April 11, 2012

Tribunal Regional Federal da 5 Região
Cais do Apolo, s/n
Edifício Ministro Djaci Falcão
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Dear Excellencies of the 5th Regional Tribunal:

The Committee for Human Rights is a permanent committee of the American Anthropological Association (AAA), which is the largest professional association of anthropologists in the world. Its purposes are to stimulate informed involvement in the area of human rights among professional anthropologists, and to bring before the Association’s leadership information on urgent, anthropologically-relevant cases of potential human rights abuse. In the context of these roles, the Committee writes to express its concern for the safety, well-being, and fair treatment of Chief Marcos Xukuru, tribal leader of the Xukuru Nation in Pesqueira, Pernambuco, Brazil. For more than two decades, the Xukuru have been undergoing a process of demarcation of their ancestral lands through FUNAI. Due to the continuing presence of ranchers on Xukuru land,
this process has led to ongoing and continual threats and intimidation against human rights defenders and tribal leaders such as Chief Marcos Xukuru (Lôbo 2010; Amnesty International 2010a).

Since 1992, four deaths have been attributed to retaliation by non-Indian ranchers: Xukuru tribal member José Everaldo Rodrigues Bispo - 1992, FUNAI attorney Geraldo Rolim - 1995, Xukuru Chief Xicão - 1998, and the leader of the village Pé de Serra, Chico Quelê – 2001. Following the assassination of Chief Xicão on May 20, 1998, his son, Marcos Luidson, was elected as the chief of the Xukuru people. Chief Marcos and his mother, Zenilda Maria de Araújo (a nominee for the Nobel Peace Prize in 2002), began to receive death threats, thus prompting the Inter-American Commission on Human Rights to order the Brazilian government (in October of 2002) to take precautionary measures to protect both of them (Fialho 1992).

Despite these measures, in February of 2003, Chief Marcos Xukuru was ambushed in an assassination attempt in which two un-armed Xukuru youths were killed. The ambush and murders caused anger among tribal members, resulting in the plundering of the cars and houses of the people who instigated and participated in the ambush. This violence could have been avoided if the Brazilian government had provided the necessary security to the area.

While attacks against the Xukuru by the non-Indian ranchers are not new, this incident marks the beginning of the process of criminalization of Xukuru involved in the demarcation process. Since 2003, over 35 criminal charges have been pressed against Xukuru leaders including Chief Marcos Xukuru (Amnesty International 2005c). The accusations against them are based on their status as leaders and no evidence was presented to demonstrate individual responsibility for specific actions. Moreover, in a clear restriction on the right to use all legal means to defend himself, the court declined to hear important witnesses for the defense, including Federal Deputy Fernando Ferro (Workers Party/Pernambuco) and Assistant Head Federal Prosecutor (Subprocuradora Geral da Republica), Raquel Dodge. The exclusion of defense witnesses is a clear violation of Chief Marcos’s guaranteed legal rights.

Despite these irregularities in the legal proceedings, on May 22, 2009, Chief Marcos was found guilty and sentenced to ten years and four months in prison, along with a fine, by the Federal Court in Caruaru, Pernambuco. (Case number 2006.83.02.000366-5).

The presupposition of Chief Marcos Xukuru’s guilt based on his position as a tribal leader is a further violation of his rights. Despite being absent at the place and time that it transpired, the Chief was considered the responsible party in the acts of destruction. His conviction was based on a conflation of his tribal leadership role with a supposed command over the incidents following his attempted assassination.

These developments suggest a broad context of violations of international norms, including the provisions of the Declaration on the Rights of Indigenous Peoples, as well as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention for the Elimination of All Forms of Racial Discrimination, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect
Universally Recognized Human Rights and Fundamental Freedoms, and the International Labor Organization Convention on Indigenous and Tribal Peoples (Convention 169). For more information on this issue, see the appendix to this letter below, prepared by Dr. Marcia Mikulak, Associate Professor of Anthropology at the University of North Dakota and a Country Specialist for Brazil with Amnesty International.

