

REPORT No. 88/11¹
DECISION TO ARCHIVE
PETITION 11.745
BRAZIL
July 21, 2011

ALLEGED VICTIMS: 16 indigenous Yanomami

PETITIONER: Center for Justice and International Law – CEJIL, *Human Rights Watch/Americas*, Venezuelan Program for Education and Action in Human Rights – PROVEA, and Office of the Apostolic Vicariate of Puerto Ayacucho

ALLEGED VIOLATIONS: Articles 1.1, 4, 5, 8, 21, 22, 24, and 25 of the American Convention on Human Rights (“the American Convention”)²

INITIATION OF PROCESSING: August 19, 1997

I. POSITION OF THE PETITIONERS

1. The petitioners allege negligence and omission on the part of the Brazilian Government in the massacre of 16 indigenous Yanomami (“the alleged victims”) in June and July 1993 in the Haximú region of Venezuela. The petitioners assert that in two incidents occurring between the months of June and July 1993, Brazilian *garimpeiros* (miners) murdered 16 indigenous Yanomami in the Haximú region, with victims including the elderly, women, and children. Subsequently, according to the petitioners, in order to escape possible retaliation from the indigenous population, the *garimpeiros* fled Venezuela through illegal airports in the region and headed to the city of Boa Vista in the Brazilian state of Roraima.

2. According to the petitioners, after the massacre the governments of Brazil and Venezuela signed a bilateral agreement (*Comissão Bilateral*) in which it was decided that Brazil would take charge of investigating what happened and punishing those responsible. The petitioners indicate that an inspection in the area of the massacre determined that the murders occurred in Venezuelan territory, but because a crime of genocide was involved,³ allegedly perpetrated by Brazilian *garimpeiros*,⁴ it was agreed that the investigation and prosecution of the Haximú Massacre was under the jurisdiction of Brazilian federal justice.

3. In their last communication submitted on July 16, 2004, the petitioners indicated that 11 years had passed since the Haximú Massacre and no final decision had been reached regarding the remedies under domestic jurisdiction. Based on the above, the petitioners alleged that there is unwarranted delay in reaching a decision in the aforementioned remedies and that the petition was admissible in accordance with Article 46.2.c of the American Convention.

II. POSITION OF THE STATE

¹ Commissioner Paulo Sérgio Pinheiro, a Brazilian national, did not participate in the deliberations or voting on this report, in accordance with Article 17.2.a of the IACHR’s Rules of Procedure. In addition, given that the record indicates that Commissioner Luz Patricia Mejía Guerrero, representing the petitioner PROVEA, acted as an advisor and/or representative to that organization during the processing of this petition, Commissioner Mejía also did not participate in the deliberations or voting on this report, in accordance with Article 17.2.b of the IACHR’s Rules of Procedure.

² In addition, the petitioners maintain that Brazil violated Article 39 of the Inter-American Charter of Social Guarantees (1948), in accordance with Article 29.b of the American Convention

³ The petitioners refer to Brazilian Law No. 2.289 of October 1, 1956, which defines the crime of genocide.

⁴ According to the petitioners, Article 7, I, d of the Brazilian Penal Code establishes the jurisdiction of Brazilian courts over cases in which the perpetrator is a Brazilian.

4. According to the State, the Federal Public Prosecutor's Office filed a criminal complaint against seven people for the crime of genocide committed in Venezuela, and the first instance decision published on December 21, 1996 convicted five *garimpeiros* for the crimes against the 16 indigenous Yanomami, sentencing them to approximately 20 years in prison, and acquitted the other two defendants based on a lack of evidence. The State also maintains that, although the convicted defendants filed appeals, the only remedy that was admitted for review was that of João Pereira de Morais because Brazilian legislation does not allow appeals by fugitive convicts. According to the State, therefore, the first instance decision became *res judicata* and is final for four of the convicted defendants. The State notes that the Federal Public Prosecutor's Office also submitted appeals regarding the two defendants who were acquitted.

5. In this regard, the State stresses the complexities involved in the Haximú Massacre due to the circumstances themselves. In this regard, the State refers to the difficulties mentioned in the first instance conviction such as the fact that the crime was committed in the Amazon jungle in an area of Venezuelan territory that is very difficult to access; that the Brazilian authorities only learned what had happened a long time after the massacre; and that Yanomami custom is to burn their dead, making it impossible to include autopsies of the alleged victims in the record. Despite these difficulties, the State emphasizes that its actions made it possible to identify the guilty and convict them in the first instance three years and five months after the massacre occurred.

6. The State reports that the Federal Regional Court issued its second instance decision on the facts of this petition, overturning the first instance decision because the court considered that the facts should have been adjudicated by a jury court since a willful offense against life was involved. The State indicates that based on the above and in order to ensure confirmation of the decision convicting the five *garimpeiros*, on March 29, 1998 the Federal Public Prosecutor's Office filed a special appeal with the Superior Court of Justice ("STJ") and an extraordinary appeal with the Federal Supreme Court ("STF"). According to the State, on September 12, 2000 the STJ issued its decision regarding the special appeal and reaffirmed the competence of the federal judge – and not the jury court – to examine criminal actions regarding the international crime of genocide. The State emphasizes that the STJ made its decision considering that the crime of genocide goes beyond a crime against life since it constitutes a crime against humanity by someone who intentionally seeks to totally or partially destroy a national, ethnic, racial, or religious group. The State indicates that this is based on the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948)⁵ as well as Law No. 2.889 of October 1, 1956. Consequently, the State indicates that the STJ recognized that the legal right referred to in this case is not the life of the individual himself but rather the life in common of a group of persons, and in this specific case, that of the indigenous Yanomami.

III. PROCESSING BY THE IACHR

7. On December 6, 1996, the Inter-American Commission received the initial petition submitted by the petitioners. On August 19, 1997, the IACHR forwarded the relevant portions of the complaint to the State. In notes submitted on November 19, 1997 and November 25, 1997, the Inter-American Commission received the Brazilian State's response to the petition.

8. The IACHR also received additional information from the petitioners on the following dates: June 17, 1997, September 3, 1997, September 16, 1997, January 8, 1998, March 26, 1998, June 30, 1998, April 8, 1999, September 20, 1999, March 1, 2000, and July 16, 2004. Those communications were duly forwarded to the State. In addition, the Inter-American Commission received additional information from the State regarding the petition on the following dates: February 25, 1998, May 27, 1998, August 3, 1998, June 21, 1999, December 27, 1999, and March 1, 2004. Those communications were duly forwarded to the petitioners.

⁵ According to the State, that convention was ratified by Brazil on April 15, 1952 (through Decree No. 30.882).

9. On May 3, 2000, the IACHR sent communications to both parties to ascertain whether they were interested in initiating a friendly settlement process regarding this petition. In those communications, the IACHR referred to petition P-11.706 regarding facts “which were complementary to the facts discussed in petition 11.745” filed against the State of Venezuela by the same petitioners. In addition, “for informational purposes,” the Inter-American Commission attached a copy of the friendly settlement signed on December 10, 1999 by Venezuela and the petitioners in petition P-11.706.⁶

10. On April 27, 2010, the IACHR requested additional information from both parties so that it could examine the admissibility of this petition and determine whether the grounds for the petition exist or survive. The petitioners did not submit the information requested. The State submitted updated information on June 4 and June 14, 2010. The IACHR forwarded that communication to the petitioners on June 9, 2010. Given the lack of updated information from the petitioners, on October 8, 2010, the IACHR repeated its earlier requests for updated information on the facts, in order to determine whether the grounds for the petition exist or survive, indicating that if it did not receive the requested information, the IACHR could archive the file. To date the petitioners have not submitted the requested information.

IV. BASIS FOR THE DECISION TO ARCHIVE

11. Both Article 48.1.b of the American Convention on Human Rights and Article 42 of the Rules of Procedure of the Inter-American Commission on Human Rights establish that, when processing a petition, once the information has been received or the period for receiving the information has elapsed, the IACHR shall verify whether the grounds for the petition or communication exist or survive and, should they not exist or survive, shall order the archiving of the file.

12. The IACHR notes that a criminal investigation was initiated in Brazil with respect to the events that occurred in Venezuela. In this respect, the petitioners alleged that in the context of that investigation the lack of diligence on the part of the Brazilian authorities impeded the effective punishment of those responsible for the Haximú Massacre and that the crimes allegedly remained unpunished. The information available indicates that a first instance decision was handed down for the crime of genocide on December 20, 1996. Said decision established that:

Confirmation [of the intention to commit genocide] also results from the fact that the *garimpeiros* killed all the indigenous people they encountered in their path. Men, women, children. Their fury was not directed toward any specific indigenous individual but rather toward all the members of the ethnic group. The competence of the federal judge also derives from the foregoing. This is not a case of a willful crime against life but rather a crime against the ethnic group – the indigenous [Yanomami].⁷

13. In this regard, the IACHR notes that the first instance decision acquits two of the defendants due to a lack of evidence regarding their participation and convicts Pedro Emiliano Garcia, Eliézio Monteiro Neri, Juvenal Silva, Francisco Alves Rodrigues, and João Pereira de Moraes, sentencing them to 20 years and six months in prison for the crimes of genocide, damage to property, and association to commit genocide, with the aggravating factors established by Law 8.072/90 on Heinous Crimes (*Lei dos Crimes Hediondos*)⁸. The first instance decision was overturned on appeal by the

⁶ That agreement includes measures on vigilance and control of the Yanomami Area, on the health situation of the Yanomami People, on the judicial investigation of the Haximú Massacre (the Venezuelan State agreed to “follow up the judicial investigation regarding the criminal process being conducted in Brazil in order to establish responsibilities and impose the respective criminal penalties”) and legislative measures to protect the indigenous peoples, including ratification of ILO Convention No. 169.

⁷ First instance decision issued in Process No. 93.000574-0, by Federal Judge Itagiba Catta Preta Neto in Boa Vista, Roraima, on December 20, 1996, p. 11 – Annex to the communication submitted by the State on September 25, 1997 and Annex to the communication submitted by the petitioners on September 16, 1997. (Freely translated from the original Portuguese: “*Tal constatação também se deflui do fato de que os garimpeiros mataram todos os silvícolas que encontraram em seu caminho. Homens, mulheres, crianças. Sua fúria não se dirigia contra nenhum silvícola especificamente, mas a todos os membros do grupo étnico. Daí, também, a competência deste juízo singular. Não se tratou de crime doloso contra a vida, mas de crime contra o grupo étnico – os silvícolas*”.)

⁸ See first instance decision issued in Process No. 93.000574-0, by Federal Judge Itagiba Catta Preta Neto in Boa Vista, Roraima, on December 20, 1996, pp. 41 and 42 – Annex to the communication submitted by the State on September 25, 1997 and

Federal Regional Court (“TRF”) of the 1st Region, which decided that the original jurisdiction to adjudicate the crimes belonged to ordinary state courts, through a jury court and not the federal judge.⁹ That decision was issued on June 30, 1998.

14. The Inter-American Commission notes that the issue of the original jurisdiction to judge the genocide perpetrated against the Yanomami People reached the highest courts in Brazil through a special appeal and an extraordinary appeal that the Federal Public Prosecutor’s Office submitted to the STJ and STF, respectively. According to the information available in the case file, on November 12, 2000 the STJ issued its decision regarding the special appeal, indicating that genocide is a special crime that consists of the intentional destruction of human racial, religious, or national groups.¹⁰ That is the definition established in the Convention for the Prevention and Punishment of the Crime of Genocide, ratified by Brazil on April 15, 1952, and in Law No. 2.899 of October 1, 1956. In addition, the STJ maintained that “all actions characteristic of the crime of genocide are not within the competence of a jury court, in that such crimes are directed not against the life of the individual alone but rather against a group or part of a group of persons,” and consequently, “the legal right being protected is the life in common of the groups of men, the community of peoples, i.e., the ethnic group.”¹¹ Finally, the Court ordered that the TRF examine, in the second instance, the merits of the appeals submitted by the parties.¹²

15. The above-mentioned decision of the STJ regarding the original jurisdiction to judge the crime of genocide was appealed by the convicted defendants in Extraordinary Appeal RE 351487 filed with the STF. The IACHR notes that that extraordinary appeal was rejected by the STF on August 3, 2006.¹³ Subsequently, the TRF issued its decision on the merits of the appeals against the conviction in the first instance decision on September 1, 2009, upholding the conviction of the defendants and also adding to the sentence of 20 years and six months in prison an additional punishment of one year and two months for the crime of “destruction, theft, or concealment of a corpse” as established in Article 211 of the Brazilian Penal Code. This decision became *res judicata* on November 3, 2009, on the basis of which the perpetrators of the acts of genocide against the Yanomami People have been convicted through a definitive judicial decision.¹⁴

16. More than 13 years have passed since processing began on August 19, 1997 and, despite repeated requests sent to the petitioners, the Inter-American Commission lacks the evidence needed to determine whether or not the grounds for this petition exist or subsist. In view of the lack of those elements, the IACHR decides to archive this petition, in accordance with Article 48.1.b of the American Convention and Article 42.1.a of the IACHR’s Rules of Procedure.

Done and signed in the city of Washington, D.C., on the 21st. day of the month of July, 2011.
(Signed) Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Felipe González, and María Silvia Guillén, members of the Commission.

Annex to the communication submitted by the petitioners on September 16, 1997.

⁹ Second instance decision issued in Process No. 93.000574-0, by the TRF of the 1st Region, in Brasília, Federal District, on June 30, 1998 – Annex I to the communication submitted by the petitioners on September 20, 1999.

¹⁰ See Decision on Special Appeal No. 222.653, issued by the STJ, on September 12, 2000, pp. 63 and 64 – Annex II to the communication submitted by the petitioners on September 20, 1999.

¹¹ See Decision on Special Appeal No. 222.653, issued by the STJ, on September 12, 2000, p. 65 – Annex II to the communication submitted by the petitioners on September 20, 1999.

¹² See Decision on Special Appeal No. 222.653, issued by the STJ, on September 12, 2000, p. 67 – Annex II to the communication submitted by the petitioners on September 20, 1999. Freely translated from the original Portuguese: “*todas as ações que configurem o crime de genocídio não estão subordinadas ao Tribunal do Júri, posto que estes delitos não se dirigem, em primeira linha, somente contra a vida do indivíduo, mas sim contra um grupo ou parte de um grupo de pessoas*” and “*o bem jurídico tutelado é a vida em comum dos grupos de homens, da comunidade de povos, ou seja, da etnia*”.)

¹³ See Decision on Extraordinary Appeal No. 351487, issued by the STF on August 3, 2006 – Annex I to the communication submitted by the State on June 14, 2010.

¹⁴ See Decision on Criminal Appeal No. 1997.01.00.017140-0, issued by the TRF of the 1st Region on September 1, 2009 – Annex II to the communication submitted by the State on June 14, 2010.