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Should We Adopt a Specific Regulation to Protect People That Are Displaced by Hydroelectric Projects?: Reflections Based on Brazilian Law and the "Belo Monte" Case

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SHOULD WE ADOPT A SPECIFIC REGULATION TO PROTECT PEOPLE THAT ARE DISPLACED BY HYDROELECTRIC PROJECTS?: REFLECTIONS BASED ON BRAZILIAN LAW AND THE “BELO MONTE” CASE

*by Bibiana Graeff**

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I. INTRODUCTION

Almost 70% of Brazil's electricity is provided by hydroelectric plants.¹ Even though Brazil is one of the biggest hydropower producers in the world, only 30% of its potential has been tapped. Therefore, the Brazilian government is planning to build large hydroelectricity plants through 2017, most of them in the Amazon.² These projects should bring economic opportunities for the country.

Several authors consider the positive aspects of hydroelectric production, such as low operational costs, a renewable energy source, and lower greenhouse gas emission, compared to thermoelectric plants. However, there is no doubt that hydroelectric plants produce serious negative effects for the flora, fauna and people by their installation and operation. According to *Movimento dos Atingidos por Barragens*, (The Movement of People affected by Dams) over the past 40 years, more than a million Brazilians were forced to leave their homes due to the over 2,000 dams that were constructed to provide water or produce electricity.³ Most of these people have not received the appropriate value for the damages and many of them have not yet received anything. The victims of these social, economic, and environmental damages are vulnerable populations, from an economic, social and legal point of view. In fact, these types of projects generally affect fishing communities, river dwellers, small farmers, and indigenous communities.

At a time when "Belo Monte," a huge controversial hydropower dam, is being installed in the heart of the Brazilian Amazon, and a law

1. For an overview of the electricity sector in Brazil, see Baggio, Guilherme. "La nature juridique de l'obligation de vente d'électricité. Rapport brésilien". In: Fromont, Michel [et. al.]. *Droit français et droit brésilien: Perspectives nationales et comparées*. Bruxelles: Bruylant, forthcoming.

2. Brasil, Ministério de Minas e Energia, Empresa de Pesquisa Energética, *Plano Decenal de Expansão de Energia 2008/2017 / Ministério de Minas e Energia. Empresa de Pesquisa Energética*. Rio de Janeiro: EPE, 2008.

3. MOVIMENTO DOS ATINGIDOS POR BARRAGENS, <http://www.mabnacional.org.br?q=noticia/mab-participa-encontro-com-comiss-ria-da-onu-para-os-direitos-humanos> (last visited Jan. 20, 2012).

to protect the people displaced by hydroelectric plants in Brazil is being discussed in the Brazilian Parliament, it seems important to study some of the legal, conceptual and practical aspects related to this type of forced displacement through the perspective of environmental justice. A "Belo Monte" case narrative, part (II), will demonstrate that a new regulation could somewhat protect the people who are forcibly displaced by this kind of project. Yet, part (III) asks the question, "What kind of protection should be guaranteed?"

II. THE "BELO MONTE" CASE

First conceived during Brazil's military dictatorship in 1975, the construction of a huge hydroelectric plant in the state of Pará has recently been authorized by the Brazilian authorities despite opposition from scientists, local communities, national and international organizations. The "Belo Monte" plant was one of the most important projects in Lula's growth acceleration program (PAC). It is planned to be the second largest hydroelectric plant in Brazil (11.2 MW), second only to the world's third largest plant, the Itaipú plant, which is shared by Brazil and Paraguay. However, several economic, ecological, social, and legal arguments have been raised against this project.

Even though the actual project is different from the one proposed in 1975, which involved more dams and a larger flood zone, it nonetheless requires a huge flood zone of nearly 400 sq. km, and will change the flow of the Xingu River for over 100 km. Construction costs are estimated at \$19 billion.⁴

In the Brazilian courts, Belo Monte has become a saga, where the Ministério Público (the Federal Public Prosecutor's Office), which is responsible for protecting the environment and the interests of indigenous peoples,⁵ has become one of the main characters. Indeed, more than a dozen lawsuits, most of them from federal prosecutors, have been filed and alleged irregularities related to plant installation procedures. This paper is not meant to analyze each of these actions, but it is important to present a summary of some of the cases before addressing more specific demands regarding the interests of some vulnerable groups that are affected by this project.

4. *O Estado de São Paulo*, 21.04.2010, caderno Economia, p. B6.

5. CF, Art. 129. "The following are institutional functions of the Public Prosecution: [. . .] III – to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests; [. . .] V – to defend judicially the rights and interests of the Indian populations". Brasil, op. cit. p. 98.

In 2001, the courts interrupted the project, because there was no decree authorizing the construction. After the adoption of this parliamentary act in 2005,⁶ several injunction attempts to block the progress of the project have not succeeded in spite of the fact that, for the most part, their merits have not yet been adjudicated. Thus, after an impact study was conducted and public consultations were performed, the government granted a provisional license, the first step in the Brazilian environmental licensing process. As a matter of fact, this administrative procedure involves three steps: a) a provisional license, granted in the preliminary planning phase of the project; b) permission authorizing the installation of the project or activity; and c) the operating license authorizing the operation of the activity or project, after verifying full compliance with the licenses listed above.⁷ On April 20, 2010, the government opened a public bidding process to choose the venture operator. Norte Energia S / A Consortium (NESA) had the winning bid.

In November 2010, concerned with the progress of the project in Brazil and alleging various violations of indigenous peoples' rights, organizations took the case to the Commission on Human Rights. In spite of the Commission's decision in favor of precautionary measures, the Brazilian government granted a license to install the plant on June 1, 2011.⁸

Given the magnitude and complexity of the project, Belo Monte is an emblematic case in many ways. Allegedly supported for economic and social reasons, the project raises questions about the limits of sustainable development, which is a deeply held principle within Brazilian legislation. It leads one to think about what kind of economic growth is desired for Brazil. It also leads one to question the size and role of the judicial power in the defense of human rights and freedoms, as well as the limits of administrative discretion. It also confirms the power of the experts and the limitations of the judge when faced with such complex and controversial environmental cases.⁹ Finally, it reveals the need for the judge to seek additional resources beyond the primary traditional law sources in building his/her argumentative reasoning. Though it is relatively common to use doctrinal opinions in Brazilian judicial decisions, it is quite rare to use scientific reviews

6. Legislative Decree n. 788/2005.

7. CONAMA resolução n. 237/97, art. 8.

8. IBAMA, *Licença de Instalação* n. 795/2011.O

9. For a discussion of the expert's power, see Hermitte, Marie-Angèle, "L'expert, le profane, le politique". In: Atlan, Henri [et. Al.]. *Savoirs et démocratie*. Marseille: Editions Parenthèses, 2003.

produced without an official expert or decisions from foreign courts. In one of the judicial decisions regarding Belo Monte, the judge not only referred to the scientific view of an American biologist produced in an unofficial panel convened for the case,¹⁰ but also mentioned the famous United States Supreme Court case, *Tennessee Valley Authority vs. Hill*.¹¹ This is a perfect illustration of the increasing tendency of judges in the face of globalization and such complex cases, to seek inspiration in solutions formulated in foreign jurisdictions.¹² Of course, these references did not constitute the principal basis of the decision and served only as secondary and complementary resources for the arguments. They were however, used to support the judge's convictions. Finally, this same decision also illustrates the ever more common trend of Brazilian judges to look to international law texts and treaties, especially in environmental matters.¹³ Thus, invoking the precautionary principle to concede an injunction to suspend the license, a decision that was later revoked, the judge was supported by the Convention on Biological Diversity (Preamble) and the Convention on Climate Change (Article 3), which were both ratified by Brazil, and the Rio Declaration on Environment and Development (Article 15).