In light of these violations of the rights of the Xukuru people, we request the following from the 5th Regional Tribunal in Recife, Pernambuco:

- The protection of the fundamental rights of Chief Marcos Xukuru and other tribal leaders
- Fair procedural treatment of indigenous people, based on respect for due process impartiality, and sensitivity to the specific cultural and political context of indigenous communities
- An end to the criminalization of human rights defenders, particularly members of indigenous communities who fight for their right to tribal lands and preservation of their culture
- An impartial, timely, and proper legal and judicial investigation which considers all evidence related to the murders and the attempted assassination of Chief Marcos Xukuru
- If appropriate after impartial and fair review of this evidence, the reversal of the current sentences levied against the Chief and other indigenous Xukuru leaders

Respectfully,

The Committee for Human Rights of the American Anthropological Association
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(PCOAS) Permanent Council of the Organization of American States
APPENDIX

Historical Context of Xukuru Human Rights Abuses

For over 20 years, the Xukuru have undergone a slow process of demarcation of their ancestral lands through the National Indian Foundation (FUNAI). Delays in the process have allowed non-Indian ranchers to take advantage of the situation by refusing to leave the reserved lands, and by provoking many conflicts, including threats and assassinations of Xukuru leaders and sympathizers. The serious human rights violations experienced by the Xukuru have included assassinations of past leaders, Xukuru community members, and legal representatives.

Furthermore, the Xukuru have experienced harassment and persecution through the legal system in the form of the legal criminalization of Chief Marcos Xukuru for his human rights activism, turning the victims of abuses perpetrated against them into criminals. Human rights abuses against the Xukuru and indigenous peoples in Brazil are intimately linked to historical colonization.

This history has generated intensely polarized views about land ownership among wealthy farmers who use their powerful social status and financial assets to negatively influence local judges, and law enforcement officials in charge of investigating crimes that occur on Indian lands. Their influence extends into municipal and state courts, and has wrongly criminalized Cacique Marcos Xukuru and other Xukuru leaders.

Historical archives dating to the 16th Century provide proof of the existence of the indigenous Xukuru peoples and their ancestral lands (Hohenthal 1958: 99). At the time of first Portuguese contact, the Xukuru territory encompassed a vast area, stretching east to west until Brejo da Madre de Deus in the state of Pernambuco, and from north to south to the boarders of Paraíba. Today, approximately 10,000 Xukuru people live in the north-eastern coastal state of Pernambuco in an area of 27,000 hectares near the town of Pesqueira (http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/AI_Brazil_42_2.pdf).

History of Land Return

In 1989, the identification and delimitation of Xukuru land was initiated by the National Foundation of the Indian (FUNAI), and demarcation in favor of the Xukuru began in 1992. In 1995, the physical demarcation of their land was completed and determined to be 27,555 (far less than Xukuru historical memory requested) hectares (Brasileiro et al, 1998), formalized by the publication of the decreto de homologação in 2001. By 2005, the Xukuru occupied only a small fraction of their land due to compensation claims of wealthy and politically powerful farmers who contested the demarcation of Xukuru land. At this point in time, Xukuru land was still not formally (legally) registered. While the return of Xukuru ancestral lands became official after 12 years of continuous activism, the violent and bloody process of losing and reclaiming land taken by Portuguese colonists began much earlier.

Until the late 1980s, only a handful of Xukuru had small scraps of land on which they practiced forms of subsistence farming. They paid rent to fazendeiros (wealthy non-indigenous farmers) for land that was once theirs, and were called “caboclos” (peasant farmers or mix-bloods). The Xukuru had lost their native language, but not their passion to retain their Indianness, their ritual dance of the tore, or their reverence for their shamans and their caciques.
Assassinations of Xukuru Leaders and Advocates

Outlined below is a history of the succession of assassinations that have occurred over the last 18 years due to Xukuru activism for the return of their ancestral lands. The following historical summary is based on documentation by Amnesty International, the Inter-American Commission for Human Rights, and a special commission requested by the Defense Council for Human Rights (CDDPH), Brazil, organized in March of 2003.

