

Inter-American Court of Human Rights

Case of Escher *et al.* v. Brazil

Judgment of November 20, 2009

(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)

In the Case of *Escher et al.*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court", or "the Tribunal"), composed by the following judges:¹

Diego García-Sayán, President in exercise;
Sergio García Ramírez, Judge;
Manuel E. Ventura Robles, Judge;
Margarette Mac Macaulay, Judge, and
Rhadys Abreu Blondet, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary;

pursuant to Article 67 of the American Convention of Human Rights (hereinafter "the Convention" or "the American Convention") and Article 59 of the Rules of Procedure (hereinafter "the Rules"),² decides on the request for interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs delivered by the Tribunal on July 6, 2009 in the present case (hereinafter "the Judgment"), interposed on November 3, 2009 by the representatives of the victims (hereinafter "the representatives").

¹ The judges Cecilia Medina Quiroga and Leonardo A. Franco informed the Court that, for reasons of *force majeure*, they will not be able to participate in the deliberation and signing of the present interpretation. For said reason, the Judge Medina Quiroga gave the Presidency pursuant to Articles 4(3) of the Rules of Procedure, to the Vice-President of the Court, Judge García-Sayán, President in exercise for the present case. Likewise, the Judge Roberto de Figueiredo Caldas, also due to reasons of *force majeure*, did not participate in the deliberation and signing of this Interpretation of the Judgment. Notwithstanding the above said, the said judges were consulted.

² Pursuant to Article 72(2) of the Rules of Procedure of the Inter-American Court, in force since March 24, 2009, "[t]he cases under discussion will continue under this Rules of Procedure, with the exception of those cases that were called to hearing before the said Rules went into force, which will continue under the previous Rules of Procedure." Hence, the Rules of Procedure of the Court mentioned in the present judgment of interpretation corresponds to the document approved by the Court on its XLIX Ordinary Period of Sessions, from November 16 to 25, 2000, and partially reformed by the Court on its LXI Ordinary Period of Sessions, from November 20 to December 4, 2003.

I INTRODUCTION OF THE REQUEST FOR INTERPRETATION AND PROCEEDING BEFORE THE COURT

1. On July 6, 2009, the Court issued the Judgment, which was notified to the parties on August 6, 2009.

2. On November 3, 2009, the representatives presented a request for interpretation of the Judgment, pursuant to Articles 67 of the Convention and Article 59 of the Rules, which "refers to the violations of Articles 8 and 25 of the American Convention" declared in the Judgment. They requested the Tribunal to interpret the operative paragraph number nine, and, specifically, clarify if the duty to investigate extends to: i) the administrative investigation regarding the Judge that authorized the wiretapping; ii) the administrative investigation regarding the military police and the former secretary of security for the wiretapping and divulgation of telephone conversations, and iii) the legal procedure of these matters, with the duly legal responsibility.

3. On November 9, 2009, pursuant to Article 59(2) of the Rules, and following instructions of the President of the Court (hereinafter "the President"), the Secretariat of the Court passed on a copy of the request for interpretation to the Inter-American Commission of Human Rights (hereinafter "the Inter-American Commission" or "the Commission") and Brazil (hereinafter "the State" or "Brazil"). Likewise, it was informed that "given the nature of the request for interpretation", the Inter-American Commission and the State may present the written arguments that they deem pertinent, no later than November 16, 2009.

4. On November 16, 2009, the State presented its written arguments and requested the Court to declare inadmissible the request for interpretation. In their opinion, this is "an attempt [from the representatives] to get a substantial modification to the content of the Judgment [and] broaden the judgment field." On the other hand, in the case that the request was admitted, Brazil required that the Court judges it inadmissible, for: i) it does not exist any difference about the sense or scope of the ninth operative paragraph of the Judgment, and ii) the possible modification of the content of the Judgment will imply in the revision of the facts already considered *non bis in idem* and principle *ne bis in idem*.

5. Also on November 16, 2009, the Commission presented its written arguments on the request of the representatives and stated that the interpretation of the Judgment is unnecessary, for the scope and content of the obligation to investigate as a measure of reparation is determined in paragraph 247 of the Judgment.

II COMPETENCE AND COMPOSITION OF THE COURT

6. Article 67 of the Convention establishes that:

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

7. Pursuant to said Article, the Court is competent to interpret its own Judgements. To examine the request for interpretation and decide on this regard, the Tribunal should have, if possible, the same composition it had when deciding on the respective Judgment,

according to Article 59(3) of the Rules. This time, the Court is composed by the Judges that decided the Judgment which interpretation has been requested by the representatives, with the said modification.³

III ADMISSIBILITY

8. It is up to the Court to verify if the request for interpretation meets the requisites established in the applicable rules, to wit, Article 67 of the Convention and Article 59 of the Rules of Procedure, that pertinently sets that:

1. The request for interpretation referred in Article 67 of the Convention, may be promoted in regards to Judgment of Merits or Reparations, and it will be presented to the Secretariat of the Court indicating on it, precisely, the matters related to the meaning and scope of the Judgment which interpretation is required.

