The right to a healthy environment under the ACHR: an unprecedent decision of the Inter-American Court of Human Rights

di Manfredi Marciante

Title: Il diritto ad un ambiente salubre nel quadro della CADU: una decisione senza precedenti della Corte Interamericana dei Diritti Umani

Keywords: Inter-American Court of Human Rights; right to a healthy environment; Indigenous rights; Economic social and Cultural rights (ESCR).

1. – On February 6th, 2020, the Inter-American Court of Human Rights (hereinafter as "the Court", "the Inter-American Court" or "the IACtHR") issued a ruling, declaring the Republic of Argentina internationally responsible for the violation of various rights of 132 indigenous communities living in the Rivadavia Department, in the Province of Salta, Argentina. There are several violations of the American Convention on Human Rights (hereinafter "the Convention", "the American Convention" or "the ACHR") identified by the Court in the judgement under analysis.

On the basis of this assumptions and also considering that the breaches of the American Convention result from the main obligation incumbent upon every State party to respect and guarantee the rights established in art. 1 § 1 ACHR, Argentina violated art. 21 of the Convention, which recognizes the right to property, in relation to the rights to judicial guarantees and judicial protection enshrined in art. 8 § 1 and 25 § 1, in conjunction with the positive obligation to adopt provisions of domestic law required in art. 2 of the American Convention. Moreover, the Court found, once again, the violation of art. 21 in the light of a violation of the political rights, as stated in art. 23 § 1 and the specific breach of art. 8 § 1 for the delay in the resolution of a judicial case. Even though these kinds of violation could appear as a "standard" violations upon a State, especially concerning an indigenous community case, the particular nature of the judgement under examination mainly regards the Court analysis as an autonomous violation of art. 26 of the ACHR – concerning the "Progressive Development" of the Treaty upon State parties – as enshrined in Chapter III of the Convention, dealing with the protection of economic, social and cultural rights.

Undeniably, this case sets an unremarkable precedent for the IACtHR jurisprudence since, for the very first time in a contentious case, the Court analyzed the rights to a healthy environment, adequate food, water and cultural identity autonomously from art. 26 of the American Convention, ordering specific measures

of reparation for the restitution of those rights, including actions for access to water and food, for the recovery of forest resources and for the recovery of indigenous culture.

2. – In the case at stake, there are many factual and controversial reasons leading to the evolution of the litigation. Firstly, it should be pointed out that Lhaka Honhat (meaning "Our Land") is an association of indigenous communities belonging to the Wichí (Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) peoples, located near the border with Bolivia and Paraguay. Despite there has been a constant presence of indigenous communities from the beginning of 17th century – living in accordance with their cultural tradition hunting, gathering and fishing – these lands have also been occupied by other inhabitants.

Indeed, since 1984 the different indigenous communities in Salta's Province have demanded the recognition and titling of their ancestral lands, because for several years they were forced to modify their uses and customs due to the settlement of Creole families, grazing in their territories, the installation of fences, the lack of access to drinking water and illegal logging. For these reasons, the indigenous claim was firstly formalized in 1991 and, during more than 28 years that have elapsed since then, State policy on indigenous property has been changing, carrying out various actions in relation to the property claimed. Later on, in December 1991 the authorities issued the "Decree No. 2609/91", establishing Salta's obligation to unify the specific lots (n. 14 and 55) and to allocate an area without subdivisions: a single property title, belonging to the indigenous communities.

