Conselho Indígena de Roraima
Rainforest Foundation US
Forest Peoples Programme

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19 January 2010

Mr. Torsten Schakel, Secretary
United Nations Committee on the Elimination of Racial Discrimination
Treaties and Commission Branch
Office of the High Commissioner for Human Rights
UNOG-OHCHR
1211 Geneva 10, Switzerland
TSchackel@ohchr.org

RE: Continued Need for Urgent Attention of the Committee regarding Brazil's Raposa Serra do Sol Indigenous Lands

Dear Mr. Schakel:

1. In anticipation of the Committee's 76th session to begin on 15 February, and on behalf of the Conselho Indígena de Roraima representing the Macuxi, Wapichana, Taurepang, Ingaricó and Patamona peoples of Raposa Serra do Sol (Raposa) indigenous land in the state of Roraima, Brazil; the Rainforest Foundation US; and the Forest Peoples Programme (the "Submitting Organizations"), we attach to this letter an *update* to provide the Committee on the Elimination of Racial Discrimination ("Committee") with important new information regarding the situation of the indigenous peoples of Raposa.

2. Much has transpired since the Committee first received a request for early warning assistance from the Submitting Organizations in June of 2006. As reported in our last update of July 2009, the most significant events that took place in 2009 were the final decision of the *Supremo Tribunal Federal* (Federal Supreme Court) of Brazil in March, which affirmed the constitutionality of the federal government's demarcation of the Raposa lands ("*Supreme Court Decision"*), and the removal of non-indigenous occupants from the area, which has for the most part been completed as of the present date. As discussed in the attached update, the *Supreme Court Decision,* however, has brought with it a series of troubling conditions that seriously threaten indigenous peoples' rights in Brazil. Furthermore, after a decade of violence and despite repeated requests by this Committee for the same, the Government of Brazil has still failed to provide a full accounting of the status of investigations into the violent attacks against the indigenous peoples of Raposa. To the knowledge of the Submitting

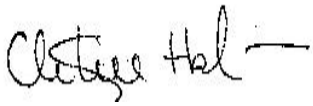
Organizations, this is because none of the attacks have been fully investigated nor responsible parties convicted. Accustomed to impunity, former non-indigenous occupants of Raposa have also exported their violence to other indigenous areas. The attached *Update* describes these issues in more depth, and addresses the outstanding violations of the Convention on the Elimination of All Forms of Racial Discrimination that continue to demand the urgent attention of this Committee.

3. ***In light of this information detailed in the comprehensive communication attached (which includes a detailed analysis of the Supreme Court Decision at its Annex B), the Submitting Organizations request that this Committee continue to remain seized of this important matter, one which has the potential to impact all indigenous peoples in Brazil. In doing so, we reiterate our request that the Committee:***

> ***a. Request the Government to submit a comprehensive report to the Committee regarding how its departments, ministries, and state agents shall interpret the overall decision and its nineteen (19) conditions in order to ensure that it does not violate the human rights affirmed in the Convention and other applicable international standards which apply to Brazil;***
>
> ***b. Encourage the Government to immediately convene a dialogue with the indigenous peoples of Raposa to discuss the full impact of the Supreme Court Decision regarding their rights to use the lands and resources in question;***
>
> ***c. Call upon the Government to finally provide a full accounting of the status of all criminal investigations and prosecutions with respect to perpetrators of violent crimes against indigenous peoples in Raposa (including those crimes listed at Annex C of the Submitting Organizations last update to the this Committee, dated 20 July 2009); and***
>
> ***d. Seek the information previously requested by this Committee but not delivered by Brazil to date (in particular in the Committee's 7 March 2008 letter) and including information regarding the status of the continuing and "in force" Pacaraima Municipal laws (described in the Submitting Organization's update of July 2009) and the pending bill to construct a hydroelectric dam affecting Raposa—absent any consultation or the free, prior and informed consent of the affected indigenous peoples.***

4. If the Secretary or Committee members require any additional information that is not contained herein, please do not hesitate to notify the undersigned.

With great respect and appreciation for your work,



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United Nations Committee on the Elimination of Racial Discrimination
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RE: Continued Need for Urgent Attention of Committee regarding Brazil's Raposa Serra do Sol Indigenous Lands

Dear Mr. Schakel:

1. In anticipation of the Committee's 76th session to begin on 15 February, and on behalf of the Conselho Indígena de Roraima (Indigenous Council of Roraima – "CIR"), representing the Macuxi, Wapichana, Taurepang, Ingaricó and Patamona peoples of Raposa Serra do Sol (RSS or Raposa) indigenous land in the state of Roraima, Brazil; the Rainforest Foundation US; and the Forest Peoples Programme (the "Submitting Organizations"), we write at this time to provide the Committee on the Elimination of Racial Discrimination ("CERD" or the "Committee") with an important update regarding the situation of the indigenous peoples of RSS. Much has transpired since the Committee first received a request for early warning assistance from the Submitting Organizations in June of 2006. As reported in our last update of July 2009, the most significant events that took place in 2009 were the final decision of the *Supremo Tribunal Federal* (Supreme Court or STF) of Brazil in March, which affirmed the constitutionality of the federal government's demarcation of the Raposa lands ("*Supreme Court Decision"* or

"Decision"),[1] and the removal of non-indigenous occupants from the area, which has for the most part been completed as of the present date. The *Supreme Court Decision,* which was issued in March 2009, affirmed the constitutionality of the federal government's demarcation of Raposa Serra do Sol. As described in our July 2009 communication, however, the decision brought with it a series of troubling conditions that threaten indigenous peoples' rights in Brazil. Impunity also continues to prevail. The residents of Raposa are still awaiting a full accounting of the status of investigations into the violent attacks committed against them during the years leading up to the demarcation and through to the expulsion of non-indigenous occupants from the territory. This communication describes these issues in more depth, and addresses the outstanding violations that continue to demand the urgent attention of this Committee.

2. In this Committee's last letter to the Federal Government of Brazil (the "Government"), dated 28 September 2009, CERD requested that the Government provide it with "*an update on this ongoing process to have a full understanding of the situation and its progression*." It further "reiterat[ed] its request for the detailed information contained in its letter of 7 March 2008." To recall, the Committee's 7 March 2008 letter to the Government asked for the following:

   (i) *information about "any remaining legal or judicial impediments that might prevent the full implementation of the Presidential Decree" calling for the removal of non-indigenous occupants*;
   (ii) *the start and end date of the removal*;
   (iii) "the *concrete measures taken to ensure peaceful removal of all illegal occupants"*;
   (iv) *the "concrete measures…adopted to prevent new illegal occupations in the RSS, as well as the results of the 88 investigations (paragraph 37 of the information received on 3 March),[2] especially prosecutions and convictions" of crimes committed against the people of RSS*;
   (v) the process by which the Government was using "to obtain the free, prior and informed consent of the indigenous peoples of RSS with regard to the project to explore hydroelectric resources" in RSS; and
   (vi) whether "consultation been completed prior to presenting the [hydroelectric] project [bill] to the House of Representatives of the National Congress..."

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[1] Ação Popular 3388, judgment of 18 and 19 March 2009, published on 29 September 2009 by the *Supremo Tribunal Federal* ("Supreme Court Decision"), *available in full* at http://www.stf.jus.br/portal/inteiroTeor/pesquisarInteiro Teor.asp#resultado (including hearing transcript and preliminary findings of the case's Special Rapporteur Britto, subsequent hearings, preliminary decision of March and final published decision of September 2009. *See Annex A* for relevant excerpt of principle decision of September 2009.

[2] The Submitting Organizations assume this is reference to a communication sent to the Committee by the Government. It has not received a copy of this letter to date.

3. In paragraphs 9-25 below, as well as in the analysis of the *Supreme Court Decision* presented as *Annex B* and the summary of violent acts described in *Annex C* and *Annex D*, the Submitting Organizations offer a response to the Committee's outstanding questions and requests for updates from the Government.

4. Upon reviewing these responses and the latest developments, the Submitting Organizations remind the Committee that while this matter concerns the Ingaricó, Wapichana, Patamona, Macuxi and Taurepang indigenous peoples of Raposa, the Government's treatment of the situation in Raposa has an impact on all indigenous peoples in Brazil. Over the past decade, the plight of the indigenous peoples of Raposa has captured the attention of the entire Brazilian nation. Indeed, in the midst of these latest developments in Raposa, including the Supreme Court's review of the Raposa case, the situation of RSS was described by the United Nations ("UN") Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples as "[e]mblematic of the various elements of the controversy over indigenous rights" in Brazil.[3] For these reasons it is imperative that the Committee remain attentive to the matter and not dismiss with haste the continued urgency of the situation in light of new developments.

5. Indeed, it should be recalled that when the Submitting Organizations first requested the assistance of CERD pursuant to its early warning and follow up procedures in June of 2006, they based their urgent request on two issues more than any other. While other violations of the Convention on the Elimination of All Forms of Racism (the "Convention") were articulated, the core of the submission was Brazil's violation of indigenous peoples' rights to the lands they traditionally used and occupied, and the violations of the lives and physical integrity of the members of the indigenous peoples living in Raposa (violent attacks against indigenous peoples).

6. As the remainder of this update will demonstrate, these grave violations persist and new violations have arisen which undermine the very rights that might have been finally remedied and enjoyed as a result of the progress we have seen on the ground. Most notably, the Brazilian Government has failed to complete any investigations and to prosecute any of the perpetrators of violent attacks against the indigenous peoples of Raposa, despite this Committee's five requests for information about investigations, prosecutions and convictions (*see below* paragraph 19). Moreover, as detailed in Annex B, the *Supreme Court Decision* which laudably confirmed the constitutionality of Raposa's demarcation and the compatibility of indigenous peoples' property rights with State sovereignty, border security, and economic development ,also drastically redefined in certain ways, and could potentially redefine in other ways yet to be seen, Brazil's constitutional obligations with respect to indigenous peoples. By attaching a number of

[3] Report on the Situation of Human Rights of Indigenous Peoples in Brazil, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34/Add.2, para. 31 (26 August 2009) (hereinafter "UN Special Rapporteur Report: Brazil 2009").

qualifications and conditions to its decision, the Supreme Court diminished the very human rights it was charged with recognizing and protecting. As such, enjoyment of these rights remains elusive and vulnerable, arguably even more so than when the Submitting Organizations first brought the situation of Raposa to the attention of this Committee.

7. For these reasons, as further detailed below, the Submitting Organizations reiterate their profound concern over the potential impacts of the Supreme Court Decision; the Pacaraima Municipal laws which are still in effect and are an affront to indigenous self-governance and control over their lands and resources; the pending bill to exploit hydroelectric resources in RSS; and the continuing impunity that prevails in terms of the violence perpetrated against the indigenous peoples of Raposa.

Request for Continued Assistance

8. In light of this information, the Submitting Organizations request that this Committee continue to remain seized of this important matter, one which has the potential to impact all indigenous peoples in Brazil. In doing so, we reiterate our request that the Committee:

   a. Request the Government to submit a comprehensive report to the Committee regarding how its departments, ministries, and state agents shall interpret the overall decision and its nineteen (19) conditions in order to ensure that it does not violate the human rights affirmed in the Convention on the Elimination of All Forms of Racial Discrimination (Convention) and other applicable international standards which apply to Brazil;

   b. Encourage the Government to immediately convene a dialogue with the indigenous peoples of Raposa to discuss the full impact of the Supreme Court Decision regarding their rights to use the lands and resources in question;

   c. Call upon the Government to finally provide a full accounting of the status of all criminal investigations and prosecutions with respect to perpetrators of violent crimes against indigenous peoples in Raposa (including those crimes listed at Annex C of the Submitting Organizations last update to the this Committee, dated 20 July 2009); and

   d. Seek the information previously requested by this Committee but not delivered by Brazil to date (in particular in the Committee's 7 March 2008 letter) and including information regarding the status of the continuing and "in force" Pacaraima Municipal laws (described in the Submitting Organization's update of July 2009) and the pending bill to construct a hydroelectric dam affecting Raposa—absent any

consultation or the obtaining the free, prior and informed consent of the affected indigenous peoples.

Responses to the Committee's Outstanding Requests for Updates from the Government

The following provides responses to the requests for information listed above that the Committee sent to The Government of Brazil.

An "update on this ongoing process to have a full understanding of the situation and its progression" including developments around the Supreme Court case:

9. On 19 March 2009, after years of inconsistent judicial decisions and an abuse of the courts by opponents of indigenous peoples rights, the Supremo Tribunal Federal (Brazil's Supreme Court or "STF") issued its final non appealable ruling in the case of Raposa. The *Supreme Court Decision* (the final official version of the Decision was not published until September 29, 2009). At first it was met with celebration by the indigenous communities of Raposa, and rightfully so. Finally, their lands were recognized as constitutionally demarcated and the Federal Government was given the go ahead to finalize the removal of non-indigenous occupants that was to have been completed back in 2006. Unfortunately, after a closer analysis of the full content of the case, this relief turned into grave concern. The Supreme Court did not confine itself to endorsing the Raposa demarcation, but it went further to interpret and define -- if not "redefine" -- the rights of indigenous peoples as currently affirmed in Article 231 of the Brazilian federal Constitution. Among other things, the Supreme Court placed numerous limitations on the rights of indigenous peoples to their property. In many ways those rights are now unrecognizable when compared to their growing meaning and application under Brazilian law as well as their clear import under international law -- including the Convention as well as other applicable international instruments, including the American Convention on Human Rights which governs the hemisphere. In particular, the *Decision* contains within it nineteen (19) conditions, each of which are detailed and analyzed in the attached *Annex B*.

10. As further detailed in Annex B, whatever progress brought by the *Supreme Court Decision* regarding the Raposa territory itself, has been undermined by its undeniable erosion of indigenous peoples' constitutional and international rights to property throughout all of Brazil. The long awaited ruling now places at risk years of progress that Brazil has made with respect to indigenous peoples and with it the hopes of full recognition and enjoyment of the rights to the traditional lands, territories and resources of all indigenous peoples in the nation. Absent some progressive interpretations and application, creative regulatory frameworks for implementation, and perhaps even new clarifications by the Supreme Court itself, there is considerable cause for concern. Sharing this concern, Dr. James Anaya, UN Special Rapporteur on the Situation of

Human Rights and Fundamental Freedoms of Indigenous Peoples described the long anticipated ruling in the following terms:

> [W]hile upholding the demarcation of the Raposa territory and ordering the removal of the non-indigenous rice farmers, the court pronounced an array of conditions, *many of them limiting, on the land rights it was confirming and on the constitutional protections for indigenous lands* more generally...
>
> The Supreme Federal Tribunal's decision in the case of Raposa Serra do Sol, adopted on 19 March 2009, articulated 19 conditions that, in the view of the majority of the justices of the high court, shape the content of the constitutional recognition and protection of indigenous lands, including demarcated and registered lands. *These conditions go far beyond the specific wording of the Constitution or of any applicable legislation, in what the federal Attorney General and some observers have deemed a questionable exercise of the court's authority as a judicial, rather than a legislative, organ*. Some of the 19 conditions confirm protections for indigenous lands, for example, exemption from taxation and prohibition of non-indigenous hunting, fishing and gathering activities. *Several of the other conditions, however, limit constitutional protections by specifying State powers over indigenous lands on the assumption of ultimate State ownership. A number of conditions affirm the authority of the federal Union, through its competent organs, to control natural resource extraction on indigenous lands, install public works projects, and to establish on these lands, without having to consult the indigenous groups concerned, police or military presence. Other provisions authorize specific Government institutions to exercise certain monitoring powers over indigenous lands, in particular for conservation purposes and to regulate entry by non-indigenous individuals*."[4] (Emphasis added).

11. Under international law, the acts of its judiciary are imputable to the Government of Brazil, even when the Government was a party to the case. Indeed, as described above by the UN Special Rapporteur and in greater detail in Annex B, the Supreme Court's ruling, including the majority of the nineteen conditions, continues the State failure to:

> (i) recognize indigenous peoples' right to property (as fully described and affirmed by the Convention);
> (ii) take adequate measures to allow for the enjoyment of that right by preventing interferences with indigenous peoples' ownership, management and control of the lands and resources in question; and
> (iii) provide a fair, effective, and prompt remedy (administrative or judicial) to address indigenous peoples land claims.

[4] UN Special Rapporteur Report: Brazil 2009, paras. 35 & 40.

The Supreme Court's decision does this by, among other things:

> (i) reducing indigenous peoples to mere social organizations without political attributes capable of governing and controlling their own lands, resources, and people;
> (ii) affirming the notion under Brazilian law that indigenous people only use, but do not own, control and manage their lands and resources;
> (iii) permitting the State to interfere with indigenous lands and control all third party interferences with indigenous lands, without any prior consultation let alone consent from indigenous peoples; and
> (iv) evidencing that the Brazilian judiciary –just like the State's administrative procedures for demarcating indigenous land– cannot offer a simple, prompt and effective remedy to indigenous land claims as required by the Convention.

12. As described further in Annex B, the Supreme Court's decision essentially limits indigenous peoples' rights to property to merely a right to "use" their traditional lands to address their subsistence and cultural needs. The ruling affirms that non-indigenous people need authorization to use such lands or resources from the State alone, and not from indigenous peoples themselves. Notably, the threat that was previously presented by third parties in particular (i.e rice growers and other non-indigenous trespassers) is now replaced with the State which can, according to the ruling, continue to exploit and interfere with indigenous lands and their resources largely without any prior consultation with or the consent of the indigenous people in question. The State is not only the ultimate arbiter of what happens in indigenous lands, but according to the decision, is largely the only decision-maker, save indigenous peoples' right to use the resources for their traditional activities and preservation of their culture and subsistence needs. As described in greater detail in Annex B, this underlying thrust of the Supreme Court's decision is wholly inconsistent with international law on the rights of indigenous peoples. As Special Rapporteur Anaya clarified after his review of the *Supreme Court Decision*, "the State's property interest in indigenous lands must operate only as a means of protection and not as a means of interference with indigenous control."[5]

13. It is notable that in its Concluding Observations of 2004 this Committee recognized that the "effective possession and use of indigenous lands and resources continues to be threatened and restricted by recurrent acts of aggression against indigenous peoples" and recommended "that the State party adopt urgent measures to recognize and protect, in practice, the right of indigenous peoples to own, develop, control and use their lands, territories and resources."[6] The *Supreme Court Decision* has failed to recognize indigenous ownership and control over their lands and made interference with their land a

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[5] UN Special Rapporteur Report: Brazil 2009, para. 40.