Since 1992, four additional leaders and advocates have been shot dead, and their deaths are attributed to retaliation by non-Indian ranchers:

- Xukuru tribal member José Everaldo Rodriques Bispo (1992)
- FUNAI attorney Geraldo Rolim (1995)
- Chief Xicão Xukuru (internationally known human Indigenous human rights defender and tribal leader 1998)
- Francisco de Assis Santana, leader of the aldeia Pé de Serra, Chico Quelé (2001)

Historical and Political Context of Xukuru Human Rights Abuses

The struggle for full recognition of their land rights has long been marked by bloodshed. Marcos Ludison de Araujo’s father, Francisco de Asis Araju, a previous leader of the Xukuru, was killed by gunmen on May 20, 1998 (AMR 19/15/98). Marcos Luidson was elected as the next chief of the Xukuru people, with the responsibility of demanding from the Brazilian authorities a conclusion to the demarcation process of Xukuru ancestral lands, and the withdrawal of non-Indian ranchers from tribal lands. Bravely following the path blazed by his father and Chief Xicão, Chief Marcos Xukuru has led his people in the struggle to take back their land. The Xukuru struggle for their constitutional right for the return of their lands has gone against the interests of non-Indian occupiers, a group of ranchers and farmers who are interested in constructing a large religious tourism center after an apparition of the Virgin Mary near the Aldeia of Cimbres, on Xukuru land.

The proposed tourism project was not accepted by Chief Marcos Xukuru because it would mean a renunciation of the ongoing effort to preserve Xukuru culture, land, and traditions. Since Chief Marcos Xukuru remained a strong objector to the interests of non-Indian ranchers, the ranchers proceeded to co-opt a small group (approximately 100) group of Xukuru, influencing them to support the tourism project, while promising them lucrative financial benefits. Chief Marcos and his mother, Zenilda Maria de Araújo (a nominee for the Nobel Peace Prize) began to receive death threats, prompting in 2002, the Inter-American Commission on Human Rights (IACHR) to order the Brazilian government to take precautionary measures to protect both of them.

Failure of State to Protect Indigenous Peoples & Culpability of State
Despite these requests, the Brazilian government has not complied with the cautionary measures ordered by the IACHR. As a consequence, in February of 2003, Chief Marcos Xukuru was ambushed in an assassination attempt led by José Lourival Frazão. In this incident, two Indians, Josenilson José dos Santos (Nilsinho) and Ademilson Barbosa da Silva were killed while protecting Chief Marcos, who escaped with some injuries. When news of the ambush and of the murders spread, there was a large revolt among the tribal members, resulting in the plundering of the cars and houses of the people involved in the ambush. Important facts resulting from the attempted assassination of Chief Marcos:

- The death of two young Xukuru males, the destruction of property, and the assassination attempt itself were caused by the omission of the Brazilian government to provide the necessary security for Chief Marcos and for not proving appropriate security within Xukuru lands.
- The destruction of material goods marks the beginning of the process of criminalizing the Xukuru involved in the demarcation proves.
- Since 2003, over 35 criminal charges have been pressed against Xukuru leaders and against Chief Marcos Xukuru; all are accused based on their status as leaders, under the assumption that as leaders, they must have ordered the revolt.
- The cases involve mere speculation, as the evidence presented does not individualize the criminal responsibility of each accused leader for specific actions; this process alone represents a violation of guarantied rights (garantismo penale).

**Irregularities Within the Justice System – Legal Criminalization of the Xukuru**

Despite the irregularities evident in the proceedings, on May 22, 2009, Chief Marcos was found guilty and sentenced in the most symbolic decision to date in this series of events. He was sentenced to ten years and four months in prison, along with a fine, by the Federal Court in Caruaru, Pernambuco (Case number 2006.83.02.000366-5).

