INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE XUCURU INDIGENOUS PEOPLE AND ITS MEMBERS *V.* BRAZIL

JUDGMENT OF FEBRUARY 5, 2018

(Preliminary objections, merits, reparations and costs)

In the case of the *Xucuru Indigenous People and its members,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") composed of the following judges:[1]

Eduardo Ferrer Mac-Gregor Poisot, President
Eduardo Vio Grossi, Vice President
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge
Eugenio Raúl Zaffaroni, Judge, and
L. Patricio Pazmiño Freire, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment structured as follows:

[1] Judge Roberto F. Caldas, a Brazilian national, did not take part in the deliberation of this judgment in accordance with the provisions of Articles 19(2) of the Court's Statute and 19(1) of its Rules of Procedure.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On March 16, 2016, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Court the case of the Xucuru Indigenous People and its members against the Federative Republic of Brazil (hereinafter "the State" or "Brazil"). According to the Commission, the case relates to the presumed violation of the rights to collective property and to personal integrity of the Xucuru indigenous people as a result of: (i) the alleged delay of more than 16 years, from 1989 to 2005, in the administrative procedure to recognize, demarcate, delimit and title their ancestral territories and lands, and (ii) the supposed delay in the complete removal of non-indigenous occupants from their lands and territories, so that these indigenous people could peacefully exercise the said rights. In addition, the case relates to the presumed violation of the rights to judicial guarantees and judicial protection as a result of the alleged failure to observe a reasonable time in the respective administrative procedure, as well as the supposed delay in deciding civil actions filed by non-indigenous persons concerning part of the ancestral territories and lands of the Xucuru indigenous people. The Commission indicated that Brazil had violated the right to property, as well as the rights to personal integrity, judicial guarantes and judicial protection established in Articles 21, 5, 8 and 25 the American Convention in relation to Articles 1(1) and 2 of this instrument.

2. *Procedure before the Commission.* The procedure before the Inter-American Commission was as follows:

a) *Petition.* On October 16, 2002, the Commission received the initial petition lodged by the National Human Rights Movement/Northeastern Region, the Legal Services Department of the Organizaciones Populares (GAJOP) and the Consejo Indigenista Misionario (CIMI), and identified it as case No. 12,728.

b) *Admissibility Report.* On October 29, 2009, the Commission adopted Admissibility Report No. 98/09 (hereinafter "the Admissibility Report").

c) *Merits Report.* On July 28, 2015, the Commission adopted Merits Report No. 44/15 under Article 50 of the American Convention (hereinafter "the Merits Report"), in which it reached a series of conclusions and made several recommendataions to the State.

i) *Conclusions.* The Commission concluded that the State was internationally responsible for:

a. The violation of the right to property enshrined in Article XXIII of the American Declaration and Article 21 of the American Convention, as well as the right to personal integrity recognized in Article 5 of the American Convention, in relation to Articles 1(1) and 2 of that instrument, to the detriment of the Xucuru indigenous people and its members.

b. The violation of the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the Xucuru indigenous people and its members.

ii) *Recommendations*. Consequently, the Commission made the following recommendations to the State:

a. Take, as soon as possible, the necessary legislative, administrative or other measures to ensure the effective removal of non-indigenous settlers from the ancestral territory

of the Xucuru indigenous people, according to their customary law, values uses and traditions. Consequently, ensure that the members of the people can continue to live their traditional way of life peacefully, in keeping with their particular cultural identity, social structure, economic system, customs, beliefs and traditions;

b. Take, as soon as possible, the necessary measures to complete the legal proceedings filed by non-indigenous persons concerning part of the territory of the Xucuru indigenous people. In compliance with this recommendation, the State must ensure that its judicial authorities decide the respective legal actions in accordance with the standards on the rights of indigenous peoples set forth in the Merits Report.
c. Redress, individually and collectively, the consequences of the violation of the rights identified in the Merits Report. In particular, take into consideration the harm caused to members of the Xucuru indigenous people by the delays in the recognition, demarcation and delimitation of their ancestral territory, and the failure to remove the non-indigenous settlers promptly and effectively.
d. Take the necessary measures to prevent the future occurrence of similar events; in particular, adopt a simple, rapid and effective remedy to protect the right of the indigenous peoples in Brazil to claim their ancestral territories and use their collective property peacefully.

3. *Notification of the State.* The Merits Report was notified to the State in a communication of October 16, 2015, granting it two months to report on compliance with the recommendations. After an extension had been granted, the Commission determined that the State had made no substantial progress in complying with the recommendations. In particular, although the Commission noted that there had been some progress in the formal removal of non-indigenous occupants of the ancestral territories and lands of the Xucuru indigenous people, the information available indicated that the said indigenous people had still not been able to exercise their right peacefully. Additionally, the State failed to present any specific information on progress in providing reparation to the Xucuru indigenous people for the violations declared in the Merits Report.

4. *Submission to the Court.* On March 16, 2016, the Commission submitted the facts and human rights violations described in the Merits Report to the Court "given the need to obtain justice."[2] Specifically, the Commission submitted to the Court the State's acts and omissions that occurred or continued to occur after December 10, 1998, the date on which the State had accepted the Court's jurisdiction.[3] This was without prejudice to the possibility that the State might accept the Court's jurisdiction to examine the whole case, pursuant to the provisions of Article 62(2) of the Convention.

5. *Requests of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked the Court to declare the international responsibility of Brazil for the violations contained in the Merits Report and to order the State, as measures of reparation, to comply with the recommendations included in that report.

[2] The Inter-American Commission appointed Commissioner Francisco Eguiguren and Executive Secretary Emilio Álvarez Icaza L. as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Executive Secretariat lawyer, as legal advisers.

[3] Those acts and omissions include: (1) violation of the right to collective property of the Xucuru indigenous people owing to a delay of seven years under the Court's temporal jurisdiction in the process of recognizing this territory; (2) violation of the right to collective property owing to the failure to remove all the non-indigenous occupants from the said ancestral territory from 1998 to date; (3) violation of the rights to judicial guarantees and judicial protection in relation to this delay in the administrative recognition procedure; (4) violation of the right to personal integrity of the members of the Xucuru indigenous people – as of December 10, 1998 – as a result of the preceding violations and the consequent impossibility of peacefully exercising the right to collective property over their ancestral lands and territories; (5) violation of the rights to judicial guarantees and judicial protection – as of December 10, 1998 – owing to the delay in deciding the civil actions filed by non-indigenous occupants of parts of the ancestral territory.

II
PROCEEDINGS BEFORE THE COURT

6. *Notification of the State and the representatives.* The submission of the cases was notified to both the State and the representatives of the presumed victims on April 19, 2016.

7. *Brief with motions, pleadings and evidence.* The representatives did not present their brief with motions, pleadings and evidence.[4]

8. *Brief with preliminary objections and answer to the submission of the case.* On September 14, 2016, the State presented its brief filing preliminary objections and answering the submission of the case (hereinafter "the answering brief"),[5] pursuant to Article 41 of the Court's Rules of Procedure. The State filed five preliminary objections and contested the alleged violations.

9. *Observations on the preliminary objections.* On October 26, 2016, the Commission presented its observations on the preliminary objections and asked the Court to reject them.

10. *Public hearing.* In an order of January 31, 2017,[6] the President of the Court called the parties and the Commission to a public hearing to receive their final oral arguments and observations on the preliminary objections and eventual merits, reparations and costs. He also required that the testimony of a witness and two expert witnesses proposed by the State and the Commission be received at that time. In addition, in the same order, he required that the opinion of an expert witness proposed by the State be received by affidavit.[7] The public hearing took place on March 21, 2017, during the fifty-seventh special session of the Court held in Guatemala City, Guatemala.[8]

11. *Amici curiae.* The Court received five *amici curiae* briefs presented by: (1) The Human Rights Clinic at the University of Ottawa, the Due Process of Law Foundation, the Study Center on International Human Rights Systems at the Universidade Federal do Paraná and the

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[4] On February 21, 2017, the representatives advised that Justicia Global would act as co-petitioner in the case.

[5] The State appointed Fernando Jacques de Magalhães Pimenta as its Agent for this case, and Maria Cristina Martins dos Anjos, Agostinho do Nascimento Netto, Pedro Marcos de Castro Saldanha, Boni de Moraes Soares, Rodrigo de Oliveira Morais, Daniela Marques, Thiago Almeida Garcia, Luciana Peres, Victor Marcelo Almeida, Andrea Vergara da Silva, Fernanda Menezes Pereira, Taiz Marrão Batista da Costa and Carolina Ribeiro Santana as deputy agents.

[6] Order of the acting President of the Inter-American Court of Human Rights of January 31, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/xucuru_31_01_17.pdf.

[7] In an order of the acting President of the Inter-American Court of Human Rights of January 31, 2017, expert witness Christian Teófilo da Silva, proposed by the State, was required to present his opinion by affidavit. In addition, expert witness Carlos Frederico Marés de Souza Filho, also proposed by the State, and expert witness Victoria Tauli-Corpuz, proposed by the Inter-American Commission were called to appear at the hearing. Subsequently, on February 17, 2017, the State, arguing *force majeure,* requested a change in the way the proposed opinions were presented, so that expert witness Christian Teófilo da Silva would be called to appear at the hearing, while expert witness Carlos Frederico Marés de Souza Filho would provide his opinion by affidavit. Furthermore, on February 21, 2017, the Inter-American Commission asked the Court to allow expert witness Victoria Tauli-Corpuz to provide her opinion by affidavit instead of at the public hearing. Consequently, on February 28, 2017, in a Secretariat note, the parties and the Inter-American Commission were notified of the decision of the acting President of the Inter-American Court to accept the proposed changes in the presentation of the opinions of the expert witness requested by the State and by the Inter-American Commission.

[8] There appeared at this hearing: (a) for the Inter-American Commission: the Executive Secretariat lawyer, Jorge Humberto Meza Flores; (b) for the presumed victims' representatives: Adelar Cupsinski, Caroline Hilgert, Marcos Luidson de Araújo, Fernando Delgado, Michael Mary Nolan, Raphaela de Araújo Lima Lopes, Rodrigo Deodato de Souza Silva and Vânia Rocha Fialho de Paiva e Souza, and (c) for the State: João Luiz de Barros Pereira Pinto, Rodrigo de Oliveira Morais, Fernanda Menezes Pereira, Luciana Peres, Carolina Ribeiro Santana, Taiz Marrão Batista da Costa and Thiago Almeida Garcia.

Amazon Cooperation Network;[9] (2) the Human Rights and Environmental Law Network at the Universidade do Estado do Amazonas and the Amazonas Human Rights Research Group;[10] (3) the Associação Juízes para a Democracia;[11] (4) the Amazonas Human Rights Clinic attached to the Post-graduate Law Program at the Universidade Federal do Pará,[12] and (5) the Office of the Brazilian Ombudsman.[13]

12. The State filed objections to the *amici curiae* briefs that were presented. Regarding the brief of the Human Rights Clinic at the University of Ottawa, the Due Process of Law Foundation, the Study Center on International Human Rights Systems at the Universidade Federal do Paraná, and the Amazon Cooperation Network, the State argued that it sought to expand the scope of the Court's analysis to include draft laws and other legislative measures irrelevant to the specific case. Also, with regard to the *amicus curiae* of the Human Rights and Environmental Law Network at the Universidade do Estado do Amazonas and the Amazonas Human Rights Research Group, the State argued that the brief revealed a bias in favor of the plaintiffs and sought to expand the purpose of the case by asking the Court to apply the *iura novit curia* principle to analyze and rule on the constitutional system for attribution of ownership over indigenous land. In the case of the brief of the Associação Juízes para a Democracia, Brazil argued that this was an organization composed of Brazilian judges, who are State agents, members of the Judiciary and, therefore, accountable to the Republic. The State also indicated that their brief was openly partial and contained matters that fell outside the purpose of the litigation, such as a decision of the Brazilian Supreme Federal Court in another case that had not been submitted to the Court's consideration. Lastly, regarding the brief of the Office of the Brazilian Ombudsman (DPU), the State argued that the brief failed to present a technical and impartial perspective of the theoretical questions that were relevant to the case by openly adopting the thesis supported by the representatives. The State also indicated that the DPU did not have a different legal personality to that of the Brazilian State; therefore, it was not possible to allow a State institution to testify against the State before an international court. Lastly, it argued that the brief overstepped the limits of the purpose of the litigation as regards the titling of indigenous lands and allegations of violence and criminalization.

13. In this regard, the Court notes that the State's observations regarding the admissibility of the *amici curiae* in this case were not presented within the established time frame; that is, in their final written arguments; consequently, they are considered to be time-barred. Nevertheless, considering the gravity of some of the assertions made by Brazil, this Court notes that, according to Article 2(3) of the Rules of Procedure, those presenting an *amicus*

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[9] The brief refers to the administrative procedure for land demarcation in Brazil and the exercise of prior consultation in that country, and was signed by Salvador Herencia Carrasco, Daniel Lopes Cerqueira, Melina Girardi Fachin and Luís Donisete Benzi Grupioni.

[10] The amicus curiae brief refers to the right to indigenous territory and was signed by Sílvia Maria da Silveira Loureiro, Pedro José Calafate Villa Simões, Jamilly Izabela de Brito Silva, Denison Melo de Aguiar, Breno Matheus Barrozo de Miranda, Caio Henrique Faustino da Silva, Emilly Bianca Ferreira dos Santos, Ian Araújo Cordeiro, Kamayra Gomes Mendes, Marlison Alves Carvalho, Matheus Costa Azevedo, Taynah Mendes Saraiva Uchôa and Victória Braga Brasil.

[11] The brief refers to the violations of the rights to collective property and to judicial guarantees and protection of the Xucuru indigenous people and its members and was signed by André Augusto Salvador Bezerra.

[12] The amicus curiae brief refers to the vulnerability of the indigenous peoples in Brazil, as regards their territorial rights, and was signed by Cristina Figueiredo Terezo Ribeiro, Laércio Dias Franco Neto, Isabela Feijó Sena Rodrigues, Ana Caroline Lima Monteiro, Raysa Antonia Alves, Tamires da Silva Lima, Carlos Eduardo Barros da Silva and Jucélio Soares de Carvalho Junior.

[13] The brief refers to the acts and omissions of the State contrary to the provisions of the American Convention on Human Rights, Convention No. 169 on Indigenous and Tribal Peoples of the International Labour Organization, and other international human rights instruments, as well as Brazilian laws, and was signed by Carlos Eduardo Barbosa Paz, Francisco de Assis Nascimento Nóbrega, Isabel Penido de Campos Machado, Pedro de Paula Lopes Almeida, Rita Lamy Freund and Antônio Carlos Araújo de Oliveira.

curiae are persons or institutions, unrelated to the case and to the proceedings before the Court, that submit reasoned arguments on the facts contained in the submission of the case or legal considerations on the subject-matter of the proceedings. In other words, they are not a procedural party to the litigation and the document is presented in order to provide information to the Court on factual or legal matters related to the case it is processing; therefore, it cannot be understood that they contain arguments or allegations that the Court must assess when deciding the case and an *amicus curiae* brief could never be assessed as an actual probative element. Therefore, the State's request that they be excluded from the proceedings is inappropriate, because the Court does not have to rule on the admissibility of such briefs, or on any requests or petitions they may contain. The observations on the content and scope of the said *amici curiae* do not affect their admissibility, without prejudice to the substance of such observations being considered when evaluating the information provided in them, if this is considered helpful.

14. *Final written arguments and observations.* On April 24, 2017, the representatives and the State forwarded their respective final written arguments, and the Commission submitted its final written observations.

15. *Observations of the parties and the Commission.* On April 26, 2017, and May 12, 2017, the Court's Secretariat forwarded the attachements to the final written arguments to the other parties and asked the representatives, the State and the Commission to present any observations they deemed pertinent. In communications of May 12 and 19, 2017, the representatives forwarded the requested observations. The State sent its observations in a communication of May 18, 2017, and the Commission did not present observations.

16. *Helpful evidence*. On March 2 and 3, 2017, the State and the representatives, respectively, presented specific documents requested by this Court.[14]

17. *Deliberation of the case*. The Court began to deliberate this judgment on February 5 2018.

III
JURISDICTION

18. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Brazil has been a State Party to the American Convention since September 25, 1992, and accepted the contentious jurisdiction of the Court on December 10, 1998.

IV
PRELIMINARY OBJECTIONS

19. In its answering brief, the State filed five preliminary objections concerning: **A**. Inadmissibility of the case by the Court owing to the publication of the Merits Report by the Commission; **B.** Lack of jurisdiction *ratione temporis* in relation to facts prior to the date of acceptance of the Court's jurisdiction; **C.** Lack of jurisdiction *ratione temporis* in relation to

[14] Documents requested from the State: (1) Complete case file of Ordinary Action No. 0002246-51.2002.4.05.8300 (originally No. 2002.83.00.002246-6), filed by Paulo Pessoa Cavalcanti de Petribu and others; (2) Updates since 1996 of Repossession Action No. 0002697-28.1992.4.05.8300 (originally No. 92.0002697-4), filed by Milton do Rego Barros Didier and others, and (3) Detailed information on the legal situation of the six non-indigenous occupants who have not yet been compensated and removed from the Xucuru indigenous land. Document, requested from the representatives: information on the members of the Xucuru indigenous people, their current composition and identification.

facts prior to the date on which the State acceded to the Convention; **D.** Lack of jurisdiction *ratione materiae* in relation to the supposed violation of ILO Convention 169, and **E.** Failure to exhaust domestic remedies.

20. To decide the objections filed by the State, the Court recalls that it will consider as preliminary objections only those arguments that are or could be, exclusively, of this nature based on their content and purpose; in other words, if they were decided favorably, this would prevent the continuation of the proceedings or a ruling on the merits.[15] It has been the Court's consistent criterion that a preliminary objection must contest the admissibility of a case or the Court's jurisdiction to examine a specific matter or part of it, due to either the person, matter, time or place.[16]

21. The Court will now proceed to examine the preliminary objections mentioned in the order in which they were presented by the State.