For these reasons, one year later the "Lhaka Honhat Aboriginal Communities Association" was formally established for the purpose, among others, of obtaining title to the lands. In 1993, Argentina established an "Advisory Commission", which in 1995 recommended the allocation of two-thirds of the area of lots 14 and 55 to indigenous communities, who agreed to these adaptations. During the same year, the construction of an international bridge began, which was subsequently and peacefully occupied by indigenous communities: the Salta's Governor at the time, made an effort in order to issue a decree releasing the final allocation of the land. The bridge was completed in 1996, but the governmental authorities made no "prior consultation" with the indigenous communities. Moreover, notwithstanding the previous Governor's commitment, in 1999, the State – by means of Decree n. 461 – made allocations of fractions of lot 55, granting plots to some communities and individuals settled there. Then, one year later, the Province presented a proposal for the awarding of lot 55, providing for the delivery of fractions to each community. Clearly, the proposal was rejected by Lhaka Honhat because the offer – among other reasons – did not contemplate lot 14, or more generally the unity of the territory. In the following years, there were actions and meetings aimed at reaching agreements between indigenous communities and Creole families on the allocation of land. Indeed, in 2014 Salta's Government issued a Decree (n. 1498/14) recognizing and transferring the "community property" of approximately 400,000 hectares of lots 14 and 55 to 71 indigenous communities and "condominium property" of the same lots to multiple Creole families. The same decree provides that, through the UEP (Provincial Executing Unit) – a technical team created in 2005 to carry out tasks related to the distribution of the land in the above-mentioned lots – 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. Despite the above, the implementation of actions relating to indigenous territory has not been completed and only a few Creole families have been relocated.

As a consequence, illegal logging activities have been carried out in the claimed territory, and Creole families were engaged in cattle ranching and installing barbed

wire fences. This has generated a decrease in forest resources and biodiversity, affecting the way in which indigenous communities have traditionally sought access to water and food. Considering the lack of response from the Argentine State, in 1998 the Lhaka Honhat filed a complaint with the Inter-American Commission on Human Rights. In 2012, this Commission issued its report on the merits, in which it declared the violation of the rights of the communities and ordered the corresponding reparations. The failure of the national State to comply led to the case being presented to the IACHR in 2019.

3. – From a purely legal perspective, it is relevant to observe that – since there are different violations identified in the case at stake – the Court decided to analyze the merits dividing the judgement into three sections. Firstly, the Court evaluated the concept of "Indigenous community property rights", as well as other rights related to it. Secondly, the Costa Rica's judges focused on the right to a healthy environment, linked with the right to adequate food, to water and to participate in cultural life. Thirdly, the IACtHR dedicated the last section of the judgement addressing the right to judicial guarantees, in relation to the previous and different legal actions initiated in the case.

As far as the first and third violations, it seems quite obvious that the Court often recalled its previous and consolidated jurisprudence in order to condemn the State's activity. When referring to the content of the right to indigenous community property (so called "community ownership"), the Court stated that the right to private property embodied in article21 of the Convention includes, in relation to indigenous peoples, communal ownership of their lands (Corte IDH, Caso de la Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua, 31-8-2001, [Fondo, Reparaciones y Costas], § 148, 149 and 151). On the basis of these assumptions, the Court noted that:

> "[e]ntre l[a]s [personas] indígenas existe una tradición comunitaria sobre una forma comunal de la propiedad colectiva de la tierra, en el sentido de que la pertenencia de ésta no se centra en un individuo sino en el grupo y su comunidad. Los indígenas por el hecho de su propia existencia tienen derecho a vivir libremente en sus propios territorios; la estrecha relación que los indígenas mantienen con la tierra debe de ser reconocida y comprendida como la base fundamental de sus culturas, su vida espiritual, su integridad y su supervivencia económica. (Corte IDH, Caso de la Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua, § 148, 149 and 151).

Indeed, the right to property protects not only the link of the indigenous communities with their territories, but also "los recursos naturales ligados a su cultura que ahí se encuentren, así como los elementos incorporales que se desprendan de ellos" (Corte IDH, Caso Comunidad Indígena Yakye Axa vs. Paraguay, 17-6-2005, [Fondo, Reparaciones y Costas], § 137). In these circumstances, the Court often stated that the right to community property implies that communities have effective participation, based on appropriate consultation processes that follow certain guidelines, in the conduct by the State or third parties of activities that may affect the integrity of their lands and natural resources. (Corte IDH, Caso del Pueblo Saramaka. vs. Surinam, 28-11-2007, [Excepciones Preliminares, Fondo, Reparaciones y Costas], § 129). Referring to the merit of the case, the judges clearly comprehended that both decrees 2786/07 and 1498/14 constituted acts of recognition of community ownership of the land claimed. The recalled internal legislation also assessed the process of agreements, related to property, followed in the case from 2007 between the indigenous communities, Creole organizations and the State. In any

case, the Court stressed that the State must fulfil its obligations towards the indigenous communities, but in doing so it must also observe the rights of the Creole population. Notwithstanding the above, the Court noted that the process to establish community property has not been completed. After more than 28 years since the recognition of the property was claimed, it has not been fully guaranteed. The territory has not been properly titled, so as to provide legal certainty, it has not been demarcated and the permanence of third parties remains.