[6] Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/c/64/C)/2 (2004), para. 15 (emphasis added) (hereinafter, CERD 2004 Concluding Observations: Brazil).

continued threat. The *Decision* has made it easier for the State itself, or through the authorization of others, to engage in a number of economic activities and operations -- including to establish infrastructure and carry out military operations within indigenous lands-- not only without the consent of the affected indigenous populations, but also without any form of consultation. This Supreme Court case has threatened to bring Brazil back to where it was before it adopted its new Constitution in 1988. It also places the Government of Brazil in violation of its duties and obligations under the Convention, as well as the American Convention, the UN Declaration on the Rights of Indigenous Peoples, ILO 169, and other international law in general.

14. Indeed, unless the State adopts significant legislation and regulations to provide for a progressive interpretation of the Supreme Court's decision, as it stands, it directly violates indigenous peoples' rights to property under Article 5 of the Convention. Moreover, as it has been applied to date, in practice one can see that the Supreme Court's decision is already having the adverse impacts that its terms suggest. For example:

    (i) The indigenous community of Serra da Moça, in Roraima, asked for enlargement of their lands to incorporate a local traditional area called Lago da Praia. The request was approved by FUNAI and by INCRA, and is awaiting decision of the Ministry of Justice. Recently, however, INCRA resettled several former non-indigenous occupants of Raposa in the same area. The ex-occupants of Raposa cited *condition (xvii)* of the *Decision* which prohibits the enlargement of already demarcated indigenous areas and as such called for the dismissal of the community's petition for expansion. They also burned several community buildings, constructively evicting the community from the area. INCRA subsequently filed an action for repossession in order to remove the non-indigenous group from the area. The Submitting Organizations understand that a court recently issued a decision making their return possible.

    (ii) On September 30, 2009 the National Confederation of Agriculture and Ranching of Brazil (CNA) filed an action known as a *"sumula vinculante"* (binding precedent) with the Supreme Court ("PSV49").[7] The purpose of the action was to ask that the Court clarify and apply a prior *sumula vinculante* decision (SV 650) to the interpretation of the recent *Supreme Court Decision* on Raposa. SV 650, issued in 2003, declared that "paragraphs I and XI of *Article* 20 of the Federal Constitution do not apply to lands of *extinct settlements*, even if occupied by

[7] Request for Stare Decisis No. 49 (*Proposta de Súmula Vinculante nº49*) ("PSV49"), National Confederation of Agriculture and Ranching of Brazil (CNA), submitted on September 30, 2009 and published for comment by the Supreme Court on October 5, 2009. See http://www.stf.jus.br/arquivo/cms/jurisprudencia PropostaSumula Vinculante/anexo/psv49.pdf (reconhecimento oficial do sumula) e ver também http://www.canaldoprodutor.com.br/noticias/cna-quer-s%C3%BAmula-vinculante-para-regular-demarca%C3%A7%C3%A3o-de-terras-ind%C3%ADgenas (summary of the request).

indigenous people in the *remote past*."[8] The new action filed by the National Confederation (PSV 49), seeks to redefine "extinct indigenous settlements" and "remote past" to mean anything before the date of October 5, 1988, when the current Constitution passed into law, rather than "time immemorial", as used in SV 650.[9] The authors of PSV 49 based their request on section 11.1 of the *Supreme Court Decision*, in which 1988 is set as the date by which indigenous peoples had to control a territory for it to be eligible for demarcation. Notably, the authors fail to take into account section 11.2 of the same decision, which asserts that indigenous groups who were evicted from their lands before October 5, 1988 and unable to return to their lands due to persistent occupation by non-indigenous peoples do not have their property claims extinguished.[10]

If approved by the Supreme Court, PSV 49 would mean that only areas occupied by indigenous peoples on the date the Federal Constitution became law in 1988 would be recognized as "lands traditionally occupied by the indians" (as the Constitution defines areas that must be ratified).[11] The decision would therefore impact over 22 requests for enlargement of indigenous lands in Roraima alone, as well as other cases throughout Brazil which are currently before the Supreme Court. FUNAI has filed a motion to dismiss the request, arguing that the definition of an "extinct settlement" should not apply to situations in which an indigenous group was evicted from their lands.[12] The Submitting Organizations appreciate FUNAI's intervention in the case, and agree with its position.

(iii) Since the *Supreme Court Decision*, Legislative Decree N^{o}. 2540/2006, which would establish the Cotingo River Hydroelectric Project has obtained new force. The project would impact Raposa, and today there are presently eight proposals before the Brazilian Senate for new dams along the Cotingo River.[13] *Conditions*

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[8] Stare Decisis Decision No. 650 (*Sumula Vinculante no. 650*) of the Supreme Court of Brazil. Published in the *Diário da Justiça da União* October 9, 2003, page 3 (further affirming that "*extinct indigenous settlements*" could not form the basis for a request to ratify an indigenous land.)

[9] *PSV 49*, page 3.

[10] *Supreme Court Decision*, §11.2. "The mark of traditional native possession, however, cannot be lost when, at the time of the promulgation of the Constitution of 1988, reoccupation did not take place due to resistant dispossession by non-indigenous people."

[11] *PSV49*, pagess 2, 6 – 8.

[12] *See* National Indian Foundation (FUNAI), Statement regarding the *Proposta Súmula Vinculante N° 49*, submitted by the General Prosecutor's office (*Advocacia-Geral da União*) and the Federal Prosecutor's Office (*Procuradoria-Geral Federal - Adjuntoria Contencioso*), to the Supreme Court (29 October 2009) ("*Manifestação FUNAI, PSV49*"). FUNAI affirms that "the rupture of the temporal link to land, if the ethicity has not been exterminated and historical-cultural links [to the land] have not been broken, does not negate the traditionality of indigenous occupation, nor signify the extinction of the respective [indigenous] settlement." *Manifestação FUNAI, PSV49*, page 9.

[13] Plans to build a hydroelectric dam within Raposa Serra do Sol continue. The proposed law written by Roraima Senator Mozarildo Cavalcanti was approved by the Federal Senate and is currently being discussed in the House of Representatives. If the Project is approved, it will then go on for sanction by the President, and become law. In addition to this proposed law, there are a number of other proposals for hydropower facilities on the Cotingo

(ii) and (iv) of the *Decision* omit the necessity to consult with indigenous peoples about such projects and make the adoption of such laws easier. Furthermore, on 19 November 2009, the Brazilian Senate approved a proposal to build the Paredão hydroelectric facility on the Mucajaí River in Roraima, without any consultation with the indigenous peoples that would be impacted by the project.

(iv) The *Decision* further affirmed control of the Chico Mendes Institute, a government agency, over the Monte Roraima National Park, which was established and superimposed on the Raposa lands without consultation or consent of the indigenous peoples in question. The *Decision* even places at risk an agreement that was negotiated following the 2005 ratification of Raposa regarding the co-management between local indigenous communities and IBAMA, as well as the role of a working group which consists of indigenous participants, both of which were negotiated without conceding indigenous peoples' original protest to the creation and management of the park. This Committee has made it clear that protected areas should only be established with the consent of the indigenous peoples in question.[14] The *Supreme Court Decision* further eviscerates the requirement for free, prior and informed consent as related to conservation projects, particularly of the scale involved in the Monte Roraima National Park. The Inter-American Court of Human Rights affirmed in *Saramaka v. Suriname* that "when large-scale projects could affect the integrity of [indigenous] people's lands and natural resources, the state has a duty not only to consult with the [indigenous peoples], but also to obtain their free, prior and informed consent in accordance with their customs and traditions."[15] A large national park and conservation area which overlaps with indigenous lands would clearly meet this threshold.

River that would affect indigenous communities in Raposa. The Submitting Organizations consider that these proposals do not respect the constitutional rights of indigenous peoples, nor the norms set forth by the Convention and other international human rights instruments which provide that all legislative measures which shall affect indigenous peoples should be realized only with prior consultation with indigenous peoples.

[14] In referring to the applicable human rights norms for conservation, especially in protected areas, see, amongst other documents, a) Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/2002, United Nations A/57/18, para. 292-314, in 304 (where they establish that the state should "not take any decision directly related to the rights and interests of members of indigenous peoples without their informed consent" in connection with nature reserves; b) Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka. 14/09/2001, United Nations doc A/56/18, para. 321-342, in 335 (where they insist that the state "recognize and Project the rights of indigenous peoples to posses, develop, control and utilize their communal lands, territories, and resources…in connection with a national park"; and c) Concluding observations of the Committee on the Elimination of Racial Discrimination: Ethiopia. 20/06/2007, United Nations doc. CERD/C/ETH/CO/15, para.. 22 (where they explain that states ought to ensure the effect participation of indigenous peoples and their "informed consent when they establish national parks and in which they refer to the effective management of such parks" and that the state "shall adopt all necessary means to guarantee that the national parks established in the ancestral lands of indigenous communities will permit sustainable social and economic development that is compatible with the cultural traits and the lifestyles of these communities.

[15] *Saramka People v. Surinam*, para. 134.

v) Recently, Magistrate Gilmar Mendes (President of the Supreme Court) granted a motion filed by ranchers who have 184 hectares within the 7,175 ratified as the Arroio Korá indigenous area in Mato Grosso do Sul.[16] He suspended the ratification in the area occupied by the ranch (i.e. carved the ranch out of the area to be ratified), arguing, among other things, that the area of the ranch has been registered to non-indigenous landowners since 1924, therefore the indigenous peoples could not demonstrate that they had been living there in 1988. As described in Annex B, the Supreme Court interpreted the Constitution as providing that in order to obtain demarcation, an area must have been occupied by the indigenous community in question in 1988 when the Constitution was adopted.

For these reasons and those detailed in Annex B, the *Supreme Court Decision* must be carefully examined by the Committee in terms of its consistency with the Convention.

Information about "any remaining legal or judicial impediments that might prevent the full implementation of the Presidential Decree" calling for the removal of non-indigenous occupants.

15. As noted above and in our July 2009 update, the removal of non-indigenous occupants of Raposa was largely completed as of that date. The "permanent possession" and the "constitutional rights" of the indigenous peoples guaranteed by the Presidential Decree[17] are now subject to the implementation and interpretation of the *Supreme Court Decision* and the limitations and conditions therein. (*See* paragraphs 9-16 above). As described above and in Annex B, the *Decision* presents challenges to the full and effective protection and realization of the rights of indigenous peoples in the Constitution. In this way, absent appropriate reforms and creative implementation, it can be said that the *Decision* risks running counter to the spirit and mandate of the Presidential Decree itself.

The start and end date of the removal.

16. Over three decades since Brazil's indigenous institute, FUNAI, first began its study of the Raposa area, and after waiting five years after their lands were ratified by the President in 2005. The *Supreme Court Decision* paved the way for a final removal to take place. The removal was completed in May 2009. A few pending issues remain with non-indigenous people who are married to indigenous occupants of RSS, but by and large, the removal process has been completed, and those who used violence to remain on the land have largely left.

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[16] "*Homologação de Terras Indígenas foi relevante porém tardia, dizem especialistas*" ("Ratification of Indigenous Lands was late but significant, say specialists"), *Amazônia*, Thiago Peres (1 August 2010), available at http://www.amazonia.org.br/noticias/noticia.cfm?id=340115.

[17] Executive Decree of 15 April 2005, published in *Diário Oficial da União*, Edition N°. 73 (18 April 2005) (hereinafter Presidential Decree (15 April 2005)).

"[T]he concrete measures taken to ensure peaceful removal of all illegal occupants."

17. In the context of completion of the removal process, the Government assessed the value of the lands, property and improvements of non-indigenous occupants. During the removal period, IBAMA (Brazil's environmental institute) also levied fines on a number of individuals as a result of environmental crimes. For the most part these fines have not been paid (demonstrating impunity once again for crimes committed against indigenous peoples and property within Raposa). Regardless, no money has yet been rededicated to recovering the health of the lands upon which the indigenous peoples depend for their basic needs – bathing, eating, drinking, gathering. Indeed, these environmental impacts continue to be present and unremediated. The rice monoculture has caused deforestation, the pollution of rivers, and the unauthorized diversion of the Surumú River to serve the rice farms. Soil erosion, water and soil contamination, illegal fishing, illegal damming of streams, silting due to unsustainable agricultural practices, improper garbage disposal, and activities that pollute water used for drinking, bathing and cooking have left a permanent mark on Raposa.[18]

"[T]he concrete measures…adopted to prevent new illegal occupations in the RSS, as well as the results of the 99 investigations (paragraph 37 of the information received on 3 March), especially prosecutions and convictions" of crimes committed against the people of RSS.

18. Over the past three and a half years, the Submitting Organizations have documented before this Committee how the indigenous peoples of Raposa have been victims of death threats, shootings, beatings, the destruction of whole villages and key community structures, forced displacement, and the deliberate interference with their ability to move in and out of the region as a result of blockades and the burning of key bridges – all of which constitute violations of their right to life and physical integrity. Perpetrators of these acts worked with the complicity of members of the government of the State of Roraima and took advantage of a lack of adequate security provided by the Federal Government throughout the period in question. Impunity has resulted from the national government's failure to complete investigations and bring the perpetrators to justice through prosecutions.

19. Despite its duties and obligations under its own law and that of international law, the State has not completed any investigation into the numerous threats and incidents of violence previously reported to this Committee -- including but not limited to the armed attacks in 2004 of the indigenous communities of Jawari, Homologação, Brilho do Sol and Lilás (prompting the Inter-American Commission on Human Rights to issue Precautionary Measures in December of 2004); the attacks on the community of Surumú in 2005; the brutal beating of *Sergio da Silva Alves* during CIR's General Assembly in February of 2007; and the May 2008 shooting of indigenous people near Fazenda

[18] Informaçãon. 107/CGVS/DIPRO (6 May 2008).

Deposito. Moreover, despite the repeated requests of this Committee, the Government has not provided any reports proving that it has completed exhaustive investigations or held any perpetrators responsible. There have been, in fact, only two cases whose investigations have led to the sanctioning of individuals: one involving a case where policemen were kidnapped by indigenous people associated with an indigenous organization allied with the rice growers who opposed the demarcation, and the other involving a case of violence Surumú in 2005. Notably, in both cases the victims were not indigenous and only indigenous perpetrators were sanctioned despite the presence of testimony regarding the involvement of non-indigenous parties. This shows a discriminatory application of the law.

20. Even in the case of the prominent arrest of the former mayor of Pacaraima, Paulo Cesar Quartiero (which was welcomed by indigenous peoples), Mr. Quartierro and his compatriots now walk free. Full investigations regarding his activities have not been completed and he has not been prosecuted for his crimes against the people of Raposa. In fact, stories have surfaced that he is planning to move to Guyana where he will buy land within other indigenous territories.[19] Indigenous peoples from Guyana are concerned with his arrival, given his track record in Brazil.

21. Because of this impunity, this Committee has repeatedly asked the Government to provide it with details on the measures it has taken to complete investigations and sanction violence against the indigenous peoples of Raposa. Such pleas were made on at least five separate occasions by this Committee in its letters to Brazil dated: 18 August 2006, 14 March 2007 (specifically asking for the number of complaints, prosecutions and convictions), 24 August 2007 (highlighting that "no information on complaints, investigations and convictions has been provided to the Committee" to date), 7 March 2008, 15 August 2008, and in its last letter, dated September 28, 2009.

22. In its 20 July 2009 letter to this Committee, the Submitting Organizations attached a chronological list of the various crimes perpetrated over the past five years against indigenous peoples. As a reminder of the most grave of these crimes, attached to this communication as Annex C is a summary with accompanying photos of some of the most pivotal acts of violence. Annex D also provides a chronological list of the critical attacks against the indigenous peoples of Raposa from 2004 to 2008. For none of these crimes have the indigenous peoples of Raposa seen investigations and prosecutions of the responsible parties completed. Such impunity only serves to foster more violence. This has been proven true by the recent violence perpetrated by the former occupants of Raposa who have now become residents of Lago da Praia and engaged in violence against its indigenous occupants (see paragraph 14(i) above). Due to the state's failure to

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[19] *See* "Quartiero fecha entendimento na Guiana" (*Quartiero closes a deal in Guyana*), Folha de Boa Vista, August 3 2009, http://www.folhabv.com.br/fbv/noticia.php?id=67393; and "Presidente guianense quer apoiar projeto de brasileiros" (*Guyanese President wants to support Brazilian Project*), Folha de Boa Vista, 28 July 2009; http://www.folhabv.com.br/fbv/noticia.php?id=67030.

sanction responsible parties, they have transported their hatred of indigenous peoples and their violent tactics to a new region with little or no fear of prosecution.

The process by which the Government was using "to obtain the free, prior and informed consent of the indigenous peoples of RSS with regard to the project to explore hydroelectric resources" in RSS.

23. The Government of Brazil has not put in place any process to consult with or to obtain the free, prior and informed consent of the indigenous peoples of RSS with respect to the exploitation of hydroelectric resources. Full respect for the right of the indigenous peoples in RSS to their lands continues to be threatened by the proposed dam involving the Cotingo River which runs through Raposa. Legislation to authorize the power plant and dam has already been approved by the Brazilian Senate (Legislative Decree N°. 2540/2006) and by the Congressional Committee on National Integration and Regional Development of the Amazon. To date the proposed legislation has moved through the Senate and is now before the House and set for debate and adoption without any consultation with, let alone consent by, the indigenous peoples that will be affected by the project. Furthermore, there are presently eight proposals before the Brazilian Senate for new dams along the Cotingo River. On 19 November 2009, the Brazilian Senate approved a proposal to build the Paredão hydroelectric facility on the Mucajaí River in Roraima, without any consultation with the indigenous peoples that would be impacted by the project

Whether "consultation has been completed prior to presenting the [hydroelectric] project [bill] to the House of Representatives of the National Congress..."

24. As previously detailed to this Committee, no consultations have been carried out with the indigenous peoples of Raposa or other areas which will be affected by the adoption of Legislative Decree N°. 2540/2006 and the implementation of the resource exploitation project contemplated by the law. As indicated above, this is made more possible given Conditions (ii) and (iv) of the *Supreme Court Decision* omit the necessity to consult with indigenous peoples about such projects and make the adoption of such a law easier.

Other Continuing Threats to Indigenous Control of their Lands and Resources

25. This Committee must further consider that the imposed non-indigenous municipalities of Normandia, Uiramutã, and Pacaraima continue to exist within the Raposa territory in stark contrast to the right of indigenous peoples to control and manage their territories using their own customs, values, and governing institutions. The Court also affirmed the "legitimate" presence of the Monte Roraima protected area established without the consultation or consent of the indigenous peoples of Raposa. In addition, as reported to the Committee in prior submissions, two laws (Pacaraima Municipal Laws N.110/2006 and 111/2006, dated 6 September 2006) were adopted in order to establish non-indigenous governance over areas of Raposa and create a new administrative unit

(district) directly within the most contentious and heavily populated region in Raposa (the region of Surumú which was the site of the violent attacks of 2005). These laws still have the effect of interfering in the indigenous peoples' own governance over their lands, as well as their political, social and cultural organizations and activities (i.e. closing an indigenous school and placing it under municipal control and requiring municipal authorization for the meeting of indigenous tuxauas (leaders)). These laws have yet to be repealed.

26. All of the above demonstrate the continued violations of the Convention that persist – particularly with respect to the rights of indigenous peoples to own, control and manage their lands and resources and their rights to be free from attacks on their lives and physical integrity. Specifically, in light of this information the Submitting Organizations request that this Committee continue to remain seized of this important matter that has the potential to impact all indigenous peoples in Brazil. In doing so, we reiterate our request that the Committee:

    a. Request the Government to submit a comprehensive report to the Committee regarding how its departments, ministries, and agents shall interpret the overall decision and its nineteen (19) conditions in order to ensure that it does not violate the human rights affirmed in the Convention and other applicable international standards which apply to Brazil;

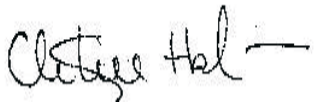
    c. Encourage the Government to immediately convene a dialogue with the indigenous peoples of Raposa to discuss the full impact of the Supreme Court decision
    regarding their rights to use the lands and resources in question;

    d. Call upon the Government to finally provide a full accounting of the status of all criminal investigations and prosecutions with respect to perpetrators of violent crimes against the indigenous peoples in Raposa (including those crimes listed at Annex C of the Submitting Organizations last update to the this Committee dated 20 July 2009); and

    e. Seek the information previously requested by this Committee but not delivered by Brazil to date (in particularly in the Committee's 7 March 2009 letter) and including information regarding the status of the continuing and "in force" Pacaraima Municipal laws (described in the Submitting Organization's update of July 2009) and the pending bill to construct a hydroelectric dam affecting Raposa—absent any consultation or the obtaining of the free, prior and informed consent of the affected indigenous peoples.

27. If the Secretary or Committee members require any additional information that is not contained herein, please do not hesitate to notify the undersigned.

With great respect and appreciation for your work,



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<u>ANNEX A</u>: *Supreme Court Decision*

Judgments

Pet. 3388 / RR - RORAIMA

PETITION

Judge (delivering opinion): Judge. CARLOS BRITTO

Judgment: 19/03/2009

Judicial Body: Full Bench

Publication

DJe-181 DECLARATION 24-09-2009 PUBLICATION 25-09-2009

SUMMARY VOL-02375-01 PP-00071

Party(ies)

PLAINTIFF(S): AUGUSTO AFFONSO BOTELHO NETO

ATTORNEY(IES): CLÁUDIO VINÍCIUS NUNES QUADROS

ASSISTANT(S): FRANCISCO MOZARILDO DE MELO CAVALCANTI

ATTORNEY(S): ANTONIO GLAUCIUS DE MORAIS E OUTROS

DEFENDANT(S): UNIÃO

ATTORNEY(S): ADVOGADO-GERAL DA UNIÃO

Summary

SUMMARY: CIVIL SUIT. DEMARCATION OF THE INDIGENOUS LAND KNOWN

AS RAPOSA SERRA DO SOL. INEXISTENCE OF DEFECTS IN THE DEMARCATION-ADMINISTRATIVE PROCEEDING. OBSERVANCE OF ARTICLES 231 AND 232 OF THE FEDERAL CONSTITUTION, AS WELL AS LAW NO. 6,001/73 AND ITS REGULATORY DECREES. CONSTITUTIONALITY AND LEGALITY OF ORDINANCE NO. 534/2005 OF THE MINISTRY OF JUSTICE AS WELL AS THE RATIFIED PRESIDENTIAL DECREE. RECOGNITION OF THE INDIGENOUS STATUS OF THE DEMARCATED AREA IN ITS ENTIRETY. THE CONTINUOUS MODEL FOR DEMARCATION. CONSTITUTIONALITY. DISCLOSURE OF CONSTITUTIONAL REGIME OF THE DEMARCATION OF INDIGENOUS NATIVE LANDS. THE FEDERAL CONSTITUTION AS A LEGAL STATUTE IN THE INDIGENOUS CAUSE. THE DEMARCATION OF INDIGENOUS LANDS AS AN ADVANCED CHAPTER OF FRATERNAL CONSTITUTIONALISM. COMMUNITY INCLUSION BY WAY OF ETHNIC IDENTITIES. THE DECISION OF REPORTING JUDGE TO ENHANCE THE RESPECTIVE SAFEGUARDED INSTITUTIONAL FOUNDATIONS AS REQUIRED BY THE HIGH LEVEL OF HISTORICAL-CULTURAL IMPORTANCE OF THE CASE. IMPROVED SAFEGUARDS FROM THE DECISION OF JUSTICE MENEZES DIREITO AND TRANSFERRED TO THE DISPOSITIVE PORTION OF THE DECISION.

1. CLAIM DISMISSED IN PART. The claim is dismissed as far as the plaintiff's issue of excluding the demarcated area or the area which was previously excluded: the 6th Special Platoon of the Frontier (*Pelotão Especial da Fronteira*), the urban centers of the Cities of Uiramutã and Normandia, the federal and state public fixtures and facilities currently existing, as well as electrical power transmission lines and the federal and state highways also already in existence. The absence of a judicial interest in this matter. Requests already considered under Ordinance No. 534/2005 of the Ministry of Justice. As far as the municipal seat of the City of Pacaraima, concerning territory considered part of the "São Marcos Indigenous Lands (*Terra Indígena São Marcos*)," as material external to the present demand. The lawsuit, for these reasons, is hereby dismissed.

2. ABSENCE OF PROCEDURAL DEFECTS IN THE CIVIL SUIT.

2.1. Nullification of claims, including formal claims, with the subject of occupation, control and possession of lands located in the indigenous area of Raposa Serra do Sol. Alleged private landholders who are not part of the present civil suit. The claim aims to achieve protection of public ownership or of a State-controlled entity (clause LXXIII of article 5 of the Federal Constitution), and not that of private interests.

2.2. Passive illegitimacy of the participation of the State of Roraima in the suit, which was not accused of practicing activities considered harmful to the type of properties at issue in this case, for their protection, as previously claimed in the civil suit. It is impossible to permit the entrance of a member-State as a plaintiff, as only citizens may legitimately bring civil suits.

2.3. Entry of the State of Roraima and of other interested parties, including the representatives of indigenous communities, is limited exclusively to that of associates of plaintiff.

2.4. Regular updates from the Public Prosecutor's Office.

3. ABSENCE OF DEFECTS IN THE ADMINISTRATIVE DEMARCATION PROCEEDING.

3.1. Proceedings must observe the rules of Decree No. 1,775/96, previously declared constitutional by the Federal Supreme Court in the *Writ of Mandamus* No. 24,045, of the report of minister Joaquim Barbosa. Those interested will have the opportunity to accredit the administrative proceeding of the demarcation of indigenous lands, as the facts therein will are founded in the State of Roraima, the City of Normandia, the alleged landholders and indigenous communities, those by means of petitions, letters and all other information provided. The observance of constitutional such guarantees demands that the parties be given both the opportunity to confront each other and the right of sufficient defense.

3.2. The data and anthropological evidence was revealed and endorsed by professionals with recognized scientific qualifications, and all of the elements demanded by the constitution and within the constitutional right of the demarcation of indigenous land were provided, although it is not required that the verdict be endorsed by all parties of the technical group (Decrees Nos. 22/91 and 1,775/96).

3.3. The administrative demarcation, ratified by the President of the Republic, is "the act that summons the presumption *juris tantum* of legitimacy and of truthfulness" (RE 183,188, of the report issued by the office of Celso de Mello), which summons up the declaratory nature and self-executing force of the ratification. There is no evidence of alleged fraud by the public party or its original assistant.

4. THE SIGNIFICANCE OF THE NOUN "NATIVES" IN THE FEDERAL CONSTITUTION. The noun "natives" is consistently used in the Federal Constitution of 1988 in the plural form, to express the differentiation of native peoples of various ethnicities. The constitutional intent is to illustrate indigenous diversity as being as much interethnic as it is intra-ethnic. Natives undergoing the process of acculturation still remain natives for the purposes of constitutional protection. Such constitutional protection is not limited to forest dwellers (*silvícolas*), these being natives in the primitive state of inhabiting the forest.

5. INDIGENOUS LANDS AS AN ESSENTIAL PART OF BRAZILIAN TERRITORY

5.1. The term "indigenous lands" as used in the Federal Constitution of 1988 include part of a Brazilian-state territory, subject exclusively to federal law. As such, what comprises the domain of any Brazilian federated persons, are those lands which are uniquely subject to the first of the reigning principles of international policies of the Federative Republic of Brazil: sovereignty or "national independence" (clause I of article I of the Federal Constitution).

5.2. All of the "indigenous lands" are public federal property (clause XI of article 20 of the Federal Constitution), which does not mean that an act granting demarcation thereby terminates or endangers any federated unit. This is true because, first of all, those units

that were federated after the Constitution of 1988 were territories previously created in accordance with the constitutional regime in which recognized the original natives' preexisting rights to territories that were "traditionally occupied" by natives. Secondly, this is true because the ownership of property is not to be confused with being the landlord of a political territory. No indigenous land is elevated to the status of a political territory, just as no indigenous ethnic group or community constitutes a federated unit. Therefore each indigenous ethnic group is understood as such within the context of a socio-cultural reality, and not that of a political-territorial nature.

6. REQUIREMENT OF INSTITUTIONAL LEADERSHIP OF THE GOVERNMENT UNITS, SO THAT SUCH STATES AND CITIES ALWAYS ACT WITHIN THEIR OWN SCOPE WITH REGARDS TO THE LANDS ALREADY DEMARCATED AS INDIGENOUS LANDS. The objective rights contained in the Constitution require the effective presence of all of the federated persons in indigenous lands to be in harmony with the model of occupation as contained within the Constitution as this is the ultimate source all of governmental authority. Such a model of occupation preserves the identity of each ethnic group when lands are opened up to a mutually advantageous relationship with other indigenous ethnicities and non-native groups. This influence complements the States and Cities in lands already demarcated as indigenous as part of a regime in collaboration with the Government and under Government leadership. The central institution role remains with the Government, which may be immediately supported by its own natives, their communities and organizations, as well as being at the center of protection and management under the Public Prosecutor's Office (*MPF*) (clause V of article 129 and article 232, both of the Federal Constitution).

7. INDIGENOUS LANDS LEGALLY CATEGORIZED AS DISTINCT FROM INDIGENOUS TERRITORIES. THE CONSTITUTIONAL DISINCLINATION TOWARDS THE TERMS OF INDIGENOUS "PEOPLE," "COUNTRY," "TERRITORY," "HOMELAND" OR "NATION." Within the legal-political context the term "territory" is only considered to be the precise spatial environment in the case of a Judicial Order, whether sovereign or autonomous. The noun "lands" is a term that assumes a composition that is distinctly socio-cultural, and not political. The Constitution is

careful to not refer to indigenous territories, instead only referring to "indigenous lands." As such, indigenous "groups," "organizations," "populations" or "communities" do not constitute federated persons. They may not form any electoral constituency or spatial jurisdiction with a political dimension. Consequently, indigenous social organizations are not recognized as combined political entities, and with respect to their particular anthropological base, it does not recognize them as transnational entities. Therefore, no indigenous Brazilian community is able to retain normative stature, by which it may be considered before an International Judicial Order as an independent "Nation," "Country," "Homeland," "National Territory" or "People." This easily sustains the notion that, at all times in which the Constitution of 1988 treats "nationality" and the other such cited vocabulary (including Country, Homeland, national territory and people), such terminology is to refer only to Brazil in its entirety.

8. DEMARCATION AS A RESPONSIBILITY OF THE EXECUTIVE BRANCH OF THE GOVERNMENT. Only the Government, by acting within the sphere of influence of the Executive Branch, may undertake the formal establishment, order and conclusion of the demarcation process of indigenous lands, just as only the Executive Branch is permitted to materially affect such processes, though this does not preventing the President of the Republic from consulting the National Defense Council (clause III of § 1 of article 91 of the Federal Constitution), especially if indigenous lands to be demarcated coincide with national borders. The responsibilities deferred to the National Congress, with concrete effect or without normative weight, are exhausted within the actions referring to clause XVI of article 49 and § 5 of article 231, both of the Federal Constitution.

9. DEMARCATION OF INDIGENOUS LANDS AS ADVANCED CHAPTER OF FRATERNAL CONSTITUTIONALISM. Articles 231 and 232 of the Federal Constitution are ultimately distinctly fraternal or united, and the providence of one constitutional block turns to the effectiveness of a new type of equality: a civil-moral equality of minorities, in light of the proto-value of community integration. These are the constitutional means to compensate for historically accumulated disadvantages made possible by official mechanisms of affirmative action. In this case, allowing the natives to enjoy an established space assures them a dignified means of economic subsistence to more efficiently be able to

preserve their genetic, linguistic and cultural identity. An acculturation process is not diluted in its proximity with non-natives, just as the acculturation brought to the Constitution not is the loss of ethnic identity, but is the sum of these world views. A sum, and not a subtraction. A gain, not a loss. Interethnic relations of mutual benefit characterize the process of constantly accumulating cultural knowledge. This is the concretization of the constitution value of community inclusion as a means of ethnic identification.

10. THE FALSE ANTAGONISM BETWEEN THE INDIGENOUS QUESTION AND DEVELOPMENT. The Public Authorities of all the federative entities are not put in charge for the purposes of underestimating these communities, and even less so with hostile intent towards such indigenous communities, but instead have the objective of benefiting such communities through diversification of the economic-cultural potential of their lands (federative entities). Any such development, which would have occurred without or against natives, where they were found living by traditional means, up until the date of the Constitution of 1988, disrespects the fundamental objective of clause II of article 3 of the Federal Constitution, the guarantor of a type of "national development" being as ecologically equilibrated as it was humanized and culturally diversified, in manner that incorporates indigenous realities.

11. THE POSITIVE CONTENTS OF THE ACT OF DEMARCATION OF INDIGENOUS LANDS.

11.1 The temporary mark of occupation. The Federal Constitution was enacted with a date certain – that of its own promulgation (October 5, 1988) – as an irreplaceable reference point for the date of occupation of the geographic space of any native ethnic group; and thus for the recognition of the natives' rights over the lands that they traditionally occupied.

11.2 The mark of traditional occupation. It is necessary that the indigenous territories be collectively located in a distinct physical space exhibiting a perpetual character, in the spiritual and psychic sense of ethnographic continuity. The tradition of native possession,

however, is not lost where, at the time of the promulgation of the Major Law (*Lei Maior*), reoccupation was not possible due to the persistent of adverse possession on the part of non-natives. Such is the case with regards to the "farms (*fazendas*)" located in the Indigenous Land Raposa Serra do Sol, whose occupation did not lower the natives' capacity for resistance and affirmation of their particular presence throughout the geographical area of "Raposa Serra do Sol."

11.3. The mark of concrete native lands and of the practical finality of traditional occupation. Indigenous areas are demarcated to actually serve as permanent habitats of the natives of a particular ethnic group, including the lands used for their productive activities, and more so are "indispensable to the preservation of environmental resources necessary for their well-being," and still some areas turn out to be "necessary to the physical and cultural reproduction" of each of the ethno-indigenous communities, "according to their common practices, customs and traditions" (their native common practices, customs and traditions, natives, and not including the common practices, customs and traditions of non-natives). Indigenous lands, in the collective native imagination, is not a simply about rights, but gains the dimension of a truthful being, or a being that summarizes in all of its ancestral nature, all co-ethnicity and the entire posterity of one ethnic group. Whereas the Constitution prohibits the removal of natives from their traditionally occupied lands, it also recognizes their right to a permanent possession and exclusive use of these lands, which is paired with the rule that these lands "are inalienable and indispensible, and the rights to them are imprescriptible" [i.e. they are not subject to a period of limitations in order to be exercised before a court, not subject to seizure, and inalienable] (§ 4 article 231 Federal Constitution). The termination of this type of possession is a heterodox institution of Constitutional rights, and not an orthodox figure of the civil code. Therefore it is intellectually clear that ARTICLES 231 AND 232 OF THE FEDERAL CONSTITUTION THEREFORE CONSTITUTE A COMPLETE LEGAL STATUE OF THE INDIGENOUS CAUSE.

11.4 The mark of the fundamentally extensive concept of what is known as the "principal of proportionality." The Constitution of 1988 makes the logical connection of the indigenous common practices, customs and traditions with the understanding, among

others, of the semantics of possession, permanence, habitat, economic production and physical and cultural reproduction of native ethic groups. This concept known as "principal of proportionality," when applied to the theme of demarcation of indigenous lands, gains a particularly expansive meaning.

