



*Conselho Indígena de Roraima
Rainforest Foundation US
Forest Peoples Programme*

3 February, 2008

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
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**RE: Continuing Urgent Need for Committee Communication with Brazil
given Pending Court decision and Ongoing Violations**

Dear Mr. Schakel:

1. 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 (Raposa) indigenous land in the state of Roraima, Brazil; the Rainforest Foundation US, and the Forest Peoples Programme (FPP) (“the Submitting Organizations”), I would like to thank the Secretariat and the Committee on the Elimination of Racial Discrimination (CERD or Committee) for the attention both have provided to address the situation of the indigenous peoples of Raposa. We would like to further take this opportunity, in anticipation of the Committee’s 74th session to provide you with a brief update as to the situation in Raposa.
2. Since the Committee’s briefing in August with FPP attorney Vanessa Jiménez, and our follow up correspondence of 8 August 2008, much has transpired in Raposa. As you might recall, at the end of March of 2008 the Federal Government announced its intentions to carry out a removal of the remaining non-indigenous occupants within the

indigenous lands of Raposa. Shortly thereafter the Governor of Roraima filed suit to suspend the removal action. On 9 April the Federal Supreme Court (*Supremo Tribunal Federal* (STF or Court) issued a preliminary decision to suspend the operation.¹ On 27 August 2008, the Court met again to take a final ruling on Petição 3388 regarding the legality of Portaria 534/05 and the Presidential Ratification Decree of 15 April 2005 authorizing the demarcation and removal. In a critical decision on August 27, one of Brazil's Federal Supreme Court judges (magistrates) serving as rapporteur of the case, Minister Carlos Ayres Britto, voted in favor of maintaining Raposa Serra do Sol as a continuous indigenous land.² After issuance of the Rapporteur's decision, it is the practice of the Court that the other ten Justices put forth their vote and any justice can ask for further time to study the case before issuing his or her decision or propose changes to the Rapporteur's opinion. On this day no other magistrates issued their vote because Justice Menezes Direito exercised his right to ask for more time. Once again, a final decision that could bring an end to the crisis in Raposa was postponed. It was then decided that the magistrates would meet again before the end of the year. Though disappointed by another delay and despite a clear trend within the STF of denial of the use of international human rights instruments defending indigenous peoples' land rights, Justice Britto's decision was celebrated by the indigenous peoples of Raposa because it recognized the security of the demarcated land.

3. Finally, on 10 December 2008, eight months after the Federal Supreme Court's original decision to suspend the removal until a final decision on the merits of the case could be reached, the full complement of the Court met once again. On this occasion, Justice Menezes Direito took the center stage. He too issued an opinion that favored the demarcation of Raposa Serra do Sol as a contiguous area according to the parameters established in Portaria No 534 and ratified by President Lula on 15 April 2005. Justice Direito recalled that Constitutional article 231 defined the right of indigenous peoples over traditionally occupied areas, but suggested a limited interpretation to that right in a way that denies the historic ancestral character of the right to land. His interpretation, instead, restricts the time frame for occupation necessary to claim indigenous territories (discussed below). Justice Direito also recalled that indigenous land rights are limited in the context of national sovereignty, exploitation of mining resources and the use of potential energy sources. With those reservations and considerations in mind, his decision was issued with (18) eighteen conditions. They are listed below:

1. The use of soil, rivers and lakes on indigenous lands can be overcome in a general manner whenever there is public interest of the Union, according to complementary norms. (citing to Federal Constitution article 231 paragraph 6);
2. Indigenous usage rights do not extend to water resources and potential energy sources, which require Congressional authorization;

¹ Decision of Federal Supreme Court (*Supremo Tribunal Federal* (STF) to Precautionary Measure (*Ação Cautelar*) N°. 2009 (9 April 2008).

² Supremo Tribunal Federal [STF], Pet. 3388, Relator: Min. Carlos Britto, 27.08.2008, Voto do Ministro Relator Carlos Britto; Veja http://www.estadao.com.br/ext/especiais/2008/08/integra_ayresbritto.pdf para a íntegra do Voto.

