

INTER-AMERICAN COURT OF HUMAN RIGHTS¹

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

JUDGMENT OF FEBRUARY 6, 2020 (*Merits, reparations and costs*)

OFFICIAL SUMMARY ISSUED BY THE INTER-AMERICAN COURT

On February 6, 2020, the Inter-American Court of Human Rights (hereinafter “the Court”) delivered a judgment in which it declared the international responsibility of the Argentine Republic for the violation of diverse rights of 132 indigenous communities that inhabit the lots identified with cadastral registration numbers 175 and 5557 of the department of Rivadavia, in the province of Salta, previously known as “Fiscal Lots 14 and 55.”

The Court determined that the State had violated the right to communal property. It also determined that the State had violated the rights to cultural identity, to a healthy environment, to adequate food and to water owing to the ineffectiveness of State measures to halt activities that harmed those rights.

The Court therefore concluded that, based on its obligation to ensure rights established in Article 1(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), Argentina had violated the following provisions of this instrument: (i) Article 21, which recognizes the right to property, in relation to the rights to judicial guarantees and judicial protection established in Articles 8(1) and 25(1), and the obligation to adopt domestic legal provisions required in Article 2; (ii) the said Article 21 and the political rights established in Article 23(1); (iii) Article 26, which refers to economic, social, cultural and environmental rights, and (iv) Articles 8(1), owing to the delay in deciding a legal case.

The Court considered that the State was not responsible for the violation of the right to recognition of juridical personality or the rights to freedom of thought and expression, freedom of association, and freedom of movement and residence, established in Articles 3, 13, 16 and 22(1) of the Convention.

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

I. Preliminary considerations

Before examining the merits of the case, the Court noted that it involved indigenous communities, the number of which had changed over time based on the process known as “fission-fusion,” typical of their ancestral social structure. Consequently, even though the Merits Report, issued by the Inter-American Commission on Human Rights on January 26,

¹ Composed of the following judges: Elizabeth Odio Benito, President; L. Patricio Pazmiño Freire, Vice President; Eduardo Vio Grossi; Humberto Antonio Sierra Porto; Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique. Judge Eugenio Raúl Zaffaroni, an Argentine national, did not take part in the processing of this case, or in the deliberation and signature of the judgment, pursuant to the provisions of Article 19(1) and (2) of the Court’s Rules of Procedure.

2017, indicated a lower number, the Court considered that it should examine the case in relation to the 132 indigenous communities that inhabit Lots 14 and 55.

The Court observed that these lots were also inhabited by *criollo* settlers. It established that these non-indigenous individuals or families were not party to the international proceedings and that it could not rule directly on their rights. However, it noted that they were involved in the land dispute that was the substance of the case. Therefore, it found it pertinent to consider their situation in the context of the procedural standards that govern the work of the Court.

Moreover, rejecting an argument by the State, the Court determined that it was admissible to examine certain supervening facts that had occurred after January 26, 2012, but that bore a relationship to the factual framework set out in the Merits Report.

II. Facts

The facts of the case refer to a claim of indigenous communities that belong to the Wichí (Mataco), Iyjawaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) peoples concerning the ownership of adjoining Fiscal Lots 14 and 55 that, together, cover an area of approximately 643,000 hectares (ha). There has been a constant presence of indigenous communities in this area, which is in the province of Salta and borders on Paraguay and Bolivia, since before 1629. In addition, the land has been occupied by *criollo* settlers since the beginning of the twentieth century.

The indigenous claim was originally filed in 1991. During the more than 28 years that have elapsed since then, the State's policy with regard to indigenous property ownership has been changing and the State has taken different measures in relation to the property claimed.

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

One year later, in December 1992, the "Lhaka Honhat Association of Aboriginal Communities" (hereinafter "Lhaka Honhat"), composed of members of different indigenous communities, was officially established to obtain title to ownership of the land, among other objectives.

In 1993, the State created an "Advisory Committee" that, in 1995, recommended allocating two-thirds of the area of Lots 14 and 55 to indigenous communities, and this was accepted by the communities.

In 1995, construction of an international bridge was commenced. In September that year the bridge was occupied peacefully by indigenous communities. The Governor of Salta at the time undertook to issue a decree that ensured the definitive adjudication of the land. The bridge was completed in 1996, in the absence of any prior consultation process with the indigenous communities.