A. Inadmissibility of the case owing to the publication of the Merits Report by the Commission

A.1. Arguments of the State and observations of the Commission

22. The ***State*** argued that the Commission had maintained the complete text of preliminary Merits Report No. 44/2015 of July 28, 2015, on its website prior to submitting the case to the Court, and it considered this to be a violation of Article 51 of the Convention, because that article authorized the Commission to issue a final report and, eventually, to publish it or to submit it to the jurisdiction of the Court, but never to publish it before submitting the case to the Court. Therefore, the State asked the Court to declare that the Commission had violated Articles 50 and 51 of the Convention and to require it to remove the said report from its website.

23. The ***Commission*** indicated that the State's argument did not constitute a preliminary objection because it did not refer to matters of jurisdiction or to the admissibility requiirements established in the Convention. It also indicated that the Merits Report issued under Article 50 of the American Convention, constituted a preliminary report of a confidential nature that could result in two actions: either the submission of the case to the Inter-American Court or its eventual publication. When, pursuant to Article 51 of the Convention, the Commission opts for one of these two actions, the report loses its initial characteristic, either because the case has been submitted to the Court or because the final report has been issued. In the instant case, following the submission of the case to the Court, the Commission proceeded to publish the Merits Report on its website in keeping with its consistent practice, and this did not violate any regulatory or Convention-based provision.

A.2. Considerations of the Court

24. The Court notes that the State's arguments are identical to those presented in its preliminary objection in the cases of the Hacienda Brasil Verde Workers *v.* Brazil and the

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[15] *Cf. Case of Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213, para. 35, and *Case of Acosta et al. v. Nicaragua*. *Preliminary objections, merits, reparations and costs.* Judgment of March 25, 2017. Series C No. 334. para. 18.

[16] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections*. Judgment of February 4, 2000, Series C No. 67, para. 34, and *Case of Acosta et al. v. Nicaragua*, para. 18.

Favela Nova Brasilia.[17] In the judgments in those cases, the Court made a detailed analysis of the State's argument and concluded that it had not proved its argument that the publication of the Merits Report on the case had been made in a way that differed from that described by the Commission or in a way that was contrary to the provisions of the American Convention. The Court's considerations in those cases applied also to the instant case because, once again, the State had failed to prove that the publication of the Merits Report was made contrary to way described by the Commission or infringing the provisions of the American Convention.

25. Consequently, the Court considers that the State's argument is inadmissible.

B. Alleged lack of jurisdiction *ratione temporis* in relation to facts prior to the date of acceptance of the Court's jurisdiction, and alleged lack of jurisdiction *ratione temporis* in relation to facts prior to the date on which the State acceded to the Convention

26. The Court will analyze the State's two preliminary objections in relation to temporal limitations (*ratione temporis*) together because they refer to related situations and involve identical arguments by the State and the Commission.

B.1. Arguments of the State and observations of the Commission

27. The ***State*** indicated that it had formalized its accession to the American Convention on November 6, 1992, and accepted the Court's jurisdiction on December 10, 1998. Therefore, the Court could only hear cases initiated after its acceptance. It also argued that the Commission's interpretation, in addition to failing to take into consideration State sovereignty, by extending the Court's jurisdiction beyond the limits declared by Brazil, had violated the special system of declarations limiting the Court's temporal jurisdiction established in Article 62(2) of the Convention.

28. Furthermore, the State indicated that the arguments relating to violations of the rights to judicial protection and to judicial guarantees of the Xucuru indigenous people in relation to the territorial claims of its members could not be evaluated as a whole, but only the possible violations resulting from actions initiated or that should have been initiated after December 10, 1998, and that constituted specific and autonomous violations based on denial of justice.

29. Additionally, the State argued that the Court should declare itself incompetent to examine supposed violations that happened before September 25, 1992, the date on which Brazil acceded to the American Convention; specifically, the acts relating to the procedure to demarcate the Xucuru indigenous lands that took place from 1989 to September 1998.

30. The ***Commission*** stressed that it had explicitly indicated that it was only submitting the facts that had occurred after December 10, 1998, to the consideration of the Inter-American Court.

B.2. Considerations of the Court

31. Brazil accepted the Inter-American Court's contentious jurisdiction on December 10, 1998, and in its declaration indicated that the Court would have jurisdiction for "matters

[17] *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, paras. 25 to 27, and *Case of Favela Nova Brasilia v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, paras. 24 to 29.

arising after the time of th[at] declaration."[18] Based on this declaration and on the principle of non-retroactivity, the Court may not exercise its contentious jurisdiction to apply the Convention and to declare a violation of its provisions when the alleged acts, or the State's conduct that could engage its international responsibility, precede this acceptance of jurisdiction.[19] Consequently, the facts that occurred before Brazil accepted the Court's contentious jurisdiction fall outside the Court's competence.[20]

32. Based on the foregoing, this Court reaffirms its consistent case law on this issue and finds that the preliminary objections are partially substantiated.

C. Alleged lack of jurisdiction *ratione materiae* in relation to the supposed violation of Convention 169 of the International Labour Organization

C.1. Arguments of the State and observations of the Commission

33. The ***State*** considered that the Court lacked material jurisdiction to examine possible violations of Convention 169 of the International Labour Organization (ILO), whose instruments do not form part of the protection system of the Organization of American States.

34. The ***Commission*** clarified that, in the Merits Report, it had merely taken into account the content of ILO Convention No. 169 in order to establish the scope of the protection of the collective property of the Xucuru indigenous people in light of the American Convention, without including direct violations of any provision of the said Convention. Moreover, it indicated that this had not been its intention. Consequently, it considered that the preliminary objection was also inadmissible.

C.2. Considerations of the Court

35. The Court has indicated that, in contentious matters, it only has jurisdiction to declare violations of the American Convention on Human Rights and other instruments of the inter-American system for the protection of human rights that allow this.[21] However, on numerous occasions, it has found it useful and appropriate to use other international treaties, such as the different ILO conventions, to analyze the content and scope of the provisions and rights of the Convention[22] in keeping with the evolution of the inter-American system and taking into consideration developments in this matter in international human rights law.[23]

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[18] The acceptance of jurisdiction declared by Brazil on December 10, 1998, indicates that: "[t]he Government of the Federative Republic of Brazil declares its recognition as binding, for an indefinite period of time, *ipso jure*, of the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention on Human Rights, according to Article 62 of that Convention, on the condition of reciprocity, and for matters arising after the time of this declaration." *Cf.* American Convention on Human Rights. Brazil, recognition of competence. Available at https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm.

[19] *Cf.* Case of *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2010. Series C No. 219, para. 16; *Case of the Hacienda Brasil Verde Workers v. Brazil*, para. 63, and *Case of Favela Nova Brasilia v. Brazil*, para. 49.

[20] *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil,* para. 16, and *Case of Favela Nova Brasilia v. Brazil v. Brazil*, para. 49.

[21] *Cf. Case of the Plan de Sánchez Massacre v. Guatemala. Merits*. Judgment of April 29, 2004. Series C No. 105, para. 51.

[22] *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 155, para. 120, and *Case of Favela Nova Brasilia v. Brazil*, para. 50. For example, the OAS Charter, the Inter-American Democratic Charter, the European Convention on Human Rights, etc.

[23] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 127, and *Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 157.

36. Since the Court considers that an eventual violation of the provisions of ILO Convention No. 169 is not the purpose of the litigation, it would be unable to declare a violation in that regard. Therefore the Court rejects this preliminary objection.

D. Alleged failure to exhaust domestic remedies

D.1. Arguments of the State and observations of the Commission

37. The ***State*** stressed that the presumed victims or their representatives were not permitted to seek international jurisdictional protection directly without first filing domestic remedies. It added that the recognition of human rights violations and their reparation can only be requested from the jurisdiction of the inter-American system of human rights if both recognition and reparation have first been sought through a remedy in the domestic jurisdiction.

38. Furthermore, regarding the registration of the Xucuru indigenous territory as the property of the Union (Note: the Federal Government) the State indicated that the legal action raising concerns was filed in August 2002, and the petition had been lodged with the Commission in October 2002; therefore, two months was a very short timeframe to decide such a complex matter. The State also argued that the petitioners, as non-governmental organizations, were authorized to take advantage of the public civil action, regulated by Law No. 7,347/85, established to defend rights of a diffuse or collective nature. Moreover, the State cited a series of public civil actions filed by one of the petitioner organizations in other cases and concluded that the Convention did not authorize the petitioners not to make use of existing domestic remedies.

39. The State also indicated that the indigenous people had always had the necessary means and remedies to contest the process of identifying and compensating the non-indigenous occupants of their land, as well as to achieve the forced removal of non-indigenous persons. Consequently, the failure to file those domestic remedies meant that it was inadmissible to submit the case to the Inter-American Court.

40. In addition, the State argued that it had not prevented or hindered the members of the Xucuru indigenous community from filing judicial remedies to claim compensation for supposed pecuniary and/or non-pecuniary damage as a result of the process of delimitation or for any other reason. It indicated that, to the contrary, Brazil's civil legislation granted the indigenous peoples, just as any other citizens, a series of rights that gave them full access to justice.

41. Lastly, the State argued that the Admissibility Report contained contradictions and omissions and also that the Commission had not ruled on the appropriate and effective remedies for each of the violations cited. In addition, the State asked that, if the Court should consider that the Commission's contradictions and omissions could be rectified, it should be allowed to again argue the matter of exhaustion of domestic remedies and the existence of appropriate remedies in light of the specific case.

42. The ***Commission*** indicated that the requirement of exhaustion of domestic remedies established in Article 46(1) of the American Convention was related to the alleged facts that violated human rights. It noted that the American Convention did not establish that additional remedies should be exhausted for the victims to be able to obtain compensation with regard to the facts regarding which the pertinent domestic remedies had either been exhausted or fell within the situations for the exception of the exhaustion of domestic remedies at the time

it ruled on admissibility. It argued that an interpretation such as that proposed by the State would not only place a disproportionate burden of proof on the victims, but would be contrary to the provisions of the Convention concerning the requirement to exhaust domestic remedies and the mechanism of reparation.

43. The Commission also indicated that although the State had argued the failure to exhaust domestic remedies during the admissibility procedure before the Commission, its arguments had been substantially different from those submitted to the Inter-American Court, so that the latter were time-barred.

D.2. Considerations of the Court

44. The Court has indicated that Article 46(1)(a) of the Convention establishes that, to determine the admissibility of a petition or communication lodged with the Commission pursuant to Articles 44 or 45 of the Convention, it is necessary that domestic remedies have been filed and exhausted in accordance with generally recognized principles of international law.[24]

45. Therefore, during the admissibility stage of a case before the Commission, the State must describe clearly the remedies that, in its opinion, have not yet been exhausted in order to safeguard the principle of procedural equality between the parties that must govern all proceedings before the inter-American system.[25] As the Court has repeatedly established, it is not the task of either this Court or the Commission to identify *ex officio* the domestic remedies that remain pending exhaustion, because it is not incumbent on the international organs to rectify the lack of precision of the State's arguments.[26] In addition, the arguments to support the preliminary objection filed by the State before the Commission during the admissibility stage must correspond to those submitted to the Court.[27]

46. In this case, at the admissibility stage, the State presented two briefs to the Commission, one on February 20, 2004, and the other on July 21, 2009. In both those briefs it argued that the case was inadmissible because the domestic remedies had not been exhausted, without indicating the remedies that should be exhausted, and also asserted that there had not been an unjustified delay in the domestic proceedings relating to the demarcation, titling and removal of non-indigenous occupants from the Xucuru indigenous territory. Subsequently on September 14, 2016, in its answering brief in the context of these proceedings before the Court, the State again referred to this preliminary objection and, for the first time, indicated various remedies that it considered that the members of the Xucuru indigenous community could have filed.

47. Based on the foregoing, the Court notes that the arguments to support the preliminary objection filed by the State before the Commission at the admissibility stage, do not correspond to those submitted to this Court. Consequently, even though the State did, in fact, present the objection of failure to exhaust domestic remedies during the processing of the case before the Commission, the Court notes that the State has only recently, during the

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[24] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987, para. 85, and *Case of Favela Nova Brasilia v. Brazil*, para. 77.

[25] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 28, and *Case of Favela Nova Brasilia v. Brazil*, para. 78.

[26] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Favela Nova Brasilia v. Brazil*, para. 78.

[27] *Cf. Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 29, and *Case of Favela Nova Brasilia v. Brazil*, para. 78.

contentious proceedings before this Court, specified which remedies it considered should be exhausted before having recourse to the inter-American system.

48. The Court considers that the arguments that the State presented to the Commission did not comply with the requirements of the preliminary objection of failure to exhaust domestic remedies. This is because it did not indicate at the adequate procedural moment, precisely and specifically, the domestic remedies that were pending exhaustion or that were underway, or provide the reasons why it considered that they were appropriate and effective. Therefore, the Court considers that this preliminary objection is inadmissible.[28]

V
EVIDENCE

A. Documentary, testimonial and expert evidence

49. The Court received diverse documents presented as evidence by the State, the representatives, and the Commission, attached to their principal briefs (*supra* paras. 4, 7 and 8). The Court also received the affidavits of expert witnesses Victoria Tauli-Corpuz and Christian Teófilo da Silva *[sic],* proposed by the Commission and the State, respectively. In the case of the evidence provided during the public hearing, the Court received the testimony of the witness José Sérgio de Souza and the opinion of expert witness Christian Teófilo da Silva both proposed by the State.

B. Admission of the evidence

B.1. Admission of the documentary evidence

50. In this case, as in others, the Court admits those documents presented by the parties and the Commission at the appropriate procedual opportunity (Article 57 of the Rules of Procedure) that were not contested or challenged, and the authenticity of which was not questioned.[29] It will now decide the disputes submitted concerning the admissibility of certain documents.

51. During the hearing, the Court's judges asked the parties for further information on the non-indigenous occupants of the territory of the Xucuru indigenous people. In response to this request, both the State and the representatives presented certain documentation together with their final written arguments. Subsequently, Brazil asked the Court to include a "supplementary document relating to annex 1" of their final written arguments.[30] The representatives asked the Court to reject this document considering that it represented an attempt to introduce evidence after the appropriate procedural stage, and also that the document had been prepared after the time limit for presenting the brief with final arguments, so that it could not be considered part of a brief submitted within the time limit. The Court notes that the content of the document challenged by the representatives is identical to annex 1 to their final written arguments; consequently, it does not constitute a hypothesis of time-barred evidence or an attempt to introduce time-barred evidence into the proceedings.

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[28] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil*, para. 93 and *Case of Favela Nova Brasilia v. Brazil,* para. 80.

[29] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988, para. 140, and *Case of Acosta et al. v. Nicaragua*, para. 20.

[30] The document refers to the non-indigenous occupants who are currently present on the indigenous lands of the Xucuru people (evidence file, folio 4276.2).

52. Lastly, the Court notes that the State presented various comments on the annexes provided by the representatives with their final written arguments.[31] Those comments refer to the content and probative value of the documents and do not entail an objection to the admission of this evidence.

B.2. Admission of the statements and expert opinions

53. The Court finds it pertinent to admit the statements made during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined in the order requiring them and the purpose of this case.

C. Assessment of the evidence

54. According to Articles 46, 47, 48, 50, 51, 57 and 58 of the Court's Rules of Procedure, and also its consistent case law concerning evidence and its assessment, the Court will examine and assess the documentary evidence forwarded by the parties and the Commission, together with the statements and the expert opinions, when establishing the facts of the case and ruling on the merits. To this end, it will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the whole body of evidence and the arguments submitted during the proceedings.[32]

VI
PRELIMINARY CONSIDERATION

55. The representatives of the presumed victims did not present their brief with pleadings, motions and evidence. However, they took part in the public hearing and submitted their brief with final arguments, at which time they presented facts, together with arguments on the violation of rights, and also claims for reparations.

56. Regarding the procedural moment to present documentary evidence, according to Article 57 of the Rules of Procedure[33] this should generally be presented together with the briefs submitting the case or with the pleadings and motions, or in the answering brief, as applicable. The Court recalls that evidence submitted outside the appropriate procedural opportunities is not admissible, subject to the exceptions established in Article 57(2) of the Rules of Procedure; namely, *force majeure*, serious impediment, or evidence that refers to an event that occurred after the said procedural moments.

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[31] The State presented various comments on annexes 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 and argued that they included considerations on the so-called "process of criminalizing leaders of the Xucuru people." It considered that this was not pertinent for the purpose of the litigation and exceeded the Court's request for clarification by representing a return to arguments that the Commission had expressly rejected as being inconsistent.

[32] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. Judgment of March 8, 1998. *Merits*, para. 76, and *Case of Favela Nova Brasilia v. Brazil,* para. 98.

[33] Rules of Procedure of the Inter-American Court of Human Rights: Article 57. Admission 1. Items of evidence tendered before the Commission will be incorporated into the case file as long as they have been received in adversarial proceedings, unless the Court considers it indispensable to duplicate them. 2. Exceptionally, and having heard the opinion of all those participating in the proceedings, the Court may admit evidence if the party that has offered it adequately explains that the evidence was not presented or offered at the procedural moments established in Articles 35(1), 36(1), 40(2), and 41(1) of these Rules of Procedure due to *force majeure* or serious impediment. Additionally, the Court may admit evidence that refers to an event which occurred after the procedural moments indicated.

57. Regarding the failure of the presumed victims' representatives to present a pleadings and motions brief, in application of Article 29(2) of the Rules of Procedure,[34] in other cases the Court has allowed the parties to take part in certain procedural actions, taking into account the stages that would have concluded and the stage at which they enter the proceedings. In those cases, the Court considered that, due to the failure to present the pleadings and motions brief, it would not assess any argument or evidence presented by the representatives that added to the case further facts, other rights that were alleged to have been violated or presumed victims, or claims for reparations and costs other than those requested by the Commission, because they had not been submitted at the appropriate procedural moment (Article 40(1) of the Rules of Procedure). Likewose, the Court recalls that the final arguments are essentially an opportunity to systematize the factual and legal arguments presented opportunely.[35]

58. Consequently, based on the adversarial and procedural preclusion principles applicable to the proceedings before the Court, the representatives' pleadings and motions will not be taken into account, unless they relate to those submitted by the Commission.

VII
FACTS

59. In this chapter, the Court will describe the context of the case and the specific facts that fall within the Court's temporal jurisdiction. The facts that took place prior to the date on which Brazil ratified its acceptance of the Court's contentious jurisdiction (December 10, 1998) will only be included as part of the context and background of the case.

