

Joint Submission
Amazon Human Rights Clinics Network

**Submission to the Third Universal
Periodic Review Cycle for Brazil**

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**REPORT: ISSUES REGARDING MINING AND ENVIRONMENTAL LAW IN
BRAZIL, ILLEGAL BURNINGS IN THE AMAZON REGION AND
CONTEMPORARY FORMS OF SLAVERY IN BRAZIL**

AMAZON HUMAN RIGHTS CLINICS NETWORK

The Amazon Human Rights Clinics Network born of successful initiatives in higher education institutions in Brazil that seeks to create an articulation of actions space, but also an exchange of experience space. Such elements characterized and remain today setting what became the first network articulation in Brazil focused on the clinical education within the legal education. Network members are: Pará Federal University – UFPA, Mato Grosso Federal University – UFMT, Amazonas State University – UEA, Para West Federal University – UFOPA, Brasília University – UnB, Roraima Federal University – UFRR, Pará South and Southeast Federal University – UNIFESSPA and University of the Joinville Region – Univille.

This report was written by the following Clinics:

Human Rights Clinic – University of the Joinville Region

The Human Rights Clinic of the University of the Joinville Region is an university project that aims to protect human rights of individuals, groups and communities of Joinville, Santa Catarina and Brazil. Through theoretical orientation and practical supervision from specialized professors, students learn the responsibilities and abilities to practice human rights law.

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Amazon Human Rights Clinic - Pará Federal University

The Amazon Human Rights Clinic (CIDHA) is not accredited with ECOSOC. It works with regard to integrate research and extension actions, which are developed by professors and students of the Pará Federal University. It serves as a space to evaluate the theoretical knowledge of students

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acquired from others curriculum subjects, when defendants to apply such knowledge in specific cases, which result in society changes, particularly with regard to ensuring human rights guarantee, thus, acting on demands of public interest.

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Human Rights and Environmental Law Clinic – Amazonas State University

Human Rights and Environmental Law Clinic – CDHDA is an institutional space from the Amazonas State University – UEA, bound to the Law course. The Clinic is engaged with human rights and environmental law current issues, allowing the students' practical application in these topics through legal mechanisms usages encouraging real practice and reality transformation.

The Clinic has no consultative status at ECOSOC.

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Clinic for Human Rights and Democracy - University of Brasilia

The Clinic for Human Rights and Democracy of the University of Brasilia (CHRD-UNB) is engaged with human rights and democracy activities, such as legal counsel, human rights advocacy, and strategic litigation. It also works together with civil society organizations in order to develop education programs aimed at the practice and research in the field of human rights.

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1. In this joint submission the Amazon Human Rights Clinics Network (AHRC) presents three main issues regarding its researches in different regions of Brazil. These issues are: 1) Mining and environmental law in Brazil, 2) Illegal burnings and 3) Contemporary forms of slavery. Each one of them will be presented separately containing their own recommendations.

ISSUE I

MINING AND ENVIRONMENTAL LAW IN BRAZIL

2. Among the possible problems concerning the Brazilian mining field, three can be highlighted: the need to improve pollution control; the necessity to specify legal criteria for environmental liability; and the need to strengthen compliance regarding human rights protection by advocating against mining public policies proposed by some Brazilian draft laws. These are some legal inconsistencies in the Brazilian scenario that question the State institutional capacity to engage a sustainable sector regulation, especially when it concerns an important field for the country development such as mining.

3. Mining in Brazil fosters development with global impacts: it is a country with one of the largest mineral reserves in the world. According to the National Department of Mineral Production (“Departamento Nacional de Produção Mineral - DNPM”), Brazil holds the largest reserves of niobium (98.2%) and natural graphite (50.6%). It is the second largest holder of tantalum reserves (33,8%) and nickel (14.7%). In 2015, it was the leading producer of niobium (93.7%), the second largest producer of magnesite (14.5%). It also increased its production of chrysotile (15.6%), manganese (15, 3%), aluminum (14.9%), iron (12,8%), tantalum (10.0%), tin (8.3%) and graphite (7.8%)ⁱ.

4. However, it faces many human rights and environment challenges. Good examples are recent cases of dams rupture, happened in Jacarei-SP (2016), Mariana-MG (2015), Itabirito-MG (2014), Mirai (2007). These cases question the effectiveness of Brazilians legal prevention mechanisms (instruments such as environmental licensing, environmental impact studies, among others), pollution control and environmental liability law. It is precisely in view of these problems that it is recommended: a) the improvement of pollution control in the sector; b) the definition of legal criteria for environmental liability and; c) the human rights obligations compliance by advocating against some of the mining public policies proposed by some Brazilian draft laws.

