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Case of the Xukuru Indigenous People v. Brazil: A procedural trajectory before the Inter-American Court of Human Rights.

Caso Povo Indígena Xukuru vs. Brasil: Uma trajetória processual perante a Corte Interamericana de Derechos Humanos

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Abstract

The article seeks to explore the procedural path of the Case of the Xukuru Indigenous People v. Brazil, within the scope of the Inter-American Court of Human Rights, especially with the court's decision in 2018 and the consequences of monitoring its compliance. Evoking a journey that involves the historical past of the violations up to the processing of the complaint in the Inter-American System, the article proposal is to give visibility to the strategies and paths used by the petitioners to obtain a favorable decision to the struggle of the Xukuru Indigenous People – the legitimate protagonists in the process of achieving their Rights.

Keywords: Indigenous Xukuru People; Inter-American Court of Human Rights; Procedural Law; Legal Sentence.

Resumo

O artigo busca explorar o percurso processual do Caso Povo Indígena Xukuru vs. Brasil, no âmbito da Corte Interamericana de Direitos Humanos, sobretudo com a culminância de sua sentença em 2018 e os desdobramentos de monitoramento do cumprimento desta. Evocando uma viagem que envolve o passado histórico das violações até adentrar o campo jurídico de tramitação da denúncia no Sistema Interamericano o artigo se propõe a dar visibilidade às estratégias e caminhos utilizados pelos peticionários do caso com vistas ao alcance da decisão favorável à luta do Povo Indígena Xukuru – legítimos protagonistas do processo de conquista de Direitos.

Palavras-chaves: Povo Indígena Xukuru; Corte Interamericana de Direitos Humanos; trâmite processual; Sentença.



1. History and general characteristics of the Xukuru Indigenous People of Ororubá

The Xukuru Indigenous People of Ororubá is composed of 2,354 families, who live in 2,265 houses. There are 7,726 indigenous individuals distributed in 24 villages within a territory of 27,555 hectares. Historical references to their presence in the territory go back to the 16th century, according to Vânia R. Fialho¹ and Kelly Oliveira². Their territory is located in the Serra do Ororubá, in the municipality of Pesqueira, state of Pernambuco, in the northeast region of Brazil. In addition, another 4,228 indigenous individuals who also belong to the Xukuru people of Ororubá live outside the indigenous land, in the urban perimeter of the city of Pesqueira. In this way, the issues that will be analyzed in this article directly impact a total population of 11,954 indigenous individuals and their culture, practices, and customs that have resisted over the centuries with the endurance that is peculiar to them.

They present a model of social organization with unique characteristics. Over the years, one can notice that such a structure was also constituted based on the confrontation of the demands and problems of the Xukurus. Thus, they have a series of shared decision-making bodies – all within their specificities – which has a traditional hierarchy based on the figures of the *Cacique* and the *Pajé* (a Shaman) as bridges between their people and the outside world, whether in political representation before the State or before the deities of the kingdom of *encantados* (enchanted beings), from where the belief in the perpetuation of ancestry in other levels of reality finds shelter in the heart of the Xukuru population.

Still in the historical context, it is relevant to point out the participation of the Xukuru people during the Paraguayan War (1864 - 1870). According to reports of the indigenous themselves, this participation took place even through forced enlistment. There are several reports that point to their participation in the conflict, including through forced enlistment³. This fact is important for the Xukuru People, due to the so-called “30 of Ororubá” group – warriors who enlisted in the Brazilian army and returned from the

¹ FIALHO, Vânia Rocha. As fronteiras do ser Xukuru. Recife: Massangana, 1998

² OLIVEIRA, Kelly. Guerreiros do Ororubá: o processo de organização política e elaboração simbólica do povo indígena Xukuru. Recife: Ed. Universitária da UFPE, 2014.

³ SILVA, Edson Hely. História, memórias e identidade entre os Xukuru do Ororubá. Available at: <https://www3.ufpe.br/remdipe/images/documentos/fontes_xukuru/silva%20edson%20hely2007.pdf>. Accessed on: 09 Jun. 2020.



War with the promise of receiving permanent possession of their traditional territory through an act of will by the then Brazilian Empire⁴. However, in 1879, under the Land Law (Law no. 601, of 1850), which aimed to regulate the administration of vacant lands of the Brazilian Empire, the then “Xukuru Settlement” ended up being officially extinguished⁵. Such a measure obviously had a major negative impact on the Xukuru People and the keeping of their territory, which was completely invaded by farmers, trespassers, and members of the local elite⁶. This was one of the most critical moments in the history of the indigenous people of Serra de Ororubá – the Xukuru Diaspora⁷.