A. Context

A.1. The Xucuru indigenous people

60. The historical references to the Xucuru indigenous people go back to the sixteenth century in the state of Pernambuco. Various historical documents describe the areas occupied by the Xucuru throughout the eighteenth century. Currently, the so-called Xukuru people of Ororubá is composed of 2,354 families, who live in 2,265 dwellings. The Xucuru indigenous land is home to 7,726 indigenous individuals distributed in 24 communities within a territory of approximately 27,555 hectares, in the municipality of Pesqueira, state of Pernambuco. In addition, around 4,000 indigenous individuals live in Pesqueira outside the indigenous land.[36]

61. The Xucuru people have their own organization, with political and power structures, including the Assembly, the Cacique and Deputy Cacique, the Ororubá Indigenous Health

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[34] Rules of Procedure of the Inter-American Court. Article 29(2): "When […] alleged victims or their representatives […] enter a case at a later stage in the proceedings, they shall participate in the proceedings at that stage."

[35] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, paras. 19 and 22; *Case of J. v. Peru. Preliminary objection, Merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 34; *Case of Liakat Ali Alibux. v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 275, para. 29; *Case of Pollo Rivera et al. v. Peru. Merits, reparations and costs*. Judgment of October 21, 2016. Series C No. 319, para. 23, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329. para. 288.

[36] The representatives answer to a request for information by the Court of March 3, 2017 (merits file, folios 464 to 466); Vânia Fialho. *Estratégias* e *Tentativas de Regularização da Terra indígena Xucuru*. Report cited by the Ministry of Justice/FUNAI/Land Affairs Directorate/CGID (evidence file, folios 1003 to 1007). Ministry of Health/ Indigenous Law Secretariat. Memorandum No. 04/2017 of March 3, 2017. Family registration information from the Indigenous Health Care Information System (SIASI) (evidence file, folio 469).

Council, an internal committee for resolving problems in the community, a Council of Leaders, and a Shaman (*Pajé*) (the spiritual leader of the community and of the leaders of the people).[37]

A.2. Laws for the recognition, demarcation and titling of indigenous lands in Brazil

62. The 1988 Constitution of the Federative Republic of Brazil (hereinafter "the Constitution") accords constitutional rank to the rights of the indigenous peoples to their lands, territories and resources. According to Article 20 of the Constitution, the indigenous areas are the property of the Union which grants permanent possession to the indigenous peoples,[38] together with the exclusive usufruct of the resources they contain.[39]

63. Since 1996, the administrative process of demarcating and titling indigenous lands is regulated by Decree No. 1775/96 and Ministry of Justice Decree No. 14/96. There are five stages to the demarcation process and it is implemented based on the initiative and leadership of the National Indigenous Peoples' Foundation (hereinafter FUNAI); however, the final administrative act of demarcation is an exclusive attribute of the President of the Republic. The administrative process starts when FUNAI becomes aware of indigenous land that needs to be demarcated or based on a request by the indigenous people themselves, their own organizations or non-governmental organizations. When the requests have been examined and the urgency of demarcation becomes known, the public administration has discretional powers as to whether or not the process should commence.[40]

64. At the **first stage** (*identification and delimitation)* the procedure begins with the designation of a working group of public officials or experts by means of an order of the President of FUNAI. The work done by this group must be coordinated by an anthropologist. The anthropological report identifying the indigenous land verifies compliance with the constitutional requirements and substantiate the procedure.[41]

65. The working group presents the report on its work to FUNAI. In the report it analyzes whether or not the land has been traditionally occupied and proposes the area to be delimited. FUNAI may adopt the report, supplement it, or reject it. If the report is adopted, within 15 days a summary of the report, a descriptive memorandym and a map of the area must be published in the Official Gazette of the Union and in the official gazettes of the states in which the area to be demarcated is located. This must also be published in the town hall of the district where the territory is located.[42]

66. Following these publications, the states, municipalities and anyone possibly interested has 90 days to present objections against the procedure to FUNAI. The objections should contain all the evidence and factual and legal arguments, incluyendo property titles, expert appraisals, reports, witness statements, photographs and maps, in order to claim compensation or to prove total or partial deficiencies in the report.[43]

67. At the **second stage** (*declaration*), FUNAI has 60 days to analyze the objections, issue its opinion and, if applicable, forward the procedure to the Ministry of Justice. If the reasons

[37] The representatives brief of March 3, 2017 (merits file, folios 464 to 466).

[38] 1988 Constitution of the Federative Republic of Brazil, Article 20, paragraph XI.

[39] 1988 Constitution of the Federative Republic of Brazil, Article 231.

[40] Decree No. 1775 of January 8, 1996, article 1 (evidence file, folios 14 to 16).

[41] Decree No. 1775 of January 8, 1996, article 2 (evidence file, folios 14 to 16).

[42] Decree No. 1775 of January 8, 1996, article 2, §7 (evidence file folios, 14 to 16).

[43] Decree No. 1775 of January 8, 1996, article 2, §8 (evidence file, folios 14 to 16).

for the objection are admitted, FUNAI may re-examine its decision and rectify the defects in the procedure or change its decision to approve the territory and concerning compliance with the constitutional requirements for recognition of indigenous land.[44]

68. However, if the administrative procedure is forwarded to the Ministry of Justice, the latter may, within 30 days, reject the identification [made of the territory], and return the file to FUNAI. This decision must be founded on non-compliance with the provisions of the first paragraph of article 231 of the Constitution.[45] The Ministry of Justice may also order the necessary measures to rectify possible procedural defects.[46] Lastly, if the Ministry of Justice approves the administrative procedure, the land traditionally occupied by the indigenous people is declared by a decree of the Ministry of Justice, which determines the administrative demarcation of the area.[47]

69. At the **third stage** (*physical demarcation*), the physical demarcations is implemented following a detailed inspection of the area and, at that time, the sites described in the working group's report are identified.[48] Once the physical demarcation has been carried out, the **fourth stage** (*homologation*) consists in this being homologated by a presidential decree, the final act of the procedure that grants legal recognition to the new indigenous land.[49] Homologation is an act of a declaratory nature and recognizes the indigenous occupation and the nullity of acts aimed at the occupation, ownership and possession of the lands, their extinction and their inability to produce legal effects. It extinguishes any property title in the area demarcated,

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[44] Decree No. 1775 of January 8, 1996, article 2, §9 (evidence file, folios 14 to 16).

[45] Brazilian Federal Constitution. Chapter VII – Indigenous Peoples. Art. 231. [The Constitution] recognizes to the indigenous peoples their social organization, customs, languages, beliefs and traditions, and the original rights to the lands they have traditionally occupied, and it shall correspond to the Union to demarcate them, and to protect and ensure respect for all their rights.

§1 The lands traditionally occupied by indigenous peoples are those that they have inhabited permanently, those used for their productive activities, those that are essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, in accordance with their practices, customs and traditions.

§2 The lands traditionally occupied by indigenous peoples are assigned to their permanent possession, granting them the exclusive usufruct of the resources of the soil, the rivers and the lakes that exist in those lands.

§3 Exploitation of the water resources, including potential producers of energy, and exploration and exploitation of mineral wealth on indigenous lands can only be carried out with the authorization of the National Congress, after hearing the communities who may be affected, and ensuring them, by a law, participation in the results of the exploitation.

§4 The lands referred to in this article are inalienable and cannot be disposed of, and the rights attached to them are imprescriptible.

§5 It is prohibited to remove indigenous groups from their lands, unless this is agreed by the National Congress in cases of catastrophe or epidemic that jeopardize their population, or in the sovereign interests of the country, following a decision of the National Congress guaranteeing, in any context, immediate return when the danger has ceased.

§6 Any actions taken with the purpose of occupation, ownership or possession of the lands referred to in this article, or exploration of the natural resources of the soil, rivers or lakes that exist within them, shall be null and void, with the exception of the relevant public interests of the Union, as established in a supplementary law; and the nullity and extinction of the right to compensation or to actions against the Union for improvements derived from occupation in good faith shall not occur, except in the form of a law.

§7 The provisions of art. 174, §3 and §4 shall not be applicable to the indigenous lands.

[46] Decree No. 1775 of January 8, 1996, article 2, §10 (evidence file, folios 14 to 16).

[47] Decree No. 1775 of January 8, 1996, article 2, §10 (I) (evidence file, folios 14 to 16).

[48] Decree No. 1775 of January 8, 1996, article 2, §1 (evidence file, folios 14 to 16).

[49] Decree No. 1775 of January 8, 1996, article 5 (evidence file, folios 14 to 16).

which becomes the property of the Union. The homologated demarcation also authorizes the removal of non-indigenous occupants from the land.[50]

70. Finaly, at the **fifth stage** (*registration)*, within 30 days of the publication of the homologation decree, FUNAI must ensure the registration of the territory in the property register of the corresponding district and in the Union's Heritage Secretariat attached to the Ministry of Finance.[51]

B. Background (prior to acceptance of jurisdiction))

B.1. The administrative process of recognition, demarcation and titling of the Xucuru indigenous territory

71. When the procedures to demarcate the Xucuru territory begain, the demarcation process was not regulated by Decree No. 1775 of January 8, 1996; rather, it was determined by Decree No. 94,945 of 1987.[52] The process started in 1989, with the creation of the technical group to identify and delimit the territory under Ordinance No. 218/FUNAI/89. According to Decree 94,945/87, FUNAI should propose to demarcate the area based on the report of the technical group.[53] The technical group issued the report identifying the territory on September 6, 1989, indicating that the Xucuru had the right to an area of 26,980 hectares (first stage). The report was adopted by the President of FUNAI (Decision No. 3) of March 23, 1992, and, on May 28 that year, the Ministry of Justice awarded permanent possession of the land to the Xucuru indigenous people by Ordinance No. 259/MJ/92.[54] In 1995, the area of the Xucuru indigenous territory was rectified to 27,555.0583 hectares (second stage); subsequently, the physical demarcation of the territory was carried out[55] (third stage).

72. On January 8, 1996, the President of the Republic promulgated Decree No. 1775/96 (*supra* para. 63), which introduced changes in the administrative process of demarcation. The decree recognized the right of third parties with interests in the territory to contest the demarcation process and file judicial actions based on their right to property, as well as to request compensation.[56] Also, in cases in which the administrative process was underway, the interested parties had the right to contest this within 90 days of the date of publication of the decree.[57]

73. Around 270[58] objections to the demarcation process were filed by interested parties, including legal entities such as the municipality of Pesqueira. On June 10, 1996, the Ministry of Justice declared all these objections inadmissible in Decision No. 32. The interested third parties filed an application for amparo before the Superior Court of Justice (hereinafter "the STJ"). On May 28, 1997, the STJ decided in favor of the interested third parties, granting a

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[50] Decree No. 1775 of January 8, 1996, article 4 (evidence file, folios 14 to 16).

[51] Decree No. 1775 of January 8, 1996, article 6 (evidence file, folios 14 to 16).

[52] Decree No. 94,945 of September 23, 1987 (evidence file, folios 19 to 21).

[53] Decree No. 94,945 of September 23, 1987, article 3 (evidence file, folios 19 to 21).

[54] The State's final arguments of April 24, 2017 (merits file, folios 1044 to 1046).

[55] Merits Report (merits file, folio 19) and the State's answering brief (merits file, folio 207).

[56] Decree No. 1775 of January 8, 1996, article 2, §8 (evidence file, folios 14 to 16).

[57] Decree No. 1775 of January 8, 1996, article 9 (evidence file, folios 14 to 16).

[58] The Merits Report of the Inter-American Commission refers to 269 or 272 objections (merits file, folio 20), but there is no support for this in the evidence file. The State referred to 269 objections in its brief with final written arguments (evidence file, folio 1354).

new time limit for the administrative objections. The new objections were also rejected by the Ministry of Justice, which reaffirmed the need to continue the demarcation.[59]

B.2. Judicial action regarding the demarcation of the Xucuru indigenous territory

74. In March 1992, Milton do Rego Barros Didier and Maria Edite Didier filed repossession action No. 0002697-28.1992.4.05.8300 (originally No. 92.0002697-4) against the Xucuru indigenous people and the passive co-litigants: the Federal Public Prosecution Service (hereinafter "the MPF"), FUNAI and the Union.[60] This action related to Fazenda Caípe, of approximately 300 hectares, located within the Xucuru indigenous territory, in Pesqueira, which had been occupied by around 350 members of the Xucuru indigenous people in 1992.

75. Following an action on a jurisdictional conflict (CC 10,588) filed by the Pesqueira Court on June 17, 1994,[61] and decided by the STJ on December 14, 1994,[62] the case file of the repossession action was forwarded to the 9th Federal Court of the state of Pernambuco. On June 17, 1998, that court handed down judgment in favor of the non-indigenous occupants.[63] Subsequently, FUNAI,[64] the Xucuru indigenous people,[65] the Public Prosecution Service[66] and the Union[67] filed appeals.

B.3. Acts of violence in the context of the demarcation of the Xucuru indigenous territory

76. Cacique Xicão, leader of the Xucuru people, was murdered on May 21, 1998. The investigation determined that the mastermind of the murder was the landowner, José Cordeiro de Santana, known as "*Zé de Riva*," a non-indigenous occupant of the Xucuru territory. The perpetrator was identified as "Ricardo," who had been hired by the mastermind through an intermediary, Rivaldo Cavalcanti de Siqueira, known as "*Riva de Alceu*." "Ricardo" died in the state of Maranhão in an incident unrelated to the instant case.[68] José Cordeiro de Santana committed suicide while in the custody of the Federal Police.[69] Following the opening of police investigation No. 211/1998-SR/DPF/PE (98.0012178-1) before the 4th Federal Court of the state of Pernambuco, the Federal Public Prosecution Service filed an unconditional public action in August 2002 (action No. 2002.83.00.012442-1), charging Rivaldo Cavalcanti Siqueira as the perpetrator of the crime of manslaughter. The trial was reassigned to the 16th Federal Court of Pernambuco and, in November 2004, the Jury Court sentenced Rivaldo Cavalcanti

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[59] Considerations of the Inter-American Commission on Human Rights of November 2, 2015 (evidence file, folios 1127-1130); the State's final written arguments (evidence file, folio 1354).

[60] Repossession action No. 0002697-28.1992.4.05.8300 (evidence file, folios 1443 to 2720).

[61] Repossession action No. 0002697-28.1992.4.05.8300 (evidence file, folios 1859 to 1864).

[62] Repossession action No. 0002697-28.1992.4.05.8300 (evidence file, folios1887 to 1898).

[63] Judgment of the Federal Trial Judge of July 17, 1998 (evidence file, folios 2074 to 2083); Final arguments of the representatives of April 24, 2017 (merits file, folios 1096 to 1163).

[64] Appeal filed by FUNAI, (evidence file, folios 2097 to 2165).

[65] Appeal filed by the Xucuru indigenous people on August 25, 1998 (evidence file, folios 2191 to 2223).

[66] Appeal filed by the Federal Public Prosecution Service on September 8, 1998 (evidence file, folios 2226 to 2228).

[67] Appeal filed by the Union on October 23, 1998 (evidence file, folios 2236 to 2240).

[68] Memorandum No. 02/PGF/PFE/FUNAI/09 addressed by the Attorney General of the Union to FUNAI, of January 21, 2009 (evidence file, folios 98-100).

[69] Memorandum No. 02/PGF/PFE/FUNAI/09 addressed by the Attorney General of the Union to FUNAI, of January 21, 2009 (evidence file, folio 98).

Siqueira to 19 years' imprisonment. Mr. Cavalcanti Siqueira was murdered in 2006 while serving his prison sentence.[70]

C. Facts within the Court's temporal jurisdiction

C.1. Continuation of the demarcation process

77. The Court has no information on the steps taken in the administrative process of demarcation between December 10, 1998, and April 2001. On April 30, 2001, the President of the Republic issued the Presidential Decree that homolgated the demarcation of the Xucuru indigenous territory corresponding to an area of 27.555.0583 hectares (fourth stage). The decree was published in the Official Gazette of the Union on May 2, 2001.[71]

78. FUNAI requested registration of the territory with the Property Registry of the municipality of Pesqueira on May 17, 2001. However, the official in charge of the Pesqueira Property Registry filed an action raising concerns (*ação de suscitação de dúvida*), No. 0012334-21.2002.4.05.8300 (originally No. 2002.83.00.012334-9), regulated by Law 6,015/73, questioning formal aspects of FUNAI's request to register the indigenous property. According to the State and the Commission, this action was filed in August 2002. The final decision, confirming the legality of the registration of the property was issued by the 12th Federal Court on June 22, 2005.[72]

79. On November 18, 2005, the title to the Xucuru indigenous territory was issued by the 1st Property Registry of Pesqueira, as property of the Union for permanent possession by the Xucuru indigenous people[73] (fifth stage).

80. The process of regularizing lands in order to survey the non-indigenous occupants was started in 1989 with the territorial identification report, and concluded in 2007, resulting in 624 plots of land surveyed.[74] The procedure for the payment of compensation for bona fide improvements[75] begain in 2001, and the last payment was made in 2013, concluding the compensation of 523 non-indigenous occupants.[76] Of the remaining 101 lots, 19 belonged to the indigenous people themselves, and 82 were possessed by non-indigenous settlers. Of those 82 lots, 75 were occupied by the Xucuru between 1992 and 2012. At the date of this judgment, 45 former non-indigenous occupants had not received their compensation and, according to the State, they were in communication with the authorities to receive the respective payments for bona fide improvements.[77] Also, six non-indigenous occupants remain within the Xucuru indigenous territory.[78]

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[70] Trial and judgment in the unconditional criminal action (evidence file, folios 4282 to 4295).

[71] Available at http://www.planalto.gov.br/ccivil_03/DNN/2001/Dnn9198.htm. Last accessed January 5, 2018.

[72] Trial and judgment in the action raising concerns (evidence file, folios 25 to 29).

[73] Registration of the Xucuru indigenous land on November 18, 2005 (evidence file, folios 31 to 38).

[74] Technical Report No. 143/2016/CGAF/DPT–FUNAI, of August 10, 2016 (evidence file, folios 1429 to 1433).

[75] 1988 Constitution of the Federative Republic of Brazil, Article 231, §6.