The improvement of pollution control in the mining sector

5. Pollution control failures is related to the lack of administrative staff at its regulatory body, the “DNPM”. It contributes to the insufficient enforcement of the current legislation, among other reasons. According to the “DNPM”, in its 2014 management report, there were a series of institutional failures and management. For example, only 50.13% of authorized permanent posts are occupied ⁱⁱ. It means that the mining regulatory agency in Brazil is working only with one half of its capacity. It also reflects at the DNPM pollution control activity: because they were not able to visit all mining dams in one year, inspections are made only in 25% of mining dams per annum. There are efforts demonstrating compliance with the target of 25% per year in the reports of 2012, 2013 and 2014 ⁱⁱⁱ.

6. However, it is a risk to limit the inspection of dams to 25% per year, considering that 75% are not supervised per year. It is evident that monitoring must increase in order to reduce the risk of damage. Besides, once an agent verify an irregularity, he can take preventive measures such as imposing a fine, or the suspending the activity, or interrupting the license, among others.

The requirement of legal criteria for environmental liability

7. The lack of legal criteria for environmental liability in Brazil is a legal interpretation problem that contributes for the inefficiency of environmental law. It concerns specifically the necessity to define economic criteria for the valuation of environmental damage. The civil liability rule in the Brazilian environmental law is a strict sense ^{iv} one, which means that the entrepreneur is required to repair the damages that were caused to the environment or indemnify such damages, irrespective of fault. However, the lack of criteria to determine how to repair and to indemnify is problematic.

8. An environmental damage involves two main legal obligations: the need to repair the material damage (the damage *in natura*) and the need to compensate the violation imposed by the material damage to the human right to an ecologically balanced environment. This human right is classified as a constitutional right ^v whose ownership belongs to everyone ^{vi}. When a environmental damage happens, we have to repair the material damage and also to indemnify the “collective moral damage ^{vii}”, that is, the damage against the human right to an ecologically balanced environment.

9. For the collective moral damage, Brazilian law provides a Fund to receive the financial compensation, the “Collective Rights Defense Fund” (“Fundo de Defesa de Direitos Difusos – FDDD”). However, the lack of economic criteria to separate the environmental material damage of the collective moral damage is a legal gap. Because

of that, rare are the cases^{viii} that objectively determine the repair of both damages. Environment liability cases usually have their focus on the compensation for material damage.

10. In the mining sector, for example, in the case of *Mirai* (Resp 1734284 MG, judged on 27.08.2014), the Superior Court of Justice (“Superior Tribunal de Justiça – STJ”) recognized the strict sense environmental liability. On the one hand, the decision is important because it tries to define some criteria for moral damage, although it is not entirely clear if it means the collective moral damage. On the other hand, the decision does not provide any economic criteria to differentiate the compensation for the environmental material damage from the compensation for the collective moral damage. *In verbis*:

" (...) liability for environmental damage is strict sense, (...) as a result of the accident, the company must recover the material and moral damage caused; c) in determining the compensation for moral damages, we recommend that the arbitration shall be made case by case, (...), in proportion to the degree of guilt, the socioeconomic level of the author, and also the size of the defendant company, guided the judge by the criteria suggested by the doctrine and jurisprudence, (...) considering also their experience and common sense (...)"^{ix}

11. The case cited above illustrates this when it states that the judge must rely upon doctrinal and jurisprudential criteria, their experience and common sense. Of course, the judge must consider these elements, however, it is necessary to analyze properly environmental liability. In addition, it can be improved by more precise economic, social and legal criteria for the determination of environmental liability.

The human rights compliance by advocating against some of the mining public polices proposed by some Brazilian draft laws.

12. The protection of human rights can be reduced by a series of draft laws taking course in the mining public police. Some drafts can be pointed out: the Proposal of Constitutional Amendment (“Proposta de Emenda Constitucional – PEC”) n.º 65/2012^x; some draft laws provided to be the new mining code (draft law n.º 37/2011^{xi}, draft law n.º 5138/2013^{xii} and draft law n.º 5263/2016, among others); some draft laws on environmental licensing, as the draft n.º 3729/04^{xiii} and the draft n.º 654/2015^{xiv}; and, finally, the draft law about mining in indigenous land, n.º 1610 / 96^{xv}.

13. With regard to the PEC n.º 65/2012, it should be firmly rejected. It violates the international and constitutional right to an ecologically balanced environment by removing from the Brazilian environmental law the environmental licensing. The PEC

removes the obligation to have an environmental licensing, linking the authorization of the project to the simple delivery of the Environmental Impact Study.

