Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 98/09; Petition 4355-02
Session:	Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)
Title/Style of Cause:	Xucuru indigenous people v. Brazil
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioner: Paolo G. Carozza. Commissioner Paulo Sergio Pinheiro, a Brazilian national, did not participate in the deliberation or decision of this petition, as provided in Article 17.2.a of the Commission's Rules of Procedure.
Dated:	29 October 2009
Citation:	Xucuru indigenous people v. Brazil, Petition 4355-02, Inter-Am. C.H.R., Report No. 98/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANTS: the Movimento Nacional de Direitos Humanos/Regional Nordeste, the Gabinete de Assessoria Juridica as Organizacoes Populares, and the Conselho Indigenista Missionario

I. SUMMARY

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

2. The petition alleges the denial of the right to property of the Xucuru indigenous people because of the delay in demarcation of their ancestral land, as well as the lack of judicial protection to guarantee their right to property. According to the petitioners, the process of drawing of boundaries, marking, and titling of Xucuru indigenous land began in 1989 and is still not finished as of this date, due to actions filed by third parties with support of the State; the

delay of the executive and judicial branches in resolving the administrative and judicial appeals they filed; changes in the rules and administrative procedures for demarcation in presidential decrees; and the ineffectiveness of the procedure for protecting the land rights of the indigenous peoples. The petitioners allege that as of this date the Xucuru indigenous people occupies less than half of their land, while the rest is occupied by non-indigenous, which leads to frequent conflicts between the two groups.

3. The State submits that domestic remedies in this case have not been exhausted, and accordingly that the petition is inadmissible for failure to satisfy Article 46.1 of the American Convention. The State submits that the administrative demarcation procedure begun in 1989 has progressed satisfactorily and within a reasonable period of time; it also indicates that the right of the Xucuru indigenous people to their land has been recognized by a ministerial decision (Portaria) of the Ministry of Justice in 1992, with the physical drawing of boundaries of the area finished in 1995; and that the ministerial decision was ratified by a presidential decree on April 30, 2001. With respect to the titling of the Xucuru indigenous land by registry in the appropriate organ, the State points out that it is pending because of a suit (Ação de Suscitação de Dúvidas) filed by the property registrar of the city of Pesqueira in the Pernambuco State Court. However, it notes that on August 9, 2002, the federal government intervened in that action, and removed it to the federal courts because it is an indigenous matter and therefore corresponds to the federal jurisdiction. According to the State's response on February 20, 2004, the matter was awaiting a decision by the federal judge. Concerning the removal of the non-indigenous from the demarcated territory, the State indicates that it has paid compensation to 296 occupants, and that payment is pending to another 183. The State submits that payment of compensation is expected to be completed in the second half of August 2009, and then the non-indigenous occupants will be removed in order to normalize the situation denounced in the petition.

4. After examining the positions of the parties in the light of the requirements for admissibility established in Articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare the case admissible with respect to Articles 8, 21, and 25 of the American Convention, in connection with the general obligations set forth in Articles 1.1 and 2 of that international instrument. In addition, based on the iura novit curia principle, the Inter-American Commission declares the petition admissible as regards a possible violation of Articles XVIII and XXIII de the American Declaration of the Rights and Duties of Man ("the American Declaration"). Therefore, the Inter-American Commission decides to notify the parties, publish the report, and include it in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. The Inter-American Commission received the initial petition submitted by the petitioners on October 16, 2002. On November 5, 2003, the IACHR transmitted the pertinent parts of the petition to the State and gave it two months to submit observations. On February 20, 2004, the Inter-American Commission received the State's response to the petition.

6. The IACHR received additional information from the petitioners on November 14, 2007, April 3, 2008, October 27, 2008, June 10, 2009, and September 3, 2009. It duly forwarded these communications to the State. The Inter-American Commission received additional information

from the State regarding the petition on July 23, 2009. That communication was duly transmitted to the petitioners.