12. "NATIVE" RIGHTS. Native's rights over the lands that they traditionally occupied were "recognized," and not simply granted, and with that such demarcation illustrates the declaratory nature of such rights, and not that such right was specifically established in each case. The declaratory act is that of an active, preexisting legal situation. This is the reasoning of a Magna Carta where there are those considered "natives," a term which expresses a specific right, more archaic than any other, of the means to prevail over alleged acquired rights, just as materialized rights in public deeds or holders of legitimate possession in favor of non-natives. Such acts, the Federal Constitution declares "null and void" (§6 of article 231 of the Federal Constitution).

13. THE PARTICULAR MODEL OF CONTINUOUS DEMARCATION OF INDIGENOUS LANDS. The model of demarcation of indigenous lands is oriented towards the idea of continuity. Demarcation provides the means for live or open frontiers in the interior, through which a collective profile is formed and this affirms economic self-sufficiency and a usufruct community. This model is also well-suited to serve the economic and cultural concept of expanding horizons which are often closed into "pockets," "islands," "blocks" or "clusters," in a manner that decimates the spirit through the progressive elimination of the elements of each culture resulting in ethnocide.

14. THE RECONCILIATION BETWEEN INDIGENOUS LANDS AND VISITS BY NON-NATIVE PEOPLES, SUCH WITH THE OPENING OF MEANS OF COMMUNICATION AND THE ESTABLISHMENT OF THE PHYSICAL FOUNDATIONS FOR THE DELIVERY OF PUBLIC SERVICES OR OTHER SERVICES OF PUBLIC IMPORTANCE. The exclusive enjoyment of the resources of the land, rivers and lakes located within indigenous lands is reconcilable with the future presence of non-natives, just as it is with the installation of public facilities, the opening of roads or other means of communication, the assembly or construction of physical foundations for the rendering of

public services or other services of public importance, so long as this occurs under the institutional leadership of the Government, under the control of the Public Prosecutor's Office and with collaborative actions of the entities alongside the Federal Administration and the natives' representatives. That which has impeded the natives and their communities, for example, by blocking roadways, collecting tolls for their use and inhibiting the ordinary functioning of government departments.

15. THE PERTINENT RELATIONSHIP BETWEEN INDIGENOUS LANDS AND THE ENVIRONMENT. There is perfect compatibility between the environment and indigenous lands, even if they include areas of environmental "conservation" and "preservation." This compatibility is that which authorizes a double affectation over the administration of the competent environmental regulatory agency.

16. DEMARCATION THAT IS NECESSARILY ENDOGENOUS OR INTRAETHNIC. Each autonomous ethnic group has for itself, exclusively, a portion of land compatible with its particular form of social organization. As such, the continuous model of demarcation, which is mono-ethnic, excludes the intermediary spaces founded between one ethnic group and another. The intra-ethnic model exists in the cases of protected ethnic groups, but if there are prolonged amicable relations between different native ethnic groups, as found in the case of Raposa Serra do Sol, an empirical co-division of spaces that makes it impossible to establish interethnic frontiers. As such, if this more deep-seated close physical proximity occurs, such as in the Indigenous Land of Raposa Serra do Sol, this does not signify intra-ethnic demarcation, and even less so does it allow for the establishment of intermediary spaces in which non-natives could legitimately occupy, nor does this meet the definition of returned state lands, nor does it allow for the establishment of Cities.

17. COMPATIBILITY BETWEEN THE BORDER OF THE FRONTIER AND INDIGENOUS LANDS. There is compatibility between the usufruct of indigenous lands and an international border. Far from standing as a structurally fragile point of the frontier borders, the permanent indigenous allocation in such a strategic space is quite useful insofar as the State institutions (principally the Armed Forces and the Federal Police) are necessarily present with their surveillance posts, equipment, weapons,

companies and agents. Such would not require a license from whomsoever that wants to do so. These mechanisms are an opportunity to raise the awareness even more of our natives, instructing them (beyond those who are recruits), alerting them against future negative influence of certain non-governmental or foreign organizations, mobilizing them in defense of national sovereignty and reinforcing in them the innate Brazilian sentiment. This mission is favorable due to the fact that our natives are the first peoples to reveal devotion to our Country (they, the natives, throughout all of our history decisively contributed to the defense and integrity of national territory) and to today provide their knowledge of the interior of the country and its borders, more so anyone else.

18. LEGAL FOUNDATIONS AND SAFEGUARDED INSTITUTIONS THAT COMPLIMENT THEM. The decision of the reporting judge adds to the respective foundations and the institutional safeguards required in this case due its high degree of historical-cultural importance. The enhanced safeguards from the decision of Justice Menezes Direito and transferred, for that purpose, to the part of provision of the decision. The manner in which it was decided was adopted to check the best theory for operation to the agreement.

Decision

Firstly, the Court, unanimously resolved the question of order, proposed by the Judge delivering the opinion, in the sense of admitting the entry in the case of the State of Roraima and of Lawrence Manly Harte, Olga Silva Fortes, Raimundo de Jesus Cardoso Sobrinho, Ivalcir Centenaro, Nelson Massami Itikawa, Genor Luiz Faccio, Luiz Afonso Faccio, Paulo Cezar Justo Quartiero, Itikawa Indústria e Comércio Ltda., Adolfo Esbell, Domício de Souza Cruz, Ernesto Francisco Hart, Jaqueline Magalhães Lima, and of the inheritance of Joaquim Ribeiro Peres, in the condition of assistants to the public plaintiff, and the National Indian Fund (*Fundação Nacional do Índio*) – FUNAI, of the Socó Indigenous Community, Barro Indigenous Community, Maturuca Indigenous Community, Jawari Indigenous Community, Tamanduá Indigenous Community, Jacarezinho Indigenous Community and the Manalai Indigenous Community, as assistants to the Government, everyone receiving the proceeding in the state in which they are located. Shortly thereafter, after the decision by the reporting Judge, judging the

civil suit as unjustified, requested the inspection of the legal briefs to Justice Menezes Direito. They said: on behalf of the assistant Francisco Mozarildo de Melo Cavalcanti, Dr. Antônio Glaucius de Morais; on behalf of the State of Roraima, Dr. Francisco Rezek; on behalf of the assistants Lawrence Manly Harte and others, Dr. Luiz Valdemar Albrecht; on behalf of the government and of the National Indian Fund, Justice José Antônio Dias Toffoli, General Counsel to the Government; on behalf of the assistant Socó Indigenous Community, Dr. Paulo Machado Guimarães; on behalf of the Barro Indigenous Community and others, Dra. Joenia Batista de Carvalho, and on behalf of the Public Prosecutor's Office, Dr. Antônio Fernando Barros and Silva de Souza, General Prosecutor of the Republic. Presiding Justice Gilmar Mendes. Plenary Session, dated August 27, 2008.

Decision:

After the decision of Justice Menezes Direito, who made a partial judgment prior to the claim for which may be observed certain determinations of tax conditions as a result of constitutional question presented as to the usufruct of the natives over the lands at issue, within the terms of his decision, the Court, against the decision of Justice Celso de Mello, deliberated to continue judging the proceeding, having held the request of the brief formulated by Justice Marco Aurélio. In continuation of the judgment, after the decision of Justice Cármen Lúcia and of Justices Ricardo Lewandowski, Eros Grau, Cezar Peluso and Ellen Gracie, who made a partial judgment prior to the civil suit for which may be observed the same conditions consistant with the decision of Justice Menezes Direito, with reservations of Justice Cármen Lúcia, with respect to items X, XVII and XVIII, and the decision of Justice Joaquim Barbosa, determining the claim meritless, Justice Carlos Britto (Judge giving opinion), readjusted his decision to also adopt observations consistent with the decision of Justice Menezes Direito, with reservations in relation to item IX, to exclude the expression "only in opinionative character" and insert the word "common practices" before the expression "native traditions and customs," and propose a precautionary penalty as allowed by AC No. 2,009-3/RR, in which he was accompanied by Justices Eros Grau, Cármen Lúcia, Joaquim Barbosa, Cezar Peluso, Ellen Gracie e Ricardo Lewandowski. Shortly after, he requested the inspection of the briefs of Justice Marco Aurélio. Occasionally absent in the second part of the session was Justice Celso de Mello. Presiding Justice Gilmar Mendez. Plenary Session, dated October 12, 2008.

Decision:

After the decision of Justice Marco Aurélio, which, preliminarily provoked the nullity of the proceeding, having held the absence of: 1) – citation of the authorities that edited the Ordinance No. 534/05 and Decree of ratification; 2) – citation of the State of Roraima and of the Cities of Uiramutã, Pacaraima and Normandia; 3) – summons of the Public Prosecutor's Office to accompany, from the beginning, the proceeding; 4) – citation of all of the interested indigenous ethnic groups; 5) – production of expert evidence and testimony and 6) – citation of all the holders of titles to property considered a infraction of the area involved, especially that of the plaintiffs of cases under consideration in the Supreme Court, and which, as far as merit, judgment proceeding the request, fixing as parameters for a new demarcation administrative claim: a) – hearing of all of the indigenous communities existing in the area to be demarcated; b) – hearing of holders of titles of a domain considered as involved lands; c) – anthropological and topographical survey to define indigenous possession, starting with the date of promulgation of the Federal Constitution, with all members of the interdisciplinary groups participating, which must all subscribe to the outcome for the report to valid; d) – in consequence of a constitutional premise of taking into account an indigenous possession, the demarcation should be viewed from all angles, beyond the first form, before the identification of such areas, or if, adopting the continuous form, with participation of the State of Roraima as well as the Cities of Uiramutã, Pacaraima and Normandia in the demarcation process, and e) – hearing of the National Defense Council (*Conselho de Defesa Nacional*) with regards to the areas of the frontier; and, after the decision of Justice Celso de Mello, who made a partial judgment prior to the claim, the judgment was suspended for continuation in the following session. Justifiably absent was Justice Ellen Gracie, whose decision was pronounced in a previous session. Plenary Session dated March 18, 2009.

Decision:

Provoking the question of order on behalf of the patron of the Socó Indigenous Community, in the sense of making a new oral argument, keeping in mind the newly suggested facts in the

judgment, the majority of the Court rejected the request, giving by Justice Joaquim Barbosa, who judged the claim as completely unjustified, and Marco Aurélio, who preliminarily questioned the nullification of the proceeding, and in merit, declared the civil suit entirely logical, gave a preliminary, logical judgment to the Court, within the terms of the decision by the reporting judge giving the opinion, which was readjusted according to consistent observations of the decision of Justice Menezes Direito, declaring the continuing demarcation of Indigenous Land Raposa Serra do Sol as constitutional, and determining that the following conditions may be observed:

[19 CONDITIONS]

(i) the usufruct of the resources of the land, rivers and lakes located within indigenous territories (article 231, § 2, of the Federal Constitution) that may always be relative however it may be in whatever form, as decided by article 231, § 6, of the Federal Constitution, relative to the public interest of the Government, according to complementary law;

(ii) natives' usufruct does not include the good use of water and potential energy resources, which will depend solely upon authorization by the National Congress;

(iii) natives' usufruct does not include the request for and the exploitation of mineral resources, which will depend solely upon authorization by the National Congress, assuring them participation in the results of such exploitation, according to law;

(iv) natives' usufruct does not include either the prospecting of nor panning for minerals, being, as the case may be, that permission for prospecting must be obtained;

(v) natives' usufruct does not come before national defense in the public interest; the installation of bases; military units and posts and other military interventions, strategic expansion of roads, the exploration of alternative sources of energy of a strategic nature and the projection of resources of a strategic nature, meeting the criteria of competent entities (Defense Ministry (*Ministério da Defesa*) and National Defense Council (*Conselho*

***de Defesa Nactional*)), which will be implemented independently of consultation with relevant indigenous communities or with FUNAI;**

(vi) the acting of Armed Forces and Federal Police in indigenous areas, within the ambit of their powers, will be assured and will occur independently of consultation with relevant indigenous communities or with FUNAI;

(vii) natives' usufruct does not impede the installation, by the Federal Government, of public fixture, lines of communication, roads and highways for transportation, as well as necessary construction for the rendering of public services by the Government, especially those of health and education;

(viii) natives' usufruct in the area affected by conservation units will be under the responsibility of the Chico Mendes Conservation and Biodiversity Institute (*Instituto Chico Mendes de Conservação da Biodiversidade*);

(ix) the Chico Mendes Conservation and Biodiversity Institute will respond on behalf of the administration of the area of the conservation unit also affected by the indigenous area with the participation of indigenous communities, whose opinions must be heard, taking into account the natives' common practices, traditions and customs, and would be able to do so after consulting FUNAI;

(x) the traffic of non-native visitors and researchers must be admitted in the conservation area during the hours and with respect to the conditions stipulated by the Chico Mendes Conservation and Biodiversity Institute;

(xi) the entrance, traffic and permanence of non-natives within the remaining area of indigenous lands, shall be pursuant to conditions established by FUNAI;

(xii) the entrance, traffic and permanence of non-natives may not be subject the collection of any taxes or other amounts of any nature by the indigenous communities;

(xiii) the collection of taxes or other amounts of any nature may not placed on or be demanded in exchange for the use of roads, public fixture, power transmission lines or any

other fixtures and installations made as a public service, excluding those expressly ratified, or not;

(xiv) indigenous lands may not be subject to rental or to any other legal act or negotiation which restricts the right to exercise its usufruct and direct possession by the indigenous community or by the natives (article 231, § 2 of the Federal Constitution and article 18, Law No. 6,001/1973);

(xv) any person foreign to the tribal groups or indigenous communities is prohibited from of hunting, foraging or collecting of fruit, as well as mixed-farming or extractive activity (article 231, § 2 of the Federal Constitution and article 18, Law No. 6,001/1973);

(xvi) in the lands under occupation and possession by indigenous groups and communities, the exclusive usufruct of natural resources and existing utilities of the occupied lands, is observed in accordance with Articles 49, XVI and 231, § 3 of CR/88, as well as the indigenous profit (article 43 of Law No. 6,001/1973), enjoying full tax immunity, the collection of any taxes, fees or contributions being allocated to or on the other;

(xvii) the enlargement of indigenous lands already demarcated is prohibited;

(xviii) natives' rights with respect to their lands are not subject to a period of limitations in order to be exercised before a court, not subject to seizure, and inalienable [imprescriptible, inembargable and unalienable] (articles 231, § 4, CR/88); and

(xix) participation of federated entities in the administrative demarcation processes of indigenous lands, imbedded in their territories, is assured, as observed to the phase in which the proceeding is encountered.

Dissenting with respect to item (xvii) were Justices Carmen Lúcia, Eros Grau and Carlos Britto, the reporting judge. Person deprived of his/her civil rights to preliminary verdict permitted in the Writ of Prevention No. 2,009-3/RR. With respect to the execution of the decision, the Court determined its immediate fulfillment, independent of the publication, granting its supervision to the high reporting judge, in understating with the Federal Regional Court of the 1st Region

(*Tribunal Regional Federal da 1ª Região*), especially with its President. Decision of the President, Judge Gilmar Mendes. Absent, justifiably, Justice Celso de Mello and Ellen Gracie, whose decision was pronounced in a previous arrangement. Plenary Session dated March 19, 2008.

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AWAITING INDEX

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Annex B: *Analysis of the Supreme Court's Decision under Domestic and International Law*

1. The March 18 and 19, 2009 judgment by Brazil's Supreme Federal Tribunal of Popular Action 3388 ("*Supreme Court Decision*" or the "*Decision*") resulted in the recognition of the demarcation of Raposa Serra do Sol ("RSS" or "Raposa") as a contiguous territory, confirmed the legality of the demarcation proceedings, and validated the process of demarcating indigenous lands, including the use of anthropological surveys. The *Decision* also recognized that the demarcation does not constitute a threat to national sovereignty nor to national security due to the fact that the territory in question is located on an international border. The Supreme Federal Tribunal ("STF" or "Supreme Court") further affirmed that the demarcation of Raposa did not compromise the principle of federalism nor the development of the State of Roraima.

2. Nevertheless, in the context of its constitutional analysis, the *Supreme Court Decision* establishes a series of conditions on the application of indigenous rights. The legal, political and administrative effects of the majority of the conditions established under the *Supreme Court Decision* limits the rights of indigenous peoples affirmed by the Brazilian federal constitution, the Convention on the Elimination of All Forms of Racial Discrimination ("CERD Convention"), as well as the American Convention on Human Rights ("American Convention"), and additional international instruments ratified and endorsed by the Government of Brazil, including but not limited to the ILO Convention 169 ("ILO 169") and the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration").

3. STF Magistrate Britto's original opinion was one of noble intentions seeking to give effect to the rights of indigenous peoples. For this he is due much appreciation. Unfortunately, the addition of the conditions introduced by Magistrate Menenez de Direito and confirmed by the other justices of the STF and the critical language adding a temporal restriction to indigenous land claims, have weakened the effect of the *Supreme Court Decision* and likely produced a decision that was not originally contemplated by Magistrate Britto (especially in the delivery of his initial opinion as Rapporteur in August of 2008). There are now express provisions within the *Decision*, and language which if interpreted and implemented poorly, reduce indigenous peoples rights to property to one of mere "use" and "possession", and without many of the well-recognized attributes of that right – including ownership,

management and effective control.[20] In Brazil, indigenous peoples do not have the right to own property, but only to the possession and exclusive usufruct of property.