The Court also assessed that Argentina does not have adequate regulations to sufficiently guarantee the right to community property, meaning that the indigenous communities did not have effective protection of their property rights. For these reasons, the Court concluded that the State violated the right to community property, in relation to the right to have adequate procedures and the obligations to guarantee rights and adopt provisions of domestic law, in violation of article21 of the Convention, in relation to Articles 8, 25, 1 § 1 and 2.

On the third part of the judgement, the Court evaluated the rights to judicial guarantees and protection, in relation to the obligations to respect and ensure rights concerning the legal proceedings brought by Lhaka Honhat. On the basis of its previous jurisprudence, it seems quite clear that the Court specified that: on one hand, the judicial guarantees included in article8 § 1 of the Convention – concerning the "due process of law" – encompasses the conditions that must be met to ensure the adequate defense of those whose rights or obligations are under judicial consideration (Corte IDH, Caso del Tribunal Constitucional vs. Perú, 31-1-2001, [Fondo, Reparaciones y Costas], § 69 and 108.); on the other hand, in relation to art. 25 of the Convention, the Court clarified the obligation of the States Parties to guarantee to all persons under their jurisdiction a simple, prompt and effective judicial remedy before a competent judge or court (Corte IDH, Caso Mejía Idrovo vs. Ecuador, 5-7-2011, [Excepciones Preliminares, Fondo, Reparaciones y Costas], § 95).

Moreover, it should also be considered that every State is obliged to provide effective remedies that allow persons to challenge acts of authorities that they consider violating their rights, regardless of whether the judicial authority declares the claim of the person who lodges the appeal to be unfounded because it is not covered by the norm that he invokes or because it does not find a violation of the right that is allegedly violated (Corte IDH, Caso Castañeda Gutman vs. México, 6-8-2008, [Excepciones Preliminares, Fondo, Reparaciones y Costas], § 101). In this line, the Court notes that articles 8 and 25 of the Convention – since as well-known articles 8, 25 and 1 are interrelated to the extent that effective judicial remedies must be exercised in accordance with the rules of due process of law (Corte IDH, Velàsquez Rodríguez vs. Honduras, 26-6-1987, [Excepciones Preliminares], § 91) – also enshrine the right to obtain a response to complaints and requests made to the judicial authorities, since the effectiveness of the remedy implies a positive obligation to provide a response within a reasonable time (Corte IDH, Caso Cantos vs. Argentina, 28-11-2002, [Fondo, Reparaciones y Costas], § 57). On the basis of these assumptions, the Court noted that, as of the amparo filed by Lhaka Honhat against decree 461/99 (and against a Resolution) on June 15, 2004, the Supreme Court of Justice ruled that the Judicial Branch of Salta should issue a decision. In spite of the above, it was only three years later, on May 8, 2007, that the Court of Justice of Salta gave effect to the Decree and the Resolution. No justification was given for such a delay. Therefore, the State violated the judicial guarantee of a reasonable period of time. Consequently, it failed to comply with article8 § 1 of the Convention, in relation to article1 § 1.

