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# ADMISSIBILITY OF INDIGENOUS TERRITORIAL DEMANDS ON THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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## ABSTRACT

Initially, the article presents a history of the formation of the inter-regional system of protection of human rights, highlighting the creation of the Inter-American Commission on Human Rights. From the analysis of a series of cases decided by the Inter-American Commission on Human Rights, the paper evaluates, first, how the organ interprets the conditions of admissibility of demands who report violations of indigenous rights, particularly those related to the recognition of lands traditionally occupied by these people. Then, based on previous theoretical and before the concrete fact of dozens of cases submitted to the court, the work proposes a qualitative analysis of how the admissibility requirements have been interpreted by the Commission. In conclusion, one can point to a certain flexibility of the said committee for the admission of these demands, which signals receptiveness to demands related to indigenous lands. For methodological purposes, the analysis was limited to the cases submitted to the Commission in the period that begins with the establishment of the Rapporteurship on the Rights of Indigenous Peoples (1990), which detains the expertise in dealing with these matters.

**Keywords:** Human Rights; Inter-American Commission on Human Rights; Admissibility; Indigenous rights; Territorial Claims.

*A ADMISSIBILIDADE DE DEMANDAS TERRITORIAIS INDÍGENAS  
NA COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS***RESUMO**

*Inicialmente, o trabalho apresenta um histórico da formação do sistema regional interamericano de proteção aos direitos humanos, destacando a criação da Comissão Interamericana de Direitos Humanos. A partir da análise de uma sucessão de julgados da Comissão Interamericana de Direitos Humanos, o paper avalia, em primeiro lugar, o modo como o órgão interpreta as condições de admissibilidade das demandas que noticiam violações a direitos indígenas, sobretudo os relacionados com o reconhecimento das terras tradicionalmente ocupadas por esses povos. Em seguida, com base no referencial teórico anterior e diante do fato concreto das dezenas de casos submetidos à corte, o trabalho faz uma análise qualitativa do modo como os requisitos de admissibilidade têm sido interpretados pelo órgão do sistema regional. Como conclusão, pode-se apontar para uma certa flexibilidade da mencionada comissão para a admissão dessas demandas, o que sinaliza para uma receptividade para o conhecimento de demandas relacionadas com terras indígenas. Para fins metodológicos, a análise se limitou aos casos submetidos à Comissão no período que se inicia com a instituição da Relatoria de Povos Indígenas (1990), destinada à especialização na abordagem destas matérias.*

**Palavras-Chave:** *Direitos Humanos; Comissão Interamericana de Direitos Humanos; Admissibilidade; Direitos Indígenas; Demandas Territoriais.*

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## INTRODUCTION

The creation of regional systems for the protection of human rights, in parallel with domestic jurisdictions and the global system, is supported by the assumption that countries and regions sharing history and cultural identity would have a sharper sensitivity to dealing with similar and common issues.

In the light of this assumption, three regional systems of human rights protection interpose as intermediaries between domestic jurisdictions and the global system of human rights protection: inter-American, African and European regional systems (HEYNS, PADILLA, ZWAAK, 2006), each facing its own historical and cultural peculiarities. In Africa, human rights violations stem mainly from political and religious intolerance; in the European system, the agenda is how to converge dissonant interests into an increasingly plural society; and in the American, of all, the one that appears with the greatest degree of peculiarity is the indigenous issue, as a guarantee of cultural and religious identity, and the protection of the human rights of peoples, who indistinctly inhabited the Americas before Europeans.

The details of the emergence of the inter-American system are not part of this work, although it is necessary, albeit superficially, to address its institutional aspects as they are.

The inter-American system for the protection of human rights is supported by four main instruments: the Charter of the Organization of American States (1948); The American Declaration of the Rights and Duties of Man (1948), which details the rights mentioned in the OAS Charter; The American Convention on Human Rights (1969), known as the San José Pact of Costa Rica, and the Additional Protocol to the Convention on Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988).

The Inter-American Commission on Human Rights, created by Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs held in Santiago, Chile (1959), and the Inter-American Court, with contentious and advisory jurisdiction, make up the Inter-American system for the protection of human rights, integrating the Organization of American States. The Court was created by the Inter-American Convention on Human Rights, also known as the Pact of San José de Costa Rica, which simultaneously expanded the Commission's attributions.

