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THE DYNAMICS OF ENERGY POLICY SECURITIZATION IN BRAZIL AND THE CONSEQUENCES FOR TRIBAL PEOPLES

AS DINÂMICAS DE SECURITIZAÇÃO DE POLÍTICAS ENERGÉTICA NO BRASIL E AS CONSEQUÊNCIAS PARA POPULAÇÕES TRIBAIS

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Abstract
The present article presents securitization theory and applies it to energy policy in Latin America. The article's focus is on how the Brazilian State marginalizes tribal land claims by securitizing energy production in order to pursue so-called development projects in the energy sector. This practice occurs via the utilization of a procedural instrument known as 'Security Suspension', the origins and consequences of which are examined in this work. The research suggests that contrary to what is affirmed by the State, this securitization does not benefit the population at large, which raises a question as to why these projects are really being carried out. While a plethora of tribal peoples' human rights are violated by this practice that perpetuates a policy directed at the marginalization of these minorities, the interest of the majority of the population in the preservation of the environment is sidelined.

Keywords
Securitization. Tribal Peoples. Security Suspension. Brazil. Development Projects.

Resumo
O presente artigo apresenta a teoria da securitização e a aplica à política energética na América Latina. O trabalho foco em como o Estado brasileiro marginaliza reivindicações das terras tribais ao securitizar a produção energética com o objetivo de perseguir o assim chamado projeto de desenvolvimento no setor energético. Essa prática ocorre via uso de um instrumento procedimental conhecido como "Suspensão de Segurança", cujas origens e consequências são examinadas neste trabalho. A pesquisa sugere que, ao contrário do que é afirmado pelo Estado, essa securitização não beneficia a população como um todo, o que levanta a questionamentos sobre a razão pela qual esses projetos estão realmente sendo levados a cabo. Enquanto uma miríade de direitos humanos das populações tribais sãoviolados por essa prática que perpetua uma política direcionada à marginalização dessas minorias, o interesse da maioria da população na preservação do meio-ambiente é deixado de lado.

Palavras-chave
Securitização. Populações Tribais. Suspensão de Segurança. Brasil. Projetos de Desenvolvimento.

"The dominant discourse, a universalist and competent discourse that excluded indigenous societies throughout history, idealized and naturalized cultural differences sometimes as barbarians and savages, sometimes as romantic and folkloric, but, always, and especially, as obstacles to the integration, unification and development of the State." (Justice Antonio Souza Prudente in §1st Federal Regional Tribunal of Brazil, 2012)

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1. INTRODUCTION

In March 2014 the Inter-American Commission on Human Rights (hereinafter 'Commission' or 'IACHR') held a thematic hearing on a Brazilian legal instrument know as Security Suspension (*Suspensão de Segurança*)[1] and its consequences for the right to access to justice in the country (IACHR, 2014). Appearing before the Commission, Brazilian tribal representatives[2] accompanied by national and international NGOs reported the rights violations caused by the state's utilization of the instrument. Demonstrating that the instrument allows the government to render ineffective judicial decisions that seek to guarantee tribal peoples' rights, their claims endeavoured to expose that Security Suspension perpetuates the dynamics of oppression between a repressive state and marginalized traditional groups (see IACHR, 2014; and AIDA et al, 2014b). The Brazilian State, in turn, submitted that the instrument was key to guaranteeing democratic interests in the face of ill-advised judicial decisions (see IACHR, 2014; and Brasil, 2014a).

A telling account of how the opposing parties regard the utilization of the legal instrument, the discussion before the Commission briefly reveals the existence of an underlying dynamic of securitization of energy production and a resulting marginalization of tribal land claims in Brazil. The present article intends to analyse this dynamic in detail, demonstrating how and why this securitization occurs and what its consequences are. Such analysis can be of fundamental importance in order to expose the inadequacy and dangers of the official discourse and how it is used to violate the human rights of groups that are historically oppressed in Brazil. This research will tackle the issue by focusing on energy production projects regarded by the government as crucial for the development of the country. As will be demonstrated, the conclusion reached through the analysis of these projects can be extended, *mutatis mutandi*, to other projects considered important for the country's economic progress, such as transport infrastructure projects.

By looking at national and international norms, judicial decisions and opinions and official and non-governmental reports, this article is structured as follows: the first section briefly explains the concept of securitization and its application to the circumstances in Brazil and throughout Latin America; the second section considers the origin and nature of the legal instrument known as Security Suspension and how it is used to securitize energy production and marginalize tribal land claims; the following section analyses some of the consequences of this policy, demonstrating several of the violations of tribal peoples' rights that result from the use of Security Suspension; the final section takes stock of the previous ones and concludes that the reason for the utilization of this legal instrument is far from what was put forward by the Brazilian State during the thematic meeting before the Inter-American Commission on Human Rights. The article concludes that by securitizing energy production, thereby prioritizing so-called development projects over tribal land claims, the public interest is sidelined while political parties and private businesses engage in an undemocratic exchange of favours.

[1] This legal instrument has been translated as "Suspension of Security" by some and "Security Suspension" by others. While the difference highlights the ambiguity of the name in Portuguese, the authors believe that "Security Suspension" is a more accurate translation of the name in keeping with the intention of the instrument's creators.

[2] For the purposes of the present essay the word 'tribal' will encompass indigenous and tribal peoples as their rights arising from ILO Convention 169 are one and the same and this author agrees with the position that the same should apply for the Brazilian Constitution (see AIDA et al, 2014a).

