OEA/Ser.L/V/II.
Doc. 141
12 May 2020
Original: Portuguese

REPORT No. 131/20
PETITION 90-11

REPORT ON ADMISSIBILITY

TRADITIONAL FARMERS' AND ARTISANAL FISHERMEN'S COMMUNITY OF AREAIS DA RIBANCEIRA
BRAZIL

Approved electronically by the Commission May 12, 2020

Cite as: IACHR, Report No. 131/20, Petition 131-20. Admissibility. Traditional farmers' and artisanal fishermen's community of Areais da Ribanceira. Brazil. May 12, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	André Halloys Dallagnol, Daniela Cristina Rabaioli, Larissa Franzoni, Cariny Pereira de Souza, Rodrigo Timm Serafin
Alleged victim:	Traditional Farmers' and Artisanal Fishermen's Community of Areais da Ribanceira
Respondent State:	Brazil[1]
Rights invoked:	Articles 4 (life), 8 (fair trial), 21 (property), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention on Human Rights[2] in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the same instrument, and other treaties[3]

II. PROCEEDINGS BEFORE THE IACHR[4]

Filing of the petition:	January 28, 2011
Additional information received at the stage of initial review:	January 31, 2011
Notification of the petition to the State:	December 11, 2015
State's first response:	February 5, 2016
Additional observations from the petitioner:	November 6, 2018

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, American Convention (instrument adopted on September 25, 1992)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International *res judicata*:	No
Rights declared admissible	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child), 21 (property), 22 (freedom of movement and residence), 25 (judicial protection), 26 (economic, social and cultural rights) of the American Convention in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the same instrument
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under Section IV
Timeliness of the petition:	Yes, under Section IV

[1] Pursuant to Article 17.2.a of the Commission's Rules of Procedure, Commission member Flávia Piovesan, a Brazilian national, did not take part in the discussion or the decision-making process on the instant matter.

[2] Hereinafter "American Convention" or "Convention."

[3] Article 14 of International Labor Organization Convention 169 (hereinafter "ILO Convention 169").

[4] The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petitioners claim that the Brazilian State is responsible for violation of the right to property of the Traditional Farmers' and Artisanal Fishermen's Community of Areais da Ribanceira (hereinafter "the alleged victim" or "the Community"), inasmuch as it was unlawfully dispossessed of its traditional territory and the land has not been demarcated. Their contention is that the failure to recognize the Community's right to property gave rise to violations of the right to life and to the economic, social and cultural rights of the Community, because it became precluded from preserving its traditions, its diet was adversely impacted, its homes were destroyed and it was constantly under threat, thus causing irreparable harm to its way of life. It further argues that the proceedings for recovery of possession violated the right to a fair trial and to judicial protection, because the alleged victims did not receive proper legal assistance or judicial notice, they were not advised to introduce evidence, there was no preliminary hearing before an investigating magistrate, and the administrative procedures, which were aimed at recognizing the traditional territory as an area of interest of the Union for purposes of agrarian reform, were not followed.

2. Based on the information and documents introduced, the area of 240.67 hectares, located in the municipality of Imbituba, Santa Catarina, was occupied by around 100 families of small scale farmers and fishermen, who are the descendants of Azorean and indigenous peoples. The occupation of the area by the alleged victims dates back to the 19th century and so, for more than 200 years, the Community has preserved its way of life and survived in the territory. According to the petitioners, the Community built a traditional way of farming, working and living to ensure its physical, social and cultural survival, combining artisanal fishing, cassava root cultivation, and the extraction of native plants, such as coconut palms and medicinal plants. Until 2000, when the ENGESUL company purchased the lands, the area had been titled in the name of different public enterprises (such as CODISC, ICC, GASPETRO, BRDE).

3. According to the petitioners, since 2000, the Rural Community Association of Imbituba (hereinafter "ACORDI"), on behalf of the alleged victims, has been endeavoring to stake an agrarian reform claim to the traditional lands and, in 2006, it jointly filed a claim for recognition of territorial rights with IBAMA (Brazilian Institute of Environment and Renewable Natural Resources). The first proceeding for agrarian regularization was instituted together with the National Institute of Settlement and Agrarian Reform (hereinafter "INCRA") in 2008. They contend that the Community is seeking mechanisms to ensure the protection of the traditional territory and its way of life through a proposal creating conservation units, such as a Reservation for Sustainable Development, Settlement or Agrarian Regularization of the Traditional Community. The State, however, did not adequately respond to those claims.

4. The petitioners assert that, in 2002, ENGESUL filed suit to recover possession after irregularly purchasing the public lands overlapping the traditional territory of the Community. In that suit, only a few farmers, and not the entire traditional population, were cited. The ruling on admissibility of the recovery of possession suit evicting the alleged victims was issued on November 22, 2006; on December 6, 2006, ACORDI filed a motion for clarification and relief from clerical error (*Embargos de Declaração*), which was denied; on January 12, 2007, it filed an appeal to the Federal Regional Court of the 4th Region (hereinafter "the TRF4"), which was denied on March 25, 2009. The decision was challenged by means of a Special Appeal (hereinafter "the RESP"), which was filed on March 16, 2009; however, the TRF4 denied the RESP on June 5, 2009, on the grounds that the Superior Court of Justice (hereinafter "the STJ") was precluded from examining evidence. The petitioners contend that the case was heard without any preliminary proceedings or a hearing.

5. The petitioners allege that, concurrently, the Federal Office of the Public Prosecutor (hereinafter "the MPF") instituted a civil investigation to assess whether or not the human rights of the alleged victims had possibly been violated as a result of the privatization of the traditional territory. The investigations gave rise to a public interest civil action, which was ruled inadmissible on December 13, 2006. The MPF filed an appeal with the TRF4, which upheld the inadmissibility ruling on March 2, 2009; after a motion for clarification was filed, it was denied on August 9, 2009, and, on that same date, the MPF filed a RESP and an Extraordinary Appeal (hereinafter "RE") to the Federal Supreme Court. According to the petitioners, those appeals have still not been examined, as of June 21, 2010, when recovery of possession was granted.

6. Thus, on July 28, 2010, the order for recovery of possession was executed. According to the petitioners, the recovery was extremely violent. They contend that even though the order noted that possession was to be carried out by justice officers and agents of the Federal Police, it was executed by the Military Police (hereinafter "the PM"), who used excessive man and fire power (Tactical Patrol Platoon PPT, cavalry and heavy weaponry). During the execution of recovery of possession, the alleged victims' homes and other improvements thereto were destroyed and they were not allowed to remove their belongings. They further argue that notice of recovery of possession was not received in advance, execution was not monitored by public institutions, and even though there were children living in the houses destroyed, neither the Public Prosecutor, specifically the Office of the Prosecutor for Children and Juveniles (*Promotoria da Infância e da Juventude*), nor the Guardianship Council (*Conselho Tutelar*) were present at the scene. The farmers were subjected to intimidation and psychological terrorism, from both the company and the Military Police. They also claim that after the recovery of possession was carried out, with the support of the Military Police, the company tried to occupy other areas of land used by the farmers, such as the site where the ACORDI headquarters is located, the cooperative cassava flour mill, the cassava planting and animal husbandry areas.

7. The petitioners maintain that after the eviction, the alleged victims were supposed to be aided by physicians, as a result of the psychological and emotional shock they endured. Mr. Antonio Valetin, for example, was admitted to the hospital after his property was destroyed and his cattle, confiscated by ENGESUL; one of the farmers whose house was destroyed and was unable to remove his belongings, went to live at the cassava flour mill of ACORDI. They claim that the alleged victims were unable to travel on public thoroughfares and to the historic sites of the Community. Additionally, with the lack of access to its traditionally occupied lands and natural resources (sites of plant cultivation and medicinal herb harvest, cassava cultivation, fishing areas), the traditional knowledge and know-how of the Community are at-risk of extinction; the alleged victims do not have access to existing natural resources, which prevents them from being able to harvest coconut palm, as they have historically done, and this has an impact on their diet, because they are unable to consume their typical foods. The petitioners also contend that community leadership has been taken into custody as pretrial detention, with the excuse of "avoiding possible crimes against public order and the right to property," even though there is no tangible evidence of such a thing happening. The charges leveled against the leaders and farmers included "illegal possession," "forming of gangs" and "incitement to violence."

8. The petitioners assert that after the repossession order was issued, the MPF filed a new public interest civil suit on the grounds that the alleged victims were dispossessed of their individual and collective identity, which would contribute to the destruction of Brazil's cultural heritage. As a consequence of execution of the order of recovery of possession, the community is allegedly suffering a loss of identity. They also argue that the Public Defender's Office of Santa Catarina is ill-equipped to assist the alleged victims.