4. – As previously mentioned, the "innovative" side of the judgement is clearly represented by the reasoning endorsed by the Court in relation to the right to a

healthy environment as an autonomous right, linked with the right to food, to water and to participate in cultural life of indigenous people. It seems quite relevant to observe that the Inter-American Commission did not find violations of article26 of the Convention in its 2/12 Fund Report, issued in 2012 (see Report No. 2/121, Case 12.094, Indigenous Communities of The Lhaka Honhat (Our Land) Association, Merits, Argentina, January 26, 2012). In spite of the above, in its written concluding observations, the Commission clearly stated that it is important to consider that – given the recent development of the jurisprudence of the Court – it can develop, for the first time, the violation of article 26 linked with the respect for the territorial rights of indigenous peoples, in particular with regard to the right to food and others that are relevant. Basing on these assumptions, the applicant's representative specified that these rights (i.e. healthy environment, food, water and participation in cultural life) were undermined, since the government of Argentina did not act to protect the indigenous rights from the presence and actions of individuals who damaged the integrity of the territory, through the installation of fences and the grazing of cattle, as well as through the illegal logging of timber. Likewise, the representative added that the presence of hundreds of Creole families in their ancestral land, led to a profound alteration in their customs, affecting the special relationship the community have had with their land, clarifying the inter-individual application of the Convention. Quoting the specific words of the United Nations Committee on Economic, Social and Cultural Rights (hereinafter referred as "CESCR" or "The Committee"), the indigenous communities explained that not only the State was clearly violating its rights, but it had full and detailed knowledge of the conditions of environmental degradation and did not take action to prevent or to reverse the situation: as a consequence, not ensuring the population's access to and use of the resources and means to ensure their livelihood. Both the aforementioned aspects are different in their substance, but lead to the same conclusion, which would be the violation of environmental rights.

Given the alleged violations, the Court firstly gave some consideration on art. 26 of the Convention. These assumptions made by the San Jose's judges are particularly original, since there is a continuous recall to the relevant international framework on the protection of environment. Reminding its previous jurisprudence, the judges once again affirmed its competence to determine violations of art. 26 of the ACHR (Corte IDH, Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") vs. Perú, 1-7-2009, [Excepción Preliminar, Fondo, Reparaciones y Costas], § 16, 17 and 97), since the protection of the economic, social, cultural and environmental rights is enshrined on the Charter of the Organization of American States (see Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948), in the light of art. 29 (Corte IDH, Caso Lagos del Campo vs. Perú, § 144).

Furthermore, the Court made an interesting evaluation to the international "corpus iuris" on environmental matters, explaining that in order to identify the rights that could interpretatively derive from art. 26 of the ACHR, it must consider a direct reference to the economic, social, educational, scientific and cultural norms contained in the OAS Charter (Corte IDH, Caso Poblete Vilches y otros vs. Chile, 8-3-2018, [Fondo, Reparaciones y Costas] § 103) while not precluding the possibility to refer to national regulations that might be relevant in the analysis of the case (Corte IDH, Caso Poblete Vilches y otros vs. Chile, § 103). It is also worth noting the reference made by the Court to the interpretation of the ACHR in the light of the rules of interpretation enshrined in the Vienna Convention on the Law of Treaties of 1969 (see United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331), affirming and recalling that:

"[los] tratados de derechos humanos son instrumentos vivos, cuya interpretación tiene que acompañar la evolución de los tiempos y las condiciones de vida actuales. Tal interpretación evolutiva es consecuente con las reglas generales de interpretación establecidas en el artículo 29 de la Convención Americana, así como con la Convención de Viena sobre el Derecho de los Tratados [...]. Además, el párrafo tercero del artículo 31 de [dicha] Convención de Viena autoriza la utilización de medios interpretativos tales como los acuerdos o la práctica o reglas relevantes del derecho internacional que los Estados hayan manifestado sobre la materia del tratado, los cuales son algunos de los métodos que se relacionan con una visión evolutiva del Tratado" (in this particular circumstance, see also, Corte IDH, Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (ANCEJUB-SUNAT) vs. Perú, 21-11-2019, [Excepciones Preliminares, Fondo, Reparaciones y Costas], § 160.