Despite the undertaking made by the Governor, in Decree 461 of 1999, the State adjudicated part of Lot 55, granting plots to some communities and individuals settled on that piece of land. Then, in December 2000, the province presented a proposal for the adjudication of Lot 55, establishing the allocation of sections to each community. This was rejected by Lhaka Honhat, among other reasons, because the proposal did not include Lot 14 or the merger of the territory. Over the following years, State agents did some work on the land, such as surveys and demarcation, but no progress was made in defining the ownership of the land.

In 2007, the Salta Court of Justice decided to annul Decree 461 based on an application for amparo filed by Lhaka Honhat in March 2000.

On October 23, 2005, Salta held a referendum in which voters in the department of Rivadavia were asked whether they wanted "the lands corresponding to Lots 55 and 14 to be handed over to the actual occupants." 98% of the votes were in favor of this option.

During a meeting on March 14, 2006, between Lhaka Honhat and representatives of Salta, it was agreed that the indigenous peoples should be allocated 400,000 ha within Lots 14 and 55, under a single title. In this regard, the indigenous communities reduced their claim, which had previously been for 530,000 ha. The same agreement was reached between Lhaka Honhat and the Organization of Criollo Families in October 2007. That month also, Salta adopted Decree 2786/07, endorsing the said agreement. In October 2008, Salta established a "technical team" within the Provincial Executing Unit (UEP), which had been created in 2005 to execute tasks related to the distribution of the land on the two lots. Over the following years, meetings were held and actions taken to achieve agreements between indigenous communities and *criollo* families regarding the adjudication of land.

On July 25, 2012, Salta issued Decree 2398/12, which ordered the "allocation, for its subsequent adjudication," of 243,000 ha of Lots 14 and 55 to the *criollo* families and 400,000 ha to the indigenous communities, "under communal ownership and with the type of title that each determines."

On May 29, 2014, Salta issued Decree 1498/14, recognizing and transferring to 71 indigenous communities "communal ownership" of approximately 400,000 ha of Lots 14 and 55, and "co-ownership" of the same lots in favor of numerous *criollo* families. The same decree established that the necessary actions and procedures would be conducted through the UEP for the "specific determination" of the territory and lots that corresponded to indigenous communities and *criollo* families.

Despite this, implementation of actions relating to the indigenous territory have not concluded and very few *criollo* families have been moved.

Furthermore, illegal logging has been carried out on the territory claimed, and *criollo* families raise cattle and have installed fencing. This has resulted in a decrease in forestry resources and biodiversity, which has affected the way in which the indigenous communities traditionally obtained food and water.

III. Merits

The Court analyzed the merits of the case in three sections of the judgment and determined violations of: (1) the right to communal property, as well as other rights related to this; (2) the rights to a healthy environment, to adequate food, to water, and to take part in cultural life, in particular in relation to cultural identity, and (3) the right to judicial guarantees, in relation to a judicial action filed in this case.

a. Right to indigenous communal property

The Court noted that, in this case, the indigenous communities' right to property over their ancestral territory was not in dispute; rather, the matter related to whether the State's conduct had provided this right with sufficient legal certainty and whether the State had permitted the free enjoyment and exercise of this right.

In this regard, the Court recalled that the right to property established in Article 21 of the Convention includes, in relation to indigenous peoples, the communal ownership of their lands. It indicated that the traditional possession of the land by the indigenous communities should be sufficient for the official recognition of ownership. It established that the State must provide legal certainty to this right, by granting a legal title that made it enforceable before State authorities or third parties, and ensuring the peaceful enjoyment of property without external interference from third parties. It also indicated that the right to communal property meant that the communities should be able to participate effectively, based on appropriate consultation procedures in keeping with specific standards, in any activities carried out by the State or third parties that could affect the integrity of their lands and natural resources.

The Court understood that Decrees 2786/07 and 1498/14 constituted acts that recognized the communal ownership of the land claimed. In addition, it assessed positively the agreements reached between the indigenous communities, the *criollo* organizations and the State in relation to the property in this case from 2007 on. This was because such agreements had the potential to allow the State to comply with its obligations and ensure the rights involved. In this regard, the Court emphasized that the State must comply with its obligations in relation to the indigenous communities but, when doing so, it should also respect the rights of the *criollo* population.

Despite this, the Court observed that the process of officializing communal ownership has not been completed; more than 28 years after the claim for recognition of property ownership was filed, this has not been fully guaranteed. The territory has not been titled adequately in order to provide legal certainty; it has not been demarcated, and third parties are still present.

The Court also verified that Argentina lacked appropriate laws to adequately ensure the right to communal property. This meant that the right to property of the indigenous communities was not protected effectively. The Court therefore concluded that the State had violated the right to communal property in relation to the right of access to adequate remedies, and to the obligations to ensure rights and to adopt domestic legal provisions, thus failing to comply with Article 21 of the Convention in relation to its Articles 8, 25, 1(1) and 2.

In addition, the Court took note of the importance of the international bridge that had been built, which involved cross-border transit and State policy with regard to the country's borders. Nevertheless, the bridge was constructed without adequate prior consultation procedures. Therefore, Argentina had violated the rights to property and to the participation of the communities, thereby failing to comply with Articles 21 and 23 of the Convention in relation to Article 1(1) of this instrument.

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

For the first time in a contentious case, the Court examined the rights to a healthy environment, adequate food, water, and cultural identity autonomously, based on Article 26 of the American Convention.

The Court considered it admissible to examine these four rights interdependently and based on their specificity in relation to indigenous peoples. It understood that illegal logging and the activities carried out on the territory by the *criollo* population – specifically raising livestock and installing fencing – affected environmental rights, and had had an impact on the traditional ways of obtaining food of the indigenous communities and on their access to water. This had altered the indigenous way of life, harming their cultural identity because, even though this has an evolutive and dynamic nature, the changes in the indigenous way of life

in this case were not the result of consensual interference. The State was aware of the harmful activities and took different actions that failed to halt them. This lack of effectiveness also occurred in a context in which Argentina has not guaranteed the indigenous communities the possibility of determining the activities that take place on their territory. Therefore, the State violated Article 26 of the American Convention in relation to its Article 1(1).

c. Judicial guarantees

Lastly, the Court noted that, following the application for amparo filed by Lhaka Honhat against Decree 461/99 (and against a court ruling), on June 15, 2004, the Supreme Court of Justice of the Nation established that the Salta Judiciary should issue a decision and, despite this, it was only three years later, on May 8, 2007, that the Salta Court of Justice annulled the decree and the ruling. There was no apparent justification for this delay. Therefore, the State violated the judicial guarantee of a reasonable time; thus failing to comply with Article 8(1) of the Convention, in relation to its Article 1(1).

IV. Reparations

The Court ordered that, as measures of reparation, the State should, as promptly as possible and within six years at the most:

- a) Conclude the actions required to delimit, demarcate and grant a title that recognized the ownership of their territory to the 132 indigenous communities. There should be a single title; in other words, a single title for all the communities and over all the territory, without prejudice to any agreements reached between the communities on the use of the communal territory.
- b) Remove the livestock and the fences of the *criollo* settlers from indigenous territory and transfer the *criollo* population from that territory, endeavoring to ensure that this transfer was voluntary, avoiding compulsory evictions during the first three years and, in any case, making an effort to ensure the effective safeguard of the rights of the *criollo* population, which meant facilitating resettlement and access to productive lands with adequate property infrastructure.

In addition, the Court established that its judgment constituted, *per se*, a form of reparation and also ordered Argentina: (i) to refrain from implementing actions, public works or undertakings on the indigenous territory or that might affect its existence, value, use and enjoyment, without previously informing the indigenous communities identified as victims, and conducting adequate, free and informed prior consultations, pursuant to the standards established in the judgment; (ii) to submit a report to the Court identifying critical situations of lack of access to drinking water or food and to draw up and implement an action plan to respond to this situation; (iii) to prepare a report, within one year, establishing the actions that must be implemented to conserve water and to avoid and rectify its contamination; to guarantee permanent access to drinking water; to avoid the persistence of the loss or decrease in forestry resources and endeavor to recover them, and to facilitate access to nutritional and culturally acceptable food; (iv) to create a community development fund and ensure its execution within no more than four years; (v) within six months, to make the publications of the judgment and its official summary, and take the actions required to disseminate the latter, including by radio broadcasts in indigenous languages and in Spanish; (vi) to adopt, within a reasonable time, the necessary legislative and/or any other measures to provide legal certainty to the right to indigenous communal property, establishing specific procedures to this end; (vii) to pay, within six months, the amount established in the judgment to reimburse costs and expenses; (viii) to provide the Court with bi-annual reports

on the measures to reconstitute the right to property, and (ix) to advise the Court, within one year, of the actions taken to comply with all the measures ordered in the judgment.

The Inter-American Court of Human Rights will monitor full compliance with the judgment, in exercise of its attributes and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with the provisions of the judgment.

The full text of the judgment can be consulted at the following link:
http://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf