

Case Study - Indigenous Rights in International Law in Latin America

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The region of Latin America has more than 42 million people comprising its indigenous population as of 2010, accounting for nearly eight percent of the region's total population. Still, these peoples are vulnerable to socioeconomic hardship and state-led oppression. Those who identify as indigenous are 2.7 times more likely to live in extreme poverty than those who do not identify as such.¹ Indigenous peoples living in rural areas are frequently subject to attacks on existence as government and multinational corporations seek to develop, industrialize, and extract natural resources from areas often treated as environmental havens. As actors in environmental conflict, indigenous groups often seek international law as means of prosecuting illegal or oppressive state action.

Indigenous peoples are afforded a number of special protections under international law doctrines. These doctrines protect the territoriality and livelihood of indigenous populations, a protection of particular importance to tribes within borders of states that do not recognize their right to self-determination. Within the United Nations, indigenous peoples have a distinct voting bloc apart from their geopolitical nations. Such a bloc came to existence after decades of organizing on the parts of transnational advocacy networks and indigenous nations. In large part, the recognition by the UN came as a result of Convention 169 of the International Labor Organization. The 1989 Convention is of critical importance to indigenous international law, as it lays out a number of rights and guarantees for indigenous peoples, such as the right to free, prior, informed consultation, the right to education, and the right to retention of traditionality and customs.²

As a marginalized population, indigenous peoples in Latin America frequently utilize international law to mediate disputes and check the power of state governments. Within the Inter-American system, there have been 212 cases on the topic of indigenous rights, litigating topics like prior consultation, women's rights, the erection of borders, and land ownership disputes.

Ethno-environmentalism in Latin America

In Latin America, indigenous groups perceive an inextricable connection between their indigeneity and respect for the natural environment. Although different indigenous groups articulate this relationship with differing nuances, the idea of *Vivir Bien* (also known as *Buen Vivir* or *Sumak Kawsay*) merges environmental and ethnic discourse.³ This way of

¹ See: <http://documents1.worldbank.org/curated/en/145891467991974540/pdf/Indigenous-Latin-America-in-the-twenty-first-century-the-first-decade.pdf>

² For further explanation on the rights afforded by Convention 169 see: <https://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm>

³ Svampa 2019, 43

understanding the world calls certain legal structures into question, embracing legal pluralism and indigenous territoriality. The indigenous social philosophy places nature at the center of human life, rather than capitalist gains. *Vivir Bien* does not mean support for absolute conservation, rather the philosophy calls for mindful, sustainable development that allows for the maintenance and regeneration of natural life. The concept is built upon the idea of collective wellbeing and care as opposed to the individual at the center of life.

The current state of environmentalism

The turn of the millennium brought renewed economic interest in Latin America due to the region's abundance of natural resources. States based their development strategies primarily on the extraction and export of primary goods, due to surging commodity prices. This era, called the "commodities consensus" by Argentine sociologist Maristella Svampa, saw the rise of extractive megaprojects like open-pit mining and the expansion of the agricultural frontier. States focused on intensifying all extraction of natural resources in order to meet market demands. Such extractive megaprojects contaminate soil, streams, and groundwater, dispersing pollution far from the source and harming many natural ecological processes. Beyond extractivism, environmental conflicts broke out relating to agriculture and land use as well. Land-grabbing has contributed to extreme inequality in Latin America: 66% of total farmland is held by only one percent of landowners.⁴ Extractivist and agricultural projects tend to occur in rural areas frequently occupied by indigenous communities. These projects cause severe environmental degradation.

The American Convention on Human Rights

Under the Inter-American System of Human Rights, the American Convention on Human Rights comprises one of the principal human rights instruments used in the Americas that lays out essential rights and guarantees for all peoples. The Convention, whose compliance is overseen by two organs of the Organization of American States (OAS), establishes the obligations of ratifying parties. The Inter-American Commission ('the Commission') and the Inter-American Court of Human Rights ('the Court') are each responsible for the interpretation, application, and compliance of member states with the American Convention. The system operates in multiple stages. Aggrieved parties first petition the Commission, stating their alleged harm. The Commission hears petitions from both victims and member-states, and makes recommendations based on their findings. In some instances, the Commission may recommend cases to the Court where decisions based on the American Convention are binding.

Indigenous Communities: Members of the Lhaka Honhat Association v. Argentina

In 1998, 132 indigenous groups under the coalition of the *Lhaka Honhat Association* filed a petition against Argentina, alleging that the State had refused to guarantee security of their

⁴ Svampa 2019b, 9

sacred indigenous territory and instead allowed settler groups to move into their lands. The communities were concerned with land in the Argentinian province of Salta, along the country's border with Paraguay and Bolivia. Although indigenous groups had lived in the area for centuries, the beginning of the twentieth century brought a number of settler groups who began small-scale development and agriculture activities. In 1991, the state of Argentina apparently formalized land ownership to the indigenous communities. Still, in the following years the State continually infringed on those lands, building bridges and allowing further settlement of outsider *criollo* communities. As a result, the Lhaka Honhat Association filed a petition with the Commission in August 1998, claiming infringement on the communal territory. The petition detailed Argentina's failure to truly grant title to the land, to control the illegal deforestation of indigenous territory by the settler communities, and to hold a free and open consultation process.

The Commission first needed to determine the merits of the case, specifically whether Argentina had done enough to provide legal certainty to the right to property, and whether it had done enough to uphold rights that were violated as they relate to food sources, the environment, and cultural identity.

The Court heard arguments as they related to Articles 21, 22, and 26 of the American Convention.⁵ Arguments considered were that of the Commission's final report, the Lhaka Honhat representatives, and the State. The Commission's report argued that the state violated the right to property because it had not provided effective access to property titles. It noted that the report came out 23 years after the first agreement between the indigenous communities and the State, but that the communities still do not have a single title. Moreover, the Commission highlighted Article 21 when discussing the importance of the role of the State in developing and implementing domestic norms. The indigenous representatives likewise argued that ineffectiveness of norms, and continual submission to the will of *criollo* settlers caused a violation of rights. In contrast, the State claimed that it agreed with the right to property, but that this case had "extreme complexity."⁶ Argentina continually stated that it was slow to act because of the settlers, whose relocation was difficult.

Article 21 of the American Convention states:

Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

⁵ For full text of the Articles, see the full American Convention:
<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

⁶ See page 39 of full case text: https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

The indigenous communities also argued that fencing put up by settlers was an interference to the right to movement, according to Article 22, which states:

Freedom to Movement and Residence

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

The representatives also made arguments pertaining to the environmental degradation of the territory. They claimed that *criollo* settler cattle over-grazed the area and led to desertification. They found that the natural vegetation of the land had begun to die out. They highlighted the ruined regeneration capacity of the land and degraded irrigation system. The Commission noted that 50 herbaceous species and bushes have disappeared due to uncontrolled grazing. Moreover, the indigenous representatives highlighted the fact that food and water access had been limited

due to livestock farming, as limited water resources were being consumed primarily by the grazing cattle and contaminated.

The State argued they had attempted to prevent the installation of settler fencing in December 2000, but that the fencing would subsequently sequester the grazing to a few areas, not eradicate it entirely. The State claimed to have taken sufficient action, but that it should not have a “disproportionate or impossible burden,” particularly regarding the relocation of *criollo* settlers who had also lived in the area for nearly 100 years. Lastly, Argentina argued that these rights to environmental protection and movement were ingrained in its constitution, implying that the state always operates according to its constitutional doctrine.

The indigenous representatives called on both Article 26 of the Convention, as well as the Protocol of San Salvador. Article 26 states:

Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

--omit the below paragraph if class reads case study as it reveals part of final ruling--

The *Lhaka Honhat* case is of particular importance to the expansion of indigenous rights in Latin America. As described in the outcome section (see page 7), the case is the first of its kind to make a legal connection between indigeneity and environmentalism. Environmental degradation impacts communities' lifestyle and thus their abilities to retain their cultural identity.