Precautionary measures

7. On the same date that they submitted the petition, October 16, 2002, the petitioners requested precautionary measures to protect the life and person of the chief of the Xucuru indigenous people, Marcos Luidson de Araújo ("Cacique Marquinhos") and his mother, Zenilda Maria de Araújo, because both had received several death threats. On October 29, 2002, the IACHR decided to grant precautionary measures on behalf of Cacique Marquinhos and Zenilda Maria de Araújo, and asked the State to take all necessary measures to protect their life and person and to begin immediately a serious and exhaustive investigation of the facts that gave rise to the precautionary measures. During its 117th regular period of sessions, on February 27, 2003 the IACHR held a public hearing on the implementation of these precautionary measures. Subsequently, on March 1, 2004, the IACHR held a working meeting to follow up on these precautionary measures, in the course of its 119th regular period of sessions.

8. The State submitted additional information on the precautionary measures granted by the IACHR on January 23, 2003, February 19, 2003, March 12, 2003, April 1, 2003, and July 15, 2003. Those communications were duly forwarded to the petitioners. The petitioners sent additional information on the situation of the persons covered by the measures on the following dates: November 12, 2002, December 6, 2002, February 4, 2003, February 7, 2003, February 14, 2003, March 21, 2003, April 4, 2003, April 23, 2003, July 22, 2003, and May 21, 2004. These communications were transmitted to the State.

9. Based on information provided by each of the parties, the IACHR decided to extend the precautionary measures in the same terms on August 1, 2003, and May 19, 2004. Lastly, the Inter-American Commission notes that it requested additional updated information on the situation of the beneficiaries from both parties on November 13, 2006, August 28, 2007, and November 2, 2007. The petitioners provided updated information on the situation of the beneficiaries on November 14, 2007, and March 28, 2008. On November 26, 2007, and April 24, 2008, the IACHR repeated its request to the State for updated information. However, the State has not replied to date.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

10. The petitioners say the Xucuru indigenous people are considered a model for the indigenous peoples of Northeastern Brazil because of the process of reasserting its indigenous identity and reclaiming its ancestral lands.

11. According to the petitioners, Brazil's 1988 Constitution stipulates that land traditionally occupied by indigenous peoples is federal property; that their original ownership of ancestral lands is recognized, and they are guaranteed permanent "possession"[FN2] of said lands.[FN3] In addition, Law No. 6001 of September 19, 1973 ("Statute of the Indigenous"), has similar

provisions regarding the right of indigenous peoples to their ancestral lands, and provides for demarcation of indigenous lands through an administrative process, in accordance with the procedure established by an executive branch decree.[FN4]

[FN2] According to the petitioners, the Brazilian Civil Code (Book III, Title I, Chapter I), Articles 1.196 ff. provides that the possessor is "one who exercises de-facto all or some of the attributes of ownership" (free translation of the Portuguese original: "Considera-se possuidor todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade"). Ownership is a right (Brazilian Civil Code, Article 1.225), that gives the owner "the authority to use, enjoy, and dispose of the thing, and the right to get it from any person who possess or detains it unjustly" (Brazilian Civil Code, Book III, Title III, Chapter I, Article 1.228. Free translation of the Portuguese original: "O proprietário tem a faculdade de usar, gozar e dispor da coisa, e o direito de reavê-la do poder de quem quer que injustamente a possua ou detenha"). In other words, possession is a fact with legal effects, or a de-facto situation, and not a right like ownership (a quintessential right).
[FN3] The petition says this is established in Articles 20, XI, and 231 of Brazil's Constitution, and Articles 22 ff. of the Statute of the Indigenous.
[FN4] The petition says this is established in Article 19 of the Statute of the Indigenous.
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12. The petitioners explain that the administrative demarcation process involves the following stages: a) identification and drawing of boundaries; b) response by interested third parties; c) decision of the Ministry of Justice; d) ratification by presidential decree; and e) registration of the indigenous land. The process also provides that if non-indigenous are on the indigenous land after the decision by the Ministry of Justice, they will be removed expeditiously.