The "Belo Monte" case also perfectly illustrates the vulnerability of certain groups in the face of hydroelectric projects in Brazil. Indigenous and coastal communities, fishermen and small landowners will be affected by this project. Here, the controversy begins with the number of people directly affected according to the Impact Study. The study sites 19,242, which is considered to be an underestimation according to scientists.¹⁴ This number refers to people who are in the area, directly affected by the project (ADA¹⁵), and should be relocated.

10. The judge argues that the project's economic viability is uncertain, reporting the opinion of Philip Martin Fearnside, Ph.D from University of Michigan, and researcher from the *Instituto Nacional de Pesquisas da Amazônia*, who cites a study which reveals that there is only a 2.8 % chance that the plant could refund the investments, as a reason why the construction of another complementary hydropower plant ("Babaquara/Altamira") would be necessary in the future (Experts Panel, p. 201)

11. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (the United States Supreme Court decided against the construction of a hydropower dam, which could lead to the extinction of a fish species (*snail darter*)).

12. JULIE ALLARD & ANTOINE GARAPON, *LES JUGES DANS LA MONDIALISATION: LA NOUVELLE REVOLUTION DU DROIT* (Paris: Seuil, 2005) (Discussing the increasing business or judicial dialogue).

13. CLAUDIA LIMA MARQUES & LUCAS LIXINSKI, *Treaty Enforcement by Brazilian Courts: Reconciling Ambivalences and Myths?*, in 1 BRAZILIAN YEARBOOK OF INTERNATIONAL LAW 138-169 (2009).

14. Cf. Painei (. . .), p. 136.

15. The "ADA" is made up "only of the locations of major constructions (eg, power houses, dams, spillways) and supporting infrastructure (e.g. unusable materials, loans,

But there are more than 120,000 inhabitants in areas that will be directly influenced by the project.¹⁶ How many of these people would have to move at a later date due to the impacts caused by the project? In this sense, over a thousand fishing families are afraid of having their economic activity affected, not only during construction but also because of the possible consequences resulting from the permanent decrease in river flow (A). Regarding the rights of indigenous peoples, the case reveals state negligence through the silence of law, administrative obstacles and legal restrictions that hinder the effective exercise of the insufficient specific rights that are recognized for them as a group (B).

A. *The Concern of Fishermen*

Two motions for preliminary injunctions were recently filed by fishermen's organizations in order to annul the installation license and stop the initiation of construction. Yet both are being blocked due to a lack of evidence, as well as the presumption of legitimacy and validity of the administrative acts that have already been adopted.

1. When Sustainability is Imposed for the Small

One of the lawsuits was heard in the Federal Court of Pará in December 2011. It was filed by an ornamental fishing organization (Association of Breeders and Exporters of Ornamental Fish from Altamira) against NESAs and others.¹⁷

The fishermen's organization argued that beginning construction would prevent a thousand families from developing their economic activity, because it would make it impossible for the fishermen to access the Xingu River. Moreover, they estimated that many fish species would disappear because of the plant.

NESA argued that there was: 1) the presumption of legality due to the installation license (an administrative act); and 2) precautionary, mitigatory and compensatory measures for each impact. The

indents), as well as by local flooding, including: Xingu's reservoirs and channels, including the proper channels and the Permanent Preservation Areas (PPAs), in the the area of Xingu located between the dam and the main powerhouse. This is the part that will suffer from the reduction of water when the plant begins operating, and the area of the Xingu River below the main powerhouse, the region near the sand banks where the Amazonian turtles breed." RIMA, pp. 58-59.

16. In the area directly influenced by the project (AID) – which is broader than the ADA, the total population was 119,165 people in 2007, where 94,463 lived in towns and 24,702 lived in rural areas (EIR, p. 54). This area of 13,940 km², includes 5 cities (Altamira, Anapu, Brasil Novo, Senador Jose Porfirio and Vitória do Xingu).

17. *Ação Ordinária* n. 326-37.2011.4.01.3903.

company also pointed out that there was no proof of the existence of any prejudice which would not be mitigated. In addition, they estimated that there was a "*periculum in mora in reverso*"; if the license were revoked, it would be prejudicial for the "company, society and environment".

According to Brazilian law, a party seeking a preliminary injunction must demonstrate the existence of two conditions: the "*fumus boni juris*" and "*periculum in mora*" (Brazilian Civil Process Code, article 273). The first condition represents the substantial likelihood of the veracity of the arguments presented by the plaintiff. The second means that if the injunction is not granted prior to the final decision on the merits, there is a threat of irreparable damage. In the present case, the judge recognized the importance of the precautionary measure, because he considered that, despite the mitigation actions proposed, their implementation would be slower than the damages caused by the plant's installation. The company had conceived an aquaculture project that would take ten years to fully complete. However, some damages would be caused due to the construction of the first channels and dams that were proposed during the first semester.

Interpreting that the fishermen would only be able to fully develop their activities after the full implementation of the aquaculture project, Judge Carlos Eduardo Martins estimated that these mitigations were unacceptable because immediate measures are needed to compensate the families for the damages that they will likely suffer. Balancing the competing interests, the judge noted that the losses arising from the immediate postponement of the construction in the area where the fishermen work would be much less than the "irreparable harm" that these workers and their families would suffer at the beginning of construction. Thus, the judge ordered the immediate suspension of the construction that would affect the river, allowing the implementation of the sites and residences to continue, because it would not interfere in navigation and fishing activities.

However, in a decision on December 16, 2011, reconsidering the initial decision, the same judge retracted his previous decision. He was convinced that the navigability would be preserved, as indicated in the engineering projects presented, and that there would be no impact on the local fish fauna where fishing is carried out, considering that the impacts would be temporary and only at the site where the construction projects were occurring and that the conservation of species could be promoted through monitoring and encouraging sustainable fishing. Thus, the risks of a declining fish population, including endangered species, were accepted due to proposed monitoring solutions and de-

creased fishing (sustainable fisheries and aquaculture in the hopes that by controlling the scope of this activity exotic species would not be introduced). Finally, for fishermen who eventually choose to change professions, one of the proposals in the impact study was to provide training to work on the project installation, with priority given to local people.¹⁸ Yet what will happen when the installation is finished?

2. The Difficult Question of Evidence, in the Face of an Administrative Act that is Presumably Perfect, Valid and Effective.

Another action was brought by the Z-57 Fishing Colony, which comprises around 1,200 fishermen who earn their living through commercial fishing in the Xingu River. They requested an injunction prohibiting the installation of the project, which was scheduled for January 2012. They alleged that these new installations would impede their fishing and navigation activities within a radius of 50 km, and make the water unfit for human consumption as well as for the fish fauna. On December 16, 2011¹⁹, denying the injunction request, Judge Hugo da Gama Filho held that the plaintiff did not produce any proof to support its claims. Moreover, based on the presumption of the legitimacy of properly executed administrative acts, they can only be removed for legal protection in the face of “concrete and unequivocal evidence.”