Lesson Plan - Exploring the American Convention

Learning Objective:

For students to learn in-depth about the different rights afforded by the American Convention as they relate to indigenous protections. They will understand the rights of recognition, of association, of movement and residence, to food, to cultural identity, and to a healthy environment as argued in the Lhaka Honhat case.

Group Activity:

Students will read and prepare for a brief simulation in which they will use the American Convention to recreate the arguments of both the indigenous and settler groups. Each group will be assigned a specific article to focus on. Students may access the Convention [here](#). Once they simulate the arguments, students will decide on what they think is an appropriate judgement and/or reparation.

Group 1: Article 21

Group 2: Article 22

Group 3: Article 26

Each group should decide who will represent which party, and who will be the presiding judge. To start, the group will answer the following questions:

1. What right is covered by the article(s)?
2. What did the Lhaka Honhat association argue relating to this right?
3. What would the *criollo* settlers argue relating to this right?
4. What questions might a judge have for the parties?

Students may consult the case study, the American convention, and the OAS website for help in answering.

The groups will then make their arguments in front of the class, with the judges asking one question each. Judges will then have five minutes to deliberate and determine a final decision and corresponding remedy. After this portion of the activity, students will learn the actual outcome of the case.

Final Judgment - *to be read after completion of simulation*

The Court found articles 21 and 26 relevant, and dismissed Article 22 from consideration, rejecting the representatives' arguments that settler fencing inhibited their right to movement. Based on the arguments made at the court, the State was given six years to delimit, demarcate, and grant an ownership title to the land for the 132 indigenous communities. The Court wanted to provide enough time for the surveying and delimitation process in which the State would need to create clear property lines that had not previously existed.

The Court found a number of violations of Articles 21 and 26, namely the right to property and integral development, which includes a myriad of subcategories. The Court found a violation of

the right to cultural identity, stating that infringement on the sacred land of the indigenous communities inhibited their right to practice their traditional rituals and customs. Upholding the right to prior consultation, the Court stated that all future activities must have a free and open consultation done in good faith. The State would also be responsible for the removal and relocation of the settler population and related fencing and livestock from the land. It was also held responsible for its violations of access to sanitary drinking water, and required to report on access to drinking water and actions established to conserve said water and remedy its contamination.

The right to food and proper nutrition is another critical aspect of the American Convention. It protects access to adequate nutrition. Under Article 26, other individuals or groups may not violate the right to food of others. In this case, the state failed to regulate activities of the settlers which infringed on the indigenous communities' rights to food. The Court determined it must remove and relocate settler communities off the land for both property and food access reasons.

The most innovative judgment was relating to the right to a healthy environment, a right deemed to be included in Article 26 of the Convention. In its final judgment, the Court stated that nature must be protected "not only because of its benefits or effects for humanity, but because of its importance for the other living organisms with which we share the planet."⁷ The American Convention protects the same economic, social, cultural, and environmental rights as protected in the OAS Charter. The state must ensure integral development for all of its peoples. The Court highlighted an "interdependence" existing between the environment and human rights.⁸

Debrief with discussion:

- Would you have changed anything about the Court's final judgement and remedies?
- What could be some problems faced by both sides when using the American Convention to make arguments?
- The Court found articles 21 and 26 relevant, and dismissed Article 22 from consideration. Why do you think this happened?
- Why might this conflict not have been able to be solved at the national level?
- What does the right to a healthy environment mean to you?
- Of the rights we discussed today, which do you think are most important to apply to issues faced within the United States and why?

⁷ See full case text, page 66.

⁸ See full case text, page 80.

Resources

The American Convention:

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

Full text of *The Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina*:

https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf

For more information on environmental politics and conflict in Latin America:

Svampa, Maristella. 2019. *Neo-Extractivism in Latin America : Socio-Environmental Conflicts, the Territorial Turn, and New Political Narratives* /. Cambridge Elements: Elements in Politics and Society in Latin America. Cambridge University Press.

Svampa, Maristella. 2019. *Development in Latin America : Toward a New Future* /. Translated by Mark Rushton. Practical Action Publishing.