



Course
Global Environmental Litigation
2020

The Kichwa de Sarayaku v. Ecuador case

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Bibliography

S. Herencia Carrasco, "Public Interest Litigation in the Inter-American Court of Human Rights : The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change", RQDI, 2015, HS, p. 199-220

C. Y. Verbeek, "Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of the Kichwa People of Sarayaku v. Ecuador." *American Indian Law Review*, vol. 37, no. 1, 2012-2013, p. 263-282.

Webography

Podcast:

France culture, [En Equateur \(2/3\) : « Le peuple Kichwa de Sarayaku : un peuple en résistance »](#)

I- Factsheet

A- Where it started

Background: Although Ecuador had formally awarded a title on a parcel of land to indigenous communities along the Bobnaza River, including the Kichwa People of Sarayaku as soon as in 1992, it reserved its rights to exploit subsoil natural resources so long as the rules of environmental protection remained observed. In this context, Ecuador, through Petroecuador, the state-owned oil company, signed in 1996 a hydrocarbon and crude oil exploration contract with an Argentinean oil company, *Comapana General de Combustibles* (CGC), covering a vast area (block 23), including 65 % of the land awarded to the Kichwa People of Sarayaku. According to Ecuadorian law, the company was meant to prepare an environmental impact assessment and to obtain the agreement of the affected people to reach the area and carry out its activities.

Environmental and cultural issues and social unrest. But the activities of the company raised major concerns among the Kichwa community. In reaction to this opposition, CGC tried to circumvent the people's consent. It allegedly, among other tricks, provided medical services to members of the community under the condition of signing a paper later converted into a letter of support to its activities. That way, and through the offering of gifts and incentives to members of the community, the company managed to secure a formal consent from parts of the affected communities and started, on this basis, a seismic survey on the Kichwa territory in October 2002, despite the continuing opposition of the community and procedures before both the Ecuadorian ombudsman and the court of first instance. More than one ton of explosives were loaded in the territory, both on the surface and at a deeper level before the survey ended in 2003 because of the continuing opposition it had to face. The contract was eventually terminated by the parties in 2010, after an attempt to resume exploration activities in 2009 had failed.

This seismic survey not only deprived the Kichwa community of the possibility to access to its land safely and peacefully while it was ongoing, but it had a significant long-lasting impact on the Kichwa territory. Indeed, it led to the destruction of trees of spiritual significance, the construction of heliports, the destruction of caves, water sources and underground rivers but also the partial destruction of another site of great significance in the worldview of the Sarayaku people. Moreover, the seismic lines remained on the territory, depriving the people of the possibility to safely access it. Despite this situation, the termination agreement signed in 2010 sets out that no environmental liability could be attributed to the contractor in the area.

B- How the dispute evolved

The Kichwa people of Sarayaku quickly organized itself to oppose CGC's project, especially through legal and judicial means. It first tried to rely on domestic mechanisms, before addressing its claims to the Inter-American Commission on Human Rights, which later addressed the case to the Inter-American Court on Human Rights.

Proceedings before the domestic mechanisms

Ecuadorian law, and even the Ecuadorian constitution, was already rather protective of indigenous communities when the dispute arose. Thus, members of the Kichwa community first claimed for the

recognition of their domestic rights before various domestic mechanisms, both before and after the implementation of the seismic survey. Representatives of the Kichwa people filed an initial application for constitutional *amparo* in 2002 considering that CGC conduct had divided the indigenous communities. This application seems to have been considered as withdrawn for obscure reasons, the State claiming that the claimants failed to participate in the public hearing organized, while the latter claim before the Court that this hearing had never been held and a higher court had denounced procedural irregularities with no consequences. Meanwhile, a claim brought before the Ombudsman of the province of Pastaza succeeded in April 2003, when he considered that both the ministry of Energy and Mines, Petroecuador and CGC had violated the Ecuadorian constitution together with the ILO convention and the Rio declaration. Later on, the Human Rights Committee of the Congress of the Republic issued a report confirming this position. But these statements produced no consequence.

Proceedings before the Inter-American Courts of Human Rights

Introduction of the case. As soon as on December 19, 2003, the Association of the Kichwa People of Sarayaku together with two NGOs (Centro de Derechos Económicos y Sociales and the Center for Justice and International Law) lodged an initial petition before the Inter-American Commission of Human Rights. The Commission declared the case admissible in 2004 and approved report on the merits in 2009. In this report, it decided to transmit the case to the Court, asking it to declare the breach of several rights enshrined into the American convention by Ecuador to the detriment of the Kichwa People of Sarayaku and its members, including the right of property, the right to life, the right to freedom of movement and the right to personal integrity. The Commission also asked the Court to order provisional measures.