Only 65 years later, at the beginning of the second half of the 20th century, the Brazilian State took another look at the Xukuru People, with the production of “(...) the first official contemporary report on the Xukuru, dated 1944, made by the *sertanista* (or Amazon explorer) and employee of the Indian Protection Service (SPI), Cícero Cavalcanti (...)”⁸. This survey is emblematic because it reports how the Xukuru People of Ororubá have been constantly persecuted throughout history in regard to their culture, their spiritual and organizational identity, due to the dispute over traditional territory. The author of the report denounces that “older *caboclos*” gathered to perform acts and rituals, and that they were denounced to the police as practitioners of witchcraft by white farmers. He also claims that spiritual leaders of the indigenous people were taken to the police station, and the Xukuru individuals were strictly prohibited from practicing their rituals and using their traditional medicine. But even in this scenario, the report on the Xukuru People of Yoruba states that “some Xukuru customs still live in their hearts”⁹.

⁴ SILVA, Edson Hely. Índios organizados, mobilizados e atuantes: história indígena em Pernambuco nos documentos do Arquivo Público. Available at: <http://www.funai.gov.br/arquivos/conteudo/cogedi/pdf/revista_estudos_pesquisas_v3_n1_2/07indios_organizados_mobilizados_e_atuantes_Edson_Silva.pdf>. Accessed on: 09 Jun. 2020.

⁵ POVOS INDÍGENAS NO BRASIL. XUKURU. Brasília, DF: 2020. Available at: <<https://pib.socioambiental.org/pt/Povo:Xukuru>>. Accessed on: 09 Jun. 2020.

⁶ SILVA, Edson Hely. História, memórias e identidade entre os Xukuru do Ororubá. Available at: <https://www3.ufpe.br/remdipe/images/documentos/fontes_xukuru/silva%20edson%20hely2007.pdf>. Accessed on: 09 Jun. 2020.

⁷ SILVA, Edson Hely. Índios organizados, mobilizados e atuantes: história indígena em Pernambuco nos documentos do Arquivo Público. Available at: <http://www.funai.gov.br/arquivos/conteudo/cogedi/pdf/revista_estudos_pesquisas_v3_n1_2/07indios_organizados_mobilizados_e_atuantes_Edson_Silva.pdf>. Accessed on: 09 Jun. 2020.

⁸ SILVA, Edson Hely. Índios organizados, mobilizados e atuantes: história indígena em Pernambuco nos documentos do Arquivo Público. Available at: <http://www.funai.gov.br/arquivos/conteudo/cogedi/pdf/revista_estudos_pesquisas_v3_n1_2/07indios_organizados_mobilizados_e_atuantes_Edson_Silva.pdf>. Accessed on: 09 Jun. 2020.

⁹ SILVA, Edson Hely. Índios organizados, mobilizados e atuantes: história indígena em Pernambuco nos documentos do Arquivo Público. Available at:



With the 1988 Constitution in force, the Xukuru began a mobilization for the reclaiming of their lands, putting pressure on authorities to guarantee their rights. With all the processes that resulted in the 1988 Magna Carta, in which the indigenous peoples had prominent participation – especially Cacique Xicão Xukuru – the Brazilian indigenous peoples managed to include in the final text of the constitutional document the recognition of "their social organization, customs, languages, beliefs and traditions, and the original rights to the lands they have traditionally occupied" (art. 231, caput); in addition to the right "to use their mother tongue and their own learning processes" in regular basic education (art. 210, § 2), and the recognition of indigenous people as "legitimate parties to file a lawsuit in defense of their rights and interests" (art. 232). However, the constitutional text did not become an automatically applicable standard for Brazilian indigenous peoples. The struggle for traditional territory would enter a new phase.

2. The period of the retaking of territory and the aggravation of the conflict

Until the Federal Constitution of 1988, indigenous peoples, according to Brazilian regulations, were considered wards of the State and did not have the capacity to file a lawsuit for their rights.

With a special chapter on guarantees, a new era of rights for Brazilian indigenous peoples was inaugurated, at least formally. In addition, article 67 of the Transitional Constitutional Provisions Act (ADCT) established a five-year deadline for the demarcation of all indigenous lands in the country.