13. In the case of the Xucuru indigenous people's lands, the petitioners indicate that the administrative demarcation process began in 1989, after pressure from the people led by their chief at the time, Cacique Xicão. According to the petitioners, in the identification and drawing of boundaries stage the technical group of the National Indigenous Foundation ("FUNAI") issued an identification report on September 6, 1989, that said the Xucurus had the right to 26,980 hectares. The next step was completed on May 29, 1992, with the publication of Ministerial Decision no. 259 of the Ministry of Justice. At that time the procedure was regulated by Decree no. 22/91, and according to the petitioners, a majority (about 70%) of the Xucuru indigenous land was occupied by non-indigenous. However, the petitioners submit that the non-indigenous were not removed, contrary to the rules then in force. The petitioners note there was no progress in the demarcation between 1992 and1995, because of various administrative measures. They further state that the process was even backsliding, and that FUNAI repeated the identification and drawing of boundaries of the Xucuru indigenous land, which was finished in 1995 with identification of an area of 27,055.0583 hectares.

14. As reported, the executive branch issued a new decree (no. 1.775) on January 8, 1996, which introduced major changes in the process of demarcation of indigenous lands. This resulted in third parties challenging the report on identification and drawing of boundaries. The petitioners say non-indigenous persons interested in the land presented 272 challenges

(contestações), all of which were thrown out by the Ministry of Justice in the administrative ruling of July 10, 1996. Subsequently, the non-indigenous filed a motion for an injunction ("mandado de segurança") in the Supreme Court ("STJ"). According to the petitioners, the STJ ruled in favor of the non-indigenous, which opened the way for new administrative challenges. Those challenges, according to the petitioners, were all rejected by the Ministry of Justice, which reaffirmed the need to complete the demarcation as called for in the 1992 ministerial decision (supra para. 13). However, the petitioners submit that once again there was no removal of the non-indigenous from the Xucuru indigenous land.

15. Throughout this process, according to the petitioners, the continuing presence of non-indigenous on Xucuru lands gave rise to a climate of tension and insecurity. The petitioners hold that every time the process moved forward significantly --or, paradoxically, when it suffered a reverse-- tension flamed up between the Xucuru indigenous people and the non-indigenous present on the indigenous lands. The petitioners allege that this situation resulted in the killing of key indigenous leaders: José Everaldo Rodrigues Bispo, son of the people's spiritual leader, on September 4, 1992; Geraldo Rolim, a FUNAI agent and active defender of the indigenous, on May 14, 1995; and finally the chief of the group, Cacique Xicão, on May 21, 1998. Xicão's successor, Cacique Marquinhos, was later threatened, which led the IACHR to grant protective measures on October 29, 2002 (supra para. 7). In the same context, but more recently, the petitioners allege that after an assassination attempt against Cacique Marquinhos in 2003, the Xucuru indigenous people damaged the property of the alleged perpetrators of the attempt. The petitioners say that as a result, Cacique Marquinhos, as leader of the people, was convicted in federal court and sentenced to 10 years and four months in prison, on May 22, 2009.

16. According to the petitioners, the presidential decree that ratified the demarcation of Xucuru indigenous land was not issued until April 30, 2001, i.e., 12 years after the start of the demarcation process. Despite that ratification, on October 16, 2002, the date the petition was presented, the petitioners report that the removal of the non-indigenous had still not taken place and they continued to occupy about 70% of the Xucuru land. The petitioners emphasize that the official recording of Xucuru indigenous land has not taken place either, because the property registry official of the city of Pesqueira refused to record the land title and furthermore filed objection motion (Ação de suscitação de dúvidas) No. 2002.83.00.012334-9 with the local judge, challenging the validity of the demarcation process.

17. In their communication of October 27, 2008, the petitioners noted that the objection motion had been transferred to federal court, because of jurisdiction issues, and was later rejected; and that the court ordered the registration of the Xucuru indigenous lands. However, the petitioners submit that non-indigenous are still on Xucuru territory, and that legal actions filed by non-indigenous against the demarcation process are still pending. The first of them is a motion to regain possession (Ação de reintegração de posse) No. 92.0002697-4 filed by a non-indigenous occupant, which was decided in his favor (and against the indigenous possession) in the lower and upper federal courts, and ratified by the STJ; a special appeal to the Supreme Federal Tribunal ("STF") is pending. The second action (a court suit to annul the administrative demarcation process No. 2002.83.00.019349-2) seeks to annul the entire demarcation process carried out and permit the return of some non-indigenous who were already removed from the area. According to the petitioners, that case is also awaiting a final judgment.