2. SECURITIZATION THEORY AND ENERGY PRODUCTION IN LATIN AMERICA

Emanating from the field of international relations and security studies, and more particularly the Copenhagen School, securitization theory is based on the notion that political or other actors seek to prioritise certain issues by deeming them matters of security or "existential threats" to security, in order to place these issues outside the normal political structure (Buzan et al, 1998: 21-29). By treating certain issues as extraordinary matters which threaten the life of the state, future welfare or another matter of similar importance, these actors look to cast off the restrictions imposed upon them by the legal and political systems. According to the proponents of securitization theory, the decision to treat an issue as an existential threat is a subjective one and not based on objectively-ascertainable conditions; therefore, the actors seeking to securitize a particular issue must convince the referent audience(s) that the issue in question does indeed pose an existential threat to something of fundamental importance to society if the securitization is to be successful (Buzan 25; 31; see also, Olesker, 2014: 373). If the securitization is successful, the actors may then resort to extraordinary measures, such as violating international law or restricting civil liberties, as well as allocating increased resources to the issue.

Professor Jenny Pearce links securitization theory to the writings of philosopher Giorgio Agamben (Pearce, 2011: 299-300). Agamben argues that the voluntary creation of a permanent state of exception has become one of the essential practices of states, with democracies increasingly achieving this not by declaring a state of emergency, but by employing the security paradigm as the principal technique of government (Agamben 2005: 2-30). One of the key characteristics of this paradigm is the elimination of the distinction between legislative, executive and judicial powers (7), and once this becomes the rule rather than the exception, the juridico-political system becomes "a killing machine" (86). Agamben considers the use of this practise to have become practically universal:

> Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that— while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law (87).

The "War on Drugs" provides us with an example of successful securitization, first domestically and then internationally, of an issue – the need to tackle the allegedly existential threat posed to society/public order in many states by the production and consumption of certain drugs. The first laws prohibiting drugs in the United States outlawed opium, targeting Chinese workers who were seen as a threat to white labour and the dominant white majority in general (Bewley-Taylor, 1999, p. 17). The public association of certain drugs with ethnic and other minorities persisted throughout the early twentieth century; cocaine was said to make blacks violent and sexually uncontrollable, Hindus were said to encourage Cannabis addiction, and marijuana was associated with Mexicans involved in criminal activities (Campbell, 1992, p. 180). These drugs have all been incorporated into the U.S. prohibitionist regime, while tobacco and alcohol (other than the period from 1920-33) have not. This is in spite of the fact that alcohol and tobacco related deaths greatly outnumber those caused by consumption of illegal drugs (Campbell, 1992, p. 176).

Campbell links the discourse used by anti-communist crusaders in the U.S. to that used by those promoting the prohibition of certain drugs, pointing out that what was really at stake was the "endangered nature of the ethical boundaries of identity" (Campbell, 1992, p. 176). That is to say, the threat from drugs in the U.S. has been perceived and portrayed as something external in origin even when tackling the issue domestically, with "foreign" substances and behaviour, as opposed to the behaviour of the dominant group, being used to highlight the difference between the "normal" and the "pathological" (Campbell, 1992, p. 184). The questionable prioritization of certain drugs for prohibition is an example of the subjective nature of the move to securitize the issue. Seeking to convince the referent audience, i.e. the white majority, by focusing on the threat posed by the behaviour of minorities demonstrates how securitization can exclude groups from society.

Although the issue of tackling the alleged threat posed by the drugs mentioned above was successfully securitized domestically, initial U.S. efforts to internationalize the prohibition on opium smoking were met with resistance, particularly from the British who benefitted economically from the opium trade. Thus, while the issue of drug prohibition was successfully securitized domestically, it took the United Sates some time to convince the referent audience – the international community – of the existential threat presented internationally by drug production and consumption (Bewley-Taylor, 1999, p. 22-25). However, these efforts were ultimately successful. According to the preamble of the Single Convention on Narcotic Drugs of 1961, "…addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with economic and social danger to mankind" (United Nations, 1961). The inclusion of such melodramatic language in an international treaty represented a successful international securitization of the issue and its almost universal adoption was confirmation of this.

Although different approaches have been taken to tackle the negative impact of addiction to those drugs that have been incorporated into the prohibitionist regime, the fact that it has been widely accepted to represent an existential threat has permitted many states to adopt extreme means that would not usually be permissible. The consequences of the securitization of tackling drug addiction have been dramatic and their effect on human rights cannot be understated. These include the increasing militarisation of law enforcement leading to unprecedented levels of violence in various countries, including many in Latin America, and this has led to extrajudicial executions, enforced disappearances and a startling increase in incarceration rates (Centre for Legal and Social Studies – CELS, 2015, pp. 10-13; 37-39).