This is how the Xukuru People began to demand the demarcation of their ancestral territory in 1989, initiating the process of demarcating the Xukuru land.

However, with the delay in getting answers about this new phase of the enforceability flow regarding the indigenous land and realizing that the land was being completely controlled by invaders and landowners, the Xukuru People began to move

<http://www.funai.gov.br/arquivos/conteudo/cogedi/pdf/revista_estudos_pesquisas_v3_n1_2/07indios_organizados_mobilizados_e_atuantes_Edson_Silva.pdf>. Accessed on: 09 Jun. 2020.



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forward with the repossession of the indigenous territory¹⁰.

Two years later, the demarcation process once again was paralyzed, and the Xukuru people took back the Caípe Farm, which was in the possession of landowner Milton Rego Didier. Mr. Didier, therefore, filed a Repossession Action related to the farm's 300 hectares. This is an emblematic action because the court handed down judgment in favor of the non-indigenous occupants in several instances. This is clearly a factor of legal uncertainty regarding the right to full and exclusive usufruct of the land by the Xukuru People.

Still in 1992, the Ministry of Justice, through Ordinance (*Portaria*) no. 259, awarded permanent possession of the 26-thousand-hectare land to the Xukuru indigenous people. According to the Xukuru people, this was the trigger for the murder of José Bispo, the *pajé's* son. The event took place within the indigenous land and aimed to shake the spiritual pillar of the Xukuru people. In response, new areas were reclaimed. With the deadline established in article 67, ADCT, for the completion of land demarcations in the country, the Xukuru People continued with the reclaiming of land. In January 1995, the work of physical demarcation of the Xukuru territory began, totaling just over 27,555 hectares. As in the case of the *pajé's* son, months after the stage of physical demarcation, FUNAI's lawyer Geraldo Rolim, an active defender of the Xukuru people, was murdered.

In 1997, 90% of the Xukuru territory was still occupied by non-indigenous third parties. Among the invaders, there were farmers and influential politicians in the region. In other words, the State did not act effectively to remove these invaders or guarantee the protection of the ancestral land. That year, three more land reclaimings were made and Cacique Xicão went on to denounce the recurring death threats he had been receiving; the Chief forwarded such facts to the authorities, but they failed to act on the threats. On May 20 of the following year, Chief Xicão Xukuru was assassinated.

With Xicão's death, who was the Xukuru's main leader and an emblematic figure in the struggle for the rights of indigenous peoples at a national level, a sociopolitical restructuring of the indigenous community was established.

It was only 1 year and 7 months after the loss of the Great Cacique Xicão that

¹⁰ FERREIRA, Ivson J.; BRASILEIRO, Sheila; FIALHO, Vânia. Dossiê Chicão Xukuru - TERRA INDÍGENA XUKURU/PE (1988-1998): BREVE HISTÓRICO DE UM CONFLITO PERMANENTE. In: "Plantaram" Xicão: Os Xukuru do Ororubá e a Criminalização do direito ao território / Vânia Fialho, Rita de Cássia Maria Neves, Mariana Carneiro Leão Figueiroa (Organizadoras). Manaus: PNCSA- UEA/UEA Edições, 2011



the indigenous community, under the guidance of the enchanted beings of nature – following their religious beliefs – found a new chief. On January 6, 2000 – already receiving several threats – Marquinhos Xukuru (who is Xicão's son) assumed the position of *cacique*. Twenty days later, the indigenous people established new repossessions of territory.

It was only on April 30, 2001, that the demarcation of the Xukuru ancestral territory was homologated. A major sequence of land reclaiming took place. In response, indigenous leader Chico Quelé was murdered. But the repossessions did not stop and amid a battle of administrative appeals within the scope of the demarcation process, the Federal Police carried out, in early 2002, the exhumation of chief Xicão's remains. With utmost cruelty, the exhumation of the body – which in the Xukuru culture is planted, not buried – in front of children and other members of the people, without minimum technical conditions for performing the forensic analysis, was another hard blow to the Xukuru people.

Led by chief Marquinhos Xukuru, the Xukuru people carried out, by the end of 2002, 21 more reclaimings of territory that were in the hands of invaders and ranchers.

On February 7, 2003, following a pattern that was repeated throughout the struggle of the Xukuru people for their territory, there was an attempt on the life of chief Marquinhos Xukuru as a response to the land repossession that had taken place. Although chief Marquinhos escaped the assassination attempt, it resulted in the death of two young indigenous people who were with him at that time. Subsequently, members of the Xukuru people rebelled against such a situation of violation, which led to the indictment of approximately 50 Xukuru individuals, including the chief himself, by the Federal Police. Overcoming all adversities, the Xukuru people reclaimed 7 more areas of territory in the following years, until 2004, in favor of fully guaranteeing the exercise of the usufruct of their entire traditional territory,

In parallel with this scenario of threats and violence against the community, the official demarcation process remained stagnant. As already mentioned, the demarcation of indigenous land was homologated on April 30, 2001. The next stage in the process would be the registration of the land in the property register of the corresponding district, as property of the Union, as well as in the Union's Heritage Secretariat. However, the Property Registry official filed the objection motion (*Ação de Suscitação de Dúvidas*), which dragged on for inexplicable three years. Finally, on November 18, 2005, the Xukuru Indigenous Land was finally registered before the Property Registry Office. In other words,



there was a four-year gap between two phases of the demarcation process that should have been consecutive.

In 2006, there were two more reclaimings, and in 2007, one more. At this time, the land survey of the territory also identified a total of 624 plots of land occupied by non-indigenous third parties, within the area identified as ancestral territory.

The following year, due to constant threats, chief Marquinhos Xukuru was included in the Program for the Protection of Human Rights Defenders, and in 2009, the Xukuru people made their last reclaiming of territory.

As a result of the indictment that took place after the attack against chief Marquinhos Xukuru, the Judiciary sentenced more than thirty Xukuru individuals to sentences ranging from 4 to 12 years in prison and a fine of 50,000 reais. After an appeal to the higher court, the sentences were reduced to an average of 4 years and replaced by alternative measures to imprisonment. However, the pecuniary penalties of 50,000 reais each were maintained.

In short, the demarcation procedure began in 1989, but the physical demarcation of the territory was only concluded in 1995. With the administrative procedure about to be concluded, all that remained to be done was the removal of non-indigenous occupants from the territory, but until the 2000s 90% of the territory was still occupied by third parties. In this way, the series of violations endured by the Xukuru people and the actions of resistance that they were forced to implement to ensure progress in the retaking of their ancestral territory remain clear. Without the strength of the Xukuru warriors, their organization, and their resistance, the ancestral land would not have been protected. Unfortunately, the State bodies only acted in favor of guaranteeing the territorial rights of the Xukuru People after much pressure and resistance from them. This situation repeats itself with other Brazilian indigenous peoples.

3. The Case before the Inter-American Human Rights System (IAHR)

Considering the situation of threats against the Xukuru people, as well as the delay in completing the process of demarcation of the indigenous land, the indigenous people decided, after dialogue with their advisors, to take the case before the Inter-American Human Rights System.



The complaint was lodged with the Inter-American Commission on October 16, 2002, where it was processed until March 2016¹¹. The initial petition was lodged by the following institutions: Legal Assistance Office for Grassroots Organizations (GAJOP), National Human Rights Movement/Northeastern Region (MNDH), and the Missionary Council for Indigenous Peoples (CIMI). The Inter-American Commission was informed of facts that indicated, in the words of the petitioners:

alleged violation of the right to collective property and of the rights to judicial guarantees and judicial protection, enshrined, respectively, in Articles 21, 8, and 25 of the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention"), in relation to the general obligations to respect the rights and adopt provisions of domestic law provided for in articles 1.1 and 2 of that instrument, to the detriment of the Xukuru indigenous people and their members, in the city of Pesqueira, state of Pernambuco¹².

To substantiate their allegations, the petitioners adduced the delay in the process of demarcation of the ancestral territory, in addition to the patent violation of the rights to judicial protection, added to the lack of effective and accessible judicial remedies, aimed at guaranteeing this right. Furthermore, when the case was already at the merits stage, the petitioners sought to add arguments referring to Articles 4 and 5 of the American Convention.