4. Whether intended by its original author or not, when read in its overall context and especially in conjunction with the (19) nineteen *Conditions*, the *Supreme Court Decision* reduces indigenous peoples to mere social and cultural organizations within their own lands with few if any attributes of self-determination and political organization.[21]

5. Part of the Decision's limitations stem from the idea that under Brazilian law, indigenous peoples cannot "*own*" land. The Committee on the Elimination of Racial Discrimination ("CERD" or "Committee") has made it clear that the CERD Convention affirms and protects "the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."[22] The Inter-American Court of Human Rights ("IA Court") and various other international instruments also have affirmed that indigenous peoples have the collective right to own the lands they have traditionally used and occupied, and that States have the duty to delimit, demarcate, and title those lands as a recognition and protection of those rights (see below). In spite of this, indigenous peoples of Raposa have never and will never, under the *Decision*, have title to their lands. As the *Supreme Court Decision* expressly states, "[a]ll of the 'indigenous lands' [in Brazil] are public federal property."[23] The State maintains the ultimate ownership in something similar to a paternalistic holding of lands "in trust" for indigenous peoples. This creates an immediate distortion of the right as affirmed by Article 5 of the CERD Convention as well as Article 21 of the American Convention which also allows for ownership, possession, control and management. The UN Committee on the Elimination of Racial Discrimination expressed concern about this situation in 2004 when it urged the immediate demarcation of Raposa's lands and recommending that "the State party adopt urgent measures to recognize and protect, in practice, the right of indigenous peoples to own, develop, control and use their lands, territories and resources."[24] (Emphasis added). Since 2004 the Committee has communicated regularly with the Government of Brazil regarding this issue.

6. The *Supreme Court Decision* states the fact that the Brazilian Constitution envisions indigenous "lands", as distinct from indigenous "territories", and thus demarcations

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[20] See http://www.stf.jus.br/portal/inteiroTeor/pesquisarInteiroTeor.asp#resultado.

[21] See *Supreme Court Decision*, para. 7 "The noun 'lands' is a term that assumes a composition that is distinctly socio-cultural, and not political."

[22] General Recommendation XXII on Indigenous Peoples, CERD (1997).

[23] *Supreme Court Decision*, para. 5.2.

[24] Letter from Régis de Gouttes, Chairman of the UN CERD Committee, to S.E. M. Clodoaldo Hugueney, Ambassador of the Permanent Mission of Brazil before the UN (August 18, 2006).

undertaken by the executive only recognize the former.[25] The *Decision* further states that indigenous peoples under the Federal Constitution are socio-cultural entities and not politico-juridical ones.[26] These two interpretations read together have wide ranging implications for the status of indigenous peoples and their land rights within Brazil. At one extreme, the STF is assuring all interested parties that the indigenous groups do not constitute "nations" in the sense of distinct political entities apart from the Brazilian state and territory.[27] This interpretation, that indigenous peoples do not have the juridical status of a state, is indeed correct, but the language of these sections establishes an overly broad precedent that would seriously restrict the autonomy of indigenous peoples living in indigenous lands.

7. Reducing indigenous peoples to socio-cultural entities and denying them any attributes of autonomy, self-governance and control over the disposition of their natural resources is a violation of their right to self-determination well affirmed by the United Nations Human Rights Committee,[28] the UN Declaration on the Rights of Indigenous Peoples ("UN Declaration"), as well as the Inter-American Court of Human Rights in *Saramaka Peoples v. Suriname*.[29] The *Supreme Court Decision* goes far beyond denying indigenous peoples the status of an independent state. By asserting that indigenous peoples do not have any political authority over their territories, it denies them the ability to promulgate their own laws and regulations consistent with their own customs and institutions or similar to a municipality within the Brazilian legal system.[30] Indeed, the STF asserts that indigenous territories are "subject exclusively to Federal Law"[31], thus ensuring that the demarcation of indigenous territories does not also create a system of governance by indigenous

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25 *Supreme Court Decision,* para. 7.

26 *Supreme Court Decision*, para. 5.2.

27 *Supreme Court Decision*, para. 7.

28 Concluding Observations: Norway, UN Human Rights Committee, CCPR/C/79/Add.112 para. 17, (1 November 1999) (calling on the government to respect the right of the Sami indigenous peoples to self-determination under Article 1 of the International Covenant of Civil and Political Rights (ICCPR) including paragraphs 2 related to deprivation of a peoples' means of subsistence); Concluding Observations: Canada, CCPR/C/79/Add.105, para. 8 (7 April 1999) (emphasizing that aboriginal rights to self-determination under the ICCPR includes their right to freely dispose of their natural wealth and resources , and to not be subject to deprivations of their own means of subsistence or extinguishments of their land rights). See also UN Declaration on the Rights of Indigenous Peoples, A/6/L.67 (September 12, 2007) (Art. 3 "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" and Article 4 "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.")

29 *Saramaka Peoples v. Suriname*. Preliminary Objections, Merits, Reparations and Costs, Judgement of November 28, 2007. Ser. C no. 172, para 93. (or "Saramaka People v. Suriname). Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

30 *Saramaka Peoples v. Suriname*, paras. 84-86.

31 *Supreme Court Decision*, para. 5.1.

groups through their institutions and municipal or local governance mechanisms.[32] The denial of this authority – and the insistence that indigenous peoples be subject exclusively to Federal Law – seriously limits the ability of indigenous peoples to follow their livelihoods and customs and direct the development and management of their resources. As the IA Court affirmed in *Saramaka Peoples v. Suriname*, this is the heart of the exercise of self-determination for indigenous peoples (see paras. 13 and 52 below). The Brazilian Constitution also recognizes the rights of indigenous peoples to have their "social organization, customs, languages, creeds and traditions recognized"[33] but the *Supreme Court Decision* severely limits this capacity by denying indigenous peoples the status of political entities and replacing their own governance with Brazilian Government ownership and control over their lands and resources.

8. It is possible that in its execution this ultimate State ownership could have been reconciled in some way with indigenous peoples' rights in practice, but this has been seriously hampered by the *Supreme Court Decision*. As UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples felt compelled to declare after reviewing the *Decision*, "the State's property interest in indigenous lands must operate only as a means of protection and not as a means of interference with indigenous control."[34] Unfortunately, the *Supreme Court Decision* emphasizes a continuing authority to *interfere*, rather than a duty and obligation to *recognize* and *protect*. The *Supreme Court Decision* prioritizes the State's ownership and control over indigenous lands and resources, granting it ultimate rights of management, decision-making, even exploitation of the lands surface and subsurface resources. In doing so, it largely removes all obligations to even consult with the indigenous peoples in question let alone seek their consent as required by international law. As affirmed by the IA Court and other human rights bodies and instruments, this is contrary to the State's duties and obligations. These setbacks are visible in most of the nineteen (19) conditions whereby the Government of Brazil:

    ● <u>is granted a singular and unilateral right to exploit a resource largely without consultation or consent</u> *(see conditions (ii), (iii) and (iv) maintaining the State's*

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[32] See also, United Nations Declaration on the Rights of Indigenous Peoples, Art. 5 ("Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." See also, Art. 18: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.")

[33] Constitution of Brazil, §231.1.

[34] Report on the Situation of Human Rights of Indigenous Peoples in Brazil, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34/Add.2, parr. 40 (26 August 2009) (hereinafter "UN Special Rapporteur Report: Brazil 2009").

right to make all decisions about the exploitation of water and potential energy sources, as well as mineral resources);

● is granted a reserved right to interfere with lands and resources regardless of indigenous use and without consultation or consent (*see condition (i) reserving the public interest option in lands rivers and lakes; condition (v) and (vi) allowing the State to install military bases, units and posts, execute Armed Forces or Federal Police operations, and expand roads, exploit sources of energy and resources of strategic importance without consultation of indigenous peoples; and condition (vii) permitting the State to install public fixtures, lines of communications, roads and highways and other necessary construction absent indigenous consultation and consent*;

● delegates entities *other than* indigenous peoples themselves to take action in indigenous lands *(see condition (xi) giving FUNAI the authority to control the entry, movement and presence of non-indigenous peoples in indigenous lands with no requirement of consultation or consent of the indigenous people in question; and conditions (viii) through (x) regarding the authority of the Chico Mendes Conservation Institute, a government agency)*.

● prohibits indigenous peoples themselves from taking unilateral actions, presumably even via traditional practices, which might allow them to reasonably benefit from their lands and resources *(see condition (ii) excluding indigenous peoples from the "good use of water and potential energy resources" absent State consent; conditions (iii) and (iv) excluding indigenous use or exploitation of mineral resources absent State consent; conditions (xiii) or (xiv) precluding indigenous peoples from levying a tax or other charge on those that transit through or reside in their lands or any road or public works, fixture, installation found within their lands; and condition (xv) effectively precluding indigenous peoples themselves from granting concessions to persons foreign to their tribe to carry out extractive activities within their lands (hunting, gathering, fishing etc))*.

9. In one of the most significant portions of the *Supreme Court Decision* the STF goes further and prohibits the expansion and enlargement of any indigenous lands already demarcated (see *Condition xvii*, below). Contrary to international law, this even excludes lands which were delimited and demarcated during the dictatorship without any participation of indigenous peoples and with no consideration of their norms, values and customs. Many of these areas, as currently demarcated, do not reflect the full extent of the traditional occupation of the indigenous peoples in question. In Brazil, there are over 398 areas already demarcated and 488 areas in the midst of administrative proceedings and pending delimitation, demarcation and ratification by the President.[35] If this decision is meant to have constitutional application for all

[35] UN Special Rapporteur Report: Brazil 2009, para. 37 (statistics provided by FUNAI). Cfr., other reports provide different numbers and say that there are 433 areas already reserved, demarcated and registered, and 212 in

indigenous peoples, and not just those of Raposa, other indigenous peoples petitioning under Brazil's existing legal framework to secure State recognition of their lands or an expansion of the same to rectify historic wrongs and inadequacies, are now seriously prejudiced and possibly precluded all together from a full vindication of their rights. (The experience of the indigenous community of Serra da Moca is an example as is the Arroio Korá indigenous area in Mato Grosso do Sul).[36]

10. *Condition (xvii)* must also be interpreted with the *Supreme Court Decision* where it redefines Brazil's Constitutional protections for communal lands. The 1988 ratification of Brazil's Constitution established the right of indigenous peoples to their traditional lands, stating that "Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property."[37] In the *Supreme Court Decision*, the Court interpreted the Constitution as providing that in order to obtain demarcation, an area must have been occupied by the indigenous community in question in 1988 when the Constitution was adopted. An exception seems to be made for communities that were forcibly dislocated from their traditional lands, as described in Section 11.2 of the *Decision*). This limiting language was included despite the fact that the Constitution defines traditionally occupied lands as "those on which they ["Indians"] live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions."[38] No such date

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administrative procedures awaiting delimitation, demarcation, and ratification. See: http://pid.socioambiental.org/pt/c/o/1/2/situacao-juridica-das-tis-hoje

[36] The indigenous community of Serra da Moça, in Roraima, asked for enlargement of their lands to incorporate a local traditional area called Lago da Praia. The request was approved by FUNAI and by INCRA, and is awaiting decision by the Ministry of Justice. Recently, however, INCRA resettled several former non-indigenous occupants of Raposa to the area of Lago da Praia. The ex-occupants of Raposa cited condition (xvii) of the Decision which prohibits enlargement of already demarcated indigenous areas and as such called for the dismissal of the community's petition for expansion. INCRA has filed an action for repossession in order to remove the non-indigenous group from the area. The Submitting Organizations understand that a court recently issued a decision making their return possible. Additionally, Magistrate Gilmar Mendes (President of the Supreme Court) recently granted a motion filed by ranchers who have 184 hectares within the 7,175 ratified as the Arroio Korá indigenous area in Mato Grosso do Sul. He suspended the ratification in the area occupied by the ranch (i.e. carved the ranch out of the area to be ratified), arguing, among other things, that the area of the ranch has been registered to non-indigenous landowners since 1924, therefore the indigenous peoples could not demonstrate that they had been living there in 1988. As described in Annex B, the Supreme Court interpreted the Constitution as providing that in order to obtain demarcation, an area must have been occupied by the indigenous community in question in 1988 when the Constitution was adopted.

[37] Constitution of Brazil, Art. 231

[38] Constitution of Brazil, Art. 231 §1(1). Also, this provision of the Constitution is consistent with the Supreme Court Decision which states: "Demarcation by living borders or inwardly open , so that they form a collective shape and affirm the economic self-sufficiency of an entire usufruct community. This model is better served to promote the idea cultural and economic idea of open horizons, as opposed to being closed off into

restriction is provided, in fact the language of the Constitution is closer to that which is required by the American Convention, the UN Declaration, and international law more generally.

11. The language of the Supreme Court with regards to this temporal limitation is dangerous because it raises the possibility that it could deprive indigenous peoples of their traditional lands. This danger is especially strong in cases in which an indigenous people received only a portion of its traditional lands under the demarcation regime that prevailed during the military dictatorship which controlled the Brazilian government prior to the 1988 Constitution. In certain cases of historical injustice, communities did not occupy the totality of their lands on the date of the promulgation of the Federal Constitution of October 5, 1988 due to the insufficient and unjust demarcation process of the prior regime. *Condition xvii* of the *Decision*, which prohibits the expansion of already demarcated territories, read together with the restriction denying the demarcation of territories not occupied by indigenous peoples on the date of the promulgation of the Constitution, could prevent such communities from extending their territories which were demarcated in a manner inconsistent with the CERD Convention, the American Convention, and international human rights instruments more broadly.

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12. As a backdrop to reading the *Supreme Court Decision* it helps to recall the latest jurisprudence of the Inter-American Court of Human Rights, the highest court in the Americas, as it has comprehensively developed the right of indigenous peoples to property as affirmed in Article 21 of the American Convention and XVIII of the UN Declaration, and done so in a manner consistent with the Concluding Observations and other statements by the Committee on the Elimination of Racial Discrimination (CERD or Committee).

13. The IA Court has made it clear in a series of decisions, but most recently in the *Saramaka People v. Suriname* case,[39] that indigenous peoples have collective rights to property over the lands they have traditionally used and occupied even if the State has not recognized such in its domestic laws.[40] This is consistent with CERD's recognition that States must "recognize and protect the rights of indigenous peoples to

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"pockets", "islands", "blocks", or "clusters", in which decimates the spirit by the progressive elimination of elements of the given culture (ethnocide)." *Supreme Court Decision*, para. 13.

[39] *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2007. Series C No. 172, at para. 194-96 (hereinafter "*Saramaka People v. Suriname*"). Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

[40] See *Saramaka People v. Suriname*, paras. 96, 102 & 194 ; see also, *Case of the Mayagna (Sumo)Community Awas Tingni*, Interamerican Court of Human Rights, August 31, 2001, Ser. C, no. 79, and *Case of the Moiwana*, Interamerican Court of Human Rights, June 15, 2005, Ser. C, no. 124.

own, develop, control and use their communal lands, territories and resources."[41] The IA Court clarified that in order to effectively exercise their rights of self-determination, indigenous peoples have the right to their ancestral properties, which includes their "right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system."[42] The IA Court went on to say that its own jurisprudence affirms that "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people."[43] CERD too has affirmed "the right [of indigenous peoples]to exclusive benefit of renewable natural resources situated on their lands."[44]

14. The IA Court made it clear that States do not have absolute rights to exploit the surface or subsurface natural resources found within indigenous territories, but indigenous peoples' rights to their lands and resources are also not absolute.[45] This is consistent, in fact, with the opinions of the UN Committee on the Elimination of Racial Discrimination which clarified that even where States maintain sovereignty in their Constitutions over subsurface resources, this right is not to be executed absolutely, but rather consistently with the State's duties and obligations to respect and protect human rights.[46] In 2007 the Committee made it clear that in Indonesia, where the country sought to control land, water and natural resources and exploit them to benefit its people, such had to be done "consistently with the rights of indigenous peoples."[47]

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41 General Recommendation of the CERD XXIII (50) (1997); See also Concluding Observations: Nicaragua, CERD/C/NIC/CO/14, para.18 (19 June 2008) (citing to CERD Recommendation XXIII regarding indigenous peoples' rights to own, develop, control, and use their lands and territories and calling on the government to demarcate lands the indigenous peoples' traditionally occupy or use; Concluding Observations: Namibia, CERD/C/NAM/CO/12, para. 18 (19 August 2008) (also calling on "State parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their lands and territories")..

42 *Saramaka People v. Suriname,* paras. 96, 102 & 194(c).

43 *Ibid.* at para. 121.

44 Concluding Observations: Bolivia, CERD/C/63/CO/2, para. 9 (10 December 2003) (finding that indigenous peoples "are free and equal in dignity and rights and free from any discrimination, including legal provisions aimed at recognizing the title to and ownership of land of indigenous groups and individuals as well as the right to exclusive benefit of renewable natural resources situated on their lands.").

45 *Ibid.* at paras. 125-128.

46 Concluding Observations: Suriname, CERD/64/CO/9, para. 11 (April 28, 2004) ("While noting the principle set forth in article 41 of the Constitution that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples. It recommends legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources").

47 Concluding Observations: Indonesia, CERD/C/IDN/CO/3, para. 17 (15 August 2007).

15. Additionally, the IA Court opined that even when the subsurface resources found within ancestral lands and territories "are not traditionally used by or essential for the survival" of indigenous peoples and their "subsistence", a violation of their right to property can still take place if extraction of those resources "will necessarily affect other resources that are vital to their way of life."[48] Clarifying the point, the IA Court added "it is true that all exploration and extraction activity in [indigenous peoples] territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the [indigenous peoples]."[49] For this reason, the *Saramaka People v. Suriname* case affirms that interferences with these rights need much more than a mere declaration of "public interest" as expressed, for example, in *Condition (i)* of the *Supreme Court Decision.*

16. The IA Court, in fact, further clarified that the right to property is not absolute and may be restricted by the State, but only "under very specific, exceptional circumstances, particularly when indigenous or tribal land rights are involved." (Emphasis added).[50] The IA Court detailed that under the American Convention a State may only restrict the use and enjoyment of the right to property of indigenous peoples where the limitations are: "a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society" and "when it does not deny their survival as a tribal people."[51] To guarantee that such restrictions do not amount to a denial of their traditions and customs, endanger their "survival as a tribal people", and "preserve, protect and guarantee the special relationship that the members of the [indigenous] community have with their territory, which in turn ensures their survival as a tribal people," the State must comply with the following four "safeguards" as well:

    a) Ensure the "effective participation" of indigenous peoples "in conformity with their customs and traditions";

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[48] According to the IA Court, the phrase "survival as a tribal people" must be understood as the ability of the [indigenous peoples in question]...to "preserve, protect and guarantee the special relationship that they have with their territory", so that "'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected. That is, the term 'survival' in this context signifies much more than physical survival." (Interpretation Judgment para. 37). Ensuring "survival" requires effective participation, including free, prior and informed consent for large-scale projects, environmental social impact assessments, benefit sharing and the implementation of "adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic, and cultural survival" of the indigenous peoples. (*Interpretation Judgment,* para. 39).