14. Considering the drafts that want to consolidate a new mining code, all norms providing the possibility of mining activities inside protected areas must be rejected. Mining is not an activity compatible with the ones which are authorized in protected areas.

15. Concerning environmental licensing (Draft law nº 3729/04 and nº 654/2015), it should also be refused. It simplifies the licensing procedure for projects considered strategic to the public interest (including mining). Finally, considering the draft law nº 1610/96 on mining in indigenous land, it should also be refused considering its lack of compatibility with Indigenous and Tribal Peoples Convention, 1989 (No. 169), carrying the risk to violate indigenous rights over their land.

RECOMMENDATIONS:

a) To increase the staff in the regulatory body in order to fulfil 100% of its capacity.

b) To improve pollution control public policy in the sector.

c) To determine, into the environment liability law, of specific economic, social and legal criteria for each type of damage involved in an environmental damage.

d) To revise all draft laws above is recommended in order to reject all possible violations to human rights and environmental law.

ISSUE II

ILLEGAL BURNINGS IN THE AMAZON REGION

16. Human rights were violated in Brazilian Amazon^{xvi} as a result of illegal burning. While world leaders celebrated in December 12th, 2015, the adoption by consensus, of the Paris Agreement under the United Nations Framework Convention on Climate Change, with ambitious goals for reducing greenhouse gas emissions and the maintenance of global warming at levels below 2°C, Brazilian Amazon experienced one of the most critical years related to forest and urban burnings.

17. According to data provided by the National Institute of Space Researches (INPE), the comparison of the total active fire focus detected by satellite system, between 1988 until 2016, shows that in 2015 the Brazilian Amazon region faced one of the highest fire rates registered in this historical series, emphasizing the great number of fire outbreaks in the State of Amazonas, which ended the year registering 15.170 focus in comparison to 9.288 focus identified in the previous year.

18. It's a notable fact that the region's climate was unusually dry for the Amazonian summer, hotter in August and September, due to the climate phenomenon of El Niño, which would have aggravated the fire outbreaks in Amazonas. According to the National Institute of Meteorology (INMET), in September, Manaus (the capital of Amazonas) had registered the temperature of 38,9°C, the highest temperature in the latest 90 years. Yet, between 1982 and 2015 were recorded four El Niño events of high intensity in the region, but the devastation caused by the fire was not as much intense as the one occurred in 2015.

19. Thus, the Amazon burnings in 2015 were not necessarily caused, in natural ways, by the El Niño phenomenon, because, to achieve the proportions taken in the dry season of 2015, certainly there was a human intervention. Criminal fires were identified not only in the cities in the south of Amazonas - known as the "fire arch" members^{xvii} - but also new fire outbreaks in the metropolitan region of Manaus were detected, which were caused by deforestation and property speculation.

20. As a consequence of these burnings - since October 1st until the beginning of the rainy season by the end of November - a thick smoky cloud covered the entire city of Manaus, the cities of the metropolitan region and several cities of Amazonas. The same scenario happened in many cities over the States of Mato Grosso, Pará, Tocantins and Rondônia. On October 13th, the governor of Amazonas declared state of emergency in 12 cities, including Manaus. With this act, the State Government and the Manaus Mayor announced a package of actions in order to avoid new fires, like the

firefighters formation. However, no information about the financial resources released to implement immediate and large scale actions during the critical period was published by the Government.

21. In Amazonas, the crisis got aggravated due to the deep budget cuts suffered by the local authorities for surveillance, prevention and environmental crimes enforcement happened few months before the El Niño, allied to the lack of tools, aircrafts and appropriated trained contingent to act in fire departments in the middle of the Amazon rainforest.

22. In this scenario, the population of the impacted cities, local communities and indigenous people have lived with the smoke from forest fires during the entire period. As known, inhaling the smoke from the burning of vegetation is extremely harmful to health, especially to the most vulnerable population groups, such as children, elderly and people with respiratory insufficiency. However, nor any warning was given by the government to inform the population about the causes of smoke or how to prevent its harmful effects on human health, neither any palliative care was taken.

23. Furthermore, it is worth mentioning that the tropical forests whose protection is a common concern of humankind among other serious environmental problems, contributes significantly to climate stability. By burning the forests' biomass, a large amount of carbon is released into the atmosphere, contributing to global warming and lack of balance of rainfall cycle. In addition, there is an irreparable loss of biodiversity and aggravation of the local communities and indigenous peoples poverty situation, despite their concern of living in harmony with the forest and rivers.