18. Concerning requirements for admissibility, especially as regards the prior exhaustion of domestic remedies, the petitioners cite the unwarranted delay in the proceedings of the domestic jurisdiction, because the demarcation process has been going on for more than 19 years since it began in 1989, without accomplishing the proper registration of the indigenous lands and removal of all the non-indigenous from the territory. The alleged delay in the domestic proceedings is said to be caused by the government, which failed to carry out its duty to ensure the effective guarantee of and respect for the Xucuru indigenous people's land rights. The petitioners therefore consider the exception provided in Article 46.2.c. of the American Convention would be applicable. They also allege that the legislation that should protect the rights of the indigenous peoples does not have effective judicial remedies accessible to them, and that therefore there should be no debate about exhaustion of domestic remedies, because the demarcation process is an administrative one that only permits administrative and judicial challenges by interested third parties, not by the indigenous themselves. In conclusion on this point, the petitioners submit that the exception set forth in Article 46.2.b of the American Convention is also applicable. They add that the petition was submitted within a reasonable period and the subject is not pending in any other international proceeding for settlement.

19. Based on the foregoing considerations, the petitioners argue that the State has violated the right to simple, prompt, and effective recourse (Article 25), with due guarantees and within a reasonable time (Article 8), because of the unreasonable delay in the demarcation process; and the right to communal property of the Xucuru indigenous people for their ancestral lands (Article 21), in connection with Articles 1.1 and 2, all of the American Convention.

B. Position of the State

20. The State alleges that the petition is inadmissible based on Article 46.1.a of the American Convention. It believes that the requirement of prior exhaustion of domestic remedies has not been met, and that the exception claimed by the petitioners concerning unwarranted delay in the decision on the remedies is inapplicable.

21. According to the State, the administrative demarcation proceeding begun in 1989 has moved forward satisfactorily and within a reasonable time. The State says the process of demarcation of indigenous lands includes several steps: a) identification and drawing of boundaries; b) physical demarcation; c) ratification by presidential decree; and d) registration of indigenous land, as provided in Decree no. 1.775 of January 8, 1996, and the Statute of the Indigenous. Further, the State submits the demarcation process is therefore complex, especially concerning non-indigenous occupants, their compensation, and their removal, according to Article 4 of that decree.

22. The State informs that the demarcation process of the Xucuru indigenous land began in 1989, through the identification and drawing of boundaries of the territory by the technical group established by the FUNAI decision (Portaria) no. 218/FUNAI/89. Subsequently, the Xucuru indigenous people's right to their land was recognized by a decision of the Ministry of Justice (Portaria) no. 259/MJ/92, of May 28, 1992. The State indicates that the physical demarcation of 27,555 hectares was done in 1995.

23. The State adds that in 1996, after the issuance of Decree no. 1.775, and specifically on the basis of its Article 2, section 8, occupants of indigenous lands were given the right to impugn the demarcation process. According to the State, there were 269 challenges filed by interested third parties for the Xucuru indigenous land, all of which were rejected by the Ministry of Justice by the administrative decision (Despacho) no. 32 of July 10, 1996. Later, according to the State, the ministerial decision was ratified by presidential decree of April 30, 2001, which confirmed the demarcation of the Xucuru indigenous land with an area of 27,555.0583 hectares. Immediately following that ratification, says the State, FUNAI tried to register the Xucuru indigenous land, but could not do so because of the objection motion (Ação de suscitação de dúvidas) filed by the land registry officer of Pesqueira in the state courts.

24. Since this is an indigenous question, hence in the federal jurisdiction, the State points out that the appropriate federal organs – FUNAI and the Union Attorney General ("AGU") – filed a motion to challenge jurisdiction, and succeeded in transferring the case to the federal courts in a decision issued on August 9, 2002. According to the State, that case has proceeded normally before the federal judge, and the case is in the judge's hands for decision since July 17, 2003, according to the State's response of February 20, 2004.

25. The State informs that between 2001 and 2005 FUNAI paid compensation to 296 non-indigenous occupants. The State mentions that the physical demarcation of the area sparked tension and violent incidents that have hampered the removal of non-indigenous occupants. Nevertheless, according to the State, in 2007 all non-indigenous occupations were identified, and only 183 non-indigenous occupants remained to be compensated, as reported in the State's communication of July 23, 2009. The State indicates that the compensations were to be paid in August 2009.