[49] *Saramaka People v. Suriname,* at paras. 126 & 155.

[50] *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185, para. 49, (hereinafter "*Interpretation Judgment*"), *available at*: http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf.

[51] *Saramaka People v. Suriname,* at paras. 127 &128.

b) Guarantee indigenous peoples receive a "reasonable benefit" from the plan or project;
c) Guarantee that any concessions do not take place "until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment"; and
d) Implement "adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional [indigenous]...lands and natural resources."[52]

17. In a way that it had not done before, the IA Court affirmed that "effective participation" means the carrying out of "good faith" consultations "with the objective of reaching an agreement", in which the State must follow a number of criteria.[53] With respect to benefit sharing, beneficiaries must be determined "in consultation with the [indigenous]…people, and not unilaterally by the State."[54]

18. Furthermore, the IA Court clarified that at times consultation is not enough, but in fact the free, prior and informed consent of indigenous peoples is needed.[55] The IA Court went on to develop this idea in its *Interpretation Judgment* and stated that "depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the [indigenous]... people. The IA Court has emphasized that when large-scale development or investment projects could affect the integrity of the [indigenous]... people's lands and natural resources, the state has a duty not only to consult with the[m]..., but also to obtain their free, prior and informed consent in accordance with their customs and traditions."[56] This is consistent with many Concluding Observations of CERD and its General Recommendations made in the context of interpreting the CERD Convention.[57]

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52 *Ibid*. at paras. 129 &158.

53 *Ibid.* at para.133. According to the IA Court, properly conducted consultations require the Government of Brazil to: actively consult with said community according to their customs and traditions;b) accept and disseminate information; c) maintain "constant communication"; d) conduct consultations in "in good faith"; e) carry out consultations "through culturally appropriate procedures"; f) commence consultations at the "the early stages of a development or investment plan, not only when the need arises to obtain approval from the community"; g) carry out consultations "with the objective of reaching an agreement"; h) ensure "early" consultations "provides time for internal discussion within communities and for proper feedback to the State"; i) ensure that consultations make communities "aware of possible risks, including environmental and health risks"; j) guarantee that "proposed development or investment plan" must be "accepted knowingly and voluntarily"; and k) guarantee that consultations "should take account of the [indigenous]…people's traditional methods of decision-making" (*Saramaka* para.133).

54 *Interpretation Judgement*, para. 25.

55 *Saramaka People v. Suriname*, para.134 (providing that in the case of "large-scale development or investment projects that would have a major impact within [an indigenous] territory, the State has a duty, not only to consult with the [indigenous peoples concerned]...but also to obtain their free, prior, and informed consent, according to their customs and traditions.")

56 *Interpretation Judgment*, para. 17.

57 See General Recommendation of the CERD XXIII (50) (1997) ("The Committee especially calls upon State parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories

Indigenous peoples' right to consent to matters affecting them is also protected in the International Covenant on Economic, Social and Cultural Rights, as well as the newly adopted UN Declaration.[58]

19. Indeed, the IA Court in fact has made it repeatedly clear that in order to protect and make effective indigenous peoples' right to property, the State must "delimit, demarcate and grant collective title over the territory of the members" of the indigenous peoples in question and do so "in accordance with their customary laws, and through previous, effective and fully informed consultations" with the people concerned.[59] The CERD Committee has affirmed its agreement with the IA Court's ruling on State demarcations of indigenous lands in consultation with indigenous peoples.[60] Furthermore, until this delimitation, demarcation, and titling occurs, the State must "abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the [indigenous] people are entitled, unless the State obtains the free, informed and prior consent of the [indigenous] people [concerned]."[61]

20. It is with the above understanding of the international law regarding indigenous peoples' self-determination, the scope of the property rights held by indigenous peoples to their traditional lands and resources, and the duties and obligations of States with respect to the same, that we can begin to understand the full scope and nature of the *Supreme Court Decision* in Brazil. It shall be recalled, as well, that the IA Court reached the *Saramaka Peoples v. Suriname* decision (essentially a

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traditionally owned or otherwise inhabited or used without *their free and informed consent*, to take steps to return those lands and territories."(emphasis added); see also Concluding Observations, Ecuador: CERD/C/ECU/CO/19, para. 16 (15 August 2008) (informing the Government that under the CERD Convention it must consult the indigenous population concerned at each stage of the process and obtain their consent in advance of the implementation of projects for the extraction of natural resources); Concluding Observations, India: CERD/C/IND/CO/19, para. 19 (5 May 2007) (urging that the "State party should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision making processes related to such projects…")

[58] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. E/C.12/1/Add.74. para. 12 (30 November 2011) (noting "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining & oil companies, at the expense of the exercise of their culture & the equilibrium of the ecosystem" and "[r]ecommend[ing] that the state "ensure the participation of indigenous peoples in decisions affecting their lives. …particularly urg[ing] the State party to consult & seek the consent of the indigenous peoples concerned ….") *See also* UN Declaration, Articles 7, 10, 11, 28, 29, & 32.

[59] *Saramaka People v. Suriname*, para.214(5), see also *Awas Tingni*, paras.151-53, & 173(3).

[60] Concluding Observations, Nicaragua, CERD/C/NIC/CO/14, para. 21 (19 June 2008) (urging Nicaragua to "proceed immediately with the demarcation and titling of the lands of the Awas Tingni community, without prejudice to the potential rights of other communities, *in accordance with the terms of the relevant judgement of the Inter-American Court of Human Rights* and general recommendation 23 (1997), paragraph 5, on the rights of indigenous peoples." (emphasis added)).

[61] *Saramaka People v. Suriname*, para.214(5); see also *Awas Tingni*, paras. 151-53, &173(3).

culmination of prior decisions) after also considering other existing international human right instruments and decisions of international human rights committees. As such, the judgment in part interprets and applies rights that are similarly affirmed and protected in other universal human rights instruments. For this reason, the rules stated above are largely repeated in the jurisprudence of UN human rights bodies responsible for interpreting human rights instruments in force in all regions of the world, and are repeated in instruments such as the UN Declaration on the Rights of Indigenous Peoples (all of which were ratified and endorsed by Brazil). Indeed, the IA Court cited a wide range of this jurisprudence and instruments, including the UN Declaration, to support its holdings in *Saramaka People v. Suriname*.[62] The S*aramaka* case is not an isolated narrow decision, therefore, but one that builds on the Court's prior decisions and helps to further shed light on the obligations of States under the American Convention while acknowledging those same rights as they appear in other international instruments.

21. Taking into consideration the jurisprudence explained above, the findings of the CERD Committee, and the recognition of indigenous peoples' rights in international law more generally, the following provides a deeper analysis and examination of the (19) nineteen *Conditions* that appear in the ruling.

The 19 Conditions

(i) the usufruct of the resources of the land, rivers and lakes located within indigenous territories (article 231, § 2, of the Federal Constitution) wherever they exist could always be relative, as set out by article 231, § 6, of the Federal Constitution, to the public interest of the Government, in compliance with complementary law.

22. On its surface, this *Condition (i)* is not necessarily objectionable, unless it is meant to subordinate all rights of indigenous peoples to a mere declaration of public interest. The IA Court has clearly stated that "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people."[63]

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[62] *Saramaka People v Suriname*, para. 88 et seq. (citing the jurisprudence of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the UNDRIP).

[63] *Saramaka People v. Suriname*, para. 121.

23. Under the American Convention on Human Rights, the IA Court has further recognized that neither the State's continuing interest in the lands and resources within its border or the indigenous peoples' interests are absolute. This is consistent with the CERD finding that even when a State exercises its right to exploit natural resources for the benefit of the nation it must do so "consistently with the rights of indigenous and tribal peoples."[64] As detailed above, however, there are clear requirements and conditions upon which the Government of Brazil may interfere with the rights of indigenous peoples to enjoy their lands and resources (see paragraphs 13-16 above). These interference, however, are to be for "very specific, exceptional circumstances." Mere declaration of "public interest" shall not be enough.[65]

24. In the cases of *Yakze Axa*, the IA Court has also made it clear that in balancing the rights of indigenous peoples with the rights of others (thereby determining what is in public interest), the State must remember that "not recognizing the ancestral rights of the members of indigenous communities over their territories could affect other basic rights such as the right to cultural identity and the very survival of the community and its members… it might be necessary to achieve the collective goal of preserving cultural identities in a democratic and pluralistic society under the meaning of the American Convention "[66] In this way, the IA Court affirmed that the preservation of an indigenous identity and culture does in fact serve the public interest in a democratic and pluralistic society. The IA Court further stated that:

> "'the law can subordinate the use and enjoyment of goods to the broader public interest'. The needs of the legal restrictions contemplated will depend on how they are designed to satisfy a public imperative, while being insufficient to demonstrate, for example, that the law accomplishes a useful or opportune purpose. The proportionality lies in how the restriction ought to be strictly designed to achieve a legitimate objective, interfering in the least means possible in the effective exercising of the right restricted. Finally, so that they would be compatible with the Convention the restrictions ought to be justified according to the collective goals that, by their importance, clearly outweigh the plain needs of the enjoyment of the restricted right." [67]

If the Government of Brazil interprets and applies *Condition (i)* in this context, it can be read as consistent with the Constitution and Brazil's obligations under the American Convention, the CERD Convention, and international law in general. Given the context of the larger conditions, it would be helpful if the Government of Brazil clarified this intention to progressively implement and interpret *Condition (i)*.

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64 Concluding Observations: Suriname, CERD/64/CO/9, para. 11 (April 28, 2004). .

65 *Saramaka People v. Suriname.* para. 49.

66 *Case of Yakze Axa v. Paraguay*, Setence of June17, 2005, Funds, Reparations, and Costs, para 217 ("*Yakze Axa v. Paraguay"*) (Original in Spanish, unofficial translation).

67 *Yakze Axa v. Paraguay*, para.145.

(ii) the exclusive usufruct of indigenous peoples does not include the approval of hydroelectric resources water and potential energy resources, which will depend solely upon authorization by the Congress.

(iii) natives' usufruct does not include the request for and the exploitation of mineral resources, which will depend solely upon authorization by the National Congress, assuring them participation in the results of such exploitation, according to law.

(iv) natives' usufruct does not include either the prospecting of nor panning for minerals, being, as the case may be, that permission for prospecting must be obtained.

25. All three of these conditions list above deny indigenous peoples any unilateral use of the natural resources within their lands, presumably even a use that is traditional. This is inconsistent with the idea that indigenous peoples have rights to own, manage, distribute and control the resources found within the lands they have traditionally used and occupied as affirmed by CERD, the UN Declaration, as well as the IA Court in *Saramaka Peoples v. Suriname* (see paragraphs 12-19 above). These articles state that with respect to the uses outlined within them, indigenous peoples cannot act without authorization by the Government.

26. These three conditions also largely repeat limitations on indigenous peoples rights that seem to exist in the the Brazilian Constitution at §231. While the Constitution provides that "[t]he lands traditionally occupied by Indians are intended for their permanent possession and they shall have the *exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein*"[68](emphasis added), in the same constitution it also states that "[h]ydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, *after hearing the communities involved*, and the participation in the results of such mining shall be ensured to them, as set forth by law."[69] (Emphasis added). Most notably, there is no reference in either of these three conditions of the *Supreme Court Decision* to the fact that the indigenous peoples concerned should be consulted if and when the State authorizes exploitation of the surface or subsurface resources discussed therein. While the Constitution of Brazil provides for consultation, the *Supreme Court Decision* removed it from the relevant conditions which otherwise track the parallel constitutional language.

27. The conditions lack any reference to requirements that the State must fulfill if it chooses to exploit the resources within indigenous lands, including when the

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68 Constitution of Brazil, §231.3(2).

69 Constitution of Brazil, §231.3(3).

exploitation is of such a nature as to require the free, prior and informed consent of indigenous peoples. (See paragraphs 13-16 above describing the *Saramaka Peoples v. Surinam* decision). CERD and other international human rights instruments also hav affirmed that indigenous peoples have rights to consultation and free prior and informed consent about activities that may affect them[70] as does the recently approved UN Declaration on the Rights of Indigenous Peoples (endorsed by Brazil).[71]

28. The lack of reference to community consultations as a requirement for the use of hydroelectric resources and mineral extraction in the conditions governing usufruct rights over indigenous territories is unfortunate. The Government must now ensure that its absence is not interpreted or applied in such a way as to undermine the constitutional protections that already exist, and the duties and obligations that Brazil has under the American Convention and other instruments. The glaring absence of a provision for consultation does not have to render the constitution a dead letter. The STF, as the authoritative interpretation body of the Brazilian Constitution, can shape the meaning of the words of the constitution, but it can be argued that it does not have the authority to overturn the plain text meaning of the constitution. This is particularly true as this constitutional mandate is further affirmed by Brazil's treaty obligations with respect to consultation and free prior and informed consent, such as the ILO 169, Article 6.2; the Convention on the Elimination of All Forms of Racial Discrimination, Article 5; and Articles 10, 11, 19, 28, 29 & 32 of the UN Draft Declaration on the Rights of Indigenous Peoples.

29. *Condition (iii)* makes some reference to the fact that indigenous peoples should benefit from the exploitation of minerals within their lands. This seems consistent with the *Saramaka Peoples v. Suriname* decision which provides that the state must comply with a number of safeguards to ensure that its activities within indigenous lands do not amount to a denial of indigenous traditions and customs and endanger their "survival as a tribal people", these include, among others, a guarantee that the indigenous peoples receive a "reasonable benefit" from the plan or project.[72] The Committee on Economic, Social & Cultural Rights has also affirmed the right of reasonable benefits being attributed to indigenous peoples[73] as has the CERD

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[70] General Recommendation XXIII of the CERD; see also, Letters from the President of CERD to S.E. M. Clodoaldo Hugueney, Ambassador of the Permanent Mission of Brazil to the United Nations (March 7, 2008, and August 15, 2008); see also, ILO Convention 169 Articles 6(2) and 15(2).

[71] UN Declaration, Articles 7, 10, 11, 28, 29, & 32.

[72] *Saramaka People v. Suriname,* at para. 129.

[73] See Committee on Economic, Social and Cultural Rights, Concluding Observations: Bolivia, E/C.12/BOL/CO/5, para. 37 (08 August 2008) (affirming that the State should ensure if there is "use of scientific products and traditional knowledge and traditional medicine" of indigenous peoples, "the profits derived there from benefit them directly."

Committee which affirmed that under the CERD Convention "prior to exploiting the resources [within indigenous lands]" the State must obtain not only free, prior and informed consent, but ensure for them "the equitable sharing of benefits to be derived from such exploitation."[74] The *Saramaka* decision also provides that the determination of that "reasonable benefit" must be taken in consultation with the indigenous peoples concerned.[75] This understanding should be read into *Condition (iii)*. Reasonable benefits, however, cannot be mere compensation for limiting rights without the consultation and consent of the indigenous peoples concerned or satisfaction of all of the other requirements laid out by the IA Court and international law more generally (as described below).

(v) natives' usufruct does not come before national defense in the public interest; the installation of bases; military units and posts and other military interventions, strategic expansion of roads, the exploration of alternative sources of energy of a strategic nature and the projection of resources of a strategic nature, meeting the criteria of competent entities (Defense Ministry (*Ministério da Defensa*) and National Defense Council (*Conselho de Defesa Nactional*)), which will be implemented independently of consultation with relevant indigenous communities or with FUNAI.

30. *Condition (v)* is a clear violation of the Brazilian Constitution, the CERD Convention and the UN Declaration, as well as the American Convention and other international instruments. First, similar to the three Conditions detailed above, it eliminates the constitutional protection of consultation by stating that all of the activities listed in this condition can take place "independently of consultation with relevant indigenous communities or with FUNAI." This is not just an omission of a consultation reference, as in *conditions (ii), (iii), and (iv*), but an actual affirmative statement that no consultation is required. Also, unlike the three conditions above, this *Condition (v)* makes no reference to the need to ensure that indigenous peoples share in the results and benefits of the exploration provided for by this article, arguably required pursuant to *Saramaka Peoples v. Suriname*.

31. *Condition (v)* as a matter of fact suggests that the State could interfere with indigenous lands whenever it deems a public interest to be involved. As detailed at length above, a declaration of public interest alone is not sufficient to justify interference with indigenous lands and resources. The Inter-American Court of

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[74] *See* Concluding Observations: Ecuador, CERD/C/62/CO/2, para. 16 (23 March 2003) (providing that "[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, *and that the equitable sharing of benefits to be derived from such exploitation be ensured* (emphasis added)."

[75] *Saramaka People v. Suriname,* at para.129.

Human Rights, in *Saramaka Peoples v. Suriname*, has stated that "it is true that all exploration and extraction activity in [indigenous peoples] territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the [indigenous peoples]."[76] For this reason, the *Saramaka* case affirms that interference with these rights requires much more than a mere declaration of "public interest" as expressed, for example, in condition (i) of the *Supreme Court Decision*. In fact, the IA Court has said that interferences with indigenous lands should only be in "exceptional circumstance and to guarantee indigenous peoples' rights when the limitations are to be imposed by the State, these limitations must be pursuant to: "a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society" and "when it does not deny their survival as a tribal people."[77] Further, to guarantee that such restrictions do not amount to a denial of their traditions and customs or endanger their "survival as a tribal people", and "preserve, protect and guarantee the special relationship that the members of the [indigenous] community have with their territory, which in turn ensures their survival as a tribal people," the State must comply with a number of safeguards, as described above in paragraph 16. These include consultation processes as well as prior environmental studies, agreements on reasonable benefit sharing and the inclusion of adequate safeguard mechanisms to avoid and mitigate potential adverse affects. None of these requirements or safeguards is mentioned in this *Condition (v).*

32. One effect of *Condition (v)* is that it will be impossible for indigenous peoples to exercise their right to consultation and ensure that the dialogue necessary to express their concerns regarding the impacts that projects covered by this condition may have on their social organization, customs, and environment. The exploration of natural resources necessary to make road networks viable or to exploit alternative energy sources (such as hydroelectric dams) within indigenous territories could, for example, lead to damage to a number of other resources necessary for the survival of the indigenous group. Without any guarantee whatsoever to consultation, which should be part of the Congressional authorization process as determined by law, or the obligation to complete studies to evaluate the impacts that could be caused by such projects, as determined by CONAMA-MMA (Brazil's National Environmental Council), indigenous peoples will remain insecure with regards to military operations and future projects.

