

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF INDIGENOUS COMMUNITIES MEMBERS OF THE LHAKA HONHAT (OUR LAND) ASSOCIATION VS. ARGENTINA

JUDGMENT OF 6 FEBRUARY 2020

(Merits, Reparations and Costs)

NON-OFFICIAL SUMMARY¹

On February 6, 2020, the Inter-American Court of Human Rights (hereinafter “Court”) issued a judgment by which it declared the international responsibility of the Argentine Republic for the violation of several rights of 132 indigenous communities living in the lots identified with cadastral plates 175 and 5557 of the Rivadavia Department, in the Province of Salta, formerly known as “fiscal lots 14 and 55”.

The Court found that the State infringed the right to communal property. In addition, it determined the State violated the rights to cultural identity, to a healthy environment, to adequate food and to water, due to the lack of effectiveness of State measures aiming at putting an end to activities that were harmful to these rights.

In view of the above, the Court concluded that Argentina breached, in relation to its obligation to respect and guarantee the rights, established in Article 1(1) of the American Conven-

¹ Translated from Spanish by Lucas Sanchez and Julia Liebermann.

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tion on Human Rights (hereinafter “Convention” or “American Convention”), the following provisions of that treaty: (i) article 21, which establishes the right to property, in relation to the rights to judicial guarantees and judicial protection contained in articles 8(1) and 25(1) and the obligation to adopt provisions of domestic law mandated in article 2; (ii) the aforementioned article 21 and the political rights established in Article 23(1); (iii) article 26, which covers economic, social, cultural and environmental rights, and (iv) article 8(1), for the delay in the resolution of a judicial case.

On the other hand, the Court considered that the State is not responsible for the violation of the right to recognition as a person before the law, nor of the freedoms of thought and expression, association, movement and residence, as established in Articles 3, 13, 16 and 22(1) of the Convention.

The Court ordered the State to adopt several measures of reparation.

I. PRELIMINARY CONSIDERATIONS

Before examining the merits of the case, the Court noted that the case involved indigenous communities whose number had been changing over time. This was due to the process known as “fission-fusion”, which is typical of their ancestral social structure. Therefore, even if the Report on the Merits issued on 26 January 2012 by the Inter-American Commission on Human Rights indicated a lower number, the Court considered that it should examine the case with respect to the 132 indigenous communities inhabiting lots 14 and 55.

The Court observed that creole settlers are also living in the indicated lots. It made clear that non-indigenous individuals or families are not a party to the international procedure and that it cannot rule directly on their rights. However, it noted that in a material sense they are involved in the substantive conflict over the lands. For this reason, it found it appropriate to consider their situation, within the framework of the procedural guidelines that govern the Court’s actions.

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On the other hand, rejecting an argument of the State, the Court determined that it was pertinent to examine certain supervening facts that occurred after 26 January 2012 but were related to the factual framework presented in the Report on the Merits.

II. FACTS

The facts of the case refer to a claim by indigenous communities belonging to the Wichí (Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) peoples, for the property of fiscal lots 14 and 55, which are adjacent to one another and together cover an area of approximately 643,000 hectares (ha). In this area, which is located within the Province of Salta and borders with Paraguay and Bolivia, there has been a constant presence of indigenous communities, at least since before 1629. In addition, the land was occupied by creole people since the beginning of the 20th century.

The indigenous claim was formalized in 1991. During the more than 28 years that have elapsed since then, the State policy with respect to indigenous property has been changing, and the State has carried out various actions in relation to the property claimed.

On 15 December 1991, Decree No. 2609/91 was issued, establishing Salta's obligation to unify lots 14 and 55 and allocate to the indigenous communities an area without subdivisions, by means of a single property title.

One year later, in December 1992, the "Lhaka Honhat Aboriginal Communities Association" (hereinafter "Lhaka Honhat"), composed of persons from different indigenous communities, was formally established for the purpose, among others, of obtaining the property title to the land.

In 1993, the State established an "Advisory Commission", that in 1995 recommended to assign two-thirds of the area of lots 14 and 55 to indigenous communities, which was accepted by these communities.

In 1995, the construction of an international bridge began. In September of that year the bridge was peacefully occupied by

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indigenous communities. The then Governor of Salta promised to adopt a decree ensuring the final allocation of the land. The bridge was completed in 1996, without a prior consultation process with the indigenous communities.