In an earlier action²⁰, filed by federal prosecutors, another judge was convinced of the existence of serious irregularities in the environmental licensing and decided in favor of the suspension of licensing and bidding the day before the venture operator was chosen. Among other reasons, his decision was based on the fact that IBAMA experts had diverging opinions about the possibility of mitigation or reduction of damages caused by the reduction of the flow on biodiversity, navigability and local populations. According to the IBAMA’s opinion n. 06/2010, it was not certain whether the flow proposed on the hydrograph could preserve the species dependent on the flood pulse. The judge estimated that given this uncertainty regarding the ideal

18. It is estimated that there would be a maximum number of 18,700 employees for the duration of the job, of which, the majority employed is expected to come from the local population. EIR, p. 24.

19. *Ação Ordinária* n. 2008.39.03.000071-9, 9ª Vara da Justiça Federal da Seção do Pará, Colônia de Pescadores Z57 X NESA and other.

20. *Ação Civil Pública* n. 410-72.2010.4.01.3903/PA, in Vara Federal de Altamira.

hydrograph, many species could disappear.²¹ IBAMA's conclusive technical opinion suggested a monitoring plan for six years after the installation of the plant, but the judge stated that this measure was insufficient, under the precautionary principle. Regarding the water quality in reservoirs, IBAMA's technical opinion n. 114/2009 affirmed that there were not sufficient studies and the damages could be serious and irreversible. IBAMA's technical opinion n. 06/2010 and technical note n. 04/2010 recommended waiting for another water quality evaluation. Ignoring these recommendations, IBAMA's conclusive opinion accepting the environmental assessment suggests that other water quality evaluations should be done. As Judge Antoni Carlos Almeida Campelo commented, it is absurd for an Environmental Assessment to not be concluded before granting a license for such a huge project. Once more, the judge estimated that the precautionary principle was violated.²² However, the judge's injunction was overturned the following day by the President of the 1st Region's Federal Court²³ based on the fact that it would cause serious economic damage. According to Article 4 of Law n. 8.437/1992,²⁴ the decision to cancel a preliminary injunction is based on an analysis of the following factors: serious damage to the public order, health, security and economy. In the Belo Monte case, the decision to suspend the various injunctions was based on the effect on public order and finances.

In the case of the Z-57 Fishing Colony, the injunction was denied by the first instance court because the judge determined that there would be no damage to their fishing activity.²⁵ Nevertheless, the decision mentioned the Appellate Court opinion pronounced in another

21. According to the environmental assessment, as stated by the judge, there are 800 species registered in the Xingu river basin, 27 of which are endemic.

22. Another of the judge's arguments should also be cited. A law (Law No 9.984/2000, art. 7) requires that a declaration of water availability for the use of water resources in hydropower projects must be done before bidding begins. In the Belo Monte project, such permission had been granted by the National Water Agency (Resolution No. 740/2009 ANA), but was based on initial hydrograph ("The hydrograph A") that was discarded by IBAMA. Thus, Judge Campelo considered it as evidence of the nullity of ANA's Resolution No. 714/2009 of the ANA, which would justify the request for suspension of the bidding.

23. *Suspensão de liminar ou antecipação de tutela* n. 0022487.47.2010.4.01.0000/DF,

24. Art. 4° "Competes to the chairman of the tribunal [. . .] suspending by reasoned order, the execution of the injunction on claims against the Government or its agents, at the request of the prosecutor or the legal entity of public rights interested, in the case of manifest public interest or flagrant illegitimacy, and to avoid serious injury to the public order, health, safety and economy."

25. Thus, the decision affirmed that the possible changes in fishing patterns during the installation of the plant over the next five years would be localized, temporary, and mitigated by a series of programs, such as encouraging sustainable fishing and the "Incentive Program for Professional Training and Development of Productive Activities."

Belo Monte action, that to grant an injunction interrupting the licensing and bidding would seriously harm public order and the economy. The judge also pointed to another argument made by the Appellate Court, that the interference of judicial activity in the specific responsibilities of private administration could only be carried out with discretion and prudence, in a timely and grounded way, when there was technical data and objectives that justified judicial intervention.²⁶

Thus, instead of incorporating solid ecological dimensions into the notion of public order,²⁷ the Brazilian courts have, as in the Belo Monte case, ruled in favor of promoting a more questionable form of economic growth, rather than true sustainable development.

B. *The Issue of Indigenous Peoples*

According to the impact study, more than half the area of Xingu River basin is occupied by indigenous and environmental preservation areas.²⁸ In contrast to engineering studies from the 1980s and 1990s, which found that part of the Indian lands of "Paquiçamba" and "Arara da Volta Grande do Xingu" would be flooded,²⁹ it has been shown that no indigenous lands will be flooded. However, because the two lands are located near the area of the project, they would be affected by the decreased flow of the Xingu River. Also, the "Área Indígena do Juruna do Km 17" (Juruna Km 17 Indigenous Area) would be directly affected, as it is located on the side of a road (PA-415) where there would be a considerable increase in traffic.³⁰ These three indigenous lands have a population of 226 people.³¹ Seven other indigenous lands (totaling 1,982 people³²) and indigenous peoples living in the city of Altamira and on the banks of the Xingu River would be indirectly impacted by the project.

26. TRF1, AGRSLT 0021954-88.2010.4.01.0000/PA, Rel. DESEMBARGADOR FEDERAL PRESIDENTE, CORTE ESPECIAL, e-DJF1 p.14 de 19/07/2010.

27. Marguerite Boutelet, Jean-Claude Fritz, *L'ordre public écologique: Towards an Ecological public order*. Bruxelles: Bruylant, 2005.

28. RIMA, p. 28. FUNAI, the agency which has a specialized staff to conduct studies on indigenous areas, identified 10 lands to be included in the study: Terra Indígena Paquiçamba; Terra Indígena Arara da Volta Grande do Xingu; Área Indígena Juruna do km 17; Terra Indígena Trincheira Bacajá; Terra Indígena Arara; Terra Indígena Cachoeira Seca; Terra Indígena Kararaô; Terra Indígena Koatinemo; Terra Indígena Araweté/Igarapé Ipixuna; Terra Indígena Apyterewa.

29. *Id.* at 15.

30. *Id.* at 46.

31. *Id.* at 49.

32. *Id.* at 52.

The main claims brought in the lawsuits against the Belo Monte project relate to the protection of certain rights of the indigenous peoples. In regards to the exploitation of hydroelectricity in indigenous territories, the Federal Constitution has established that the Parliament shall not only adopt specific regulations (article, 1 § 176, 231, § 6), but shall also only authorize each project "after hearing from the communities involved [. . .]" (article 231, Paragraph 3). Since 1988, the Parliament has never adopted the regulations imposed by articles 176, § 1, and 231, § 6 (1). Additionally, no prior consultation was held before the adoption of the decree authorizing the project (2).

1. Two Weights, Two Measures

In two different lawsuits, federal prosecutors brought to light the lack of specific regulations required by the Constitution which are, in their opinion, an essential condition for the progress of a project such as Belo Monte.

One of the lawsuits sought a preliminary injunction to cancel the preliminary license and public bidding, based on the inexistence of the regulation required under the article 176, § 1° (Federal Constitution).³³ This provision states that the utilization of hydraulic energy may only take place with authorization or concession by the Union, in the national interest, "in the manner set forth by law, which law shall establish specific conditions when such activities are to be conducted in the boundary zone or on indigenous lands." The Public Prosecutor argued that until the Parliament adopts this legal act, it will not be possible to install a hydroelectric plant in territories occupied by indigenous communities.

On April 14th, 2010, federal Judge Campelo considered that the two conditions for the granting of a preliminary injunction were met: (1) the "*fumus boni juris*," since the rules had been clearly presented; and 2) the "*periculum in mora*," since the administrative proceedings leading to the plant installation had already begun.

Nonetheless, two days later, the injunction was overturned by the 1st Region's Federal Court (TRF1). The state lawyers argued that all of the administrative proceedings, including the licensing process, were legal. Moreover, they alleged that a suspension would be detrimental to the "administrative order," especially to the electric sector and its planned expansion, which was established from 2008 to 2017.

33. Federal Justice (1st instance), Altamira, State of Pará. Process n. 411-57.2010.4.01.3903, MP X ANEEL (and others).

They also claimed that the injunction would create a legal uncertainty and scare away investors. In summary, they argued that the injunction would cause severe damage to the public order and economy.

The rapporteur did not see the occurrence of "*periculum in mora*" for the indigenous community, since the emission of a prior license and the bidding would not result in the immediate construction of the Belo Monte power plant, because several other steps would be necessary for the effective completion of the project. This point of the argument was not convincing, because the alleged damages would not be created solely during the construction or operation of the plant, but would occur based on the simple fact of the completion of all procedures prior to installation of the plant, since the specific requirements for hydropower projects on indigenous lands provided by the Constitution are not yet established. These conditions could be related to the impact study, for example. The consideration that damage to indigenous peoples would only occur from the moment that the project is installed, overlooks and underestimates the fundamental rights to information and participation of these populations, which are guaranteed both by national and international law.

On the other hand, the rapporteur argued that it would be "*periculum in mora*," not because holding the bidding on the scheduled date would bring "serious economic losses to the public," but because of "the noticeable deficiency in the production of electric energy that the country suffers from at the moment" and the delay in completing the project would cause the federal government to resort to "other energy sources such as thermoelectric, which is notoriously more expensive and polluting." This supposedly "green" argument has become another factor in the basis of judicial decisions in Belo Monte, and is presented as an absolute truth.

The other lawsuit³⁴ was intended to annul the decree authorizing the Belo Monte project based on, among other arguments, the absence of complementary law under Article 231, § 6, which provides that acts must take into account the occupation, domain, and possession of indigenous lands or "the exploitation of the natural riches of the soil, rivers, and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the union, as provided by a supplementary law."

On November 9, 2011, the 1st Region's Regional Federal Court found that a law regulating the matters relating to the use of water

34. 1ST REGION FEDERAL JUSTICE, ACP, N. 2006.39.03.000711-8, SEÇÃO DO PARA, SUBSEÇÃO DE ALTAMIRA.

resources was not necessary, since the Federal Constitution requires it, exclusively, in cases of the exploitation of the wealth natural soil, rivers and lakes existing in the lands occupied by indigenous people, when there is significant public interest of the Union.

Regardless, not adopting this law reveals a "two weights, two measures" logic. While indigenous people await the passage of laws provided by the Constitution for more than 20 years, the decree authorizing the creation of the impact study and the licensing the Belo Monte project was approved in a record time of 15 days in Parliament.

2. The Controversy Regarding the Consultation of Indigenous Peoples

The question of providing the right of information and participation of indigenous people is another sensitive point in the Belo Monte case, which has been brought not only to the Brazilian judiciary, but also to international courts.

On the one hand, Brazilian law fails to detail the specific conditions for the exploitation of hydropower on indigenous lands. On the other hand, the Constitution seems to clearly state the need for consultation before a decision is made by the Parliament on a project of this nature (article 231, Paragraph 3³⁵). Based on this foundation, among others, prosecutors filed a civil action in 2006 maintaining the illegality of the decree.³⁶ This case also had foundations in international law. They invoked the ILO Convention No 169, which under the prosecutor's interpretation requires prior consultation.³⁷

Article 6 of the ILO Convention No. 169 provides that governments shall:

"(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, *whenever consideration is being given to legislative or administrative measures which may affect them directly*" (emphasis added).

They also relied on the relevant position taken by Dalmo Dal-lari, according to which the constitutional determination to consult the affected communities is intended to ensure their participation in the

35. This was the first time that Parliament had adopted a decree to authorize the performance of impact assessment and licensing of hydroelectric projects on indigenous lands, pursuant to this constitutional provision.

36. *Ação Civil Pública* n. 2006.39.03.000711-8, Ministério Público Federal X Eletronorte, Eletrobrás, IBAMA, FUNAI; 5ª Turma do Tribunal Regional Federal, 709-88.2006.4.01.3903.

37. Indigenous and Tribal Peoples Convention, signed in 1989 and ratified by Brasil on 06/19/2002, through legislative decree n. 142/2002.

definition of the economic projects to be developed on their land. This is the reason why the Parliament has a duty to hold a consultation; to take into account the views of the communities in the decision-making process.³⁸

On November 9, the Federal Regional Court dismissed the lawsuit filed by the Federal Public Prosecutor's Office.³⁹ Three judges participated in this trial. The rapporteur, in a thirty-two page decision, Judge Selene Maria de Almeida found the decree invalid because, in her opinion, hearing the indigenous communities should be a precondition, making the Congress responsible for consulting them. Judge Almeida held that even before this consultation occurs, the project's proponent has the obligation to submit an impact study to the legislature, including an anthropological study of the affected communities. Then, there would be two types of mandatory consultations, a consultation by executive agencies during the licensing process and a consultation by the Legislature, before the authorization by decree. However, the two other judges had a different interpretation. Thus, the decision that prevailed was that although the Constitution does not explicitly state the need to prior consult the communities regarding the National Congress authorization, the principle of reasonableness dictates that this consultation can only occur after the environmental studies have been concluded, because these will define the actual impact of the project. The decision also stated that the Parliament should not conduct the consultation because it can and should be carried out by FUNAI, whose role is to monitor and ensure compliance with the Brazilian Indigenous peoples' Policy.⁴⁰ Regarding the standard set in the ILO Convention No. 169, it was found that there was no violation because the consultations were to be held after the act adopted by the Parliament. Finally, the decision was influenced by the position of the Federal Supreme Court (STF) that, in this case, suspended the injunction that had considered invalid the Decree and had stopped the licensing process.⁴¹ The Supreme Court estimated that the Legislative

38. Juliana Santilli (org.). *Os Direitos Indígenas e a Constituição*. Porto Alegre: Núcleo de Direitos Indígenas e Sérgio Antônio Frabris Editor, 1993, p. 149.

39. TRF1, 5ª Turma, AC 2006.39.03.000711-8/PA, e-DJF1 p.566 de 25/11/2011.

40. Law n. 5371/67 and Decree n. 7056/2009.

41. *Suspensão de Liminar* n. 125, decided on 03/16/2007, Ministra Ellen Grace, DJ 29/03/2007, p. 36. The Supreme Court had already ruled on decree 788/2005 in a *Ação direta de Inconstitucionalidade* which sought to declare it unconstitutional. However, the trial did not rule on the merits, arguing that such action would only apply to legislative acts of general and abstract (laws in general), not the particular character acts as the legislative decree analyzed. STF, ADI 3573/DF, 01/12/2005, Min Carlos Brito, DJ 19.12.2006, p. 35.

Decree effects depended on the mandatory environmental impact study and the affected communities consultation.

Thus, up to the present moment, the legal uncertainties which have been raised regarding compliance with the rights of information and participation of indigenous communities in the Belo Monte case have not been enough to stop the progress of the project. However, it cannot be forgotten that Brazil has made commitments at the international level.