The Cabinet of Legal Assessorship to Popular Organizations (GAJOP); the National Movement of Human Rights Northeast (MNDH/Regional); and the Indigenous Missionary Council (CIMI) wrote to the following human rights representatives:

- The special Rapporteur on the Situation of Human Rights Defenders
- Mr. Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers
- Mr. James Anaya – Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People
- Mr. Githu Muigai – Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia, and related Intolerance on June 18, 2009.

GAJOP, MNDH, and CIMI identified the following oversights in legal proceedings against Chief Marcos Xukuru and other Xukuru leaders (see attached letter *Conselho Indigenista Missionário*).
The seriousness of these oversights stems from three principal aspects of the legal processes during trial:

1. The curtailment of the right to use all legal means to defend himself
2. The noticeable presupposition of culpability
3. The depoliticization of pre-existing conflicts between Indians and non-Indian ranchers over Xukuru ancestral lands

**Clarification of Importance of Judicial Oversights**

The first point indicated above is a clear restriction on the right to use all legal means available by law to defend himself, the court declined to hear important witnesses for the defense, including Federal Deputy Fernando Ferro (Workers Party/Pernambuco), and Assistant Head Federal Prosecutor (Subprocuradora Geral a Republica), Raquel Dodge. Considering that the testimony offered by each witness has the potential to influence the judge on the question being decided, each excluded witness leaves the analysis over the totality of the circumstances in a precarious state, permitting a faulty construction of the facts, as well as a violation of guaranteed legal rights.

The second point enumerated above to consider is the presupposition of the culpability of Chief Marcos Xukuru based on the leadership he has exhibited in advocating for his people. The Chief was a victim in the above mentioned ambush: he was taken to the hospital and remained at his mother’s house on the day of the uprising. However, despite being unaware of the revolt and absent at the place and time during which it transpired, the Chief was considered the principal in the acts of destruction. There was therefore, an argument in support of attributing responsibility to Chief Marcos that conflated his tribal leadership role with a supposed command over the incidents following his attempted assassination.

The third point listed above that is important to emphasize is that the proceedings reveal a complete depoliticization of the underlying land rights conflicts between the Xukuru and non-Indian ranchers. Having considered the ambush of the Chief a mere isolated, contingent occurrence, with its true motives obscured, the court interpreted the Xukuru tribe’s reaction as a disturbance lacking motive, and as an act of unjustified hate that arose spontaneously. The failure to consider any political context is one more example of a complete abdication of responsibility to by the relevant authorities in conflicts in the region.

CIMI lawyers assisted Dr. Gilberto Marques, Lawyer for the defense of Chief Marcos Xukuru and other Xukuru leaders, included those assassinated in the past discussed above. They have identified the failures of FUNAI, The Federal Police, and the Public Ministry that historically contributed to the violence perpetrated against Xukuru leaders. These failures are listed respectively below:

**FUNAI**

- Delays in identification, compensation, and eviction of squatters (Farmers)
- Failure to participate in planning of land *reomadas* (reoccupations by Xukuru of ancestral lands as described above)
• Failure to provide its own information on the events in the Xukuru Reservation that resulted in the deaths of two Indians, an attempt to kill the chief, and the destruction of homes and property to the Xukuru, police, and the court
• Failure or unacceptable delay in dealing with the issue of banishment of farmers still occupying demarcated lands: sufficient consideration was given to the credibility

**Federal Police**

• In the murder report on the case of Chicão, the inefficiency and indifference of the Federal Police investigation is indicative of police bias.
• In the murder of Quelé, inadequate verification of facts under investigation (proving the motive for the crime) demonstrates prejudice against and indifference for the Xukuru.
• The involvement of the Federal Public Ministry (in a hidden agenda) to seize a witness for the defendant carried out an illegal arrest with impunity.
• In the attempted assassination of Chief Marcos, the Federal Police prioritized the assessment of material damages, ignoring the attempted assassination against Chief Marcos, having him arrested.
• The Federal Police perform incomplete investigations, failing to gather important evidence such as gun powder residue on potential suspects. Focusing on Chief Marcos as a perpetrator of a crime, instead of gathering clear evidence, Chief Marcos was not deemed a victim, but considered an agent provocateur in the case that investigated precisely the attempt on his own life; the chief is indicted in the inquest as a criminal in the acts of destruction that occurred due to the attempt on his life.
• Insufficient consideration was given to the credibility of witnesses and no consideration was given to the political and historical processes associated with the return of Indigenous ancestral lands.