24. Thus, by signing the Paris Agreement on 22 April this year, the Brazilian government announced ambitious targets for reducing emissions of greenhouse effect gases, reaffirming its international commitment to "zero deforestation" in the Amazon.

RECOMMENDATIONS:

e) To strengthen fire monitoring mechanisms in the Amazon, using the data available in order to establish national prevention and firefighting policies.

f) To abstain from promoting changes in environmental legislation, aiming to weakening mechanisms such as: license concession only with a previous Environmental Impact Assessment, as well as independent, prior and informed indigenous peoples and traditional communities consent, in order to develop public policies for the region built upon

the principles of sustainable development and commitment to future generations.

g) To require from competent authorities investigation, prosecution and punishment of those responsible for wildfires occurred in the Brazilian Amazon.

h) To pursue international cooperation for transferring resources to equip and train the fire departments within the Amazon region states in order to combat forest fires more effectively and efficiently.

i) To encourage agro-environmental education through Public Awareness Activities and Programs about the risk of misuse of fire as a soil preparation resource in family farms crops.

ISSUE III

CONTEMPORARY FORMS OF SLAVERY IN BRAZIL

25. In a research made by Amazon Human Rights Clinic of the Post-Graduation Program in Law of Federal University of Pará (UFPA), named as “Work analogous to slavery: jurisprudential analyses of the crime in the Brazilian Federal Judicial System”, in partnership with the Project “Federal Prosecution Service- FPS against Contemporary Slavery, from the Chambers of Coordination and Review of the Federal Prosecution Service, including the analysis of all criminal decisions in the first level of jurisdiction by the Brazilian Federal Judicial Systems, in lawsuits about the crime “work analogous to slavery”, we see that the main factor that results in the impunity of the crime in our country, it’s not the prescription of punitive intention, but the acquittal made by the Appeal Court.

26. Of 560 (five hundred and sixty) lawsuits made by the Federal Prosecution Service, only 152 (one hundred and fifty-two) had a sentence in the first level, which represents 27% (twenty-seven per cent). Unfortunately, the wait for the decision it’s more than 5 (five) years.

27. The analysis of the acquittal shows that one of the main arguments used by the Brazilian Federal Judicial System to justify is based on the idea that the fact it is not an offense because of the absence of violence and the non-restriction of liberty from the victim-worker. This happens due the difficulty of the judges to understand the modern concept of work under degrading treatment.

28. According to this decisions, to set as degrading treatment, it’s vital the complete submission of the worker to the power from the active agents, with the consequent elimination of its will, in other words, removing the worker’s liberty to not want to execute the job.

29. Therefore, no matter the shameful work conditions set for the workers, the degrading treatment only will happen if it’s shown the complete subjection of the victims to the employee’s will, which is typified by the withdrawal of liberty and the possibility of the workers to choose.

30. Nevertheless, Brazil has an exemplar legislation to punish this crime e to punish the ones who practice slavery work, which is a result of international influence, as by international treaties, or by quasi-judicial organs or specialized agencies, as the International Labour Organization. Moreover, stand out the work of specialists in the subject and the movements that enhance the normative previsions existing in Brazil.

31. This new ways of exploitation of the worker are affecting the new foundations of the judicial decisions, which are adopting interpretative arguments in a wrong way, not adapting the current legislation to the reality.

32. Other sever setback is the bill from the Senate, named PLS n. 432/2013, which do not include the modern ways of slavery, aim for turn legal judicial decisions such as the ones mentioned above.

33. Besides the conventional position verified in the judicial decisions made by the Brazilian Federal Judicial System, it appears the same position is made by some of the members of the Federal Prosecution Service, which are Federal Circuit Prosecutor. Those are the ones practice at the Appeal Court of the Judicial System and choose to not punish the employees.

34. Further, the difficulty in participate of the supervisions promoted by the “Grupo de Fiscalização Móvel”, in which the participation fundamental, in a way that the Federal Prosecution Service has legal investigation assignment in evidence collection to the criminal investigation.

35. About the “Grupo Especial de Fiscalização Móvel”, today only 4 (four) from 9 (nine) “Grupos” are able to operate, in national level. There is a significant lack of hearing officers, more than one thousand. In the state of Pará, the supervisions are made without effective participation of Federal Police, but it’s made in collaboration with the Environmental Military Police, due to the limited number of officers. Consequently, there’s a huge reduction in the number of cases that were taken to Judicial System, because of the lack of supervisions. Accordingly to the Pastoral Commission of Land, 70% (seventy per cent) of the reports are not being investigated, which makes the reduction of lawsuits. This reduction happens not because of the reduction in the crime, but due to the difficulty to realize the operations.