[76] Technical Report No. 143/2016/CGAF/DPT–FUNAI, of August 10, 2016 (evidence file, folios 1429 to 1433).

[77] Technical Report No. 143/2016/CGAF/DPT–FUNAI, of August 10, 2016 (evidence file, folios 1429 to 1433).

[78] Executive Technical Order No. 214/2016/DPT-FUNAI, of July 26, 2016 (evidence file, folios 1412 to 1428). The six occupants who remain on the indigenous territory are Luiz Alves de Almeida, with two lots in Vila de Cimbres and Sítio Ramalho (corresponding to an area of 0.06 hectares and 102.3 hectares, respectively), Maria das Montanhas Lima, with one lot in near Sucupira village, Sítio Campina Nova (corresponding to an area of 6.78 hectares), Bernadete Lourdes Maciel, with one lot in Vila de Cimbres (corresponding to an area of 23.62 hectares), Jose Pedro do Nascimento, with one lot in Capim de Planta (corresponding to an area of 9.61 hectares), Jose Paulino da Silva, with one lot in Pé de Serra del Oiti (corresponding to an area of 7.06 hectares) and Murilo Tenorio de Freitas, with one lot in Ipanema (corresponding to an area of 11.00 hectares). The total territory of non-indigenous occupants represents

C.2. Continuation of the pending judicial actions relating to the demarcation of the Xucuru indigenous territory

81. Regarding the repossession action filed in March 1992, the judgment of July 17, 1998, was appealed by the MPF, FUNAI, the Xucuru indigenous people and the Union (*supra* para. 75). Civil Appeal No. 1718199-PE (originally No. 99.05.35132-9) was rejected in second instance by the Federal Regional Court of the 5th Region (hereinafter also "the TRF-5") on April 24, 2003.[79]

82. FUNAI[80] and the Union[81] filed a Special Appeal before the STJ and this organ rejected the appeal and confirmed the judgment of the TRF-5, on November 6, 2007.[82] The Union and FUNAI filed a series of requests for reconsideration (*embargos de declaração*)[83] and for review (*agravos de instrumento*)[84] before the STJ between 2007 and 2012. These appeals were rejected, with the exception of an appeal for clarification filed by the Union on February 8, 2010, which was decided favorably on May 10, 2011.[85]

83. The judgment in the repossession action became *res judicata* on March 28, 2014.[86]

84. On March 10, 2016, FUNAI filed a motion to set aside the judgment based on non-compliance with the right to adversarial hearings and to a full defense. The Federal Regional Court's decision on this action continues pending and no definitive solution has been reached in the dispute concerning this 300-hectare lot in the territory of the Xucuru indigenous people.[87]

85. In addition, in February 2002, Paulo Pessoa Cavalcanti de Petribu and others filed ordinary action No. 0002246-51.2002.4.05.8300 (originally No. 2002.83.00.002246-6), requesting the annulment of the administrative process of demarcation of the following properties located within the territory identified as part of the Xucuru indigenous land: the fazendas Lagoa da Pedra, Ramalho and Lago Grande, and the farms Capim Grosso and Pedra da Cobra.[88] The authors of the action argued that the demarcation should be annulled because they had not been notified personally in order to be able to submit objections to the administrative process.[89]

160.43 hectares of the entire Xucuru indigenous territory of 27,555.583 hectares. See, the State's final arguments of April 24, 2017 (merits file, folios 986 to 1086).

[79] Processing of Civil Appeal AC1718199-PE (evidence file, folios 54 to 57).

[80] Appeal filed by FUNAI on June 27, 2003 (evidence file, folios 2381 to 2401).

[81] Appeal filed by the Union on August 4, 2003 (evidence file, folios 2482 to 2486).

[82] Judgment of the STJ of November 6, 2007 (evidence file, folios 2516 to 2520).

[83] Appeal filed before the judge or court that delivered the judgment in order to clarify ambiguities and/or contradictions in that judgment; to correct the possible omission of points on which the judge should have ruled, and to correct possible material errors.

[84] Appeal against interlocutory decisions that could cause serious harm to one of the parties and be difficult to redress. The assessment of the appeal for review must be made immediately by the higher instance.

[85] Processing of the repossession action originally No. 0002697-28.1992.4.05.8300 (evidence file, folios 1443 to 2720); Processing of Special Appeal No. 646.933-PE, STJ decision of November 6, 2007 (evidence file, folios 59 to 75).

[86] Repossession action No. 0002697-28.1992.4.05.8300 (evidence file, folios 1443 to 2720).

[87] Details of the proceedings. Federal Justice System for the 5th Region (evidence file, folio 4006).

[88] Table forwarded by the State as helpful evidence (evidence file, folios 4034 to 4038).

[89] In December 2002, in addition to the ordinary action, the same authors also filed a request for an unnamed precautionary measure No. 0019349-71.2002.4.05.8300 (originally No. 2002.83.00.019349-2), to obtain pre-trial expert evidence regard the alleged invasion and destruction of Fazenda Lagoa da Pedra. The precautionary measure

86. On June 1, 2010, the 12th Federal Trial Court of Pernambuco decided that the ordinary action was partially admissible, excluding the Union as a respondent party, and determining that the authors had the right to receive compensation from FUNAI amounting to R$1,385,375.86. FUNAI and the Union filed an appeal against this judgment with the Regional Court of the 5th Region, which amended the first instance decision on July 26, 2012. In its decision, the TRF-5 recognized the Union as a party to the proceedings, recognized defects in the process to demarcate the Xucuru indigenous territory, but did not declare its nullification owing to the gravity of such a measure; however, it determined the payment of compensation for "losses and damage" in favor of the plaintiffs.[90] On December 7, 2012, FUNAI filed a special remedy before the STJ and an extraordinary remedy before the STF. The decisions of the STJ and the STF remain pending.[91]

C.3. Acts of harassment against leaders of the Xucuru indigenous people

87. The process of the delimitation, demarcation and freeing of the indigenous land of the Xucuru people of encumbrances was marked by a context of insecurity and threats[92] that resulted in the death of several of the indigenous community's leaders.[93]

88. The presence of non-indigenous occupants in the territory of the Xucuru people during the administrative process of its demarcation and the existence of outside interests gave rise to internal conflicts and discrepancies within the indigenous community itself.[94]

89. The son and heir of Cacique Xicão, Cacique Marquinhos, and his mother, Zenilda Maria de Araújo, were threatened owing to their position as leaders of the Xucuru indigenous people's struggle for the recognition of their ancestral lands.[95] In 2001, the threats were focused on Cacique Marquinhos.[96] The Inter-American Commission granted precautionary measures in favor of both of them on October 29, 2002.

was decided in favor of the non-indigenous occupants on December 9, 2009. See, proceedings and judgment of December 9, 2009, on the precautionary measure (evidence file, folios 59 to 75).

[90] Decision of the Federal Court of the 5th Region (evidence file, folios 2804 a 2813).

[91] Special appeal, Superior Court of Justice (evidence file, folio 2819).

[92] The State's report. Case of Xucuru. Special Human Rights Secretariat, Office of the President of the Republic, February 20, 2004 (evidence file, folios 187 to 198); Open letter from the Xucuru people to the population of Pesqueira and to all the pilgrims to Nossa Senhora das Graças of September 22, 2001 (evidence file, folios 169 to 170); File No. 1.26.000.000875/2001-39 of the Public Prosecution Service, Pernambuco Prosecutor General's Office, of March 16, 2003 (evidence file, folios 225 to 267); initial petition and request for precautionary measures of October 16, 2002 (evidence file, folios 333 to 363).

[93] File No. 1.26.000.000875/2001-39 of the Public Prosecution Service, Pernambuco Prosecutor General's Office of March 16, 2003 (evidence file, folios 225 to 267); Report on criminal acts against the Xucuru people of March 26, 2007 (evidence file, folios 565 and 566).

[94] The State's report. Case of Xucuru. Special Human Rights Secretariat, Office of the President of the Republic, February 20, 2004 (evidence file, folios 187 to 198); File No. 1.26.000.000875/2001-39 of the Public Prosecution Service, Pernambuco Prosecutor General's Office of March 16, 2003 (evidence file, folios 225 to 267); Report cited by the Ministry of Justice /FUNAI/Land Affairs Directorate/CGID (evidence file, folios 1003 to 1007); Annex 17. AD/Diper. Agencia de Desarrollo Económico de Pernambuco S.A. (evidence file, folios 172 to 184).

[95] Statement of Cacique Marquinhos in the context of the state's Program for the Protection of Human Rights Defenders of August 9, 2007 (evidence file, folios 712 and 713).

[96] Initial petition and request for precautionary measures of October 16, 2002.

90. Despite this, Cacique Marquinhos suffered an attempt on his life on February 7, 2003,[97] which resulted in the death of two members of the Xucuru people who were with the Cacique at that time.[98] These incidents triggered acts of violence in the indigenous territory.[99] As a result of this, approximately 500 members of the community were expelled from the Xucuru indigenous land and accommodated in the municipality of Pesqueira.[100]

91. On March 20, 2003, the National Human Rights Council (CDDPH) set up a special commission to monitor the investigation into the attempted murder of Cacique Marquinhos and related acts.[101] Lastly, the Cacique was included in the Pernambuco Program for the Protection of Human Rights Defenders in 2008.[102]

VIII
MERITS

92. In this chapter, the Court will develop pertinent legal considerations with regard to the alleged violations of the rights to property, judicial guarantees and judicial protection, and also to personal integrity, all in relation to the process to demarcate, free of encumbrances and title the territory of the Xucuru Indigenous people and its members.

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[97] Report on the attack against Cacique Marquinhos on the website "JC OnLine" on February 7, 2003 (evidence file, folio 567); Statement of Cacique Marquinhos in the Federal Police Station in Caruaru on September 10, 2009 (evidence file, folio 570).

[98] Report of the General Coordination for the Defense of Indigenous Rights (CGDDI) (evidence file, folios 199 to 204).

[99] The State's report. Case of Xucuru. Special Human Rights Secretariat, Office of the President of the Republic. February 20, 2004 (evidence file, folios 187 to 198); Report of the General Coordination for the Defense of Indigenous Rights (CGDDI) (evidence file, folios 199 to 204).

[100] The State's report. Case of Xucuru. Special Human Rights Secretariat, Office of the President of the Republic, February 20, 2004 (evidence file, folios 187 to 198); Report of the General Coordination for the Defense of Indigenous Rights (CGDDI) (evidence file, folios 199 to 204).

[101] Resolution No. 18 of March 20, 2003 (evidence file, folio 205).

[102] Communication of the State of July 20, 2013, in the precautionary measures file (evidence file, folios 102 to 109); *Defensores e Defensoras de Direitos Humanos – O enfrentamento das desigualdades em Pernambuco* [Human Rights Defenders – Confronting inequalities in Pernambuco], publication of the Pernambuco Program for the Protection of Human Rights Defenders (evidence file, folios 111 to 115); Public hearing before the Inter-American Commission, February 27, 2003.

VIII-1
RIGHTS TO PROPERTY,[103] JUDICIAL GUARANTEES[104] AND JUDICIAL PROTECTION[105]

93. In this chapter, the Court will examine the alleged violations of the right to collective property of the Xucuru indigenous people and the alleged ineffectiveness of the administrative process for the recognition, demarcation, titling, registration and freeing of encumbrances of the territory. To this end, the Court will include considerations on: (i) the right to collective property and the principle of legal certainty; (ii) the obligation to ensure the right to collective property and the principle of legal certainty; (iii) the guarantee of a reasonable time and the effectiveness of the administrative process, and (iv) the application of the preceding legal precepts to this specific case. Lastly, the Court wil analyze: (v) the alleged failure to comply with the obligation to adopt domestic legal provisions established in Article 2 of the American Convention.

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[103] Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law

[104] Article 8. Right to a Fair Trial (Judicial guarantees).

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees

a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court

b) prior notification in detail to the accused of the charges against him

c) adequate time and means for the preparation of his defense;

d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g) the right not to be compelled to be a witness against himself or to plead guilty; and

h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

[105] Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b) to develop the possibilities of judicial remedy; and

c) to ensure that the competent authorities shall enforce such remedies when granted.

A. Arguments of the parties and of the Commission

94. The ***Commission*** indicated that the indigenous peoples' right to collective property had specific characteristics owing to their special relationship to their traditional lands and territories, on the integrity of which their very survival as a people depended, and this was a matter requiring international legal protection. Indigenous territory was a form of property that was not founded on official recognition by the State, but on the traditional use and possession of the lands and resources.

95. Regarding the obligation to recognize and demarcate the lands, the Commission argued that this procedure constituted the means by which legal certainty was granted to collective ownership by the indigenous peoples and prevented conflicts with different actors because it established the basis for those peoples to achieve the possession and peaceful use of their lands and territories by freeing these of encumbrances.

96. In relation to the violations derived from the obligation to free the indigenous territory of encumbrances promptly, the Commission indicated that, in the instant case, the State's international responsibility was constituted as a result of the years during which the Xucuru indigenous people were unable to exercise the peaceful possession of their lands and territories owing to the presence of non-indigenous persons on that territory. It stressed that, in the instant case, the State had the duty to free the demarcated indigenous lands of encumbrances, completing the compensation payments for the bona fide improvements made by non-indigenous third party occupants and, in this way, permitting their removal from the lands of the indigenous people.

97. According to the Commission, the violations derived from the delay in the settlement of the judicial actions filed by non-indigenous third parties in 1992 and 2002 were due to the fact that they remained undecided indefinitely, giving rise to a permanent threat to the right to collective property and constituting a factor of increased legal uncertainty for the Xucuru indigenous people. On this basis, the Commission concluded that the State was responsible for the violation of Article 21, in relation to Articles 1(1) and 2 of the American Convention.

98. With regard to judicial guarantees and judicial protection, the Commission considered that the State had not demonstrated that the administrative process for the demarcation of the territory of the Xucuru people involved aspects or disputes that were particularly complex in relation to the delay of more than 16 years to conclude the administrative process of recognition, demarcation and titling of the indigenous territory. Consequently, the Commission considered that the duration of the administrative process was not reasonable pursuant to the provisions of the American Convention.

99. According to the Commission, the State's argument concerning the complexity of the registration of the indigenous territory and the number of non-indigenous occupants was unrelated to, and had no causal nexus with, the delay in the administrative process because, as the file itself showed, the identification of those occupants in order to free the land of encumbrances was not determinant to complete the stages of this process. The Commission emphasized that, in practice, this took place in parallel and continued after the stages had been completed.

100. The Commission indicated that no final judgment had been handed down on the judicial actions filed by non-indigenous occupants of the Xucuru indigenous territory for more than 20 and 12 years, respectively, and this was incompatible with the principle of a reasonable time established in the Convention. The delay in the settlement of the two judicial actions constituted a permanent threat to the right to collective property, as a result of the failure to

decide them promptly and within a reasonable time. Consequently, the State was responsible for the violation of Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the Xucuru indigenous people.

101. The ***representatives*** indicated that the process of demarcating the indigenous land had still not been finalized and it should be considered that, for 27 years, the Xucuru people had been waiting to obtain the peaceful and exclusive enjoyment of their territory.

102. They underscored that the Xucuru indigenous people's actual situation had led to instability and uncertainty for three reasons: (i) the presence of six non-indigenous occupants, who possessed seven lots, and who continued living in the territory without the people's consent; (ii) the existence of other former occupants, who were no longer on the land, but who had not yet received the compensation they were owed, and (iii) the failure to decide the action filed by Paulo Petribu and the unfavorable court decision ordered the return of possession to Milton Didier and Maria Edite Didier, which is enforceable. According to the representatives, this represented a violation of the rights of the indignous peoples recognized in the American Convention, preventing the Xucuru indigenous people from living in their territory peacefully and without threats.

103. The representatives emphasized that the State erred when it argued that there was a situation of peaceful coexistence to excuse itself from its responsibility of concluding the demarcation process. This was because, first, it was necessary to consider the history of murders and threats against the indigenous people by the non-indigenous occupants who remained on the territory and, second, because the legal structure of the demarcation process established the obligation to free the territory of encumbrances without it being necessary to examine whether the indigenous people consent to this.

104. They also indicated that, from the start of the demarcation process and up until the registration of the Xucuru people's indigenous territory, the institutional protection of the indigenous people was guaranteed formally; however, in practice, the administrative process did not provide access to the full enjoyment of their rights to their original territory, protection and legal certainty.

105. In conclusion, the representatives argued that the Brazilian State had violated the right to collective property established in Article 21, in relation to the obligations of Articles 1(1) and 2 of the American Convention, as a result of the delay in the demarcation and titling process and the failure to free the collective property of non-indigenous occupants.

106. Regarding the rights to judicial guarantess and judicial protection, the representatives argued that the administrative process for the delimitation and demarcation of the land of indigenous peoples is divided into different stages that are part of a process that should move forward successively without any type of complication. However, in the case of the indigenous territory of the Xucuru people, the implementation of each of these stages did not occur automatically, exposing the indigenous people to a series of threats and legal uncertainties. Regarding the judicial actions filed by non-indigenous individuals, they asserted that these exceeded a reasonable duration pursuant to the parameters established in the Convention. The actions filed by third parties were not complex; therefore, there was no justification for them to take so long, and this had increased the adverse effects of the prior situation. Consequently, the representatives concluded that the State had violated Articles 8 and 25 in relation to the obligations established in Articles 1(1) and 2 of the Convention.

107. The ***State*** argued that the laws of Brazil guaranteed greater protection for the indigenous communities, establishing permanent possession of the land, which is inalienable,

imprescriptible and immune from seizure. It is the indigenous peoples who had the exclusive usufruct of the resources of the soil, rivers, lakes, etc., respecting their social organization, customs, languages, beliefs and traditions. The Constitution established the obligation of the Union to delimit and protect the indigenous lands.

108. The State also indicated that it was not possible to consider a violation of the guarantee of access to justice in relation to the administrative process of demarcation, because this is a process initiated *ex officio* by the State in compliance with the Constitution. Despite the possibility that they can take part in all stages of the administrative process of demarcation, the indigenous peoples are not the authors, but rather the beneficiaries, of the State's actions and of the result of the administrative process. According to the State, it was unreasonable to declare a violation because the last of the non-indigenous occupants had not been removed, without taking into account that the land had been demarcated and titled for more than a decade.

109. Regarding the presence of non-indigenous occupants in the Xucuru indigenous land, the State argued that, during a recent official inspection, it had verified that, currently, this was insignificant, peaceful and accepted by the indigenous people. Consequently, the State alleged that it had ensured the peaceful possession of the territory of the Xucuru indigenous people with the payment of more than 84% of the compensation owed to the former occupants. Also, today, the indigenous people possessed almost all the former occupied areas, and only seven plots of land remained in the hands of non-indigenous occupants.

110. Lastly, the State argued that the right to collective property of the Xucuru indigenous people had not been violated, since there had not been an unjustified delay either in the demarcation process or in the titling and freeing the indigenous land of encumbrances. Accordingly, Brazil concluded that it had not violated Article 21 in relation to the obligations established in Articles 1(1) and 2 of the American Convention.

111. The State indicated that, during the administrative process and the judicial actions filed by non-indigenous third parties, the members of the Xucuru indigenous community had not met the requirements to be passive subjects of those measures. Therefore, there was no reason to allege the violation of Article 8 in relation to the obligations established in Article 1(1) of the American Convention.

112. The State also argued that the demarcation of indigenous lands was a complex task. It justified this by the need for transparency in the procedure and the possibility of all the parties intervening, especially the non-indigenous occupants who had historically settled on that territory in good faith. The existence of conflicts and resistance by the non-indigenous occupants and even among the members of the Xucuru indigenous people represented a complex factual reality, so that "if there was a delay, this is justified by the reality."

113. Regarding the action raising concerns, the State indicated that this had not questioned the indigenous nature of the land, the appropriateness of the demarcation process or the right to permanent possess of the Xucuru people, which was protected by the Constitution as an original rights, because demarcation was a declaratory procedure concerning a pre-existing right, and registration merely a public act. The act of registering the demarcated land entailed factual complexity and had effects on third-party rights. Even if it were considered that the registration of the Xucuru indigenous land was a legitimate measure to publicize the indigenous possession of this territory, the concerns raised by the Pesqueira property registry official should not be considered unreasonable. On this basis, the State considered that there had not been an unjustified delay either in the process to demarcate the indigenous land or in the titling of permanent possession.

114. In addition, with regard to the two judicial actions, the State argued that it had complied with its constitutional duty to ensure the right of access to justice, and had not violated the international obligations established in the American Convention. According to the State, it was evident that the resolution of judicial proceedings required time, a circumstance that had an impact on the duration of the administrative process of demarcation. Also, denying access to justice to non-indigenous persons would be acting arbitrarily. It added that confusion between Articles 8 and 25 of the Convention should be avoided and they should not be interpreted in the same way to arrive at the same result. The State concluded that it had not violated Articles 8(1) and 25 in relation to the obligations established in Article 1(1) of the Convention.

B. Considerations of the Court

B.1. The right to collective property in the American Convention

115. The Court recalls that Article 21 of the American Convention protects the close ties that the indigenous peoples have with their lands, as well as with the natural resources and incorporeal elements derived from them. Indigenous and tribal peoples have a shared tradition concerning a communal form of collective ownership of the land, in the sense that its possession is not centered on the individual but rather on the group and its community.[106] This notion of ownership and possession of the land does not necessarily conform to the classic concept of property and possession; however, the Court has established that it deserves equal protection under Article 21 of the American Convention. Disregarding specific versions of the right to the use and enjoyment of property, based on the culture, practices, customs and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property which, in turn, would render protection under Article 21 of the Convention illusory for these groups.[107] To disregard the ancestral right of members of indigenous communities over their territories could adversely impact other basic rights such as the right to cultural identity and the very survival of the indigenous communities and their members.[108]

116. This Court's case law has repeatedly recognized the indigenous peoples' right to property in relation to their traditional territories and the duty of protection derived from Article 21 of the American Convention, in light of the provisions of ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, as well as the rights recognized by the States in their domestic laws or in other international instruments and decisions, all of which form a *corpus juris* that defines the obligations of the States Parties to the American Convention, in relation to the protection of the rights relating to indigenous property.[109] Therefore, when analyzing the meaning and scope of Article 21 of the Convention in the instant case, the Court will take into account, based on the general rules of

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[106] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79, para. 149, and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs.* Judgment of November 25, 2015. Series C No. 309, para. 129.

[107] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, para. 120, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*. *Merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 305, para. 100.

[108] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of June 17, 2005. Series C No. 125, para. 147, and *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*. *Preliminary objections, merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 284, para. 18.

[109] *Cf. Juridical Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03* of September 17, 2003. Series A No. 18, para. 120; *Case of the Yakye Axa Indigenous Community v. Paraguay,* paras. 127 and 128, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 103.

interpretation established in Article 29(b) of this instrument and as it has previously,[110] the aforementioned special interrelatedness of collective ownership of the land for the indigenous peoples, as well as the measures that the State contends that it has carried out to make those rights fully effective.[111]

117. In addition, the Court recalls its case law with regard to the communal ownership of indigenous lands according to which, *inter alia*: (1) the traditional possession of indigenous peoples over their lands has the same effects as the title of full ownership granted by the State; (2) traditional possession grants the indigenous peoples the right to require official recognition of ownership and its registration; (3) members of indigenous peoples who, for reasons beyond their control, have left or lost possession of their traditional lands maintain the right to ownership of such lands, even without legal title, except when those lands have been legitimately transferred to third parties in good faith; (4) the State must delimit, demarcate and grant collective title to the lands of the members of the indigenous communities;[112] (5) members of indigenous peoples who, involuntarily, have lost the possession of their lands, and these have been transferred legitimately to third parties in good faith, have the right to recover them or to obtain other land of the same area and quality;[113] (6) the State must ensure the effective ownership of the indigenous peoples and refrain from taking actions that could result in agents of the State itself, or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use or enjoyment of their territory;[114] (7) the State must ensure the right of the indigenous peoples to control effectively and be owners of their territory without any type of external interference by third parties,[115] and (8) the State must esnure the right of the indigenous peoples to the control and use of their territory and natural resources.[116] Accordingly, the Court has asserted that the use of the land is not a privilege that can be taken away by the State or eclipsed by rights to property of third parties; rather it is a right of members of indigenous and tribal peoples to obtain the titling of their territory in order to ensure the permanent use and enjoyment of this land.[117]

118. The Court has also established that the State's failure to delimit and demarcate effectively the borders of the territory over which there is a right to collective property of an indigenous people may create a climate of permanent insecurity among the members of the peoples concerned because they have no certainty about the geographical borders of their

[110] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 148; *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama,* para. 113, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 103.

[111] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay,* para. 124, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 103.

[112] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 105.

[113] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 128, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 109, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 131.

[114] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 132.

[115] *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, para. 115, and *Case of the Kaliña and Lokono Peoples v. Suriname.* para. 132.

[116] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 146, and *Case of the Kaliña and Lokono Peoples v. Suriname.* para. 132.

[117] *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 211, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 105.

right to collective property and, consequently, cannot know the limits to their free use and enjoyment of the respective property and its resources.[118]

119. The Court has also established that, based on the principle of legal certainty, the territorial rights of indigenous peoples must be realized by the adoption of the necessary administrative and legislative measures to create an effective mechanism for the delimitation, demarcation and titling that recognizes these rights in practice.[119] This is because the recognition of the right to indigenous collective property must be ensured by the granting of a formal property title or a similar form of State recognition that provides legal certainty to the indigenous ownership of the land *vis-à-vis* the actions of third parties or agents of the State itself. A merely abstract or legal recognition of indigenous lands, territories or resources is meaningless if the property is not physically delimited and demarcated.[120] At the same time, this demarcation and titling must result in the effective and peaceful use and enjoyment of collective property.

120. In the instant case, the Court observes that a dispute exists between the parties regarding the scope of Brazil's international obligations. In particular, both the Commission and the representatives argue a violation of the right to collective property owing to two aspects of the lack of legal certainty: (i) regarding the right to property in relation to the Xucuru territory and the ineffectiveness of the actions taken by the State to register and title the territory, and (ii) regarding the lack of legal certainty for the use and enjoyment of the property owing to the delay in freeing the territory of non-indigenous occupants. Consequently, the Court will proceed to offer some considerations on the scope of the obligations derived from the general duty to ensure rights in relation to Article 21 of the Convention, and also their relationship to the notion of "legal certainty" in light of international human rights law. The purpose of this is to determine whether the acts and alleged omissions of the Brazilian State engaged its international responsibility by a failure to comply with the general obligation mentioned above, as well due to the ineffectiveness of the administrative processes.

B.2. The duty to guarantee the right to collective property and legal certainty

121. This Court has repeatedly asserted that Article 1(1) of the Convention has two aspects. On the one hand, is the (negative) obligation to respect rights which means that States must refrain from committing acts that violate the fundamental rights and freedoms recognized in the Convention;[121] on the other hand are the (positive) obligations of States to ensure rights. These obligations entail the duty of the State Party to organize the whole government apparatus and, in general, all the structures through which the exercise of public power is manifested, so that they are able to ensure, legally, the free and full exercise of human rights.[122] These obligations are constituted and must be implemented in different ways, depending on the right in question. For example, it is evident that to ensure equality and non-

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[118] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 106.

[119] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 133.

[120] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 143, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 133.

[121] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala,* para. 139; *Case of Castillo González v. Venezuel*a, para. 122; *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras,* para. 208, and *Case of Velásquez Paiz et al. v. Guatemala*. *Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2015. Series C No. 307, para. 106.

[122] *Cf. Case of Velásquez Rodríguez v. Honduras*. Merits, para. 166 and 167, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 207.

discrimination *de jure* and *de facto* does not require the State to take the same actions as to ensure the free use and enjoyment of property or, as in this case, the collective property of indigenous people.

122. The principle of legal certainty is very closely linked to the foregoing. This principle guarantees, among other matters, stability in legal situations and is a fundamenal element to ensure the public's confidence in democratic institutionality. This confidence constitutes one of the basic elements of the rule of law,[123] provided it is based on a real and effective certainty of the fundamental rights and freedoms. This Court agrees with its European peer in the sense that this principle is implicit in all the articles of the Convention.[124] In contrast, the lack of legal certainty may arise due to legal or administrative aspects or to State practices[125] that diminish public confidence in the institutions (judicial, legislative or executive) or in the enjoyment of the rights or obligations recognized through them, and may result in instability in relation to the exercise of the fundamental rights, and legal situations in general.

123. Therefore, for this Court, legal certainty – among other concepts – is ensured when there is confidence that the fundamental rights and freedoms will be respected and ensured to all persons subject to the jurisdiction of a State Party to the American Convention. This, as already explained, may occur by different means depending on the specific situation and the human right in question.

124. In the paticular situation of indigenous peoples, expert witness Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples, noted that to ensure the use and enjoyment of the right to collective property, States must ensure that there is no external interference in the traditional territories;[126] in other words, States must remove any type of interference in the territory in question by freeing it of encumbrances[127] so that the exercise of the right to property has real and tangible content. Expert witness Carlos Frederico Marés de Souza Filho expressed the same opinion during the proceedings.[128] A recognition that is merely abstract or legal of the indigenous lands, territories or resources is meaningless if the communities or peoples concerned are unable to exercise their right fully and peacefully. Freeing the territory of encumbrances entails not only evicting bona fide third parties or those who illegally occupy the demarcated and titled territories, but also ensuring their peaceful possession and that the titled property has no hidden defects; that is, it is free of obligations or liens that benefit third parties. If this is not verified, the Court finds that it is clear that the right to collective property has not been fully guaranteed. Therefore, the Court considers that the administrative processes of delimitation, demarcation, titling and freeing indigenous territories of encumbrances are mechanisms that ensure legal certainty and protection of this right.

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[123] ECHR. *Case of Vinčić and Others v. Serbia*, No. 44698/06. Judgment of December 1, 2009, para. 56. See also, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 192

[124] ECHR. *Case of Beian v. Romania (No. 1)*, No. 30658/05. Judgment of December 6, 2007, para. 39, and *Case of Brumărescu v. Romania* [Grand Chamber], No. 28342/95. Judgment of November 10, 1999, para. 61. See also, Advisory Opinion OC-24/17, para. 192

[125] ECHR. *Case of Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05. Judgment of October 20, 2011, para. 56. See also, Advisory Opinion OC-24/17, para. 192

[126] Affidavit with expert opinion of Victoria Tauli-Corpuz of March 17, 2017 (merits file, folio 715).

[127] *Case of the Punta Piedra Garifuna Community and its members v. Honduras*, para. 181.

[128] Affidavit with expert opinion of Carlos Frederico Marés de Souza Filho of March 12, 2017 (merits file, folio 650).

125. The foregoing does not mean that every time there is a conflict between private or State territorial interests and the territorial interests of members of indigenous communities the latter should prevail over the former,[129] and this Court has already ruled on the legal instruments required to resolve such situations.[130] The Court reiterates its case law that both the property of private individuals and the collective property of members of indigenous communities are protected by Article 21 of the American Convention.[131] In this regard, the Court has indicated that when there are conflicts of interests in relation to indigenous claims, or when the right to indigenous collective property and the private property of an individual enter into real or apparent conflict, it is necessary to assess on a case-by-case basis the legality, necessity, proportionality and achievement of a legitimate goal in a democratic society[132] (public or social interest), of restricting the right to private property on the one hand, and the right to traditional lands on the other,[133] without the restriction of the latter entailing the denial of their survival as a people.[134] The Court has defined the content of each of these parameters in its case law (*Case of the Yakye Axa Indigenous Community*[135] and thereafter).

126. That task corresponds exclusively to the State,[136] without any discrimination and taking into account the criteria and circumstances described above, including the special relationship that the indigenous peoples have with their lands.[137] However, the Court deems it pertinent to make a distinction between the weighing of rights that is sometimes necessary during a process of recognition, demarcation and titling of the territorial rights of the interested peoples and the process of freeing the territory of encumbrances. The latter will usually require that the collective property rights have already been defined.

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[129] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 149, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 158.

[130] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 149, 151 and 217, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 158.

[131] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay,* para. 143, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 155.

[132] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay,* paras. 144 and 146, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 155. Regarding the standard of proportionality see also: *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 51, and Case of *Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 127.

[133] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay,* para. 143, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 155.

[134] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay,* para. 143, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 155.

[135] Article 21(1) of the Convention stipulates that "[t]he law may subordinate such use and enjoyment to the interest of society." The need for legally established restrictions will depend on their being addressed at meeting an urgent public interest, and it is not sufficient that it is proved, for example, that the law has a useful and opportune purpose. The proportionality stems from the fact that the restriction must be closely adapted to achieving a legitimate purpose, interfering as little as possible in the effective exercise of the restricted right. Lastly, to be compatible with the Convention, restrictions must be justified by collective objectives that, owing to their importance, clearly predominate over the need for the full enjoyment of the restricted right. *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para.145 and *ff.,* and *Case of the Kaliña and Lokono Peoples v. Suriname,* para. 155.

[136] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 136 and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 156.

[137] States must bear in mind that the territorial rights of indigenous peoples encompass a different and broader concept that is related to the collective right to survival as an organized people, with control of its habitat as a necessary condition for the reproduction of its culture, for its development, and to implements its life projects. The ownership of the land guarantees that members of indigenous communities are able to conserve their cultural heritage. *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 146, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 156.

127. In this regard, the Court notes that, in Brazil, this weighing is not necessary, based on the Federal Constitution and its interpretation by the Federal Supreme Court,[138] which accords preeminence to the right to collective property over the right to private property, when the historical possession and traditional links to the territory of the original or indigenous people have been established. In other words, the rights of original or indigenous peoples prevail over bona fide third parties and non-indigenous occupants. Also, the State has asserted that it has the constitutional obligation to protect indigenous lands.[139]

128. It is also important to stress that, in Brazil, the titling of an indigenous territory is declaratory in nature and does not constitute the right. This act facilitates the protection of the territory and, consequently, constitutes an important stage to guarantee the right to collective property. In the words of the expert witness propsed by the State, Carlos Frederico Marés de Souza Filho, "when a piece of land is occupied by an indigenous people, the pubic authorities have the obligation to protect it, ensure respect for its resources and demarcate it. […] This means that the land does not need to be demarcated to be protected, but it must be demarcated as a obligation of the Brazilian State. Demarcations is a right and guarantee of the people who traditionally occupy it."[140] Therefore, demarcation is presumably an act of protection and not of creation of the right to collective property in Brazil, which is considered an original rights of the indigenous and tribal peoples.

129. Consequently, in the instant case the dispute revolves around determining whether the actions undertaken by the State in this specific case were effective to ensure this recognition of rights, and the impact of the delay in the processes on this recognition. The Court will also analyze whether the delay in deciding the judicial actions filed by non-indigenous third parties affected the legal certainty of the right to collective property of the Xucuru indigenous people.

B.3. The reasonable time and the effectiveness of administrative processes

130. This Court's case law has indicated in other cases that indigenous and tribal peoples have a right to the existence of effective and prompt administrative mechanisms to protect, ensure and promote their rights over indigenous territories, mechanisms through which it is possible to implement procedures for the recognition, titling, demarcation and delimitation of their territorial ownership.[141] These procedures must comply with the rules of due process of law contained in Articles 8 and 25 of the American Convention.[142]

131. Together with the foregoing, the Court has reiterated that the right of everyone to simple and prompt recourse, or any other effective recourse, to a competent judge or court for protection against acts that violate their fundamental rights "constitutes one of the basic pillars, not only of the American Convention, but of the rule of law itself in a democratic society

[138] STF. *Actio popularis*. Demarcation of the Raposa Serra do Sol indigenous land of March 19, 2009; Writ of mandamus MS 21575/MS - Mato Grosso do Sul, February 3, 1994; Direct action of unconstitutionality, ADI 1512/RR – Roraima, January 7, 1996; Point of order in the original civil action, ACO-QO 312/BA – Bahia, February 27, 2002; Writ of mandamus, MS 23862/GO – Goiás, March 4, 2004.

[139] *Cf.* Federal Constitution of Brazil, Article 231: The State shall recognize to the indigenous peoples their social organization, customs, languages, beliefs and traditions, and the originary rights to the lands they have traditionally occupied, and it shall correspond to the Union to demarcate those lands and to protect and ensure respect for all their resources.