**Public Ministry**

• The Brazilian Secretariat of the National Council for the Defense of the Rights of the Human Person (CDDPH) review of Chief Marcos’s trial stated in their report that the criminal case to determine responsibilities for incidents in the aldeia of Cimbres that resulted in the destruction of homes, cars, and other personal property is contaminated at its source by a botched and prejudiced investigation. The committee deemed the trial to be an act of institutional violence that at all times seeks to present Chief Marcos and traditional leaders as dangerous people who do not respect the state because of their human rights activism.
• The defense for the accused was pressured by the judge during the trial to “give up” on hearing witnesses for the defense. The judge assigned July 1, 2008 (a single day) for hearing all of the 152 enrolled witnesses. Tiven the technical impossibility of hearing 152 witnesses for the defense in one day, the defense argued for the testimony of only a part of the witnesses. All witnesses were heard on the side of the prosecution.
• The actions by the judge to refuse to hear witnesses for the defense demonstrates that he had already formed his final opinion, no matter what the witnesses for the defense had to say.
The judge who had held all the hearings in the case and had direct contact with the evidence in the case was transferred to another Federal Court in the state of Paraiba. This judge did not hand down the sentence. The sentence was given by a newly arrived judge at the court, violating the legal principle of physical identity of the judge.

The assassination attempt against Chief Marcos and the murder of the two young Indian men who accompanied him caused enormous grief within the Xukuru community, which has lost many leaders to acts of violence, while the perpetrators of violence remain free and unpunished. The history of impunity and institutional violence against the xukuru was a significant factor in the insurgency that occurred in the Aldeia of Cimbres after the attempted assassination of Chief Marcos.

Invited witnesses to give depositions at the Prosecutors’ office, with the intent of arresting them for their capture.

Upheld dates for hearings of depositions, even after the requisite injunctive rulings.

The Public Minister did not attend the hearing of witnesses, intending to give the impression of not being part of the legal proceedings in order to avoid potential repercussions for illegal arrests of witnesses arriving to give depositions.

Failed to exercise proper legal and judicial control of evidence produced by the Federal Police during trial.

Civil prosecutors did not share with the criminal prosecutors all the information available to them, demonstrating the fragility and inconsistency of the alleged motive for the death of some Xukuru victims of Assassination.

Violations of International Human Rights Norms

The outcome of this trial indicates a broad context of violations of international norms, which can best be understood in light of the provisions of the following international human rights provisions of which Brazil is a state-party:

- The Declaration on the Rights of Indigenous Peoples
- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- The Convention for the Elimination of All Forms of Racial Discrimination
- The Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

According to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) “…Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination in the exercise of their rights, in particular that based on their indigenous origin or identity” (Article 2) (http://www.un.org/esa/socdev/unpfii/en/drip.html). It is in this sense that Article 40 of the same Declaration guarantees:
“Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States and other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration of the customs, traditions, rules, and legal systems of the Indigenous peoples concerned and international human rights” (Article 40)

It becomes evident that this case must not be isolated from the context of insecurity and unjustified delays in the process of demarcation of the Indigenous lands and effective transfer of traditional territory to Indigenous communities. Accordingly, Article 27 affirms

“States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples’ laws, traditions, customs, and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories, and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process” (Article 27)

1 All the above assassinations have been documented by AI in the 2005 report on Brazil’s indigenous peoples: “Foreigners in our own country”: Indigenous Peoples in Brazil (http://www2.ohchr.org/english/bodies/cescr/docs/info-ngo/AI_Brazil_42_2.pdf).