Proceedings before the Court. The Court ordered these provisional measures in a decision taken on July 6, 2004 and they remained into force until its judgment on the merits. Representatives of the Sarayaku People were authorized to intervene in the proceeding, while the Court received various *amicus curiae* briefs. The victims were recognized the possibility to benefit of the victim's legal assistance fund so that they can participate in the proceeding. A public hearing was held in 2011, permitting the testimony of members of the community. Upon invitation by the State, a delegation of judges, for the first time in the history of the Court, conducted a proceeding at the site of the events of a contentious case submitted to its jurisdiction on April 21, 2012. At the end of this visit, a representative of the State recognized Ecuador's responsibility. But the Court considered that, despite the significance of this acknowledgement, it remained necessary to make specific determinations on the events at stake "because this contributes to making reparation to the victims, to preventing a recurrence of similar acts and, in general, to the satisfaction of the purposes of the inter-American jurisdiction over human rights". That being said, the Court relied on this acknowledgement to deny the Ecuador's objection regarding the exhaustion of domestic remedies.

Merits. In this judgment, the Court stated that Ecuador violated the right to prior and informed consultation, in relation with communal property and cultural identity rights, insisting on the collective nature of these rights. After having recalled the obligation to consult the indigenous communities affected, based on the ILO convention which has given rise, according to the Court, to a general principle of international law on this point, the Court insisted that this obligation rests upon the State and cannot be delegated to any private contractor. It further stressed that the putative consultation led by CGC had, in any case, been runed neither in good faith (fraudulent methods) nor adequately (no respect for Sarayaku people political organisation). Furthermore, the Court found that Ecuador was responsible for having put at grave risk the rights to life and physical integrity of the Sarayaku People by allowing CGC to burry explosives throughout the territory. It nevertheless dismissed the claims

based on harassment and torture for lack of evidence of the State's involvement in the challenged conducts.

Reparation. Eventually, the Court ordered the State to fully repair the damage caused to the Kichwa Indigenous People of Sarayaku itself. This full restitution could be achieved through a combination of various measures:

- Restitution: Ecuador must neutralize, deactivate and, if applicable, remove all pentolite left on the surface and buried in the territory of the Sarayaku People, based on a consultation process with the People, in no more than three years ;
- Guarantees of non-repetition:
 - o Ecuador must consult the Sarayaku People in a prior, adequate and effective manner in the event that it seeks to carry out any activity that could involve a potential impact on their territory.
 - o Ecuador must adopt the necessary measures to give full effect, within a reasonable time, to the right to prior consultation of the indigenous and tribal peoples and communities and to amend those that prevent its free and full exercise.
 - o Ecuador must implement, within a reasonable time and with the respective budgetary allocations, mandatory training programs or courses that include modules on the national and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as other officials whose functions involve relations with indigenous peoples, in the terms of paragraph 302 of this Judgment.
- Satisfaction:
 - o Ecuador must carry out a public act of acknowledgment of international responsibility.
 - o Ecuador must publish the judgment to make it available to those concerned.
- Compensation: The State must pay 90.000 USD for the pecuniary damages and 1.250.000 USD for the non-pecuniary damages suffered by the community, to be paid to the association of Sarayaku people so that the money may be invested as the People see fit.

Implementation follow-up. The monitoring compliance with judgment procedure indicates that Ecuador has partially complied with the measures ordered by the Court as reparation means (latest declaration on June 22, 2016:

- Ecuador carried out a public act of acknowledgment of its international responsibility and ensured the publication of the judgment; it also paid the amount dues as financial compensation. It appears that a part of this money has been spent by the people to create its own airline company ([Aerosarayaku](#));
- Ecuador established training programs for civil servants but without making them mandatory;
- But it appears that Ecuador failed, according to the Court, to neutralize the explosives disseminated in the field and to enact the necessary measures to ensure full compliance with the principle of prior and informed consultation to the benefit of the Sarayaku community and other indigenous peoples. It appears that disputes between indigenous peoples and extractive industries or energy companies remain rather [frequent](#) in Ecuador, the State failing to find the proper balance on these issues. Due to this reluctance on the part of Ecuador, indigenous peoples are now trying to convince western funders to no longer [back](#) this kind of projects.

II- Issues to be discussed

PROCEDURAL ISSUES

- The claimant:
 - The initial petitioners (an association representing the people and NGOs), the Inter-American Commission.
 - The participation of the initial petitioners and the victims to the proceeding.
 - The Kichwa de Sarayaku people itself as the damaged party.
- The respondent
 - The host State, internationally comply to ensure the respect of indigenous rights by private parties and which obligations cannot be transferred to these parties.
- Admissibility:
 - Exhaustion of domestic remedies.
- Procedure:
 - Provisional measures: content, bindingness and impact.
 - Field visit by the judges.

MERITS

- States' due diligence obligations in relation with the conduct of private parties.
- Value, content and scope of the right to free, prior and informed consultation (no right to free, prior and informed consent).

RELIEF

- Principle of full reparation; diversity of the reliefs
 - Retrospective: restitution, satisfaction, compensation
 - Prospective: guarantees of non-repetition
- Enforcement of the judgment: compliance with judgment monitoring by the Court itself; difficulties to ensure the implementation of the most intrusive measures.
- Direct and indirect (awareness, evolution of the law at the international and domestic levels) impact.