9. For its part, the State alleges that, on May 25, 2000, the company ENGESUL purchased five areas of land in the Municipality of Imbituba from the company PETROBRÁS GÁS S/A – GASPETRO. In the aforementioned purchase, ENGESUL took responsibility for environmental monitoring of the area for a period of 50 years in order to prevent potential ecological disasters from happening. According to the State, since the time of the purchase of the area, the company began the monitoring and introduced the environmental recovery plan. It claims that, on September 5, 2002, several families of small-scale farmers and fishermen encroached on the land owned by ENGESUL to engage in a special way of farming, working and living, thus giving rise to the creation of the Traditional Farmers' and Fishermen's Community of Areais da Ribanceira. As a result of the encroachment, the company filed a suit to recover possession, wherein it was determined that the property would be returned. After the decision in favor of recovery of possession was upheld on appeal, the alleged victims filed a new appeal (*ação rescisória*), on May 3, 2010, to vacate the judgment of recovery of possession. The appeal was denied on May 7, 2010, on the grounds that the procedure they chose to follow could not be used as substitute appeal to contest a decision that ran counter to the interests pursued by the party. Additionally, the State contends that the petitioners have not explained how domestic remedies have been exhausted and what right, that is protected in the Inter-American system, has been violated. It claims that the Commission is not competent to recognize violations of treaties coming from outside the Inter-American system, or to recognize violations of economic, social and cultural rights. It further argues that the petitioners cannot use the Commission to act as a body of the fourth instance to review judgments, inasmuch as all the judicial proceedings respected due process of law.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

10. The petitioners claim that Brazilian legislation does not have any instrument to ensure the right to communal property for traditional peoples and communities. The State has asserted that domestic remedies were not exhausted and that Brazilian legislation makes available to the alleged victims several procedural tools, that are adequate and effective, to protect the violated right. It contends that there is no evidence that the petitioners have sought civil reparations in domestic courts. Moreover, it alleges that at the time of the filing of the petition, a motion to vacate the judgment filed by the alleged victims was being heard, which was intended to revisit the object of the recovery of possession and, thus, the petitioners had not exhausted domestic remedies.

11. As for the exhaustion requirement, the parties agree that on July 28, 2010, the order for recovery of possession was executed and that, concurrently, a motion to vacate judgment was filed in order to challenge the judgment handed down on November 22, 2006, ruling in favor of the recovery of possession against the alleged victims. Additionally, the Commission notes that the Brazilian State claims that the motion to vacate judgment was not the adequate remedy to challenge the recovery of possession, because "it could not be used as a substitute appeal because of disagreement with the decision that was contrary to the interests pursued by the party." Also, the decision denying the RESP, on June 5, 2009, in the context of the recovery of possession case, held that the STJ could not reexamine evidence, according to legal Precedent 7 of that Court,[5] which led to the determination to execute the order to recover possession on July 28, 2010. However, based on that information, the Commission understands that there is no remedy available in the Brazilian jurisdiction against the execution of an order to recover possession and, therefore, the exception set forth in Article 46.2.a of the Convention and Article 31.2.a of the Rules of Procedure is applicable.

VII. ANALYSIS OF COLORABLE CLAIM

12. The Commission understands the instant petition to include allegations concerning the violation of the right to property of the traditional community of farmers and artisan fishermen of Areais da Ribanceira, which for at least two hundred years has been living on the property that is the subject of the recovery of possession, and the consequences thereof on the living conditions of the Community. When the alleged victims were evicted, their homes were destroyed, they were deprived of the right to move on their traditional land and their rights to their traditional dietary and cultural habits were violated. Additionally, the order to recover possession allegedly did not take into consideration the presence of children on the property and was lacking the involvement of the responsible authority (Office of the Prosecutor for Children and Juveniles) and the Guardianship Council to ensure the rights of those children. Additionally, notice of the recovery of possession was not served in advance and the order was executed with violence and physical and psychological threats against the alleged victims. *The instant petition also includes allegations linked to the consequences of the recovery of possession and the delay of Brazilian authorities in demarcating and recognizing the traditional territory.*

13. Initially, in relation to the argument that the IACHR lacks jurisdiction to analyze violations of Article 26 of the American Convention, the Commission notes that said article establishes the obligation of the States parties to progressively develop the full effectiveness of rights. derived from the economic, social and educational, scientific and cultural norms contained in the Charter of the Organization of American States. In this sense, in light of current jurisprudence, the Commission is empowered to recognize not only the setback and the violation of the progressive development of economic, social, cultural and environmental rights, but also the autonomous violation of those rights enshrined in the OAS Charter.[6]

[5] Pursuant to Legal Precedent 7 of the SJT, "The pursuit of mere reexamination of evidence is not appealable by special appeal."

