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## **REPORT No. 44/15**

### **CASE 12.728**

REPORT ON THE MERITS

XUCURU INDIGENOUS PEOPLE

BRAZIL

Approved by the Commission at its meeting No. 2044 held on July 28, 2015, during its 155th regular session

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**CASE 12.728**  
**XUCURU INDIGENOUS PEOPLE**  
**MERITS**  
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**REPORT No. 44/15**

<sup>1</sup> Commissioner Paulo Vannuchi, a Brazilian national, did not participate in the deliberation or decision of this case, as provided in Article 17.2.a of the Commission's Rules of Procedure.

**CASE 12.728**  
**XUCURU INDIGENOUS PEOPLE**  
**MERITS**  
**BRAZIL**  
**July 28, 2015**

**I. SUMMARY**

1. On October 16th, 2002, the *Movimento Nacional de Direitos Humanos/Regional Nordeste* [National Human Rights Movement/Northeast Region], the *Gabinete de Assessoria Jurídica às Organizações Populares – GAJOP* [Legal Advisory Office for Popular Organizations] and the *Conselho Indigenista Missionário – CIMI* [Missionary Indigenist Council] (hereinafter "the petitioners"), lodged a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission", "Commission" or "IACHR") against the Federative Republic of Brazil (hereinafter "the State", "the Brazilian State" or "Brazil"), for the alleged violations of the right to collective property and to a fair trial and judicial protection, enshrined, respectively in Articles 21, 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") in relation with the general obligations to respect the rights and to adopt provisions in domestic law provided in Articles 1.1 and 2 of the same treaty, to the detriment of the Xucuru indigenous people and its members, in the city of Pesqueira, state of Pernambuco.

2. The petitioners allege that the State has violated the right to collective property of the Xucuru indigenous people and its members as a result of the delay in the demarcation of their ancestral land and the ineffectiveness of the judicial protection intended to guarantee such right, as well as the lack of effective and accessible judicial remedies. In the merits stage the petitioners included allegations regarding Articles 4 and 5 of the American Convention. In turn, the State argues that the petition is inadmissible because the administrative process of demarcation of the "Xucuru Indigenous Territory" (*Terra Indígena Xucuru*), which initiated in 1989, has formally concluded. On the other hand, the State acknowledges that it has not yet completed the full removal of non-indigenous occupants. The State alleges that, nevertheless, the process of demarcation of the Xucuru territory took place in a reasonable timeframe, taking into account the complexity of the matter and the need to guarantee due process of law to non-indigenous third parties, as well as their to fair compensation.

3. After analyzing the positions of the parties, the proven facts and the applicable rules, the Commission concludes that the Brazilian State is internationally responsible for the violation of Article XXIII of the American Declaration of the Rights and Duties of Man for events up to ratification of the American Convention by Brazil on 25 September 1992. The Commission also concludes that, since that date, the State is responsible for the violation of the right to personal integrity, collective property, to a fair trial and judicial protection established in Articles 5, 21, 8.1 and 25.1 of the American Convention, in relation to the obligations established in Articles 1.1 and 2 thereof, to the detriment of the Xucuru indigenous people and its members.

**II. PROCEEDINGS SUBSEQUENT TO THE ADMISSIBILITY REPORT**

4. On October 29, 2009 the Inter-American Commission adopted Admissibility Report No. 98/09 determining that the alleged facts could constitute violations of the rights established in Articles 8, 21, 25, 1.1 and 2 of the American Convention, as well as Articles XVIII and XXIII of the American Declaration of the Rights and Duties of Man<sup>2</sup>. On January 6, 2010 the IACHR notified the parties the said report, informed them that the case had been registered under number 12.728 and, in conformity with Article 37.1 of the Rules in force at the time, set a deadline of three months for the petitioners to submit additional observations on the merits. Furthermore, in accordance with Article 48.1.f of the American Convention and Article 37.4 of the Rules then in force, the Inter-American Commission made itself available to the parties to reach a friendly settlement in this matter. The parties did not manifest regarding a possible friendly settlement.

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<sup>2</sup> CIDH. Report No 98/p09, P4355-02, Admissibility, Xucuru Indigenous People, Brazil, October 29, 2009.

5. In a communication dated March 25, 2010, the petitioners submitted additional observations on the merits. This communication was transmitted to the State on April 20, 2010 for it to submit its additional observations on the merits within three months, under Article 37.1 of the Rules then in force. The State submitted additional observations on the merits in a communication dated September 6, 2010, which was duly forwarded to the petitioners. The petitioners submitted additional information on November 24, 2010 and March 21, 2011, which were duly transmitted to the State. The State, submitted additional information on January 13, 2011 and June 3, 2011, which were duly forwarded to the petitioners.

6. In parallel with the processing of the original petition and of the case 12.728, on October 16, 2002 – the same date the petition was filed– the petitioners requested precautionary measures to guarantee the life and personal integrity of the head of the Xucuru indigenous people, Marcos Luidson de Araújo (“Cacique Marquinhos”) and his mother, Zenilda Maria de Araújo, for alleged death threats received by both. On October 29, 2002 the IACHR granted precautionary measures (“MC-372-02”) in favor of Cacique Marquinhos and Zenilda Maria de Araújo, and requested the State to adopt all necessary measures to protect the personal integrity and life of the beneficiaries and immediately initiate a serious and thorough investigation regarding the alleged facts that gave rise to the precautionary measures. These measures remain in effect as of the date of approval of this report.

### III. POSITION OF THE PARTIES

#### A. Petitioners

7. The petitioners state that the Xucuru indigenous people, as the Commission has noted in its Report on the Situation of Human Rights in Brazil (1997), is composed by approximately 6,000 people who for over a century, at least since the Paraguayan War (1864-1870), have been fighting for the recognition of their ancestral lands. They indicate that, despite this, the process of demarcation of the Xucuru indigenous territory did not begin until the late 1980s, following pressure from the people headed by their then chief, Cacique Xicão, “in a context of general insecurity”. They point out that such context was marked by the murder of indigenous leaders and defenders of their rights, including Cacique Xicão, as well as by threats and the attempted murder against his son and successor, Cacique Marquinhos<sup>3</sup>.

8. Regarding the administrative process of demarcation of the Xucuru indigenous territory and indigenous lands in general, the petitioners argue that it comprises five phases, culminating in the registration of the indigenous land<sup>4</sup>. Furthermore, they indicated that according to the process “if the presence of outsiders in the indigenous land is verified, their removal will be executed as a matter of priority.”

9. According to the petitioners, the lands traditionally occupied by indigenous belong to the Union; that the indigenous peoples’ original right to their ancestral lands is formally recognized; and they are guaranteed permanent “possession” of those lands through an administrative process of demarcation of indigenous lands. The petitioners add that the right of indigenous peoples to the “possession” of their ancestral lands and the aforementioned demarcation process are recognized and regulated in Brazil through the “Statute of the Indigenous” (Estatuto do Índio) - Law 6.001 of September 19, 1973, the Federal Constitution of 1988 and, in the case of the lengthy administrative proceeding relating to the Xucuru indigenous territory, of Decrees No. 94.945 of 1987, 22 of 1991 and 1.775 of 1996.

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<sup>3</sup> According to this context, the petitioners stated that “the continued presence of non-indigenous people in the Xucuru lands originated a situation of tension and insecurity.” The petitioners note that each time the process had a significant advance or, paradoxically, suffered a setback, tension raged between Xucuru indigenous and non-indigenous people present on the indigenous lands. This, to the petitioners, resulted in the deaths of important indigenous leaders: José Everaldo Rodrigues Bispo, son of the spiritual leader of the people, on September 4, 1992; Geraldo Rolim, FUNAI representative and active defender of indigenous people, on May 14, 1995; and finally the village chief, Cacique Xicão, on May 21, 1998.

<sup>4</sup> As alleged by the petitioners, the administrative process of demarcation of indigenous lands includes the following steps: i) identification and delimitation; ii) the response from interested parties; iii) decision of the Minister of Justice; iv) Approval by decree of the President of the Republic; and v) registration of the indigenous land.

10. They indicated in more detail that the administrative process started in 1989, under Decree No. 94.945 of 1987, and that at the stage of identification and delimitation, the Technical Group of the National Indigenous Foundation (*Fundação Nacional do Índio*, hereinafter "FUNAI") issued an Identification Report on September 6, 1989, which states that the Xucuru were entitled to an area of 26,980 hectares. The petitioners add that, after the adoption of Decree No. 22 of 1991, the Minister of Justice issued ministerial decision No. 259 on May 29, 1992, confirming the demarcation of the territory. By that date, according to the petitioners, the majority (approximately 70%) of the Xucuru indigenous territory was occupied by non-indigenous people, however, the removal of such persons was not executed, in defiance of existing rules. The petitioners note that the demarcation process did not progress from 1992 to 1995<sup>5</sup> as a result of various administrative measures, and even retrograded during that period. They added that during the process the FUNAI repeated the identification and delimitation of the Xucuru indigenous territory, which, they indicated, was completed in 1995 identifying an area of 27.055,0583 hectares.<sup>6</sup>

11. According to the petitioners, on January 8, 1996 the Executive Branch issued a new decree (Decree No. 1.775 of 1996) which introduced significant changes in the process of demarcation of indigenous lands, specifically giving third parties interested on the indigenous lands the right to challenge the identification and delimitation report. The petitioners point out that non-indigenous people - including the Pesqueira mayoralty and the Municipal Council - filed 272 challenges (*contestações*) against the demarcation, all of which were deemed inadmissible by the Minister of Justice through administrative decision No. 32 of July 10, 1996. Subsequently, the non-indigenous filed a motion for an injunction (*mandado de segurança* No. 4802-DF) to the High Court of Justice (hereinafter "STJ"). According to the petitioners, on May 28, 1997 the STJ decided in favor of the non-indigenous, which opened the way for new challenges. Such challenges, according to the petitioners, were all rejected by the Minister of Justice, and thus reaffirmed the need to implement the demarcation in the terms of the ministerial decision of 1992<sup>7</sup>. However, the petitioners point out that at this time the removal of non-indigenous from the Xucuru indigenous land was also not executed.

12. According to the petitioners, the Presidential Decree that ratified the demarcation of the Xucuru indigenous territory was not issued until April 30, 2001, that is, 12 years after the start of the demarcation process. Despite this ratification, the petitioners say that the removal of non-indigenous did not take place. The petitioners emphasize that the next step established in the legislation, that is, the registration of the indigenous land within thirty days, was not carried out either because the Property Registry Official of the city of Pesqueira refused to register the land title and furthermore, filed an objection motion (*Ação de suscitação de dúvidas*) No. 2002.83.00.012334-9 before the local judge, challenging the validity of the demarcation process and the competence of the FUNAI to require such registration<sup>8</sup>.

13. The petitioners underscore that this legal action was baseless, and that it was filed with the mere purpose of further delaying the demarcation process, since Article 6 of Decree No. 1,775 precisely established that after the presidential ratification, FUNAI should promote the registration of the respective indigenous territory. The petitioners point out that the legal challenge presented by that public official effectively delayed the demarcation process for four years.

14. Notwithstanding the respective registration of the Xucuru indigenous territory in 2005, the petitioners continue to argue that the Xucuru indigenous people do not enjoy yet their collective property, for non-indigenous people, who have still not been compensated by the State, remain in their territory. They also note that the final decision on two legal actions filed by non-indigenous challenging the demarcation process, are still pending: a motion to regain possession (*Ação de reintegração de posse* No. 92.0002697-4) and a court suit to annul the administrative demarcation process (*Acción judicial para anulación del proceso administrativo de demarcación* No. 2002.83.00.019349-2).

<sup>5</sup> As a matter of context, the petitioners referred to a series of assassinations of its leaders throughout the process. According to the petitioners, José Everaldo Rodrigues Bispo, spiritual son of the village chief, was killed on September 4, 1992.