The Inter-American Commission has the function of conducting a judgment on the existence of human rights violations in the countries that are signatories to the Convention. Therefore, in its daily practice, and in accordance with what determines its act of establishment, the Commission makes a judgment on the admissibility of petitions submitted to it by any State member of the Organization (Article 44 of the Convention). The first step in the internationalization of an alleged regional human rights violation is the examination of the admissibility before the Commission. Subsequently, upon completion of the examination of merit, the organ may resolve on the submission of the alleged infraction to the Court.

This study aims to examine the concrete cases in which the Commission has examined the admissibility of alleged violations of indigenous rights and, more specifically, situations involving territorial claims. In other words, the purpose is to identify the factual and legal circumstances that determined the admissibility of indigenous territorial claims within the Commission. The emphasis on territorial aspects is justified by the indisputable economic approaches that land ownership has in countries whose national wealth rests mainly on mineral commodities and agricultural products and the importance that the relation with the land has for the very development of the indigenous peoples.

From the examination of these concrete cases, a pattern will be drawn, identifying a constant in the Commission's positions on the interpretation of the admissibility requirements with respect to these concrete cases. In other words, the decisive criteria of the Commission in the assessment of the generic requirements of admissibility, when applied to specific cases.

It is already anticipated that it is not part of the methodological cut of this work to evaluate the concrete consequences of admissibility, that is, if there was a friendly solution (possibility contained in the Convention), or refer the matter to the Inter-American Court. Of course, given the importance of these parallel themes, they will merit independent work.

The article is intended not only for *policymakers*, responsible for public policies in domestic environments, but also for all stakeholders, at any level or position, in the recognition of indigenous territorial rights. It seeks to identify the circumstances in which it becomes possible, concretely, the leap from the domestic system to the regional system.

For methodological purposes, the analysis will be limited to cases submitted to the Commission in the period beginning with the

establishment of the Rapporteurship of Indigenous Peoples (1990), aimed at specializing in addressing these matters.

In the first part of the paper, the admissibility will be addressed in general terms, as will the guidelines adopted by the Commission in its evaluation. In the second part, more especially, it will be assessed the cases in which the commission assessed indigenous territorial demands and deliberated for its reception and feasibility.

## **1 THE EXAMINATION OF ADMISSIBILITY OF PETITIONS BEFORE THE INTER-AMERICAN COMMISSION**

The inter-American human rights jurisdiction, through its system composed of the Commission and the Court, acts in a subsidiary way to domestic systems (MAZZUOLI, 2010).

For this reason, the initial admissibility before the Commission can be interpreted as the first step towards the internationalization of an alleged human rights offense. To this end, the following item will present a generic typology of the admissibility criteria and then specific aspects related to how the Commission has interpreted them.

### **1.1 Guiding Principles of Admissibility in the Inter-American Convention**

The general requirements for the admissibility of petitions submitted to the Commission are set forth in Articles 46 and 47 of the Inter-American Convention on Human Rights - Pacto de São José da Costa Rica, and may be summarized as follows:

a) exhaustion of domestic jurisdiction and proposition within a period of six months from the date on which the person presumed impaired in his rights has been notified of the final decision (art. 46, 1, 'a' and 'b');

b) absence of international *lis alibi pendens* (Article 46 (1) (c)) or, if there is no international judgment, for the reproduction of an earlier petition or communication already examined by the Commission or by another international organ (art. 47, 'd');

c) *standing to suit* (art. 46, 1, 'd');

d) thematic relevance (narrate violation of rights protected by the Convention; art. 47, 'b');

e) not manifestly unfounded or invalid (art. 47, 'c').

In this scenery, it is seen that part of the requirements of admissibility concern the form, and others to the merit or substantive issues, which are analyzed at this stage, *in status assertionis*.

They mainly concern the analysis of the exhaustion of domestic jurisdiction and proposition within a period of six months, the absence of *lis pendens* or international *res judicata* and active legitimacy.

On the other hand, they relate to the question of substance, the assessment of the thematic relevance, and whether the petition addressed to the Commission is not manifestly unfounded or invalid.

## **1.2 Examination of admissibility in the Inter-American Commission in specific cases**

In assessing the specific cases brought before it, the Commission has on a number of occasions examined the admissibility requirements already put forward. The objective, before properly evidencing the analysis of admissibility requirements in the cases of indigenous territorial claims, is to identify generic guidelines on how to interpret such conditions.

