

REPORT Nº 2/02
ADMISSIBILITY
PETITION 12.313
YAKYE AXA INDIGENOUS COMMUNITY OF THE ENXET-LENGUA PEOPLE
PARAGUAY
February 27, 2002

I. SUMMARY

1. On January 10, 2000, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition submitted by Tomás Galeano and Esteban López, leaders of the Yakye Axa indigenous community of the Enxet-Lengua people, represented by the Tierraviva Organization for the Indigenous Peoples of the Chaco (hereinafter "Tierraviva") and the Center for Justice and International Law (hereinafter "CEJIL"), (collectively hereinafter "the petitioners"), on behalf of the Yakye Axa indigenous community of the Enxet-Lengua people and its members (hereinafter "the Yakye Axa indigenous community" or "the indigenous community"), filed against the Republic of Paraguay (hereinafter "the Paraguayan State," "Paraguay," or "the State"). The petition claims that the Paraguayan State violated Articles 4 (right to life) and 25 (judicial protection), in conjunction with Article 1(1) (obligation to respect rights), of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and, in addition, that the State ignored Article 27 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR") and Articles 1(2), 2(1), 4(1), and 5(a) of the International Labor Organization's Convention 169 concerning tribal and indigenous peoples (hereinafter "Convention 169"), to the detriment of the indigenous community, by failing to provide it with comprehensive assistance during the processing of its claim over traditional territories, failing to conclude the administrative processing of its bid to recover those lands, and by preventing it from conducting its traditional subsistence economic activities — hunting, fishing, and gathering.

2. With respect to admissibility, the petitioners claim that their petition is admissible, applying the exceptions to the requirement of exhausting domestic remedies and to the timely lodging of petitions set forth in Article 46(2)(a) and (b) of the Convention. For its part, the State has submitted no arguments with respect to the admissibility of the complaint.

3. The Commission, after analyzing the positions of the parties and the requirements set forth in Articles 46 and 47 of the Convention. For its part, the State has since the beginning of the proceeding offered a friendly solution and participated fully in the proceeding.

II. PROCESSING BY THE COMMISSION

4. On January 10, 2000, the Commission received the petition lodged against the Paraguayan State. On July 27, 2000, the Commission forwarded the relevant parts to the State and asked it to submit all appropriate information within a period of 90 days.

5. On October 16, 2000 the State expressed its interest in initiating friendly settlement proceedings. The Commission asked the petitioners for their comments.

6. On March 1, 2001, during the 110th session of the Commission, a hearing was held, with representatives of both sides in attendance. The petitioners submitted their guidelines for the negotiation process. On April 10, the State presented additional information.

7. On September 10, 2001, the petitioners sent notes to the Commission, informing it of their decision to withdraw from the friendly settlement proceedings and seeking the adoption of precautionary measures on the indigenous community's behalf. On September 11, 2001, the Commission asked the State for information on the request for precautionary measures and, on September 14, on the withdrawal from the friendly settlement process. That same

September 14, the State sent the IACHR information on the request for precautionary measures, which was forwarded to the petitioners. The petitioners submitted their comments on September 20 and 25, 2001.

8. On September 26, 2001, the Commission asked the State to adopt precautionary measures on behalf of the Yakye Axa indigenous community. On October 1, 2001, the petitioners sent the Commission additional information. On October 12, 2001, the State reported on the adoption of precautionary measures and the Commission forwarded the relevant parts to the petitioners. On November 2 and 7, 2001, the parties submitted additional information.

9. On November 12, 2001, during the Commission's 113th session, the parties signed an Agreement of Willingness.

10. On December 19, 2001, the State and the petitioners both submitted additional information, which was forwarded to the other party for comments. On January 2, 2002, the State presented additional information, which was duly passed on to the petitioners for their comments. On January 19, 2002, the petitioners gave notice of their decision to withdraw from the friendly settlement process; the corresponding note was forwarded to the State on January 22, 2002.