33. With regards to the Armed Forces and the Federal Police in indigenous lands, Decree 4.412/2002 (the constitutionality of which was contested by the indigenous peoples of

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76 *Saramaka People v. Suriname,* at paras. 126 & 155.

77 *Saramaka People v. Suriname,* at paras. 127 &128.

Raposa), states in article 3: "The Armed Forces and Federal Police, when acting in lands occupied by indigenous peoples, will adopt, within the limits of their competencies and without prejudice to the attributes referred to in Article 1, means to protect the life and patrimony of the indigenous and their community, with respect to their uses, customs and traditions and overcoming the eventual situations of conflict or tension involving indigenous persons or groups." This accommodation of indigenous customs and traditions is in no way reflected in the above condition, and by removing consultation with indigenous peoples, and even with FUNAI, the likelihood of adequate consideration of indigenous ways of life, traditions, and customary uses of their lands is unlikely and as a result, violates both national and international law.

34. It is further notable that this condition, while speaking of actions related to the military and national security, is not describing state actions taken in times of a declaration of emergency,[78] but is simply a subordination of the rights and interests of indigenous peoples to the "public interest".

35. Article 231, § 6 of the Brazilian Constitution states: "Acts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law".[79] This requirement limits interferences with the right to property by indigenous peoples and ought to be completed in accordance with the law to prevent arbitrary actions by the state. This requirement was affirmed by the IA Court in the *Saramaka v. Suriname* decision (see paragraph 31 above) as well as Article 231 §6 of the Brazilian Constitution.

36. In the case of military activities, it also is notable that the recent UN Declaration provides for the following:

> 1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
> 2. States shall undertake effective consultations with the indigenous peoples concerned,

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[78] See for example, American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25, Art. 27 (1992); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Art. 4 (1976).

[79] Constitution, Article 231 §6.

through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.[80]

Condition (v) does not contemplate such safeguards or balancing of rights and protections. For these reasons, its future interpretation and application are tremendously worrisome to the indigenous peoples of RSS. As currently stated, this condition does not make the use and enjoyment of the right to property easier for indigenous peoples, but once again prioritizes the right of the State to interfere with indigenous peoples' rights over its duty to protect and promote those rights.

(vi) the acting of Armed Forces and Federal Police in indigenous areas, within the ambit of their powers, will be assured and will occur independently of consultation with relevant indigenous communities or with FUNAI.

37. State sovereignty and territorial integrity is not an excuse for the armed forces and security forces of a country to violate the rights of citizens. This is even more true where no state of emergency has been called in accordance with international law.[81] *Condition (vi)* suffers the same frailties as *Condition v* described and analyzed above in paragraphs 30-36. It is also important to note that the implications of this condition have already been demonstrated in Raposa itself. Recently, the Federal Police entered Raposa and expelled a group of wildcat miners (*garimpeiros*). Although the removal of the garimpeiros was a positive step, the Federal Police did not consult with the indigenous leaders of Raposa before commencing the operation. It would represent a significant improvement in the relations between indigenous peoples and the Federal Police if they were to consult with indigenous leaders before initiating an operation of this type. *Condition (vi)* does not increase the likelihood of improvement in relations between the State and indigenous peoples, absent significant political will.

(vii) natives' usufruct does not impede the installation, by the Federal Government, of public fixture, lines of communication, roads and highways for transportation, as well as necessary construction for the rendering of public services by the Government, especially those of health and education.

38. The Constitution of Brazil, as with other constitutions, already provides that the Government can install public fixtures, lines of communications, roads, highways and other necessary construction when it is determined that such efforts are in the public interest of the nation. As already described in detail above, these state actions cannot simply be taken at will or through a mere declaration of public interest. They should

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[80] *UN Declaration*, Art. 30.

[81] American Convention, Art. 27; International Covenant on Civil and Political Rights, Art. 4, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

be advanced only in exceptional circumstances and particular requirements must be satisfied by the State as specified in paragraphs 13-16 above. These include carrying out the project in question, pursuant to a law, a prior social and environmental assessment, the provision of reasonable benefits to affected peoples, the application of mitigation measures, and only after there has been good faith consultation with indigenous peoples securing their free, prior and informed consent in necessary circumstances. The language of this condition implies no application of these safeguards and protections. Indeed, this singular condition exemplifies what the UN Special Rapporteur Anaya cautioned after reading the *Supreme Court Decision,* "the State's property interest in indigenous lands must operate only as a means of protection and not as a means of interference with indigenous control."[82] This condition suggests that "interference" is the rule, rather than the exception. A careful interpretation and application must be pursued if it is to be applied consistent with the Government of Brazil's duties and obligations under the American Convention and other international human rights instruments. For instance, CERD itself has called on states to seek indigenous peoples free prior and informed consent before commencing large scale projects such as dams and has found that the CERD Convention requires prior independent social and environmental assessments before concessions for such projects occur.[83] The Government is still moving toward the adoption of a law to construct a hydroelectric dam which will impact Raposa. This is being done without consultation and consent of the affected indigenous peoples. The above condition of the *Decision* makes this effort even easier.

(viii) natives' usufruct in the area affected by conservation units will be under the responsibility of the Chico Mendes Conservation and Biodiversity Institute (*Instituto Chico Mendes de Conservação da Biodiversidade*).

(ix) the Chico Mendes Conservation and Biodiversity Institute will respond on behalf of the administration of the area of the conservation area also affected by indigenous lands with the participation of indigenous communities, whose opinions must be heard, taking into account the natives' common practices, traditions and customs, and would be able to do so after consulting FUNAI.

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82 UN Special Rapporteur Report: Brazil 2009, para. 40.

83 Concluding Observations, India, CERD/C/IND/CO/19, para. 19 (5 May 2007) (urging India to "seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects" as per the CERD Convention); Concluding Observations, Ecuador, CERD/C/ECU/CO/19, para. 16 (15 August 2008) (encouraging that Ecuador, pursuant to its obligations under the CERD Convention, "ensure[s] that oil companies carry out environmental impact studies in the areas where they plan to begin operations before obtaining licences").

(x) the traffic of non-native visitors and researchers must be admitted in the conservation area during the hours and with respect to the conditions stipulated by the Chico Mendes Conservation and Biodiversity Institute.

39. To understand the full implications of these *Conditions (viii), (ix) and (x)*, it is important to understand the history of the Monte Roraima National Park and the Chico Mendes Conservation and Biodiversity Institute ("Chico Mendes Institute"). The Monte Roraima National Park and Conservation Area was created by executive decree in 1987, but was nullified with the enactment of the Federal Constitution of 1988. For many years, the indigenous peoples of Raposa were not even aware of the existence of this Park. No conservation work whatsoever was completed by IBAMA or the Chico Mendes Institute until 2000, when IBAMA presented the idea of constructing a checkpoint in the area.

40. The superimposition of the National Park and Conservation Area on top of Raposa, without the consultation and consent of the indigenous peoples concerned, violates the exclusive usufruct rights granted under the Brazilian Constitution, and ought to be considered unconstitutional under Article 231 §6 of the Constitution, which nullifies and denies legal impact to all acts that have as their objective the occupation, control or possession of indigenous lands. The superimposition of the Park also violates Article 5 of the CERD Convention which was interpreted by the Committee as requiring the "effective participation of indigenous communities in the decisions directly relating to their rights and interests, including their informed consent in the establishment of national parks, and as to how the effective management of those parks is carried out. [For these reasons], [t]he Committee also recommend[ed] that the State adopt all measures to guarantee that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities."[84] Furthermore, the OAS Draft Declaration on the Rights of Indigenous Peoples, yet to be adopted in full but with provisional consensus of states on numerous articles, includes a provision that prohibits the establishment of conservation and protected areas without the free, prior and informed consent of the affected indigenous peoples. This provision has been provisionally approved by consensus by all member states including Brazil. [85]

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[84] Concluding Observations: Ethiopia, CERD/C/ETH/CO/15, para. 22 (20 June 2007).

[85] Results of the Twelfth Negotiation Meeting for the Search for Consensus of The Working Group to Draft the American Declaration on the Rights of Indigenous Peoples, Art. 7, GT/DADIN/doc. 334/08 rev. 5 (3 December 2009.

41. The area included in the Park is also considered a sacred area to the indigenous peoples of Raposa. It is known as the place where the God Makunaima lives, according to the religion of the Macuxi, Ingaricó, Patamona and Wapichana. The area has been conserved historically by indigenous communities through their traditional management practices. Since 2005, with the Decree ratifying Raposa, the Ingaricó community whose lands are covered by the Park has reluctantly agreed to work with the Chico Mendes Institute in a joint management project. The above conditions of the *Supreme Court Decision* could prejudice this agreement as well as the indigenous peoples' interests in increasing their control over the protected area.

42. It is also worth noting that there was little clarification about the role of indigenous peoples in the park management plan initiated after the ratification of Raposa. This work, in particular the discussions around the management plan, was completed in a rapid manner, at the same time that the indigenous communities were preoccupied with mobilizing to defend their property rights. As such, they did not count with good faith consultations and effective participation. The language of the *Decision* appears to sanction the park regardless of the manner of its inception.

43. The three provisions above have the effect of certifying a protected area that was imposed on the indigenous peoples of Raposa Serra do Sol without their consent. They also endorse a government institute that largely supplants indigenous management and control over their resources. International law, including the CERD Convention, the UN Declaration, as well as the American Convention as interpreted by *Saramaka Peoples v. Suriname* makes it clear that indigenous people have the right to own, control and manage their traditional lands and resources (see paragraphs 14-15 above). This includes control over the conservation of those lands and resources. Indeed, the IA Court has made it clear that all the rules and assertions expressed in the sentence of *Saramaka Peoples v. Suriname* and its *Interpretation*, are applicable to whatever development plan or proposed investment that could impact the integrity of the territories of indigenous or tribal peoples. The IA Court explains in a footnote that the term "development plan or investment" means "whatever activity that could effect the integrity of the lands or natural resources of the Saramaka territory, in particular, whatever proposal related to timber or mineral concessions."[86] This definition clearly includes activities such as conservation projects, because they include all those that could impact the integrity of the territories or natural resources of indigenous peoples.[87]

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[86] *Saramka People v. Surinam*, para. 129, nota 124.

[87] In referring to the applicable human rights norms for conservation, especially in protected areas, see, amongst other documents: Concluding observations: Botsuana, CERD/ A/57/18, paras. 292-314 (23 August 2002)(where they establish that the state should "not take any decision directly related to the rights and interests of members of indigenous peoples without their informed consent" in connection with nature reserves; Concluding

44. The imposition of a protected area and a non-indigenous institute to manage it is an interference with the rights of indigenous peoples to the enjoyment of their lands and resources. Conservation projects, particularly of the scale involved in the Monte Roraima Park, affect the integrity of indigenous peoples' territories. This means that it is not be enough for a state to simply declare that it is in the national interest to conserve an area. Moreover, the IA Court "emphasized that when large-scale projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramaka's, but also to obtain their free, prior and informed consent in accordance with their customs and traditions."[88] Nothing in the conditions outlined above provides for this consent, but rather indicates merely a consultation with indigenous peoples, perhaps to give appearances of "co-management." Co-management, however, is not indigenous ownership, control and management of their resources. It merely represents participation in a management plan set forth by the Government. This is contrary to international law. For instance, the UN Declaration of the Rights of Indigenous Peoples, Article 32, provides that:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

45. In the establishment of the National Park and the imposition of the Chico Mendes Institute to manage the same, the Brazilian Government violated the rights of indigenous peoples to the ownership, control and management of their lands and resources. For years indigenous peoples of the area have complained about the park, the manner in which it was created, and its management structure. While maintaining these complaints and calling for a reconsideration of the imposition of the Park, recently the Government and the indigenous peoples made progress by establishing a working group to manage the area – a group headed by an Ingaricó indigenous

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Observations: Sri Lanka, CERD/A/56/18, paras. 321-342 (14 September 2001) (where they insist that the state "recognize and Project the rights of indigenous peoples to posses, develop, control and utilize their communal lands, territories, and resources…in connection with a national park"; and Concluding Observations: Ethiopia, CERD/C/ETH/CO/15, para. 22 (20 June 2007) (where they explain that states ought to ensure the effect participation of indigenous peoples and their "informed consent when they establish national parks and in which they refer to the effective management of such parks" and that the state "shall adopt all necessary means to guarantee that the national parks established in the ancestral lands of indigenous communities will permit sustainable social and economic development that is compatible with the cultural traits and the lifestyles of these communities

[88] *Saramka People v. Surinam*, para. 134.

representative from the area. The three conditions above have the effect of sanctioning the park's establishment, ensuring its permanence and threatening what small advances the indigenous peoples have made in retaking control over the conservation of their lands and resources, at least through the working group.

(xi) the entrance, traffic and permanence of non-natives within the remaining area of indigenous lands, shall be pursuant to conditions established by FUNAI.

46. This provision is one more example of how the STF has interpreted the Constitution of Brazil to render the indigenous peoples of Raposa to be no more than social and cultural entities with truly no authority to manage and control their own lands and resources. Their right to property – to their ancestral lands – is reduced to nothing more than a use right. Even the exclusive possession the Constitution affords them is merely within the power of the Government to enforce and protect. Under this condition, the indigenous peoples have no real control of who comes in and out of their lands. They are at the mercy of the Government, according to this provision. In a paternalistic paradigm outdated and rejected by existing international norms related to indigenous peoples, the STF places the Government in full control of indigenous lands — not the indigenous peoples. This is consistent with the fact that it is the Government that remains the "owner" of the Raposa indigenous lands, and not the indigenous peoples themselves.

47. According to the provision above, indigenous peoples have some form of exclusive use of their lands and resources, yet their use and enjoyment of those lands and resources are forever subject to the Government's control. Under the express terms of this condition, indigenous peoples do not even participate in decisions about who can enter or stay within their lands –this is delegated to a Governmental body. This provision, in its spirit, further offends international law's respect for and protection of indigenous peoples' own decision making institutions and authorities.[89]

(xii) the entrance, traffic and permanence of non-natives may not be subject the collection of any taxes or other amounts of any nature by the indigenous communities.

(xiii) the collection of taxes or other amounts of any nature may not placed on or be demanded in exchange for the use of roads, public fixture, power transmission lines or any

[89] See UN Declaration on the Rights of Indigenous Peoples, Article 5, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." See also Article 18 "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

other fixtures and installations made as a public service, excluding those expressly ratified, or not.

48. *Conditions (xii) and (xiii)*, especially if poorly interpreted and applied, can be read to violate the right of indigenous peoples to enjoy the reasonable benefits stemming from any interference with their lands and resources. This is a right that is well affirmed by the IA Court (see para. 16 above) as well as CERD and the UN Committee on Economic, Social and Cultural Rights.[90] Through the above conditions, the *Supreme Court Decision* removes the government's obligation to negotiate a reasonable benefit sharing agreement with indigenous peoples for the imposition of a public service/installation on their land, is outright inconsistent with the Article 21 rights to property under the American Convention attributable to indigenous peoples.

49. The above conditions also violate the right of indigenous peoples, in the exercise of their self-determination and control of their resources, to decide how they might benefit from their resources. This includes contracting with and charging others for their use. This again stems from the STF's constitutional interpretation that only State owns indigenous lands and resources, and that indigenous peoples rights to the same are much much less – something akin to a mere authorized user. There is an underlying attitude that indigenous peoples are simply traditional users of the lands and resources and as such, would never consider a use that is beyond their traditions or beyond what is necessary for mere subsistence, rather than contributing to a sustainable local economy. This is an archaic notion of what indigenous peoples can do and have a right to do with their lands and resources.

(xiv) indigenous lands may not be subject to rental or to any other legal act or settlement which restricts the right to exercise its usufruct and direct possession by the indigenous community or by the natives (article 231, § 2 of the Federal Constitution and article 18, Law No. 6,001/1973).

50. This condition is merely consistent with the Brazilian Constitution recognizing the inalienable and indisposable nature (Art. 231(4)) of indigenous lands. However, it also seems internally inconsistent with other conditions in the *Supreme Court Decision* – particularly, for instance, those related to the Chico Mendes Institute. Through a decree and then through the STF ruling, a national park was imposed upon Raposa lands and is being managed by non-indigenous entity. The Park is clearly a restriction on the indigenous communities' use and direct possession of their lands. It is difficult to see how the Park itself, affirmed in *Conditions (viii), (ix) and (x)*, does not conflict with the condition as stated above.

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[90] *See* supra notes 73 & 74.

(xv) any person foreign to the tribal groups or indigenous communities is prohibited from of hunting, foraging or collecting of , fruit, as well as mixed-farming or extractive activity (article 231, § 2 of the Federal Constitution and article 18, Law No. 6,001/1973).

51. While presumably meant to be a protection, this condition also withdraws from indigenous peoples their own right to enter into agreements with other tribes or third parties for the use of their resources as they deem fit, including where these uses where permitted historically under customary laws and practices. Like *Condition (xiv)* above, it is also someone internally inconsistent with the many other conditions which clearly allow others to exploit the resources in non-traditional ways (particularly government entities, and individuals and groups authorized by the government). While the assumption of the *Supreme Court Decision* is that *only* the indigenous peoples of Raposa can conduct such traditional activities, the implication of this condition – particularly when read with the other conditions and elements of the *Decision* – is that indigenous peoples' exclusive use of their lands and resources is really about "traditional" uses. Any other kind of use is reserved purely for the State or must first be approved by the State. This provision again refers to archaic notions of indigenous peoples, and the interpretation and application of this provision must be considered carefully.