<sup>6</sup> According to the petitioners, Geraldo Rolim, FUNAI representative and active defender of the Indians, was killed on May 14, 1995.

<sup>7</sup> According to the petitioners, the village chief, Cacique Xicão was killed on May 21, 1998.

<sup>8</sup> According to the petitioners, another indigenous leader Francisco Assis Santana ("Chico Quelé"), head of the village "Pé de Serra do Oiti", he was killed on August 23, 2001.

15. Regarding the rights violated in this case, first the petitioners argue that Brazil has violated **the right to collective property of the Xucuru indigenous people and its members**, enshrined in Articles 21.1 of the American Convention and XXIII of the American Declaration. In this regard, they argue that the Xucuru indigenous people do not just want the registration of their territory, but has the right to its use and enjoyment through the "undisturbed possession" of their land to ensure the perpetuation of their culture and respect for their special relationship with their lands, territories and resources.

16. With regard to the alleged violation of **the right to a fair trial and judicial protection** established in Articles 8.1 and 25.1 of the American Convention and XVIII of the American Declaration, the petitioners alleged the unwarranted delay by state officials to finalize the demarcation process of the Xucuru indigenous territory, including the formal registration of the territory and the effective removal of non-indigenous settlers. According to the petitioners, the delay of 16 years (1989-2005) to achieve the titling of the Xucuru territory, as well as the more than 21 years that have elapsed to achieve effective removal of non-indigenous from the area constitute *per se* a violation of the principle of a reasonable time period and an evidence of ineffectiveness and denial of justice.

17. Furthermore, in accordance with the **obligation enshrined in Article 2 of the American Convention**, the petitioners argue that Brazil should adopt legal instruments to allow that, once a specific territory is recognized as indigenous by an act of the executive branch, the Federal Government automatically proceeds to its possession for the benefit of the respective indigenous people, in order to avoid demarcation processes extending indefinitely, as it allegedly happened in this case.

18. In the merits stage the petitioners have also alleged the violation of the **rights to life and personal integrity** established in Articles 4.1 and 5.1 of the Convention, resulting from the lack of compliance with the precautionary measures granted in favor of Cacique Marquinhos and Zenilda Maria de Araújo. They specifically mentioned the attempted assassination suffered by Cacique Marquinhos on February 2003. Also at the merits stage the petitioners submitted arguments on alleged violations relating to the context of tension and insecurity that has characterized the demarcation process, as well as the difficulties in the implementation of the precautionary measures. They argued generally that the number of deaths that occurred during the demarcation process have not been properly investigated, nor has the attempted murder suffered by the Cacique Marquinhos on 7 February 2003 been duly investigated. This, according to the petitioners, has resulted in distrust of the Xucuru indigenous people towards the State authorities, particularly the Federal Police and the Federal Public Ministry (hereinafter "MPF"). Also, with respect to the MPF, in the merits stage the petitioners stressed that the "new strategy" by non-indigenous to obstruct the demarcation is the "criminalization of indigenous leaders", which is supported by that body, and they indicate that this is reflected in "countless criminal actions" promoted by the MPF against the Xucuru indigenous people. They cited as an example the criminal action brought against Cacique Marquinhos for events that occurred after the assassination attempt against him when the Xucuru indigenous people destroyed lands and property in the city of Pesqueira.

## B. State

19. The State argues that the administrative process of demarcation of the Xucuru indigenous territory has formally concluded after due registration of the indigenous land in November 2005 as property of the Federal Union. The State adds that the only thing that has not yet been accomplished is the full removal of non-indigenous occupants after the payment of compensation in accordance with relevant legislation. Thus, the State alleges that it has duly recognized the right of the Xucuru indigenous people and its members to their ancestral territory.

20. Specifically, the State contends that the administrative process of demarcation of the Xucuru indigenous territory began in 1989, through identification and demarcation of the territory conducted by the Technical Group of FUNAI created by Decree (*Portaria*) No. 218 /FUNAI/89. According to the State, the identification and demarcation report was approved by the President of FUNAI in 1992 and shortly after the Minister of Justice declared the possession by the alleged victims of the Xucuru indigenous territory, through *Portaria* No. 259/MJ/92 on 28 May, 1992. According to the State the physical demarcation of the territory



was carried out in 1995. The State reports that in 1996 Decree No. 1.775 was promulgated, which gave the good-faith occupants of the indigenous lands the possibility to challenge the demarcation process and, as a result, 269 challenges were filed by parties interested in the Xucuru indigenous territory. The State argues that those challenges were all simultaneously rejected by Ministerial Decision (*Despacho*) No. 32 from the Minister of Justice, which was published in the Official Gazette of the Union (hereinafter "DOU") on July 10, 1996. The State adds that on April 30, 2001, through a Presidential Decree published in the DOU on May 2, 2001, the executive branch of Brazil homologated the demarcation of the Xucuru indigenous territory corresponding to an area of 27.055,0583 hectares. According to the State, the next step, consisting of the registration of indigenous territory, was not carried out immediately because the Property Registry official Official of the City of Pesqueira filed the objection motion (*Ação de suscitação de dúvidas*) No. 2002.83.00.012334-9 (original number 2002.83.00.012334-9) in August 2002. The State warns that such action was dismissed on June 22, 2005 and that it proceeded to register the indigenous territory in November 18, 2005, as property of the Federal Union for permanent "possession" of the Xucuru indigenous people. The State notes that the administrative demarcation process was formally concluded with the registration of the Xucuru indigenous lands on that date.

21. Notwithstanding the foregoing, the State has recognized throughout the processing of this case that the removal of non-indigenous occupants from the Xucuru indigenous territory has not been fully completed. In this regard, the State reports that between 2001 and 2005, FUNAI paid compensation to 296 non-indigenous occupants, while the survey of non-indigenous occupations, completed in 2007, indicated the existence of 624 occupations. The State emphasizes that it continued making efforts to complete the process of restoration of the indigenous territory and that approximately by 2010 more than 90% of non-indigenous occupants were already properly compensated and removed from the area. According to the State, approximately 50 occupants still remain, who have not been compensated or removed as a result of gaps in their documentation or due to legal actions pending a final decision.

22. Regarding the last point, the State reports that there are two legal challenges filed by non-indigenous settlers pending a final decision: (i) a "motion to regain possession"; and (ii) an "ordinary action to annul the administrative demarcation process". On this point the State reiterates the arguments presented in the admissibility stage on the non-exhaustion of domestic remedies. In addition, the State argues that the admissibility report was legally wrong and inconsistent with the jurisprudence of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "Court"), when it determined that the challenges lodged by third parties interested in the indigenous territory, by not being filed by the petitioners or the alleged victims or on their behalf, would not be taken into consideration to determine whether the requirement of exhaustion of domestic remedies was met. The State indicates that in the merits stage the Commission must consider such legal actions as "necessary and integral parts of the demarcation process of the Xucuru indigenous territory".

23. According to the State, the motion to regain possession was promoted by Milton do Rego Barros Didier and another in March, 1992, with regards to the possession of the Hacienda "Caípe", of about 300 hectares, in the city of Pesqueira. It indicates that following a conflict of jurisdiction the motion was decided in the first instance in favor of non-indigenous occupants in July 1998. It points out that the appeal was rejected in second instance by the Federal Regional Court of the 5th Region (hereinafter "TRF"), on April 24, 2003. A special appeal was presented to the STJ in December 2003, which was rejected on November 6, 2007. It further states that a motion of *embargo de declaração* was filed, which was rejected in November 2009. Finally, it indicates that another motion of *embargo de declaração* was filed and is currently pending.

24. Also, according to the State, the ordinary action was promoted by Paulo Pessoa Cavalcanti de Petribu and 7 other individuals in February 2002, seeking the annulment of the administrative demarcation process concerning their properties: the Hacienda "Lagoa da Pedra", "Ramalho", "Lago Grande" and the farms "Capim Grosso" and "Pedra da Cobra". According to the account of the State, they also filed, simultaneously and as a complement to the ordinary action, an injunction in December 2002 regarding the anticipated production of evidence on the invasion and destruction of the Hacienda "Lagoa da Pedra". It indicates that on June 1, 2010, the 12th Federal Court of Pernambuco decided in first instance that the ordinary action was

partially admissible and determined that the authors were entitled to compensation from FUNAI. The State adds that such ordinary action is still pending decision on appeal.

25. Regarding the rights allegedly violated, the State emphasizes in general that the processes of demarcation of indigenous lands have an inherent complexity, particularly in relation to non-indigenous occupants. According to the State, the Inter-American Court itself has recognized such complexity. In this regard, the State asserts that there are different interests involved in these processes, particularly of non-indigenous occupants who live in that territory and who cannot be forcibly evicted without due process and just compensation. Thus, the State argues that the deadline for the demarcation of the Xucuru indigenous territory was reasonable and was justified by the complexity of the matter.

26. The State also argues that, in regard to the procedural activity of the interested parties, the actions promoted by non-indigenous third parties to challenge the demarcation of the Xucuru indigenous territory must be taken into account in assessing the reasonableness of the time. The State argues that the term "interested" should be interpreted broadly, not narrowly, to ensure that there are no limitations imposed to the human rights of third parties, particularly non-indigenous who have legitimate rights over the indigenous territory.

27. In conclusion, the State acknowledges the delay in the demarcation process and the effective "peaceful enjoyment" of the Xucuru indigenous territory by the alleged victims, but claims that this is justified both by the complexity of the matter and the procedural activity of other interested parties. The State also notes that Brazilian legislation and public policies primarily implemented by FUNAI, duly guarantee the right to property of indigenous people. The State adds that, pursuant to the obligation to take steps to enforce the rights enshrined in the inter-American instruments, it conducted an extensive process of consultation with indigenous peoples and leaders, including Cacique Marquinhos of Xucuru, to prepare the bill of the new "Statute of the Indigenous", presented to the Chamber of Deputies on August 13, 2009. The State also notes that during the 2nd National Conference of the Judicial Branch, in 2009, the National Justice Council (hereinafter "CNJ") established as one of its ten core objectives "to identify the oldest legal proceedings and take concrete measures to judge all those [proceedings] distributed until December 31, 2005 (in 1st and 2nd instance or higher courts)", in order to ensure the right to justice within a reasonable time.

28. Finally, the State notes that the alleged "criminalization of indigenous leaders" of the Xucuru people, alleged by the petitioners in the merits stage, does not allow the exercise of the principles of contradictory and defense by the State, because it was presented in a general manner without specifying what were the "innumerable criminal actions" promoted by the MPF against the Xucuru indigenous people. The State emphasized that the facts object of the case were delimited by the Commission in its Admissibility Report No. 98/09 without including said aspects.

#### **IV. PROVEN FACTS**

##### **A. The Xucuru indigenous people**

29. According to an expert opinion by anthropologist Vânia Fialho, who participated in the process of demarcation of the Xucuru indigenous territory as a consultant for FUNAI, "The Xucuru Indigenous Land, divided into 23 'villages' or settlements, has an estimated population of 7,000 indigenous people (being the largest indigenous population in northeastern Brazil). It is located in the municipality of Pesqueira, state of Pernambuco, at 216 kilometers from the city of Recife." Also, the anthropologist states that "there are historical references to the indigenous Xucuru since the sixteenth century" and that "official documents of the Government of Pernambuco, in the mid-eighteenth century, indicate that the colonization of the region inhabited by the Xucurus began from the Town of Cimbres, formerly known as Ararobá Village, which served as a catechism center for several local indigenous groups for about two centuries."<sup>9</sup>

<sup>9</sup> FIALHO, Vânia. Estratégias e Tentativas de Regularização da Terra Indígena Xucuru, quoted in Communication from the petitioners, October 10, 2002, pgs. 4 and 5. See, in the same, the State Communication of July 21, 2009. Annex (document titled "TI Xucuru" prepared by the Ministry of Justice / FUNAI / Directorate of Land Affairs / CGID), p. 1.



