is also about achieving the constitutional objective of sustainable development, when it comes to conservation, sustainable use and fair sharing of the benefits of biodiversity. It is essential that the Brazilian State, together with the State of Pará, seek to carry out actions to mitigate the negative externalities caused in the Xikrin indigenous land, rethinking the economic importance and the immeasurable losses caused by the lack of conditions and the harm to society in general.

At the local level, one should look at the possibility of the Participatory Monitoring Committee translating the growing political-institutional expressiveness and economic autonomy of the Xikrin population, materialized in proposals based on international parameters to contribute by adding to public policies.

Thus, mirroring the situation of the Xikrin Indigenous People in the face of the realization of the S11D project by the mining company Vale S.A., it is challenging for the scenario of the Xikrin Indigenous People, in the state of Pará, which needs to understand the protection of human rights in its dimensions, achieving a multilevel governance, as it is a problem of political-economic mismanagement and, secondly, the feasibility of protecting the rights of the Xikrins.

Accept the representation of these people in the management of socio-environmental projects so that the activities of exploration of mineral resources occur within the framework of human rights both in the national and international spheres, praising the concept of the Brazilian Democratic State and thus seeking to settle the debt with the traditional Xikrin people, mitigating the conflict of economic order and legal limits that the State of Pará has been going through.

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