52. The approach to indigenous peoples rights to their lands and resources demonstrated in the above condition is also a violation of their right to the exercise of self-determination which at a minimum must mean the right to "freely pursue their economic, social and cultural development," and "freely dispose of their natural wealth and resources."[91] *In Saramaka Peoples v. Surinam*, the Inter-American Court of Human Rights explained that this supports an interpretation of Article 21, inter alia, recognizing indigenous peoples' right "to freely determine and enjoy their own social, cultural and economic development" within their traditional territories and requires the State to recognize indigenous peoples' "right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system."[92] These rights were also affirmed in the recently adopted UN Declaration on the Rights of Indigenous Peoples.[93] Based on *Condition (xv)* and those above, any reading of the *Supreme Court Decision* to limit indigenous peoples traditional practices and to replace their decision-making authority with that of the Government, is wholly inconsistent with international law affirming indigenous peoples' rights.

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91 *Saramaka People v. Suriname*, para. 93.

92 *Saramaka People v. Suriname*, paras. 95, 194 & 214(7).

93 UN Declaration, Arts. 3, 4, 18 & 26.

(xvi) in the lands under occupation and possession by indigenous groups and communities, the exclusive usufruct of natural resources and existing utilities of the occupied lands, is observed in accordance with Articles 49, XVI and 231, § 3 of CR/88, as well as the indigenous profit (article 43 of Law No. 6,001/1973), enjoying full tax immunity, the collection of any taxes, fees or contributions being allocated to on or the other.

53. This is a welcomed provision, consistent with the Constitution's characterization of indigenous lands as unencumberable and therefore the non-applicability of taxes to indigenous communities and the activities they carry out on their own lands and with their own resources.

(xvii) the enlargement of demarcated indigenous lands is prohibited.

54. This condition is troubling for several reasons. As discussed above, in the past (particularly prior to the 1988 Constitution), various indigenous peoples did not have the full extent of their traditional lands demarcated in a way that reflected their traditional use and occupation of these territories. These lands also were demarcated without consultations nor consent and were not in accordance with indigenous norms, customs and values, nor were they conceived in a manner that would assure indigenous peoples' continued cultural survival (see paragraphs 12-19).

55. The careful interpretation and application of this condition can help to ensure that its effect is not detrimental to the rights of indigenous peoples in Brazil. *Condition (xvii)* states in no uncertain terms and with no further explanation that "the enlargement of demarcated lands is prohibited." However, for this statement to be coherent and internally consistent with the rest of the *Decision*, it must be read in light of three other elements of the *Supreme Court Decision*. First of all, the *Supreme Court Decision* justifies the demarcation of ancestral indigenous territories by asserting that the determining fact of indigenous occupation is the perpetual presence of indigenous peoples in a specific geographic territory on the date of the constitution's ratification on October 5, 1988, and that the constitution merely recognizes a preexisting right of indigenous peoples to these lands.[94] Secondly, the reporting judge makes clear in paragraph 11.2 of the *Supreme Court Decision* that "the traditional possession by natives, therefore, is not lost where, at the time of the promulgation of the Majority Law of 1988, the reoccupation [of their traditional lands] could not occur solely because of the persistent occupation by non-indigenous peoples."[95]

56. Thirdly, paragraph 13 of the *Supreme Court Decision* explicitly describes the need for indigenous territories to have sufficient room to pursue indigenous peoples' cultural,

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94 *Supreme Court Decision*, para. 5.2.

95 *Supreme Court Decision*, para. 11.2.

economic and social well-being, and as such the establishment of small patches of territory is equivalent to ethnocide.

57. There is a danger, therefore, that the *Supreme Court Decision* could be interpreted and applied in a manner that would violate indigenous peoples' rights under international law. This could occur in situations in which indigenous peoples who occupied a piece of land that constituted only part of their traditional lands on October 5, 1988, due to the inadequate demarcation of their lands by the previous military government, might be denied the right to expand their lands to include all of their traditional lands. The danger of this is immediate. For instance, the National Agricultural and Livestock Confederation (CNA) has submitted a petition for *Sumula Vinculante* (a request for *stare decisis*, or a binding decision) that attempts to ensure a strict interpretation of the *Supreme Court Decision.* The new action filed by the National Confederation (PSV 49), seeks to redefine "extinct indigenous settlements" and "remote past" to mean anything before the date of October 5, 1988, when the current Constitution passed into law. If approved by the Supreme Court, PSV 49 would mean that only areas occupied by indigenous peoples on the date the Federal Constitution became law in 1988 would be recognized as "lands traditionally occupied by the indians" (as the Constitution defines areas that must be ratified). The *Decision* would therefore impact over 22 requests for enlargement of indigenous lands in Roraima alone, as well as other cases throughout Brazil which are currently before the Supreme Court.[96] Additionally, this condition has already impacted the indigenous community of Serra da Moca and the Arroio Korá indigenous area where opposition has used the limitation to call for a denial of the expansion of indigenous areas. In the latter, a Supreme Court magistrate has granted the opposition's motion.[97]

58. The Submitting Organizations encourage the Brazilian government to immediately offer an interpretation of *Condition (xvii)* that eliminates the danger elaborated upon in the prior paragraphs. As previously mentioned, many indigenous communities occupied only a portion of their traditional territory on October 5, 1988 due to prior dislocations --either by the State or by non-indigenous groups. As such, for the *Supreme Court Decision* to be internally coherent as well as consistent with international law, it must be interpreted so that these communities would still have the right to petition for the expansion of their full territories –at a minimum where the departure from their lands prior to 1988 was not voluntary.

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[96] Petition for Sumula Vinculante by the National Confederation of Agricultural and Livestock Producers of Brazil, September 30, 2009. FUNAI has filed a motion to dismiss the request, arguing that the definition of an "extinct settlement" should not apply to situations in which an indigenous group was evicted from their lands.

[97] *See* supra note 36.

59. In order to ensure an interpretation that is constitutional, does not violate international law, and is internally consistent with the *Supreme Court Decision*, the State of Brazil must assert an application such that indigenous communities who are currently occupying only a piece, or "island", of their original lands particularly as a result of encroachments by others are still entitled to claim the whole of their traditional territories. On a case by case basis and consistent with human rights, these petitions would then be processed. This is particularly important in the cases in which the indigenous groups in question do not have the capacity to fully pursue their cultural needs and are not economically self-sufficient due to the patch-work nature of the demarcation, as explicitly denounced by the *Supreme Court Decision*. Thus *indigenous lands* that were demarcated prior to the passage of the 1988 constitution and do not meet the conditions of sections 11.2 and 13 should be available for expansions, notwithstanding *Condition (xvii)*.

60. The State's interpretation of the above Condition should be consistent with the CERD Convention, American Convention on Human Rights, the UN Declaration and international law more broadly. As such, the *Decision* should (i) place no time limit on the right of indigenous peoples to seek demarcation and titling of their lands, (ii) ensure that such demarcations and titling are done in a manner that is consistent with their own customs, values and norms, and (iii) except in "specific and exceptional circumstances" (none of which are met here) no State activity can take place (even a limitation on demarcations or demarcation expansions) which would interfere with their use and enjoyment of their lands –particularly those that "impl[y] a denial of the traditions and ways of life that place in danger the subsistence of the group and its members."[98]

(xviii) natives' rights with respect to their lands are not subject to a period of limitations in order to be exercised before a court, not subject to seizure, and these rights are indisposable and inalienable (articles 231, § 4, CR/88).

61. Overall, this provision is appropriate. It is unclear, however, how it is to be read consistently with the outright prohibition on expansions of demarcations and the limitations applicable to lands not occupied by indigenous peoples as of 1988.

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98 *Saramaka People v. Suriname*, para. 128. In paragraph 37 of the Intrepretation of the Court it explains that the phrase "survival as a tribal community" ought to be understood as the capacity of the Saramaka to "preserve, project and guarantee the special relationship that they have with their territory" so that they could "continue living their traditional lifestyle and their cultural identity, social structure, economic system, ,customs, beliefs, and distinctive traditions will be respected, guaranteed and protected." Therefore, the term "survival" signifies, in this context, much more than purely physical survival.

(xix) the participation of federated entities in the administrative demarcation processes of indigenous lands, imbedded in their territories, is assured, as observed to the phase in which the proceeding is encountered.

62. This condition is worrisome. On the one hand, Brazilian law affirms that federal units, such as the States of the Union (including the State of Roraima itself), have the right to contribute information to the processes of demarcation that occur in their territories, and through these contributions, to contest the demarcations through demonstrating deficiencies, or to request indemnifications.[99] This provision can thus be read as merely a reaffirmation of existing law. On the other hand, it is also worrisome because it reaffirms and legitimates a process of demarcation that, in the case of Raposa, did not offer a guarantee of "a fair and efficient process to resolve the demands and territorial rights of indigenous peoples."[100] During continuous communications with the CERD Committee and the Inter-American Commission on Human Rights, the indigenous peoples of RSS have demonstrated that it was the State of Roraima itself (a federaded unit) and several of its officials who directed the fight against demarcation, abused legal processes and the judicial system to delay the demarcation for decades, and perpetuated violence against indigenous peoples. As a result of this experience, it rightfully gives the Submitting Organizations some trepidation regarding the possible interpretation and application of this condition in the future. *Condition (xix)* can be said to affirm one element of the Brazilian legal framework that already needs reform to ensure compliance with its obligations under international law. At present, the Brazilian demarcation process is already flawed by the manner in which opponents can abuse and use the judicial system to delay demarcations as well as the manner in which the required ratification by the President can be compelled by no one (including the affected indigenous peoples). A proper interpretation and application of this provision might remedy shortcomings in the domestic legal framework.

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[99] Decree no 1.775, of January 8, 1996, describes the administrative procedures for demarcating indigenous lands and other orders, §8,

[100] Maya Indigenous Communities v. Belize, case 12.053, October 24, 2003, paras. 173-177; *Mary and Carrie Dann* (United States), Case no. 11.140 (27 December 2002), para. 142.

63. The *Supreme Court Decision*, including the majority of the (19) nineteen conditions, appears to create more rules to limit the rights of indigenous peoples rather than recognize and protect their rights. Some of these conditions contradict the Brazilian Constitution itself, as well as international law. For this reason, the Government of Brazil must take the necessary steps --in consultation with indigenous peoples and other state entities whose competencies are implicated-- to review the *Decision* and work together to ensure that it furthers rather than debilitates the rights of indigenous peoples.

<u>Annex C</u>: *Examples of Unpunished Violence*

Against the Indigenous Peoples of Raposa

23 November 2004, Armed raid is conducted on four indigenous communities (Brilho do Sol, Homologação, Jawari and Lilás) and two field houses (Insikiran & Tai Tai), in Baixo Cotingo, Roraima.

A family in front of their burned house (Community of Jawari, Raposa); injured face of Jocivaldo Constantino, as shot during an attack; houses and health clinic burnt during the attack.

17 September 2005, 150 armed and masked men enter the Surumú Mission at the entrance to RSS; the Surumu School is attacked and burned, including the class building, church, hospital, and dormitory. A teacher is beaten and has his car burned.

The burned Surumu Mission; the burnt Clinic; the beaten professor of SENAI

6-9 February 2007, violence occurs in Surumú as indigenous peoples hold the Conselho Indígena de Roraima (CIR) annual General Assembly in Roraima. Several interruptions occur during the meeting due to attacks against the building in which the indigenous peoples were convened. Sergio da Silva Alves, an indigenous man volunteering for security for the Assembly was severely beaten.

Sergio da Silva Alves being attended by indigenous participants infront of the meeting location.

5 May 2008, Ten indigenous people in Surumu are shot by gunmen (with ties to former Mayor Paulo Quartiero), who also throw explosives at them. The community is then named "10 Irmãos", in honor of those shot. The indigenous peoples were shot while peacefully trying to construct a *maloca* (traditional indigenous house).

Annex D: *Key Acts of Violence Still require Full Investigation and Prosecution*

2004

23 November, Armed raid is conducted on four indigenous communities (Brilho do Sol, Homologação, Jawari and Lilás) and two field houses (Insikiran & Tai Tai), in Baixo Cotingo.

2005

September, Urucuri Bridge permitting access to northern areas of Raposa, near the community of São Mateus, is burned.

17 September, 150 armed and masked men enter the Surumu Mission at the entrance to RSS; the Surumu School is attacked and burned, including the class building, church, hospital, and dormitory. A teacher is beaten and has his car burned.

22 September, men linked to the opposition of the demarcation of Raposa set fire to three wooden bridges on access roads to the Serras region, where the celebrations are being held

23 November, Armed men set fire to two houses in the community of Nova Vitoria.

2006

March, Indigenous communities Maloquinha, Barro, Miang and Cumana I are invaded by armed men.

19 April, Opposition demonstrators blockade route 174 and massively remain on RSS.

23 April, Two employees of rice farmer, Nelson Itikawa, shoot 4 bullets at the indigenous man Moises Martins in Tai Tai area.

2007

February, Former Pacaraima Municipal Mayor and rice farmer Paulo Quartiero and allies attempt to prohibit the CIR General Assembly in Surumu. Several interruptions occur during the meeting due to attacks against the building in which the indigenous peoples were convened. One indigenous man volunteering for security to the Assembly was severely beaten.

14 June, Members of the Macuxi people are threatened by non-indigenous farm workers when they peacefully reoccupied a traditional site known as Parawani (within Raposa), located near the rice farms Deposito and Canada.

17 June, A traditional leader from the Barro community, Anselmo Dionisio Filho, is followed and intimidated by a white car and 4 passengers filming his every move on the road accessing

RSS and Uiramuta. Among the occupants of the white car are Congressman Marcio Junqueira and Quartiero. Later, Quartiero and another man enter Parawani settlement area in the same white car followed by another vehicle loaded with 30 hooded armed men, circling 6 community members and 1 child. The attackers shoot into the air and destroy many of the community's belongings. They then load people into a truck, carrying them to another location and threatening them with death if they return to the settlement.

21 June, Heliomar Gomes de Souza, Lindomar Lauro Brasil, and Histarley Souza face threats by the same white car and gun shots by hooded men on the main bridge accessing RSS, while traveling from Surumu to Canta Galo community.

27 June, Indigenous people from SODIUR and ALIDCIR, linked to the rice-growers, blockade roads, preventing people connected to CIR from passing.

28 July, Shots are fired by gunmen allegedly linked to Quartiero and another rice-grower, Ivo Barili, near the community of Jawari in RSS.

19 September, Indigenous people from the community of Barro claim they have been followed by motorcycles ridden by gunmen hired by Quartiero, who fired their guns, intimidating and threatening indigenous leaders.

1 November: People from Copaíba receive death threats from gunmen allegedly hired by Quartiero, who point their guns at them, taking the fish they had just caught.

8 November, Jair Cunha and his family have to leave the Homologacao indigenous community to another indigenous community fearing threats and discrimination by non-indigenous occupant Raimundo Cardoso Sobrinho. Similarly, the non-indigenous employee of Fazenda Sao Jose, Coronel Wilson, is threatening indigenous families in the area; and rice farmer Ivalcir Centenario prohibited indigenous peoples to fish or hunt near his occupation and is building fences to limit the transit of indigenous peoples in RSS. Indigenous communities of Cantao and Canta Galo are impeded in their attempts to fish and hunt in their lands as demarcated and titled.

13 November, Macuxi indigenous leader from Macaco community, Dobercio Mendes, is murdered in Vila Normandia, an area which was excluded from RSS when it was ratified in 2005, but within the limits recognized in 1998.

November 15, Men hired by Quartiero prohibit indigenous people from fishing in RSS. They ride through RSS on motorcycles, armed, intimidating community members.

November, Six military soldiers from the military unit within RSS steal a cow from the indigenous community Pedra Branca. Despite a confession of the crime and witnesses, the case was closed by Ministerio Publico Federal alleging lack of proof.

December, Indigenous peoples of RSS communicated to the authorities that rice farmers in the area are inciting different indigenous groups to enter in conflict and have burned houses accusing CIR indigenous leaders Nelino Galé and Junior of such crimes. Nelino, regional coordinator for

CIR in that region, received multiple death threats, as had Walter, regional coordinator for Surumú.

2008

January, Indigenous leaders from the four regions of RSS have received death threats by word of mouth. CIR Coordinators and lawyer Joenia Wapichana have received a number of threatening phone calls, none of which have been explicit, but which caused them to stay on guard and change their numbers.

1 January, Returning from a party, Juscelino Pereira Mota is followed by a motorcycle driven by a former FUNAI employee, José Raimundo, and Ronan, a member of the community of Contão, who proceed to beat him up.

17 January, People from Copaíba receive death threats from gunmen tied to Quartiero, who are again driving motorcycles, armed, through Baixo Cotingo in RSS.

19 March, Home-made bombs are placed near the location where CIR's General Assembly is taking place, in Barro, RSS. The suspects are gunmen tied to Quartiero.

27 March, The Federal Government announces it will initiate removal of the rice-growers Quartiero leads opposition to the removal process in the press, in the courts, and on the ground. Under his influence, bridges are burned, roads blockaded, and bombs are thrown. One of his employees is even arrested for throwing a bomb at the federal police station in Pacaraima. Communities in RSS are effectively isolated.

30 March 30, Quartiero gathers people in the old police station in Barro, promising to resist removal. Two bridges leading to the community and to the rest of RSS are burned.

31 March, The community school in Barro is invaded, and half of the chairs are taken to one of Quartiero's ranches. The Elias Madeiras Bridge, leading to the community, is blocaded by Quartiero and other protestors, using cars, tractors, agricultural machinery, nails and sandbags. Protestors set off explosives; one of them explodes near tuxaua Moacildo, causing him to pass out. The person accused of throwing the bomb works for Quartiero.

4 April, Community members from Copaíba are again threatened and shot at by gunmen tied to Quartiero.

14 April, Men identified as Genival, Edílson and Alexandre, led by Quartiero, invade the Padre José de Anchieta School in Barro, sending students and teachers away and physically threatening school employees.

5 May, Ten indigenous people in Surumu are shot by gunmen with ties to Quartiero, who also throw explosives at them. The community is then named "10 Irmãos", in honor of those shot.