It should be noted, first of all, that the Inter-American Court, if provoked by the Commission, may re-examine the conditions for admissibility. Of course, the possibility or not of a review exposes a potential dissonance among the organs that are part of the inter-American system. The Court, in its pronouncements, repeatedly reaffirms its competence to review the conditions, despite the Commission's opposition. Specifically, the possibility of reexamining the conditions before the Court, according to André de Carvalho Ramos (2013), causes an imbalance between the parties, since the State, when rejecting its allegations of inadmissibility before the Commission, can reiterate them before The Court, while the other parties do not have any recourse to the Court, in case of acceptance of any of the grounds of inadmissibility. However, in examining the specific cases, it is well known that, at least in relation to indigenous territorial rights, during the period covered, there was no case of inadmissibility before the Commission.

### *1.2.1 Formal admissibility requirements*

Before examining the merits in *status assertion* of the petitions before it, the Commission examines formal requirements of the claim,

which are, according to its own rules: a) exhaustion of domestic jurisdiction and proposition within a period of six months, from the date on which the person presumed impaired in his rights has been notified of the final decision; b) active legitimacy; and c) absence of *lis pendens* or *res judicata* international, by the reproduction of a petition or previous communication, already examined by the Commission or another international organ.

***1.2.1.1 Exhaustion of the domestic jurisdiction and proposition within a period of six months, from the date on which the presumed person harmed in his rights has been notified of the final decision (art. 46, 1, 'a' and 'b')***

In the specific case of the exhaustion of domestic jurisdiction and the filing of the petition within the prescribed period, the Convention provides instruments for interpreting whether the situation described meets this requirement. The art. 46, item 2, items 'a', 'b' and 'c', informs that no expiration or attention to the deadline will be required when there is no due process of law in the domestic law of the State for the protection of the right or rights allegedly infringed; not if the person presumed to have been prejudiced in its rights has not been allowed access to the remedies under domestic law, or has been prevented from exhausting them; and, finally, unjustified delay in the decision on the aforementioned appeals, since there is an international duty assigned to the State to provide the judicial means competent for the appraisal of violations of human rights (CANÇADO TRINDADE, 1997).

In short, domestic exhaustion or attention to time will not be required when the legal system does not provide adequate procedural instruments or, even if existing, there is an unwarranted delay in the assessment of human rights violations, as were the cases *Caballero Delgado v. Colombia* (1994) and *Velazquez Rodrigues* (1988), mentioned by Buergethal, Shelton, Stewart (2009).

In addition to the aforementioned exceptions, the Court recognized in its judgments three more: a) when the available remedy is not apt; (b) it is unnecessary (for example, there is already a case law of the domestic higher court in a different sense); or c) when defenders are missing or there are barriers to access to justice (RAMOS, 2013).

With regard to the exhaustion of domestic jurisdiction, the Rules of Procedure of the Inter-American Commission, in its art. 31, 3, attributed to the State the burden of proving that the remedies were not exhausted, when the petitioner claims that it is impossible to prove the requirement, unless

this is clearly deduced from the case file. In the analysis of the question, the Commission points out a redistribution of the burden of proof of the petitioner's allegations, certainly in the light of the applicants' presumption of the applicant's claims - the States accused of human rights violations, having as their main case the burden of proof to the State of Faren Garbi (1987).

On the other hand, the same Regulation, with respect to the deadline for the filing of the petition, in its art. 32 provides that in cases where exceptions to the requirement of prior exhaustion of domestic remedies apply, the petition must be submitted within a reasonable time, at the discretion of the Commission. To do so, it will consider the date on which the alleged violation of rights occurred and the circumstances of each case.

However, Mazzuoli points out that

In the practice of the inter-American system, the rule of prior exhaustion of domestic remedies has been (strictly coherently) interpreted restrictively, mitigating its scope when it is proven that the victim of human rights violations does not have the necessary means and conditions to exhaust domestic judicial remedies before initiating proceedings before the Inter-American Commission (MAZZUOLI, 2010, pp. 87-110).

In these cases, the author continues, "the State may even be held responsible internationally, precisely because it failed to provide the individual with legal means to repair the damage caused to him as a result of the violation of human rights" (MAZZUOLI, 2010, p. 87-110).