A. Precautionary Measures

11. On September 11, 2001, the petitioners asked the Commission to adopt precautionary measures on behalf of the Yakye Axa indigenous community in consideration of "major incidents occurring in the past hours that seriously threaten the security of the community's families and its integrity." They reported that a criminal judge in Concepción, in proceedings "Investigation of invasion of property, serious coercion, and robbery at Estancia Loma Verde," ordered the indigenous community's houses to be removed. The place where the community members' homes currently stand is a strip of common land under the jurisdiction of the Traffic Office; the State, in the friendly settlement proceedings, had agreed to guarantee their continued, peaceful occupation of this land.¹ However, on August 29, the National Indigenous Institute (hereinafter "the INDI") was informed by the court of the decision instructing it, together with the Ministry of Public Works and the Ministry of the Interior, to remove the community's houses. The petitioners claim that in these proceedings filed against the community, they had not been allowed to appoint an attorney. Therefore, they note, the community was totally defenseless and could be evicted within a matter of hours. The request for precautionary measures was forwarded to the State on September 11, 2001, with a period of four days in which to report back to the Commission.

12. On September 26, 2001, the Commission, after due consideration of the information submitted by the State and the petitioners, asked that precautionary measures be adopted with respect to the Yakye Axa indigenous community:

1. To suspend the enforcement of any court or administrative order involving the eviction and/or removal of the homes of the Yakye Axa indigenous community and of its members until such time as the organs of the inter-American human rights system have examined the petition in hand and adopted a final decision on the merits of the case.
2. To refrain from all other actions and undertakings affecting the right to property, free transit, and residence of the Yakye Axa indigenous community and its members.
3. To take all steps necessary to ensure the life and physical, mental, and moral integrity of the members of the Yakye Axa indigenous community, bearing in mind the grounds and provisions of Presidential Decree N° 3789 of June 23, 1999.

¹ Resolution N° 4, minutes of the meeting held by the parties in Asunción, Paraguay, on July 24, 2001.

13. On October 12, 2001, the State informed the IACHR that precautionary measures had been adopted: the president of the Supreme Court of Justice and minister in charge of human rights matters, Dr. Raúl Sapena Brugada, had asked the judge responsible for ordering the removal of the indigenous community's homes to remit the case file to him and had requested the public works and interior ministries to suspend all eviction proceedings affecting the Yakye Axa community.

14. On November 2, 2001, the petitioners told the Commission that they appreciated the measures adopted by the president of the Supreme Court, which had been appropriate and were adopted speedily in accordance with the seriousness of the situation they were facing. In their note they added, however, that the State's adoption of the precautionary measures requested by the IACHR had only been partial, in that the judicial resolution ordering the removal of the community's homes had not been revoked, that they had not been guaranteed peaceful occupation of the land where the community was living, and that the measures needed to ensure the lives and physical, mental, and moral integrity of the community's members had not been adopted.

B. Friendly Settlement Proceedings

15. In its first comments filing, the State asked the IACHR to make itself available to the parties in order to reach a friendly settlement. As a part of this process, the parties held meetings in Asunción, Paraguay. At the meeting held on March 27, 2001, it was agreed to recognize the lands claimed by the indigenous community as part of their traditional habitat, based on the anthropological report drawn up by Mr. Chase Sardi, a professional anthropologist, at the INDI's request.²

16. On September 10, 2001, the petitioners informed the IACHR of their decision to withdraw from the negotiations after analyzing the results achieved to date and the possibility of the matter being resolved through that channel. They based their decision on the fact that although the State had recognized the community's ancestral right to the claimed lands, no steps had been taken toward repairing, or even beginning to effectively repair, the community's infringed human rights. In contrast to the promises the State had made, there was a court order for the removal of the community's houses, issued by a judge in Concepción judicial district.

17. At the working meeting held with the IACHR on November 12, 2001, the parties signed an Agreement of Willingness and agreed to keep the Commission informed regarding compliance with those commitments. On December 19, 2001, the parties sent the Commission information regarding the steps they had taken in compliance with the agreement.