In spite of the Governor's commitment, in 1999, by means of Decree 461, the State allocated fractions of lot 55, granting plots to some communities and individuals settled there. Then, in December 2000, the Province presented a proposal for the allocation of lot 55, providing for the delivery of fractions to each community. This was rejected by Lhaka Honhat because the offer did not contemplate lot 14 or the unity of the territory, among other reasons. During the following years, state agents carried out some tasks on the land, such as measurements and marking of boundaries, but there was no progress on the definitions about land ownership. In 2007, the Court of Justice of Salta, based on an application for amparo filed by Lhaka Honhat in March 2000, decided to suspend Decree 461.

On 23 October 2005, Salta held a referendum, in which the voters from Rivadavia Department were asked whether they wanted "the lands corresponding to lots 55 and 14 to be handed over to their current occupants". The "Yes" obtained 98% of the votes.

At a meeting on 14 March 2006 between Lhaka Honhat and representatives from Salta, it was agreed that 400,000 ha within lots 14 and 55 should be allocated to the indigenous peoples, in a single title. In this regard, the indigenous communities reduced their claim, which was previously 530,000 ha. The same agreement was reached in October 2007 between Lhaka Honhat and the Organization of Creole Families. In the latter month Salta adopted Decree 2786/07, endorsing the above. In October 2008, Salta created a "technical team" composed of the Provincial Executing Unit (UEP), which had been created in 2005 to carry out tasks related to land distribution in the aforementioned lots. In the following years, actions and meetings took place that aimed at reaching agreements between indigenous communities and creole families on the allocation of land.

On 25 July 2012, Salta issued Decree No. 2398/12, which provided for the "assignment, with a view to their subsequent al-

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location”, of 243,000 ha of lots 14 and 55 for creole families and 400,000 ha for indigenous communities, “in communal property and under the title form determined by each of them”.

On 29 May 2014, Salta issued Decree 1498/14, by means of which it recognized and transferred to 71 indigenous communities the “communal property” of approximately 400,000 ha of lots 14 and 55, and to several creole families the “condominium property” of the same lots. This decree provides that the acts and procedures necessary for the “specific determination” of the territory and lots corresponding to indigenous communities and creole families should be carried out through the UEP.

In spite of the above, the implementation of actions related to the indigenous territory has not concluded and only a few creole families were relocated.

On the other hand, illegal logging activities have been carried out in the claimed territory, and creole families are engaged in live-stock farming and installing barbed wire fences. This generated a decrease in forest resources and biodiversity, which in turn affected the way in which indigenous communities traditionally sought access to water and food.

III. MERITS

The merits of the case were analyzed by the Court in three sections of the judgment, finding violations of: 1) the right to communal property, as well as other rights in relation to it; 2) the rights to a healthy environment, to adequate food, to water and to participate in cultural life, especially in relation to cultural identity, and 3) the right to judicial guarantees in relation to a judicial action initiated in the case.

a. Right to indigenous communal property

The Court noted that in this case the right to property of the indigenous communities over their ancestral territories was not in question, but rather if the State’s conduct had offered adequate

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legal certainty and if it had allowed a free and exercise and enjoyment of this right.

In this regard, the Court recalled that the right to property, as laid down in Article 21 of the Convention, includes, in relation to indigenous peoples, the communal property of their lands. It stressed that traditional possession of the land by the indigenous communities should be sufficient for the official recognition of property. It made clear that the State has to provide legal certainty to the right, offering a legal title that makes it enforceable against the authorities themselves or third parties and ensuring the peaceful enjoyment of property, without interference from third parties. Furthermore, it stated that the right to communal property implies that communities have effective participation, based on adequate consultation processes that follow previously determined procedures, when the State or third parties conduct activities that could affect the integrity of their lands and natural resources.

The Court found that Decrees 2786/07 and 1498/14 constituted acts of recognition of communal property of the claimed lands. Furthermore, it assessed the process of agreements related to property that was followed in the case since 2007 between indigenous communities, creole organizations and the State. These agreements have the potential to allow the State to comply with its obligations and satisfy the concerned rights. In this regard, the Court highlighted that the State must comply with its obligations towards the indigenous communities, but while doing so it must also observe the rights of the creole population.

Notwithstanding the above, the Court noted that the process to determine the communal property has not concluded. After more than 28 years claiming the recognition of property, it has not been fully guaranteed. The territory has not been properly titled, in a way which offers legal certainty, it has not been demarcated, and the presence of third parties continues.

The Court also established that Argentina does not have adequate regulations in place to sufficiently guarantee the right to communal property. This left the indigenous communities with no effective protection of their right to property. Thus, the Court

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concluded that the State violated the right to communal property, in relation to the right to have adequate procedures and to the obligation to guarantee rights and adopt provisions of internal law, failing to comply with Article 21 of the Convention, in relation to Articles 8, 25, 1.1 and 2.

On the other hand, the Court noted the relevance of the international bridge built, which involves border traffic and national border policy. The bridge, however, was built without adequate prior consultation procedures. Therefore, Argentina violated the rights to property and participation of the communities, in breach of Articles 21 and 23 of the Convention in relation to Article 1.1 of the treaty.

b. Rights to a healthy environment, to adequate food, to water and to participate in cultural life

For the first time in a contentious case, the Court analyzed the rights to a healthy environment, to adequate food, to water and to cultural identity autonomously on the basis of with Article 26 of the Convention. The Court considered it appropriate to examine these four rights in their interdependence and in accordance with their particularities regarding indigenous peoples. It found that the illegal logging and the activities carried out on the territory by the creole population, on occasion livestock farming and the installation of fences, affected environmental goods, impacting on the traditional feeding habits of the indigenous communities and on their access to water. This altered the indigenous way of life, damaging their cultural identity, because although it has an evolutionary and dynamic character, the alterations to the indigenous way of life in this case were not based on a consensual interference. The State had knowledge of the harmful activities and adopted various actions, which have not been effective in stopping them. This lack of effectiveness is part of a situation in which Argentina has not guaranteed the indigenous communities the possibility to determine the activities on their territory. Therefore, the State violated Article 26 of the American Convention in relation to its Article 1.1.

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c. Judicial Guarantees

Finally, the Court observed that after the Lhaka Honhat filed an amparo proceeding against Decree 461/99 (as well as against a Resolution), on 15 July 2004 the Supreme Court of the Nation ordered the Judiciary of Salta to issue a decision and that, despite this, it took three years, until 8 May 2007, for the Court of Justice of Salta to suspend the Decree and the Resolution. No justification was given for this delay. Therefore, the State violated the judicial guarantee of a proceeding in reasonable time. Thus, it failed to comply Article 8.1 of the Convention in relation with Article 1.1.

IV. REPARATIONS

The Court ordered the State, as measures of reparation to be fulfilled promptly and within a maximum period of six years:

- a) Complete the necessary actions in order to define, to demarcate, and to issue a title that recognizes the property of the 132 indigenous communities over their territory. The land title should be a single one, meaning, one for all the communities as a whole and relating to the entire territory, without limiting the communities' agreements concerning the use of the common land.
- b) Remove from the indigenous territory the barbed wire fences and livestock of the creole settlers and ensure the relocation of the creole population out of that territory, promoting that this is done on a voluntary basis, avoiding forced evictions during the first three years and, under any circumstances, effectively safeguarding the rights of the creole population, which implies the possibility of resettlement or the access to fertile land with adequate property infrastructure.

Furthermore, the Court established that the judgment constitutes per se a form of reparation and ordered Argentina to; i) abstain from realizing acts, works or ventures on indigenous territory or which could affect its existence, value, use or enjoyment,

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without providing prior information to the affected indigenous communities as well as carrying out adequate, free and informed prior consultation, in accordance with the guidelines outlined in the judgement; ii) submit to the Court a study that identifies critical situations concerning the lack of access to drinking water or food, formulate a plan of action to cope with these situations and start implementing it; iii) elaborate, within a maximum period of one year, a study establishing actions to be implemented for the conservation of water and to prevent or remedy its contamination; guarantee permanent access to drinking water; prevent the continued loss or reduction of forest resources and seek its recovery, and enable the access to nutritionally and culturally appropriate food; iv) create a community development fund and implement its execution within a period not exceeding four years; v) Within a maximum period of six months, publish this judgement and its official summary, as well as to disseminate the latter document, including through radio broadcast, in indigenous languages and in Spanish; vi) adopt, within a reasonable period of time, the legislative and/or other measures that are necessary for provide legal certainty to the right to indigenous communal property, foreseeing special procedures for that purpose; vii) pay, within a period of six months, an amount of money, established in the judgement, for the reimbursement of expenses and costs; viii) submit to the Court semi-annual reports about the measures taken to restore the right to property, and to, y ix) inform the Court, within a period of one year, about the measures adopted to comply with all the measures dictated in the judgement.

The Inter-American Court of Human Rights will supervise full compliance with the judgment, in accordance with its mandate and complying with its duties under the American Convention on Human Rights, and will close the case when the State has fully implemented the measures ordered in the judgement.

The full text of the judgement is available at the following link (only in Spanish): http://www.corteidh.or.cr/docs/casos/articulos/seriec_400_esp.pdf