[...]

4. The request for interpretation will not suspend the execution of the Judgment.

5. The Court will determine the proceeding that will follow and will decide through a Judgment.

9. Likewise, Article 29(3) of the Rules establishes that "Judgments and orders of the Court may not be contested in any way."

10. That Court has confirmed that the representatives presented the request for interpretation within the deadline established in Article 67 of the Convention, it was presented on November 3, 2009 and the Judgment was notified to the parties on August 6, 2009.

11. On the other hand, as disposed by this Tribunal on its jurisprudence, a request for interpretation must not be used as means for appeal of the decision which interpretation is requested. Said request has as object, exclusively, to clarify the sense of a Judgment when one of the parties states that the text of its operative paragraphs or its considerations lacks clarity or precision, as long as those considerations affect the operative part. Therefore, a modification or annulment of the Judgment through a request for interpretation cannot be asked.⁴ Likewise, there cannot be a request for the broadening of the reach of a measure for reparation.

12. Regarding the above said, the Court has established that the request for interpretation of the Judgment cannot address matters of fact and right already established and to which the Tribunal already holds a decision.⁵

³ Cf. *Supra* note 1.

⁴ Cf. *Case of Loayza Tamayo v. Perú*. Interpretation of Judgment on Merits. Judgment of March 8, 1998. Series C No. 47, para. 16; *Case of Valle Jaramillo et al. v. Colombia*. Interpretation of the Judgment on Merits, Reparations, and Costs. Judgment of July 7, 2009. Series C No. 201, para. 8; *Case of García Prieto et al. v. El Salvador*. Interpretation of the Judgment on Preliminary Exceptions, Merits, Reparations, and Costs. Judgment of November 24, 2008. Series C No. 188, para. 7.

⁵ Cf. *Case of Loayza Tamayo v. Perú*. Interpretation of the Judgment on Reparations. Judgment of June 3, 1999. Series C No. 53, para. 15; *Case of the Miguel Castro Castro Prison v. Perú*. Interpretation of the Judgment on Merits, Reparations, and Costs. Judgment of August 2, 2008. Series C No. 181, para. 26; and *Case of Cantoral Huamaní and García Santa Cruz*. Interpretation of the Judgment on Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 28, 2008. Series C No. 176, para. 11.

13. The Court will proceed to analyze the request for interpretation presented by the representatives and, if so, will clarify the scope of the ninth operative paragraph of the Judgment. For this, it will examine the matters set forth by the representatives, as well as the observations by the Inter-American Commission and the State.

IV SCOPE OF THE NINTH OPERATIVE PARAGRAPH OF THE JUDGMENT

14. The representatives requested a clarification on the ninth operative paragraph of the Judgment, which establishes that "the State must investigate the facts the led to the violations [...] in the case, in terms of paragraph 247 of the [...] Judgment" to clarify:

15. The Commission affirmed that "the paragraphs [204, 205, and 247] establish the scope of the ninth operative paragraph regarding the lack of a judicial investigation for the divulgation of the recordings that contained phone conversations and that generated the consequent international obligation to investigate as a measure of reparation, despite the fact that this is not the only fact that generated violations in the present case." It stated that the explicit reference of paragraph 247 establishes the scope and content of the obligation to investigate ordered as reparation, reason for which the Commission considers unnecessary the interpretation of the Judgment.

16. The State asked the Court to declare inadmissible the request because it did not comply with the requisites set on Article 67 of the Convention, and Article 29(3) and 59(1) of the Rules of Procedure, and because it is an attempt of the representatives to modify the content of the Judgment. The admission of the request may lead to the establishing of three new obligations for the State. As for the merit of the request, the State affirmed that there is not imprecision or inaccuracy in the Judgment, and that the ninth operative paragraphs does not leave any doubt as for the meaning or scope of the obligation in it. It alleged that said operative paragraph relates the content of the obligation to paragraph 247, which establishes that the facts should be investigated, and determines that, regarding the other violations, the Judgment, its publication, and the compensation for the non-pecuniary damages are measures enough for reparation. Additionally, it expressed that the possible modification of the content of the Judgment, in the sense of ordering the investigation of the facts mentioned in paragraphs 208, 209, and 210 of the Judgment, will lead the State to incur in *bis in idem* in relation to said facts. The above said in virtue that "the Judge [...] who authorized the recordings (referred in paragraphs 208 and 209 of the Judgment), the former Secretary of Security, and the police (referred in paragraph 210 of the Judgment) were duly judicially processed, from which it results *res judicata*." Therefore, it concluded that the request should be considered inadmissible by the Court.

17. The Court considers that even if the scope and meaning of the ninth operative paragraph is evident, in order to clarify any possible question in the regard, the Court will proceed to answer the questions formulated by the representatives and interpret said operative paragraph and *Considering* paragraphs, in terms of Article 67 of the Convention and Article 59 of the Rules.

18. In the first place, the Inter-American Court reminds of its decision of July 6, 2009 it found violations to the rights of guarantees and the legal protection acknowledged in Articles 8(1) and 25(1) of the American Convention, "in relation to the legal and administrative procedures" indicated in paragraphs 204, 205, and 209 of the Judgment.⁶ In consequence, in Chapter XI of the Judgment corresponding to reparations, under the title C.iii) "*Duty to investigate, judge, and if necessary, punish the responsible for violations to Human Rights*", the Court established in paragraph 247, the obligation to investigate said matters, conclusion reflected in the Judgment in the ninth operative paragraph.

19. The ninth operative paragraph of the Judgment sets that the State "must investigate the fact that led to the violations of the present case, in terms of paragraph 247 of the [...] Judgment." From the reading of the said, it is evident that the Court considered that the obligation to investigate resulted as a measure of reparation pertinent for those violations declared by the Tribunal on the Judgment, in paragraph 247.

20. Paragraph 247 reads as:

In this case, the Court found that a violation of Articles 8 and 25 has been proved as regards the criminal investigation into the dissemination of telephone conversations conducted against the former Secretary of Security (*supra* para. 204). The Court also found it proved that the State did not investigate the handing over and dissemination of the tapes with the recorded conversations to one of the media, and did not establish the criminal responsibility for this act (*supra* para. 205). Regarding the handing over and dissemination of the tapes with the recorded conversations, in accordance with the criteria established in the Court's case law, the State must investigate the facts and take the necessary measures. Also, regarding the other violations found, the Court considers that this judgment, its publication and the compensation for the pecuniary damage are sufficient measures of reparation.

21. Also from the reading of this paragraph, the facts and persons on to whom falls the obligation of the State to investigate is evident. Firstly, paragraph 247 of the Judgment points out the facts that should be object of a judicial investigation: a) "the divulgation of phone conversations [done by] the former Secretary of Security", and b) " the delivery and divulgation of the tapes with the recorded conversations." Additionally, in order to clear any possible mistaken interpretation, in that same paragraph there is an explicit reference to paragraphs 204⁷ and 205⁸ of the Judgment, in which the violations that must be

⁶ Cf. *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 6, 2009. Series C No. 200, para. 214.

⁷ Cf. *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 6, 2009. Series C No. 200, para. 204:

204. The Court has indicated that, without judicial authorization, the former Secretary of Security revealed the audio version of the recordings to other people and distributed printed fragments of the conversations, and he may also have disseminated new portions of the recordings (*supra* paras. 95 and 156). Despite the differences between the testimony of the former Secretary of Security and that of the three journalists summoned to give testimony about what happened during the press conference, particularly with regard to the distribution of transcripts of parts of some of the intercepted conversations and the audio reproduction of the recordings during the said event, no other evidence was sought that might have clarified the facts. In this regard, the respective television channels were not asked to provide the tapes with the news items broadcast on the *Journal Nacional* on June 7 and 8, 1999, or the recording of the said press conference. Hence, the Court considers that the Second Criminal Chamber of the Court of Justice of the state of Paraná concluded that the former Secretary of Security did not disseminate new extracts of the telephone conversations without having this evidence or comparing the material involved in the two disseminations.

⁸ Cf. *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 6, 2009. Series C No. 200, para. 205:

investigated were considered. Moreover, paragraph 247 clarifies that “regarding the other found violation”, the reparations that the Tribunal considered pertinent were the publication of the Judgment, and the compensation for non-pecuniary damage. Therefore, the Inter-American Court warns that the literal interpretation of the ninth operative paragraph, read with paragraph signed, allows to determine the content and scope of said operative paragraph and the consequent State obligation.

V
OPERATIVE PARAGRAPH

21. Therefore,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

pursuant to Article 67 of the American Convention on Human Rights, and Article 29(3) and 59 of the Rules of Procedure,

DECIDES:

Unanimously,

1. To declare admissible the request for interpretation of the Judgment on Preliminary Objection, Merits, Reparations, and Costs, presented by the representatives of the victims in the present case presented by the representatives of the victims, in terms of paragraph 17 of the present request for interpretation.
2. To determine the meaning and scope of the Judgment on Preliminary Objection, Merits, Reparations, and Costs, in terms of paragraph 18 to 21 of the present Judgment of Interpretation.
3. To require the Secretariat of the Inter-American Court of Human Rights to notify the present Judgment to the State, the Inter-American Commission, and the representatives of the victims.

Done in Spanish, English, and Portuguese, the Spanish text being authentic, in San José, Costa Rica, on November 20, 2009.

205. The Court also observes that the State did not take other investigative measures that could have determined who was responsible for the first dissemination of the recorded material; namely the delivery of the tapes to the television channel. Despite the findings in the judgment of the Court of Justice of the state of Paraná in relation to the evidence about who was the author of the delivery of the recorded tapes to the press, the principal suspect being a member of the Military Police, no measures were taken to clarify these facts and, if applicable, punish those responsible, despite the provisions of Article 10 of Law No. 9,296/96 and the fact that the offense of the breach of judicial confidentiality should have been investigated by the State *ex officio*.

Diego García-Sayán
President in Exercise

Sergio García Ramírez

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President in exercise

Pablo Saavedra Alessandri
Secretary