18. In consideration of the terms set forth in the State's note of January 2, 2002, the petitioners informed the Commission of their decision to withdraw from the friendly settlement proceedings, a decision that had been made by the Assembly of the Yakye Axa indigenous community.

III. POSITIONS OF THE PARTIES

A. The Petitioners

19. The petitioners claim that the State of Paraguay has violated Articles 4 and 25 of the Convention, in conjunction with Article 1(1) thereof, and that in addition, the State has also ignored Article 27 of the ICCPR and Articles 1(2), 2(1), 4(1), and 5(a) of Convention 169, to

² "Anthropological Report on the Yakye Axa (Loma Verde) Community of the Enxet-Lengua People," by Chase Sardi; included in the case file.

the detriment of the Yakye Axa indigenous community of the Enxet-Lengua people, by failing to provide the community with comprehensive assistance during the processing of their traditional territory claim, by failing to conclude the administrative processing of their bid to recover those lands, and by preventing them from conducting their traditional subsistence economic activities — hunting, fishing, and gathering.

20. The petitioners claim that the Yakye Axa indigenous community belongs to the Enxet-Lengua people, that they are hunter-gathers, and that they have historically pursued those activities in their traditional habitat. They add that the community comprises 47 families³ and that, since 1996, they have been living at Km 80 along the road from Pozo Colorado to Concepción, opposite Estancia Loma Verde, in Presidente Hayes department, where the territory they claim as ancestral lands or traditional territory is located.

21. With respect to the bid to recover their ancestral territory, they say they began the relevant administrative and judicial procedures in 1993, but that the proceedings are nevertheless still pending, even though the Paraguayan Constitution recognizes the existence of indigenous peoples, which are defined as cultural groups predating the creation and organization of the Paraguayan State, and stipulates that it is the duty of the State to provide indigenous peoples with free community property “of an amount and quality adequate for the conservation and pursuit of their particular ways of life.”⁴

22. In their complaint they maintain that the place where the indigenous community is currently located is inadequate for its component families to live in. They say that automobile exhaust fumes and the dust stirred up by the permanent flow of traffic has had a serious impact on the community's most vulnerable members: its children and old folk. Most of the community's children suffer from respiratory ailments, which are not attended to because of the lack of medical assistance and health care. This situation is made worse by the food shortage—the courts have ordered the community's members to refrain from hunting and fishing on the ancestral lands they claim, which prevents them from supplying their families with basic foodstuffs. Four members of the community have died from bronchial and respiratory diseases.

23. The community's serious nutritional and health situation was recognized by the State of Paraguay on June 23, 1999, in Decree N° 3789/99, which declared the community to be in a state of emergency and ordered its members to be provided with medical and nutritional assistance for as long as their land claim was being processed.

24. The petitioners point out that the deplorable conditions in which the indigenous community's members live were noted by the IACHR during its on-site visit to Paraguay in 1999.⁵

25. Despite the State's express recognition, in the aforementioned decree, of the indigenous community's emergency situation, the “provision of medical and nutritional assistance” ordered by the President of the Republic for the community's families has been scant and insufficient.

3 Presidential Decree N° 3789/99, of June 23, 1999 which declared a state of emergency for the Yakye Axa Community, indicates that the community is composed of 57 families.

4 Article 64 of the Constitution of Paraguay.

5 During its 1999 on-site visit to Paraguay, “the IACHR visited Pozo Colorado district [...] in order to speak with the Yakye Axa and Sawhoyamaxa indigenous communities of the Enxet people. The Commission was able to see the deplorable situation of these peoples, who live alongside the national highway, without services of any kind, waiting for the authorities to allocate them the land they need. The Commission appreciates the importance of Presidential Decree N° 3789 of June 23, 1999, which declared these indigenous communities to be in a ‘state of emergency’ on account of the extreme conditions they face. In spite of this, the Commission was told that the effective measures ordered by the executive decree for the immediate provision of medical and nutritional assistance to the families that make up that community have not yet been adopted. Similarly, the Commission will closely follow the results of the efforts that have begun to provide the indigenous communities with the land they need.” IACHR Press Release 23/99.