Paragraph (a) of Article 6 of ILO Convention No. 169 seems to clearly establish the requirement to consult with indigenous communities involved when it comes to both *legislative* and *administrative* measures that may affect them. According to a systematic reading of the 1988 Constitution, authorization for hydropower projects on indigenous lands will depend on at least two separate procedures: One being an administrative measure (impact study, article 226, § 1, CF), and the other is a legislative measure (congressional authorization, Article 231, § 3, CF). The administrative measure includes any activities that may cause damage to the environment and the prior environmental impact study. The legislative measure is an exception, because of the importance of the specific protection set out in the Constitution to ensure the rights of indigenous peoples. It is no mistake that this provision was inserted in a chapter specifically addressed to these communities. Thus, if Article 231 refers to the need to adopt "the authorization of Congress only after hearing from affected communities," this seems to be an additional requirement that was established by Article 225, § 1, IV. The framers of the Constitution wanted to mark the peculiarity of hydroelectric development in indigenous lands with a measure that would guarantee the participation of the legislative branch in the decision-making process regarding each project. As for consultation, only two interpretations seem reasonable: One is that the Congress should carry out the consultation prior to granting any authorization that it will grant (before or after the impact study), or that the Congress makes its decision after the completion of the impact study and consultations that will have been made based on administrative procedures. Regardless of the prevailing interpretation, at some point there will certainly be measures that are independent and different in nature (legislative and administrative) which are necessary, indispensable and decisive for future development that involves indigenous peoples. Therefore, in light of Article 6A of the ILO Convention No. 169, the legislative authorization, which has a distinct nature and purpose of the administrative acts, should require a specific consultation of the indigenous people involved.

If the legislative authority for hydroelectric projects on indigenous lands can proceed the elaboration of socio-environmental impact reports, an interpretation that has been defended in the Supreme Court, then what is the purpose of this requirement? Is it to ensure that such initiatives are supported by a parliamentary majority, after being verified by environmental demands? But if the idea is to give political and democratic legitimacy to this kind of enterprise, and above all to ensure the rights to participate in political decisions on issues sensitive to indigenous interests, how have those who are interested not been involved from the very beginning of the process, as required by ILO Convention No. 169?

The issue of holding consultation before a decision is made was also brought to the American Commission on Human Rights (IACHR), from the Organization of American States (OAS). Based on the threats to the lives and physical integrity of indigenous peoples caused by the impact of the construction of Belo Monte, and on the principles of non-compliance of adequate consultation with the indigenous peoples, entities representing these groups brought this case to the regional body. On April 1, 2011, the Commission granted precautionary measures and determined that Brazil should: (1) suspend the project until a free, informative, good faith, and culturally appropriate consultation is guaranteed in order to reach an agreement with each of the affected indigenous communities; (2) guarantee that all communities have access to the Environmental and Social Impact Study in an accessible format which includes a translation to their native languages; (3) take measures to protect the life and personal integrity of members of the indigenous people in voluntary isolation and to prevent the spread of diseases and epidemics.

The Brazilian government reacted with criticism and, according to some, retaliations to this decision, which was revised on July 29, 2011.⁴² The change was principally based on the matter of consultation and informed consent, which came to be regarded as a matter of merit that transcended the procedure of precautionary measures. The requests of the Commission were adjusted to include the protection of the cultural integrity of people in voluntary isolation.

42. Soon after the decision Brazil withdrew the candidacy of former Secretary of Human Rights Paulo Vanucchi, from a vacancy on the Human Rights of the OAS, although the Director of the Human Rights Department of the Ministry of Foreign Affairs has stated that it was not out of retaliation. See DANIELLA JINKINGS, *Representante do Itamaraty diz que Brasil não deslegitima OEA por medida cautelar sobre Belo Monte* (last visited Apr. 5, 2012), www.itamaraty.gov.br/sala-de-imprensa/selecao-diaria-de-noticias/midias-nacionais/brasil/agencia-brasil/2011/05/05/representante-do-itamaraty-diz-que-brasil-nao.

The Commission more precisely formulated what measures should be taken to protect the health of indigenous peoples affected, by requesting that Brazil: (a) accelerate the finalization and implementation of the Integrated Health Program For Indigenous in the region of Belo Monte; and (b) design and implement effective plans and programs specifically required by FUNAI in the Technical Opinion 21/09. Lastly, Brazil should ensure the rapid completion of pending procedures of ancestral lands regularization in the Xingu basin to adopt effective measures for the protection of ancestral lands mentioned against misappropriation and occupation by non-indigenous, in the face of the exploration or deterioration of their natural resources.

Since this decision, Brazil has been very hostile towards the CIDH. On October 27, in an unprecedented move, it did not attend a hearing called by the Commission.⁴³ Since April, Brazil has not paid its annual \$6.5 million fee to the OEA.⁴⁴ It is unfortunate that Brazil is acting in this manner and not cooperating even to pursue dialogue with indigenous communities, or to strengthen the regional body for the protection of Human Rights in the Americas.

Analyzing the Belo Monte case and considering Brazilian energy planning, it must be noted that Brazil continues, in spite of some progress that has been made, to present a risk for vulnerable groups that face the impacts caused by this type of enterprise and do not have a full guarantee to have their fundamental rights protected. It is clear that large numbers of people will end up having to move, not only because of the physical installation of the project, but also in terms of the social effects that come from it, which it appears as time goes by, will impede or complicate the lives of these people.

On the one hand, it is evident that the law is not a sufficient guarantee of enforcing rights. Indeed, when dealing with indigenous populations, the case Belo Monte and its “successive decisions for and against the execution of works, based on different legal interpretations, but based on the same legal provisions,” especially reveals “an ethical and epistemological gap about how the judiciary thinks about indigenous culture, which allows it to go forward and backward, even unintentionally, causing insecurity, panic and hopelessness within

43. LISANDRA PARAGUASSU, *Governo não irá à audiência sobre Belo Monte na OEA* (Apr. 5, 2012), <http://economia.estadao.com.br/noticias/economia,governo-nao-ira-a-audiencia-sobre-belo-monte-na-oea,89490,0.htm>.

44. DENISE CHRISPIM MARIN *Calote brasileiro obriga OEA a apertar o cinto* (Apr. 5, 2012), <http://m.estadao.com.br/noticias/impreso,calote-brasileiro-obriga-oea-a-apertar-o-cinto,806427.htm>.

these minorities”.⁴⁵ On the other hand, people displaced by dams could be considered as “environmentally displaced”. However, a lack of a legal status and specific protection for this kind of forced displacement is also one of the urgent required changes in terms of both the Brazilian Domestic and International Law in order to address this question that has the tendency to only become more accentuated.

III. FOR A PROTECTIVE REGULATION OF DISPLACED PEOPLE BY HYDROELECTRIC PROJECTS: “ENVIRONMENTALLY-DISPLACED PEOPLE”?

The impact of forced displacement produced by the installing of hydroelectric facilities in Brazil in the last forty years originated an important social movement and, more recently, also generated several legal initiatives aiming at the ones directly affected by water dams in general.⁴⁶ As a matter of fact, in the past ten years, four different bills were put before one of the houses of the Brazilian Parliament (*Câmara dos Deputados do Congresso Nacional*), three of them having already been archived.⁴⁷

There is an understanding that the broadness of the problem in Brazil and the perspective of building new dams will require thinking about a judicial protection of people affected by the damage provoked by the construction of such facilities. However, it cannot be forgotten that this problem presents itself in relation with other catastrophes, either naturally-originated or human-originated, that have been causing great tragedies and forced displacements in Brazil – such as floods, mudslides caused by strong rains and deforestation. People that are forcibly displaced by these sort of events may be framed as “environ-

45. Violeta Refkalefsky Loureiro, *Desenvolvimento, meio ambiente e direitos dos índios: da necessidade de um novo ethos jurídico*. Rev. direito GV [online]. 2010, vol.6, n.2 (Jan. 18, 2012), pp. 503-526, <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322010000200008&lng=en&nrm=iso>. ISSN 1808-2432. <http://dx.doi.org/10.1590/S1808-24322010000200008>.