26. Based on the foregoing considerations, the State holds that the demarcation process is proceeding without delays, although it has not been completed owing to difficulties in connection with the removal of non-indigenous occupants from the identified territory. The State says it is giving high priority to the removal of non-indigenous occupants from Xucuru territory, and that once all the compensations have been paid that removal will be carried out, thereby normalizing the situation denounced in the petition.

IV. ANALYSIS OF ADMISSIBILITY

A. The Commission's competence ratione personae, ratione materiae, ratione temporis, and ratione loci

27. Pursuant to Article 44 of the American Convention, the petitioners, as legally recognized nongovernmental organizations, are eligible to submit petitions to the IACHR. The petition specifies as alleged victims the Xucuru indigenous people and its members,[FN5] for whom the Brazilian State has undertaken to guarantee and respect the rights set forth in the American Convention. As a member state of the Organization of American States,[FN6] Brazil is also a state party to the American Convention, which it ratified on September 25, 1992. The Inter-American Commission therefore has ratione personae competence to consider the petition.

[FN5] The Xucuru are an organized people located in a specific geographical area, whose members may be individually identified. The initial petition presented by the petitioners says that the Xucuru indigenous people have a population of about 7,000 indigenous persons, which is the largest indigenous population in the northeastern region of Brazil. In this regard, see IACHR, Report 62/04, Admissibility, P 167/03, Kichwa Peoples of the Sarayaku Community and its Members, Ecuador, October 13, 2004, para. 47; and I-A Court. 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.

[FN6] Brazil is a founding member of the Organization of American States; it signed the OAS Charter in 1948 and deposited its instrument of ratification in 1950.

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28. In accordance with Articles 1.2.b and 20 of its Statute, the IACHR has ratione materiae competence to examine possible violations of human rights protected by the American Declaration, and ratione materiae and ratione temporis competence to examine possible violations of the American Convention that occurred after the ratification of said treaty by Brazil. The Inter-American Commission notes that the facts described in the petition began in 1989, when the State had not yet ratified the American Convention. Nevertheless, the IACHR has ratione temporis competence to determine whether in the period prior to September 25, 1992, there was any violation of rights protected by the American Declaration. In this regard, the Inter-American Court of Human Rights ("the Inter-American Court") has said:

Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.[FN7]

[FN7] I-A Court, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, para. 45. See also IACHR, Report No. 19/98, Admissibility, Case 11.516, Ovelário Tames, Brazil, February 21, 1998, para. 15; Report No. 33/01, Admissibility, Caso 11.552, Guerrilla de Araguaia, Julia Gomes Lund et al, Brazil, March 6, 2001, para. 38; Report No. 17/98, Admissibility, Cases 11.407 Clarival Xavier Coutrim, 11.406, Celso Bonfim de Lima, 11.416, Marcos Almeida Ferreira, 11.413, Delton Gomes da Mota, 11.417, Marcos de Assis Ruben, 11.412, Wanderley Galati, 11.414, Ozeas Antônio dos Santos, 11.415, Carlos Eduardo Gomes Ribeiro, 11.286, Aluísio Cavalcanti Júnior and Cláudio Aparecido de Moraes, Brazil, February 21, 1998, para. 163.

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29. The IACHR also has ratione loci competence to consider the petition, because it alleges violations of human rights protected in the American Declaration and the American Convention said to have occurred within the jurisdiction of Brazil, a State party to those instruments.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

30. Article 46.1 de the American Convention stipulates that admission of a petition requires that remedies under domestic law have been pursued and exhausted. Paragraph 2 of the same article states that the requirements for exhaustion of domestic remedies shall not be applicable when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

31. The Brazilian State considers that the requirement for prior exhaustion of domestic remedies has not been satisfied, and that the exception claimed by the petitioners concerning unwarranted delay in the decision on the remedies is inapplicable. According to the State, the administrative demarcation proceeding begun in 1989 has moved forward satisfactorily and within a reasonable time. In conclusion, it maintains that the demarcation process is moving ahead without delay, although it recognizes that the process has not yet been completed because of difficulties encountered with regard to removal of non-indigenous occupants from the identified territory.