The Brazilian State, on the other hand, continually argued that the petition is inadmissible, given the understanding that the administrative process of demarcation of the "Xukuru Indigenous Territory", which began in 1989, was concluded, at least formally. The State, on the other hand, acknowledged that the removal of non-indigenous occupants from the indigenous territory had not yet been completed. The dimension of a reasonable time for demarcating the indigenous territory was also the subject of arguments from the Brazilian State, which alleged that, nevertheless, the process of demarcation of the Xukuru territory took place in a reasonable timeframe, considering

¹¹ IACHR - Inter-American Commission on Human Rights. Case of the Xukuru Indigenous People and Its Members V. Brazil. Inter-American Commission Admissibility Report. Washington, D.C: IACHR, 2009. Available at: < <http://www.cidh.oas.org/annualrep/2009eng/Brazil4355.02eng.htm> >. Accessed on: 09 Jun. 2020.

IACHR - Inter-American Commission on Human Rights. Case of the Xukuru Indigenous People and Its Members V. Brazil. Inter-American Commission Report of the Merits. Washington, D.C: IACHR, 2015. Available at: < <https://www.oas.org/en/iachr/decisions/court/2016/12728FondoEn.pdf> >. Accessed on: 09 Jun. 2020.

¹² IACHR - Inter-American Commission on Human Rights. Case of the Xukuru Indigenous People and Its Members V. Brazil. Inter-American Commission Report of the Merits. Washington, D.C: IACHR, 2015. Available at: < <https://www.oas.org/en/iachr/decisions/court/2016/12728FondoEn.pdf> >. Accessed on: 09 Jun. 2020.



“the complexity of the matter and the need to guarantee due process of law to non-indigenous third parties, as well as their right to fair compensation.”¹³

The Inter-American Commission, considering the arguments put forward by the parties during the proceedings, concluded that the Brazilian State had violated Article XXIII of the American Declaration of the Rights and Duties of Man. It is worth mentioning that such international responsibility based on the American Declaration covered the period of the events up to the ratification of the American Convention by Brazil on 25 September 1992. The Inter-American Commission also concluded that, since that date, the State should be held responsible for violating the right to personal integrity, collective property, judicial guarantees, and judicial protection established in Articles 5, 21, 8.1 and 25.1 of the American Convention, in relation to the obligations provided for in Articles 1.1 and 2 thereof, to the detriment of the Xukuru indigenous people and its members.¹⁴

At the end of the Merits Report, dated July 28, 2015, the Inter-American Commission made the following recommendations to the Brazilian State:

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

¹³ IACHR - Inter-American Commission on Human Rights. Case of the Xukuru Indigenous People and Its Members V. Brazil. Inter-American Commission Report of the Merits. Washington, D.C: IACHR, 2015. Available at: < <https://www.oas.org/en/iachr/decisions/court/2016/12728FondoEn.pdf>>. Accessed on: 09 Jun. 2020.

¹⁴ IACHR - Inter-American Commission on Human Rights. Case of the Xukuru Indigenous People and Its Members V. Brazil. Inter-American Commission Report of the Merits. Washington, D.C: IACHR, 2015. Available at: < <https://www.oas.org/en/iachr/decisions/court/2016/12728FondoEn.pdf>>. Accessed on: 09 Jun. 2020.



the right of the indigenous peoples in Brazil to claim their ancestral territories and use their collective property peacefully.

The Merits Report granted two months for the State to report on compliance with the recommendations issued by the Inter-American Commission. After the deadline and after granting an extension, the IACHR found that the State had made no substantial progress in complying with the recommendations, even regarding reparation to the Xukuru Indigenous People for the violations they suffered. It is worth noting that although the Commission identified some progress in terms of the formal removal of non-indigenous occupants of the ancestral territory of the Xukuru Indigenous People, the information available indicated that the Xukuru people had still not been able to exercise their right peacefully.

On March 16, 2016, the Commission submitted the case to the Inter-American Court, requesting that Brazil be declared internationally responsible for the violations contained in the Merits Report, and that the Brazilian State be ordered to comply with the measures of reparation included in that report. 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 Brazilian State had accepted the optional clause regarding the Inter-American Court's mandatory jurisdiction.

On April 19, 2016, the Inter-American Court notified the State, as well as the representatives of the presumed victims about the case. During this period, there was a funding crisis that affected many non-governmental organizations and weakened their performance, making it impossible to present their brief with motions, pleadings and evidence. This led to new partnerships being formed, and NGO Justiça Global joined as a representative of the victims. The goal was to involve a wider universe of actors in the technical, political, and financial support for the continuity of the case.

On September 14, 2016, the State presented its answering brief, in which five preliminary objections were filed. On October 26, 2016, the Inter-American Commission presented its observations on the preliminary objections submitted by the Brazilian State and asked the Court to reject them.

An important milestone for the processing of the Xukuru Indigenous People and its members v. Brazil was the order of January 31, 2017, by the President of the Inter-American Court. He summoned the parties and the Inter-American Commission to a



public hearing, to receive their final oral arguments and observations both on the preliminary objections and on eventual merits, reparations and costs.

In the proceedings before the Inter-American Court, the expert reports presented by Professor Carlos Frederico Marés and Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples, were of paramount importance. The experts presented impressive reports on the legal system governing indigenous lands in Brazil, as well as on international standards regarding the guarantee of indigenous peoples' right to property, a binding rule for the States, respectively.

The hearing took place in Guatemala City on March 21, 2017 and was attended by representatives of the advisory organizations (CIMI, GAJOP and Justiça Global), the anthropologist Vânia Fialho and Chief Marquinhos Xukuru.¹⁵

The Inter-American Court received at least five *amici curiae* briefs¹⁶, presented by Human Rights Clinics of Brazilian and foreign universities, by the Association of Judges for Democracy (*Associação de Juízes para a Democracia*) and by the Public Defender's Office of the Union. The State filed objections regarding these *amici curiae*, arguing that they intended to expand the scope of the Court's analysis to include bills and other legislative measures irrelevant to the specific case. The State also indicated that some briefs were openly partial and that they dealt with issues beyond the scope of the case. With respect to one of the briefs, the State argued that it failed to present a technical and impartial perspective of the theoretical issues that were relevant to the case by openly adopting the theses supported by the representatives. Regarding the State's arguments, the Inter-American Court noted that "the State's observations on the admissibility of the *amici curiae* in this case were not presented within the period established for that purpose,

¹⁵ I/A Court H.R. Public Hearing. Caso Pueblo Indígena Xukuru y sus miembros Vs. Brasil. Guatemala City: I/A Court H.R., 2017. 1 video (1h26min17). Available at: <<https://vimeopro.com/corteidh/caso-pueblo-indigena-Xukuru-y-sus-miembros-vs-brasil>>. Accessed on: 09 Jun. 2020.

¹⁶ 1) Jointly by 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; (2) also jointly by the Human Rights and Environmental Law Network at the Universidade do Estado do Amazonas and the Amazonas Human Rights Research Group; (3) the Associação Juízes para a Democracia; (4) the Amazonas Human Rights Clinic attached to the Post-graduate Law Program at the Universidade Federal do Pará, and (5) the Public Defender's Office of the Union. I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf>. Accessed on: 09 Jun. 2020.



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 its final written arguments”¹⁷, having been considered time barred. The Inter-American Court also stated that “the observations on the content and scope of the aforementioned *amici curiae* do not affect their admissibility, without prejudice to the fact that these observations can be substantially considered when evaluating the information provided in them, if this is deemed appropriate.”¹⁸

After the submission – on April 24, 2017 – of the final written arguments both by the representatives of the victims and by the State, and after the Inter-American Commission its final written observations, the Court’s Secretariat forwarded the attachments 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. Only the victims’ representatives and the State presented observations.

It is important to mention that during the Public Hearing, the Inter-American Court requested documents and information to be presented as *helpful evidence*. In this sense, on March 2 and 3, 2017, the State and the representatives, respectively, presented the requested documents.¹⁹

On February 5, 2018, the case finally came to an end, with the deliberation of the judgment.

The Inter-American Court understood that the violation of the territorial rights of the Xukuru People did not end with the conclusion of the formal stage of demarcation, that is, with the registration of the territory at the 1st Property Registry, in Pesqueira,

¹⁷ I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf>. Accessed on: 09 Jun. 2020.

¹⁸ I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf>. Accessed on: 09 Jun. 2020.

¹⁹ 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 Xukuru indigenous land. Document requested from the representatives: information on the members of the Xukuru indigenous people, their current composition and identification. I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf>. Accessed on: 09 Jun. 2020.



Pernambuco, but that the violation was permanent as long as non-indigenous people continued to occupy the territory.

Thus, Brazil was ordered to conclude the process of freeing the Xukuru indigenous territory of third-party occupants, making all pending payments for bona fide improvements, ensuring the Xukuru people's full and effective ownership of their territory. The Inter-American Court also ordered the State to guarantee the protection of the territory against any invasion, interference or adverse effects from third parties or state agents.

In other words, the State was obliged to ensure that non-indigenous people were removed from the land, as well as to prevent new occupations and invasions from taking place. Finally, the State was obliged to protect the Xukuru's autonomy over their territory. The Court also ordered Brazil to pay costs and compensations, the latter of which would be in the form of a fund, to be administered by the Xukuru people.

The conviction of Brazil in the case of the Xukuru Indigenous People and their Members v. Brazil was a historic achievement, the result of years of struggle by the Xukuru people for justice and the demarcation of their territory.²⁰ In addition, it was the first conviction involving the violation of indigenous territorial rights, that is, for the first time, the country was convicted of violating Article 21 of the American Convention on Human Rights in relation to indigenous peoples.

The Inter-American Court of Human Rights has very advanced parameters regarding the guarantee of indigenous territorial rights and this case law was reaffirmed in the case of the Xukuru Indigenous People and its Members v. Brazil; it is, therefore, valid not only for this specific case but for other indigenous peoples across the continent who are in a similar situation of struggle for their territory.

The parameters for interpreting the collective right to property, in accordance with the consolidated case law of the Inter-American Court of Human Rights, are the following: 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 by indigenous peoples grants them the right to require official recognition of ownership and its registration by the State; 3) Members of indigenous peoples who, for reasons

²⁰ I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf>. Accessed on: 09 Jun. 2020.



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) In the case of transfer to third parties in good faith, after the involuntary loss of possession of the land, the members of the indigenous peoples have the right to recover them or to obtain other lands of the same size and quality; 5) The State must delimit, demarcate and grant collective title to the lands of the members of the indigenous communities; 6) The State must ensure the effective ownership of the indigenous peoples over their lands, protecting this right from interference by State agents and third parties; 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; 8) The State must ensure the right of the indigenous peoples to control and use their territory and natural resources.²¹

Thus, applying these parameters of interpretation of article 21, the Inter-American Court affirmed the Brazilian State's obligation to implement and provide legal certainty to the traditional possession of indigenous peoples over their territory. The administrative process of delimitation, demarcation, titling, and removal of non-indigenous occupants from indigenous territories existing in the Brazilian law system, is an appropriate means to guarantee this right.

In the case of the Xukuru people, there was a conflict between the individual right to private property (non-indigenous people who owned land inside the indigenous territory) and the collective indigenous right, which had the community as the holder. From the perspective of the Inter-American Court, both rights are equally protected by the American Convention, despite the collective right being traditional and having effects equivalent to the title of possession granted by the State.

Thus, in the event of a conflict between those two rights, it would be the exclusive responsibility of the State to carry out a case-by-case weighing between the two rights, trying to make them compatible with mutual restrictions, without, however, the

²¹ I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf. Accessed on: 09 Jun. 2020.

I/A Court H.R. Case of the Kaliña and Lokono Peoples V. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_309_2015_ing.pdf. Accessed on: 09 Jun. 2020.



restriction of the right to traditional lands entailing “the denial of their survival as a people.”²²

However, in the Brazilian case, the Inter-American Court states that this weighing was already carried out by the Federal Constitution and its interpretation by the Federal Supreme Court:

[...] 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.²³

The Court also found that the titling of an indigenous territory in Brazil is declaratory in nature and does not constitute the right, being only an instrument to provide legal certainty to the constitutionally guaranteed right of indigenous peoples to their territory.

However, this process, in the case of the Xukuru people, failed to provide legal certainty to the indigenous people, as it dragged on for approximately twenty years; that is, from the year it was initiated (1998) to the date of the Court's judgment, as well as because it implied a direct violation of the indigenous' right to property.

On the other hand, it is important to highlight that some points considered to be very important by the victims were left aside by the Inter-American Court's judges. For example, the issue of violation of personal integrity (Article 5 of the American Convention): the psychological damage to the indigenous community, who had to live for so many years dealing with several threats; the assassination of leaders, and the legal uncertainty regarding their territory was not acknowledged by the Inter-American Court, unfortunately.

More than three years after the Inter-American Court's judgment, the victims' representatives are still involved in the process of implementing the Court's judgment. The payment of US\$ 1,000,000 as compensation was completed in February 2020, but the community is still waiting for the completion of the process of freeing the Xukuru indigenous territory of third-party occupants. In fact, six non-indigenous families continue

²² I/A Court H.R. Case of the Xukuru Indigenous People And Its Members V. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018, Series C, No. 346. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf>. Accessed on: 09 Jun. 2020.