The need for exhaustion of the domestic routes was the basis for the inadmissibility of the only interstate petition submitted to the Commission to date: *Nicaragua v. Costa Rica*, judged on 03/08/2006 (BUERGENTHAL, SHELTON, STEWART, 2009).

Regarding the necessity of the State's allegation before the Commission of the objection of inadmissibility due to the lack of exhaustion of domestic remedies, the Court considered that it should be filed before the Commission itself, failing which the objection would be either quashed or tacitly dropped. In the case of *Castillo Paez v. Peru*, with a judgment dated of 30/01/1996 (RAMOS, 2013).

In this regard, the Court and the Commission have sustained that

[...] in accordance with generally recognized principles of international law and international practice, the rule requiring prior exhaustion of domestic remedies is



designed in the interest of the State, as it seeks to relieve it from responding to an international body for acts that Before they have had the opportunity to remedy them with their own resources (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report No. 5/04, 2004).

### ***1.2.1.2 Standing to sue***

The art. 46 (1) (d) does not specifically mention active legitimacy, but requires that the petition addressed to the Commission should contain the name, nationality, occupation, address and signature of the person or persons or of the legal representative of the Entity to submit the petition. The requirement meets the need to prove that the petitioners are in the condition set forth in art. Article 44 of the Convention, which provides that “any person or group of persons or non-governmental entity legally recognized in one or more Member States of the Organization may submit petitions to the Commission containing denunciations or complaints of violation of this Convention by a State Party”.

The possibility that any person could provoke the international processing of an alleged human rights offense by addressing the Commission constitutes, as teaches Mazzuoli (2010, p. 87-110),

An exception to the optional clause (which allows the State party to express its views on whether or not to accept this mechanism), since the Convention allows any person or group of persons (whether national or not) to apply to the Inter-American Commission, Expressed by the State recognizing this system.

In addition, the convention system does not require the petitioner to be the victim or victims themselves (BUERGENTHAL, SHELTON, STEWART, 2009).

### ***1.2.1.3 Absence of lis pendens or res judicata international, by the reproduction of a petition or previous communication, already examined by the Commission or by another international body***

The Rules of Procedure of the Inter-American Commission deal indiscriminately with the circumstances in which, according to the general theory of the case, it would show *lis pendens* or *res judicata*<sup>1</sup>. The normative,

<sup>1</sup> Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 137th regular session, held from October 28 to November 13, 2009; And amended on

in its Article 33, 1, ‘a’ and ‘b’) will not consider a petition in cases where the matter is pending in another process of settlement before the international governmental organization of which the State concerned is a party, or constitutes substantially the reproduction of a petition pending or already examined and resolved by the Commission or by another international governmental organ of which the aforementioned State is a party.

The Commission’s own Rules of Procedure, in its art. 33 (2), lists the cases in which the Commission will examine the petitions independently of any apparent duplication. The committee shall consider the cases before it where: (a) the procedure followed before the other organ is limited to the general examination of human rights in the State concerned, and there is no decision on the specific facts which are the subject of the application or does not lead to its effective solution; b) the petitioner before the Commission is the alleged victim of the violation, or a relative of his, and the petitioner before the other organ is a third person or a nongovernmental entity, without a mandate from the first.

In the first exception, there is a scenario of contiguity, that is, the aforementioned violation is contained in the first petition submitted to another international organ, but has no specific treatment. In the second case, what is recognized is the absence of identity of parts.

### *1.2.2 Requirements of admissibility of foundations or merit*

Once the formal obstacles have been overcome, the Commission will then examine the substantive plausibility of demand, firstly by assessing: (a) the thematic relevance; And, secondly, (b) the plausibility of the application.

#### ***1.2.2.1 Thematic relevance (Narrate violation to rights protected by the convention, art. 47 (b) of the Convention)***

In principle, as an organ of the Convention, the Commission examines human rights offenses enshrined in the Pact of San José, Costa Rica. The art. 29, letter ‘b’, of the referenced pact, however, allows to extend the interpretive limits of its devices, determining that

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2 September 2011 and at its 147th session, held from 8 to 22 March 2013 for its entry into force on 1 August 2013

Nothing in this Convention shall be interpreted as: (a) to allow any State, group or individual to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to limit them to a greater extent than it Preview; b) limit the enjoyment and exercise of any right or freedom that may be recognized by virtue of the laws of any of the States Parties or by virtue of Conventions to which one of said States is a party; c) exclude other rights and guarantees that are inherent to the human being, or that derive from the representative democratic form of government; d) to exclude or limit the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have (MAZZOULI, 2010, pp. 87-110).