30. The Commission also referred to the "Xucuru of Oruguba" in its Report on the Situation of Human Rights in Brazil (1997), stating that "for over a century, according to the tradition of the people, its members accepted to fight in the Paraguayan War in the Brazilian Army in exchange for recognition of their land, which then was not done." As found by the Commission, "the Xucuru are about six thousand people. The demarcation of the land is being conducted by FUNAI in a context of general insecurity and with minimal resources."<sup>10</sup>

31. Furthermore, in its 1997 report, the Commission noted that the Xucuru indigenous people were a "typical case" that exemplified one of the main obstacles that hinder the recognition and consolidation of indigenous areas in Brazil: "the legal difficulties met in ousting intrusive occupants"<sup>11</sup>. According to the Commission, in relation to the Xucuru indigenous territory "the occupation by indigenous people reaches 12% of the surface, the rest is occupied by 281 agricultural landowners and loggers."<sup>12</sup> Coupled with the massive presence of non-indigenous settlers in the indigenous territory, the Commission also "was able to verify that in the states where there are indigenous groups, the persons who defend them are continuously exposed to threats [and violence]."<sup>13</sup>

32. The same situation was more recently observed by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, who said that when land demarcation processes suffer opposition from powerful non-indigenous landowners, this results in violence against indigenous people and exemplified this assertion referring, *inter alia*, to what happened in Pernambuco with the Xucuru people<sup>14</sup>. In the words of the Special Rapporteur:

The efforts to regain traditional lands have led to tensions that on numerous occasions have erupted into violence. (...) The homicides were a result of both internal and external tensions, and many killings and threats of violence ag ação of reintegração de posse ainst indigenous individuals are either directly or indirectly related to the indigenous land struggle<sup>15</sup>.

33. The details of this situation will be referred to by the Commission in the subsequent sections on proven facts.

#### **B. The legal framework on the recognition, demarcation and titling of indigenous lands in Brazil**

34. The Constitution of the Federal Republic of Brazil of 1988 (hereinafter "the Federal Constitution" or "CF 1988") grants constitutional status to a number of rights of indigenous people, including with regard to their lands, territories and resources. The CF 1988, as the Commission has recognized, represents the overcoming of the "integrationist perspective" which was the spirit of the law hitherto, particularly the Statute of the Indigenous (*Estatuto do Indio or Law 6,001 of 1973*)<sup>16</sup>. Regarding the progress that the CF 1988 meant at the time, particularly by abolishing the idea that indigenous people should be assimilated culturally, the Commission has expressed that:

<sup>10</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", parr. 45.

<sup>11</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI. E(2).

<sup>12</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", parr. 45.

<sup>13</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", parr. 81.

<sup>14</sup> United Nations, Report of the Special Rapporteur on the situation of human rights of indigenous peoples in Brazil, A/HRC/12/34/Add.2, 26 Aug. 2009, parrs. 31 and 32.

<sup>15</sup> United Nations, Report of the Special Rapporteur on the situation of human rights of indigenous peoples in Brazil, A/HRC/12/34/Add.2, 26 Aug. 2009, parr. 49.

<sup>16</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", parr. 16.

Chapter VIII of the Brazilian Constitution of 1988 is devoted to one of the most advanced normative positions in comparative legislation. Its provisions relate directly to the Indians' rights, surpassing the formerly ruling doctrine of "natural assimilation," and grant permanent recognition to the inherent original rights of the indigenous peoples, predicated on their status as the initial historical and permanent occupants of their lands<sup>17</sup>.

35. Furthermore, regarding the legal regime of indigenous lands, i.e., the status of indigenous land rights, the Commission has established that:

**The indigenous areas in Brazil are the property of the Union**, as expressly stated in the Political Constitution (PC Art. 20, XI). As a result, they are subject to federal jurisdiction. At the same time, the Constitution itself recognizes the concept of "original domain" in the rights of the indigenous peoples to the land which they traditionally occupy. In other words, those rights do not stem from an act or grant of the State, but from the historical status of occupancy and ancestral utilization of that land. It also recognizes their permanent possession and exclusive usufruct of the soil, rivers and lakes, plus a share in the benefits received from exploitation of the water and energy resources of the subsoil, but **the ownership correspond to the Union**<sup>18</sup>.

36. In sum, the Brazilian legislation, particularly the Federal Constitution, establishes that the right to property of indigenous lands is conferred to the State (or the "Union"). Thus, Article 20, paragraph IX of the CF 1988 states that "are property of the Union: the lands traditionally occupied by indigenous people"<sup>19</sup>. Therefore, the Federal Constitution provides that the State is the owner of indigenous lands, not indigenous people or their members, who are guaranteed "permanent possession" of the lands traditionally occupied by them and the exclusive use of the resources attached to them, in terms of Article 231 and its paragraphs. In its relevant parts, Article 231 of the CF 1988 provides the following:

Art. 231. Indigenous people re recognized their social organization, customs, languages, beliefs and traditions and the original rights to the land they originally occupied, being the responsibility of the Union to demarcate, protect and guarantee respect for all of their property.

Par. 1 The lands traditionally occupied by indigenous are those inhabited by them permanently, those used for their productive activities, those indispensable to the preservation of environmental resources necessary for their welfare and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions.

Par. 2 The lands traditionally occupied by indigenous people are intended for their permanent possession, corresponding to them the exclusive usufruct of the resources of the soil, the rivers and the lakes existing therein.

Par. 3 The use of water resources, including energy potentials, the exploration and extraction of mineral resources in indigenous lands can only be made effective with the authorization of the National Congress, after hearing the affected communities, whose participation in the results of the exploitation is ensured, in the manner established by law.

Par. 4 Lands in this article are inalienable and non-disposable and the rights over them, imprescriptible.

<sup>17</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", par. 5.

<sup>18</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", par. 25. [emphasis added].

<sup>19</sup> Annex 1. Relevant legislation. CF 1988, Article 20 XI.

Par. 5 The removal of indigenous groups from their lands is prohibited, except by referendum of the National Congress, in case of disaster or epidemic that threatens the population, or in the interest of the sovereignty of the country, after deliberation by the National Congress, guaranteed in any hypothesis, their immediate return once the risk has ceased.

Par. 6 Are null and extinct, not producing legal effects, the acts aimed at the occupation or control and possession of the lands referred to in this Article, and the exploitation of natural resources of the soil, rivers or lakes existing in them, except for the relevant public interest of the Union, as established by supplementary law, not generating the nullity or extinction a right to compensation or action against the Union except, according to the law, with regard to benefits arising from occupation in good faith.<sup>20</sup>

37. The Commission has observed that "many of these constitutional rights [in Brazil] depend on regulatory legislation" and the Statute of the Indigenous of 1973, which precedes CF 1988, currently remains in force<sup>21</sup>. The Statute of the Indigenous follows the integrationist precepts of the old Convention No. 107 of the International Labor Organization ("ILO") and, "as it is contravenes the provisions of the [Federal] Constitution of 1988 on many of its provisions."<sup>22</sup> However, it refers to the procedure for the demarcation of indigenous lands. Specifically, its Article 19 establishes that "indigenous lands, on the initiative and guidance of the federal organ for the assistance to indigenous people, shall be administratively demarcated according to the process established by decree of the Executive Branch."<sup>23</sup>

38. Currently the Executive Branch decree applicable to such administrative demarcation of indigenous lands is Decree No. 1.775 of January 8, 1996, which establishes- similarly to the Statute of the Indigenous - that indigenous lands "will be administratively demarcated by initiative and under the guidance of the federal organ for the assistance to indigenous peoples, according to the provisions of this Decree "<sup>24</sup>. Since the issuance of this decree, the demarcation process was governed by it. However, the IACHR notes that earlier during the process of demarcation of the Xucuru indigenous territory, launched in 1989, other executive decrees were in force and informed the procedure followed by the state authorities, as will be explained *infra* (Section VIII). Currently, Decree No. 1.775 details the various steps to be followed for the recognition, demarcation and titling of indigenous lands. According to Decree No. 1775, "the indigenous people, represented through their own customs, will participate in all stages of the process."<sup>25</sup>

39. Under Article 2 and paragraphs 1, 6 ° and 7 of Decree n. 1775, the process of demarcation of indigenous lands begins with the identification and delimitation of the respective territory, which must be approved by the President of FUNAI, under the following terms:

Article 2 - The demarcation of lands traditionally occupied by indigenous will be based on work done by an anthropologist with recognized qualifications, who shall prepare an anthropological study of identification, within a period specified in the act of appointment issued by the president of the federal organ for assistance to indigenous people.

Par. 1 The federal organ for the assistance to indigenous people will designate a specialized technical group, preferably consisting of officials of the same functional background, coordinated by the anthropologist, to make complementary ethno-historical, sociologic, legal, cartographic, environmental and territorial studies needed for its delimitation.

<sup>20</sup> Annex 1. Relevant legislation. CF 1988.

<sup>21</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", par. 9.

<sup>22</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", par. 9.

<sup>23</sup> Annex 1. Relevant legislation. Law 6.001 of December 19, 1973, Article 19.

<sup>24</sup> Annex 1. Relevant legislation. Decree n. 1,775 of January 8, 1996, Article 1.

<sup>25</sup> Annex 1. Relevant legislation. Decree n. 1.775 Article 2, par. 3

Par. 6 Once the work of identification and delimitation is concluded, the technical group will present a substantiated report to the federal organ for the assistance to indigenous people, indicating the indigenous territory to be demarcated.

Par. 10 Once the report is approved by the president of the federal organ for the assistance to indigenous people, he will publish, within fifteen days of its receipt, a summary of the report in the Official Gazette of the Union and in the Official Gazette of the respective state where the area under demarcation is located, along with a descriptive document and a map of the area, and it will also be publicized at the headquarters of the respective Municipality.<sup>26</sup>

40. Once the study of identification and delimitation has been approved by FUNAI, third parties interested in the identified and delimited territory may challenge the FUNAI studies and litigate their property rights with regard to the area, or request compensation for improvements (*benfeitorias*) in accordance with paragraphs 8 and 9 of Article 2 of Decree No. 1.775, a situation in which the file will have to be submitted to the Minister of Justice:

Par. 8 Since the start of the demarcation process until ninety days after the publication referred to above, states and municipalities where the area under demarcation is located and other interested parties may intervene, by submitting to the federal organ for the assistance to indigenous peoples communications with all relevant evidence such as title deeds, surveys, reports, witness statements, photographs and maps, to litigate compensation or to demonstrate total or partial flaws, in the report referred to above.

Par.9 Within sixty days, the federal organ for the assistance to indigenous peoples must send the relevant file to the Minister of Justice, together with opinions concerning the reasons and evidence presented<sup>27</sup>.

41. After receiving the file, the Minister of Justice shall adopt a decision within a period of thirty days, according to paragraph 10 of article 2 of Decree No. 1.775. According to items I, II and III, respectively, of that provision, the Minister of Justice may: (i) declare by ministerial decision, the boundaries of the indigenous territory and order its demarcation; (ii) identify any additional necessary measures, to be taken within ninety days; or (iii) reject the identification and delimitation study and return the file to FUNAI, through a substantiated decision<sup>28</sup>.

42. If the decision of the Minister of Justice confirms the identification and delimitation and orders the demarcation of the indigenous territory, Article 4 of Decree No. 1.775 determines the recovery of the area, in the following terms, "if the presence of non-indigenous occupants in the area under demarcation is verified, the federal organ will proceed with their removal as a matter of priority, in accordance with the study prepared by the technical group, and respecting the applicable law."<sup>29</sup>

43. Likewise, under Article 5 of Decree No. 1.775, "once the administrative process established in this Decree has taken place, the demarcation of indigenous lands will be homologated by decree"<sup>30</sup> of the President of the Republic.

44. Finally, Article 6 of Decree No. 1.775 provides that "within thirty days after the publication of the decree of approval, the federal organ for the assistance to indigenous peoples will promote the respective registration [of the indigenous territory] in the property registry of the corresponding municipality and with the Union's Secretariat for Federal Heritage".<sup>31</sup>

<sup>26</sup> Annex 1. Relevant legislation. Decree n. 1.775

<sup>27</sup> Annex 1. Relevant legislation. Decree n. 1.775

<sup>28</sup> Annex 1. Relevant legislation. Decree n. 1.775, Article 2, Paragraph 10, sub clauses I,II,III.

<sup>29</sup> Annex 1. Relevant legislation. Decree n. 1.775, Article 4.

<sup>30</sup> Annex 1. Relevant legislation. Decree n. 1.775, Article 5.

<sup>31</sup> Annex 1. Relevant legislation. Decree n. 1.775, Article 6.

### C. The administrative process of recognition, demarcation and titling of the Xucuru indigenous territory

45. In general, both parties described the administrative process of demarcation of the Xucuru indigenous territory in similar terms. Therefore, it is not disputed that such process began in 1989 with the decision to create a Technical Group for the identification and demarcation of the territory, and that the registration of the "Xucuru Indigenous Land" took place in 2005, more the 16 years later. Nor is it disputed that the removal of non-indigenous occupants from the Xucuru indigenous territory has not been fully completed. For its part, the State has recognized that approximately 50 non-indigenous settlers remain in the Xucuru territory, which have not been removed as a result of gaps in their documentation or due to legal actions awaiting a final decision. Brazil has emphasized, however, that non-indigenous occupants have been removed from more than 90% of the Xucuru indigenous territory to date<sup>32</sup>. The petitioners, similarly, have highlighted that the removal of non-indigenous occupants from the Xucuru indigenous territory has not been completed to date<sup>33</sup>. The Commission has no exact information on how many non-indigenous people remain to date in the ancestral territory of the Xucuru. However, as noted, both sides agree that the removal process has not been completed.

46. In this regard, the Commission notes that the parties have not submitted copies of the administrative process of demarcation, or of the legal proceedings relating to the recognition, demarcation and titling of the Xucuru indigenous territory. Nevertheless, considering that there is no crucial controversy over those facts<sup>34</sup>, the Commission proceeds to describe the afore-mentioned administrative process with as much details as possible, based on the information available on the file

47. The administrative demarcation process was formally launched in March 1989, through *Portaria* no. 218/FUNAI/89 of the FUNAI, which led to the creation of the Technical Group for the identification and delimitation of indigenous territory, as set out in the Decree No. 94 945 of September 23, 1987<sup>35</sup>. According to the legislation then in force, FUNAI should propose the demarcation of the area, based on the study of the Technical Group (paragraph 4 of Article 2 of Decree No. 94.945)<sup>36</sup>. The Technical Group issued an Identification Report on September 6, 1989, in which it is stated that the Xucuru were entitled to an area of 26,980 hectares<sup>37</sup>.

48. In 1992, already under the effect of Decree No. 22 of 4 February 1991, the Identification and Delimitation Report of the Technical Group was approved by the President of FUNAI, published in the Official Gazette of the Union and submitted to the Minister of Justice to decide on the approval process, as set out in paragraphs 7 and 8 of article 2 of Decree No. 22<sup>38</sup>. Then, on May 28 or 29, 1992, the Minister of Justice also approved the process, declared the boundaries of the indigenous land and determined its demarcation through *Portaria* n ° 259/MJ/92, in accordance with the provisions of Paragraph 9 of Article 2 of Decree No. 22<sup>39</sup>.

<sup>32</sup> See Communication from the State of June 3, 2011, par. 11 and Communication of the State of September 6, 2010, par. 17. The IACHR takes note that the State has not submitted up to date information on the merits of the case since March 2011.

<sup>33</sup> See Communication from the petitioners of March 21, 2011; and communication from the Petitioners of November 24, 2010. The IACHR takes note that the petitioners have not submitted up to date information on the merits of the case since March 2011.

<sup>34</sup> See the description made in : Brief of additional observations on the merits presented by the petitioners on March 31, 2010; and brief with additional observations on the merits presented by the State on September 20, 2010.

<sup>35</sup> Annex 1. Relevant legislation. Regarding this early stage, Decree n. 94 945 stated that "the demarcation of lands occupied or inhabited by indigenous, to which Article 17, paragraph I, of Law No. 6,001, of December 19, 1973, will be preceded by the recognition and delineation of the areas ". Also stated, "the technical group will proceed to the analysis and studies on the identification and delimitation of the respective lands under the coordination of the National Indigenous Foundation - FUNAI".

<sup>36</sup> Annex 1. Relevant legislation. Decree n. 94 945 Article 2, paragraph 4

<sup>37</sup> Annex 1. Relevant legislation. According to Article 3 of Decree n. 94 945, "FUNAI's proposal should be examined by an Inter-ministerial Group, which will draw a conclusive opinion, and will be subjected to consideration of the Ministers of Interior, Agrarian Reform and Development and, in the case of land border, also the Secretary -General of the National Security Council. "

<sup>38</sup> Annex 1. Relevant legislation. Decree n. 22, Article 2, paragraphs 7 and 8.

<sup>39</sup> Annex 1. Relevant legislation. Decree n. 22 Article 2, paragraph 9. To this end, "the work of identification and demarcation of indigenous lands previously made could be used by FUNAI, whenever compatible with the principles of the new decree and with the consent of the indigenous people in question (Article 3 Decree n. 22).



49. At that time, the vast majority of the Xucuru indigenous lands were occupied by non-indigenous, as verified by the IACHR<sup>40</sup>. Article 4 of Decree No. 22 (then in force) established that, "during the demarcation process, the federal organ shall remove from the lands non-indigenous occupants, and for that purpose may sign an agreement with the federal organ for the assistance to indigenous peoples"<sup>41</sup>. Notwithstanding the foregoing, there is no information on file to indicate that between 1992 and 1995 the State proceeded to start consolidating the Xucuru indigenous territory, and remove any non-indigenous occupying the territory during that period. Indeed, according to information provided by the parties, there was no progress in the administrative process of demarcation between 1992 and 1995.

50. In 1995, the extension of the Xucuru territory was rectified to an area corresponding to 27.055.0583 hectares, and the physical demarcation of territory took place. Subsequently, on January 8, 1996, the President of the Republic issued Decree No. 1775, which introduced significant changes in the administrative process of demarcation of indigenous lands. As described above, Decree No. 1,775 recognized for the first time to third parties interested in the territory identified and delimited, the right to challenge the demarcation process and litigate their property rights in the area, or to request compensation<sup>42</sup>. Decree No. 1775 recognized such power to the states and municipalities where the area subject to demarcation is located on and to other stakeholders, "since the start of the demarcation process" (Article 2, paragraph 8)<sup>43</sup>. Also, for cases where the demarcation process was pending, as the Xucuru indigenous territory, Article 9 of Decree No. 1775 stipulated that "if the decree of approval had not yet been the subject of property registration or at the Union's Secretariat for Federal Heritage, interested parties may intervene in the same terms of Article 2, paragraph 8, within ninety days from the date of publication of this decree."<sup>44</sup> So, as of January 8, 1996, the administrative process of demarcation of the Xucuru indigenous territory came to be regulated by Decree No. 1,775, whose main contents were described *supra*.

51. According to information provided by the parties, after the promulgation of Decree No. 1,775, people interested in the Xucuru territory - including legal entities like the Pesqueira Mayoralty- filed 272 or 269 challenges (contestacões) against the demarcation process in question. Under the coinciding description of both parties, on July 10, 1996 the Minister of Justice declared all those challenges inadmissible through its *Despacho* No. 32. Subsequently, third parties interested in the Xucuru territory filed a motion for an injunction (*mandado de segurança* No. 4802-DF) to the High Court of Justice ("STJ")<sup>45</sup>. Both sides agreed that on May 28, 1997 the STJ decided the motion in favor of the third parties, giving them a new deadline for administrative challenges. As described by both parties, the new challenges were all rejected by the Minister of Justice, which reaffirmed the need to proceed with the demarcation in terms of the *Portaria* from the Minister of Justice of the year 1992.

52. The Commission recalls that if the decision of the Minister of Justice confirms the demarcation as performed, Article 4 of Decree No. 1775 establishes that "if the presence of non-indigenous settlers in the area under demarcation is verified, the federal organ for the land will proceed to remove them as a matter of priority, in accordance with the study prepared by the technical group, and observing the applicable law."<sup>46</sup> That is, both Decree No. 1,775 and Decree No. 22, mandate the removal of non-indigenous from the indigenous territory under demarcation. Nevertheless, there is no information on the file to indicate that between 1997 and 2001 the State started the consolidation of the Xucuru indigenous territory and the removal of the non-indigenous occupants thereof.

53. Indeed, the State has informed the IACHR that between 2001 and 2005, it paid compensation to 296 non-indigenous occupants and proceeded to remove them from the Xucuru indigenous territory.

<sup>40</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", par. 45. (the IACHR indicated that almost 90% of the Xucuru indigenous land was occupied by non-indigenous people).

<sup>41</sup> Annex 1. Relevant legislation. Decree n. 22, Article 4.

<sup>42</sup> The Commission notes that the above Decree n. 94.945 OF 1987 and n. 22 of 1991 did not contain similar provisions.

<sup>43</sup> Annex 1. Relevant legislation. Decree n. 1.775, Article 2, paragraph 8.

<sup>44</sup> Annex 1. Relevant legislation. Decree n. 1.775, Article 9.

<sup>45</sup> The Commission does not have copies of Mandado de Segurança No. 4802-DF file.

<sup>46</sup> Annex 1. Relevant legislation. Decree n. 1.775, article 4.



According to the evidence on the file, by November 27, 2003, the State had identified 396 occupants (corresponding to 486 occupied areas or *ocupações*). Of these, up to that time, it had compensated 149 occupants (corresponding to 220 occupied areas), therefore remaining to be compensated 247 occupants (corresponding to 266 occupied areas). In this regard, the IACHR notes that the document submitted by the State on the payment of compensation for improvements specifically states that "the survey of occupations has not yet been concluded."<sup>47</sup> Such a survey, as reported by the State, was completed in 2007 and indicated the existence of 624 areas occupied within the Xucuru indigenous territory.

54. On April 3, 2001 in accordance with Article 5 of Decree No. 1775, the President issued a Presidential Decree (published in the Official Gazette on May 2, 2001), approving the demarcation of the Xucuru indigenous territory, corresponding to an area 27055.0583 hectares<sup>48</sup>. Under Article 6 of Decree No. 1775, within thirty days after the publication of the decree of approval on May 2, 2001, the FUNAI should promote the respective registration of the Xucuru land in the Property Registry Office of the municipality of Pesqueira and in the Union's Secretariat for Federal Heritage.

55. However, both parties coincided that the registration of the Xucuru indigenous territory did not occur within thirty days after May 2, 2001, and took place in 2005. After the FUNAI required the registration in the municipality of Pesqueira on May 17, 2001, the officer of the Property Registry Office of Pesqueira, Juarez Lopes de Melo, filed objection motion No. 0012334-51.2002.4.05.8300 (original number 2002.83.00.012334-9) on August 2002, questioning the competence of the FUNAI to require the registration of the indigenous territory. According to the evidence in the case, the motion was dismissed on June 22, 2005.<sup>49</sup> The IACHR notes that the filing of that motion by such public official and its decision issued until June 22, 2005, caused a delay of more than four years for the registration of the Xucuru indigenous territory to take place, and for the titling as property of the Union to be completed.