46. *Supra*, note 3.

47. Proposition now processing: PL 1486/2007, which deals with the binding effect of social work projects directed towards the populations living in flooded areas. Filed propositions: PL 91/2003, which considered the negative effect over the social-economic environment due to displacement of peoples in the building of dams, roads and other constructions; PL 4849/2005, that dealt with the providing of social work to people of areas flooded by reservoirs, and PL 7125/2006, that instituted a special National Day to the ones expropriated and affected by dams, to be celebrated on December 22nd. Research made on January 20, 2012 between the periods of January 2002 to January 2012 in: www2.camara.gov.br.

mentally displaced", a term whose contours are being traced by doctrine and by international organizations.

These displacements are a worldwide problem that tend to accentuate due to the issue of global warming and the still present non-sustainable economic model of exploring resources. In fact, as many of these forced migrations do not happen within the borders of a state, but are actually international, many authors took into consideration utilizing other terms to refer to the displaced people, such as "environmental refugee", "ecological refugee" or "climate refugee".

Could displacement caused by dams fit into the protection to which environmentally displaced people are supposedly entitled? It seems reasonable to think that it could be more productive, instead of fragmenting the body of laws that regulates each kind of people who are displaced due to environmental reasons, to adopt a broader and more comprehensive framework (A), that may, eventually, in the future, merge into one international treaty that seeks to protect them (B). As not every person "affected by" dams is a "displaced" one, a specific law for the ones affected, an even broader concept, seems important in the Brazilian framework; however, in the inexistence of such a regulation, and if a law or treaty comes to be approved for the displaced people, this protection will probably benefit the ones displaced specifically by dams. On the other hand, if in the future, both regulations are indeed adopted, with a definition of "environmentally displaced" that may encompass cases of catastrophes or human-generated degradations, we are likely to have a normative conflict regarding the rules that regulate the ones displaced by the building of hydroelectric facilities. As this is a case of the protection of human rights, inspired in the lessons of Cançado Trindade⁴⁸, the solution would be to apply the most favorable dispositions available (*pro homine*), from what Erik Jayme calls the, "*dialogue des sources*", or dialoguing sources.⁴⁹

48. ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM (II) 317 (2005).

49. ERIK JAYME, IDENTITÉ CULTURELLE ET INTÉGRATION: LE DROIT INTERNATIONAL PRIVÉ POSTMODERNE, 251 (1995). The "*dialogue des sources*" theory, that defends the possibility of a simultaneous coordinated application of more than one normative text, was well accepted by Brazilian scholars, specially in the works of Professor Dr. Claudia Lima Marques. See e.g., CLAUDIA LIMA MARQUES, PROCÉDURE CIVILE INTERNATIONALE ET MERCOSUR: POUR UN DIALOGUE DES RÈGLES UNIVERSELLES ET RÉGIONALES 465 (2003).

A. *For a Comprehensive Regulation*

A regulation dealing with the protection of people displaced by dams should, in my opinion, be comprehensive in two ways: broad for both the subject/group that is to be protected by it (1), and broad in the diversity of rights to be crystallized in it (2).

1. The Subject/Group to be Protected and its Specificities

First, it is indispensable to define who the people displaced by dams are (a), making a distinction between the notion of “displaced” and the ones “affected” by them, and establishing a resembling notion of “displaced by dams” and “environmentally displaced.” Secondly, it is important to consider that, in protecting the ones displaced by dams, the ones to be protected are not only individuals, but groups with specific particularities, not forgetting the “hipervulnerability” of certain categories on the basis of gender, age and mental or physical condition (b).

a. *“Affected by dams,” “displaced by dams” and “environmentally displaced”*

Not all of those individuals affected by a hydroelectric project will necessarily be displaced. The notion of “affected” is broader than the notion of displacement. That is why, in my opinion, those affected by dams should have specific legislation even if eventually one regarding “environmentally displaced people” is adopted. The “affected” is the one that suffers damages from the project (in its broader scope). The “displaced” is not just the one that loses its property or the one that is relocated due to the reservoir and other necessary installations for the building of the plant. The concept of “displaced” should include those people that, due to the negative effects, either immediate or not, provoked by the installation and by the operation of the hydroelectric facilities see themselves compelled to leave their homes, for health, social-cultural or economic reasons.

According to Vainer, there are several concepts of what “affected” may constitute.⁵⁰ There are old reductionist concepts, such as the “territorial-patrimonialist”, that associates the concept of “affected” with the concept of owner, and a hydric approach, that associates “affected” with flooded. Multilateral agencies tend to adopt a more

50. CARLOS VAINER, “EXTRAÍDO D’O CONCEITO DE ATINGIDO. UMA REVISÃO DO DEBATE E DIRETRIZES”. IN: PAINEL DE ESPECIALISTAS. 213-229 (2009).

comprehensive concept, including the ones economically affected (International Financial Corporation), or the communities that gather and nourish the displaced (World Bank and Inter-American Development Bank). The concept formulated by the World Commission on Dams is no less broad, including the physical displacements such as the ones related to life-style, the latter being the ones that deprive people from their means of production and dislocate people from the way they live.⁵¹ The author also quotes broad doctrinal concepts⁵², and the broadened understanding adopted by Eletrobrás⁵³ in many documents since the 90s.

The bill n. 1486/2007 now before the Brazilian Parliament is directed to the "peoples of areas flooded by reservoirs;" the definition of the ones to benefit from such bill is unclear, due to the fact that the text does not specify if it regards the people that are located in the areas to be flooded or if it comprises people that are located around these areas. Article 3 of the bill determines only that the protection applies to "those who inhabit expropriated real estate that is either rural or urban, as well as the people who in this real estate exercise economic activity, including owners, aggregated people, squatters, wage earners, tenants, sharecroppers, partners and tenders." That way, if the interpretation given is that the bill only comprises people physically situated within the flooded area, this rule would be insufficient, attached to the ancient hydric conception of 'affected,' leaving other affected populations aside. In the "Belo Monte" case, for instance, the indigenous communities would not be under protection, since their lands are not themselves flooded.

In relation to the concept of "environmentally-displaced persons," a draft of an International Convention written by, among others, Professor Michel Prieur, defines these as:

[. . .] individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their

51. This independent organization was created in 1997 by the World Bank, governments companies, and NGOs in order to evaluate the dams constructed in the world. After years of work the Commission released its final document. World Commission on Dams, 2000, p. 102.

52. Among others, quotes: PATRICK McCULLY, *SILENCED RIVERS: THE ECOLOGY AND POLITICS OF LARGE DAMS* 350 (London: Zed Books) (1996).

53. Eletrobrás is a large state electrical energy generator, which is a concern of the Amazon hydro planning and the Belo Monte Project.

living conditions, resulting in their forced displacement, at the outset or throughout, from their habitual residence (art. 2.2).⁵⁴

After the abovementioned definition, the text specifies that it applies to both natural and anthropic degradations, if they are either brutal, slow, progressive or programmed. In fact, some of the first authors to develop the subject, utilizing the “environmental refugees” term, also included in this concept the anthropic-generated catastrophes’ refugees.⁵⁵ That being so, Professor Essam El-Hinnawi, in 1985, presented us with the first “environmental refugees” concept to become popular and defined them as:⁵⁶

those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life (emphasis added).⁵⁷

Therefore, in these doctrinal concepts, the ones displaced by hydroelectric dams could be considered “environmentally displaced”, as Prof. Prieur himself admits.⁵⁸ That being so, if the bill now before the Brazilian Parliament were to be approved, its dispositions should be indeed harmonized with the ones eventually present on an international treaty that would eventually be ratified by Brazil. What would be fundamental, however, would be to reassure a broad protection that could embrace all the ones affected by dams, not only the ones (physically) displaced, reason for which it seems in any way necessary to adopt a specific regulatory instrument for the ones affected by dams in Brazil, that are indeed an urgent matter – as well exemplified by the Belo Monte case – and could be more rapidly solved than if by an International Treaty.

54. Michel Prieur [et. al.]. Draft convention on the international status of environmentally-displaced persons, *Revue européenne de droit de l'environnement*, n. 40/2008, p. 395-406.

55. In that sense it is, for instance, the definition brought by: Jodi Jacobson. *Environmental Refugees: a Yardstick of Habitability*. World Watch Paper n. 86, Washington, D.C.: World Watch Institute, 1988.

56. The term “environmental refugee” was created before in the 70s by Lester Brown. See LESTER BROWN, *Plan 4.0 B: Mobilizing to Save Civilization* 51 (New York: Norton & Company) (2009).

57. ESSAM EL-HINNAWI, *Environmental Refugees*. Nairobi: UNEP, 1985, p. 4.

58. ROSELI RIBEIRO, *Prieur defende Convenção específica para refugiados ambientais* (Jan. 20, 2012), <http://www.observatorioeco.com.br/prieur-defende-uma-convencao-especifica-para-refugiados-ambientais/>

b. The Individual, the Group, and its Specificities

As aforementioned, the definition of environmentally displaced mentioned in the Convention's draft led by Prof. Prieur is intended for "individuals, families and peoples." Unlike the constructing of public buildings and expropriations in urban areas, the installation of hydroelectric plants indeed usually affects entire communities, in particular groups socially and economically vulnerable. The disarticulation and breaking the balance in pre-established social bonds present in certain communities is one of the damages provoked by such projects.

These communities may have a peculiar status, as indigenous communities, to which all group-specified legislation will apply. Therefore, in that sense, the eventual protection to be ensured to the ones displaced by hydroelectric enterprises shall take into consideration the previous specific legislation regarding such groups. In the case of hydroelectric plants in indigenous territory, it is first necessary to adopt the legislation foreseen in the 1988 Brazilian Constitution that does not yet exist (cf. *supra*, Part I).

It is necessary to take into consideration not only the way of life, tradition and culture of the affected peoples, but also the special protection granted by the Constitution to certain other categories, such as the family, the child, the teenager, the young people and the elderly (Brazilian Constitution, articles 226 to 230). To consider the displaced as individuals and as groups to be protected means granting them individual and collective rights.

1. The Protection to be Granted

The protection to be guaranteed to the displaced by hydroelectric plants should be broad so as to, on one hand, take into account the diversity of individuals and groups involved and, on the other hand, comprise all the moments in the process: before, after and during the plant installation.

The social work program predicted in the bill n. 1486/2007 as a condition for the granting of licenses to installation is indeed quite modest, in that sense. According to this project, the program should include, at least:

- I. Legal, psychological, medical, dental, hospital and social aid;
- II. The supplying of a list of products for basic needs for the minimum period of one year;
- III. Financial aid to relocated families in order to promote development of productive activities through special credit lines generated by the Government;

- IV. Providing of technical assistance in agricultural and technical matters, with offer of professionalizing courses;
- V. Supply of logistical support, including transportation and stay, to people who live in the affected areas, providing them with broad and effective participation in public hearings, meetings and encounters necessary to the analysis and to the exposure of social work programs and environmental studies intrinsic to the enterprise;
- VI. Elaborating and distributing of information material, explaining to people their rights and duties as entrepreneurs and as affected people, utilizing language that is easy to understand; (art. 2).

Although some of these measures seem appropriate for the "before" (e.g. "V"), the "during" (e.g. "I") and the "after" (e.g. "II") of the installations, they generally lack precision for the period of duration; which may decrease their effectiveness. As for the considerations regarding the individual and collective peculiarities, the project does not mention minorities, ethnic groups or families. It does not make reference to cultural aspects, except for the "language that is easy to understand" provision. In sum, it creates differential treatment without support in the Constitution. For example, it favors agricultural activities (with provisions of the Government's purchase of the harvest during a maximum period of two years, art. 2, § 2), and does not predict any similar measures to other economic activities.

The draft convention group led by Prof. Priour presents good ideas for the rights to be ensured to displaced people. Firstly, the project makes a distinction between rights of all the displaced (Art. 5), rights of the temporarily displaced (Art. 6) and rights of the definitively displaced (Art. 7), as well as rights of displaced families and peoples (Art. 8). This fine differentiation makes it very easy to apprehend the different individual and collective situations, and could possibly be translated into the legislation regarding the peoples displaced by hydroelectric dams. For instance, it may be necessary to temporarily displace some people during the work of installing the plant. The proposition is also to be praised for its reference to families and minorities, and it is innovative in introducing the right to water (Art. 5.3), not yet recognized by Brazilian law, or the right to salubrious and safe inhabitation (Art. 5.4).

Finally, the protection of any forced displacement should be framed by one principle: the improvement, or at least maintenance, of the former living standards of the displaced.

2. For an International Regulation

If there is no perspective regarding the adoption of a specific international convention on people affected by dams, there are at least several propositions of treaties to protect environmentally displaced and environmental refugees. Although there is no specific instrument to protect the ones displaced by disasters or environmental degradation, such migrations are indeed a reality that worries the High Commission on Refugees of the United Nations.⁵⁹ This problem is also one that Brazilian authorities, in 2010, dealt with for the first time after numerous requests for granting refugee status to people displaced due to environmental disaster. Haitians who, after a dramatic earthquake in January 2010, received a permanent visa for humanitarian reasons in Brazil but did not receive the status of refugee.⁶⁰ The National Refugee Council (CONARE), the Brazilian organ responsible for analyzing refugee requests, ruled that the Haitians could not be framed as refugees because environmental disasters are not serious violations of human rights, which is one of the cases for granting refugee status under Brazilian legislation. Indeed, in general, the UNHCR itself understands that there are no norms to establish this framework.⁶¹

A treaty to protect environmentally displaced people could be beneficial to the ones displaced due to hydroelectric enterprises, not only due to recognition of rights, but also for the international control and accountability over the application of norms. First, it is necessary to understand how the refugee rights evolved, a body of law that, although relatively broadened in its current development, still does not extend, according to the main opinion, to environmentally displaced people (1). Secondly, it is important to know a few of the propositions of international protection for environmentally displaced people and environmental refugees (2).

59. Data points that climate change displaced more than 42 million people in 2010 NORWAY COUNCIL FOR REFUGEES <http://genevalunch.com/blog/2011/06/06/new-reports-show-climate-change-behind-worrisome-displacements/> (Apr. 5, 2012).

60. From January 2010 to September 2011, 2186 Haitians entered Brazil and filed for a recognition request for refugee status. GABRIEL GUALANO DE GODOY, *O caso dos haitianos no Brasil e a via da proteção humanitária complementar* [The Haitian Case in Brazil and the Complementary Humanitarian Protection], pp. 45. In: ANDRÉ DE CARVALHO RAMOS, GILBERTO RODRIGUES, GUILHERME ASSIS DE ALMEIDA (orgs.), *60 anos de ACNUR. Perspectivas de futuro*. São Paulo: CL-A cultura, pp. 45-68., p. 64 (2011).

61. This is the reason why the terminology "environmental refugee" does not seem appropriate.

2. The Evolution of Refugee Rights: Incorporating the Forced Displacement for Environmental Disasters or Degradation?

The international protection of refugees was consolidated after the end of World War II, and is very much related to this episode, in the sense that it was limited to displacements which happened before 1951 (reservation regarding time) and was also restricted to events that occurred in Europe (reservation regarding location). Refugees were defined as “[. . .] any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion.” (The Geneva Convention Establishing the Status of Refugees of 1951, Art. 1).

From this definition, initially restrictive, the system broadened considerably;⁶² first, the 1967 Protocol suppressed the time reservation;⁶³ second, the protection was extended to the ones that were forced to leave their habitual residence in seek of refuge in another state due to grave human rights violations, a new concept introduced by the African Unit Organization Convention of 1969 (now the African Union). A broadening of the definition was also proclaimed in the Cartagena Declaration, including people who left their places of origin when their lives, safety or freedom were threatened by generalized violence, foreign aggression, internal conflicts, massive human rights violations or other circumstances that gravely affected the public order.⁶⁴

Although not a binding text, the aforementioned Declaration served as an inspiration so that many countries would incorporate a broad refugee definition in its internal legislations. The Brazilian law on refugees of 1997 enshrines, other than the cases already predicted in the 1951 Convention, a protection to those displaced by “grave and generalized violations of human rights.”⁶⁵ In my opinion, an extensive interpretation of this disposition could include a few “environmental

62. For a discussion of the evolution of the institute of “refugee” and its differences with political asylum, see ANDRÉ DE CARVALHO RAMOS, “Asilo e refúgio: semelhanças, diferenças e perspectivas”. In: ANDRÉ DE CARVALHO RAMOS, GILBERTO RODRIGUES, GUILHERME ASSIS DE ALMEIDA (orgs.), *supra*, note 60, pp. 15-44.

63. The protocol kept the possibility for States to maintain the geographic reservation, that was only abandoned by Brazil on December 19, 1989.

64. Adopted in the “Colóquio sobre Proteção Internacional dos Refugiados na América Central, México e Panamá: Problemas Jurídicos e Humanitários”, Cartagena, Colômbia, between 19 and 22 November 1984.

65. Legal act No. 9474/97, Art. 1, III, de 1997 (Braz.) About this disposition, Brazil has before taken in refugees from Angola, Sierra Leone, Afghanistan and others. Conf. André de Carvalho Ramos, *op. cit.*, p. 30.

displacements," such as the ones caused by "grave and generalized" degradation or environmental catastrophe, as the right to a healthy and balanced environment – a human right present in many international texts - would have been violated. This has not been the CONARE interpretation, as the case of the Haitians demonstrates.

In that sense, the refugee protection system may be extended to environmentally displaced persons, it would be necessary to negotiate a reform in the existing texts or the adoption of a new additional treaty to the 1951 Convention. Inserting the matter of environmentally displaced in the scope of refugee regulations would allow an advantageous use of preexisting structures. In fact, ACNUR has been acting for internal displacements, including the ones provoked by environmental degradation or environmental disasters. But an extension of the status of refugee to internationally displacements caused by environmental damage would provoke a considerable increase of cases ACNUR would have to deal with, demanding new sources and great efforts for financing measures to be implemented.⁶⁶ Another difficulty is the tendency of developed countries to close their borders, which, specially in a scenario of economic crisis, could oppose to the broadening of the refugee concept. Moreover, the definition of "environmental refugee" comprises a gray area: in certain cases, it is hard to determine whether the line between the voluntary character of the displacement (e.g. better economic conditions) from the forced character (e.g. when the environmental damage makes it impossible to subsist). That being so, some propositions tend to formulate to the environmentally displaced a particular treatment, different from the one granted to refugees.

B. The Propositions for a Convention Dealing Specifically with Environmentally Displaced

Besides the propositions that would tend to extend the Law of Refugees to the "environmental refugees," there are other academic initiatives that would tend to adopt a specific convention for the

66. Cañado Trindade for instance defends a possible extension of Refugee Law to include environmental disasters of anthropic origin, based in the broad definition of the Cartagena Declaration. See ANTÔNIO AUGUSTO CAÑADO TRINDADE, *Direitos Humanos e Meio-Ambiente: paralelo dos sistemas de proteção internacional*, Porto Alegre: Sergio Antonio Fabris (1993). The proposition of the Maldives would be the adopting of a protocol to be integrated in the normative destined to refugees, including not only displacements in the international level, but also internal displacements, related to environmental degradation both of anthropic and of natural origins. See Republic of the Maldives (Ministry of Environment, Energy and Water). *First Meeting on Protocol on Environmental Refugees in the 1951 Convention and 1967 Protocol relating to the Status of Refugees*. Male, 14-15, August, 2006.

environmentally displaced, such as the French team led by Prof. Michel Prieur (CRIDEAU proposition), and a group of Australian researchers led by David Hodgkinson.

Both propositions develop the creation of a new international organization for matters specifically related to this sort of displacement, as well as a fund to foment its actions. The difficulty lies in, of course, the definition of the funding sources. The CRIDEAU proposition predicts, alongside with voluntary contributions from States and private actors, a fee based specially in factors that provoke such displacements (imprecise definition, but whose outlines would be defined later in an additional protocol). The Australian project fund would be financed by a fee based on the common but differentiated responsibility principle. The particularity of this proposition would be to limit the protection to climate-related displacements, without however attaching it to the Climate Change Convention or the Kyoto Protocol⁶⁷. That way, this option, unlike the CRIDEAU proposition, could not be applied to the displacement caused by dams of hydroelectric facilities.

IV. FINAL CONSIDERATIONS

An international convention focused on the environmentally displaced should be adopted because environmental refugees are not sufficiently protected by the existing norms and institutions. From an ideal point of view, this body of rules should be broad in scope in order to encompass all environmentally displaced, not only ones displaced due to climate change.

The adoption, however, of such instrument in a short or medium term seems quite difficult. Because an international convention of this nature needs time to be negotiated and approved, all domestic legislation which has the capability to deal with internal displacement is of great help.

In Brazil, the human displacement drama provoked by hydroelectric dams reveals once more that Environmental Law and Human Rights Law should walk together⁶⁸ to ensure sustainable development is reached, from an economic, environmental, and also social point of

67. A CONVENTION FOR PERSONS DISPLACED BY CLIMATE CHANGE (JAN. 26, 2011), <http://www.ccdpconvention.com>.

68. For a discussion of the need of approximating International Human Rights Law and International Environmental Law, as well as a thorough analysis of Inter-American Court of Human Rights cases on indigenous peoples, see Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study* in *The Need for Enforceable International Environmental Human Rights*, 43 STAN. J. INT'L L. 3 (2007).

view. A legal treatment specific to this kind of displacement is urgent, specifically in Brazil, due to the absence of a broader all-inclusive environmentally displaced people legislation. These displaced people should be seen in its aspects of individuals and of groups, in its universality and specificity.