For this reason, states that are not signatories to the Convention are not free to conform to the terms of the OAS Charter and the American Declaration of the Rights and Duties of Man. In this case, however, the Commission, which historically preceded the Court, will not act specifically as an organ of the Convention, but as an organ of the OAS (“Charter body”) and, in case of admissibility and intervention by the Commission, any disregard or noncompliance by the non-signatory State of the Convention may determine the referral of the matter to the Assembly of the Organization of American (MAZZOULI, 2010; BUERGENTHAL, SHELTON, STEWART, 2009).

#### ***1.2.2.2 Plausibility of the petition (not manifestly unfounded or unfounded, Article 47 (c) of the Convention)***

Finally, the plausibility of the petition can be interpreted as having minimum, factual or legal grounds, which are not confused with the formal aspects mentioned above; of course, plausibility will be examined in *status assertionis*, and any factual controversies will be relegated to the future stages of the procedure in the Commission and the Court.

## **2 THE EXAMINATION OF ADMISSIBILITY ON SPECIFIC TERMS: INDIGENOUS TERRITORIAL DEMANDS**

In this part, the objective is to evaluate how the Commission has assessed the admissibility requirements in the numerous indigenous

territorial demands submitted to the organ, especially since the establishment of the Rapporteurship of Indigenous Peoples in 1990.

The requirements will be examined in the light of what has been said about the general conditions of admissibility.

## **2.1 Indigenous territories: the role of regional human rights systems**

The demands and petitions concerning indigenous rights are not limited to cases of territorial applications. However, in this paper, by methodological decision, only petitions filed with the Commission, starting in 1990, containing territorial claims will be analyzed.

As highlighted above, these demands represent a specific difference, and of quality, in relation to those submitted to other regional systems for the protection of human rights. Geographical proximity and historical and cultural identity play a decisive role in the alleged violations of human rights to be submitted to the regional systems established for their protection.

## **2.2 Specific cases of admissibility in the Commission on indigenous territorial claims: search for patterns**

Based on the data provided by the Inter-American Commission, a number of petitions filed before the Inter-American Commission are identified, in which its admissibility was assessed. The table below indicates the number of the admissibility report, the affected individuals or community, the respondent country, the date of the decision and the judgment as to its admissibility or not.

In the search for patterns to analyze the indigenous territorial demands, one can find the following specific aspects:

**a) Defendant's burden to demonstrate unfunded domestic assets:** In several precedents, the Commission, along the lines of the Court, attributed to the defendant - to the State, the burden of proving the existence of domestic legal means not exhausted (*Kalina de Maho v. Suriname*, 2013);

**b) Reasonable time limit for bringing an action before the Commission:** where the absence of effective domestic remedies is recognized, the Commission shall carry out a detailed examination of the case. It recognized, for example, that the protocol of the petition is

Number of the information of Admissibility	Affected Individuals or Community	Defendant country	Date of decision	Admitted / Not supported
99/99	Mary y Carrie Dann	Unitedm States	27/9/1999	Admitted
78/00	Mayas Indigenous Communities and their members	Belize	5/10/2000	Admitted
02/02	Indigenous Community Yakye Axa of prople Enxet-Lengua	Paraguay	27/2/2002	Admitted
11/03	Indigenous Community Xákmok Kásek of people Enxet	Paraguay	20/2/2003	Admitted
12/03	Indigenous Community Sawhoyamaxa of people Enxet	Paraguay	20/2/2003	Admitted
62/04	Indigenous People Kichwa of Sarayaku and their members	Ecuador	13/10/2004	Admitted
29/06	Community Garífuna Triunfo da Cruz and its members.	Honduras	14/3/2006	Admitted
78/06	Aboriginal Communities Lhaka Honhat (Nuestra Tierra)	Argentina	21/10/2006	Admitted
80/06	Members of the indigenous community of Ananas and others	Brazil	21/10/2006	Admitted
39/07	Community Garífuna of Cayos Cochinos and its members	Honduras	24/7/2007	Admitted
55/07	Indigenous Community Kelyenmagategma of people Enxet-Lengua and its members	Paraguay	24/7/2007	Admitted
76/07	People Kaliña and Lokono	Suriname	15/10/2007	Admitted
58/09	Indigenous people Kuna de Madungandí and Embera de Bayano and their members.	Panamá	21/4/2009	Admitted
75/09	Indigenous Communities Ngöbe and their members in valley of Rio Changuinola	Panamá	5/8/2009	Admitted
98/09	Indigenous people Xucurú	Brazil	29/10/2009	Admitted
105/09	Group of the Treaty Hul'qumi'num	Canada	30/10/2009	Admitted
141/09	Agricultural Community Diaguita dos Huascoltinos and its members	Chile	30/12/2009	Admitted
63/10	Community Garífuna Punta Piedra and its membersros	Honduras	24/3/2010	Admitted
125/10	Indegenous Peoples of Raposa Serra do Sol	Brazil	23/10/2010	Admitted
87/12	Communities Maya Kaqchikel de los Hornos and El Pericón I and their members	Guatemala	8/11/2012	Admitted
09/13	Indigenous Community Kaliña de Maho	Suriname	19/3/2013	Admitted

reasonable when there are no instruments for the protection of domestic law, the expulsion of land took place in March, and the protocol of the petition to the Commission in December of the same year (*Kalina de Maho v. Suriname*, 2013);

**c) Voluntary withdrawal of communities from disputed lands:** at least in one opportunity (*Kalina de Maho v. Suriname*, 2013), the Commission considered a defensive matter consisting in claiming that the communities voluntarily left their lands, not by state action. On that occasion, the Commission heard the application, considering that the defensive thesis was confused with its own merits, to be proved in the subsequent stages;;

**d) Insufficiency of possessory actions as a skillful means to protect indigenous lands:** in at least one case, the Commission recognized that the existence of possessory actions in domestic law would not be sufficient for the effective protection of indigenous territorial rights (*Communities Maya Kaqchikel de los Hornos and El Pericón I and their members v. Guatemala*, 2012);

**e) Continuing infractions:** in the face of continuous infractions, the Commission has mitigated the period of 6 months for the protocol of the petition (*Communities Maya Kaqchikel de los Hornos and El Pericón I and their members v. Guatemala*, 2012; *Kalina and Lokono v. Suriname*, 2007);

**f) Lack of legal recognition of traditional forms of possession, collective legal personality or instruments of collective postulation:** the Commission, in line with the Court's own judgments, admits that there is an infringement of the Convention when there is no legal recognition of traditional forms of land tenure, as well as the non-distinction of legal personality or instruments for collective postulation, in violation of art. 21 of the Convention, which recognizes the right to private property. There is, according to the Commission, a positive obligation to take special measures to guarantee members of indigenous and tribal peoples the full and equal exercise of the right to the territories they have traditionally used and occupied (*Community Garífuna Punta Piedra and its members v. Honduras*, 2010). This understanding was confirmed later in the Court I.D.H, in the *Case of People Saramaka Vs. Surinam* (judgment in 28/11/2007), as well as in the *Community Mayagna (Sumo) Awas Tingni Vs. Nicaragua* (judgment in 31/08/2001), *Indigenous Community Yakye Axa Vs. Paraguay* (judgment in 17/06/2005) and *Indigenous Community*

*Sawhoyamaya Vs. Paraguay* (29/03/2006);

**g) Existence of legal challenge by other interested parties:** according to the Commission, the processing of third-party actions, sometimes contrary to the demarcations, does not impede the knowledge of the petition, on the grounds that domestic means have not been exhausted. This is the case, still under Commission appreciation, of the demarcation of the Raposa Serra do Sol, where the trial of popular action proposed by interested third parties in reviewing the demarcation process (*Indigenous Peoples of Raposa Serra do Sol v. Brazil*, 2010);

**h) Application of the American Declaration:** In some cases, particularly in the case of countries that have ratified the Convention belatedly, the Commission has assessed the facts in the light of the American Declaration. In the specific case of *Raposa Serra do Sol v. Brazil* (2010), the Commission found that Articles I, II, III, VIII, IX, XVIII, XXIII of the American Declaration had been violated. The same treatment is given to countries that have not ratified the Convention (*Group of the Treaty Hul'qumi'num v. Canadá*, 2009; *Indigenous Communities Mayas and its members*, 2000);