26. With respect to the friendly settlement proceedings begun under the aegis of the IACHR, the petitioners gave notice, on January 19, 2002, that they were withdrawing from the negotiations; this was a decision taken by the community's members, in light of the fact that continuing with the process would only delay any resolution of the complaint.

B. The State

27. In its first filing of comments on the complaint, the State noted its interest in beginning friendly settlement proceedings; it also stated its willingness to establish a negotiating panel with the petitioners, in order to better understand this petition in light of the experience it had gained during the processing of Case 11.173, Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities.

28. The State also informed the Commission about Presidential Decree No. 3789/99 of June 23, 1999, which declared a state of emergency in the Yakye Axa community and ordered that they be provided with medical and nutritional assistance. The relevant paragraphs of this decree read as follows:

That, in turn, the Yakye Axa community of the Enxet Lengua people, numbering fifty-seven families, are claiming 15,000 hectares of their traditional territory, awaiting the resolution of that claim, and dwelling opposite the lands claimed, alongside the same Colorado to Concepción road, at Km 80.

That these communities are denied access to the traditional means of subsistence associated with their cultural identity, through the owners' ban on their entry into the habitat they claim as a part of their ancestral territories.

That this circumstance, currently under administrative and judicial examination, hinders the normal pursuit of these native communities' lives because of the lack of the minimum necessary nutritional means and medical assistance, and it is a source of concern for the Government that requires an urgent response.

That since overseeing the preservation of the nation's indigenous peoples is a matter of public interest in accordance with provisions clearly set down in Chapter V of the National Constitution, in Law 904/84 "Statute of Indigenous Communities," and in Law 234/93 "Adoption of ILO Convention 169," and since it is an obligation of the State to provide public assistance and help to prevent or address urgent needs, as provided by the aforesaid laws, such assistance should be rendered to the Yakye Axa and Sawhoyamaya indigenous communities.

NOW THEREFORE,

The President of the Republic of Paraguay decrees that:

Art. 1: A state of emergency is declared among the Yakye Axa and Sawhoyamaya indigenous communities of the Enxet Lengua people in Pozo Colorado district, Presidente Hayes department, of the Paraguayan Chaco.

Art. 2: The Paraguayan Indigenous Institute, the Ministry of the Interior, and the Ministry of Public Health and Social Welfare shall take appropriate steps for the immediate provision of medical and nutritional assistance to the families that make up these communities for as long as the judicial proceedings relating to the legal status of the land they claim as their traditional habitat remain ongoing.⁶

⁶ Decree N° 3789/99, President of the Republic of Paraguay.

29. With respect to the land claim proceedings, the State reports that the lands claimed by the indigenous community were declared part of their traditional habitat.

30. The State actively participated in the meetings between the parties held in Asunción and Washington, D.C.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. The Commission's Competence *Ratione Loci*, *Ratione Personae*, *Ratione Temporis*, and *Ratione Materiae*

31. The petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the Commission. As its alleged victims, the petition identifies individual persons⁷ with respect to whom the State of Paraguay has assumed the commitment of respecting and ensuring the rights enshrined in the American Convention. As regards the State, the Commission notes that Paraguay has been a state party to the American Convention since ratifying it on August 24, 1989. The Commission therefore has competence *ratione personae* to examine the complaint.

32. The Commission has competence *ratione loci* to hear this petition, since it alleges violations of rights protected by the American Convention occurring within the territory of a state party thereto.

33. The Commission has competence *ratione temporis*, since the incidents alleged in the petition took place at a time when the obligation of respecting and guaranteeing the rights enshrined in the Convention was already in force for the State of Paraguay.

34. Finally, the Commission has competence *ratione materiae*, since the petition describes violations of human rights that are protected by the American Convention.

35. With respect to the section of the petitioners' complaint alleging that the State of Paraguay ignored Article 27 of the ICCPR and Articles 1(2), 2(1), 4(1), and 5(a) of ILO Convention 169, the Commission does not have competence in this regard; it may and must, however, use them as guidelines for interpreting the conventional obligations, as described in Article 29 of the Convention.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

36. Article 46(1)(a) of the Convention stipulates that one requirement for a petition to be admitted is that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." Article 46(2) of the American Convention provides that the terms of Article 46(1)(a) do not apply when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

37. With respect to the key aspect of the petition—the recovery of the indigenous community's ancestral territory—the petitioners claim that they began the proceedings provided for that purpose by Paraguayan domestic law in 1993. File No. 7261/93, also involving the INDI, was

⁷ The petitioners provided a register of the indigenous community, individually listing each one of its members.

lodged with the Rural Welfare Institute (IBR). They note that more than eight years have gone by since the proceedings started and that the community has not yet been given its land. That means that the proceedings have still not been settled after more than eight years.

38. Consequently, given the characteristics of this case, the Commission believes that the exception set forth in Article 46(2)(c) of the American Convention is applicable and that therefore the requirements of the American Convention regarding the exhaustion of domestic remedies do not apply.

2. Timeliness of the Petition

39. According to Article 46(1)(b) of the American Convention, the general rule is that a petition must be lodged within a period of six months "from the date on which the party alleging violation of his rights was notified of the final judgment." Under Article 32(2) of the Commission's Rules of Procedure, this deadline shall not apply when exceptions to the prior exhaustion requirement are applicable. In such a situation, the Rules of Procedure stipulate that the petition must be lodged within a reasonable period of time, considering the date on which the alleged violation of rights occurred and the specific circumstances of the case.

40. The Commission notes that more than eight years have gone by since the representatives of the Yakye Axa indigenous community began proceedings to recover their ancestral lands and that, to date, the authorities have not resolved the matter; and that, with the application of the unwarranted delay exception, there has been no final decision under domestic law since exhaustion has been waived; consequently, the IACHR maintains that the petition was lodged within the "reasonable period of time" described by the Convention.

3. Duplication of Proceedings and *Res Judicata*

41. Articles 46(1)(c) and 47(d) of the Convention set forth admissibility requirements whereby the subject of the petition or communication must not be pending in another international proceeding for settlement and must not be substantially the same as one previously studied by the Commission or by another international organization.

42. Nothing in the case file indicates that the substance of this petition is pending in any other international settlement proceeding or that it is substantially the same as any other petition already examined by the Commission or other international body.

43. The Commission therefore concludes that the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the Alleged Facts

44. Article 47(b) of the Convention provides that any petition that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention" shall be inadmissible.

45. The Commission believes that the petitioners' allegations, if true, could tend to establish a violation of the rights enshrined in Articles 4 and 25 of the Convention, in conjunction with Article 1(1) thereof. In addition, the Commission notes that the petitioners have not argued that Articles 21 and 8 were violated. The IACHR believes that it is not necessary for petitions to indicate each and every allegedly violated right. With particular regard to this, and in light of the Court's recent case law⁸ on indigenous property rights, the Commission concludes that the allegations could tend to establish a violation of Articles 21 and 8 of the Convention.

⁸ "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory;

46. Based on the foregoing, the Commission believes that the requirements set forth in Article 47(b) and (c) of the American Convention have been met.

V. CONCLUSIONS

47. The Commission concludes that it is competent to hear the complaint submitted by the petitioners and that the petition is admissible under Articles 46 and 47 of the Convention.

48. Based on the foregoing considerations of fact and law, and without prejudging the substance of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

1. To declare that the petitioners' complaint regarding the alleged violation of Articles 4, 21, 25, 8, and 1(1), to the detriment of the Yakye Axa indigenous community of the Enxet-Lengua people, is admissible;
2. To notify this decision to the State of Paraguay and to the petitioners.
3. To continue with its analysis of the merits of this case; and,
4. To publish this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 27th day of February, 2002. (Signed): Juan Méndez, President; Marta Altolaguirre, First Vice-President; Jose Zalaquett, Second Vice-President; Commissioners Robert K. Goldman, Julio Prado Vallejo and Clare K. Roberts.

the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations." Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, Judgment of August 31, 2001.