²³ *Ibidem*, par. 127.



to occupy 160 hectares of the Xukuru IT, with a decision of repossession to be executed in an area of 300 hectares.²⁴

The delay in the payment of compensation, ordered by the Inter-American Court, was due to a controversy over the way in which such reparation should be paid. Finally, with the approval of the Inter-American Court, the Brazilian State agreed to make the payment directly to the Xukuru association, with the aim of creating a Community Development Fund.

If, on the one hand, the payment made by the Union directly to the members of the Xukuru Indigenous People is a great achievement, as it represents a measure of respect for the autonomy and self-determination of the indigenous people, at the same time it can become a great setback in these same aspects, depending on whether the State bodies will demand some kind of reimbursement for the expenditure of the fund's resources, on the part of the indigenous community.

Conclusions

After many years of struggle and many lives lost, the Xukuru people achieved a very important victory to guarantee their rights. But more than a victory for the Xukuru people, the Inter-American Court's ruling was an achievement for indigenous peoples, who saw highly advanced parameters regarding the interpretation of Article 21 of the American Convention on Human Rights being reaffirmed by the highest body of the Inter-American System.

In the case of Brazil, specifically, the ruling in the Xukuru case exhibits incisive elements that can be very strategic at a time of so many setbacks in the country's indigenous policy.

Thus, for example, the affirmation of indigenous peoples' right to a territory as prior to the title that validates it, the right to titling of the territory, as well as the notion that an indigenous community retains the right to its territory even if it has been

²⁴ CIMI – Missionary Council for Indigenous Peoples. Povo Xukuru recebe indenização do governo após sentença da CIDH que condenou o Estado por violações de direitos humanos. Brasília, DF: CIMI, 2020. Available at: <<https://cimi.org.br/2020/02/povo-xukuru-recebe-indenizacao-do-governo-federal-como-sentenca-da-cidh-que-condenou-o-estado-por-violacoes-de-direitos-humanos/>>. Accessed on: 05 Jun. 2020.



involuntarily expelled from it can be very valuable arguments to combat threats to indigenous peoples' right to territory.²⁵ Among these, we can mention the so-called "time frame thesis" (*Tese do Marco Temporal*), which gained relevance in the trial of the Raposa Serra do Sol case (Petition 3388).²⁶

In this way, the Inter-American Court's judgment also calls upon Brazilian courts to exercise control of conventionality, that is, the analysis of compatibility between international treaties and conventions on laws and norms issued by the various organs of the Brazilian State, at its three levels: municipal, state and federal.

Another point that draws attention to the Xukuru case in the Inter-American System is that the case made it possible for the indigenous peoples of Brazil to make more consistent use of the System to guarantee their rights since only in 2016 did the Inter-American Court had the chance to pronounce on the case involving the Brazilian State, on the one hand, and an indigenous community, on the other.

It is true that the inter-American system has its limits, as a new battle is currently being waged by the victims' representatives to bring the judgment to effect. However, it is an important contribution, which can strengthen the struggle of indigenous peoples nationally and contribute to the achievement of some victories.

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²⁵ As an example, we can cite the Proposed Constitutional Amendment no. 215/2000, which transfers to the National Congress the authority to approve the demarcation of indigenous lands and the ratification of the demarcations already approved (Bill 490/07 has a similar content); and Legal Opinion no. 01/2017 and Ordinance no. 303/2012, both from the General Attorney's Office (the latter has already been revoked), which establish the binding nature of the nineteen conditions stated in the Raposa Serra do Sol case, one of which is precisely the time frame thesis, and which restrict the demarcation of land in the country.

²⁶ In the ruling, STF stated that the Constitution of the Republic established the date of its promulgation, October 5, 1988, as "an irreplaceable reference for the occupation of a certain geographic space by this or that aboriginal ethnicity; that is, for the recognition of the original rights of indigenous groups over the lands they traditionally occupy". Some demarcations of indigenous lands have been undone by the application of the time frame thesis, even though the plenary of the STF has not yet affirmed its constitutionality. To check the Court's decision, see: <<http://www.stf.jus.br/arquivo/cms/noticiario/stf/anexo/pet3388ma.pdf>>. Accessed on: 09 Jun. 2020



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