3. Indigenous usage rights do not include the study and extraction of natural resources, which require Congressional authorization;
4. Indigenous usage rights do not include mining or prospecting,; depending on the case, a mining permit would be required;
5. Indigenous usage rights are conditional on the interests of National Defense policy. The installation of military bases, units and other military infrastructure; the strategic expansion of roads; the exploitation of energy alternatives and the safeguarding of strategic resources, as determined by the relevant government agencies (the Ministry of Defense and the National Defense Council) will be implemented regardless of consultation with indigenous communities affected or with FUNAI;
6. The activities of the Federal Police on indigenous lands are guaranteed and will take place regardless of consultation with indigenous communities affected or with FUNAI;
7. Indigenous usage rights do not impede the installation of public utilities, communications networks, roads and means of transportation, nor the infrastructure necessary for the provision of public services—particularly health and education—by the Union;
8. Indigenous enjoyment of rights over areas affected by Conservation Units is limited to entrance, transit and permanence, as well as hunting, fishing and vegetal extraction during the periods, seasons and conditions established by the administration of the Conservation Unit, under the responsibility of the Instituto Chico Mendes de Conservação da Biodiversidade;
9. The Instituto Chico Mendes de Conservação da Biodiversidade will be responsible for administering conservation units overlapping with indigenous lands, with the participation of indigenous peoples from the area, who can only offer their opinions, and taking into consideration indigenous traditions and customs, for which it may consult with FUNAI;
10. The transit of non-indigenous visitors and researchers must be allowed in the area affected by the conservation unit according to the times and conditions established by the administration;
11. The entry, transit and permanence of non-indigenous people on the rest of an indigenous land will be allowed, according to conditions established by FUNAI;
12. The entry, transit and permanence of non-indigenous people cannot be subject to charging any fees or other charges by indigenous communities;
13. The charging of fees or any amount of money of any nature by indigenous communities cannot be applied to or demanded in exchange of the use of roads, public utilities, transmission of energy or any other equipment or installation that serves the public even if not explicitly excluded in the ratification of the area;
14. Indigenous lands cannot be object of leases or any legal transactions that restrict the full exercise of direct possession by indigenous communities;

15. Non-members of a tribal group or indigenous communities are prohibited from hunting, fishing, collecting fruit or developing agricultural or ranching activities;
 16. Indigenous patrimony - indigenous lands; the exclusive enjoyment of natural resources and the utilities existing on occupied indigenous lands (according to article 49 XVI and article 213 para. 3 of the Constitution); and indigenous income – is exempt from taxes;
 17. Demarcated indigenous lands cannot be expanded;
 18. Indigenous rights related to their lands are imprescriptible and the lands are inalienable and indisposible.³
4. Before a final judgment could be issued and the other magistrates issue their opinion, another judge asked for more time to review the case, delaying justice again. The Court closed its proceedings once again without a final decision and stated that it would reconvene in early 2009 for a third attempt to put a conclusion to this case – possibly even before the end of this month of February 2009.
 5. We now understand that some of the remaining judges favor the application of the above stated conditions to a final decision on the case. Others do not. The conditions listed above will be discussed and reviewed during the Court’s next sitting regarding the case. During that time the magistrates will also have to do what they have been postponing for over eight months come February. They will have to implement the majority’s decision to lift the injunction on the federal removal process that began last March and has been suspended since April. Since then, all occupants of Raposa have been waiting for a conclusion to this crisis and continued uncertainty. Eight Justices out of eleven have already decided in favor of lifting the injunction but the measure has not yet been implemented since the case is technically still pending before the Supreme Court and without a final and binding decision.
 6. The Submitting Organizations, as well as the indigenous peoples of Raposa are pleased by the final decisions of Justice Britto and the underlying decision of Justice Carlos Menezes Direito to approve the existing and contiguous demarcation of Raposa Serra do Sol. However, all remain very concerned that by the end of this month another delay will occur and no final decision will be forthcoming once again. Equally important, there is a great fear that if the eighteen (18) conditions listed above are not removed or modified significantly, they will collectively, and in many cases individually, undermine the very rights that the Court pretends to protect and enforce as a part of the State’s overall obligations under national and international law.⁴ In doing so they will prevent the indigenous peoples of Raposa – and other areas in Brazil – from enjoying the full use and enjoyment of their traditional lands as guaranteed by the Brazilian Constitution and Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination

³ Minister Menezes Direito’s full vote is not publicly available, with only the 18 conditions being published. See http://www.estadao.com.br/nacional/not_nac291712.0.htm for the original Portuguese version.

⁴ Upon analysis, conditions 14, 15, 16, & 18 largely restate provisions and protections already existing in Brazil’s internal legal framework, but without know the final wording, the best approach is a decision without any conditions.

(Convention). All in Brazil, not just those in Roraima and Raposa, are following this case closely because of this wider national impact the ruling will have in the nation.

7. While this Committee has affirmed that under the Convention indigenous peoples have the right to consultation as well as free, prior and informed consent over activities that can affect their rights, lands, territories and resources, several of the 18 conditions stated above dispense with the need for consultation (such as those involving activities of the Federal Police); allow the Federal government to continue unimpeded in various public works, development and resource exploitation activities; strips indigenous peoples of their ability to negotiate reasonable benefits from commercial and state infrastructure and development projects undertaken within their lands; and even allows the free transit and settlement of non-indigenous peoples in any area, appearing to question the very necessity of finishing the federal removal of non-indigenous occupants.
8. Additionally, while the 1988 ratification of Brazil's Constitution established the right of indigenous peoples to their traditional lands, in his decision Justice Menezes Direito interpreted the Constitution as providing that an area must have been occupied by the indigenous community in 1988 to be demarcated as indigenous land. Under this interpretation, traditional lands where indigenous peoples were displaced or forced to leave before 1988 could no longer be claimed by the indigenous people in question. Condition seventeen (17) in particular would also prohibit the enlargement of demarcated indigenous lands in Brazil, based on an alleged lack of traditional occupancy (prior to the 1988 Constitution).
9. Furthermore, the Submitting Organizations are concerned by the Magistrates' notable level of discomfort with the notion that international law or international bodies have a role to play in advancing the rights of indigenous peoples and settling land claims between the State of Brazil and indigenous peoples. The magistrates' aversion to international law and therefore the obligation and duties of the State under these laws to take measures to make effect the right affirmed under international law is worrisome given the advances that Brazil has made in the last decade in the area of human rights.
10. In his original decision, for instance, making reference to international law and in particular the recently adopted UN Declaration on the Rights of Indigenous peoples, Justice Britto stated: "It is our Constitution that the Brazilian Indians must bow to as their letter of freedom in the socio-economic and historic-cultural field, and not this or that international declaration of rights, nonetheless well intended."⁵ Justice Menezes made much stronger statements against the import of international law to indigenous people's rights and in particular the UN Declaration. He questioned the role of international human rights bodies when dealing with indigenous issues and stated that the Declaration itself represents an ambiguity and a risk to the legal security in the domestic order. This decision was supported by some of the other Justices and is prevailing so far. These

⁵ A live feed of the Court's deliberations was broadcast by *TV Justiça* on the 10th of December. See http://www.tvjustica.jus.br/videos/DIRETO_DO_PLENARIO_10_12_08_MANHA_PARTE_1.wmv.

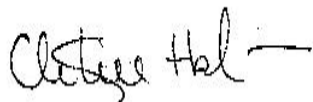
sentiments coming from Brazil's highest court are quite troubling and deserving of the Committee's attention.

11. As a result of these continuing delays in justice at the judiciary level and the possibility of a final decision that has conditions and limitations which undermine the very rights that Brazil, and therefore the Federal Supreme Court has been asked to protect, the Submitting Organizations wish to convey to the Committee that the situation remains quite grave in Raposa. Violations and irreparable harms are ongoing and shall continue until a final decision is issued and the State takes more decisive actions to: (i) fully sanction those involved in environmental crimes (including collecting penalties and enforcing embargoes), (ii) fully investigate the outstanding cases of violence that have occurred over the last four years against the indigenous of Raposa and process those responsible, (iii) see to the nullification of the Pacaraima municipal laws that are still in effect; and (iv) remedy deficiencies in the process surrounding and substance of the draft law to authorize a dam on the Cotingo River running through Raposa. For these reasons we respectfully request that the Committee:

- a. continue its urgent review of this situation during the upcoming session in February;
- b. contact immediately the Government of Brazil to express their appreciation for a movement closer to a final court decision, but further manifest the Committee's profound concern over the possibility of more judicial delays as well as a final decision that may include conditions and limitations that undermine the very rights Brazil is obligated to respect and promote under its own laws and the Convention;
- c. request that that Government of Brazil immediately inform the Committee as to what steps it has taken as a party to the case before the Court to ensure that no limitations and conditions are attached to the decision that would undermine indigenous peoples rights and result in backward steps for Brazil's legal framework;
- d. seek the information previously requested by this Committee but not delivered by Brazil to date –including information regarding the status of the continuing Pacaraima Municipal laws, the pending bill to construct a dam affecting Raposa, and all criminal investigations and processing of those responsible for violent attacks on the indigenous peoples of Raposa (as reported by the Submitting Organizations to this Committee in its past communications); and
- e. consider offering the advisory services of the Office of the High Commissioner on Human Rights and/or this Committee to Brazil to help bring it within compliance of the Convention.

12. We thank you again for the Secretariat and Committee's attention to this urgent matter. 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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