**i) Actions of constitutional guarantees:** according to the Commission, the use of actions to protect constitutional guarantees is sufficient to prove the exhaustion of domestic resources (*Diaguita dos Huascoltinos Agricultural Community and its members v. Chile*, 2009 (*Comunidade Agrícola Diaguita dos Huascoltinos e seus membros v. Chile*, 2009; *Kichwa de Saraiaku v. Equador*, 2004);

**j) Unfavorable domestic jurisprudence:** In some cases, when confronted with this situation, the Commission recognized that the existence of unfavorable domestic jurisprudence authorizes the exemption of the exhaustion of domestic means (*Group of the Treaty Hul'qumi'num v. Canadá*, 2009);

**k) Lack of consultation with the community as a violation of the right to political participation:** in a number of cases, the Commission has interpreted the absence of any consultation with the community regarding the management of its land, or the lack of any mechanism for collective participation, as an offense to art. 23 of the Convention, which recognizes the political rights of participation (*Agricultural Community Diaguita dos Huascoltinos and its members v Chile*, 2009);

**l) Principle of *iura novit curia*:** The Commission recognized the possibility of framing the alleged violations in any of the articles of the

Convention or of the Declaration, regardless of the qualification presented in the petition. In the specific case of the Indigenous People Xucuru v. Brazil (2009), the Commission described the violations prior to the ratification of the Convention by Brazil on September 25, 1992, as made to Articles XVIII (Right of Access to Justice) and XXIII (Property Rights) of the American Declaration of Rights Humans. Likewise, requalifying the infractions, when assessing the admissibility of the petition presented by the Ngöbe v. Panama (2009), the Commission found that the violations reported fall under Articles 8 (judicial guarantees) and 25 (legal protection of rights) of the American Convention, but also to art. 2 (duty to adopt provisions of domestic law) and to art. 24 (equality before the law) of the Convention;

**m) Duplication in case of submission to international organs with different attributions:** The Commission acknowledged that there was no duplicity of cases where aspects of the alleged violation were reported to organs other than the Commission, such as the Committee on the Elimination of Racial Discrimination (CERD) (Peoples Kaliña and Lokono v. Suriname, 2007);

**n) Relationship between provisions of the Convention and the Declaration:** According to the Commission, since the Convention enters into force with respect to a State, it is this instrument, not the Declaration, which becomes the specific source of law to be applied by the Inter-American Commission (Aboriginal Communities Lhaka Honhat, Nuestra Tierra, V. Argentina, 2006);

**o) Violation of the ILO Convention 169:** With respect to the allegation of violation of the provisions of ILO Convention 169 concerning indigenous and tribal peoples, the Commission acknowledged that it was not in a position to assess them, although it was possible to use it as an interpretative standard for conventional obligations, as provided in art. 29 of the Convention (Garifuna Community Triunfo da Cruz and its members v. Honduras, 2006).

In another judgment, the Commission understood that the instrument provided for in art. 16, of ILO Convention 169, ie the duty to consult indigenous peoples prior to resettlement, does not constitute a domestic environment to be exhausted before transferring the issue to the regional system for the protection of human rights Indigenous Xákmok Kásek of the people Enxet v. Paraguay, 2003).



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## CONCLUSION

From the concrete cases analyzed, it can be said that the Commission has interpreted the admissibility requirements of petitions in a very favorable sense to the petitioners, facilitating access to the regional system for the protection of human rights. The jurisprudence of the Commission, therefore, facilitates the entry of indigenous territorial demands, reinforcing the presence of the regional system in this theme.

It is also observed that some countries have been demanded more frequently, especially Paraguay, with four accepted claims, and Honduras, with three petitions admitted.

In practically all petitions, at some point the existence of judicial instruments for the protection of allegedly offended human rights has been assessed, and the Commission has been very strict on this point. Whether as a result of the delay or because of the inefficiency of the judicial instrument made available to the parties, the Commission has admitted petitions based on insufficient domestic instruments.

It is important to note in the assessment of the merits in *status assertionis* that the Commission recognizes as an offense against the human rights enshrined in the Convention and the Declaration, the lack of recognition of traditional land tenure in collective terms (not just distinguishing between mere private ownership), as well as the non-characterization of collective legal personality and the absence of collective instruments of postulation in favor of these rights.

Finally, it is pointed out that the methodological cut of this research focused on the admissibility of petitions before the Commission, relegating to future examination the question of the judgment by submitting the questions to the Court and, conclusively, the decisions of the Court itself regarding the alleged infringement.

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