Particular appreciation should be given to this specific logical-legal step taken by the Court, since on the basis of the aforementioned evaluation – and also referring to the important international "corpus iuris" previously outlined – the judges have the possibility to determine the specific rights included in art. 26 of the Inter-American Convention. That being said, the Court finally clarified that it is making an interpretation in order to update the meanings of the rights deriving from art. 26 of the Convention, as also previously specified by the Court in its judgements (Corte IDH, Caso Cuscul Pivaral y otros vs. Guatemala, 14-5-2019,[Excepciones Preliminares, Fondo, Reparaciones y Costas] § 101). Another relevant evaluation made by the Court consists in the recognition of the principle "iura novit curia". Indeed, verifying the recognition and the relevant content of the rights enshrined in art. 26 ACHR, the Court emphasizes that the representative of the indigenous community did not allege the violation of the human right to water. In spite of the above, the judges expressly stated that due to the facts of the case, the right to water must be analyzed as a possible violation of the norms of the Convention since it is strictly linked with the right of healthy environment, in this way clarifying the main content of the principle "iura novit curia" (Corte IDH, Velàsquez Rodríguez vs. Honduras, 29-7-1988, [Fondo], § 163).

5. – As outlined above, since this judgment represents the first contentious case in which the IACtHR ruled on the right to a healthy environment, to adequate food, to water and to participate in cultural life on the basis of art. 26 of the ACHR, it seems appropriate to evaluate some consideration made by the Court – and therefore their relevant implications– of these rights with respect to indigenous people. As far as the right to a healthy environment is concerned, the Court found appropriate to firstly recall the recent Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights (Cfr. Medio ambiente y derechos humanos (obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal - interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos). Hereinfter cited as "Opinión Consultiva OC-23/17").

One of the most interesting part of the Advisory Opinion concerns the direct reference made by the Court to the United Nations framework on the environment (see, for example, some of the most important document on this matter: the Stockholm Declaration on the Human Environment (United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1); the Rio Declaration on Environment and Development (United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. [Vol. 1]); the Johannesburg Declaration on Sustainable

Development and Plan of Implementation of the World Summit on Sustainable Development (United Nations World Summit on Sustainable Development, Johannesburg, 4 September 2002, UN Doc. 199/20); the document "Transforming our World: The Agenda 2030 for Sustainable Development" (UNGA Resolution 70/1, 25 September 2015, U.N. Doc. A/RES/70/1); and the Inter-American Democratic Charter (adopted at the first plenary session of the OAS General Assembly, held on 11 September 2001 during its Twenty-eighth Period of Sessions).

6. – Bearing in mind the relevant legal framework, it should be pointed out that the Costa Rica's judges have already stated that the right to a healthy environment must be included among the rights protected by art. 26 of the ACHR, also given the obligation upon States to achieve the integral development of their peoples, arising from arts. 30, 31, 33 and 34 of the Convention (Opinión Consultiva OC-23/17, § 57 and see also the footnote at page 85). It seems relevant to note that the Court explicitly referred to the content and scope of the right to a healthy environment, specifically conceiving it as an autonomous right, since it protects the components of the environment, such as forests, seas, rivers and others. The Court also stressed this kind of protection because of its importance for the other living organisms with which the planet is shared, keeping in mind that the above does not prevent other human rights from being violated as a consequence of environmental damage (Opinión Consultiva OC-23/17, § 59, 62 and 64).

More than that, it seems interesting to note that on this specific issue, the Court observed that the right to a healthy environment must not be undermined by the economic development dimension, but rather it must be guaranteed in any case and, therefore, this is the main reason that create obligations upon States. In the light of the above, it's worth remembering that the OAS General Assembly issued several resolutions urging States in the region to promote the right to a healthy environment as a "priority component" of their development policies and in order to combat climate change (see, for example, the resolutions Human Rights and Environment AG/RES. 1926 (XXXIII-O/03), which recognizes "the growing importance attached to the need to manage the environment in a sustainable manner in order to promote human dignity and well-being"; Human Rights and Climate Change in the Americas AG/RES. 2429 (XXXVIII-O/08), which recognizes the "close relationship" between environmental protection and human rights and stresses that climate change has adverse effects on the enjoyment of human rights, and the Inter-American Program for Sustainable Development AG/RES. 2882 (XLVI-O/16), which recognizes the three dimensions of development, in line with Agenda 2030.

Moreover, the Court made a clear reference to the relevant domestic legislation of the State (Corte IDH, Caso Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, 6-2-2020, [Fondo, Reparaciones y Costas], § 204), also evaluating that Argentina ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999), which in its article 11, entitled "Right to a Healthy Environment", provides that: "1. Toda persona tiene derecho a vivir en un medio ambiente sano y a contar con servicios públicos básicos. 2. Los Estados partes promoverán la protección, preservación y mejoramiento del medio ambiente". Furthermore, in order to justify an "American consensus" on the matter, the Court noted that sixteen States of the American continent include the right to a healthy environment in their Constitutions (in addition to that of Argentina, the Constitutions of the following countries consecrate the right to the environment: Bolivia, Brazil, Chile, Colombia, Costa Rica,

Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela). It seems interesting to highlight a parallelism that could be elaborate on the subject concerning the international "consensus". Specifically, when the the rules of the American Convention need to be interpreted in an evolutionary and generally extensive way – i.e. going beyond the literal meaning of the words – the Court tends to ascertain the possible existence of the American consensus as the ECtHR does, mutatis mutandis, in the European continent. Moreover, this is not the first time the Inter-American Court made a clear and explicit reference to the Constitutions in order to protect rights enshrined at international level (Corte IDH, Pueblo indígena Xucuru y sus miembros vs. Brasil, 5-2-2018, [Excepciones Preliminares, Fondo, Reparaciones y Costas] and it seems appropriate to recall, without presumption of exclusivity, MARCIANTE, Manfredi. Tutela dei diritti dei popoli indigeni nel sistema CADU: note a margine della sentenza Pueblo indígena Xucuru. DPCE Online, [S.l.], v. 35, n. 2, july 2018. ISSN 2037-6677. Available at: <http://www.dpceonline.it/index.php/dpceonline/article/view/535>. Date accessed: 16 june 2020, page 581.

7. – As often affirmed by various international courts and tribunals, even in the case at stake the Court clarified that the right to a healthy environment concerns the usual double obligation upon every State, i.e. the obligation to respect and the obligation to guarantee what is enshrined in art. 1 § 1 of the Convention, since one of the form of this specific kind of observance consists of preventing possible violation of the right (Corte IDH, Caso Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, § 207).

In the light of the above, it seems appropriate to recall that the Court pointed out – due to the obligation to respect human rights, provided for in article1 § 1 of the Convention – that States must refrain from, unlawfully polluting the environment in a manner which affects the conditions for a dignified life of the people, for example, by depositing waste in a manner which affects the quality of or access to drinking water and/or food sources (see, Opinión Consultiva OC-23/17, § 117). In order to support this perspective, it is really interesting the reference made by the San José judges to the Committee on Economic, Social and Cultural Rights (General Comment 15: The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 20 January 2003, U.N. Doc. E/C.12/2002/11, §§ 17-19, and General Comment 14: The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, UN Doc. E/C.12/2000/4, § 34).

As well-known, the specific duty incumbent upon States is also incumbent upon private third parties, in order to prevent them from violating the protected legal assets, including all those measures of a legal, political, administrative and cultural nature useful to promote the safeguarding of human rights and ensuring that eventual violations thereof are effectively considered and treated as an illegal act (Opinión Consultiva OC-23/17, § 118). In line with the constant international jurisprudence concerning the "positive obligation" upon each State's government (see, for example, the ECtHR jurisprudence Oneryildiz vs. Turkey, 30.11.2004, § 89; Vo vs. France, 8.7.2004, § 89), the Court specified that on certain occasions States have the obligation to establish adequate mechanism to supervise and control certain activities in order to guarantee the protection of international human rights, protecting them from the actions of public entities as well as private persons (Corte IDH, Caso Ximenes Lopes vs. Brasil, 4-7-2006, [Fondo, Reparaciones y Costas], §§ 86, 89 and 99).

8. – However, what is relevant – on the basis of these previous argument recalled by

the Court – is the following reasoning made by the San José judges. They specified that the obligation to prevent is an obligation of means or behavior, and its non-fulfillment is not assessed by the mere fact that a right has been violated. It seems interesting to observe that the Court has expressed the same notion, although not directly linked to the right to a healthy environment, in other decisions (Corte IDH, Caso Velásquez Rodríguez vs. Honduras, [Fondo], §§ 165, 166 and Caso López Soto Y Otros vs. Venezuela, 26-9-2018, [Fondo, Reparaciones y Costas] § 130), also recalling the same principle in the above-discussed Advisory Opinion (Opinión Consultiva OC-23/17, § 118).

Moreover, the very same issue was affirmed by the African Commission on Human and Peoples' Rights, stressing that the right to a healthy environment imposes an obligation on States to take reasonable measures to prevent pollution and degradation of the environment, promote conservation and ensure ecologically sustainable development and use of natural resources (see, Comisión Africana de Derechos Humanos y de los Pueblos, Caso Ogoni vs. Nigeria, Comunicación 155/96, 27-5-2002, § 52). In the case at stake, the obligation to prevent also refers to the rights to adequate food, to water, and to participate in cultural life (Corte IDH, Caso Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, § 207).

9. – Another important step took by the Court concerns the analysis of the principle of prevention, which is currently one the most important issues in international environmental law (see, for example, LA Duvic-Paoli, The Prevention Principle in International Environmental Law [2018], Cambridge University Press, pp. 15-26). Indeed, it seems interesting to point out that the San José judges classified that, when specifically referring to environmental matters, the principle of prevention of an environmental damage is customary international law.

The Court also clarified that this principle entails an obligation incumbent upon States to carry out all the necessary measure before the production of an environmental damage. In doing so, the Court affirmed that it could often be possible – due to the different particularities – to restore the previously existing situation after the production of such damage (Corte IDH, Caso Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, § 208). For these reasons, the Court pointed out that States are obliged to use all means at their disposal in order to prevent that every activities, occurring under their jurisdiction, could possibly cause a significant damage to the environment (Opinión Consultiva OC-23/17, § 142). Clearly, this obligation must be fulfilled following a standard of due diligence, appropriate and proportional to the degree of risk environmental damage (Opinión Consultiva OC-23/17, § 142).

Moreover, the Court also considered that when rights may be affected by environmental problems, there could be a potential greater negative impact when referring to certain groups in situations of vulnerability. Indigenous people are clearly among those groups, because they are communities depending primarily on environmental resources and therefore – on the basis of the international human rights law – States are legally bound to address this specific vulnerability, in accordance with the principle of equality and discrimination (Opinión Consultiva OC-23/17, § 66, 67), since the positive obligations of States Parties with regard to the protection of the environment are different – or in any case are modulated in different ways – in order to safeguard vulnerable individuals or groups. For the purpose of this extensive protection linked with the principle of non-discrimination, in the Advisory Opinion the Court refers to documents made by the Human Rights Council, since it was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on

them (on this specific argument, see the Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (15 January 2009, U.N. Doc. A/HRC/10/61, § 42) and the Report of the Special Rapporteur on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment (1 February 2016, U.N. Doc. A/HRC/31/52, § 81).

10. – Another important step took by the Court in the judgement concerns the affirmation of interdependence between the rights under specific analysis (i.e. environment, adequate food, water and cultural identity) in relation to indigenous people. In order to do so, the above-mentioned consideration are supported by the reasoning of the Court, since there are some clear reference to the relevant indigenous rights related to: i) the ILO Convention-169, recalling among others the State's obligation to adopt all the necessary measures in order to safeguard the cultures and the environment of indigenous people (see International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, arts. 4 § 1, 7 § 1, 15 § 1 and 23); ii) the United Nations Declaration on the Rights of Indigenous People (UNDRIP), indicating the rights of indigenous people to the conservation and protection of the environment in order to secure their own means of subsistence and development (UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, arts. 20 § 1, 29 § 1 and 32 § 1).