56. The titling of the Xucuru indigenous territory was completed on November 18, 2005 through its registration in the 1st Property Registry of Pesqueira (Pernambuco), as property of the Federal Union for the permanent "possession" of the Xucuru indigenous people.<sup>50</sup> Therefore, it is not disputed that the administrative demarcation process in question began in 1989 and the titling of the "Xucuru Indigenous Land" was completed in 2005, more than sixteen years later. It is not disputed either that the full removal of non-indigenous occupants from the territory has not yet been completed.

#### **D. Pending legal actions in relation to the demarcation of the Xucuru indigenous people**

57. In addition to the possibility introduced since January 8, 1996 (with the promulgation of Decree No. 1775) to challenge the demarcation process at the administrative level, since 1992 non-indigenous settlers also filed legal actions of territorial nature, alleging their property rights over areas included in the Xucuru indigenous territory. Those legal actions are still pending a final decision. On March 1992, Milton do Rego Barros Didier and another individual filed a "motion to regain possession" (*ação* of reintegração de posse); and on February 2002, Paulo Pessoa Cavalcanti de Petribu and others filed an "ordinary action for the annulment of the administrative demarcation process" (*ação ordinária*). The parties coincide that the two legal challenges are still pending a final decision.<sup>51</sup>

58. The motion to regain possession No. 0002697-28.1992.4.05.8300 (original number 92.0002697-4), was filed by Milton do Rego Barros Didier and his spouse on March 1992 with regard to the possession of the Hacienda "Caípe" of about 300 hectares, in the municipality of Pesqueira. After the conflict

<sup>47</sup> Annex 2. Summary Chart: Control of severance payments to non-indigenous occupants of November 27, 2003 (Annex to the Communication from the State of February 20, 2004).

<sup>48</sup> Available at [http://www.planalto.gov.br/ccivil\\_03/DNN/2001/Dnn9198.htm](http://www.planalto.gov.br/ccivil_03/DNN/2001/Dnn9198.htm) (last visited on May 20, 2015).

<sup>49</sup> Annex 3. Processing and decision of the objection motion (Annex 1 of the Communication of the State of September 6, 2010).

<sup>50</sup> Annex 4. Certification of the 1st Property Registry Office of Pesqueira-PE, of November 11, 2005 (Annex 2 of the Communication of the State of September 6, 2010).

<sup>51</sup> The Commission does not have complete copies of the records referred 2 lawsuits, but only information on the procedural step of the same, and some sentences or sentence fragments. This documentation is cited in the subsequent notes (See Annexes 3-8 of the Communication from the State of September 6, 2010).

of jurisdiction (CC 10.588) was decided by the STJ on December 14, 1994, the referred motion was decided in the first instance in favor of the non-indigenous occupants, on July 24, 1998<sup>52</sup>. This decision was appealed and the Civil Appeal AC178199-PE (n° 0035132-79.1999.4.05.000 - original number 99.05.35132-9) was rejected by the 5th Region Federal Regional Court on April 24, 2003<sup>53</sup>. A special appeal (n° 646 933-PE or 2003/0230169) was filed before the STJ on December 2003, which was rejected on November 6, 2007 (decision published on November 26, 2007) was filed. A motion of *embargos de declaração* was filed on December 6, 2007 (No. 243862/2007), which was rejected on December 11, 2009 (decision published on December 16, 2009). Finally, two *embargos de declaração* were filed: one by FUNAI on February 1, 2010 (No. 11598/2010), and one in the Federal Union on February 8, 2010 (No. 20028/2010) both of which, according to available information, are still pending<sup>54</sup>.

59. With respect to the ordinary action No. 0002246-51.2002.4.05.8300 (original number 2002.83.00.002246-6), it was promoted by Paulo Pessoa Cavalcanti de Petribu, Helena Correa de Araujo Cavalcanti de Petribu, Paulo Pessoa Cavalcanti de Petribu Filho, Maria Helena Reis Cavalcanti de Petribu, Miguel Cavalcanti de Petribu, Cristina Marta de Andrade Mello Cavalcanti de Petribu, Jorge Cavalcanti de Petribu and Patricia Monteiro Brennand Cavalcanti de Petribu, on February 2002, seeking the annulment of the administrative demarcation process on the following properties: Hacienda "Lagoa da Pedra", "Ramalho", "Lago Grande" and farms "Capim Grosso" and "Pedra da Cobra". The authors alleged that the demarcation should be annulled because they had not been personally notified to intervene in the administrative process. The same authors also filed in parallel and as a complement to the ordinary action, a Precautionary Measure request No. 0019349-71.2002.4.05.8300 (original number 2002.83.00.019349-2) on December 2002 regarding anticipated evidence on the invasion and destruction of the Hacienda "Lagoa da Pedra", which was decided in their favor on December 9, 2009<sup>55</sup>. Regarding the main action (ordinary action n° 0002246-51.2002.4.05.8300), the IACHR notes that on June 1, 2010, the 12th Federal Court of Pernambuco decided in first instance that the action was partially admissible in regard to the compensation due, and determined that the authors were entitled to compensation from FUNAI in the amount of R\$ 1,385,375.86. The appeal in this ordinary action is still pending decision<sup>56</sup>.

#### **E. Tension, insecurity and violence in the frame of the demarcation of the Xucuru indigenous territory**

60. The IACHR has previously held that "the demarcation of the [Xucuru] lands was being conducted by FUNAI in a context of general insecurity"<sup>57</sup>. By way of context, the IACHR notes that it is a fact that during the process of demarcation of the indigenous territory a number of important indigenous leaders were murdered, such as José Everaldo Rodrigues Bispo<sup>58</sup>, son of the spiritual leader of the community, on September 4, 1992; Geraldo Rolim<sup>59</sup>, representative of FUNAI and active defender of indigenous people, on May 14, 1995; and finally, the chief of the indigenous people, Cacique Xicão<sup>60</sup> on May 21, 1998. While the

<sup>52</sup> Annex 5. Procedural step of the action of reintegration of possession and fragment of the judgment of first instance (Annex 3 of the Communication from the State of September 6, 2010). Said fragment that "it is appropriate reintegration of possession promoted by Milton do Rego Barros Didier and another against [indigenous people] Xucuru, Federal Union, FUNAI and the Federal Public Prosecutor"; Annex 6. Procedural step and decision on the conflict of competence (Annex 4 of the Communication from the State of September 6, 2010).

<sup>53</sup> Annex 7. Civil procedural step of Appeal AC178199-PE (Annex 5 of the Communication from the State of September 6, 2010).

<sup>54</sup> Annex 8. Procedural step of 646.933-PE and Judgment of the STJ on November 6, 2007 (Annex 6 of the Communication from the State of September 6, 2010) Special Appeal.

<sup>55</sup> Annex 9. Procedural step and decision of December 9, 2009 on the precautionary measures (Annex 8 of the Communication from the State of September 6, 2010).

<sup>56</sup> Annex 10. Procedural step and the ordinary first instance judgment of June 1, 2010 (Annex 7 of the Communication from the State of September 6, 2010) action.

<sup>57</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. OEA/Ser.L/V/II.97 Doc. 29 rev. 1, 29 September 1997, Chapter VI "Human Rights of the Indigenous Peoples in Brazil", parr. 45.

<sup>58</sup> Referred by Amnesty International in its report Indigenous Leaders Marked for Death. Available at: <https://www.amnesty.org/.../amr190151998en.pdf>

<sup>59</sup> Referred by Amnesty International in its report Indigenous Leaders Marked for Death. Available at: <https://www.amnesty.org/.../amr190151998en.pdf>

<sup>60</sup> Referred by Amnesty International in its report Indigenous Leaders Marked for Death. Available at: <https://www.amnesty.org/.../amr190151998en.pdf>

IACHR does not possess detailed information on these deaths, at least in the case of the murder of Chief Xicão the Office of the Attorney General established that the mastermind of the crime was the farmer and non-indigenous occupant of the Xucuru indigenous territory, José Cordeiro de Santana ("Zé de Riva"), and the perpetrator was the gunman known as "Ricardo", who had been hired by the mastermind through the intermediary Rivaldo Cavalcanti Siqueira ("Riva de Alceu")<sup>61</sup>.

61. The IACHR also considers a proven fact that Cacique Xicão's successor, his son Cacique Marquinhos, began to receive threats together with his mother, Zenilda Maria de Araujo, because of his leadership in the struggle of the Xucuru indigenous people for the recognition of their ancestral lands. Of these threats, the Commission was made aware of two threats received in the second half of 1999, as well as of anonymous letters received in March 2000, which stated that the widow of Cacique Xicão and his son would be included in a "list" to be silenced. In 2001 the threats had focused on Cacique Marquinhos<sup>62</sup>. This situation led the IACHR to grant precautionary measures in favor of both on October 29, 2002. The Commission also considers as a proven fact that despite the precautionary measures issued by the IACHR, Cacique Marquinhos suffered an attempt on his life on February 7, 2003, and was eventually included in the Protection Program for Human Rights Defenders of Pernambuco, in 2008<sup>63</sup>. Such precautionary measures remain in force to date, as a result of that situation of tension, insecurity and violence.

62. Finally, the Commission also notes that the continued presence of non-indigenous settlers in the Xucuru indigenous territory during the administrative process of demarcation and the existence of interests other than those of the indigenous people fighting for decades for its ancestral territory, ended up causing dissent and internal conflicts within the Xucuru indigenous people themselves. Thus, it is also a notorious fact the dissent reflected in the existence of a group of Xucurus referred to as "Grupo de Biá" or "Xucurus de Cimbres", that for example, support the development of tourism projects in areas included within the indigenous territory demarcated and titled (specifically the expansion project of the *Santuário Nossa Senhora das Graças*, in the town of Cimbres, in the area called "Guarda" within the Xucuru indigenous territory). The information available to the IACHR indicates that the attack against Cacique Marquinhos occurred on February 7, 2003 would have been undertaken by members of the dissident group<sup>64</sup>.

## V. LEGAL ANALYSIS

### A. Preliminary matters

63. Prior to the merits analysis, the IACHR would like to make some clarifications on the allegations made by the parties and on the scope of the present case. In its Admissibility Report No. 98/09, the Inter-American Commission defined the object of the case referring to the alleged violation of "the right to property of the Xucuru indigenous people resulting from the delay in the process of demarcation of their ancestral territory and the ineffectiveness of the judicial protection to guarantee its right to property"<sup>65</sup>.

64. Nevertheless, as observed from the position of the petitioners, during the merits phase, the petitioners submitted new allegations, including on what they called the "new strategy" of non-indigenous to obstruct the demarcation of the Xucuru territory through the "criminalization of indigenous leaders," that would be taking place through "countless criminal actions" promoted by the Federal Public Ministry against

<sup>61</sup> See Annex 11. Memorandum No. 02 / PGF / PFE / FUNAI / 09, the General Advocacy of the Union for FUNAI, dated January 21, 2009 (Annex to the Communication from the State of July 21, 2009).

<sup>62</sup> Initial petition and request for precautionary measures on October 16, 2002.

<sup>63</sup> See Annex 12. Communication from the State of July 20, 2013 (on file with the Precautionary Measures); Annex 13. Defenders of Human Rights - The Confrontation of Inequalities in Pernambuco, publication of the Agenda for Protection of Human Rights Defenders in Pernambuco (Annex 3 of the Communication from the State of July 20, 2013 (on file with the Precautionary Measures) ; and public hearing before the Commission on February 27, 2003.

<sup>64</sup> Annex 14. Report - CGDDI: Case Xucuru - Recife / PE "; and Annex IX - "Administrative Procedure No. 1.26.000.000875/2001-39 the Federal Public Ministry (Annex to communication from the State of February 20, 2004, par. 7); Annex 17. Proposal for the Economic Development Agency of Pernambuco SA "(AD / Diper), June 1998 (Annex 3 to the communication of the petitioners of October 7, 2008, par. 38); and Annex 15. Xucuru village open letter to the people of Pesqueira and all the pilgrims of Nossa Senhora das Graças of September 22, 2001 (Annex 4 of the Communication of the petitioners of October 10, 2002).

<sup>65</sup> IACHR. Report No. 98/09, P4355-02, Admissibility, Xucuru Indigenous People, Brazil, October 29, 2009, par. 41 and 42.

Xucuru indigenous people. In this regard, the IACHR notes, firstly, that the petitioners have not submitted detailed or specific information about these actions, and therefore its connection with the subject-matter of this case is not clear nor the way in which they have exhausted domestic remedies in regard to those allegations. While the Inter-American Commission has some flexibility to extend the subject-matter of a petition under its knowledge when it comes to supervening events directly related to the case under consideration, provided that the right to defense of the State is guaranteed. In this case and under the described circumstances, the Commission considers that it does not have sufficient elements to proceed in that manner.

65. On the other hand, during the processing of the case and particularly due to the precautionary measures MC-372-02, the parties submitted information on the context of tension, insecurity and violence that has characterized the process of demarcation of the Xucuru indigenous territory. In this regard, the IACHR notes that in the present case, even though related, the precautionary measures and the pending case are different. The IACHR notes that during the proceedings on the admissibility of the petition, the petitioners made reference to the facts of insecurity and violence expressly stating that they did so by way of context. At the merits stage, however, they presented substantive arguments on these facts, like the deaths and investigations that took place in the framework of the demarcation process. While the Commission has included a specific section on these established facts in this report, it considers that they offer greater elements on the circumstances in which the alleged harm to the ancestral property took place. Taking into account the above elements and the lack of sufficient information about the alleged facts, the allegations made and the processes opened in response, will continue to be treated by the Commission them as context enabling it to perform independent determinations of admissibility and merits of these events, as it has done in other cases<sup>66</sup>.

**B. Article 21 of the American Convention, in relation to Articles 1.1 and 2 of the same treaty, and Article XXIII of the American Declaration; and Article 5 of the American Convention in relation to Article 1.1. of the same instrument**

**1. The territorial rights of indigenous peoples in the Inter-American System of Human Rights**

66. The jurisprudence of the inter-American human rights system has repeatedly recognized the right to property of indigenous peoples over their ancestral lands, and the duty of protection set forth in Article 21 of the American Convention. In this regard, the IACHR has stated that indigenous and tribal peoples have a right to communal property on lands they have traditionally used and occupied, and that the character of this right is dependent on the modalities of use and land customary use<sup>67</sup>. It is also necessary to note that as has consistently been established by the organs of the Inter-American system, the indigenous territorial property is a form of property that is not based on official recognition of the State, but in the use and possession of traditional lands and resources; the territories of indigenous and tribal people "belong to them by use or ancestral occupation"<sup>68</sup>. The right of indigenous communal property is also based on indigenous legal cultures and their ancestral property systems, regardless of the state recognition; the origin of the property rights of indigenous and tribal peoples is therefore in the customary system of land tenure, which has traditionally existed between the communities<sup>69</sup>. As a result, the Court has stated that "traditional possession of indigenous over their land is equivalent to the title of full domain granted by the State"<sup>70</sup>.

<sup>66</sup> Report No. 76/12, Case 12,548, Merit. Garifuna community Triunfo de la Cruz and its members. Honduras. Available at: <http://www.oas.org/es/cidh/decisiones/corte/12.548FondoEsp.pdf>.

<sup>67</sup> IACHR. Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 151. See inter alia Commission, Report No. 75/02, Case 11.140, Mary and Carrie Dann (USA), December 27, 2002, par. 130; and IACHR. FOLLOW-UP REPORT - ACCESS TO JUSTICE AND SOCIAL INCLUSION: THE ROAD TOWARDS STRENGTHENING DEMOCRACY IN BOLIVIA, OAS/Ser/L/V/II.135, Doc 40, August 7, 2009, par. 160.

<sup>68</sup> IACHR, ACCESS TO JUSTICE AND SOCIAL INCLUSION: THE ROAD TOWARDS STRENGTHENING DEMOCRACY IN BOLIVIA. OEA/Ser.L/V/II. Doc. 34, 28 June 2007, par. 231.

<sup>69</sup> See, inter alia, Court HR, Case of the Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 96; IACHR, Arguments before the Inter-American Court of Human Rights in the case of Awas Tingni v. Nicaragua. Cited in: IACHR, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs.

67. In the same sense, the Inter-American Court has noted that "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community"<sup>71</sup>. In addition to this collective conception of property, indigenous peoples have a special, unique and internationally protected relationship with their ancestral lands, which is absent in the case of non-indigenous. This special and unique relationship between indigenous people and their traditional territories has international legal protection. As stated by the IACHR and the Inter-American Court, the preservation of the particular connection between the indigenous communities and their lands and resources is linked to the very existence of these peoples, and therefore "deserves special protection measures"<sup>72</sup>. The property rights of indigenous and tribal peoples protect this close link they have with their territories and natural resources associated with their culture found there<sup>73</sup>.

68. Furthermore, the Inter-American Court has stated the following regarding the property rights of indigenous people:

Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention.<sup>186</sup> The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity.<sup>74</sup>

69. In sum, under the Inter-American instruments on human rights, the indigenous and tribal people have the right to recognition and protection of "their specific versions of the right to use and enjoyment of property, arising from the culture, customs and beliefs of each people".<sup>75</sup> There is not one way

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Judgment of August 31, 2001. Series C No. 79, para. 140 (a); and IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115.

<sup>70</sup> Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 151; Sawhoyamaxa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 128; and Case of the Indigenous Community Xákmok Kásek. Vs. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, par. 109.

<sup>71</sup> Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Judgment of August 31, 2001. Series C No. 79 par. 149. Case of the Indigenous Community Yakye Axa v Paraguay. Reparations and Costs Fund. Judgment June 17, 2005. Series C No. 125, par. 131; Sawhoyamaxa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146. para. 118; Indigenous Community Case Xákmok Kásek. Vs. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214, paras. 85-87; Case of the Saramaka People. Vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 85; If Kichwa Indigenous People of Sarayaku Vs Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, par. 145.

<sup>72</sup> IACHR. Report Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources. 2009. Para. 55. Available at: <http://www.oas.org/es/cidh/indigenas/docs/pdf/Tierras-Ancestrales.ESP.pdf>; IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (USA), December 27, 2002, par. 128; Court HR Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Judgment of August 31, 2001. Series C No. 79 para. 149. See also Inter-American Court of Human Rights, Case Sawhoyamaxa Indigenous Community v Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 222.

<sup>73</sup> IACHR. FOLLOW-UP REPORT - ACCESS TO JUSTICE AND SOCIAL INCLUSION: THE ROAD TOWARDS STRENGTHENING DEMOCRACY IN BOLIVIA, OAS / Ser / L / V / II.135, Doc 40, August 7, 2009, par.. 156. Court HR. Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, par. 148. Court HR. Caso Yakye Axa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, par. 137. Court HR. Sawhoyamaxa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 118, 121.

<sup>74</sup> Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Judgment of August 31, 2001. Series C No. 79 par. 149. Case of the Indigenous Community Yakye Axa v Paraguay. Reparations and Costs Fund. Judgment June 17, 2005. Series C No. 125, par. 137; Sawhoyamaxa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146. par. 118.

<sup>75</sup> IA Court, Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgement of March 29, 2006. Series C No. 146. Par. 120.



to use and enjoy the protected property; both the property and modes of possession of territories by indigenous and tribal people may differ from the non-indigenous conception of domain, but are protected by the right to property<sup>76</sup>. The unique relationship between indigenous people and their traditional territory "may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; hunting, fishing or seasonal or nomadic gathering; use of natural resources associated with their customs; and any other characteristic of their culture"<sup>77</sup>. Article 21 of the Convention protects any of these modes<sup>78</sup>.

## **2. The right to property of the Xucuru indigenous people and its members**

### **2.1 In regard to the delay in the recognition**

70. As established by the IACHR and the Inter-American Court, under Article 21 of the American Convention, indigenous people have property and control rights over lands and resources they have historically occupied and, therefore, have the right to be legally recognized as owners of their territories, and to obtain a duly registered legal title to their land.<sup>79</sup>

71. The IACHR also notes that Brazil ratified ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries ("Convention 169"), on 25 July 2002. With the ratification of Convention No. 169, the State bound itself to adopt special measures to guarantee indigenous people the effective and unrestricted enjoyment of human rights and fundamental freedoms, respecting their social and cultural identity, their customs, traditions and institutions. Under Articles 21 and 29 of the American

<sup>76</sup> IA Court, Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgement of March 29, 2006. Series C No. 146. Par. 120.

<sup>77</sup> IA Court, Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgement of March 29, 2006. Series C No. 146. Par. 131.

<sup>78</sup> Indeed, as the Commission has stated, the general international legal principles applicable in the context of human rights of indigenous include "the right of indigenous people to legal recognition of their varied and specific forms and modalities of control, ownership, use and enjoyment of territories and property" [ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann v. United States, December 27, 2002, par. 130]; indigenous and tribal people have a right to communal property on lands they have traditionally used and occupied, and "the nature of that right is based on the modalities of land use and customary land tenure" [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, par. 151] for each village. For the Court, "ignoring the specific versions of use and enjoyment of property, springing from the culture, customs and beliefs of each people, tantamount to holding that there is only one way to use and dispose of property, which in turn, would render illusory the protection of Article 21 of the Convention for millions of people" [IACHR. Sawhoyamaya Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 120]. This interpretative approach is supported in terms of other international instruments, indicating international attitudes toward the role of traditional systems of land tenure in modern systems of protection of human rights; for example, Convention No. 169 expressly establishes the state's duty to "safeguard the right of people [indigenous] to use lands that are not exclusively occupied by them, but to which they have traditionally had access for their traditional activities and subsistence ", paying particular attention to cases of nomadic peoples and shifting cultivators [Convention 169, art. 14.1]. The right to legal recognition of forms and modalities own control, ownership, use and enjoyment of territories, property and natural resources by indigenous and tribal peoples are also protected by Art. 27 of the International Covenant and Political protects the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture minorities, in accordance with other group members [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann v. United States, December 27, 2002, par. 130, footnote No. 97], as these forms and characteristics of the territories regarding modalities are manifestations of the culture of indigenous peoples. The Human Rights Committee has explained that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples" [Human Rights Committee, General Comment No. 23: The rights of minorities (Article 27 of the ICCPR), 08/04/94, UN Doc CCPR / C / 21 / Rev.. 1 / Add.5, paragraph 7; cited in IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann v. United States, December 27, 2002, para. 130, footnote No. 97]. Therefore, the protection of cultural rights of indigenous people may include protection of modes of relationship with the territory through such traditional activities as fishing or hunting [Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27 of the ICCPR), 08/04/94, UN Doc. CCPR / C / 21 / Rev. 1 / Add.5, paragraph 7; cited in IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann v. United States, December 27, 2002, par. 130, footnote No. 97], to the extent that hunting, fishing and gathering is an essential element of indigenous culture [Court HR. Caso Yakye Axa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, par. 140]. This complex notion of the right to indigenous property is also reflected in the UN Declaration, under which "indigenous people have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional property or other traditional occupation or use, as well as those who have otherwise acquired "[UN Declaration, supra nota 1, art. 26.2].

<sup>79</sup> See, inter alia, IACHR. Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, par. 137; IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115



Convention, the IACHR also takes into account Convention No. 169 in its analysis of this case. With regard to the right to property, Convention 169 Article 14.1 states:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

72. From the proven facts in the present case, the Commission notes that although it has recognized that the 1988 Constitution implied, in general terms, an step forward with respect to the integrationist perspective of the Indian Statute of 1973, it also notes that regarding the right to property of indigenous lands the Federal Constitution establishes that "they are properties of the Union"(Article 20, paragraph XI). Additionally, as described in the section on proven facts, the IACHR notes that Article 231 of the CF of 1988 and its paragraphs confer the right to property to the State and grant indigenous peoples the "permanent possession" of the lands traditionally occupied by them and the exclusive use of its existing resources. That is, the Brazilian legislation, particularly the Federal Constitution provides that the right to property of indigenous lands is vested in the State, i.e. the "Union". Indeed, in this case, the title issued and registered on November 18, 2005 regarding the "Xucuru Indigenous Land " indicates that the corresponding 27055.05883 acre property has as its "Owner: Federal Union"<sup>80</sup>. However, the IACHR notes that the petitioners did not present allegations with regard to the scope and nature of the title itself, but their arguments were focused in the delay in the recognition and the lack of effective restitution. Therefore, the Commission will decide these two aspects which have been the subject of the debate between de parties.

73. The Commission notes the 16-year time elapsed from the start of the administrative process to the effective recognition. While this topic will be discussed in detail in the section on the right to a fair trial and judicial protection, the fact that the Xucuru indigenous people received recognition only in 2005 after starting the process in 1989 is, on its turn, a violation of the right to collective property.

## **2.2 In regard to the lack of full removal of non-indigenous occupants from the territory**

74. In addition to the delay in the recognition of the Xucuru indigenous people ancestral lands, in the present case is also discussed the State's obligation guarantee the peaceful possession of the Xucuru indigenous territory through the removal of non-indigenous occupants from the territory (desintrusão) and the effective protection of the territory against third parties.

75. The IACHR has stated that ensuring the effective enjoyment of the territorial property by indigenous people is one of the ultimate objectives of the legal protection of this right. States are required to adopt special measures to ensure the effective enjoyment of the right to territorial property by indigenous people<sup>81</sup>.

76. In this regard, the IACHR has emphasized that "the demarcation and legal recording of the indigenous lands is in fact only the first step in its establishment and real defense", since in practice the property and effective possession are continually threatened, usurped or reduced by different actions of fact or law<sup>82</sup>.

77. The Commission has also pointed that indigenous and tribal people have right to be protected from conflicts with third parties for land, through the prompt granting of a property title, and the

<sup>80</sup> Annex 4. Certificate of 1st Registration of Properties Pesqueira-PE, dated November 11, 2005 (Annex 2 of the Communication of the State of September 6, 2010).

<sup>81</sup> IACHR, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 56/09 30 December 2009, par. 86.

<sup>82</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL. Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, september 29, 1997, par. 33.

delimitation and the demarcation of their lands without delays, in order to prevent conflicts and attacks by others<sup>83</sup>. Likewise, indigenous and tribal people and its members are entitled to have their territory reserved for them, with no presence of third parties or non-indigenous settlers. The State has a correlative obligation to prevent invasion or colonization of indigenous or tribal territory by other people, and to perform the necessary actions to relocate those non-indigenous inhabitants of the territory who are settled there. Therefore, the IACHR underscores that the State's obligation to recognize and guarantee the exercise of the right to communal property of indigenous people "necessarily requires the state to delimitate and effectively demarcate the territory covered by the right of property of the [corresponding indigenous or tribal] people and adopt appropriate measures to protect the right of the [respective] people to its territory."<sup>84</sup>

78. Likewise, at the United Nations level, the Committee against Racial Discrimination in its General Observation No. 23 exhorted the States to protect rights of indigenous people to control and use their lands when they have been occupied by third parties without their consent<sup>85</sup>.

79. Finally, the Inter-American Court has indicated since 2001 in the case of the *Mayagna (Sumo) Awas Tingni Vs. Nicaragua* in 2001 that States must ensure the effective property of indigenous people<sup>86</sup>. Subsequently in 2007, in the case of the *Saramaka people Vs. Suriname*, the Court emphasized the State's obligation to guarantee the right of indigenous people to effectively control and be owners of their territory without any external interference<sup>87</sup>.

80. With regards to the continued presence of non-indigenous settlers in the Xucuru indigenous territory, the State argued that it cannot ignore the rights of "good faith" non-indigenous settlers and that they have to be compensated for the improvements made to indigenous lands.

81. The Commission agrees with the State to the extent that, as has been expressed by the Court, both "the private property of individuals" as well as the "communal property of the members of indigenous communities" are protected by the Convention. However, as has been established in the jurisprudence of the Inter-American system, when these rights are in conflict, the problem should be solved in accordance with the principles governing the restrictions on human rights<sup>88</sup>. Therefore, with respect to such conflicts, it is the obligation of the State to ensure that, in practice, indigenous peoples can occupy and use their ancestral lands and territories in which non indigenous are present, by means of adequate mechanisms of compensation in their favor, given that different for indigenous collective property, private property is essentially susceptible of compensation.

82. While it may be understood that there is a conflict of rights and/or interests between the Xucuru indigenous people and non-indigenous occupants, the Commission notes that the jurisprudence of the Inter-American system supports the preferential nature of the right to indigenous property, while the same, it is not susceptible to be compensable, unlike the individual property. Specifically, in the case *Comunidad Indígena Sawhoyamaya vs. Paraguay*, the Inter-American Court the State has the duty of prioritizing the rights

<sup>83</sup> IACHR, DEMOCRACY AND HUMAN RIGHTS IN VENEZUELA. OEA/Ser.L/V/II Doc. 54 of 30 December 2009, par. 1137 - Recommendation 2; and IACHR, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 56/09 30 December 2009, par. 113.

<sup>84</sup> IACHR. Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 132.

<sup>85</sup> UN Committee against Racial Discrimination, General Comment No. 23 on the rights of indigenous peoples, 2007, para. 5. Available in: [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1\\_Global/INT\\_CERD\\_GEC\\_7495\\_S.doc](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_GEC_7495_S.doc) (accessed on May 20, 2015)

<sup>86</sup> Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, par. 148-153.

<sup>87</sup> Inter-American Court of Human Rights, Case of the Saramaka People. Vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 115.

<sup>88</sup> Inter-American Court of Human Rights, Case Xákmok Kásek Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, par. 143

of indigenous people in cases of conflict with third parties, in the extent that the first are intrinsically linked to the cultural and material survival<sup>89</sup>.

83. The Inter-American Commission considers that it is proven that the Xucuru indigenous people has been unable to use and enjoy their lands peacefully. The State has recognized the continued presence of non-indigenous settlers in the Xucuru indigenous territory. It has also highlighted the efforts of the FUNAI to pay compensation to such occupants prior to performing their removal from the territory, since the year 2001. It is a fact, however, that for years the State abstained to effectively remove non-indigenous settlers from the Xucuru indigenous territory. Also, in its last communication to the Commission the State acknowledged that such removal process had not yet finalized. These elements allow the Commission to conclude that the State of Brazil has not complied diligently and in a timely manner with its obligation to remove all non-indigenous settlers from the territory of the Xucuru indigenous people.

84. In light of the above, the Commission finds that the belated recognition and the failure of the State to guarantee the property and peaceful possession thereof by the effective removal of non-indigenous occupants, implied that the system, in general and as applied to the case, did not effectively protected the rights to property and, therefore, constituted a violation of Article 21 of the American Convention, in connection with Articles 1.1 and 2 of the same international instrument, since the ratification of that instrument by Brazil on September 25 of 1992. Prior to that date, the IACHR considers that Article XXIII of the American Declaration of the Rights and Duties of Man applies.

85. The Commission also highlights that one of the consequences of the lack of timely recognition and of the lack of effective protection and removal of non-indigenous settlers from the land historically occupied by the Xucuru indigenous people led to a situation of insecurity and violence, as it has been considered proven. In other words, this situation has prevented the Xucuru indigenous people from peacefully enjoying and living in their territory, and instead has made them live in a situation of instability, conflict and even risk to the life and personal integrity of its members. Under the principle *iura novit curia*, the Commission considers that the effects of the actions and omissions of the State in relation to the collective property of the Xucuru people has also generated an impairment to mental and moral integrity of its members, in violation of Article 5.1 of the American Convention.

### **C. Articles 8 and 25 of the American Convention, in relation to Article 1.1 of the same treaty and Article XVIII of the American Declaration**

86. The Commission would like to remind that the State has a general obligation to provide effective judicial remedies to individuals claiming to be victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due legal process (Article 8.1), all within the general obligation, for such States, to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1.1)<sup>90</sup>. In this regard, the Inter-American Court has specified that due process be followed both in administrative proceedings and in any other procedure whose decisions may affect the rights of individuals<sup>91</sup>.

<sup>89</sup> Inter-American Court of Human Rights, Case of Sawhoyamaxa Indigenous Community v Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 197

<sup>90</sup> Inter-American Court of Human Rights, Case Velásquez Rodríguez v Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; If Kichwa Indigenous People of Sarayaku Vs Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 260; and Case of the Indigenous Peoples of Madungandí Kuna and Embera of Bayano and its Member Vs. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 284, par. 165.

<sup>91</sup> Inter-American Court of Human Rights, Case Indigenous Community Yakye Axa v Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 62; Baena Ricardo et al vs. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 127; Sawhoyamaxa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83. The Court has indicated that domestic administrative procedures to comply with the guarantees of due process include, for example, procedures for recognition of indigenous leaders, procedures for recognition of legal personality, and land restitution procedures [Inter-American Court of Human Rights, Case Sawhoyamaxa Indigenous Community v Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 81, 82].

87. Similarly, the jurisprudence of the Inter-American System of Human Rights has determined that indigenous and tribal people have the right to effective administrative mechanisms to protect, ensure and promote their rights over ancestral lands, through which it is possible to carry out the processes of recognition, titling, demarcation and delimitation of their territory<sup>92</sup>.

88. Subsequently, the Commission will examine, first, the effectiveness of the administrative process for the recognition, demarcation and titling of the Xucuru indigenous territory. Secondly, the Commission will refer to the fulfillment of such obligations in the legal proceedings relating to the demarcation of indigenous territory of which the IACHR is aware.

### **1. The effectiveness of the administrative process of recognition and demarcation of Xucuru indigenous territory**

89. As was established in the proven facts, the administrative process of demarcation of the Xucuru indigenous territory dates from 1989, and the registration of the "Xucuru Indigenous Land" took place on November 18, 2005, over sixteen years later. At this point, the IACHR will examine the reasonableness of the time that it took to obtain that title of "possession" of the Xucuru indigenous territory.

90. The Inter-American system has taken into account four factors to determine whether the time is reasonable: i) the complexity of the matter; ii) the procedural activity of the interested party; iii) the conduct of judicial authorities, and iv) the impairment in the legal situation of the person involved in the process<sup>93</sup>. On this last item, to determine whether the time is reasonable, the impairment generated by the length of the proceeding in the legal situation of the person involved in such proceeding must be taken into account<sup>94</sup>, considering, among other elements, the subject matter of the controversy<sup>95</sup>. In this regard, the Court has established that if the passage of time has a relevant impact on the legal status of the alleged victim, it will be necessary for the process to advance more diligently so that the case is resolved in a short time<sup>96</sup>.

91. On the complexity of the case, the State indicated that the process of demarcation of indigenous lands is inherently complex, particularly due to the presence of non-indigenous settlers. The Commission considers that the issue of complexity requires a case by case analysis based in its circumstances. The Commission considers that establishing *a priori* that every process of demarcation and delimitation of land is complex could render illusory the right of indigenous peoples to a simple, prompt and effective resource to guarantee their right to collective property. The Commission stresses that this analysis is necessarily made on the basis of the specific facts of each case.