36. It still has to be clarified, in conclusion, that contemporary slavery in Amazon it’s linked to the development of this region, where the State of Brazil presents itself as instigator of conflicts and ongoing disputes, bearing in mind the model of development, that don’t respect the diversity and do not include the marginalized; vulnerable workers, doubly, or due to the State, or due to the model of development that was utilized , or due to omission, with the absence of public polices to promote the exercise of rights.

RECOMMENDATIONS:

j) To the National Council of Justice to start a goal to keep track the lawsuit of slavery work;

l) To the Brazilian State to file the PLS n. 432/2013, which is in the Nacional Congress, in a way to block the legislative rewind and the incompatibility of the Brazilian law to the international standards;

m) To the federal judges to pass through empowerment courses, with the crime of slavery work as subject. To this programs would be attributed high scores for effects of promotion or removal in career merits.

n) To council for compulsory attendance of the Federal Prosecution Service in the supervisions made by “Grupo de Fiscalização Móvel”

o) To boost the Chamber of Coordination and Review from the Federal Prosecution Service for the theme of Contemporary Slavery, by making a national data base about the lawsuits and the position of the members at them.

p) To prevent and punish the crime of contemporary slavery in Brazil, it is essential to increase the number of hearing officers and to swoop on “Grupo Especial de Fiscalização Móvel” to do the supervisions.

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- iii DNPM. Relatório de gestão do exercício de 2012, p. 28; Relatório de gestão do exercício de 2013, p.22; Relatório de gestão do exercício de 2014, p.35. Available at: <http://www.dnpm.gov.br/dnpm/colecoes/colecao-de-relatorios-gestao-anual>. Accessed in: 24.07.2016.
- iv Art. nº 14, §1º, Law nº 6938/1981. Available at: <http://www.planalto.gov.br/>.
- v Art. 225, *caput*, Federal Constitution of Brazil. Available at: <http://www.planalto.gov.br/>.
- vi Art.81, parágrafo único, “I”, Law nº 8.078/1990. Available at: <http://www.planalto.gov.br/>.
- vii STJ - AgRg no AREsp 134717-MG, AgRg no Ag 1297996-MG, AgRg no AREsp 86042-MG, ARES 330842-MG, ARES 300210-MG, REsp 1374342-MG, REsp 1292141-SP, REsp 1376449-SP. Available at: <http://www.stj.jus.br/sites/STJ>
- viii Resp nº. 1.164.630- MG. Available at: <http://www.stj.jus.br/sites/STJ>
- ix Free translation. Original: “(...) a responsabilidade por dano ambiental é objetiva, (...) em decorrência do acidente, a empresa deve recompor os danos materiais e morais causados; c) na fixação da indenização por danos morais, recomendável que o arbitramento seja feito caso a caso e com moderação, proporcionalmente ao grau de culpa, ao nível socioeconômico dos autores, e, ainda, ao porte da empresa recorrida, orientando-se o juiz pelos critérios sugeridos pela doutrina e jurisprudência, com razoabilidade, valendo-se de sua experiência e bom senso STJ (...)”. Res p 1374284 -MG. Available at: http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?livre=MIRA%CD&repetitivos=REPETITIVOS&&tipo_viu_sualizacao=RESUMO&b=ACOR&thesaurus=JURIDICO&p=true. Accessed in: 02.08.2016.
- x PEC nº65/2012. Available at: <https://www25.senado.leg.br/web/atividade/materias/-/materia/109736>. Accessed in: 27.07.2016.
- xi Draft Law n.º 37/2011. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=490935>. Accessed in 25.07.2016.
- xii Draft law n.º 5138/201. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=567588>. Accessed in 25.07.2016.
- xiii Draft law n.º 3729/2004. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=257161>. Accessed in: 27.07.2016.
- xiv Draft law n.º 654/2015. Available at: <https://www25.senado.leg.br/web/atividade/materias/-/materia/123372>. Accessed in: 27.07.2016.
- xv Draft law n.º 1610/96. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=16969>. Accessed in: 27.07.2016.
- xvi The administrative Brazilian Amazon is also called Legal Amazon and comprises nine states: Acre, Rondônia, Amazonas, Roraima, Pará, Amapá and Tocantins, besides the western part of Maranhão and the north of Mato Grosso.
- xvii The “fire arch” is a huge strip of land in Brazil, comprising the south of Pará and Amazonas, north of Tocantins and Mato Grosso, Rondônia and Acre. This area is characterized by the amazon rain forest devastation in order to give place to extensive agriculture (mainly soy beans) and cattle farming. These areas registered the highest fire rates in Brazil.