32. In the first place, the Inter-American Commission notes that in accordance with the principles of international law and the precedents established by the IACHR and the Inter-American Court, the State that argues non-exhaustion must identify which domestic remedies are to be used and provide evidence of their efficacy.[FN8]

[FN8] IACHR. Report N° 32/05, Admissibility, P 642/03, Luis Rolando Cuscul Pivaral et al. affected by HIV/AIDS, Guatemala, March 7, 2005, paras. 33-35; IA-Court. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; and Case of Nogueira de Carvalho et al v. Brazil. Preliminary Objections and Merits. Judgment of November 28, 2006. Series C No. 161, para. 51.

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33. In this regard, the IACHR considers it pertinent to reiterate that the subject of this petition is the Xucuru indigenous people’s right to the property of its ancestral lands. The parties agree that the right to property (or to “possession” as it is termed in Brazilian legislation) of the indigenous peoples in Brazil must be guaranteed through an administrative demarcation process at the initiative of FUNAI and the Ministry of Justice. It is also agreed in this case that the administrative demarcation process of the Xucuru indigenous land began in 1989, 20 years ago, without having been completed via administrative action.

34. The Inter-American Commission also considers it pertinent to point out that --as alleged by the petitioners and not disputed by the State-- the judicial appeals that have been filed since 1989 in the course of the administrative demarcation process have been initiated by third parties with an interest in the indigenous land, for the purpose of challenging, obstructing, or annulling the administrative demarcation process. In other words, these judicial appeals are not filed by the petitioners or the alleged victims, nor on their behalf. This is the case, for example with the objection motion (No. 2002.83.00.012334-9), the suit to regain possession (No. 92.0002697-4), and the suit to annul the administrative demarcation process (No. 2002.83.00019349-2). Therefore, the Inter-American Commission will not consider these remedies when determining whether the requirement for prior exhaustion of domestic remedies has been met in accordance with Article 46.1.a of the American Convention.

35. In short, FUNAI and the Ministry of Justice began the administrative measures specified in domestic legislation for restoration of the Xucuru indigenous people's traditional habitat in 1989, and to date --20 years later-- the matter has still not been finally settled. The State has not presented specific and concrete information on particular circumstances applicable to this case that could justify, for the purposes of the admissibility ruling, the aforementioned length of time without finalizing the administrative demarcation process. Taking into account the circumstances of the present petition, the IACHR considers that the time elapsed since the start of the administrative process greatly exceeds what would be reasonable, in order to ensure the basic rights of the Xucuru indigenous people. Therefore, the IACHR considers that there has been unwarranted delay in the pertinent administrative route, i.e., the administrative demarcation process, so the exception established in Article 46.2.c of the American Convention is applicable.[FN9]

[FN9] See, mutatis mutandi, IACHR. Report N° 11/03, Admissibility, P 0326, Xakmok Kásek Indigenous Community, Paraguay, February 20, 2003, para. 38; and Report N° 12/03, Admissibility, P 0322/2001, Sawhoyamaxa Indigenous Community of the Enxet People, Paraguay, February 20, 2003, para. 45.

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36. It must also be noted that applying the exceptions to the rule for exhaustion of domestic remedies of Article 46.2 of the American Convention is closely linked to determining possible violations of certain rights established in that international instrument, such as the guarantees of access to justice. Nonetheless, Article 46.2 of the American Convention, by its nature and purpose, has its own autonomous content vis á vis the substantive norms of that international instrument. Therefore, the determination as to whether the exceptions to the prior exhaustion rule provided for in that article apply to the instant case must be made prior to and separate from the analysis of the merits, since it depends on a standard of appreciation different from that used to determine the violation of Articles 8 and 25 of the American Convention.[FN10] Therefore, the Inter-American Commission clarifies that the causes and effects that have prevented the exhaustion of domestic remedies in this case will be analyzed, as applicable, in the IACHR's report on the merits of the case, to determine whether they in fact constitute violations of the American Convention.

[FN10] IACHR, Report Nº 19/07, Petition 170-02, Admissibility, Ariomar Oliveira Rocha, Ademir Federicci and Natur de Assis Filho, Brazil, March 3, 2007, para. 27; Report Nº 23/07, Petition 435-2006, Admissibility, Eduardo José Landaeta Mejía et al., Venezuela, March 9, 2007, para. 47; Report Nº 40/07, Petition 665-05, Admissibility, Alan Felipe da Silva, Leonardo Santos da Silva, Rodrigo da Guia Martins Figueiro Tavares et al, Brazil, July 23, 2007, para. 55.

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2. Deadline for presentation

37. Article 46.1.b of the American Convention requires that petitions be submitted within six months of notification of the final judgment. Article 32.2 of the IACHR's Rules of Procedure stipulates that when the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Inter-American Commission, considering the circumstances of each case.

38. The IACHR said supra that an exception to the rule for prior exhaustion of domestic remedies is applicable, so it must determine whether the petition was submitted within a reasonable period of time. In the circumstances of the instant case, the Inter-American Commission notes that the petition was lodged on October 16, 2002, several years after the start of the administrative process for demarcation of the Xucuru indigenous land, but before it was completed, since it has not been completed to this date. Based on the specific circumstances of the matter, particularly the allegations of an allegedly unwarranted delay in the administrative process of demarcation of the indigenous territory, the IACHR considers that the petition was submitted within a reasonable period of time, and therefore satisfies the requirement of Article 32.2 of its Rules of Procedure.

3. Duplication of proceedings and international res judicata

39. The case file has no information that would indicate that the petition submitted to the Inter-American Commission is pending in another international proceeding for settlement, nor that it is substantially the same as one previously studied by the IACHR or another international organization, as established in Articles 46.1.c. and 47.d. of the American Convention, respectively.

4. Nature of the allegations

40. Article 47.b. of the American Convention provides that the Inter-American Commission shall consider inadmissible any petition or communication submitted if "it does not state facts that tend to establish a violation of the rights guaranteed by this Convention." The criterion for evaluating these requirements differs from that used to reach a decision on the merits of a petition. The IACHR makes a prima facie evaluation to see if the petition has the basis of a possible or potential violation of a right guaranteed in the American Convention, and not to establish the actual existence of a violation of rights. In other words, this is a preliminary analysis that does not attempt to prejudge the merits of the case.

41. The petitioners allege that the State has violated the right to property of the Xucuru indigenous people because of the delay in demarcation of their ancestral land and the ineffectiveness of judicial protection to guarantee their right to property.

42. On this aspect, the Inter-American Commission notes that if the petitioners' allegations are proved with respect to the allegedly unwarranted delay in the process of demarcation of the Xucuru ancestral land and the ineffectiveness of judicial protection to guarantee their right to property, as well as the alleged lack of effective judicial remedies that are accessible to the indigenous people, they could constitute violations of Articles 8, 21, and 25 of the American Convention, in connection with the general obligations to respect the rights and adopt provisions in domestic law to ensure the exercise of the rights established in that international treaty, as stipulated in Articles 1.1 and 2 .

43. The Inter-American Commission notes that the demarcation process at issue started in 1989, when Brazil had not yet ratified the American Convention; therefore, in application of the iura novit curia principle, the IACHR considers that the facts described supra, which occurred prior to September 25, 1992, could constitute violations of Articles XVIII (right to a fair trial) and XXIII (right to property) of the American Declaration.

44. In conclusion, the IACHR decides that the petition is admissible under Article 47.b of the American Convention, in the terms described above, concerning alleged violations of Articles XVIII and XXIII of the American Declaration; and Articles 8, 21, and 25 of the American Convention, in connection with Articles 1.1 and 2 of this treaty.

V. CONCLUSIONS

45. The IACHR concludes that it has competence to consider the merits of this case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention. Based on the foregoing arguments of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition admissible with respect to the alleged violation of Articles 8, 21, and 25 of the American Convention in connection with Articles 1.1 and 2 of the same instrument. Based on the iura novit curia principle, it also declares the petition admissible as regards a possible violation of Articles XVIII and XXIII of the American Declaration.
2. To notify the State and the petitioners of this decision.
3. To begin consideration of the merits of the case.
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 29th day of the month of October, 2009. (Signed): Luz Patricia Mejía Guerrero, President; Victor Abramovich, First Vice-president; Felipe González, Second Vice-president; and Paolo G. Carozza, members of the Commission.