92. While as indicated by the State in the case *Yakye Axa vs. Paraguay* the Court indicated that it was a complex issue, it did so "based on the evidence presented in the chapter on Proven Facts"<sup>97</sup>. However, it also notes that in the case of *Kuna Indigenous People of Madungandí and Embera of Bayano and its Members vs. Panama*, the Inter-American Court stated that, "with respect to the first element [complexity], the Court

<sup>92</sup> Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 138; Case *Yakye Axa Indigenous Community vs. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 143; and Commission, the rights of indigenous and tribal people to their ancestral lands and natural resources. STANDARDS AND JURISPRUDENCE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS. OEA / Ser.L / V / II.Doc.56 / 09, December 30, 2009, par. 335.

<sup>93</sup> IACHR, Report No. 111/10, Case 12,539, background, Sebastián Claus Furlan and Family, Argentina, October 21, 2010, par. 100; Court HR, Case of Valle Jaramillo et al v Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, par. 155.

<sup>94</sup> Inter-American Court of Human Rights, Case of Valle Jaramillo et al v Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, par. 155; and Case Furlan and Family Vs. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, par. 194.

<sup>95</sup> Inter-American Court of Human Rights, Case Indigenous Community Xákmok Kásek. Vs. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, par. 136; and Case Furlan and Family Vs. Argentina Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, par. 194

<sup>96</sup> Inter-American Court of Human Rights, Case of Valle Jaramillo et al v Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 155; and Case Furlan and Family Vs. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, par. 194

<sup>97</sup> Inter-American Court of Human Rights, Case Indigenous Community Yakye Axa v Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 87

notes that those processes did not involve legal issues or discussions that could justify a delay of several years linked to the complexity of the matter"<sup>98</sup>.

93. In this regard, the analysis of complexity of the case must be made case by case. In this respect, facing a delay like the one that took place in the present case, it corresponds to the State invoking the complexity of the case as a justification for the delay, to argue aspects of the concrete case that make it complex, as well as the causal link between such aspects and the specific delays.

94. In the present case, the Commission considers that the State did not prove that the administrative process of demarcation of the Xucuru territory involved particularly complex issues or discussions that relate to the delay of more than sixteen years. On the contrary, the Commission notes that the extent of the territory claimed was clearly defined from the early stages of the administrative process. As for the activity of the interested parties, the Commission notes that it has no elements to conclude that their performance hindered in any way its development. In respect to that item, the Inter-American Commission also wishes to clarify that, in accordance with Brazilian law, recognition, demarcation and titling of indigenous lands is the exclusive competence of the State (the Federal Union), through the FUNAI. In that sense, the Xucuru indigenous collective or its members as individuals in any way influenced the observed delays in the development process.

95. In contrast to the above and in relation to the behavior of the state authorities in the administrative process, the evidence shows that their performance was not diligent. Indeed, the Commission notes several significant periods of time where the process did not progress as a result of the lack of the action from the authorities and even as a result of actions designed to obstruct the administrative process. The Commission notes that the identification report of the Xucuru indigenous territory, prepared by the Technical Group of FUNAI in 1989 was ratified by the Minister of Justice through Portaria No. 259/MJ/92, three years later, in May 1992. Another three years passed without significant progress between 1992 and 1995. After the decision of the Minister of Justice on the challenges presented by non-indigenous occupants based on Decree No. 1,775, no significant progress was made between 1997 and 2001, that is, for four additional years. Finally, the Commission notes that, following the approval of the demarcation by the President of the Republic and the registration requirement promoted by FUNAI in 2001, the next step consisted in the registration of the indigenous land, and it took another four years partly due to the challenge filed by a State official in his official capacity in August 2002. The decision of such motion was issued almost three years later, on June 25, 2005. Finally, the record of the property as Union property was made on November 18, 2005, as noted, more than sixteen years after the administrative process formally initiated.

96. It follows that these delays are attributable either by omission or by action to the Brazilian State, without the State justifying these delays in a specific manner. Consequently, the Commission considers that the period that the administrative took was not reasonable under the terms required by the Convention.

97. Moreover, the Commission considers that the ineffectiveness of the administrative process is also evident in that, as noted above, it did not lead to effective removal of non-indigenous settlers from the titled areas, thus preventing the peaceful possession of the land by the Xucuru indigenous people and its members. Under domestic and international applicable law, the State had a duty to remove non-indigenous occupants from the demarcated indigenous lands, which would conclude with compensation for improvements made by them and their withdrawal from the Xucuru indigenous people lands. The IACHR has given as proved that the removal of non-indigenous occupants has not been fully performed after beginning the administrative process of demarcation in 1989 and found it to be in violation of the right to collective property. In this section, the Commission considers that the ineffectiveness of the administrative process to achieve the removal of non-indigenous settlers from the land, which was the mechanism available in the Brazilian system for the Xucuru people to achieve this purpose, is also a violation of the rights to a fair trial and judicial protection.

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<sup>98</sup> Inter-American Court of Human Rights, Case of the Indigenous Peoples of Madungandí Kuna and Embera of Bayano and its Member Vs. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 284, par. 181.



98. Under the considerations expressed in this section, the Commission concludes that the State of Brazil failed to comply with the obligation to provide the Xucuru indigenous people and its members an effective remedy substantiated with due process to resolve their territorial claims. Therefore, the Inter-American Commission concludes that the State violated Articles 8.1 and 25.1 of the American Convention to the detriment of the Xucuru indigenous people and its members in relation to the obligations under Article 1.1 of the same treaty, after the ratification of this instrument in September 25, 1992.

99. Considering that the violation declared in this section is based primarily on the delay and ineffectiveness of administrative proceedings taken as a whole and that the American Declaration would be only applicable to the case until 1992, the Commission has no sufficient elements to consider that autonomous violations of the right to justice enshrined in the Declaration between the start of the administrative process in 1989 and 25 September 1992 took place. In that sense, at this point the Commission limits its findings to the violation of the American Convention.

## **2. Pending legal actions in relation to the demarcation of the Xucuru indigenous territory**

100. The Commission has considered proven that since 1992 non-indigenous settlers also filed legal actions of territorial nature claiming their property rights over areas included in the Xucuru indigenous territory. Thus, in March 1992, Milton do Rego Barros Didier and another filed a "motion to regain possession" and in February 2002, Paulo Pessoa Cavalcanti de Petribu and others brought an "ordinary action for the annulment of the administrative demarcation process".

101. The Commission has noted, in relation to indigenous peoples, that when conflicts arise with third parties for land, they are entitled to protection through appropriate and effective procedures; that they are guaranteed the full enjoyment of their right to property; and that rapid and effective special mechanisms are in place to resolve legal disputes over the ownership of their lands<sup>99</sup>.

102. The information available indicates that the two legal challenges are still pending final decisions with the effect of preventing the completion of the full restoration of indigenous lands.

103. In analyzing the four elements to determine the reasonability of the time elapsed, the Commission notes that the behavior of state authorities has also been determinant in the delay of the two legal challenges.

104. Indeed, the Commission insists that the motion to regain possession filed in March 1992, was decided in the first instance in favor of non-indigenous occupants, on July 24, 1998, more than six years later. Civil Appeal AC178199-PE, meanwhile, was rejected on April 24, 2003, almost five years later. The 646.933-PE special appeal was rejected on November 6, 2007, more than four years later. Two more years passed until the decision on the first appeal of *embargos de declaração*, which was rejected on 11 December 2009. Finally, two other appeals of *embargos de declaração* were presented in February 2010 and are still pending, according to the evidence on file. Likewise, regarding the ordinary action filed in February 2002, it was decided in the first instance on June 1, 2010, more than eight years after its introduction. According to the information available, this ordinary action is still pending decision on appeal. The State did not submit specific justification regarding these time-periods, which are, in themselves, excessive.

105. Consequently, the Commission concludes that the duration of legal actions filed by non-indigenous settlers from the Xucuru indigenous territory, for which there is not a final decision after over 20

<sup>99</sup> IACHR, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 56/09 30 December 2009, par. 113; IACHR, DEMOCRACY AND HUMAN RIGHTS IN VENEZUELA. OEA/Ser.L/V/II Doc. 54 of 30 December 2009, pars. 1062-1066; 1071; 1137 - Recommendations 1 to 4; and IACHR, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA. Doc.. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, February 26, 1999, pars. 21-27 and Recommendation 3.



and 10 years respectively, is not compatible with the principle of a reasonable timeframe. Consequently, the Commission considers that the State is responsible for the violation of Article 8.1 of the American Convention, in relation to 1.1 of the same treaty, to the detriment of the Xucuru indigenous people and its members regarding the two legal challenges filed by non-indigenous occupants.

106. The Commission continues to note, finally, on decisions already issued in the motions to regain possession presented in 1992, that its content seems to be incompatible with the standards reiterated in this merits report on the territorial rights of indigenous people. Indeed, the decision of the STJ of November 6, 2007, in referring to and confirming the judgment of first instance in favor of non-indigenous occupants indicates that "in the present case, there are documents proving that in 1885 [the ancestor of the author] acquired the lands of Hacienda Caipe. [...]. Therefore, in 1885, the lands in dispute already belonged to the author's ancestors." Also, the decision of the STJ stated that, "in reality, the constitutional protection of indigenous began with the Federal Constitution of 1934 and by that time, the lands were already occupied [by non-indigenous ancestors of the author]"<sup>100</sup>. The Commission notes that this argument is inconsistent with the internationally consolidated notion in the sense that the land rights of indigenous peoples arise from their historical occupation and use and not from formal recognition from the States.

107. Given that these are not final decisions, the Commission will not comment on the international responsibility of the State for the content of these decisions. Notwithstanding the foregoing, this content will be considered when establishing the recommendation for the speedy resolution of these legal challenges

## VI. CONCLUSIONS

108. By virtue of the considerations of fact and law set out in this report, the Inter-American Commission on Human Rights concludes that:

1. The State of Brazil violated the right to property enshrined in Article XXIII of the American Declaration and Article 21 of the American Convention, in relation to Articles 1.1 and 2 of the same instruments, to the detriment of the Xucuru indigenous people and its members. In addition, the State of Brazil violated the right to personal integrity enshrined in Article 5 of the American Convention, in relation to Article 1.1. of the same instrument.

2. The State of Brazil violated the rights to a fair trial and judicial protection enshrined in Articles 8.1 and 25.1 of the American Convention, in relation with Article 1.1 thereof to the detriment of the Xucuru indigenous people and its members.

## VII. RECOMMENDATIONS

109. Based on the analysis and conclusions of this report,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF BRAZIL:**

1. Adopt as soon as possible the necessary measures, including legislative, administrative or other measures necessary for the effective removal of non-indigenous settlers from the ancestral lands of the Xucuru indigenous people, according to their customary law, values uses and traditions. Consequently, ensure that indigenous members can continue to live peacefully their traditional way of life, according to their cultural identity, social structure, economic system, customs, beliefs and traditions;

2. Adopt as soon as possible the necessary measures to complete the legal proceedings filed by non-indigenous persons regarding part of the territory of the Xucuru indigenous people. In compliance with

<sup>100</sup> Annex 16. STJ ruling of November 6, 2007 (Annex 6 of the Communication from the State of September 6, 2010). The Commission has no copy of the judgment of first instance, the July 24, 1998.

this recommendation, the State must ensure that its judicial authorities resolve the respective legal actions in accordance with the standards on the rights of indigenous peoples set forth in this report.

3. Repair on an individual and collective level the consequences of the violation of the rights identified hereto. In particular, consider the damage caused to members of the Xucuru indigenous people by the delays in the recognition, demarcation and delimitation, and the lack of timely and effective removal of non-indigenous settlers from their ancestral territory.

4. Take the necessary measures to prevent future occurrence of similar events, in particular, adopt a simple, fast and effective remedy to protect the right of indigenous people in Brazil to claim their ancestral territories and peacefully exercising their collective property.