A separate examination deserves the correct reminder made by the Court to the Rio Declaration, which states that: "[…] las poblaciones indígenas y sus comunidades, desempeñan un papel fundamental en la ordenación del medio ambiente y en el desarrollo debido a sus conocimientos y prácticas tradicionales. Los Estados deberían reconocer y apoyar debidamente su identidad, cultura e intereses y hacer posible su participación efectiva en el logro del desarrollo sostenible" (Rio Declaration on Environment and Development (A/CONF.151/26, vol. I), principle 22; for a clear and exhaustive examination see J.E. Viñuales, The Rio Declaration on Environment and Development, a Commentary [ed.], Oxford University Press, 2015) and to the Convention on Biological Diversity, affirming that: "[p]rotegerá y alentará la utilización consuetudinaria de los recursos biológicos, de conformidad con las prácticas culturales tradicionales que sean compatibles con las exigencias de la conservación o de la utilización sostenible" (The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69), art. 10.c).

11. – Subsequently, after an in-depth examination of the relevant facts concerning the livestock, illegal logging and fences and the recognition of the actions taken by the State in this case, the Court assess an analysis of the State responsibility. The judges firstly noted that, given the evolutionary and dynamic nature of culture, cultural patterns specific to indigenous people can change over time and through contact with other human groups – making a clear reference to the coexistence with the Creole's people – also elaborating that this circumstances does not deprive the "indigenous character" of the community. In the light of the above, the Court affirmed that:

> "[…] los cambios en la forma de vida de las comunidades, advertidos tanto por el Estado como por los representantes, han estado relacionados con la interferencia, en su territorio, de pobladores no indígenas y actividades ajenas a sus costumbres tradicionales. Esta interferencia, que nunca fue consentida por las comunidades, sino que se enmarcó en una lesión al libre disfrute de su territorio ancestral, afectó bienes naturales o ambientales de dicho territorio, incidiendo en el modo tradicional de alimentación de las comunidades indígenas

> y en su acceso al agua. En este marco, las alteraciones a la forma de vida indígena no pueden ser vistas, como pretende el Estado, como introducidas por las propias comunidades, como si hubiera sido el resultado de una determinación deliberada y voluntaria. Por ello, ha existido una lesión a la identidad cultural relacionada con recursos naturales y alimentarios". (Corte IDH, Caso Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, § 284).

Bearing in mind the above-mentioned considerations related to the facts of the case, the Court finally concludes that the State has had knowledge of all the relevant activities in the case at stake but they (also referring to the State as an organization made by different public offices) have not been effective in stopping the harmful activities. Indeed, the lack of effectiveness of the State's actions must be considered as a part of a situation in which the Government has not guaranteed the indigenous communities the possibility of determining – freely or through adequate consultation – the activities on their territory, therefore determining a violation of the rights enshrined in the ACHR.

12. – In conclusion, even the reparation measures ordered by the Court seems relevant in the case at stake. Indeed, the Court asses the obligation to restore the territory of the communities considered as a victim, ordering the transfer of it to non-indigenous Creoles within six years. Specifically, during the first three years the transfer must be done on a voluntary basis and after this considerably short period the State may resort to evictions to carry out the transfer, also emphasizing that the relocation must occur on productive land with access to adequate public services in favor of the settlers. This reparation could lead to a successive problem for the State, because involves a series of duties in relation to the Creole's families who are also in situation of vulnerability, since their rights could be affected implementing the reparations ordered. Moreover, the Inter-American Court ordered to the State to establish a community development fund for the communities of the Lhaka Honhat Association. Despite this reparation is in line with the Court's previous cases related to the rights of indigenous people (Corte IDH, Caso Comunidad Indígena Xákmok Kásek vs. Paraguay, 24-8-2010, [Fondo, Reparaciones Y Costas]; Caso Comunidad indígena Yakye Axa vs. Paraguay, 17-6-2005, [Fondo, Reparaciones y Costas]; Caso Pueblos Kaliña Y Lokono vs. Surinam, 25-11-2015, [Fondo, Reparaciones y Costas], the judges consider for the first time that the main purpose of this fund must be to repair the damage to cultural identity, also specifying that it will also be useful as a compensation for material and immaterial damage.

Manfredi Marciante
Dip.to di Giurisprudenza
Libera Università Internazionale degli Studi Sociali Guido Carli
mmarciante@luiss.it

Note e commenti – *DPCE on line*, 2022/2
ISSN: 2037-6677