[140] Affidavit with expert opinion of Carlos Frederico Marés de Souza Filho of March 5, 2017 (merits file, folio 642).

[141] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 138, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 227.

[142] *Cf. Case of Godínez Cruz v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 3, para. 92, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 227.

in the sense of the Convention."[143] In addition, with regard to indigenous and tribal peoples, it is essential that the State provide effective protection that takes into account their inherent particularities, their economic and social characteristics and situation of special vulnerability, and also their customary law, values, practices and customs.[144]

132. This Court has indicated that it is not sufficient that the law establishes procedures for the titling, delimitation, demarcation and freeing indigenouos or ancestral territories of encumbrances; rather, these procedures must produce practical effects. The Court has also indicated that such procedures must be effective, in the sense that they should provide a real possibility[145] for the indigenous and tribal communities to be able to defend their rights and exercise effective control of their territory without any external interference.[146]

133. In this regard, the Court shares the opinion of the United Nations Special Rapporteur on the rights of indigenous peoples who, in her expert opinion, indicated that "effectiveness"in the context of the case *sub judice* implied that the administrative procedure designed by the State would be prompt and able to regularize and guarantee the right of the indigenous peoples to use and enjoy their territories peacefully. In this specific case, this was not limited to the formal titling of communal property, but included the eviction of non-indigenous persons present in the said territory.

134. Although it is true that, in general, when analyzing the reasonable time the Court must consider the overall duration of a process,[147] in certain particular situations it may be pertinent to make a specific assessment of its different stages.[148] In the instant case, the Court must ascertain not only whether there was too long a delay in the administrative process, but also in the process of freeing the territories of the Xucuru people of encumbrances. Consequently, the Court will now examine the relevant actions taken in the administrative process and the freeing of the territory of non-indigenous occupants during the time it exercised its contentious jurisdiction; that is, from December 10, 1998, to the date of the delivery of this judgment.

135. This Court's case law has considered four elements to determine whether or not the guarantee of a reasonable time has been fulfilled, namely: (a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the judicial authorities, and (d) the effects on the legal situation of the person involved in the proceedings. Also, on previous occasion, the Court has found that it corresponds to the State to justify, based on the said criteria, the reason why it has required the time that has passed to process the case.[149]

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[143] *Cf. Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 82, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 228.

[144] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 63, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 228.

[145] *Cf. Case of the Court Constitutional Court v. Peru. Jurisdiction*. Judgment of January 31, 2001. Series C No. 71, para. 90, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 240.

[146] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nigaragua. Merits,* paras. 150 to 153, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 153.

[147] *Cf. Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of Tenorio Roca et al. v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2016. Series C No. 314, para. 239.

[148] *Cf. Case of the Afro-descendant Communities displaced from the Rio Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 403, and *Case of Tenorio Roca et al. v. Peru*, para. 239.

[149] *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Favela Nova Brasilia v. Brazil*, para. 218.

136. The Court considers that, pursuant to its case law,[150] the guarantee of a reasonable time should be interpreted and applied to ensure the rules of due process of law contained in Article 8 of the American Convention in administrative processes to implement the recognition, demarcation, delimitation and titling of indigenous peoples' property, especially when their purpose is to protect, ensure and promote the rights to indigenous territories.[151]

i. Complexity of the matter

137. This Court's case law has taken diverse criteria into account to determine the complexity of a matter. They include: (i) the complexity of the evidence;[152] (ii) the number of procedural subjects[153] or victims;[154] (iii) the characteristics of the remedies contained in domestic law,[155] and (iv) the context in which the facts occurred.[156]

138. More specifically, in cases of indigenous peoples in similar circumstances, the Court has considered that the determination of their rights does not involve legal aspects or discussions that can justify a delay of several years owing to the complexity of the matter.[157] Indeed, in the instant case, the Court has verified that the existence and scope of the right of the Xucuru people to their territories was not disputed when the State accepted the Court's contentious jurisdiction. The territory had been demarcated and it merely remained to free it of encumbrances and title it. The Court notes that the presidential homologation of the Xucuru territory occurred on April 30, 2001, two years and four months after the acceptance of the Court's contentious jurisdiction. However, it was not until November 18, 2005, that the definitive title of the said territory was formalized (*supra* para. 79). The State has not demonstrated the complexity that would explain the delay in finalizing the process of titling started in December 1998 that did not end until November 2005. Also, in the Court's opinion, the action "raising concerns" filed by the Presqueira property registry official was not complex because it was limited to a legal matter that had already been established and resolved by the Brazilian Constitution and other legal norms issued to regulate the process of recognition, demarcation, titling and registration of indigenous territories.

139. Nevertheless, the Court notes that, in certain circumstances, freeing indigenous territories of third party occupants may signify a complex task. This is due to factors such as

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[150] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 138, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 227.

[151] *Cf. Case of Godínez Cruz v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 3, para. 92. Similarly, see, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, paras. 97 and 98, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, paras. 227 and 251.

[152] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 78, and *Case of Favela Nova Brasilia v. Brazil*, para. 220.

[153] *Cf.* Case of *Acosta Calderón v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2005. Series C No. 129, para. 106, and *Case of Favela Nova Brasilia v. Brazil*, para. 220.

[154] *Cf.* Case of *Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 156, and *Case of Favela Nova Brasilia v. Brazil*, para. 220. Similarly, see, *Case of Baldeón García v. Peru. Merits, reparations and costs*. Judgment of April 6, 2006. Series C No. 147, para. 152; Case of *Vargas Areco v. Paraguay. Merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 155, para. 103, and *Case of Quispialaya Vilcapoma v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2015. Series C No. 308, para. 179.

[155] *Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, para. 83, and *Case of Favela Nova Brasilia v. Brazil,* para. 220.

[156] *Cf. Case of Genie Lacayo v. Nicaragua. Merits*. Judgment of January 29, 1997. Series C No. 30, paras. 78 and 79, and *Case of Favela Nova Brasilia v. Brazil,* para. 220.

[157] *Cf. Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, para. 181.

the size of the territory, its geographical characteristics, the number of third parties present in the territory, and the profile or characteristics of the individuals or groups of individuals that have to be evicted.

140. In the instant case, the Court has insufficient evidence to establish precisely how many individuals and plots of land were still occupied by non-indigenous third parties on December 10, 1998. The body of evidence in this case reveals that, in 1992, 70% of the Xucuru traditional territories were occupied by third parties in 624 plots or occupations. Also, according to the evidence provided by the parties, in 2016, this percentage had been reduced to 0.5%; specificially, six non-indigenous owners who still occupied seven plots covering 160.43 hectares of the Xucuru indigenous territory. In addition, the Court has verified that 45 compensation payments have not yet been paid to non-indigenous third parties who have already left the territory (*supra* para. 80).

141. Exclusively with regard to the process to free the territory of non-indigenous occupants, the Court considers that this was a complex and expensive procedure owing to the large number of non-indigenous owners. Nevertheless, it notes that the cadastral survey of non-indigenous occupants took 18 years (from 1989 to 2007) (*supra* para. 80); that is, nine years within the Court's jurisdiction. The Court has also verified that the procedure to pay compensation for bona fide improvements began in 2001, and the most recent payment was made in 2013, completing the compensation of 523 non-indigenous occupants. According to the statement of witness José Sergio de Souza during the public hearing, and information provided by the State, the payment of compensation was interrupted for several years on different occasions for budgetary reasons, as well as due to problems with the beneficiaries' documentation, and has still not been concluded. The State did not provide precise information on the percentage of Xucuru territory that remained pending freeing of encumbrances at December 10, 1998, or explain the specific complexity that, at the present time, has an impact on or explains the delay in freeing the Xucuru territory of non-indigenous occupants. Notwithstanding the fact that only six non-indigenous occupants remain in the Xucuru territory at the time this judgment is handed down, the Court notes that, despite the large number of non-indigenous occupants in the said territory at the start of the process of recognition and titling in 1989, the complexity and costs of the process of removing the non-indigenous occupants, there is no justification for the delay of almost 28 years – 19 of these within the Court's jurisdiction - in carrying out and concluding this process.

ii. The procedural activity of the interested parties

142. Regarding the second element, the Court must evaluate whether the interested parties intervened as they were reasonably required to at the different procedural stages.[158]

143. In this case, the Court considers that it has been proved that it corresponded to the State, through FUNAI, to initiate and expedite the administrative process of demarcation and titling, as well as freeing the territory of encumbrances. In this regard, the Court finds that the Xucuru people could not be required to intervene in the administrative process and no information or evidence is available that would allow the Court to infer that the delay in the process can be attributed to the members of the Xucuru indigenous people in any way.

iii. The conduct of the State authorities

[158] *Cf. Case of Fornerón and daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 242, para. 69, and Case of *Andrade Salmón v. Bolivia*, para. 158.

144. Regarding the conduct of the State authorities, the Court has understood that, as leaders of the process, "they have the duty to guide and process the judicial [or administrative] proceedings in a way that does not sacrifice justice and due process to formalism."[159]

145. In relation to this element, the Court observes different moments at which the failure of the State authorities to provide procedural impetus can be noted. The case file provided to the Court reveals that there was no significant progress in the administrative process from December 10, 1998, until 2001, when the presidential homologation of the demarcated lands occurred.

146. The Court observes that, although the presidential homologation of the demarcated territory occurred on April 30, 2001, FUNAI's request to register the property was contested by the Pesqueira property registry official in August 2002. This had a direct impact on the fact that the terrritories were not titled until November 18, 2005. The Court notes that the delay of four years to decide that action occurred despite its lack of complexity.[160] Therefore, the additional delay in the titling of the lands can be directly attributed to the procedural activity of the State and of the authorities who processed the action.

147. In addition, as regards the freeing of the territory of encumbrances, the Court considers that it leads to the same conclusion. The available evidence shows that the delay in this process occurred due to the State's budgetary or organizational difficulties. Consequently, the compensation of bona fide third parties and their removal from the territory took more than 20 years, 14 of these within the Court's contentious jurisdiction (*supra* paras. 77 to 80), and these procedures have not yet concluded.

iv. *The effects on the legal situation of the person involved in the proceedings*

148. With regard to this element, the Court has indicated that, in order to determine whether the time is reasonable it is necessary to take into account the effects caused by the duration of the proceedings on the legal situation of the persons involved, considering, among other aspects, the subject matter of the dispute. The Court has established that, if the passage of time has a relevant impact on the legal situation of the individual, it will be necessary that the proceedings are expedited with greater diligence in order to resolve the matter rapidly.[161] The Court considers that, in itself, the delay could entail an autonomous violation of the right to communal property and, therefore, it will be examined in detail in light of Article 21 of the American Convention (*infra* paras. 150 to 162).

149. Consequently, the Court finds that, based on the considerations outlined in this section, there is sufficient evidence to conclude that the delay in the administrative process was excessive; in particular, in the homologation and titling of the Xucuru territory. In addition, the time required by the State to free the titled territories of non-indigenous occupants cannot be justified. Therefore, the Court considers that the State violated the right to the judicial guarantee of a reasonable time recognized in Article 8(1) of the Convention, in relation to Article 1(1) of this instrument.

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[159] *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101, para. 211, and Case of *Andrade Salmón v. Bolivia*, para. 158.

[160] Judgment of the action raising concerns of June 22, 2005. Annexed to the Merits Report of the Commission (evidence file, folios 27 to 29).

[161] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008, para. 155, and *Case of Yarce et al. v. Colombia. Preliminary objection, Merits, reparations and costs*. Judgment of November 22, 2016. Series C No. 325, para. 288.

B.4. The alleged violation of the right to collective property

150. In reality, the existence of the right of the Xucuru people to their traditional lands is not in dispute in the instant case. Both the Constitution and the State itself, mainly through FUNAI, have made significant efforts over the years to protect and ensure the right to collective property of indigenous peoples in Brazil.[162] However, the Court has identified three points on which a dispute between the parties exists and which could constitute a violation of the right to collective property. On the one hand, the alleged failure to comply with the positive obligation to ensure the right to property; on the other, the lack of legal certainty regarding the peaceful use and enjoyment of the traditional territories of the Xucuru people derived from the failure to free them of encumbrances. Also, the effectiveness of the relevant domestic process is disputed. In this regard, the Court must verify these factors and determine whether they entail a violation of the right to collective property of this people pursuant to Article 21 of the Convention.

151. The Court considers that the evidence available reveals that the State has made various efforts to implement the rights of the Xucuru people over their traditional territories.[163] As of December 10, 1998, the two final stages of the process of recognition, demarcation and titling of the territory remained pending; in other words, the presidential homologation and the registration of the indigenous land in the property register. Neither stage involved field work or complex procedures, other than the political decision to issue the presidential decree and register it. As previously mentioned, the Court does not have any information on the administrative process of demarcation between that date and April 30, 2001, when the President of the Republic issued the Presidential Decree homologating the demarcation of the Xucuru indigenous territory (*supra* para. 81).

152. Following the Presidential Decree, the fifth stage of the administrative process was suspended due to an action raising concerns filed by a public official of the Pesqueira Property Registry. Therefore, it was only in November 2005 when the administrative titling process concluded with the definitive registration of the Xucuru indigenous territory (*supra* para. 79).

153. The procedure to free the territory of non-indigenous occupants and pay compensation for bona fide improvements took place in parallel to the process of demarcation, titling and registration. During that procedure, which began in 2001, 523 non-indigenous occupants – of a total of 624 occupants surveyed – were compensated (*supra* para. 80).[164] According to the available evidence, by 2003, FUNAI had disbursed more than eight million reales[165] to comply

[162] *Cf.* Decree No. 1,775, of January 8, 1996 (evidence file, folio 1396), *Portaria*/FUNAI No. 14, of January 9, 1996 (evidence file, folio 1400), Decision of the 6th Coordination and Review Chamber of the Federal Public Prosecution Service in action No. 1.26.000.000791/2003-67 (evidence file, folio 1404), Technical Report No. 155 2016 CGAFDPT-FUNAI (evidence file, folio 1435), Copy of File No. 0002697-28.1992.4.05.83000, 9th Federal Court of Pernambuco (Milton Barros Didier and Maria Edite Didier) (evidence file, folio 1443), Technical Report No. 12/2017/CORT/CGAF/DPT-FUNAI (evidence file, folio 4276.2), Memorandum No. 02/PGF/PFE/FUNAI/09 (evidence file, folio 4278).

[163] The administrative process with regard to the Xucuru indigenous territory was initiated *ex officio* by FUNAI in 1989. During this process, a change in the law resulted in the possibility of objections to the process being filed by non-indigenous occupants, and these were decided promptly at the time by the Ministry of Justice. The physical demarcation of the territory was concluded in 1995 (*supra* para. 71). Consequently, of the five stages established by Decree No. 1775/96, three had already been completed when Brazil accepted the Court's jurisdiction in December 1998. All those actions fall outside this Court's contentious jurisdiction (*supra* paras. 31 and 32).

[164] Technical Report No. 155/2016/CGAF/DPT/FUNAI of September 6, 2016 (helpful evidence file, folios 4032 to 4038).

[165] Summary table of payments of compensation to non-indigenous occupants, dated November 27, 2003. Annex 2 to the Merits Report (evidence file, folio 23).

with this item.[166] However, at the date of this judgment, the Court has information that 45 former non-indigenous occupants have not received their compensation and six non-indigenous families still remain on the traditional territory.[167]

154. The Court notes that the fact that the the Xucuru indigenous territory was not homologated and registgered until 2005 and the slow and incomplete freeing of this territory of encumbranes were fundamental elements that allowed the presence of non-indigenous occupants. This – in part – resulted in tensions and disputes between indigenous and non-indigenous individuals (*supra* paras. 87 to 91). In her expert opinion, Special Rapporteur Tauli-Corpuz indicated that a negative impact derived from the failure to regularize indigenous territories is the pattern of tension and violence that usually arises in such situations.[168] According to her opinion, these circumstances are aggravated by the delays in such processes.

155. In this regard, the State asserted that the re-occupation of most of the territory by the Xucuru indigenous people took place between 1992 and 2012.[169] However, the State did not specify when and how the recovery of each plot of land took place. In addition, the State did not present evidence of the how the process to evict the 624 registered occupations was carried out. Consequently, the Court considers that the actions taken by the State were not effetive to ensure the free enjoyment of the right to property of the Xucuru indigenous people.

156. In the Court's opinion, although it is true that the Xucuru people have possessed the formal recognition of the collective ownership of their territories since November 2005, there is still no legal certainty about their rights over the whole of the territory. In other words, the members of the Xucuru people cannot have confidence that all the rights linked to their collective property will be respected and ensured.

157. The Court notes that repossession action No. 0002697-28.1992.4.05.8300 (originally No. 92.0002697-4) filed in March 1992 (*supra* para. 74) and ordinary action No. 0002246-51.2002.4.05.8300 (originally No. 2002.83.00.002246-6), requesting the annulment of the administrative process of demarcation of the Xucuru indigenous territory in relation to five lots (*supra* para. 85) had a direct impact on the right to collective property of the Xucuru

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[166] In a hearing held on March 21, 2017, the State's representatives asserted that Brazil, through FUNAI, had disbursed around 20 million reales in compensation to the non-indigenous occupants; however, it did not provide evidence to support this statement.

[167] In this regard, the State presented the following information on the measures to free the Xucuru territory of non-indigenous occupants: according to the records of FUNAI, prior to this procedure a total of 634 occupations by non-indigenous persons in the Xucuru indigenous territory had been identified of which, up until 2013, 523 had been fully compensated to bona fide possessors. Among the 101 occupations that had not been compensated, it was verified that, in reality, 19 belonged to members of the Xucuru indigenous people, which evidently meant the inexistence of any right to receive compensation. Compensation for the 82 remaining occupations was pending for different reasons, including: (a) pending judicial actions, including to discuss the amount of the compensation; (b) the existence of debts backed by the property that were more than the value of the improvements to be compensated (which naturally meant that the possessors had no interest in the compensation); (c) the absence of formal documentation on the property in order to make the payment owed, or merely (d) the impossibility of locating the bona fide owner, on the land occupied or anywhere else. The six occupants who remain on indigenous lands are as follows: 1. Luiz Alves de Almeida (LVAs 494 and 495): two lots in Vila de Cimbres and Sítio Ramalho with an area of 0.06 hectares and 102.3 hectares, respectively; 2. Maria das Montanhas Lima (LVA 543): one lot near Sucupira village, Sítio Campina Nova with an area of 6.78 hectares; 3. Bernadete Lourdes Maciel (LVA 517): one lot in Vila de Cimbres (with an area of 23.62 hectares: 4. Jose Pedro do Nascimento, with one lot in Capim de Planta (corresponding to an area of 9.61 hectares), Jose Paulino da Silva (inheritance) (LVA 587): one lot in Pé de Serra del Oiti with an area of 7.06 hectares, and 6. Murilo Tenorio de Freitas (LVA 580): one lot known as Ipanema with an area of 11.00 hectares (merits file, folios 1058 and 1059).

[168] Affidavit with expert opinion of Victoria Tauli-Corpuz of March 17, 2017 (merits file, folio 713). Expert witness Marés de Souza Filho expressed the same opinions (merits file, folio 652).

[169] Brief with final arguments of the State of Brazil (merits file, folio 1017).

indigenous people. Even though both legal actions were filed by non-indigenous third parties, it is evident that the Court must examine both proceedings because they had a direct impact on the legal certainty of the ownership of the rights to the collective territory.

158. In the case of the repossession action filed in 1992, a final decision was only reached in 2014, when it became *res judicata* (*supra* para. 83); in other words, 22 years after it had been filed and 16 years after Brazil had accepted the Court's jurisdiction. This action had an impact on 300 hectares of Xucuru territory and could be executed at any moment, notwithstanding the motion to set aside the judgment filed by FUNAI in 2016 (*supra* para. 84). In addition, the second action, filed in 2002, was intended to annul the administrative process and was only decided in first instance in 2012, with appeals still pending before higher courts (*supra* paras. 85 and 86).

159. Regarding these two actions, the Court recognizes that the State does not bear direct responsibility because they were filed by non-indigenous third parties; although it had the obligation to provide an adequate remedy to determine rights – including those of third parties. However, the excessive delay in processing and deciding the said actions had an additional impact on the fragile legal certainty of the Xucuru people in relation to the ownership of their ancestral territory.

160. That said, as has been established above, in this Court's opinion, at the time Brazil accepted the Court's contentioius jurisdiction, the determination of the right to property of the Xucuru indigenous people was not inherently complex. Also, the State has not demonstrated that the said proceedings represented a legal or factual complexity that could justify the absence of a final decision even today.

161. In addition, as established previously, the process of demarcation and titling and the settlement of the legal actions filed by third parties took an inordinate amount of time, were ineffective, and did not guarantee legal certainty to the Xucuru people. Added to this, even though the administrative process with its different stages is established in the laws of Brazil, in this case it did not achieve the result for which it was conceived; that is, to ensure that the Xucuru people could have full confidence in being able to peacefully exercise their right to use and enjoyment of their traditional territories. In the Court's opinion, although only six non-indigenous occupants remain living within the indigenous territory and 45 former occupants have not received their compensation, until the Xucuru people have legal certainty to exercise fully their right to communal property, the national instances will not have been completely effective in ensuring that right. This is not an observation limited to the moment that this judgment is delivered, but it also takes into consideration the almost 19 years from December 10, 1998, to date during which the ineffectiveness of the process has entailed a direct violation of the right to property of the Xucuru indigenous people. Consequently, the Court considers that the violation of this right has occurred due to the failure to ensure it effectively and to provide legal certainty.

162. Therefore, the Court concludes that the administrative process of demarcating, titling and freeing the the Xucuru indigenous territory of encumbrances was partially ineffective. Moreover, the delay in deciding the actions filed by non-indigenous third parties affected the legal certainty of the right to property of the Xucuru indigenous people. Consequently, the Court considers that the State violated the right to judicial protection as well as the right to collective property recognized in Articles 25 and 21 of the Convention, in relation to Article 1(1) of this instrument.

B.5. Alleged failure to comply with the obligation to adopt domestic legal provisions

163. This Court has ordered amendments to the legislation when, during the litigation of a specific case, it has been proved that a domestic law violated the rights established in the Convention.[170] However, the Court has rejected requests of this nature[171] when the parties have not argued or proved the existence of a specific law that is incompatible with the Convention and that has been applied to the victims of the specific case. In addition, this type of request has been rejected when it has not been demonstrated that a legislative omission entailed failure to comply with Article 2 of the Convention.[172]

164. The representatives argued extemporaneously in their brief with final arguments (*supra* paras. 55 to 58), that domestic laws contained defects such as the absence of time limits for the conclusion of the stages of the process of recognition, demarcation and titling, with the exception of the 30 days to register the proprty title in the property registry (fifth stage). It is alleged that this leads to a lack of legal certainty and, in the instant case, contributed to the delay in the administrative process and the situation of tension and violence that was verified.

165. If the Commission or the representatives considered that there was a presumed lack of compatibility between the laws of Brazil and the Convention, this should have been proved during the different stages of the proceedings before this Court. The Commission did not specify precisely which of these laws – or, if applicable, their omission – were incompatible with the Convention. And the representatives' allegation, in addition to being time-barred, refers to an infra-constitutional law that regulates the process of demarcation and titling, but does not specify the law they consider to be incompatible with the Convention, or how such a law should be amended to comply with the provisions of Article 2 of the Convention. In this regard, the Court has indicated that "[t]he purpose of the Court's contentious jurisdiction is not to review domestic laws in abstract, but rather it is exercised to decide specific cases in which it is alleged that an act [or omission] of the State, executed against certain persons, is contrary to the Convention."[173] On this basis, the Court considers that neither the Commission nor the representatives presented sufficient arguments that would allow it to delare non-compliance with the obligation to adopt domestic legal provisions established in Article 2 of the American Convention.

166. Based on the above, this Court considers that it has no evidence to determine which law could be in conflict with the Convention and, especially, how that possible law had a negative impact on the process of recognition, titling and freeing the Xucuru territory of encumbrances. Therefore, the Court concludes that the State is not responsible for failing to comply with the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to Article 21 of this instrument.

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[170] *Case of Garibaldi v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of September 23, 2009. Series C No. 203, para. 173, and *Case of Escher et al. v. Brazil*. *Preliminary objections, merits, reparations and costs*. Judgment of July 6, 2009. Series C No. 200, para. 254.

[171] *Case of Garibaldi v. Brazil,* para. 173, and *Case of Escher et al. v. Brazil*, para. 254.

[172] *Case of Garibaldi v. Brazil*, para. 173*; Case of Escher et al. v. Brazil*, para. 254, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras,* para. 211.

[173] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights),* Advisory Opinion OC-14/94, December 9, 1994. Series A No. 14, para. 48; *Case of Genie Lacayo v. Nicaragua*. *Preliminary objections*. Judgment of January 27, 1995. Series C No. 21, para. 50; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 130; *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213, para. 51, and *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations*. Judgment of August 28, 2013. Series C No. 267. para. 157.

VIII-2
RIGHT TO PERSONAL INTEGRITY[174]

A. Arguments of the parties and of the Commission

167. Regarding Article 5(1) of the American Convention, the ***Commission*** noted that the absence of prompt recognition, the lack of effective protection, and the failure to complete the evictions from the territory historically occupied by the Xucuru indigenous people resulted in a situation of insecurity and violence based on which it considered, in light of the *iura novit curia* principle, that the right to mental and moral integrity of the members of the Xucuru people had been violated, contrary to the provisions of Article 5(1) of the American Convention. The Commission presented no further arguments to make this determination.

168. The ***representatives*** argued that the State's failure to recognize the Xucuru lands rapidly, the absence of real protection for the indigenous peoples, and the failure to remove non-indigenous occupants effectively generated a climate of insecurity, tension and violence that has harmed the health and personal integrity of the Xucuru people as a whole and its members. According to the representatives, the violation of Article 5 "is a result of the nature of the harm suffered [by the Xucuru people]: murders, harassment and other tensions and violence, as well as recurring criminalization processes." The other arguments of the representatives were considered to be time-barred (*supra* para. 55 to 58).

169. The ***State*** argued that the Merits Report did not clearly reveal the action, act or omission of the State that had involved the supposed violation of the right to personal integrity. It indicated that, *prima facie*, there was no direct and automatic correlationship between a suposed violation of the right to property of a person or group of persons and the violation of their right to personal integrity. The State also asserted that the Commission had not complied with its obligation to argue and to prove that there had been an autonomous violation of the right to personal integrity, because it had merely asserted the existence of this violation, which placed important constraints on the State's ability to defend itself on this point. Moreover, the Commission had not identified the physical or mental harm resulting from the alleged violation of the right to property.

170. Regarding the supposed strategy to criminalize the indigenous leaders, the State stressed that the Commission itself, when defining the purpose of this case, had not considered this argument because it was not connected to the factual framework, and did not establish how the domestic remedies had been exhausted. The State also argued that the Commission had not had sufficient information on the supposed facts, the reports to the State authorities and the corresponding investigations and criminal prosecution proceedings, so that it could not make an autonomous determination of admissibility and merits based on such facts. Consequently, those specific facts had not been submitted to the Court's consideration in the brief submitting the case, even as context.

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[174] Article 5. Right to Humane Treatment.

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

B. Considerations of the Court

171. This Court has indicated that the violation of the right to physical and mental integrity of the individual has different connotations of degree that range from torture to other types of abuse or cruel, inhuman or degrading treatment, the physical and mental effects of which vary in intensity based on factors that are endogenous and exogenous to the individual (such as, duration of the treatment, age, sex, health, context and vulnerability) that must be analyzed in each specific situation.[175] In other words, the personal characteristics of a supposed victim of torture or cruel, inhuman or degrading treatment must be taken into account when determining whether their personal integrity has been violated, because such characteristics may change the individual's perception of the reality and, consequently, increase the suffering and the feelings of humilliation when they are subjected to certain treatments.[176] The Court stresses that suffering is an experience that is specific to each individual and, therefore, will depend on numerous factors that make each person a unique human being.[177]

172. As part of the obligation to ensure rights, the State has the legal obligation "to prevent, within reason, the violation of human rights, and to conduct a serious investigation with the means available to it of the violations that have been committed within the sphere of its jurisdiction in order to identify those responsible, impose the pertinent penalities on them and ensure that the victims receives adequate reparation."[178]

173. Therefore, this obligation to ensure rights exceeds the relationship between state agents and the persons subject to its jurisdiction, and also includes the obligation, in the private sphere, to prevent third parties violating protected legal rights.[179] This does not mean that a State will be responsible for any violation of human rights committed among private individuals within its jurisdiction, because its duty to adopt measures of prevention and protection of individuals in their relationships with each other are conditioned to awareness of a situation of real and imminent danger for a specific individual or group of individuals – or that the State should have been aware of this situation of real and immediate danger[180] – and the reasonable possibilities or preventing or avoiding that danger.

174. This Court has also indicated that, in addition to the general obligations to respect and to ensure rights, special obligations are derived from Article 1(1) of the Convention that can be determined based on the particular needs of protection of a subject of law, due either to their personal condition or to the specific situation in which they find themselves.[181] In this regard, the Court recalls that, in certain contexts, States are obliged to adopt all necessary and reasonable measures to ensure the rights to life, personal liberty and personal integrity of those persons who are in a situation of special vulnerability, particularly as a result of their work, provided that the State is aware of a real and imminent risk to them and there is a

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[175] *Case of Loayza Tamayo v. Peru*. *Merits*, paras. 57 and 58, and *Case of Favela Nova Brasilia v. Brazil,* para. 250.

[176] *Case of Ximenes Lopes v. Brazil,* para. 127, and *Case of Favela Nova Brasilia v. Brazil,* para. 250.

[177] *Case of I.V. v. Bolivia,* para. 267.

[178] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 174, and *Case of I.V. v. Bolivia*, para. 207.

[179] *Case of the "Mapiripán Massacre" v. Colombia*, para. 111, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 209.

[180] *Case of the Pueblo Bello Massacre v. Colombia, Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2015. Series C No. 307, para. 109.

[181] *Case of the Pueblo Bello Massacre v. Colombia*, para. 111, and *Case of I.V. v. Bolivia*, para. 206.

reasonable possibility of preventing or avoiding that risk.[182] The Court finds that these considerations apply to the situation of the indigenous leaders and to the members of indigenous peoples who are acting in defense of their territories and human rights.

175. The Court reiterates that the defense of human rights can only be exercised freely when those who defend them are not victims of threats or any type of physical, mental or moral abuse or other acts of harassment.[183] Therefore, it is the State's duty not only to create the legal and formal conditions, but also to ensure the factual conditions, in which human rights defenders can exercise their functions freely.[184] In turn, States must: facilitate the necessary means so that human rights defenders or those who occupy a public office regarding which they are threatened or in a situation of risk, or those who report human right violations, can freely carry out their activities; protect them when they are threatened in order to prevent attacks on their life and integrity; generate the conditions for the elimination of violations by State agents and private individuals; refrain from imposing obstacles that obstruct their task, and investigate seriously and effectively any violations committed against them, combating impunity.[185] In essence, the State's obligation to ensure the rights to life and personal integrity is enhanced in the case of a human rights defender.

176. In the instant case, the dispute refers to the State's obligation to ensure the right to personal integrity of the Xucuru indigenous people and its members. Nevertheless, the Court notes that, in its Merits Report, the Commission included an allegation regarding the violation of Article 5 of the Convention, without specifying the fact that this violation referred to and who were its victims. According to the Commission, the delay in the process of demarcation, titling and freeing the territory of encumbrances, added to the failure of the State to protect the territory, gave rise to insecurity and violence. This presumably violated the right to mental and moral integrity of the members of the Xucuru people. That conclusions was made based on the *iura novit curia* principle, because the representatives had not presented that allegation during the processing of the case before the Commission.

177. Even though the Commission did not indicate the specific facts that presumably resulted in the violation of the right to personal integrity of the Xucuru people, the Court notes that the factual framework presented in the Merits Report refers to three deaths: of Xucuru indigenous leaders in September 1992 (José Everaldo Rodrigues Bispo) and May 1998

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[182] *Case of Luna López v. Honduras. Merits, reparations and costs*. Judgment of October 10, 2013. Series C No. 269, para. 123 and *Case of Yarce et al. v. Colombia*, para. 192.

[183] *Case of Fleury et al. v. Haiti*. Merits and reparations Judgment of November 23, 2011. Series C No. 236. para. 81, and *Case of Acosta et al. v. Nicaragua*, para. 140. See also, IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, para. 46.

[184] *Case of García and family members v. Guatemala*. *Merits, reparations and costs*. Judgment of November 29, 2012 Series C No. 258, para. 182, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 142.

[185] *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits.* Judgment of November 28, 2006. Series C No. 161, para. 77; *Case of the Human Rights Defender et al. v. Guatemala*, para. 142, and *Case of Acosta et al. v. Nicaragua*, para. 140. See also, United Nations Working Group on Arbitrary Detention, Opinion No. 39/2012 (Belarus), UN Doc. A/HRC/WGAD/2012/39, November 23, 2012, para. 45, Available at: http://undocs.org/A/HRC/WGAD/2012/39. Similarly, see UN, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* A/RES/53/144, March 8, 1999, Article 12(2): "The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration," and Resolutions 1818/01 of May 17, 2001, and 1842/02 of June 4, 2002, of the General Assembly of the Organization of American States, *Human rights defenders in the Americas: support for the individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas*, in which it resolved: "To urge Member States to step up their efforts to adopt the necessary measures, in keeping with their domestic law and with internationally accepted principles and standards, to safeguard the lives, personal safety, and freedom of expression of human rights defenders."

(Cacique Xicão), and of a FUNAI official in May 1995 (Geraldo Rolim); in other words, prior to acceptance of the Court's contentious jurisdiction. In addition, the Commission indicated that it did not have detailed information on these deaths and referred to a brief of the Attorney General of the Brazilian Union establishing the masterminds and perpetrators of the murder of Cacique Xicão. Lastly, the Commission referred to the precautionary measures granted on October 29, 2002, in favor of Cacique Marquinhos and his mother, Zenilda Maria de Araujo, owing to the threats received between 1999 and 2002. The precautionary measures remain in force to date.[186]

178. The Court considers, first, that the Commission did not comply with the burden of proof as regard its allegation, taking into account that it did not present the necessary legal and factual arguments; it did not indicate the specific facts that constituted the alleged violation, or those responsible. This is particularly relevant in the instant case, because the alleged violation of the right to personal integrity presumably prejudiced members of the Xucuru indigenous people; that is, thousands of people.

179. That said, the arguments of the representatives, presented during the public hearing and in their brief with final arguments, supplemented the Commission's allegation. Specifically, they presented more specific and precise arguments and described certain aspects of the "lack of State protection" that presumably resulted in the impunity of the murder of Cacique Xicão (in May 1998) and the failure to protect the leaders of the indigenous people.

180. In this regard, it is important to recall that this allegation was presented for the first time during the public hearing, and subsequently described in detail in the brief with final arguments. The Court recalls that arguments presented at that stage and evidence provided together with the final written arguments are time barred (*supra* paras. 57 and 58) and, consequently, the Court is unable to examine them, because this would impair the State's right to defend itself. The State would be unable to defend itself adequately in the case of specific accusations presented for the first time during the public hearing.

181. Consequently, the Court considers that although it is possible to note the existence of a context of tension and violence during certain periods of the process of demarcation, titling and freeing the Xucuru indigenous territory of encumbrances (*supra* paras. 76, 87, 88, 89, 90 and 91), the Commission's arguments do not provide sufficient grounds to establish the international responsibility of the State. Furthermore, since the arguments of the representatives were time-barred, the Court does not have sufficient evidence to prove an irreparable violation of the mental and moral integrity of the Xucuru indigenous people and its members. Consequently, the Court is unable to conclude that the State violated the right to personal integrity established in Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument.

IX
REPARATIONS
(Application of Article 63(1) of the American Convention)

182. Based on the provisions of Article 63(1) of the American Convention,[187] the Court has indicated that any violation of an international obligation that has caused harm entails the

[186] Merits Report No. 44/15, para. 61 (merits file, folio 23).