[6] IACHR, Report No. 70/04, Petition 667/01. Admissibility. Jesús Manuel Naranjo Cárdenas and others (Retirees of the Venezuelan Aviation Company VIASA). Venezuela. October 15, 2004, para. 61. I / A Court H.R. Case of Indigenous Communities Members of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400; I / A Court H.R. Case of Lagos del Campo v. Peru. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of August 31, 2017. Series

14. In view of the case involves public and private companies, the Commission must examine the obligations of the States to respect and guarantee the rights provided for in the American Convention in the context of business activities. The IACHR has emphasized that, according to international standards "[...] they identify four state duties [...] in the context of business activities: i) the duty to regulate and adopt provisions of domestic law, ii) duty to prevent human rights violations in the context of business activities, iii) duty to monitor such activities and iv) duty to investigate, punish and ensure access to comprehensive reparations for victims in such contexts.[7]

15. In view of the foregoing considerations and after examining the elements of fact and law set forth by the parties, the Commission finds that the petitioners' allegations are not manifestly groundless and warrant an examination of the merits because, if proven to be true, they may tend to establish violations of the rights protected in Articles 4 (life),[8] 5 (humane treatment), 8 (fair trial), 19 (rights of the child), 21 (property), 22 (movement and residence), 25 (judicial protection), 26 (economic, social and cultural rights) of the American Convention in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the same instrument. As for the right to life, the Commission notes that it encompasses not only the right of every human being to not be arbitrarily deprived of life, but also the State's duty to take affirmative measures so that conditions are not created to impede or hamper access to a dignified existence.[9]

16. As for the other international instruments alleged by the petitioners, the Commission is not competent to establish violations of the provisions of those treaties; however, it will take them into account to interpret the provisions of the American Convention at the stage of the merits of the instant case, as provided for under Article 29 of the American Convention.

17. Lastly, with respect to the State's allegation about the fourth instance, the Commission notes that in admitting this petition, it does not pretend to override the competence of domestic judicial authorities. However, at the stage of the merits of the instant petition it will examine whether the judicial proceedings conformed to all judicial guarantees of access to justice for the alleged victims as provided for under the American Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child), 21 (property), 22 (movement and residence), 25 (judicial protection), 26 (economic, social and cultural rights) of the American Convention in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the same instrument; and

2. To notify the parties of this decision; to continue with the examination of merits of the matter; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

C No. 340; I / A Court H.R. Case of Cuscul Pivaral et al. V. Guatemala. Preliminary Exception, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No. 359.

[7] IACHR. Business and Human Rights Report: Inter-American Standards. Approved by the Inter-American Commission on Human Rights on November 1, 2019, para. 69, para. 86

[8] With respect to the guarantee of the right to a dignified life, as provided for in Article 4 of the American Convention, and the relationship thereof to traditional territories and peoples, as well as to States' heightened positive obligations, regarding the protection of the lives of vulnerable individuals and groups and those living in an at-risk situation, see IACHR, Report No. 2/02, Petition 12.313. Admissibility. Yaxye Axa Indigenous Community of the Enxet-Lengua People. Paraguay, February 27, 2002; IACHR. Situation of the Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Regions. OAS/Ser.L/V/II. Doc. 176, September 29, 2019, pars. 41 and 42. IA Court of HR. *Case of the Yakye Axa Indigenous Community vs. Paraguay.* Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, pars. 158, 162 and 168; IA Court of HR, Case of the *Sawhoyamaxa Indigenous Community vs. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 153; and IA Court of HR. *Xákmok Kásek Indigenous Community vs. Paraguay,* Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, pars. 215 and 217.

[9] IACHR, Report No. 67/02 (Merits), Petition 12.313, Yakye Axa Indigenous Community, Paraguay, October 24, 2002, pars. 161 and 167.

Approved by the Inter-American Commission on Human Rights on the 12th day of the month of May, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.