Pearce argues that the role played by Latin American states in fomenting violence generates political capital for the state and that high levels of violence are not a result of institutional weakness, but a new perverse form of state (Pearce pp. 295-297). In this perverse form of state, "internal 'wars' with violent youth, drug traffickers, and the remaining insurgent forces in the region" legitimize states (299). This brings us to a final key characteristic often present in securitization which applies in equal measure to the securitization of energy production and that of narcotics production and consumption. By successfully securitizing an issue, the State in practice often seeks to create a category of "non-citizens" who are stripped of their rights and can be subjected to the pure violence of the state (Pearce 299). In the "War on Drugs", the groups excluded from societal order include young men in marginalized areas with a large organized crime presence and rural communities involved in the cultivation of certain crops for their own subsistence, while the securitization of

energy production excludes tribal peoples whose efforts to defend and exercise their fundamental rights are deemed to negatively impact upon the rights of the majority and public order. To further illustrate the point and the link between securitization theory and states of exception, it is worth noting that Agamben points to the erasure of the legal status of the Jews in the Nazi labor camps and those indefinitely held captive in Guantanamo as examples of those placed outside the law when the juridical order is suspended (Agamben 2005: 3-4).

The Copenhagen School asserts that securitizing an issue is effectively an admittance of failure, an acceptance that normal politics cannot address the matter at hand (Buzan et al, 1998: 29). While accepting that taking the political decision to securitize an issue could be unavoidable in certain circumstances (e.g. when facing an "implacable or barbarian aggressor") or tactically advantageous (e.g. in order to raise awareness regarding environmental problems), the Copenhagen School believes that desecuritization should always be the long-term goal (Ibid). Of course, there are alternative critical security theories and the Copenhagen School has received criticism. For example, Floyd purports that desecuritization does not necessarily return an issue to the realm of normal politics and she points to the international ban on landmines and the creation of the International Criminal Court as examples of securitization with positive consequences (Floyd, 2007: 43-45). This article does not seek to contribute to this broader debate, instead limiting itself to applying securitization theory analysis to the issue of energy production and other so-called development projects.

The authors of the present article find the relation between securitization theory and the governmental technique of creating a permanent state of exception particularly pertinent to the subject at hand. Successfully securitizing an issue permits the securitizing actor to suspend the political and juridical rules that apply to that particular issue, thereby creating a bubble of exception, set apart from the rest of the legal and political system which continues to operate as usual to the extent possible, within which extraordinary measures can be taken to address what has subjectively been identified as an “existential threat”. Depending on how they are framed and the level of acceptance they achieve from the referent audience, these bubbles of exception can swell in size and they can endure for lengthy periods. Of course, the main difference between a state of exception and securitization theory is that the former is declaratory or *decisionist* in nature – i.e. it comes into being upon being declared by the state – whereas the securitizing actor must convince the referent audience for a successful securitization (see Olesker, 2014: pp. 374-375; Williams, 2003: 517-518).

The authors believe that the Brazilian legal instrument of Security Suspension has elements of both of these theories. As will be explained later, it was created during a state of exception, but its successful implementation by the Executive requires the acquiescence of the Judiciary. Hence, the Judiciary is the referent audience. Although the Judiciary is an autonomous power of the republic, the Executive wields significant influence in the pattern of promotion in the higher courts and this dynamic is reflected in the lower courts (see more on this issue on pages 20-22). Therefore, we have elements of a state of exception where the distinction between powers is blurred and power is concentrated in the hands of the Executive. There are also elements of securitization theory evident, with the political actor availing of Security Suspension as the securitizing actor, the Judiciary as the referent audience, the tribal peoples who own the land as the excluded group and the suspension of judicial decisions for security reasons, and consequent rights violations, the extraordinary measures permitted to avert the existential threat posed by obstacles to energy production.

Buzan and Wæver argue that regions play an important part in defining the structure of international security (460). Before we turn to examine Security Suspension, let us first briefly consider the matter of securitization of energy production elsewhere in Latin America, which forms part of a wider pattern of securitization of "development" or economic progress. This article will not undertake a country-by-country analysis of this issue, but briefly analyzing a couple of examples should help us to identify a securitizing trend in the region.

The reform of the energy sector will form an important part of Mexican President Enrique Peña Nieto's dubious human rights legacy. A constitutional reform which came into force in December 2013 (Mexico, 2013) paved the way for a packet of reforms – nine pieces of secondary legislation were passed and 12 more were amended – which sought to open up the energy sector, particularly the oil and gas industries, to private and foreign investment. Although the reform was well-received by the International Monetary Fund (IMF) (IMF, 2014), the Inter-American Development Bank (El Economista, 2014) and others, human rights organisations were alarmed at its potential impact on human rights. Among their initial concerns was the wording of Transitional Article[3] 8 of the Constitutional Reform, which they said would result in human rights violations (Red TDT, 2015: p. 30). This article states that the exploration and extraction of petroleum and other hydrocarbons are strategic in nature and are therefore of "public utility" and of "social interest and public order", and it gives such activities preference over all others either on or below the surface (Mexico, 2013: Transitional Article 8). Transitional Article 8 paved the way for the inclusion of a pathway in the legislative measures that followed for the *de facto* expropriation of land where an actor from the extractive industry who wishes to use the property cannot reach an agreement with the owner(s) (See, CEMDA, 2014: pp. 16-18). Indigenous and other rural communities, already among the most marginalised groups in Mexico, appear likely to be denied their rights as a result of these reforms, and the power imbalance between these actors and the companies involved in the extractive industry will be further skewed by the shadow of expropriation looming over any negotiations (see, for example, Montalvo, 2014 and CartoCrítica, 2014).

Pearce argues that some Latin American states are often geared to respond violently to protect the interests of elites rather than govern in the name of the people (301). In Mexico, where "the strategies of state and criminal violence facilitate new mechanisms of social control and the depoliticization of civil society through terror" (Red TDT, 2015: 28), certain elite groups dominate political life and constitute the relevant referent audiences that must be persuaded for the successful securitization of an issue. The fact that the Executive managed to obtain the consent of both houses of parliament to pass the energy reform, thereby elevating both public and private extractive industry activities above all others, must be regarded as at least a partially successful securitization of the issue of energy production. The widespread approval the reform was met with in the international community and in the mainstream Mexican media confirms that the securitization was indeed successful.

After a lengthy drafting process and a referendum, the Bolivian Constitution was promulgated in 2009. Although it has been heralded for its progressive norms on the environment,

[3] In Mexican constitutional reform, transitional articles are similar to directives insofar as they fill the gap between the reform and existing law, as well as providing direction on the reform and/or creation of secondary laws.

indigenous rights, the right to water and democratic participation, among others (see Amparo Rodríguez, 2012: 31-37), it also states that activities related to the exploitation of non-renewable resources have the character of "state necessity and public utility" (Bolivia, 2009: Article 356). Perez Castellón puts this ambiguity down to the unresolved debate over the development model to be implemented in Bolivia, with the government seeking to prioritise extractive and infrastructure projects, whereas certain indigenous groups from the highlands and lowlands favour an alternative model that respects nature and indigenous peoples' rights (Pérez Castellón, 2013: pp. 8-9).

The use of the term "public utility" in both the Mexican constitutional reform and the actual text of the Bolivian Constitution is no accident. Both instruments seek to justify the expropriation of land for the purposes of the exploitation of non-renewable resources. Article 21 of the American Convention on Human Rights (hereinafter ACHR) establishes the right to property, but it also sets out the reasons for which this right may be restricted: "No one shall be deprived of his property except upon payment of just compensation, *for reasons of public utility or social interest*, and in the cases and according to the forms established by law [emphasis added]" (Organization of the American States, 1969: Article 21[2]). Pérez Callejón argues that characterizing extractive activities as of public utility in the Bolivian Constitution is an attempt to elude the requirement under Bolivian law that each declaration of public utility be clearly and coherently justified in a specially-drafted piece of legislation (Pérez Callejón, 2014). As in the Mexican Energy Reform, this gives such activities absolute preference over all others and legally facilitates expropriation.

Given the political intricacies and multiple points of debate involved in the constitutional reform process, a thorough analysis of the characterization of the exploitation of non-renewable resources as of public utility would be a difficult task and would go beyond the scope of the article. However, it is possible to reach several preliminary conclusions in this respect. Firstly, the use of the term "public utility" is intended to justify the suspension of the right to property. Economic advancement is the goal of this measure and anything perceived as an obstacle to progress would be seen as a threat to a "state necessity". Declarations by President Morales that consultations with indigenous peoples "waste a lot of time" and that it was therefore necessary to modify the law in order to speed up investment shed light on the Bolivian Government's priorities (Datos, 2015). This discourse and the suspension of indigenous peoples' rights and the right to property will inevitably impact most severely upon indigenous peoples in possession of the land where extractive projects are to be carried out.

In both Mexico and Bolivia the Executive power has changed the law to give extractive activities priority over all others. The justification given for these changes is that extractive activities are essential for development to be achieved. This understanding of development fails to consider the internationally agreed characteristics of the right to development as set out in the UN Declaration on the Right to Development, which recognizes the right of peoples to self-determination and explicitly states that "all human rights and fundamental freedoms are indivisible and interdependent" (UN, 1986: Articles 1(2) and 6(2). In addition, this prioritization fails to take into account the concerns regarding the extractive model of development which are shared by many (see, for example, Red TDT, 2015). Any obstacles to this vision of development are seen as barriers to progress, with negative consequences for the population as a whole. This discourse seeks to justify the extraordinary measure of expropriation of land, thereby restricting property and tribal rights, among others. We

will now discuss how this trend is characterized in Brazil, through the suspension of judicial decisions handed down for the protection of the rights of those facing the adverse impact of large "development" projects. We argue that the projects being protected by the use of Security Suspension benefit certain elites rather than a populace as a whole. To examine whether the same is true of the projects being carried out in the name of development and to the detriment of marginalized rural communities in Mexico, Bolivia and elsewhere in Latin America would be a useful exercise but is beyond the scope of this article.

3. THE TOOL FOR TRIBAL LANDS SECURITIZATION

It is important to look into the context under which Suspension of Security was created, as it can be regarded as indicative of its nature. The legal instrument came into existence in a period appropriately identified by the NGOs and tribal peoples that took the matter to the Commission as a state of exception in Brazil (AIDA et al, 2014b: 5). By the time the instrument was passed into law in 1936, Brazil was ruled by Getúlio Vargas, who came to power via a *coup d'etat* in 1930 and held onto it until 1945. Before the IACHR the representatives of the Brazilian State claimed the instrument was passed into law under a democratic regime, since Vargas was confirmed into power via elections held in 1934 (IACHR, 2014). However, these representatives failed to mention the fact that these elections were indirect and considered by the Superior Electoral Tribunal (2012) as breaking with the democratic traditions of the country. Also absent in the representatives' discourse was the fact that Vargas perpetrated another *coup* in 1937, demonstrating the instability and lack of democratic guarantees of the period.

Going beyond this contextual examination of the origins of Security Suspension, an analysis of the characteristics and evolution of the instrument demonstrates its undemocratic nature. The instrument was first created so as allow for the suspension of the execution of preliminary or interlocutory injunctions awarded by judges in certain limited circumstances where the decision was determined to go against the public interest. Specifically, the instrument could be used to suspend injunctions awarded, through the implementation of *Mandado de Segurança* (hereinafter 'MS') (See Brasil, 1936), by lower court judges. MS is a legal instrument that is somewhat similar to the instrument of a*mparo,* which exists in many other Latin American jurisdictions and enables individuals to protect their rights against manifestly illegal acts of public officials (AIDA et al, 2014b: 5). As long as these injunctions were considered to threaten the public interest, their effect could be suspended by the president of a superior court until the judge of the lower court or the appeals court chamber reached a final decision on the merits of the case (see Brasil, 1936). In 1936, only those decisions that were considered a threat to public order, health and security were subject to suspension via the utilization of the instrument (Brasil, 1936: art. 13).

In 1964, during yet another state of exception in Brazil characterized by a military dictatorship, the instrument was expanded so that it could suspend the effectiveness of decisions that were regarded as a threat to the public economy (see Brasil, 1964). In 1992, the instrument was expanded even further, allowing it to be utilized against judicial decisions emanating from any kind of lawsuits and not only those related to MS petitions (see Brasil, 1992). While Security Suspension was first idealized as an instrument that aimed to preserve the public interest when challenged by individual claims, this last mutation of the instrument allowed it to suspend decisions seeking to

preserve collective rights as well (see AIDA et al, 2014b: 5). With the 1992 reform, not only preliminary or interlocutory injunctions awarded by the lower courts but also by the appeals courts could be suspended.

In 2001 the instrument underwent its most recent reform with the adoption of a Provisional Measure allowing public officials to utilize it to request the suspension of any decision of lower courts and appeal chambers, even those that judged upon the merits of the case, for as long as these decisions could be appealed (see Brasil, 2001; and AIDA et al, 2014b:5). In 2009 a new law regulating the MS instrument was promulgated, but none of these characteristics were modified (Brasil, 2009). The jurisprudence, however, has expanded the range of actors that can require the suspension of judicial decisions to include private companies that provide public services (see, e.g., 1st Federal Regional Tribunal, 2015).

The aforementioned attributes of Security Suspension demonstrate that the instrument confers upon state bodies and private actors providing public services powers that do not meet democratic standards. These state bodies, represented by public officials, and private companies can request the president of courts of appeal to suspend the effectiveness of any judicial decision – as long as it can still be appealed - if they subjectively consider it to pose a threat to one of a broad spectrum of public interests. It should be recalled that in Brazil the executive branch of the government has a strong influence in the promotion of members of the judiciary. The practice of exchanging promotions for the suspension of decisions has been reported by members of the Federal Prosecutor's Office during meetings of a working group with a mandate to combat the consequences of Security Suspension[4]. In contravention of both Article 8 of the ACHR and the UN Human Rights Committee General Comment n. 32 that provides for the independence and impartiality of judicial systems (United Nations Human Rights Committee, 2007: para 19; see also IACHR, 2013: 10-11), Security Suspension allows the executive branch to exert pressure upon members of the judiciary when projects considered a priority by the government are threatened by a judicial decision (see AIDA et al, 2014b: 25).

The separation of powers is a fundamental principle of parliamentary democracy which ensures that there are checks in place to prevent too much power from becoming concentrated in one branch of government. Effectively enabling public officials to suspend judicial decisions based on their subjective assertion that such decisions are not in the public interest has the effect of eroding an important check on power. While in theory the fact that a higher court judge must agree to carry out a suspension may help to prevent abuse, the dependence of these very judicial officials on the other branches of government tend to make gaining judicial approval a foregone conclusion. As will be shown later, the suspension of decisions handed down to protect individual or collective rights in cases involving the construction of dams or other large development projects is hugely significant. The legal process all the way up to the final appeal takes years. Allowing construction and other works to proceed even after a judge has ordered their suspension or cancellation based on the merits of the case provides the government with an incentive to delay the case whenever possible and has the ultimate effect of nullifying the right to challenge projects such as these in court.

[4] Working group meeting records of December 18, 2013 [File with the author].

The abovementioned undemocratic characteristics of Security Suspension indicate how the instrument can be easily utilized in order to securitize the production of energy at the expense of tribal land claims in Brazil. Following a recent country visit, the UN Working Group on Business and Human Rights voiced the concern that "[security suspension] appears to be a disproportionate instrument, the use of which could pit the power of the federal State against affected communities." (United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, 2016, p. 13 § 44). The following examples will serve to demonstrate this in detail. They exhibit how the government uses the instrument to advance a political discourse that perpetuates an historical pattern of oppression of tribal peoples. The examples also show that the acceptance and reproduction of said discourse via Security Suspension decisions by the judiciary can be regarded as successful securitization of energy production resulting in the marginalization of tribal land claims.

An emblematic Security Suspension decision is SL125 ruled by then president of the Brazilian Supreme Tribunal (also "STF"), Justice Ellen Gracie. On this occasion, Justice Ellen was called upon by the Union, represented by the Attorney General of the Republic, to determine whether a decision from a federal appeals court should be suspended or not. After analysing an interlocutory appeal, the appeals court had ruled that the construction of the Belo Monte Dam should be suspended, as indigenous communities whose lands would be impacted by the construction had not been consulted before the project received congressional approval (see STF, 2007). By not consulting these peoples, the state had violated a procedural human right (i.e. the right to free, prior and informed consultation) that served as a guarantee for avoiding further tribal human rights violations that could result from such a project (see AIDA et al, 2014a: 16-29).

Belo Monte was the biggest so-called development project under way in the country and claimed by the government to be the third largest dam in the world (see Jaichand and Sampaio, 2013: 409-411; also Aneel). Before the Supreme Court, the government alleged that stopping the project would threaten public order and the economy, two of the concepts that justify the utilization of Security Suspension (see STF, 2007). In setting out its argument, the government advanced a securitizing discourse with two principal and cumulative components. Firstly, it claimed that halting the project would severely compromise an energy policy that was of vital importance for the implementation of public policy that was in the public interest (see STF, 2007). Secondly, the government claimed that, if it was not allowed to carry on with the project, sixteen other dams would have to be constructed so as to implement the abovementioned public policy, which would result in more public spending and the flooding of an area fourteen times the size of the one to be affected by Belo Monte, thereby expanding the harmful environmental and related effects (see STF, 2007). In sum, the project was in the interest of the general public and stopping it would result in monetary and environmental losses.

Aside from the monetary and environmental aspects, at that time the government did not elaborate on what it considered this 'public interest' to be. However, it did so when precautionary measures were sought before the IACHR for alleged human rights violations arising from the construction of the dam. Before the Commission the government alleged the dam was necessary for the accomplishment of fundamental objectives set out in the Constitution, such as the promotion of

human dignity, elimination of extreme poverty, national development and the reduction of social inequality (Jaichand and Sampaio, 2013: 410).

By claiming that the construction of Belo Monte was a matter of public interest on the basis of the state's fundamental objectives as detailed in the Constitution, the government painted the picture as one of survival of its social democratic values, all of which it portrayed as being dependent on economic progress. This portrayal is undoubtedly that of an existential threat as these values compose the very identity of the nation. By utilizing Security Suspension to frame a decision suspending the project as a threat to said values, the government sought to securitize the issue by convincing the referent audience, i.e. the judiciary as the guarantor of Constitutional values[5], of the existential nature of the threat posed. It is clear that when doing so, the government failed to consider other fundamental values that compose the identity of the nation, such as respect for and celebration of cultural diversity, which are not dependent on economic progress (see, e.g., Brasil, 1988: art. 215).

As tribal peoples' rights are inextricably interconnected with the preservation of their land rights (see Jaichand and Sampaio, 2013: 414-415), respect for and celebration of cultural diversity would entail abstaining from pursuing projects that could bring about a substantial impact to these territories (see IACHR, 2009: para 330; and AIDA et al, 2014a: 25-26). Hence, excluding the values related to cultural diversity from the national identity makes it clear that the securitization discourse utilized by the government is to the detriment of the tribal peoples' land claims in Brazil. During the thematic meeting before the Commission, tribal peoples and NGOs demonstrated a pattern of utilization of this discourse, with the government drawing the attention of the judiciary to the alleged grave impacts to public order and the economy if decisions against projects considered key to national development were not suspended. This was the case with a complex of more than 100 dams projected for the Tapajós basin (AIDA et al, 2014b: 14-20), the Barra Grande Dam (AIDA et al, 2014b: 21-23) and even the duplication of the Carajás railway that has the sole purpose of transporting and exporting iron ore reserves (AIDA et al, 2014b: 9-13).

The selectivity of the values advanced by the government as composing the threatened national identity reinforces the political character of its discourse[6] and should not come as a surprise given the extensive room for subjectivity provided by the Security Suspension legislation. What may come as a surprise for some is the acceptance and utilization of this political discourse by the judiciary, allowing for the successful securitization of large "development" projects and the resulting marginalization of tribal land claims. In deciding SL125, a decision within the Belo Monte case, Justice Gracie allowed herself to enter the political sphere when stating that one of the reasons why the project should not be halted was because this would entail the construction of other dams and enormous public spending. Rather than confining herself to the application of the law to the facts before her, the other reasons given by Justice Gracie for allowing Belo Monte to continue were equally problematic. She stated that a judicial decision to the contrary would invade the discretionary sphere of governmental decisions, as well as holding that the legislative decree that approved the

[5] The idea of securitization as applicable to the present scenario was adapted from Olesker's work (see 2014: 373-375).

[6] According to Olesker, framing something as a security matter is a political decision (see 2014: 374).

project without consulting the affected tribal peoples was merely programmatic and consultations could be held at a later stage.

In deciding via Security Suspension to suspend the appeals court decision suspending construction of the Belo Monte Dam, Justice Gracie excused herself from even considering the law applicable to the case, which determined that consultations should be held at the planning stage of such projects, prior to any decisions (see ILO, 1989: arts. 6 and 15)[7]. By accepting the government's argument that the suspension of the project would represent an invasion by the judiciary into the political sphere, the President of the Supreme Court disregarded the applicable laws and effectively suspended the government's obligation to act within the confines of the law. Indeed, the use of this line of reasoning makes it difficult to see how a judge might refuse an application made under Security Suspension. The successful securitization of the Belo Monte project excluded tribal peoples' rights and interests from the public interest, confirming their status as an existential threat to public order and the economy, elements on which the government's selective idea of the constitutional values composing the national identity are dependent.

At the meeting before the Commission, it was shown that the judiciary systematically accepts and legitimizes the governmental discourse as demonstrated above, resulting in the successful securitization of energy production and similar projects to the detriment of tribal peoples' land claims (see AIDA et al, 2014b: 14-23). This politicization of the judiciary resulting from the utilization of Security Suspension and the consequent securitization here under analysis entails various violations of tribal peoples' rights, perpetuating historic dynamics of repression between these peoples and the state as will be demonstrated in the following section.

4. THE CONSEQUENCES FOR TRIBAL PEOPLES

The historic oppression of tribal peoples in Brazil is well documented. Indigenous land and connected rights have been trampled upon to such an extent that their population has been reduced from 5 million to some 700,000 persons, nowadays composing only 0.43% of the Brazilian population (United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: 7-8). More than 1000 languages were lost in this process (Ibid). Another minority, the Quilombolas, who are self-identified tribal peoples taking their denomination from the formation of quilombos communities of former slaves, have also historically struggled to have their traditions and territories recognized and respected (see Comissão Pró-Índio de São Paulo). Yet another minority, the Ribeirinhos are river people who to this day are not even acknowledged as tribal peoples by the government in spite of having developed deep connections to the territories they came to inhabit to the point that their cultural distinctiveness can be considered endemic (see Morin, 2014). Their classification as traditional communities, and not as tribal peoples, represents the continuation of a policy of exclusion that they have been subjected to since the first half of the twentieth century[8].

This historic pattern of oppression that results in rights violations is perpetuated and facilitated by the utilization of Security Suspension. The very framing by the government and acceptance by the judiciary of tribal land claims as an existential threat to the fundamental values of

[7] See ILO Convention 169 entered into force in Brazil in 19 April 2004 via Decree n. 5.051.

[8] On the exclusion of Ribeirinhos from public policy see Morin's work (2014).

the state should be considered discriminatory, as it considers these minorities' cultural survival less important than the economic progress of the country. As will be discussed later in this article, the argument that these projects benefit the majority of the population is highly questionable. In this context of cultural prejudice, numerous human rights violations that are a direct and indirect consequence of the utilization of Security Suspension can be identified. Some of these violations are outlined below.

The procedural rights violations related to due process and access to justice that were presented before the IACHR can be considered a direct consequence of the use of Security Suspension. Articles 8 of the American Convention on Human Rights and 14 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), both ratified by Brazil[9], clarify that everyone has the right to be judged by an independent, impartial and competent court (see Organization of the American States, 1969: art. 8; and United Nations, 1966: art. 14). As pointed out above, by using the instrument being discussed the government violates the right of these peoples to have their case heard by an impartial and independent judge or court, as the decision makers are expected to rule on political and subjective grounds while influenced by officials who play a decisive part in these judges' career prospects.

The right to be heard by a competent court is also directly violated by the use of Security Suspension. In Brazil a judge or court is assigned a case on a random basis so the parties cannot choose to take the case to a decision maker for his/her political or legal opinions (see AIDA et al, 2014b: 25-26). However, as mentioned earlier, irrespective of the judge or court previously assigned to the case, a Security Suspension appeal is always directed at the president of a superior court, a person with no specific knowledge of the facts and who is called upon to suspend in a matter of minutes a detailed decision from a lower court or judge familiar with the case (AIDA et al, 2014b: 25-26). The right to an effective recourse/remedy set out in articles 25 of the ACHR and 2(3)(a) of the ICCPR is also violated by the use of Security Suspension. As previously outlined, the instrument allows the state to suspend, until a final decision on the merits, a ruling from a lower court that was directed at protecting human rights. In Brazil a final decision on the merits can take many years to be reached, and by the time the suspension of lower courts' decisions are lifted the violations they were directed at protecting are already consummated, rendering these decisions ineffective (see AIDA et al, 2014b: 26-27).

Logically, by making these protective decisions ineffective, the use of Security Suspension can be regarded as an indirect cause of tribal peoples' material and procedural human rights being violated, as it clears the way for these violations to occur. In the case of Belo Monte, the SL125 decision allowed the government to continue pursuing the construction of the dam without holding a consultation process with tribal peoples as provided for by the applicable law. Hence, the legal instrument was used to disregard these peoples' procedural human right that serves as guarantor for the protection of rights such as self-determination, property and cultural rights[10]. The same pattern of human rights violations can be spotted in other so-called development projects that survive due

[9] The ICCPR was ratified by Brazil on 24 January 1992 and the ACHR on 9 July 1992.

[10] FPIC rights are considered a guarantor of tribal peoples material human rights and a minimum core obligation of the State for guaranteeing the minimum acceptable of social rights (see AIDA et al, 2014a:18).

to the utilization of Security Suspension[11]. As was to be expected due to the indivisibility and interdependency of tribal peoples' rights[12], in Belo Monte these violations resulted in the deterioration of their health, water and food sources (see AIDA et al, 2014a: 14-16). The water from the Xingu River that indigenous peoples and Ribeirinhos use for drinking, fishing and bathing has been polluted to such an extent that in 2012, 9 out of 10 indigenous children had acute diarrhoea, 14% of these children were poorly fed and cases of intestinal parasitosis soared by 244%, all due to the construction of the dam (AIDA et al, 2014a: 14-16). Other judicial rulings that tried to stop the construction of the dam and prevent or halt these violations were also made ineffective by subsequent Security Suspension rulings emanating from higher courts[13]. The same *modus operandi* with the consequent violations is under way in the Tapajós basin and there is no reason to believe it will be any different elsewhere (AIDA et at, 2014b: 14-20).

The brief analysis of the above violations that are directly or indirectly caused by the utilization of Security Suspension should sufficiently demonstrate how the instrument perpetuates and facilitates the historic patterns of oppression suffered by tribal peoples in Brazil. It perpetuates that oppression when these peoples' rights are directly violated by its utilization, and it facilitates oppression when it curbs the effectiveness of rulings protective of their rights. It can thus be concluded that the Brazilian state was trying to mislead the IACHR when it affirmed that the instrument was key to guaranteeing democratic interests in the face of ill-advised judicial decisions – unless the state believes that a democracy is tantamount to the tyrannical rule of the majority, or worse still, the prioritization of elite interests over the human rights of some of Brazil's most marginalised people.

5. CONCLUDING REMARKS

By analysing the origins and nature of Security Suspension and the consequences of its utilization to securitize so-called development projects to the detriment of tribal land claims, the authors conclude that it cannot be democratic values that guide those making use of the instrument. The instrument is a product of an undemocratic regime and its utilization directly and indirectly violates a plethora of tribal peoples' human rights. On top of that, it does so by excluding cultural diversity as a part of the core values of the nation, designating as an existential threat the land claims of minorities who have been historically oppressed by the government. The securitization of extractive industry activities and other related projects in Brazil is part of a regional trend. One of the consequences of this is the exclusion of tribal peoples from the national identity and the systematic violation of their rights.

Furthermore, in advancing its priority projects while trying to impose economic interest as the core value of Brazilian society, the government actually seems to do little for the benefit of the majority of the population. At a time when concerns about climate change are at its peak, the majority

[11] See, for example, the complex of dams in the Tapajós basin (AIDA et al, 2014b: 14-20). Rojas and Do Valle cite more examples (2013).

[12] Jaichand and Sampaio see the interconnection of indigenous people's rights as an optimal example of the indivisibility and interdependence of human rights (see 2013: 417). As this connection is based on the common relation all of other rights to these peoples land rights, it is submitted that the assertion is applicable to tribal peoples in general, and not only indigenous peoples.

[13] See, for example, 1st Federal Regional Tribunal of Brazil, 2011; and STF, 2012 confirming the *ultra vires* effects of SL125.

population would be better served by a government that respects tribal peoples' land rights and works to prevent the deforestation of vast territories of the country, preserving the environment and biodiversity (see Bandeira, 2014). This would mean de-securitizing energy production and other so-called development projects and adopting a new understanding of development in keeping with the UN Declaration on the Right to Development for the benefit of tribal peoples in Brazil and the general population. However, if the government's energy policy and its so-called development projects that entail the marginalization of tribal land claims here analysed are neither sought in the interest of the minority nor of the majority of the population, it is important to consider the interested parties and their motivations.

Fearnside has suggested that the real beneficiaries of projects such as those discussed in this article are construction and consultancy firms and also the aluminum industry (Fearnside, 2006: 19). A recent investigation conducted in Brazil revealed that big construction companies were involved in one of the biggest cases of corruption faced by the country, through which 10 billion reais were diverted from the state-owned oil company Petrobras (El País, 2014). These companies contributed 62% of the donations for the 2014 national elections campaign of the party in power (El País, 2014). in addition, 34% of the total donated to the opposition parties came from these companies (El País, 2014). Three of these companies are a part of the consortium responsible for the construction of the Belo Monte Dam (Consórcio Construtor Belo Monte, 2015). So far, one of them is also involved in the construction projects of Tapajós (see Brasil, 2014b). With this modus operandi and with the substantial political power this kind of money can harness, it did not seem far-fetched to imagine that the real reason behind the construction of these projects in Brazil was to enrich a small niche of enterprises favoured by politicians that depend on such companies to remain in power. This dynamic has been noted by the UN Working Group on Business and Human Rights in the following terms:

> 45. The Working Group also noted concerns about undue corporate influence on regulatory and policymaking processes and that the Government's capability to oversee business operations may, in some cases, be affected by political financing processes and corporate lobbying. 46 Such perceptions have been exacerbated by a series of corruption scandals involving major companies and elected politicians. (United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, 2016, p. 13 § 45)

Confirming that the said concerns are justified, Senator Delcídio do Amaral, who was arrested for obstruction of justice during the abovementioned investigations, blew the whistle on the real dynamics behind these projects. In the case of Belo Monte, the Senator affirmed that by irregularly favouring national companies to construct and provide equipment to the project, 15 to 20 million reais were illegally provided by these companies to finance the elections of PT and PMDB political parties' members (see Época 2016) – the parties from suspended President Dilma Rousseff (PT), from President in exercise Michel Temer (PMDB), from suspended president of the Chamber of Deputies Eduardo Cunha (PMDB) and from president of the Senate Renan Calheiros (PMDB). For as long as Security Suspension exists and allows those in power to act outside of the confines of the law by securitizing energy production and whatever else they decide meets their definition of development, it is the entire Brazilian society that will pay the price as their social democratic constitutional values are sabotaged and manipulated to the detriment of historically marginalized tribal peoples and their land rights.

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