[187] Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his

duty to redress this appropriately,[188] and that this provision reflects a customary norm that constitues one of the fundamental principles of contemporary international law on State responsibility.[189]

183. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consiste in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the violated rights and to redress the consequences to which the violations gave rise.[190]

184. The Court has established that the reparations must have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe the concurrence of these factors in order to rule appropriately and pursuant to law.[191]

185. Based on the violations declared in the preceding chapter, the Court will proceed to analyze the claims submitted by the victims' representatives, together with the arguments of the State, in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to make reparation.[192]

186. In their brief with final arguments, the representatives asked the Court to establish measures of reparation in favor of the Xucuru indigenous people and its members in the judgment.[193] However, they failed to present the brief with pleadings, motions and evidence at the procedural moment established in Article 40 of the Court's Rules of Procedure.[194]

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right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[188] *Cf. Case of Velásquez Rodríguez v. Honduras*. Reparations and costs. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Acosta et al. v. Nicaragua,* para. 209.

[189] *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of Acosta et al. v. Nicaragua,* para. 209.

[190] *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 26, and *Case of Favela Nova Brasilia v. Brazil*, para. 210..

[191] *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Acosta et al. v. Nicaragua*, para. 210.

[192] *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 to 27, and *Case of Acosta et al. v. Nicaragua*, para. 211.

[193] The representatives requested the following measures of reparation in favor of the Xucuru people and its members: (i) Conclude the demarcation process of the Xucuru indigenous land freeing the whole area of encumbrances, removing the non-indigenous occupants, in no more than one year, and guaranteeing their protection against new invaders; (ii) Publication of the judgment in the media: TV and newspapers and by radio in the state of Pernambuco and throughout the country; (iii) Organize a public act to acknowledge State responsibility for the facts; (iv) Guarantee the continuation of the measures of protection in favor of Zenilda and Marcos, reinforcing the National Program of Human Rights Defenders; (v) create a community development fund for the Xucuru people; (vi) Guarantee indigenous territorial rights, avoiding retrogression in the domestic legal system; (vii) Allow the indigenous peoples access to justice, ensuring their effective participation and recognition of their juridical personality in all proceedings that concern them; (viii) Adapt the Indigenous Peoples Statute (Law 6,000/73), based on the 1988 Federal Constitution and international laws, by a free, prior and informed consultation process; (ix) Promote free, prior and informed consultation pursuant to inter-American case law, with the support of ILO Convention 169, each time an initiative is presented that could affect the rights of the indigenous peoples in their lands; (x) Exercise control of conventionality in any judicial decision that may negatively affect the legal certainty and integrity of the Xucuru indigenous land, and declare null and void any property title that opposes this; (xii) Pay the costs and expenses of the petitioners based on inter-American case law.

[194] Rules of Procedure of the Inter-American Court of Human Rights, Article 40: Brief with pleadings, motions and evidence. 1. Upon notification of the presentation of the case to the presumed victim or his/her representatives, they shall have a non-renewable period of two months as of reception of that brief and its annexes to submit to the Court autonomously the brief with pleadings, motions, and evidence. 2. The brief with pleadings, motions, and evidence

Consequently, the Court is unable to take into consideration the requests for reparation they presented in their final written arguments and can only examine the recommendations made by the Commission in Merits Report No. 44/15.

A. Injured party

187. The Court reiterates that, pursuant to Article 63(1) of the Convention, those who have been declared victims of the violation of any right recognized therein are considered injured parties.[195] Therefore, the Court considers that the Xucuru indigenous people are the injured party.

B. Restitution

188. The ***Commission*** asked the Court to order the State to adopt, forthwith, the necessary measures to give effect to the right of the Xucuru indigenous people and its members to collective ownership and possession of their ancestral territory. In particular, the State must adopt the legislative, administrative or any other measures required to truly free the territory of encumbrances, in keeping with their customary law, values, practices and customs. In addition, it must guarantee to the members of the community that they may continue their traditional way of life in keeping with their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions.

189. Second, it recommended that the State adopt, forthwith, the necessary measures to conclude the judicial actions filed by non-indigenous persons in relation to part of the territory of the Xucuru people. The Commission noted that the State should ensure that its judicial authorities decide the respective actions based on the standards for the rights of indigenous peoples.

190. The ***State*** indicated that the Commission's recommendation was based on a factual reality that no longer existed, and that was absolutely distinct from the one that existed nowadays. Indeed, according to the State, FUNAI officials have clearly reported that no conflictive situation exists in the Xucuru indigenous land.

191. According to the State, the situation of the six citizens who still live on Xucuru territory is absolutely peaceful, with no resistance or objections from the Xucuru people, and they were merely waiting to receive the compensation to which they had a right in order to abandon indigenous land definitively. Consequently, the State understood that the Commission's recommendation – although it could have made sense at the time of the facts considered in its Merits Report – was no longer adapted to the factual reality and, therefore, should be considered inappropriate.

192. In the case of the second recommendation, the State argued that it was completely unrelated to the current situation experienced by the Xucuru indigenous people. The judicial action filed by Milton Barros Didier and Maria Edite Didier had already been concluded by the judiciary's competent instances; moreover, it clarfied that it was *res juzgata*t and, therefore, the current situation could not be changed. According to the State, the Commission's

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shall contain: (a) a description of the facts within the factual framework established in the presentation of the case by the Commission; (b) the evidence offered, properly organized, with an indication of the alleged facts and arguments that it relates to; (c) the identification of deponents and the purpose of their statements. In the case of expert witnesses, their *curricula vitae* and contact information must also be submitted; (d) the claims, including those relating to reparations and costs.

[195] *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of Favela Nova Brasilia v. Brazil*, para. 287.

recommendation concerning this judicial action was no longer relevant. Lastly, the State reported that it was negotiating payment of compensation for bona fide improvements with Mr. and Mrs. Didier.

193. In this judgment, the Court determined that the process of demarcating and titling the Xucuru indigenous territory had concluded in 2005 with the registration of this property in the Property Registry of the municipality of Pesqueira (*supra* para. 79). Also, there was no dispute between the parties that six families continue to occupy 160 hectares of the Xucuru indigenous territory and that the judgment in favor of Milton Didier and Maria Didier on repossession of 300 hectares can be executed at any time. In this regard, while recognizing the limited number of non-indigenous occupants of the Xucuru territory at the present time, the Court establishes that the State must guarantee, immediately and effectively, the right of the Xucuru indigenous people to collective ownership of all their territory, so that they do not experience any invasion, interference or adverse effects from third parties or state agents that could impair the existence, value, use and enjoyment of their territory.[196]

194. In particular, the State must free of encumbrances the the Xucuru indigenous territory that remains in possession of non-indigenous third parties and pay the compensation pending for bona fide improvements. The State must comply with this obligation *ex officio* and with extreme diligence. The State must remove any type of obstacle or interference with the territory in question; in particular, by ensuring the full and effetive ownership of the Xucuru people over their territory within no more than 18 months following notification of this judgment.

195. Regarding the repossession judgment favorable to Milton do Rego Barros Didier and Maria Edite Barros Didier, if the negotiations that the State has advised are underway for them to receive compensation for the bona fide improvements[197] should not succeed, in keeping with the Court's case law, the State must assess the possibility of purchasing or expropriating these lands based on public purpose or social interest.[198]

196. If, based on objective and well-founded reasons,[199] the total or partial restitution of that specific area was not materially and legally possible, exceptionally, the State must offer the Xucuru indigenous people alternative lands of the same or better physical quality, which must be adjacent to their titled territory, free of any material or formal defect and duly titled to them. The land must be chosen by mutual agreement with the Xucuru indigenous people in keeping with their own forms of consultation and decision-making, values, practices and customs.[200] Once agreement has been reached, this measure must be executed within one year of notification of its acceptance by the Xucuru indigenous people. The State must respond for all the expenses derived from the said process, as well as the expenses corresponding to any loss or damage suffered as a result of the granting of these alternative lands.[201]

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[196] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs,* Judgment of August 31, 2001. Series C No. 79, para. 153.2, and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs,* Judgment of November 25, 2015. Series C No. 309, para. 282.

[197] Brief with final arguments (merits file, folio 1018).

[198] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 217, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras*, para. 324. d.

[199] *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 217, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras*, para. 325.

[200] *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 217, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras*, para. 325.

[201] *Case of the Garifuna Community of Punta Piedra and its members v. Honduras*, para. 325. See also, Article 16.5 of ILO Convention No. 169.

C. Measures of satisfaction: publication of the judgment

197. International case law and, in particular that of this Court, has established repeatedly that the judgment constitutes, in itself, a form of reparation.[202] Additionally, the Court will determine measures that seek to redress the non-pecuniary damage and that are not of a monetary nature, as well as measures with public scope or repercussion.[203]

198. Neither the ***representatives,*** nor the ***State*** or the ***Commission*** referred to this measures of reparation.

199. However, the Court finds it pertinent to order, as it has in other cases,[204] that the State, within six months of notification of this judgment, make the following publications: (a) the official summary of this judgment prepared by the Court in the Official Gazette in a legible and appropriate font, and (b) this judgment in its entirety available for at least one year on an official website of the State.

200. The State must advise this Court immediately when it has made each of the publications ordered, regardless of the one-year time frame for presenting its first report established in the twelfth operative paragraph of the judgment.

D. Other measures

201. The ***Commission*** asked the Court to order the State to take the necessary measures to prevent the occurrence of similar facts in future; in particular, to adopt a simple, prompt and effective remedy that protects the right of the indigenous peoples of Brazil to claim their ancestral territories and to exercise their collective ownership peacefully.

202. The ***State*** argued that the laws of Brazil and its case law recognize the ownership rights of the indigenous peoples over their ancestral lands and clearly establish appropriate procedural mechanisms to allow the indigenous communities to claim, by a legal action, the ownership of the lands traditionally occupied, even in the absence of administrative processes concerning their lands.

203. The State considered that its procedural legal framework was absolutely effective to provide the indigenous peoples with judicial protection for their rights. It also argued the existence of procedures that were sufficiently clear and defined to enable the public powers to manage, administratively, the process of the demarcation and delimitation of indigenous lands, based on technical studies and with the participation of the indigenous peoples. These procedures were defined in laws and legislative instruments that described the requirements and stages that should be observed for the demarcation and titling of indigenous lands, without ignoring the protection of the rights of bona fide third parties.

204. The State also argued that it did not need to regulate, by laws or legislative instruments of any kind, the judicial and administrative procedures that could result in the full exercise of the rights of the indigenous peoples over their lands. In addition, it considered that the

[202] *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Favela Nova Brasilia v. Brazil*, para. 297.

[203] *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Favela Nova Brasilia v. Brazil*, para. 297.

[204] *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Favela Nova Brasilia v. Brazil*, para. 300.

Commission's recommendation was inappropriate because it would require instituting a legal action to determine whether or not Brazil's national laws were in keeping with the Convention.

205. The Court considers that the need to adopt a simple, prompt and effective remedy that protects the right of the indigenous peoples of Brazil has not been demonstrated, bearing in mind that both the Constitution and infra-constitutional laws and their interpretation by the higher courts confer protection on those rights. Furthermore, it has not been proved that the State failed to comply with the obligation to adopt domestic legal provisions related to the process of recognition, titling and freeing the Xucuru territory of encumbrances.

E. Collective compensation

206. Regarding pecuniary and non-pecuniary damage, the ***Commission*** asked the Court to order the State to make reparation individually and collectively for the consequences of the violations of the rights that have been declared. In particular, the harm caused to the members of the Xucuru indigenous people by the delays in the recognition, demarcation and titling, and the failure to free their ancestral territory of encumbrances promptly and effectively.

207. The ***State*** argued that the recommendation to take measures to compensate the inadequate reparation of damage was inappropriate because domestic remedies had not been exhausted, and pecuniary or non-pecuniary damage had not been alleged and proved before the domestic judiciary, or even proved before the Commission. Therefore, there were no grounds for issuing an international judgment against the State sentencing it to make reparation for damage. To the contrary, the complementary nature of the inter-American system of human rights would be violated. The State also indicated that the attribution of a compensatory penalty should not be the first option among the appropriate measures of reparation, at the risk of incurring in the monetization of the system of individual petitions.

208. In its case law, the Court has developed the concept of pecuniary damage and the situations in which it should be compensated. The Court has established that pecuniary damage includes "loss or detriment to the victims' income, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."[205]

209. Regarding non-pecuniary damage, the Court has established that this "may encompass both the suffering and affliction caused to the direct victims and their families, the impairment of values of great significance to the individual, and also changes of a non-pecuniary nature in the living conditions of the victims or their families."[206] The Court has indicated that "since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, this can only be compensated, for the purposes of integral reparation to the victim, by the payment of a sum of money or the delivery of goods or services with a monetary value that the Court determines in reasonable application of sound judicial discretion and in terms of equity."[207]

210. The Court notes that the parties did not specify their requests in relation to the pecuniary and non-pecuniary damage. Therefore, the Court will only refer to the non-pecuniary damage caused by the human rights violations declared in this judgment and the

[205] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Acosta et al. v. Nicaragua*, para. 233.

[206] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84(a), and *Case of Acosta et al. v. Nicaragua*, para. 236.

[207] *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 243, and *Case of Favela Nova Brasilia v. Brazil*, para. 352.

corresponding international responsibility of the State to the detriment of the Xucuru indigenous people.

211. Based on the human rights violations determined in this judgment, the Court orders the creation of a community development fund as compensation for the non-pecuniary damage that the members of the indigenous people have suffered. The Court clarifies that this fund is additional to any other present or future benefit that may correspond to the indigenous people in relation to the State's general development obligations.

212. The Court establishes, in equity, the sum of US$1,000,000.00 (one million United States dollars) to constitute the said fund. Consensus must be reached with the members of the Xucuru indigenous people on the use of this fund for any measure that is considered pertinent to benefit the indigenous territory and its inhabitants. The State must set up this fund – in consultation with the members of the Xucuru people – within no more than 18 months of notification of this judgment.

F. Costs and expenses

213. In their final written arguments, the representatives asked the Court for the payment of "the costs and expenses of the petitioners based on inter-American case law," without specifying the amounts or presenting any supporting evidence.

214. The Court reiterates that, according to its case law,[208] costs and expenses form part of the concept of reparation because the activity deployed by the victims in order to obtain justice, at both the national and the international level, entails disbursements that should be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.[209]

215. As it has on other occasions, the Court recalls that it is not sufficient merely to forward probative documents; rather the parties are required to include arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[210]

216. In the instant case, the Court notes that the representatives did not submit their brief with pleadings, motions and evidence and, in their brief with final arguments, the representatives merely included a generic request without submitting probative documents or evidence. Consequently, the Court will not order the payment of expenses since these have not been authenticated. However, given that the international litigation lasted several years, the Court finds it appropriate to grant a reasonable sum of US$10,000.00 (ten thousand United States dollars) to the representatives in this case for the concept of costs.

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[208] *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 42, and *Case of Acosta et al. v. Nicaragua*, para. 241.

[209] *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Acosta et al. v. Nicaragua*, para. 241.

[210] *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 277, and Case of *Favela Nova Brasilia v. Brazil*, para. 357.

G. Method of complying with the payments ordered

217. The sum allocated in this judgment for reimbursement of costs must be delivered to the representatives in full, as established in this judgment, without any deductions due to possible taxes or charges.

218. If the State should fall in arrears with regard to the community development fund, it shall pay interest on the amount owed, converted to Brazilian reales, corresponding to banking interest on arrears in the Federative Republic of Brazil.

219. The State must comply with its pecuniary obligations by payment in United States dollars or the equivalent in Brazilian currency, using the exchange rate in force on the New York Stock Exchange (United States of America), the day before the payment to make the calculation.

X
OPERATIVE PARAGRAPHS

220. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To reject the preliminary objections filed by the State concerning the inadmissibility of the case by the Court owing to the publication of the Merits Report by the Commission; the lack of jurisdiction *ratione materiae* in relation to the supposed violation of ILO Convention 169, and the failure to exhaust domestic remedies, pursuant to paragraphs 24, 25, 35, 36, 44, 45, 46, 47 and 48 of this judgment.

2. To declare partially admissible the preliminary objections filed by the State concerning lack of jurisdiction *ratione temporis* in relation to facts prior to the date of the State's acceptances of the Court's jurisdiction, pursuant to paragraphs 31 and 32 of this judgment.

DECLARES:

Unanimously, that:

3. The State is responsible for the violation of the right to the judicial guarantee of a reasonable time established in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the Xucuru indigenous people, pursuant to paragraphs 130 to 149 of this judgment.

Unanimously, that:

4. The State is responsible for the violation of the right to judicial protection, as well as the right to collective property, established in Articles 25 and 21 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the Xucuru indigenous people, pursuant to paragraphs 150 to 162 of this judgment.

Unanimously, that:

5. The State is not responsible for the violation of the obligation to adopt domestic legal provisions established in Article 2 of the American Convention on Human Rights, in relation to Article 21 of this instrument, to the detriment of the Xucuru indigenous people, pursuant to paragraphs 163 to 166 of this judgment.

Unanimously, that:

6. The State is not responsible for the violation of the right to personal integrity recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the Xucuru indigenous people, pursuant to paragraphs 171 to 181 of this judgment.

AND ESTABLISHES:

Unanimously, that:

7. This judgment constitutes, *per se,* a form of reparation.

8. The State shall ensure, immediately and effectively, the right to collective property of the Xucuru indigenous people over their territory, so that they do not suffer any invasion, interference or adverse effects from third parties or State agents that could impair the existence, value, use and enjoyment of their territory, pursuant to paragraph 193 of this judgment.

9. The State shall conclude the process of freeing the Xucuru indigenous territory of third party occupants with extreme diligence, make the pending payments for bona fide improvements, and remove any type of obstacle or interference in the territory in question in order to ensure the Xucuru people's full and effective ownership of their territory within no more than 18 months, pursuant to paragraphs 194 to 196 of this judgment.

10. The State shall make the publications specified in paragraph 199 of the judgment, as indicated.

11. The State shall pay the amounts established in paragraphs 212 and 216 of this judgment, for costs and compensation for non-pecuniary damage, pursuant to paragraphs 217 to 219 of this judgment.

12. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures taken to comply with it.

13. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case close when the State has complied fully with all its provisions.

ICtHR, *Case of the Xucuru Indigenous People and its members v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary