

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT (OUR  
LAND) ASSOCIATION V. ARGENTINA**

**JUDGMENT OF FEBRUARY 6, 2020  
(*Merits, reparations and costs*)**

In the case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*,

the Inter-American Court of Human Rights (hereinafter also “the Inter-American Court” or “the Court”), composed of the following judges:\*

Elizabeth Odio Benito, President  
L. Patricio Pazmiño Freire, Vice President  
Eduardo Vio Grossi, Judge  
Humberto Antonio Sierra Porto, Judge  
Eduardo Ferrer Mac-Gregor Poisot, Judge, and  
Ricardo Pérez Manrique, Judge

also present,

Pablo Saavedra Alessandri, Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”) and Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers this judgment, structured as follows:

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\* Judge Eugenio Raúl Zaffaroni, an Argentine national, did not take part in the processing of this case or in the deliberation and signature of this judgment, in accordance with the provisions of Articles 19(1) and 19(2) of the Court’s Rules of Procedure.

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## I

### INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On February 1, 2018, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Court the case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*. According to the Commission, the case relates to the presumed violation of the right to property over the ancestral territory of the indigenous communities that are members of the Lhaka Honhat Association of Aboriginal Communities (*infra* para. 61; hereinafter also “the Lhaka Honhat Association” or “Lhaka Honhat”). The Commission indicated that, when it issued Merits Report No. 2/12 (hereinafter also “the Merits Report”), “two decades had passed” since the communities had “presented their initial request for title in 1991.” It noted that, despite this, the Argentine Republic (hereinafter also “the State” or “Argentina”)<sup>1</sup> had failed to grant the communities “effective title to their ancestral territory.” The land in question is located in two properties that, together, cover around 643,000 hectares (ha), currently identified with the cadastral registration numbers 175 and 5557 of the department of Rivadavia, province of Salta (*infra* para. 80; hereinafter also, with regard to both properties, “Lots 14 and 55”). Prior to 2014, these properties were considered to be “fiscal” lands, owned by the State, and known as “Fiscal Lots 14 and 55.” In 2012, the lots were “allocated” for “subsequent adjudication” to indigenous communities and non-indigenous settlers (*criollos*) residing in the area and, in 2014, they were “transferred” integrally to this population. The Commission indicated that, in addition to the failure to grant title to the land, the State’s failure to “adopt effective actions to control the illegal deforestation of indigenous territory” had violated the right to property, and also that the State had carried out “public works” and granted “concessions for oil and gas exploration” without complying with the requirements of conducting prior “social and environmental impact assessments” and “prior, free and informed consultations.” It argued that Argentina had also violated the communities’ rights “of access to information and [...] to take part in matters that might affect them.” Lastly, it “found that the right to judicial guarantees and judicial protection had been violated owing to the failure to provide an effective procedure to obtain ownership of the ancestral territory; and also due to the successive variations in the applicable administrative procedure for claiming indigenous territory.”

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a) *Petition.* On August 4, 1998, the Commission received the initial petition lodged by Lhaka Honhat, sponsored by the *Centro de Estudios Legales y Sociales* (CELS) and the Center for Justice and International Law (CEJIL).

b) *Admissibility and Merits Reports.* On October 21, 2006, the Commission adopted Admissibility Report No. 78/06, declaring the petition admissible. On January 26, 2012,

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<sup>1</sup> Argentina is a federal State. In this case, both national authorities and authorities of one of the provinces that compose the federation (the province of Salta) intervened. In this judgment, the reference to “the State” or to “Argentina,” except when expressly indicated, refers to the State as a whole, which comprises all its authorities, both national and of the federative entities, including those of the province of Salta.

it adopted Merits Report No. 2/12, in which it reached a series of conclusions,<sup>2</sup> and made several recommendations to Argentina.<sup>3</sup>

c) *Notification to the State*. The Commission notified the Merits Report to the State in a communication dated March 26, 2012, and sent the following day, granting it two months to report on compliance with the recommendations.

d) *Reports on the Commission's recommendations*. On May 25, 2012, the State responded to the Merits Report. It indicated that it had forwarded it to the competent provincial authorities asking them to send their observations, and requested an extension of the time frame to report on the measures taken. According to the file of the procedure before the Commission, the State was granted 22 extensions, the last one on November 1, 2017. These extensions were granted because the Commission noted some progress in the implementation of its recommendations. In this regard, some actions may be underlined. In briefs dated January 15 and July 8, 2014, the State presented reports on the actions undertaken and the resources provided in the area by the State and by the province of Salta (hereinafter also "Salta" or "the province"), and on the "road map" to comply with the recommendations. On July 19, 2016, Argentina provided the Commission with information on the measures taken and noted their complexity. On October 25, 2017, the parties and the Commission held a working meeting in which it was agreed that the State would submit a detailed proposal for compliance with the recommendations. On November 1 that year, the Commission granted the last extension to the State, which submitted its proposal dated November 24, as well as a new report and a request for an extension in a communication dated January 16, 2018. This request was denied. The Commission considered that, although some progress had been made, the proposal submitted by the State "only offered long-term possibilities of implementation" and that there was no prospect that the recommendations would be implemented within a reasonable time.

3. *Submission to the Court*. On February 1, 2018, based on the foregoing, the Commission submitted this case to the Court. It appointed then Commissioner Luis Ernesto Vargas Silva and Executive Secretary Paulo Abrão as delegates, and Elizabeth Abi-Mershed, then Deputy Executive Secretary, and Silvia Serrano Guzmán and Paulina Corominas as legal advisers.

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<sup>2</sup> The Inter-American Commission concluded that the State had violated, to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, the following rights and provisions of the Convention in relation to the obligations to respect and to ensure the rights and to adopt domestic legal provisions established in Articles 1(1) and 2 of the Convention: the rights to property, to freedom of thought and expression, and to political rights recognized, respectively in Articles 21, 13 and 23. Also, that Argentina had violated, to the detriment of the same communities, the rights to judicial guarantees and to judicial protection established in Articles 8 and 25 of the American Convention, respectively, in connection with its Articles 21 and 1(1) and, as it later clarified (*infra* footnote 113) also Article 2 of the treaty.

<sup>3</sup> The Commission recommended that the State: "1. [...] finalize promptly the legalization process in Fiscal Lots 14 and 55, taking into account, in addition to the inter-American standards described in th[e Merits R]eport, the following guidelines: The petitioners have the right to an undivided territory that allows them to develop their nomadic way of life; the 400,000 hectares that the government has promised to allocate them must be continuous, without obstacles, subdivisions or fragmentation, with due regard to the claims of other indigenous communities. The fences which have been set up within the indigenous territory must be removed. Deforestation must be controlled. 2. Provide redress for the violation of the rights to property and access to information concerning the execution of public works without prior informed consultation, environmental impact assessments or benefit sharing. 3. Ensure that, when demarcating the territory and approving any future public works or concessions on indigenous ancestral lands, the State conduct prior informed consultations and environmental impact assessments and share the resulting benefits pursuant to inter-American standards."

4. *The Commission's requests.* The Commission asked this Court to find and declare the international responsibility of Argentina for the violations established in the Merits Report and to order, as measures of reparations, the recommendations included therein (*supra* footnotes 2 and 3).

## II PROCEEDINGS BEFORE THE COURT

5. *Notification of the State and the representatives.* The submission of the case was notified to the State and to the representatives (*infra* para. 6) on February 7, 2018.

6. *Brief with pleadings, motions and evidence.* On May 25, 2018, CELS and Lhaka Honhat (hereinafter, referring to both organizations, "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Articles 25 and 40 of the Rules of Procedure. They agreed with the Commission's conclusions concerning the articles of the Convention that had been violated (*supra* footnote 2). In addition, they alleged the violation of the rights to recognition of juridical personality, freedom of association, and freedom of movement and residence, as well as the rights to cultural identity, adequate food (hereinafter also "the right to food") and a healthy environment that they alleged were contained in Article 26 of the Convention. They asked the Court to order the State to take different measures of reparation and to reimburse costs and expenses.

7. *Answering brief.* On September 4, 2018, the State presented its brief with a preliminary objection, answering the submission of the case and with observations on the pleadings and motions brief (hereinafter "the answering brief"). It submitted an argument that it called a "preliminary objection" (*infra* para. 15), denied the alleged violations, and responded to the requests for reparation.

8. *Public hearing.* On February 8, 2019, the then President of the Court<sup>4</sup> (hereinafter, "the President") issued an order in which he called the State, the representatives and the Inter-American Commission to a public hearing on the alleged "preliminary objection" and the possible merits, reparations and costs, in order to hear the final oral arguments and observations of the parties and of the Commission, respectively. In addition, he called on two members of the indigenous communities proposed by the representatives to testify at this hearing, as well as two expert witnesses, one proposed by the State and the other by the Commission. He also required affidavits to be received from eight deponents proposed by the State; five members of the indigenous communities presumed victims, and three witnesses; and also from two expert witnesses, proposed by the representatives. The hearing was held on March 14, 2019, at the seat of the Court during its 130<sup>th</sup> regular session.<sup>5</sup> During the hearing, members of the Court asked the parties and the Commission to provide certain

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<sup>4</sup> Judge Eduardo Ferrer Mac-Gregor Poisot was the President of the Court on that date.

<sup>5</sup> There appeared at this hearing: (a) for the Inter-American Commission: Luis Ernesto Vargas, Commissioner; Silvia Serrano Guzmán and Paulina Corominas, Executive Secretariat lawyers; (b) for the presumed victims: Francisco Pérez and Rogelio Segundo, members of Lhaka Honhat, and Diego Morales, Matías Duarte and Erika Schmidhuber Peña, CELS, and (c) for the State: Javier Salgado, Agent, Director del International Human Rights Litigation of the Ministry of Foreign Affairs and Worship; Ramiro Badía, Deputy Agent and National Director of Legal Affairs of the National Human Rights and Cultural Pluralism Secretariat; Siro de Martini, Adviser to the Ministry of Justice and Human Rights; Pamela Caletti, State Prosecutor for the province of Salta, and Ana Carolina Heiz, Coordinator General of the State Prosecution Service of the province of Salta.

information and explanations. In addition, the Court advised that it had accepted the representative's request, made in the pleadings and motions brief, to conduct an on-site procedure (*infra* para. 10).

9. *Amicus curiae*. The Court received *amicus curiae* briefs from: (i) Asociación de Abogados y Abogadas de Derecho Indígena (AADI) and the Servicio Paz y Justicia (SERPAJ),<sup>6</sup> (ii) the Human Rights Center of the Jurisprudence Faculty of the Pontificia Universidad Católica del Ecuador;<sup>7</sup> (iii) the Fundación Ambiente y Recursos Naturales (FARN);<sup>8</sup> (iv) the Due Process of Law Foundation (DPLF), the Human Rights Clinic of the University of Ottawa, the Democracy and Human Rights Institute of the Pontificia Universidad Católica del Perú, the Center for Studies on International Human Rights Systems of the Universidade Federal do Paraná, the International Human Rights Clinic of the Universidad de Guadalajara, and the O'Neill Institute for National and Global Health Law at Georgetown University Law Center;<sup>9</sup> (v) various organizations coordinated by the Secretariat of the International Economic, Social and Cultural Rights Network (ESCR-Net);<sup>10</sup> (vi) Tierraviva a los pueblos indígenas del Chaco (hereinafter "Tierraviva");<sup>11</sup> (vii) the Legal Clinic of the Human Rights Center of the Law Faculty of the Universidad de Buenos Aires (CDH-UBA),<sup>12</sup> and (viii) Oliver De Schutter, Professor

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<sup>6</sup> The document was signed, on behalf of AADI, by Darío Rodríguez Duch, President, and on behalf of SERPAJ, by Adolfo Pérez Esquivel, President and recipient of the Nobel Peace Prize, Ana Almada, Luis Romero Batallano and Angelica Mendoza, Coordinators, and Mariana Katz, lawyer. It relates to the right "to recognition of communal territories by an appropriate legal mechanism."

<sup>7</sup> The brief, signed by Mario Melo Cevallos (Coordinator), José Valenzuela and Estefanía Gómez, refers to the right to ancestral territory of the indigenous peoples when this is partially occupied by settlers.

<sup>8</sup> The text was signed by Andrés Nápoli, Executive Director. It deals with "aspects related to matters of consultation, consent and environmental impact assessments in relation to the guarantee of the right to a healthy environment."

<sup>9</sup> The brief was signed, on behalf of each establishment, respectively, by: Katya Salazar and Daniel Cerqueira, Executive Director and Senior Program Officer; Salvador Herencia Carrasco, Director; Elizabeth Salmon and Cristina Blanco, Director and Principal Researcher; Melina Girardi Fachin, Coordinator; Ángel Cabrera, Coordinator, and Andrés Constantini, Associate. It indicated that the foregoing, with the exception of Katya Salazar and Elizabeth Salmón, took part "in the research, elaboration and review" of the document, together with Quetzal Prado, Miguel Alcaraz, Verónica Luna, Lucero Salazar, Askur Palencia and Sergio Villa (students, Universidad de Guadalajara); Marina Bonatto, Francisco Foltran, Fabio Rezende Braga and Kauan Cangussú (students, Universidade Federal do Paraná), and Jordi Feo Valero and Shona Moreau (students, University of Ottawa). The brief refers to "[i]nternational standards and comparative case law on the demarcation of indigenous territories and economic, social, cultural and environmental rights."

<sup>10</sup> These organizations are: Asociación Civil por la Igualdad y la Justicia (ACIJ); Amnesty International; Interamerican Association for Environmental Defense; Comisión Colombiana de Juristas; Dejusticia; FIAN International; International Women's Rights Action Watch-Asia Pacific, and Minority Rights Group International. In addition to Fernando Ribeiro Delgado, Coordinator of the Working Group on Strategic Litigation of the ESCR-Net, the document was signed, respectively, by: Dalile Antúnez, Co-Director; Lucy Claridge, Director for Strategic Litigation; Liliana Ávila, Senior Lawyer; Gustavo Gallón Giraldo, Director; Diana Guarnizo, Director of Research on Economic Justice; Felipe Bley Folly, Lawyer; Fernando Priyanthi, Executive Director, and Jennifer Castelo, Head of Legal Affairs, a.i. The document deals with the Court's "jurisdiction and authority" to rule on "violations of the rights guaranteed by Article 26 of the Convention [...] including the rights to a health environment, cultural identity, food and water."

<sup>11</sup> This communication, signed by Rodrigo Villagra Carrón, Julia Cabello Alonso and Oscar Ayala Amarilla refers to issues that were identified as follows: "The meaning of the land for the indigenous peoples in relation to the *criollo* land claims [...] and the role of the *criollos* in this specific case"; "Time as a determinant factor in the realization of human rights"; "Agreements reached between the parties involved"; "International undertakings and the national budget"; "Provincial state and national State," and "Subject of law."

<sup>12</sup> Martín Sigal (Director) and María Noel Leoni Zardo (Professor) signed the letter. Its arguments refer to the "inadequate nature of the [Argentine] federal legislation in relation to international standards" with



at the Université catholique de Louvain (UCL) and former United Nations Special Rapporteur on the right to food (2008–2014).<sup>13</sup>

10. *On-site procedure.* In their pleadings and motions brief, and also on October 31, 2018, the representatives requested an “on-site visit.” On November 13, 2018, the State indicated that an on-site procedure (hereinafter “on-site visit” or “visit”) was extremely important and the Commission considered it was “useful and pertinent.” Bearing in mind the principle of immediacy, the Court understood that it would be appropriate to conduct this on-site procedure and it took place on May 17, 2019.<sup>14</sup> During the visit to the village of Santa María an assembly of representatives of indigenous communities was held. On that occasion, they discussed the purpose of the case before the Court. Subsequently, the delegation visited the areas surrounding Santa María in order to observe, above all, the alleged presence of fencing and livestock. The delegation then traveled to the *Misión la Paz* International Bridge. In addition, a meeting was held with representatives of *criollo* families in Santa Victoria Este. Following this, the delegation visited part of the area in which, according to the parties and the Commission, *criollo* families would be transferred and spoke to a relocated *criollo* family who explained their situation.

11. *Final written arguments and observations.* On June 3, 2019, the representatives and Argentina forwarded their final written arguments with attached documents and the Commission submitted its final written observations.<sup>15</sup> The representatives provided information on facts that had occurred following the presentation of the pleadings and motions brief: the increase in the number of communities, and flooding that had occurred at the beginning of 2019 (*infra* paras. 24, 28 and 39).

12. *Deliberation of this case.* The Court began to deliberate this judgment on November 27, 2019, and continued starting on January 29, 2020.

### **III JURISDICTION**

13. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Argentina has been a State Party to the American

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regard to “the rights of indigenous communities to obtain recognition of their juridical personality and to accede to their lands.”

<sup>13</sup> The brief refers to the right to food in this case

<sup>14</sup> The Court’s delegation for this visit was composed of Judges Humberto Antonio Sierra Porto and L. Patricio Pazmiño Freire; the Legal Affairs Coordinator, Alexei Julio Estrada, and Agustín Enrique Martín, lawyer attached to the Court’s Secretariat. The State was represented by Edith Azucena, Provincial Minister for Indigenous Affairs and Social Development; Ariel Francisco Sánchez, Deputy Secretary for Territorial Regulation and Registration of Indigenous Communities; Florencia Luñis Zavaleta, Director for Regularization of Lands with Community Conflicts; Pamela Caletti, State Prosecutor for Salta; Ana Coralina Geist, Coordinator General of the State Prosecution Service of Salta; Graciela María Galindez, Notary Public of the provincial government; Jimena Psathakis, President of the National Institute for Indigenous Affairs (INAI), Ana Bourse and Juan Cruz Testa (INAI) and Javier Salgado, Director of International Human Rights Litigation of the Ministry of Foreign Affairs and Worship. The Inter-American Commission was represented by Paulina Corominas Etchegaray, Legal Adviser to the Commission, and the representatives by Francisco Pérez and Rogelio Segundo from Lhaka Honhat; Diego Morales and Matías Duarte from CELS, and Ezequiel María and Julián Reynoso, who made an audiovisual recording.

<sup>15</sup> During the public hearing, the Court advised that, since an on-site visit would be made, it had decided to postpone the deadlines established in the order of February 8, 2019, for the presentation of final written arguments and observations. On March 19, 2019, it advised that the deadline would expire on June 3, 2019.

Convention since September 5, 1984, and accepted the contentious jurisdiction of the Court on that same date.

#### **IV PRELIMINARY CONSIDERATIONS**

14. Before reviewing the evidence received and the facts of the case, and examining its merits, the Court will now include some considerations on: (a) the State's opposition to the Court examining facts that occurred after January 26, 2012, and (b) determination of the presumed victims.

##### **A) Facts subsequent to January 26, 2012**

###### ***A.1 Arguments of the parties and the Commission***

15. The **State** argued, referring to this as a "preliminary objection," that the Court "did not have jurisdiction" for facts subsequent to January 26, 2012, the date on which Merits Report No. 2/12 was adopted. It indicated that domestic remedies had not been exhausted with regard to such facts.

16. Argentina made this assertion in general terms, referring to all the facts that had taken place following the said date. Nevertheless, it mentioned some facts as "examples," and did so alluding to allegations made by the representatives in relation to those facts. The factual circumstances mentioned by the State in this regard are as follows: (1) the issue of Decree 2398/12, published on July 25, 2012, concerning the adjudication of land; (2) the adoption, in 2013, of the additional protocol on collaboration between the National Institute for Indigenous Affairs (INAI) and the Provincial Executing Unit (UEP), ratified by Decree 2001/13, which established a "work plan" for the land distribution; (3) the issue, in 2014, of Decree 1498/14, which "recognizes and transfers" property; (4) meetings held between officials on June 23 (or July) and July 11, 2012, during which it was indicated that the communities required legal status in order to formalize communal property ownership; (5) "episodes" that occurred in "mid-2015" and towards the end of 2016, in which, respectively, a topographer had attempted to ignore a map prepared by members of indigenous communities, and the UEP had done some work without guaranteeing the participation of indigenous communities; (6) the adoption of the project "Northeastern Argentine Gas Pipeline (GNEA)," which the representatives indicated they had become aware of in 2014, and that was approved in 2015 by Provincial Resolution 16/15, and the subsequent "attempts" to stop this, and (7) the alleged "attempts to develop Rancho El Nato," which the representatives indicated they had become aware of towards the end of 2016.

17. The **representatives** argued that all the facts that had occurred after the issue of the Merits Report should be examined because they were related "directly [...] to its contents."

18. The **Commission** observed that the State's argument did not constitute a preliminary objection because it referred to the merits of the case: the factual framework.

###### ***A.2 Considerations of the Court***

19. The Court notes that the State's objection does not relate to the Court's jurisdiction or to the requirements for the admissibility of the case, but rather to the

determination of its factual framework. Therefore, it does not constitute a preliminary objection.

20. It should be recalled that, although the factual framework of the case is based on the facts set out in the Merits Report, it can also comprise the supervening facts that may be forwarded to the Court at any stage of the proceedings before the delivery of the judgment, provided they are related to the facts of the case.<sup>16</sup>

21. That said, the State did not explain clearly why it considered that all the facts subsequent to January 26, 2012, should be denied the status of supervening facts; Argentina only mentioned some examples included in the allegations made by the representatives.

22. Among those examples, the State referred to facts related to the project "Northeastern Argentine Gas Pipeline (GNEA)," which, it indicated, had been approved in 2015, as well as alleged "attempts" "to develop" a locality within the area claimed by the indigenous communities called "Rancho El Ñato," which the representatives had become aware of at the end of 2016.

23. Not only were these facts subsequent to those described in the Merits Report, but they are also independent of the latter. The Merits Report mentioned various public works or projects in the territory, describing the construction of an international bridge, the "construction and widening" of roads, and oil and gas exploration. The Court finds that the facts indicated by the representatives regarding the gas pipeline and the infrastructure development do not evolve from the facts contained in the Merits Report; nor are they supplementary circumstances that explain in greater detail the facts described by the Commission. To the contrary, although they may relate to the communal property that is claimed or to the rights related to this, they are facts that would constitute new and different violations to those that the Commission submitted to the consideration of the Court. Consequently, the Court understands that the alleged facts relating to the construction of a gas pipeline in 2015 and the development of Rancho El Ñato do not form part of the factual framework of this case. Hence, nor does an administrative action relating to the gas pipeline, which the representatives alleged was filed in July 2015, form part of the factual framework. The Court will not analyze these factual circumstances or the arguments that refer specifically to them.

24. Added to the above, and although it does not form part of the "examples" described by the State, the following should be clarified: in their final written arguments, the representatives advised that, owing to the construction "without consultation" of route 54, "the normal run-off of water was affected, and this caused extensive flooding at the beginning of 2018." The facts relating to public works on provincial route 54 fall within the factual framework established in the Merits Report, but this does not cover subsequent circumstances that could possibly relate, in part, to the way in which the work was carried out. An analysis of this would constitute an excessive addition to the facts of the case. Therefore, the Court determines that the said flooding does not form part of the factual framework of the case.

25. To the contrary, other facts should not be excluded. The Merits Report described various circumstances related to the "[s]ituation of the indigenous communal property."

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<sup>16</sup> *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 59, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2018. Series C No. 37, para. 45.

With the exception of the facts that have been excluded, the other facts alluded to by the State (*supra* para. 16) are acts that relate to the recognition of property rights. Thus, they constitute a development or evolution of the facts described in the Merits Report. Therefore, they are facts that are part of the case submitted to this Court and can be considered supervening facts; they correspond to the factual framework of the case, and they will be examined.

26. It remains to clarify that, since the supervening facts are part of the factual framework of the case, by definition, they do not constitute a new case or a new situation that presumably violates rights. Accordingly, it is not appropriate to examine the State's arguments concerning the requirement of prior exhaustion of domestic remedies (*supra* para. 15).

## **B) Determination of the presumed victims**

### ***B.1 Arguments of the parties and the Commission***

27. The **Commission**, in the Merits Report issued on January 26, 2012, considered that the victims were 27 communities that, based on information provided by the State, are members of the Lhaka Honhat Association. It also noted that "the number of indigenous communities that inhabit [former] Fiscal Lots 55 and 14 has varied in the course of the present proceedings."<sup>17</sup> In its final written observations, the Commission indicated that "regardless of those represented by [Lhaka Honhat,] all [the communities] have a legitimate right to their ancestral territory."

28. The **representatives** indicated that, according to Provincial Decree 1498/14 of 2014, the State had recognized 71 communities as holders of communal property rights; that by March 14, 2018, another 18 had been established, and that by April 25 that year there were "at least 92 communities that were fighting for their rights."<sup>18</sup> They explained that the variation was "due to the nature of the communities, which merge to form new communities and separate to create others." On June 3, 2019, they presented an updated list of the indigenous communities at May that year, identifying a total of 132 indigenous communities in the territory.<sup>19</sup> They explained that this did not represent "individuals who were not already incorporated"; rather, they were "the same individuals who were already living in the territory," but who, for different reasons, had decided to form other communities.

29. The **State** argued that it was "necessary to consider the complexity represented by the appearance of new communities that, in future, may not want to be part of a single title, which could lead to inter-community conflicts because they all have shared

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<sup>17</sup> It explained that "[t]he initial petition of 1998 referred to 35 indigenous communities, while in October 2007, the petitioners indicated a total of 45 communities; [and that] the State, in February 2009, referred to 50 communities, and in May 2011, it informed about 47 communities." Despite this, the Court notes that the initial petition alluded to "approximately" 35 communities without identifying them. When referring to the communities indicated in the initial petition in the Merits Report, the Commission merely listed 21, explaining that they had "provided the precise geographical location of their hunting and gathering routes." The 21 communities listed in the Merits Report that the Commission understood to be included in the initial petition and the 27 that, in the Merits Report, the Commission considered victims are identified, respectively, in Annexes I and II to this judgment.

<sup>18</sup> The 71 communities indicated in Decree 1498/14 and the 92 referred to in the pleadings and motions brief are listed in Annexes III and IV to this judgment, respectively.

<sup>19</sup> The 132 communities indicated by the representatives are listed in Annex V to this judgment.

ownership and use of natural resources.” Argentina disputed the supervening nature of the most recent list of communities presented by the representatives and indicated that it “has no information” as to the authenticity of the list.

## **B.2 Considerations of the Court**

30. First, the Court notes that it is admissible, in cases relating to the inherent rights of indigenous peoples, that the indigenous “communities” are considered presumed victims.<sup>20</sup>

31. In addition, although, according to Article 35(1) of the Rules of Procedure, the Merits Report should identify the presumed victims, Article 35(2) of these rules establishes an exception, which applies when “it has not been possible to identify one or more of the alleged victims in cases of massive or collective violations of human rights.”<sup>21</sup> The Court has assessed the particular characteristics of each case when determining whether this exception is admissible.

32. The information presented to the Court indicates that the number of indigenous communities settled on the land claimed has varied. The representatives advised that, in June 2019, there were 132 communities, which is more than the number indicated in the pleadings and motions brief. Although the State disputed the supervening nature of the increase, it did not provide any reasons for this. There is no reason to consider that the information provided by the representatives is false. Moreover, they have clarified that the increase does not refer to new individuals; rather, the same individuals have formed new communities.

33. It has been pointed out that the variations in the numbers respond to the inherent characteristics of the peoples concerned because they are nomadic communities, whose ancestral social structure involves the dynamic known as “fission-fusion.”<sup>22</sup> This has not been indicated merely by the representatives and the Commission, but is also revealed by the expert evidence. Thus, expert witness Naharro stated that “it is very difficult to

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<sup>20</sup> Thus, pursuant to its “reiterated case law,” the Court has indicated that “the indigenous communities are holders of rights protected by the inter-American system and may appear before it to defend their rights and those of their members” (Cf. *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 And 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) And (B) of the Protocol of San Salvador*). Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 72). The Court notes that it has been indicated that the indigenous “communities” presumed victims in this case belong to different “peoples” (*infra* para. 47). It is useful to clarify that, although the State has indicated that “indigenous people” and “indigenous communities” are used indistinctly in Argentine law, there are domestic laws which would appear to infer that the word “people” has been understood to cover a larger group than the word “community” (for example, Resolution 328/2010 of the National Institute for Indigenous Affairs, which refers to “communities” as constituents of “peoples” (*infra* para. 54). Similarly, Article VIII of the American Declaration on the Rights of Indigenous Peoples (adopted on June 14, 2016 - AG/RES. 2888 (XLVI-O/16)), states that “[i]ndigenous individuals and communities have the right to belong to one or more indigenous peoples, in accordance with the identity, traditions, customs, and systems of belonging of each people. No discrimination of any kind may arise from the exercise of such a right.” Thus, for the purposes of this case, the Court understands that the word “community” represents a unit composed of indigenous individuals or families who belong to one or more indigenous “peoples.”

<sup>21</sup> *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of Coc Max et al. (Xamán Massacre) v. Guatemala. Merits, reparations and costs*. Judgment of August 22, 2018. Series C No. 356, para. 16.

<sup>22</sup> This “fission-fusion” consists in the indigenous communities merging into new communities and separating to create others, so that the number of communities may change over time. This dynamic of the indigenous peoples was recognized in Merits Report 2/12 and has not been contested.

calculate the exact number of communities; the figure is constantly changing because the process of fission and fusion of the residential units is part of the main social repertoire aimed at maintaining peaceful coexistence.”

34. This difficulty relates to the cultural characteristics of the indigenous communities. This is a factual situation that, as such, exists regardless of formal delimitations that could be established for practical reasons such as those revealed by the State’s argument concerning the possible “complexity” due to the failure to make a precise determination (*supra* para. 29). Delimiting the presumed victims by ignoring the cultural characteristics of the communities concerned would be inconsistent with the protection of the rights of indigenous peoples and communities based on their cultural identity; it could also have an impact on the effectiveness of the decision taken by the Court which would be circumscribed to a group of communities defined on a merely formal basis that did not necessarily correspond to the factual reality.

35. This Court finds that the case is collective in nature and that Article 35(2) of the Rules of Procedure is applicable. The Court considers that all the indigenous communities indicated by the representatives in their final written arguments that live on the land previously identified as “Fiscal Lots 14 and 55” and currently identified with cadastral registration numbers 175 and 5557 of the department of Rivadavia, in the province of Salta, are presumed victims (*supra* para. 1 and *infra* para. 80). Therefore, the presumed victims in this case are the 132 indigenous communities indicated by the representatives (*supra* para. 28 and Annex V). It should be understood that this includes the communities of the indigenous peoples involved in this case (*infra* para. 47) who inhabit the said territory, and that may derive from those 132 communities through the said “fission-fusion” process (*supra* para. 33).<sup>23</sup>

36. It is also pertinent to establish that the Court has taken note that Lots 14 and 55 are also inhabited by “*criollos*” or non-indigenous settlers. The Court is prevented from ruling directly on the rights of the non-indigenous settlers because they are not a formal party to these international judicial proceedings. However, it is undeniable that they are a party, in the physical sense, to the substantive conflict related to the use and ownership of the land. Although this Court is unable to rule on their rights, it understands that it is relevant to take their situation into account in order to examine this case appropriately and to ensure the effectiveness of the decision adopted in this judgment. The Court has endeavored, within the procedural rules that govern its actions, to listen to the *criollos*, and it met with several individuals representing *criollo* families and organizations in the context of the on-site visit. During the meeting, the territorial problems involved were discussed, and they expressed their points of view on the procedure to locate the *criollo* settlers, the conditions required to resolve the territorial conflict, and the State’s intervention in this regard. In addition, the Court’s delegation received documentation presented by the *criollos* during the meeting and afterwards. This documentation contains a “proposal” to differentiate the indigenous territory from the land corresponding to the *criollo* population. The Court has also received written testimony from some *criollos* (*infra* para. 45), in which they referred to the facts of this case describing, among other matters, the impact and the difficulties arising from the

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<sup>23</sup> The Court clarifies that, based on the principle of self-recognition or self-identification with the indigenous identity and the right to participate in indigenous cultural life and cultural identity, which includes indigenous forms of organization as applicable, the definition of which communities are part of the 132 resulting from the “fission-fusion” process does not correspond to the State authorities or to this Court, but to all the indigenous communities. Nevertheless, the presumed victims in this case do not encompass just any indigenous community or person that could inhabit the territory in question, but only the 132 communities indicated and, if appropriate, those derived from these 132 through the “fission-fusion” process.

territorial relocation process. The Court will bear all this in mind, in particular when evaluating the actions taken in the case in relation to the presence of *criollo* settlers on the land claimed by the indigenous communities and their relocation, and when considering the measures of reparation that could be required in this regard.

## V EVIDENCE

### A) Admissibility of the documentary evidence

37. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, attached to their main briefs (*supra* paras. 1, 3, 6 and 7). It also received documents attached to the final written arguments of the representatives and the State (*supra* para. 11), two documents handed over during the on-site visit, and one document sent later by the *criollo* settlers (*infra* paras. 40 and 43, and footnote 27). Videos of the visit were also incorporated into the case file (*infra* para. 39).

38. The Court admits those documents presented at the appropriate moment by the parties and the Commission the admissibility of which was not contested or challenged and whose authenticity was not questioned.<sup>24</sup> Also, on August 29, 2019, the Court advised the parties and the Commission that it had incorporated evidence, *ex officio*, and asked the State to provide helpful evidence. The parties and the Commission did not object to the admissibility of this documentation, which has been incorporated into the case file.<sup>25</sup>

39. The representatives presented two sets of documents with their final written arguments: (a) a report on flooding at the beginning of 2019, prepared by Luis María de la Cruz, together with his *curriculum vitae*, and (b) a list of 132 indigenous communities and a series of documents indicating the names of the communities and of the *caciques*, or in which representatives of indigenous communities state that they are settled in the territory claimed in this case and that they support Lhaka Honhat. On June 5, 2019, the representatives forwarded videos, photographs and audio recordings of the assembly of *caciques* held on May 17, 2019, during the Court's visit. On June 18, 2019, the State considered all the preceding documents were time-barred owing to the moment when

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<sup>24</sup> Cf. Article 57 of the Rules of Procedure; also, *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Gorioitía v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of September 3, 2019. Series C No. 382, para. 27. See also, similarly, *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2019. Series C No. 397, para. 38.

<sup>25</sup> The following documents were incorporated, *ex officio*, as evidence: (A) Domestic case law: Federal Administrative Contentious Chamber, Chamber III, Mapuche Trypayantu Community v. National State–INAI ref. Discovery proceedings. Judgment of November 22, 2018; CSJN, province of Neuquén v. National State (Ministry of Social Development - National Institute for Indigenous Affairs) ref. challenge to administrative acts and request for a declaratory judgment, judgment of September 11, 2018, point I; Aguas Blancas Aboriginal Community v. Province of Salta – Amparo. Judgment of September 19, 2016. File No. CJS 37,010/14; volume 207:289/306; "Indigenous Federation of Neuquén v. Province of Neuquén ref. action on unconstitutionality," 10-12-2013. (B) National legislation: law 24,071; Civil Code, national law 17,711; Civil and Commercial Code, law 26,994; law 25,799, law 26,160; law 23,302; Decree of the National Executive Branch (PEN) 155/89, PEN Decree 1122/07; PEN Decree 791/12; PEN Decree 672/2016; INAI Resolution 587/2007; INAI Resolution 70-E/2016; INAI Resolution 478/2018; INAI Resolution 477/2018; INAI Resolution 328/2010. (C) Salta legislation: law 7,070 and Decree 3505/14. In addition, at the Court's request, on September 5, 2019, the State forwarded Salta Ministerial Resolution 449/1992 of December 9, 1992 and Salta Decree 3097/95.

they were presented and asked the Court to reject them. Also, during the visit and on different days of June 2019, videos on that procedure were presented.<sup>26</sup>

40. First, the Court recalls that, on April 26, 2019, the Court's Secretariat had requested the parties to forward the audiovisual recording of the visit. In addition, the on-site procedure, carried out pursuant to the principle of immediacy, is evidence that will be taken into consideration. The above-mentioned documents cannot, in themselves, be considered as "documentary proof"; rather they play a supporting role, providing an account of what the Court's two judges witnessed directly. To this extent, the documents are useful. Therefore, the Court admits the videos of the visit forwarded by the representatives and the State. It also considers that the documents received during the visit are useful and admits them pursuant to Article 58 of the Rules of Procedure.<sup>27</sup> The second set of document indicated in the preceding paragraph, forwarded by the representatives with their final written arguments are also useful and are admitted.

41. The report by Luis María de la Cruz (*supra* para. 39) was not requested and refers to the 2019 floods, an event that is not part of the factual framework (*supra* para. 24). Consequently, neither the report nor the author's *curriculum vitae* is admissible.

42. On June 3, 2019, together with its final written arguments, the State presented Resolution 4811/96 and Resolution 328/2010, which the Court had requested during the public hearing of March 14, 2019. The representatives and the Commission made no observations in this regard. The Court admits these documents because they were requested.

43. Lastly, on July 29, 2019, the Court received a document from the following "Associations of *Criollo* Families": Organization of Criollo families (OFC), *Asociación de Pequeños Productores Real Frontera*, *Asociación Ganadera 20 de Septiembre*, *Asociación Vecinos Unidos*, *Asociación Nuestro Chaco* and "some unaffiliated holders of occupancy rights," with "a comprehensive proposal to resolve the [...] land processes in relation to [...] Lots [...] 55 and 14."

44. The Court has indicated that the *criollos* are not a formal party to these proceedings (*supra* para. 36), but notes that the document they forwarded is useful. The Court takes into account the particular circumstances of this case as regards the involvement of the *criollo* population in the disputed aspects, and also that the testimony of some members of this population has been received both in written statements and

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<sup>26</sup> On June 26, 2019, the Court sent the representatives and the Commission the electronic links for the videos forwarded by the State on June 24. In addition, it advised the State that one link could not be accessed. On June 28, Argentina presented the videos and they were forwarded to the Commission and the representatives. On July 5, 2019, they advised that they had difficulty understanding the dialogue recorded in the videos. On July 15, the Commission indicated that "it had been unable to access the videos by the electronic links" and asked for a three-day extension to make observations following the date on which it was able to access the videos. The same day, the representatives indicated that they had no observations to make on the videos presented by the State, even though they reiterated the difficulties mentioned previously. On August 5, 2019, the Secretariat again forward the videos to the Commission and, regarding the comments of the representatives, clarified that the problems lay with the original videos and did not depend on the Secretariat. On August 8, 2019, the Commission indicated that it had no observations to make on the videos.

<sup>27</sup> The documents presented were: note of May 15, 2019, signed by Víctor González, *Cacique* of the Misión La Paz Community, and note of May 16, 2019, signed by representatives and members of *criollo* associations (Cf. merits file, fs. 1634 to 1637 and 1638 to 1639). They were forwarded to the parties and the Commission, who did not contest their admissibility.



during the on-site procedure. Consequently, the Court admits this document based on its authority under Article 58(a) of the Rules of Procedure.<sup>28</sup>

**B) Admissibility of the testimonial and expert evidence**

45. During the public hearing, the Court heard the statement of two caciques of indigenous communities, Francisco Pérez and Rogelio Segundo. It also received the affidavits of Francisco Gómez, Humberto Chenes, Constantino Fortunato, Asencio Pérez and Víctor González, who are members of indigenous communities, and of the witnesses Abraham Ricalde, Zaturnio Ceballos and Oscar Dante Albornoz, *criollo* settlers. In addition, it received affidavits with the expert opinions of Nancy Adriana Yáñez Fuenzalida, Rodrigo Sebastián Solá, Norma Teresa Naharro and Emiliana Catalina Buliubasich.<sup>29</sup> All these statements were admitted.

**VI  
FACTS**

46. The facts of this case refer to a claim by indigenous communities to the ownership of lands located in the Argentine province of Salta, which has been ongoing for nearly 35 years. Over this period, the State has taken various steps and enacted several laws. Some of these, especially in 1991, 2012 and 2014, made progress towards the recognition of indigenous land ownership. As will be described, implementation of actions related to the indigenous territory has not yet concluded. The relevant circumstances include the presence of non-indigenous settlers on the land claimed and also various activities being carried out on these lands: livestock farming, installation of fences and illegal logging. The factual framework of the case also includes projects and civil works on these lands. In addition, there have been several administrative and judicial actions that relate to this case, including the establishment, in 1992, of the Lhaka Honhat civil association to claim the land and its request, in 2017, to be recognized as an indigenous organization. The relevant facts are set forth below, and in the following chapters of this judgment. The Court will now describe: (a) the population that lives on Lots 14 and 55; (b) the relevant legislation on indigenous land; (c) the indigenous territorial claims in this case; (d) the civil works, activities and projects in the territory claimed, and (e) the administrative and judicial actions filed in this case.

**A) Introduction: the indigenous and criollo population on Lots 14 and 55**

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<sup>28</sup> Article 58 of the Rules of Procedure indicates: "The Court may, at any stage of the proceedings: (a) obtain, on its own motion, any evidence it considers helpful and necessary. In particular, it may hear, as an alleged victim, witness, expert witness, or in any other capacity, any person whose statement, testimony, or opinion it deems to be relevant."

<sup>29</sup> The following should be noted with regard to expert witnesses Yáñez Fuenzalida and Buliubasich. The Commission advised that the former was unable to attend the public hearing. On March 4, 2019, on the instructions of the President, the Commission was informed that expert witness Yáñez Fuenzalida could provide her opinion in writing. The representatives proposed Ms. Buliubasich's testimony "by affidavit" and the State offered her expert opinion at the public hearing. In the order of February 8, 2019 (*supra* para. 8), the Court admitted Ms. Buliubasich's opinion as an expert witness to be provided during the public hearing. On March 6, 2019, the State withdrew this expert opinion. On the President's instructions, the representatives were consulted whether they remained interested in her statement, and on March 11, 2019, they responded affirmatively and agreed that it would be an expert opinion; also, that they were unable to "organize" Ms. Buliubasich's trip to Costa Rica for the hearing. On the President's instructions, the representatives were advised that they could forward the opinion in writing, and they did this on April 1, 2019. Given that neither expert witness would attend the hearing, this was held on a single day, March 14, 2019.

47. Numerous communities of the indigenous peoples Wichí (Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) inhabit an area that was previously known as Fiscal Lots 14 and 55 (*supra* para. 1 and *infra* para. 80), in the department of Rivadavia, in the Argentine province of Salta, in the Chaco Salteño region. The two lots are adjacent and together cover an area of approximately 643,000 hectares.<sup>30</sup> The area borders with the Republic of Paraguay and the Plurinational State of Bolivia. None of this is contested.

48. Maps showing the location of this territory are included below:

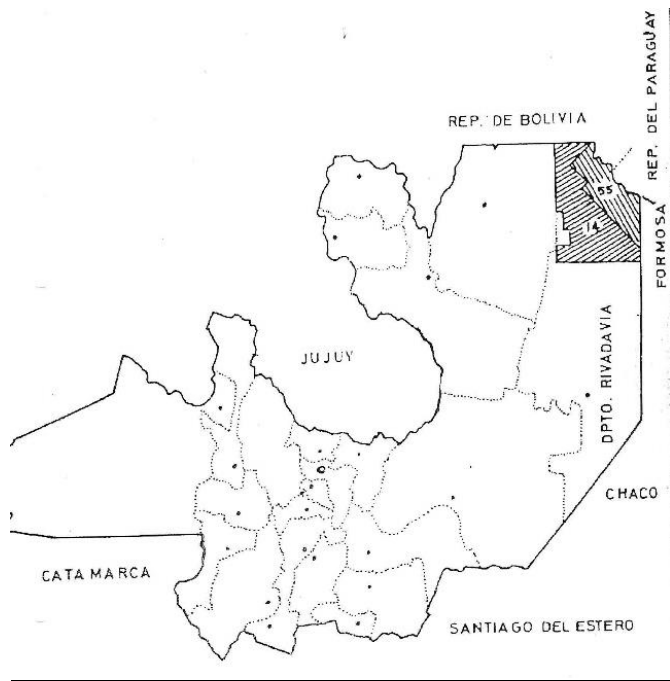


1.

<sup>30</sup> The area indicated is not exact, but rather approximate according to Salta Decree 1498/14 (*infra* para. 80). It should be noted that any reference in this judgment, including in Chapter VIII on reparations, to the number of hectares that correspond to Lots 14 and 55 should be understood as alluding to an inexact, and approximate, surface area.



2.



3.<sup>31</sup>

<sup>31</sup> The source of Map 1 is the National Geographical Institute attached to the Argentine Ministry of Defense (Available at: <https://www.ign.gob.ar/AreaServicios/Descargas/MapasEscolares>" \ | "nanogallery/gallery2/0/6). Map 2 is a sketch that is included in this judgment merely for illustrative purposes, so it should not be understood as a precise representation of the extension, form or limits of the areas indicated. Map 3 is included in the body of evidence (evidence file, file of the procedure before the Commission, f. 3,415).

49. According to the expert opinions of Ms. Naharro and Ms. Buliubasich, indigenous people were present in the area prior to 1629 and, therefore, before the establishment of the Argentine State in the nineteenth century. Ms. Naharro's expert opinion indicated that numerous testimonies and documents produced between the eighteenth century and the beginning of the twentieth century "mention the presence of hunter-gatherers in the area of the Pilcomayo [River]." Most of the indigenous people who have continued to live in this place up until today belong to the Wichí ethnic group. Different reports "reveal the importance of their relationship [...] with their land and territory, and indicate the threat posed by the development of productive activities that are incompatible with their way of life." State documentation indicates that the "aboriginal" population of the area belongs to the "so-called *Chaco proto-culture*" and is composed of "nomadic or semi-nomadic groups with an economy based on hunting, gathering and fishing."<sup>32</sup>

50. The number of indigenous communities on Lots 14 and 55 is variable owing to the constant dynamic of community fragmentation and fusion that characterizes these peoples (*supra* para. 33).<sup>33</sup> The State and the representatives indicated the existence of more than 2,000 indigenous families. The representatives affirmed that, at May 2018, "the indigenous communities were made up of around 2,031 families and approximately 10,155 persons." There is no dispute that these are communities of indigenous peoples, or regarding their ancestral ties to the land they inhabit (*infra* footnote 88).

51. The indigenous presence in the area referred to has been constant and, in addition, the land has been occupied from at least the beginning of the twentieth century<sup>34</sup> by individuals identified as "*criollos*," in other words non-indigenous settlers or peasant farmers. Colonia Buenaventura was founded in 1902 and the national government transferred 625 hectares to the "*criollo*" families who settled there; subsequently, more land of the same or a greater area was transferred. However, in 1905, the Salta government advised the national government that lots adjudicated as national fiscal lands might be located within provincial territory and, in fact, later, at least after 1967, it was formally established that the land belonged to the province.<sup>35</sup>

52. The parties agree that, currently, the number of *criollo* families in the area exceeds 465. Argentina indicated that these are "small subsistence farmers who are

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<sup>32</sup> Cf. "Antecedentes relativos a las tierras públicas del Lote Fiscal 55. Área Pilcomayo. Provincia de Salta." Document issued by the government of the province of Salta (evidence file, annex 4.A to the pleadings and motions brief, fs. 29,450 to 29,674).

<sup>33</sup> Regarding their nomadic nature, expert witness Naharro explained that "[t]raditionally these communities have daily and annual routes." She indicated that "[t]he annual routes are those over which the whole family moves to another settlement from which they make their daily expeditions"; however, this is less "applicable" nowadays "owing to the process of sedentarization related to the services of water, schools, etc." The *amicus curiae* brief sent by Tierraviva indicates that the "human collectives" of the indigenous peoples in this case "are permanently being created, reproduced and transformed," and that they include "forms of organization based on the family, community, and homogeneous peoples"; also "networks of alliances among relatives and groups, and even between ethnic groups." The same document explains that "the demographic growth is accompanied by an increase in settlements and villages that may be more permanent or more transitory, which makes it absurd to reduce them to communities that are individually separated and demarcated by fixed limits."

<sup>34</sup> Expert witness Buliubasich described a process of "occupation" of the Chaco region between 1884 and 1917, underlining the founding of Colonia Buenaventura in 1902.

<sup>35</sup> Cf. "Antecedentes relativos a las tierras públicas del Lote Fiscal 55. Área Pilcomayo. Provincia de Salta."

basically dedicated to cattle raising" on "unfenced land," "most of them" without hired hands. Several *criollo* families have installed fencing.<sup>36</sup>

**B) Relevant general legislation on indigenous lands**

53. Before describing the specific facts relating to the territorial claim in this case, the Court will indicate the pertinent State regulations with regard to rights of indigenous peoples. Bearing in mind that Argentina is a federal State and that the facts of this case relate to indigenous communities that inhabit the province of Salta, the Court will, first, refer to the national legislation, and then to that of Salta.

54. The Court notes that, at the national level, the following relevant legal provisions exist:

a) *1985 and 1989. Law 23,302 and Decree 155/1989.* National law 23,302 on *Indigenous policy and support for the Aboriginal Communities*, enacted in 1985, created the National Institute for Indigenous Affairs (INAI).<sup>37</sup> Its articles 7 to 13 refer to the adjudication of fiscal lands in favor of some of the country's indigenous communities, establishing that INAI should draw up "plans" for land adjudication.<sup>38</sup> Law 23,302 was regulated by Decree 155/1989 of the National Executive Branch (PEN),<sup>39</sup> and, among its provisions, it states that INAI "[s]hall invite the provinces to accede to Law 23,302." Law 23,302 and Decree 155/89 have remained in force following the 1994 constitutional amendment.

b) *1992. Law 24,071.* Law 24,071 was promulgated on April 7, 1992, adopting Convention 169 of the International Labour Organization (ILO) on Indigenous and Tribal Peoples (hereinafter "Convention 169" or "ILO Convention 169").<sup>40</sup>

c) *1994. Amendment of the Constitution.* On August 22, 1994, the Constitution was amended.<sup>41</sup> The pertinent aspect of the reform accorded constitutional rank to international human rights instruments including the American Convention. Article 75.17 established that: "[i]t shall correspond to Congress [... t]o recognize the ethnic and cultural pre-existence of the Argentine indigenous peoples[;...t]o recognize the communal ownership and possession of the lands they traditionally occupy, and to regulate the transfer of other suitable lands that are sufficient for human development, none of which shall be entailed, conveyed or attached."

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<sup>36</sup> In the course of the on-site visit, fencing was observed. The presence of fencing, as well as the fact that "it is on indigenous territory" and that there is fencing that belongs to "*criollo* families," was indicated by the State in its answering brief. See also, Carrasco, Morita and Briones, Claudia, "*La tierra que nos quitaron*" IWGIA document No. 18 (evidence file, annex A.5 to the pleadings and motions brief and annex 7 to the Merits Report, fs. 103 to 115 and 29,676 to 29,704).

<sup>37</sup> As a decentralized entity with indigenous participation and attached to the Ministry of Health and Social Action. Law 23,302 was amended in 2003 by Law 25,799, in aspects that are not relevant to this case.

<sup>38</sup> The law does not address the question of land held by private individuals. The Court will not refer to this aspect as it is not relevant to this case.

<sup>39</sup> Decree 155/1989 was amended by Decree 791/2012 of May 23, 2012, in aspects that are not relevant for the analysis made in this judgment.

<sup>40</sup> ILO Convention 169 was ratified on July 3, 2000. Previously, in 1960, ILO Convention 107 on Indigenous and Tribal Populations had been ratified. Argentina had adopted ILO Convention 107 by Law 14,932 promulgated on December 15, 1959. ILO Convention 107 was automatically denounced owing to the country's ratification of Convention 169.

<sup>41</sup> Later, national Law 24,430, enacted on December 15, 1994, and promulgated on January 3, 1995, ordered the "publication of the official text of the Constitution (sanctioned in 1853 with the amendments of 1860, 1866, 1898, 1957 and 1994)."

- d) *2006. Law 26,160 and subsequent renewals.* Law No. 26,160 *on the Territorial Survey of Indigenous Communities*, published on November 29, 2006, was promulgated to respond to the emergency situation with regard to the possession and ownership of lands occupied by indigenous communities in Argentine territory. The justification given by the PEN when submitting the respective bill to Congress indicated that it sought to “contribute to the policies that are already being implemented but that have not yet achieved their objective of recognizing the communal ownership of the lands occupied by the communities.”<sup>42</sup> The text of the law establishes that execution of eviction proceedings and judgments be suspended for four years and that the indigenous territories be surveyed in order to achieve the “legalization of ownership.” The suspension of evictions indicated in the law was extended on several occasions, most recently until the end of 2021.<sup>43</sup>
- e) *2010. Decree 700/2010.* PEN Decree 700/2010 of May 20, 2010, set up a committee for the “analysis and legalization of indigenous communal property,” establishing that one of its objectives was to draw up “a bill to officialize a procedure that implements the constitutional guarantee of recognition of indigenous communal land possession and ownership, stipulating its legal nature and characteristics.”
- f) *2010. INAI Resolution 328/2010:* INAI Resolution 328/2010, issued on July 19, 2010, created the National Registry of Organizations of Indigenous Peoples (Re.No.Pi.).<sup>44</sup>
- g) *2016. National Civil and Commercial Code.* On January 1, 2016, Law 26,994, promulgated on October 7, 2014, entered into force, repealing the Civil and Commercial Codes and adopting the National Civil and Commercial Code, applicable at both the national and provincial level. Article 9 of the law indicates that “[t]he rights of the indigenous peoples, in particular to communal property [...] shall be subject to a special law,” and article 18 of the new Code establishes that “the recognized indigenous communities have the right to the communal ownership and possession of the lands they traditionally occupy and other suitable lands that are sufficient for human

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<sup>42</sup> This justification indicated that the indigenous communities were “victims of evictions and conflicts in relation to their effective possession [of the lands]. This circumstance means that the solutions attempted under different policies were belated, ineffective or merely palliative for a territorial situation made worse by the evictions or conflicts experienced by the community.” It also described frequent obstacles encountered by the communities to obtain access to justice and explained that INAI had “established a ‘Program for Community Development and Access to Justice’ by Resolution No. 235/04; this provides a subsidy to indigenous communities requesting this to cover the expenses required to defend their rights or to file legal actions to legalize land titles [...] or to defend possession, as well as any other type of action to reinforce land ownership.” The justification asserted that “despite the foregoing,” the communities are at “particular disadvantage” *vis-à-vis* the actions of third parties, and indicated that “this is revealed by numerous judicial decisions *in absentia* in eviction proceedings filed against them, difficulties in exercising their right of defense before courts that are sometimes extremely far away, notifications of legal actions that they do not understand, difficulty in access to their defense counsel or to timely advice, *de facto* evictions, invasion of their territory by third parties, land clearance or deforestation, violent land invasion, adjudication as mere holders of lands by provincial agencies that regulate access to fiscal lands, transfer of ownership of the lands they have always occupied, difficulties to access compensation when the territory is affected by the installation of a gas pipeline, an oil pipeline, petroleum exploration, etc.” Expert witness Solá underscored the importance of Law 26,160 as a “tool” to suspend evictions, but indicated that the procedure established by the law and its regulations “concludes with an administrative decision” and this is not suitable for “recognition of land titles.” The *amicus curiae* presented by AADI and SERPAJ makes a similar assertion.

<sup>43</sup> This was renewed by laws 26,554, 26,894 and 27,400, published in the Official Gazette on December 11, 2009, October 21, 2013, and November 23, 2017, respectively. Law 26,160 was regulated by Decree 1122/07, published on August 27, 2007, which designated INAI as the executing authority. INAI Resolution 587/2007 of October 25, 2007, created the National Program of “Territorial Survey of Indigenous Communities – Execution of Law No. 26,160.”

<sup>44</sup> Cf. INAI Resolution 328/2019 issued on July 19, 2010 (evidence file, annexes to the State’s final arguments, fs. 37,058 to 37,066).

development *as established by law* pursuant to the provisions of article 75.17 of the Constitution” (italics added).

55. In the case of Salta, in 1986, the province adopted *Law 6,373 on Promotion of Aboriginal Development*, establishing that the “Provincial Institute for Aboriginal People,” set up under this law would carry out a survey of “aboriginal settlements” and then conduct the necessary procedures for the “adjudication” of “ownership” to the land. In 1992, by *Law 6,681*, Salta acceded to National Law 23,302 on *Indigenous policy and support for the Aboriginal Communities*. In 1998, the *Salta Constitution* was amended and the current wording of the relevant part of article 15 recognizes the indigenous peoples’ “communal possession and ownership of the fiscal lands that they traditionally occupy.” In 2000, Salta adopted *Law 7,121, concerning the development of the indigenous peoples of Salta*. The law created the Provincial Institute of Indigenous Peoples of Salta (IPPIS) and contains a chapter on land adjudication the articles of which include a similar text to the respective articles in Law 6,373. In 2011, Salta issued, *Decree 3459/11*, ratifying a cooperation agreement between the provincial Ministry of Human Development and INAI. In 2014, *Decree 3505/14* “to reinforce the legalization process [...]to guarantee recognition of the property of the communities.” It ordered the creation of the “Provincial Executing Unit for the Territorial Survey of Indigenous Communities of the province of Salta (U.E.P.Re.Te.C.I.),” “to coordinate” actions between the nation and the province to “survey” “land occupied by the indigenous communities.”

### **C) Indigenous territorial claims in this case**

56. The Court will now outline the events following the indigenous land claims. For greater clarity, the incidents that have taken place over almost 35 years (calculated from the initial actions) will be divided into stages. As this Court has been able to note, these respond to changes in State policies regarding indigenous property. Accordingly, the Court will describe: (a) a first stage (prior to 1999), in which the State received the initial claims and took steps towards a unified recognition of ownership; (b) a second stage (1999 - 2004), during which the State’s policy tended towards a fragmented recognition of ownership; (c) a third stage (2005 and 2006), marked by a referendum on property ownership and the creation of a specific State entity to implement actions concerning land, and (d) a fourth stage (after 2007) during which agreements were signed between *criollos* and indigenous peoples and steps were taken to implement these.

#### ***C.1 First stage (prior to 1999): first claims and commitments to grant land titles***

57. One of the precedents to the facts of this case was that, on June 26, 1984, indigenous communities settled on Lots 14 and 55, in a “Joint declaration,” requested Salta to grant them title to the land and contested the sub-division of the territory.<sup>45</sup>

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<sup>45</sup> “*La tierra que nos quitaron*,” by Morita Carrasco and Claudia Briones. IWGIA document No. 18. This happened before September 5, 1984, when Argentina ratified the Convention and accepted the Court’s jurisdiction. Therefore, it is described merely as background information that permits a better understanding of the facts of the case and the Court will not assess the State’s conduct in circumstances prior to September 5, 1984.

58. In 1987 the provincial state decided to recognize land ownership to the "occupants" of Lot 55, whatever their "condition" (that is, both *criollos* and indigenous peoples) who met certain requirements.<sup>46</sup>

59. On July 28, 27 indigenous communities settled on Lot 55 submitted a formal claim to Salta for "legalization of the title to ownership of the land."<sup>47</sup>

60. On December 15, 1991, Decree No. 2609/91 was issued ratifying the terms of a memorandum of understanding of December 5. The Decree established as an obligation of the province: (a) unification of Lots 14 and 55 "to subject them to a common purpose," and (b) adjudication of "a surface area without subdivisions, by a single title of ownership, to the [indigenous] communities."<sup>48</sup>

61. On December 9, 1992, Ministerial Resolution 499 was issued adopting the statute of the "Lhaka Honhat Association of Aboriginal Communities" and granting it legal status. The Association is composed of inhabitants of Lots 14 and 55 who are members of indigenous communities. Its "objectives" include: "obtaining land ownership titles"; "protecting the forest and the river"; "monitoring and controlling the exploitation of the area's renewable natural resources [...] as established by the pertinent laws in coordination with the relevant State agencies," and "ensuring respect for the universally recognized rights of the aboriginal peoples to use freely their natural wealth and their resources to meet their particular needs."<sup>49</sup>

62. In 1995, Salta issued Decree 3097/95<sup>50</sup> adopting recommendations made in April that year by an advisory committee created in 1993 by Decree 18/93.<sup>51</sup> It had been suggested that two-thirds of the total surface area of Lots 14 and 55 should be transferred to indigenous communities and one-third to the *criollo* population. At that time, the petitioners advised the Inter-American Commission that the indigenous communities had accepted this. Subsequently, in April 1996, the Lhaka Honhat

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<sup>46</sup> This was established in provincial Law 6,469 of 1987 (evidence file, annex B.3 to the pleadings and motions brief, fs. 29,738 to 29,740). The evidence reveals that before this, from the perspective of formal legality, the indigenous presence in the area was recognized in two ways: *de facto* occupation (with no legal title of any kind) and occupation with right of usufruct. In 1971 and 1972, following provincial Decree 2293 of 1971 creating "Provincial indigenous reserves," Salta granted "usufruct permits" to some indigenous communities (for example, Santa María and Misión La Paz). Provincial Laws 3,844 and 4,086 of 1964 and 1965 were also relevant with regard to Lot 55; they established "colonization" policies, legislating "in favor of the *criollos*" and were enacted from a "developmental and integrationist" perspective (Cf. Carrasco, Morita and Briones, Claudia, "*La tierra que nos quitaron*," IWGIA document No. 18).

<sup>47</sup> Cf. "*La tierra que nos quitaron*," by Morita Carrasco and Claudia Briones. IWGIA document No. 18.

<sup>48</sup> Cf. Decree 2609/91 (evidence file, annex B.6 to the pleadings and motions brief, fs. 29,782 and 29,783). It is important to underline that Decree 2609/91 established the suspension of "authorizations" or "any act that entails the granting of forestry and agricultural concessions" in the lots mentioned until "the definitive titles have been granted to the aboriginal and *criollo* communities."

<sup>49</sup> Cf. Statute of the Lhaka Honhat Association of Aboriginal Communities (evidence file, annex B.7 to the pleadings and motions brief, fs. 29,785 to 29,791).

<sup>50</sup> Cf. IWGIA report: Case of Lhaka Honhat. IWGIA and CELS, 2006 (evidence file, annex B.12 to the pleadings and motions brief, fs. 30,031 to 30,071).

<sup>51</sup> Cf. Decree 18/93 of January 13, 1993 (evidence file, annex B.9 to the pleadings and motions brief, fs. 29,799 to 29,801). The Decree created an honorary advisory committee to make recommendations on the "appropriate methodology" for granting the lands to the indigenous communities and conserving the environment." These recommendations were made in April 1995, even though a 90-day time limit had been established in January 1993 (Cf. Resolution 120 of the Salta Ministry of the Interior of April 5, 1993 (evidence file, annex B.10 to the pleadings and motions brief, fs. 29,802 to 29,804).



Association and Salta signed a memorandum of understanding "to advance towards a plan to regularize the settlements on Fiscal Lots 55 and 14."<sup>52</sup>

63. In 1995, the construction of an international bridge was started in the territory claimed by indigenous communities. On August 25 and September 16, 1996, several members of the indigenous communities occupied the bridge (*infra* para. 180). The Governor of Salta visited the site in person and signed an agreement in which he undertook to issue a decree within 30 days that "ensured the final adjudication of the land in question, establishing the terms and conditions."<sup>53</sup>

64. Between 1996 and 1998, Lhaka Honhat sent several letters to the authorities asking them to formalize communal ownership of the property.<sup>54</sup>

### ***C.2 Second stage (1999-2004): attempts to divide up the land into individual parcels and indigenous opposition***

65. On November 8, 1999, the province published edicts pursuant to Resolution 423/99 issued on November 2, serving notice to all those who considered that they had rights over the land of Lot 55, because some of the land would be adjudicated to inhabitants of that land who had been surveyed.<sup>55</sup> On December 24, by Decree 461, Salta adjudicated parcels within Lot 55 to some individuals and indigenous communities settled on the land.<sup>56</sup>

66. On November 1, 2000, it was agreed to initiate a process of "discussions" for the State to suspend the civil works on the territory and halt the land grant process.<sup>57</sup> On December 15 that year, Salta presented a proposal for the adjudication of Lot 55, granting parcels to each community, but subject to each one having legal status. In a letter of February 6, 2001, Lhaka Honhat contested the proposal arguing that it did not include Lot 14, that it did not establish a single title, but rather fragmented titles, that it subjected the granting of land to agreements with *criollos*, and that it required each

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<sup>52</sup> As indicated in the Merits Report, this circumstances was referred to in an "Ombudsman Resolution" of August 11, 1999, according to documentation forwarded to the Commission by the Ombudsman and received on January 19, 2001.

<sup>53</sup> This circumstance, as indicated in the Merits Report, was mentioned in an "Ombudsman Resolution" of August 11, 1999, according to documentation forwarded to the Commission by the Ombudsman and received on January 19, 2001.

<sup>54</sup> The Inter-American Commission indicated that, in January 2001, the Argentine Ombudsman sent the Commission a copy of 18 letters sent between 1996 and 1998 to the Governor of the province of Salta, the Director of INAI, the Minister of the Interior and the President of the Republic, among others.

<sup>55</sup> Cf. Resolution 423 published on November 2, 1999 (evidence file, annex C.2 to the pleadings and motions brief, fs. 30,106 to 30,110).

<sup>56</sup> Thus: (a) the communal ownership of various parcels of Lot 55 were adjudicated to the following indigenous communities: Molathati (1,003 ha), Madre Esperanza (781 ha), La Merced Nueva (295 ha), Nueva Esperanza (47 ha) and Bella Vista (1,682 ha); and (b) the individual ownership of various parcels of Lot 55 was adjudicated to three individuals, with the following areas: 1,014 ha, 758 ha and 22 ha. Cf. Salta Decree No. 461 of December 24, 1999 (evidence file, procedure before the Commission, f. 4,847 and annex C.3 to the pleadings and motions brief, fs. 30,111 to 30,116).

<sup>57</sup> Cf. Agreement of November 1, 2000 (evidence file, annex C.4 to the pleadings and motions brief, fs. 30,117 and 30,118).

community to obtain legal status.<sup>58</sup> In August 2001, the State informed the Inter-American Commission that it agreed to incorporate Lot 14 into its proposal.<sup>59</sup>

67. On February 22, 2001, Salta issued Decree No. 339/01, creating a committee composed of representatives of the State, the *criollos* and the indigenous communities to complete the "mapping" of Lots 14 and 55 in order to establish the "location of the different indigenous and *criollo* communities."<sup>60</sup> On December 26 that year, Lhaka Honhat advised the Inter-American Commission that the said committee had never met and that the indigenous communities themselves had begun to survey the population and map the lots.<sup>61</sup>

68. On September 11, 2001, June 4 and July 8, 2002, and August 5 and September 9, 2004, the petitioners at the time advised the Inter-American Commission that Salta's agents continued to survey and demarcate Lots 14 and 55.<sup>62</sup> On August 5, 2004, the State indicated that it would refrain from carrying out any other public works or infrastructure that had not been agreed with the petitioners and that it would not conduct any further surveys or make partial land grants on the lots claimed.<sup>63</sup>

### ***C.3 Third stage (2005-2006): Creation of the Provincial Executing Unit (UEP), referendum and subsequent actions***

69. On March 2, 2005, during a working meeting at the seat of the Inter-American Commission, the province of Salta presented a land distribution proposal.<sup>64</sup>

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<sup>58</sup> Cf. Communication from the petitioners to the Commission of July 19, 2001, and State's proposal of December 15, 2000 (evidence file, Annexes C.10 and C.7 to the pleadings and motions brief, fs. 30,172 to 30,210 and 30,128 to 30,140).

<sup>59</sup> Cf. Communication from the State to the Commission of September 19, 2001 (evidence file, annex C.8 to the pleadings and motions brief, fs. 30,141 to 30,168).

<sup>60</sup> Cf. Salta Decree 339/01 (evidence file, annex C.9 to the pleadings and motions brief, fs. 30,169 to 30,171) and note to the Commission of July 19, 2001.

<sup>61</sup> Cf. Communication from Lhaka Honhat to the Commission of December 26, 2001 (evidence file, annex C.11 to the pleadings and motions brief, fs. 30,212 to 30,213).

<sup>62</sup> Cf. Minutes of the meeting of June 4, 2004; letter attached to the communication from the petitioners to the Commission received on July 26, 2002; note to the Ministry of Foreign Affairs of September 9, 2004; Communication attached to the petitioners' report to the Commission of November 14, 2001; Communication from Lhaka Honhat to the Commission of September 11, 2001; Communication from the petitioners to the Commission received on July 8, 2002, and note to the Commission of July 8, 2002 (evidence file, Annexes C.23, C.26, C.11 and C.14 to the pleadings and motions brief, fs. 30,284 to 30,286; 30,298 and 30,299; 4,317; 30,211 to 30,213; 5,087 and 30,224 to 30,228). It is relevant to note that on August 2, 2002, Provincial Decree 295/02 established that those who occupied Lots 14 and 55 should not install fencing until the regularization process had ended.

<sup>63</sup> Cf. Minutes of the meeting of August 5, 2002 (evidence file, annex C.16 to the pleadings and motions brief, fs. 30,232 to 30,234).

<sup>64</sup> According to the representatives, the province expressed its intention to conduct a referendum if the petitioners did not accept the proposal. On April 18, 2005, Lhaka Honhat received a note from the Salta State Prosecutor, through the Ministry of Foreign Affairs, in which it ended Salta's participation in the friendly settlement procedure and indicated that it would submit the land distribution proposal to a referendum. (Cf. Proposal of the province of Salta presented to the working meeting on March 2, 2005; minutes of the meeting of March 2, 2005, and note of April 12, 2005 (evidence file, Annexes D.1, D.2 and D.5 to the pleadings and motions brief, fs. 30,317 to 30,370, 30,371 to 30,372 and 30,377 to 30,379.)

70. On May 10, 2005, Provincial Decree 939/05 was published creating the "Provincial Executing Unit (UEP)" to be the authority responsible for executing Salta's proposal of March 2005, and one of its functions was to identify the area occupied traditionally, move the *criollos*, and verify the relocation agreements.<sup>65</sup>

71. During March 2005, in the context of the international processing of the case before the Commission, Salta expressed its intention of holding a referendum. In May and June that year various national State entities expressed their opposition to this consultation.<sup>66</sup> Nevertheless, on July 25, 2005, provincial Law 7,352 was published announcing the referendum for the entire population of the department of Rivadavia eligible to vote to decide on the "handing over" of the land comprised by Lots 14 and 55. Specifically, the law called on "the electorate of the department of Rivadavia to vote responding whether or not they wanted the lands corresponding to Fiscal Lots 55 and 14 to be transferred to the current occupants." On October 8, 2005, the caciques, members of Lhaka Honhat, signed a public statement asking for the referendum to be suspended.<sup>67</sup>

72. The referendum was held on October 23, 2005, at the same time as the provincial and national legislative elections. A "yes" vote meant that the voter was "in favor of transferring the land corresponding to Fiscal Lots 55 and 14 to the current occupants, both aboriginals and *criollos*, executing the necessary infrastructure works." The "yes" vote obtained the majority with 98% of the votes cast.<sup>68</sup>

73. Between December 2, 2005, and April 19, 2006, Salta published orders aimed at taking steps to implement the transfer of the land in keeping with the result of the referendum, summoning *criollo* families to submit forms to confirm certain requirements in this regard.<sup>69</sup>

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<sup>65</sup> Cf. Salta Decree 939 of May 10, 2005 (evidence file, annex D.7 to the pleadings and motions brief, fs. 30,384 to 30,391).

<sup>66</sup> On May 2, 2005, INAI asked the government of Salta not to conduct the referendum "because it was a unilateral measure that did not respect the agreements reached under the friendly settlement"; on May 3, the Argentine Ministry of Foreign Affairs asked the government of Salta to review its decision because "it could entail the Argentine State's international responsibility"; on June 12, INAI sent a note to the President of the Salta Chamber of Deputies indicating that "it would be committing a flagrant and unhelpful violation if [the rights of the indigenous communities] were submitted to a referendum by all the citizens of the department of Rivadavia." (Cf. Notes of INAI and the Ministry of Foreign Affairs dated May 2 and July 12, 2005, and May 3, 2005, respectively (evidence file, Annexes D.8, D.9 and D.10 to the pleadings and motions brief, fs. 30,392 to 30,394, 30,395 and 30,396, and 30,397 to 30,400). In addition, on September 21, 2005, the national government sent the Inter-American Commission a document entitled "Joint declaration of the national State agencies who are taking part in the expanded negotiations of the friendly settlement process under petition No. 12,094 of the Inter-American Commission on Human Rights," in which representatives of the Ministries of Foreign Affairs and Justice, and of INAI expressed their concern owing to the impasse in the friendly settlement process following the organization of the referendum and asked the Governor of the province to suspend it "to facilitate a solution to the problem" (Note SG 257 of August 23, 2005 (evidence file, procedure before the Commission, f. 5,366). On August 17, 2005, The Salta State Prosecutor sent a note to the Commission defending the referendum as "the appropriate way to implement the right to prior consultation" (note of August 17, 2005; evidence file, annex D.17 to the pleadings and motions brief, fs. 30,437 to 30,457).

<sup>67</sup> Cf. Joint statement and "Petition" submitted as annexes to the communication from the petitioners of November 10, 2005, and Lhaka Honhat memorandum of October 8, 2005 (evidence file, annex D.21 to the pleadings and motions brief, fs. 30,472 to 30,480).

<sup>68</sup> Cf. Communication from the petitioners to the Commission received on November 11, 2005, forwarded to the State on January 31, 2006 (evidence file, annex D.28 to pleadings and motions brief, fs. 30,533 to 30,544).

<sup>69</sup> Cf. Decrees 2406/05 and 2407/05, and Resolution 65/06 (evidence file, Annexes E.1, E.2 and E.3, fs. 30,559 to 30,561, 30,562 to 30,566 and 30,568 to 30,573, respectively).

74. Despite the foregoing, on March 14, 2006, in a meeting between the Secretary General of the Office of the Governor of Salta and the General Coordinator of Lhaka Honhat, it was agreed that the traditional occupation of the land should be respected; in other words, a minimum of 400,000 ha under a single title. In this regard, the representatives indicated that following the mapping exercise conducted at the beginning of 2000, it had been concluded that the communities used around 530,000 ha, but had decided to reduce their claim to 400,000 ha.<sup>70</sup>

#### **C.4. Fourth stage (after 2007)**

##### C.4.1 October 2007 Memorandum of Understanding and implementing actions

75. On June 1 and August 24, 2007, Lhaka Honhat and the Organization of *Criollo* Families (OFC) reached agreement, recorded in memoranda, on the surface area of the land that would correspond to the indigenous peoples (400,000 ha), and the area that would be destined to relocate any *criollo* families that had to be moved, and on the applicable distribution criteria.<sup>71</sup> On October 17, 2007, a Memorandum of Understanding was signed with representatives of Salta and the national State, confirming this.<sup>72</sup> On October 23, Salta issued Decree 2786/07<sup>73</sup> formally endorsing the Memorandum of Understanding and allocating the ownership of Lots 14 and 55 to the occupants: 400,000 ha to the indigenous communities and 243,000 ha to the *criollo* population. This decree revoked the obligation of the communities to obtain legal status in order to obtain individual titles, which had been established in Ministerial Resolution 65/06 the purpose of which was to execute the results of the referendum.

76. On October 28, 2008, Salta issued Decree 4705/08 creating a technical team, composed of members of the UEP, to implement the land transfer. Subsequently, in 2009, the year in which a series of meeting was held between the *criollo* and the indigenous populations, Salta issued Resolution 340/09, establishing the final list of *criollo* settlers who met the previously established requirements to prove their occupation of the land.<sup>74</sup>

77. Between 2009 and 2011 various meeting were held to try and reach agreements between the indigenous communities and the *criollo* families on the adjudication of the land.

##### C.4.2 Decree 2398 of 2012 and subsequent actions<sup>75</sup>

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<sup>70</sup> Cf. Memorandum of March 14, 2006 (evidence file, annex 32 to the Merits Report, fs. 422 to 424).

<sup>71</sup> Cf. Memoranda of June 1 and August 24, 2007 (evidence file, Annexes G.1 and G.2 to the pleadings and motions brief, fs. 30,883 to 30,884 and 30,885 to 30,886).

<sup>72</sup> Cf. Memorandum of Understanding of June 17, 2007 (evidence file, annex G.3 to the pleadings and motions brief, fs. 30,887 to 30,891).

<sup>73</sup> Cf. Decree 2786/07 (evidence file, annex G.5. to the pleadings and motions brief, fs. 30,922 to 30,924).

<sup>74</sup> Cf. Report 2008-2011 on the land regularization process (evidence file, annex 40 to the Merits Report, fs. 488 to 515). The requirements were established by Resolution 65/06.

<sup>75</sup> The Court notes that it has been informed that, in March and April 2013, several incidents occurred in the area of Lots 14 and 55. On March 27, a team member of ASOCIANA, a foundation that provides advice

78. On July 25, 2012, Salta issued Decree 2398/12, the text of which cites the Merits Report as a precedent. The decree established the "allocation, for its subsequent adjudication" of 243,000 ha of Lots 14 and 55" to the *criollo* families "that have authenticated their right" pursuant to Resolutions 65/06 and 340/09, and 400,000 ha to the indigenous communities "under communal ownership and under the titling arrangement that each of them determines." In addition, it ordered the publication of the said allocations by the corresponding registration in the Land Registry.<sup>76</sup>

79. On July 12, 2013, Provincial Decree 2001/13 was published and this included a "Program to legalize the communal property" that mentioned a "work plan" to define the territorial delimitations based on "participatory workshops" with indigenous peoples and *criollos*.<sup>77</sup> In addition, at the same time, the representatives and the State agreed that a map prepared by the Lhaka Honhat communities would be used as a basis for any fieldwork.<sup>78</sup>

#### C.4.3 Decree 1498 of 2014 and subsequent actions

80. On May 29, 2014, Salta issued Decree 1498/14, establishing that it: (a) "recognize[d] and transfer[red]"; (i) "communal ownership" to 71 indigenous communities of approximately 400,000 ha of the "real estate" with cadastral registration numbers 175 and 5557 of the department of Rivadavia, in the province of Salta" (previously identified as Fiscal Lots 55 and 14),<sup>79</sup> and (ii) "ownership under the condominium regime" of the same land in favor of numerous *criollo* families;<sup>80</sup> (b) reserve[d] to the provincial state 6.34% of the land for "institutional use" (c) established that the "specific determination" of the land and lots that correspond[ed] to the

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to the communities, was allegedly attacked by a *criollo* settler. On April 17, 15 indigenous people of La Puntana were injured and another seven arrested by the police for carrying out a protest in the school of that community. Cf. Public announcement of April 9, 2013 and Report of the Human Rights Commission of the Universidad Nacional de Salta (evidence file, annex H.13 to the pleadings and motions brief, fs. 31,181 to 31,193). The Court has not received legal arguments in relation to these incidents.

<sup>76</sup> Cf. Decree 2398/12 (evidence file, Annex H.8 to the pleadings and motions brief, fs. 31,161 to 31,163).

<sup>77</sup> The work plan called for the incorporation of INAI into the process of formalizing the communal property and the use of the funds allocated by national Law 26,160 (*supra* para. 54). It established that "participatory workshops" for the *criollo* families and the indigenous communities would be held approximately every 15 days, as well as a methodology to define a "map of overlapping territories" and then develop proposals to obtain a map that marked the limits between indigenous territory and *criollo* territory. It also called for workshops among "*criollo* neighbors" to define the parcels for each *criollo* family (cf. evidence file, annex H.24 to the pleadings and motions brief, fs. 31,258 to 31,282).

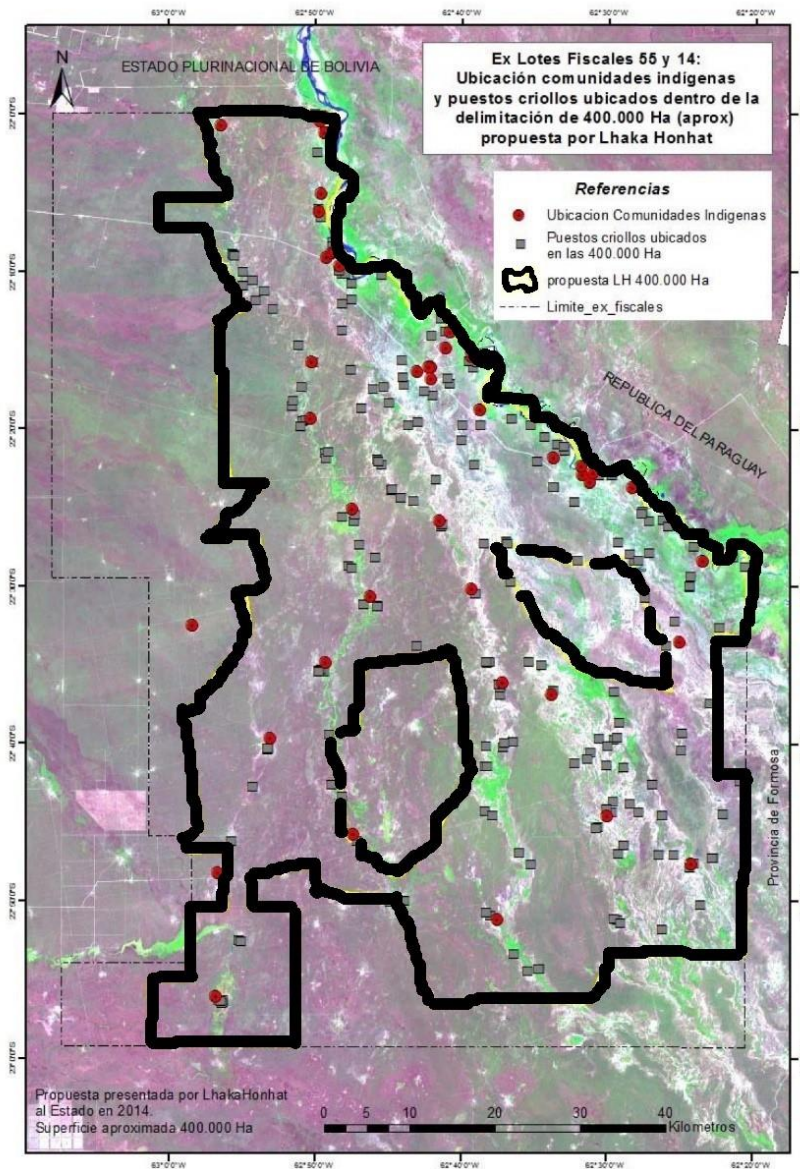
<sup>78</sup> However, in a joint memorandum of July 17, the OFC, Lhaka Honhat and caciques of various areas indicated that they had met "to analyze the situation of inaction by the UEP and the failure to comply with the commitments made by the Governor of the province" (Cf. Memorandum of July 17, 2013, evidence file, annex H.20 to the pleadings and motions brief, fs. 31,224 to 31,226).

<sup>79</sup> Decree 1498/14 states, literally, that the communal property covers 58.27% of the properties registered in the Land Registry as Nos. 175 and 5557 of the department of Rivadavia. The Decree's considerations clarify that the numbers refer to Lots 55 and 14, the exact surface area of which had not been calculated, but an area of 643,000 ha had been taken as a reference.

<sup>80</sup> The exact number of *criollo* "families" contemplated in Decree 1498/14 is unclear because the description included is not by person or family, but by "parcels" (*puestos*). It refers to 382 "parcels," indicating individuals who are "applicants" for them. On reading the decree it can be seen that, in some cases, the same person is an "applicant" for various parcels and, also, that there are various "applicants" who have the same last name, which suggests they belong to the same family.

indigenous and the *criollo* families “and all the necessary acts and procedures prior to the adjudication and obtaining of the corresponding registration” would be carried out through the UEP.

81. In its considerations, Decree 1498/14 indicated that, for the specific location of territories of the communities and lots of *criollo* families, it would take into account, “as a reference” the map provided to the province by Lhaka Honhat.<sup>81</sup> A version of this map, copied below, was forwarded to the Court by the representatives:<sup>82</sup>



<sup>81</sup> Cf. Decree 1498/14 (evidence file, annex H.32 to the pleadings and motions brief, fs. 31,336 to 31,352).

<sup>82</sup> Cf. Map (evidence file, annex H.66 to the pleadings and motions brief, fs. 31,798 to 31,804). The representatives indicated that it is version of the map “at April 2018” which shows, according to the representatives, “almost all the *criollos* settled on the 400,000 hectares claimed by the indigenous communities that do not even have an agreement to be relocated.”

82. On July 28, 2014, Salta issued Resolution 654, adopting cooperation agreements in relation to the "work plan" for Lots 14 and 55. These agreements had been signed by the Salta Human Rights Ministry and the UEP with Lhaka Honhat and the OFC, and established that these two organizations would appoint five persons to incorporate the UEP as "field technicians."<sup>83</sup>

83. On November 27, 2014, and during the first months of 2015, the indigenous communities informed the Commission that delays continued in the demarcation and titling fieldwork.<sup>84</sup>

84. According to information presented by the representatives, from September 2015 to the end of June 2016, budgetary resource were not available for the procedures and infrastructure works required for the relocations.<sup>85</sup> In addition, there was no information on coordination of tasks by the national State and the UEP. On July 19 that year, the State advised the Inter-American Commission that a series of agreements had been signed to move forward with the legalization of the indigenous communal property.<sup>86</sup>

85. On October 25, 2017, during a working meeting with the Commission, the State announced a "comprehensive work plan to comply with the recommendations [of the Merits Report]," which established an implementation time frame of eight years.<sup>87</sup>

#### **D) Construction work, activities and projects on the territory claimed**

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<sup>83</sup> Cf. Resolution 654 of the Ministry of Human Rights of the province of Salta (evidence file, annex H.34 to the pleadings and motions brief, fs. 31,357 to 31,366).

<sup>84</sup> Cf. Note to the Commission of November 27, 2014 (evidence file, annex H.37 to the pleadings and motions brief, fs. 31,376 to 31,380).

<sup>85</sup> During a meeting at the beginning of March, provincial officials indicated that the budget submitted to the national State for carrying out the work required for the relocation of the *criollo* families had not yet been approved (Cf. note of Lhaka Honhat to the Salta Ministry of Indigenous Affairs of January 27, 2016; evidence file, annex H.44 to the pleadings and motions brief, fs. 31,450 and 31,451).

<sup>86</sup> Cf. note to the Commission of July 4, 2016 (evidence file, annex H.46 to the pleadings and motions brief, fs. 31,455 to 31,459). The State referred to the following agreements: Framework Cooperation Agreement between the National Geographical Institute and the Salta Ministry of Indigenous Affairs and Community Development; Framework Cooperation Agreement between the Ministry of the Interior, Public Works and Housing, the Housing and Habitat Secretariat, and the province of Salta, for the construction of housing, urbanization of vulnerable districts, and improvement of the habitat, and Implementation Agreement for the Communal Property of the indigenous communities settled on former Lots 14 and 55 of the department of Rivadavia, in the province of Salta, between INAI and the Salta Ministry of Indigenous Affairs.

<sup>87</sup> Argentina explained that the time frame responded, "fundamentally," to the "need for the *criollo* families to adopt the pertinent technology and skills to achieve adequate livestock management. Otherwise, they would return to their former practices of managing livestock in unfenced land, which would mean that the animals would return to the territories of the communities." The Plan had four elements: (1) Property Titles; (2) Productive units for *criollo* families; (3) Domestic units for relocated *criollo* families, and (4) Public infrastructure in relocation areas. Element 1 established: in the first year, conclude the demarcation of the 400,000 ha of the indigenous communities, together with the agreement with the *criollo* families and the final location of their parcels; in the second year: conclude the surveys and title deeds and transfer property titles to indigenous communities and *criollo* families. Elements 2, 3 and 4 establish: (i) in two years, relocate families with their livestock who have final agreements and who are beneficiaries of surveyed parcels, productive projects, access to water and housing; (ii) in five years, complete the relocation of families with their livestock who have final agreements; (iii) in eight years: complete relocation of families with their livestock who have not undergone the necessary survey to achieve agreements. Cf. Comprehensive Work Plan submitted by the State to the Commission dated November 24, 2017 (hereinafter "Comprehensive Work Plan") (evidence file, annex H.59 to the pleadings and motions brief, fs. 31,626 to 31,649).

86. Information has been presented indicating that illegal logging activities have been carried out in the area of Lots 14 and 55. It has also been indicated that the *criollo* population raises cattle and has installed fencing. This information is described below (*infra* paras. 257 to 266).

87. The Court will also describe below (*infra* paras. 177, 178 and 180, and footnotes 165 and 166) facts and indications related to work carried out or planned on the territory in relation to: (a) construction of an international bridge; (b) national highway 86; (c) provincial route 54, and (d) oil and gas exploration.

### **E) Administrative and judicial actions filed in this case**

88. Lhaka Honhat filed judicial actions related to the facts of the case: (a) on September 11, 1995, an application for amparo before the Salta Court of Justice (hereinafter also "CJS") requesting the immediate suspension of the work on the international bridge (*supra* para. 87 and *infra* para. 180); (b) on March 8, 2000, an application for amparo against Decree 461/99 and Resolution 423/99 (*supra* para. 65), and (c) on August 11, 2005, an action before the National Supreme Court of Justice (hereinafter also "CSJN") requiring a declaratory judgment against the referendum law (*supra* para. 71). These actions will be dealt with below (*infra* paras. 297, 300 and 303). Also, in 2017, Lhaka Honhat applied for recognition as an indigenous organization in the administrative jurisdiction (*infra* footnote 148). There is no record that this application was decided.

## **VII MERITS**

89. In this case, there is no dispute that the indigenous communities have ancestral ties to the territory or their right to its ownership,<sup>88</sup> and this has been recognized in different domestic laws. The dispute relates to whether the State's actions have provided legal certainty to the right to property and its full exercise. Thus, while Argentina has indicated that it has acted diligently to ensure this, the Commission and the representatives maintain the contrary. In addition, it has been indicated that activities carried out on the territory have harmed the environment, food sources and cultural identity. In this regard, it has been alleged that several rights have been violated<sup>89</sup> and the Court has been asked to consider various situations, including judicial proceedings.

90. The facts set out previously – and more will be described below – reveal that the State's conduct has involved laws, but also different actions and procedures, to determine the property and possible relocation of settlers who are "*criollos*" – in other words, non-indigenous settlers – who inhabit the area, and to effect their relocation.

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<sup>88</sup> In the Merits Report the Commission indicated that both the petitioners at the time and the State had expressly "acknowledged that the indigenous communities that inhabit Lots 14 and 55 are entitled to ownership of their ancestral territory." Also, during the processing of the case before the Court, the representatives indicated that the State "has acknowledged on numerous occasions that the indigenous communities are entitled to their territories, so that this case does not relate to whether they are entitled to their territories but rather to the effective implementation of this right." Argentina also affirmed, similarly, that "No doubt exists regarding acknowledgement of the communities' right to property and of the territory they traditionally use."

<sup>89</sup> The Court will examine all the violations alleged by the Commission and the representatives. In this regard, it recalls its consistent case law that: "[t]he presumed victims and their representatives may invoke the violation of rights other than those included in the Merits Report, provided these relate to the facts contained in that document" (*Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Girón et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 390, para. 94).



Actions have also been taken to control illegal logging and the installation of fencing. All this has occurred over the course of several years in relation to a more extensive area of land inhabited by a large population composed of *criollos* and numerous indigenous communities belonging to different peoples, whose numbers vary. The State's actions in these circumstances have required the intervention of different provincial and national government agencies, as well as the allocation of human and budgetary resources. The Court notes these circumstances and the significant complexity they represent and will take them into account.

91. The Court will make its analysis as follows: (1) first, it will refer to the right to communal property, and examine other rights that, as has been alleged, are related to property in this case: (a) it will set out some general considerations on indigenous communal property and then outline the respective arguments of the Commission and the parties together with the Court's analysis of: (b) the recognition and determination of communal property, and (c) projects and construction works executed on the territory claimed. The Court will then examine: (2) the arguments relating to violations of the rights to freedom of movement and residence, a healthy environment, food and cultural identity, also considering the right to water, and (3) the alleged violations of the rights to judicial guarantees and judicial protection in relation to judicial actions filed in this case.

## **VII.1 RIGHT TO INDIGENOUS COMMUNAL PROPERTY<sup>90</sup>**

### **A) General considerations on communal property**

92. The Court will refer to different elements of the right to communal property and finds it useful to establish some general consideration on this right and refer to some aspects regarding which it has developed case law.

93. The Court has referred to the content of the right to indigenous communal property and its implications. In 2001, in the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, taking into account different interpretation parameters,<sup>91</sup> it

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<sup>90</sup> Article 21 of the Convention. In this section, the Court will examine, together with the right to communal property, the rights to recognition of juridical personality, to judicial guarantees, to freedom of thought and expression, to freedom of association, political rights, and the right to judicial protection, established in Articles 3, 8, 13, 16, 23 and 25 of the Convention, respectively. The examination of these rights will be made in relation to Articles 1(1) and 2 of the Convention, which establish, respectively, the obligations to respect and to ensure rights, and to adopt domestic legal provisions.

<sup>91</sup> On that occasion, it alluded to "an evolutive interpretation of the international instruments for the protection of human rights, taking into account the applicable interpretation standards and pursuant to Article 29(b) of the Convention – which prohibits a restrictive interpretation of the rights" (*Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79, para. 148). Later, in the case of the *Yakye Axa Indigenous Community v. Paraguay*, the Court indicated that an "evolutive" interpretation that took into account that "human rights treaties are living instruments, the interpretation of which must evolve with the times and current circumstances," was pertinent and in keeping with the provisions of Article 29 of the Convention. It also asserted that, pursuant to the Vienna Convention on the Law of Treaties, when interpreting a treaty it is necessary to consider not only the instruments formally related to it, but also the system in which it is inserted; thus, ILO Convention 169 was relevant (*Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, paras. 127 and 128; also subsequent case law, such as the judgment in the case of the *Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 5, 2018. Series C No. 346, para. 115). Convention 169 of the International Labour Organization is also relevant bearing in mind that Article 29(b) of the American Convention indicates that no provision of the Convention shall be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another

established that the right to private property recognized in Article 21 of the Convention included, in the case of indigenous peoples, the communal ownership of their lands.<sup>92</sup> Thus it explained that:

Among indigenous [people] there is a community tradition that relates to a communal form of collective ownership of the land, in the sense that its possession is not centered on an individual, but rather on the group and its community. Indigenous people, due to their very existence, have the right to live freely on their own territories; the close relationship that indigenous people have with the land should be recognized and understood as the very foundation of their cultures, their spiritual life, their integrity, and their economic survival.<sup>93</sup>

94. In 2005, when deciding the case of the *Yakye Axa Indigenous Community v. Paraguay*, the Court understood that the right to property protects not only the connection of the indigenous communities to their territories, but also “the natural resources these territories contain that are connected to their culture, as well as the intangible elements derived from them.”<sup>94</sup> Then, in the case of the *Saramaka People v.*

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convention to which one of the said States is a party.” Argentina adopted ILO Convention 169 in a 1992 law and ratified it in 2000 (*supra* para. 54 and footnote 40). The Court clarifies that the case law standards and criteria of this Court expressed in this judgment are consistent with the said understanding. In addition, since the facts of this case extend over a prolonged period, the Court finds it useful to mention that Argentina, based on different international (and also domestic) legal provisions, has assumed obligations towards indigenous peoples over the whole time that must be taken into account. Prior to 1984 – in 1959 and 1960, respectively – Argentina acceded to and ratified ILO Convention 107 (*supra* footnote 40), which established that “the right to ownership [...] over the lands [indigenous people] traditionally occupy shall be recognized.” Then, in 1985, national Law 23,302 was enacted (*supra* para. 54) and, among other provisions, it set out actions for the adjudication of ownership of provincial and national fiscal land to indigenous communities and recognition of their juridical personality. This law was regulated in 1989 by Executive Decree 155 (*supra* para. 54). In addition, the amendment of the National Constitution in 1994 and the Constitution of Salta in 1998 recognized State obligations in relation to indigenous peoples (*supra* paras. 54 and 55). Previously, in 1986, Salta had enacted Law No. 6,373 on the “Aboriginal Development Program” and, in 1992, it ratified national Law 23,302, by provincial Law 6,681 (*supra* para. 55). It is also pertinent to note that expert witness Solá stated that Argentina had voted in favor of the adoption of the United Nations and the American Declarations on the Rights of Indigenous Peoples. Expert witness Yáñez Fuenzalida also noted that Argentina had voted in favor of the former text. The Court will take these instruments into account in a supplementary manner.

<sup>92</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, paras. 148, 149 and 151. See, similarly: *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 131 and 132; *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006, Series C No. 146, para. 118, and *Case of the Saramaka People. v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007, Series C No. 173, para. 90. Also, following its judgment in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court ruled with regard to a tribal people in the *Case of the Mowjuna Community v. Suriname*. According to the respective judgment (*Preliminary objections, merits, reparations and costs*. Judgment of June 15, 2005. Series C No. 124, para. 133) “this Court’s case law in relation to the indigenous communities and their communal rights to property [...] must also be applied to members of [...] tribal communities.” Even before its ruling in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court had noted the pertinence of considering the customs of tribal peoples as standards that are effective in the community sphere (*Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs*. Judgment of September 10, 1993. Series C No. 15, para. 62).

<sup>93</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, paras. 148, 149 and 151.

<sup>94</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 137. Similarly, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 145; *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 284, para. 111 and 112; *Case of the Garifuna Community of Punta Piedra and its members v. Honduras. Preliminary objections, merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 304, para. 165; *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras. Merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 324, para. 100; *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs*. Judgment of November 25, 2015. Series C No. 309, para. 129, and *Case of the Xucuru Indigenous People and its members v. Brazil (Preliminary objections, merits, reparations and costs*. Judgment of February 5, 2018. Series C No. 346, para. 115.

*Suriname*, it indicated that “the right to the use and enjoyment of the territory would have no meaning if it was not connected to the natural resources that are found within that territory.” Consequently, the ownership of the land relates to the “need to ensure the security and permanence of the control and use of the natural resources [...], which, in turn, preserves the way of life” of the communities. The resources that are protected by the right to communal property are those that the communities “have used traditionally and that are necessary for the very survival, development and continuity of their way of life.”<sup>95</sup> Therefore, any activities by the State or third parties that could “affect the integrity of the land and natural resources” should respect certain parameters that the State must guarantee: the real participation of the communities concerned; their reasonable benefit, and the prior execution of social and environmental impact assessments.<sup>96</sup>

95. In addition in the 2001 judgment in the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court indicated that “the possession of the land should suffice for the indigenous communities [...] to obtain official recognition of their communal ownership and its consequent registration.”<sup>97</sup> This action declares the pre-existing right; it does not constitute the right.<sup>98</sup> In its 2005 judgment in the case of the *Yakye Axa Indigenous Community v. Paraguay*, the Court underscored that the State should not only acknowledge the right to communal property, but should also make this “truly effective in practice.”<sup>99</sup> The Court has indicated that the relationship of the indigenous peoples with the land “is not merely a privilege that is granted to use the land that can be taken away by the State or overshadowed by property rights of third parties, but a right [...] to obtain title to their territory in order to guarantee the permanent use and enjoyment of this land.”<sup>100</sup> When ruling on the case of the *Sawhoyamaxa Indigenous Community v. Paraguay* in 2006, the Court stipulated that:

(1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto,<sup>101</sup> even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith, and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands

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<sup>95</sup> *Case of the Saramaka People v. Suriname*, paras. 121 and 122. Similarly, *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, para. 112.

<sup>96</sup> *Case of the Saramaka People v. Suriname*, paras. 129 and footnote 124.

<sup>97</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, paras. 148, 149 and 151.

<sup>98</sup> Thus, the Court has held that “in the case of indigenous communities that have occupied their ancestral lands in accordance with customary practices – yet lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership” and the consequent registration” (*Case of the Moiwana Community v. Suriname*, para. 131).

<sup>99</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 141.

<sup>100</sup> *Cf. Case of the Moiwana Community v. Suriname*, para. 211, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117.

<sup>101</sup> The Court has indicated that indigenous peoples’ right to ownership of their territories extends, in principle, to the lands and resources that they currently use, and also those lands that were taken from them and with which they still have a connection (*Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153.2, and *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 135).

have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.”<sup>102</sup>

96. The State is obliged to give “geographical certainty” to the communal property as this Court indicated when deciding the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. On that occasion, and in subsequent decisions, the Court referred to the obligation “to delimit” and “to demarcate” the territory, in addition to the obligation to “grant title to it.”<sup>103</sup> For example, in 2014, in the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, the Court stated that, “based on the principle of legal certainty, the State obligation to take measures to ensure the right to property of the indigenous peoples necessarily signifies, that the State must demarcate, delimit, and grant title to the territories of the indigenous communities [...]. Therefore, failure to comply with these obligations constitutes a violation of the use and enjoyment of the

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<sup>102</sup> *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 128, also *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117. Regarding the mention of “innocent third parties,” it should be explained that the Court has noted in its case law that there may be a conflict between the indigenous communal property and individual private property. In this regard, this reference should also be understood taking into consideration other aspects noted by the Court in its case law. Thus, the Court has stated that possible restrictions of indigenous communal property may be admissible under the Convention, provided these respect certain parameters: (a) “they must be established by law”; (b) “for the purpose of achieving a legitimate objective in a democratic society,” in other words, a “collective objective [...] that, owing to its importance, clearly outweighs the need for the full enjoyment of the restricted right”; (c) are “necessary” “to meet a compelling public interest,” and (d) are “proportionate,” in the sense of being “closely adapted to attainment of the legitimate objective, interfering as little as possible in the effective exercise of the restricted right.” On this basis, when communal property is involved, the State must assess the conflict between property rights on a case-by-case basis and the “restrictions that would result from the recognition of one right rather than the other.” Accordingly, States must take into account that “indigenous territorial rights encompass a different and broader concept that relates to the collective right to survival as an organized people, with control over its habitat as a necessary condition for the reproduction of its culture, for its development and to implement its life projects; o]wnership of the land ensures that the members of the indigenous communities preserve their cultural heritage.” Moreover, the preservation of the cultural identity of indigenous peoples or communities may be a “collective objective” that makes it necessary to restrict the rights of private individuals. This does not mean that indigenous communal ownership should always prevail over private ownership, but when indigenous communities are deprived of their traditional territory with justification, as indicated in Article 16(4) of ILO Convention 169, these communities “shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.” The Court has indicated that “[s]election and transfer of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, a consensual agreement must be reached with the peoples involved, in accordance with their own consultation mechanisms, values, customs and customary law” (Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 144, 145, 146, 148 and 151, and *Case of the Saramaka People v. Suriname*, para. 127).

<sup>103</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153. The Court had occasion to indicate, in relation to a specific case, that the obligations of the State are “sequential” and apply with regard to both traditional territory and “alternative lands”; “first, it is necessary to identify the territory of the Community, which means establishing its limits and demarcations, as well as its extension. Once the territory and its limits have been determined, if this is in the hands of third parties, the State must initiate the procedures to purchase it or assess whether it should be expropriated [...]. If, for justified and objective reasons, the State is unable to reclaim the territory that has been identified as the traditional land of the Community, it must provide it with alternative land to be chosen by mutual agreement. Lastly, when the land has been expropriated or chosen by mutual agreement, the State must provide title to it and transfer it physically and formally to the Community” (*Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the judgment on merits, reparations and costs*. Judgment of February 6, 2006, para. 34). In principle, these indications, which were given in a specific case, can be generalized. The Court has also had occasion to examine concrete facts that denote the discontinuous nature of the titled land, or its division and fragmentation, so that the different lots that compose it do not have a single “geographical extension,” which has a negative impact on the use and enjoyment of the said territory (*Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 127).

property of the members of the said communities."<sup>104</sup> Demarcation and granting title should result in the peaceful use and enjoyment of the property.<sup>105</sup>

97. In keeping with the foregoing, in 2015, the Court underlined that "based on the principle of legal certainty, the territorial rights of indigenous peoples must be implemented by the adoption of the legislative and administrative measures required to create an effective mechanism for delimitation, demarcation and titling that recognizes those rights in practice" and makes them enforceable before the State authorities or third parties.<sup>106</sup> It included similar findings in its 2018 decision in the case of the *Xucuru Indigenous People and its members v. Brazil*.<sup>107</sup>

98. Based on the above, it is relevant to recall that the State must ensure the effective ownership of the indigenous peoples and, therefore, it must: (a) delimit indigenous lands from others and grant collective title to the lands of the communities;<sup>108</sup> (b) "refrain from carrying out actions that may result in agents of the State or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use and enjoyment of their territory,"<sup>109</sup> and (c) guarantee the right of the indigenous peoples to truly control and use their territory and natural resources,<sup>110</sup> and to own their territory without any type of external interference from third parties.<sup>111</sup>

### **B) Recognition and determination of communal property**

99. The Court will now consider the arguments submitted by the Commission and the parties with regard to the recognition and determination of the property. In other words, it will assess the arguments on the alleged absence of appropriate procedure to guarantee the ownership and granting of an adequate property title that would provide legal certainty to the right. It will also examine the obligation to ensure the right to property in relation to the presence of non-indigenous settlers on the claimed territory. These arguments relate to the right to property established in Article 21 of the Convention. The violation of the rights to an effective procedure for the protection of

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<sup>104</sup> *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, para. 119. The Court ruled similarly in subsequent cases: *Cf. Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, para. 120, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 118.

<sup>105</sup> *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 119.

<sup>106</sup> *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 133.

<sup>107</sup> *Cf. Case of the Xucuru Indigenous People and its members v. Brazil*, para. 119.

<sup>108</sup> *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117. In this regard, expert witness Yáñez Fuenzalida stated that "[i]n the case of land without title, the international obligation of the State is to demarcate and grant title to indigenous territories to provide legal certainty over the indigenous ancestral domains."

<sup>109</sup> *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117.

<sup>110</sup> *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 137; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 146, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117. This is consistent with Article 26(1) of the United Nations Declaration on the Rights of Indigenous Peoples. Also, the Committee on the Elimination of Racial Discrimination urged States "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources" (*General Recommendation 23, Rights of Indigenous Peoples*. (Fifty-first session, 1997) Doc. A/52/18, annex V, para. 5).

<sup>111</sup> *Cf. Case of the Saramaka People v. Suriname*, para. 115 and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117.

property, to recognition of juridical personality, to freedom of association, and of political rights has also been alleged. These are established, respectively, in Articles 8 and 25, 3, 16 and 23 of the Convention.

### **B.1 Arguments of the Commission and of the parties**

100. The **Commission** argued that the State had violated the communities' right to property "because it had not provided effective access to property titles over ancestral territory," and added that this violation occurred: (a) because it had failed to implement domestic norms that recognized this, and (b) in relation to the rights to judicial guarantees and protection, owing to the absence of an effective procedure to recognize and "legalize" ownership.<sup>112</sup> In its Merits Report, the Commission linked this to non-compliance with Articles 1(1) and 2 of the Convention, which establish, respectively, the obligations to respect and to ensure rights, and to adopt domestic legal provisions.<sup>113</sup>

101. The Commission indicated that it was 23 years after the first agreement, in 1991, that Decree 1498/14 transferred the ownership to the communities. However, the dispute had continued with regard to the demarcation of the territory and the way in which the land had been titled. It argued that "the communities still do not have a single, communal title" and it concluded that "the State continues to fail to comply with its obligation to make decisive and definitive progress in demarcation and delimitation."

102. The Commission also understood that the State had violated the right to property owing to the failure to "provide clear title" to the territory. It noted the presence of non-indigenous settler families on Lots 14 and 55.<sup>114</sup> It argued that "the State had failed to comply with its duty to prevent non-indigenous families from continuing to settle on the ancestral territory." It concluded that "now that more than 20 years ha[d] passed since the first agreement signed with the province of Salta and [five] years since the issue of Decree 1498/14, the communities have not been able to enjoy the territory effectively."

103. The **representatives** argued the violation of the right to communal property owing to: (a) the ineffectiveness of norms to allow the real enjoyment of this right; (b) the enactment of laws contrary to the realization of the "right to communal property"; (c) "the implementation of a fieldwork methodology characterized, first, by the successive and unilateral changes in the applicable procedures and, then, by the decision

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<sup>112</sup> In this context, the Commission indicated that there were "six successive variations in the applicable procedures," which included a "line of action" addressed at "allocating parcels to indigenous and *criollo* families." It included the 2005 referendum among those procedures. The Commission alleged that the referendum "was not the same as a process of prior consultation on [the] land allocation decision," and that this action "subjected the decision on a matter that directly affected the indigenous population to an expression of the will of the general population."

<sup>113</sup> It should be clarified that, when examining the last point cited in the Merits Report, the Commission referred to Article 2 of the American Convention. However, it did not mention this article in its conclusions on that aspect (expressed in paragraph 3 of the "Conclusions" of the Merits Report. In its final written arguments, it clarified that "in its Merits Report [...] the Commission concluded that the State [...] had] violated the rights established in Articles 8 and 25 of the Convention [...] in connection with Article 21 and with Article 2 of the Convention, because the State had not complied with the rights legally recognized to the communities by provincial decrees, and had not provided the communities with a specific procedure, clearly regulated and appropriate to assert their right to collective property."

<sup>114</sup> The Commission noted that, given the difference between the hunter-gatherer, fishing and nomadic way of life of the indigenous communities and the cattle-raising way of life of the *criollo* population that seriously degrades the natural habitat, conflicts and tensions over land use and access to natural resources had arisen. One of the main problems is that of the appropriation of land, and the installation of fencing by the *criollos*, which prevents, restricts and curtails the mobility of the indigenous peoples.

to subject [...] the process to the will of third parties" (*criollo* settlers), and (d) the absence "in [...] Argentina and Salta of an institutional mechanism for the delimitation and demarcation of territories." They alleged the violation of the same rights and obligations as those indicated by the Commission.<sup>115</sup>

104. The representatives argued that the State had not provided an effective procedure that would make it possible to "delimit, demarcate and title indigenous territory"; one that could "provide a concrete response to the territorial claims of the communities", including with regard to the "providing clear title to the [territory]."

105. They indicated that the violation of the right to property was "constituted" because "the indigenous communities still do not have title to their communal property [and] that much remains to be done in relation to the demarcation and delimitation of their territories." They emphasized that, to respect the "traditions and cultural norms" of the communities, the title required was "a single collective title without internal subdivisions" or "individual parcels."<sup>116</sup> They pointed out that Decree 1498/14 is not the same as a title and that "it has established a condominium arrangement between communities [...], *criollo* families and the province of Salta itself over Lots 55 and 14."

106. In this regard, they affirmed that the State had implemented a work methodology that disregarded its duty to return the indigenous lands and territories, because it was operating under the assumption that relocation agreements existed between indigenous and *criollo* families. They indicated that, "by failing to develop an alternative mechanism to guarantee the territorial rights if agreements were not reached," the State was trying "to subject any guarantee of rights of the indigenous communities to the wishes of third parties."<sup>117</sup> They added that an "extremely" serious violation of political rights had been verified produced by the "fraudulent" referendum held in 2005 and affirmed that it was not possible to submit the guarantee and protection of fundamental rights of the indigenous communities to a plebiscite.<sup>118</sup>

107. The representatives also argued that the recognition of juridical personality had not been effective because, in 1992, several communities had to organize themselves into a civil association to obtain legal status and negotiate the property claim. They

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<sup>115</sup> It should be clarified that, when referring to the violation of the rights to judicial guarantees and judicial protection, contrary to the Commission, the representative did so in relation to administrative and judicial actions filed to claim the defense of different aspects of the right to property. This judgment includes a chapter that examines the judicial actions (*infra* Chapter VII.3).

<sup>116</sup> They explained that the way of life of the communities involved the freedom to move throughout the entire territory and that if the title were not as indicated it would just "change the *criollo* fencing for parceled properties." Regarding the claim for a "single" title and the fact that there are communities that are not members of Lhaka Honhat, they indicated that "all the indigenous communities have territorial claims and that, in the worst case scenario, [...] internal conflicts [...] should be resolved by the communities using their own conflict resolution mechanisms."

<sup>117</sup> The representatives also criticized this methodology indicating that "it was the State itself that: (a) has not carried out the necessary infrastructure works to achieve the relocation of the *criollo* families with whom an agreement has been reached [...] and (b) has not taken any effective action to eliminate fencing in the ancestral territory in order to mitigate the tremendous consequences for the traditional way of life of the indigenous communities."

<sup>118</sup> Additionally, they indicated that to guarantee democracy and, therefore, human rights, it was essential that elections be "authentic" and effectively reflect the will of the voters. In this regard, they affirmed that, during the said referendum, at least two irregularities were verified that prevented considering it to be "authentic" and a genuine expression of the will of the people, which entailed a violation of Article 23 of the Convention: the use of ballots with misleading messages promising economic well-being, and the fraudulent calculation of the quorum required for the validity of the vote.

indicated that this type of association bears no relationship to the traditional form of organization of the indigenous communities. They explained that, on October 23, 2017, an explicit request was sent to the Salta Ministry of Indigenous Affairs for recognition of Lhaka Honhat as an indigenous organization with its respective legal status. They pointed out that the Ministry had not replied to this request and indicated that “the lack of juridical personality [...], also interferes in the exercise of the right to freedom of association, because [...] it prevents the exercise of forms of community association for territorial and cultural claims.” They added that “the registration” in the National Registry of Indigenous Peoples (Re.No.Pi.), regulated by INAI Resolution 328/2010, “does nothing to resolve the violation of the right [...] to juridical personality [...] because it contains a series of requirements that are not adapted to the form of organization adopted by Lhaka Honhat.”<sup>119</sup> They also noted that this resolution is from 2010 and that, at that date, the violation of the right to juridical personality had already been “consolidated.”

108. The representatives also affirmed that, given the presence of the *criollo* population, there was a “failure to guarantee the property rights.” They indicated that, on May 25, 2018, of 282 *criollo* families who should have been relocated, only two had completed the process fully (*infra* footnote 143).

109. The **State** denied that rights relating to the land had been violated. It argued that “there can be no doubt regarding recognition of the communities’ right to property,” and that Argentina had “worked continuously to achieve the full enjoyment of all the rights.” It underscored the “complexity” of the case, which it classified as “extreme” indicating, among other reasons, the presence of “*criollo* settlers with rights in the area,” the need for “public works” to “facilitate the relocation of the settlers,” the “problems” relating to “specific competences” of Salta and the national State, and “the complexity resulting from the appearance of new communities that, perhaps in the future, do not want to be part of a single title.”

110. The State developed its arguments, indicating that it had recognized the communities’ right to property in different acts.<sup>120</sup> It affirmed that “[t]he communities] already possess the single title based on Provincial Decree 1498/14.” It asserted that “[t]he criteria for recognition of the lands [...] was based on provincial, national and international laws that recognize the areas of traditional use as the territory of the communities.” Argentina added that “financial and human resources ha[d] consistently been devoted to the historical process of land regularization.” It also indicated that the referendum had produced no legal effect and, therefore, the Court should not rule on that situation.<sup>121</sup>

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<sup>119</sup> They referred, in particular, to articles 6, 7 and 8 of the said Resolution, indicating that “the requirements established [...] represent an imposition of ways and means of organization that are incompatible with the cultural identity of the indigenous peoples and, in particular, with the way in which Lhaka Honhat has been functioning. The system of majorities and minorities described in the INAI Resolution is totally incompatible with the mode of operation of this organization.”

<sup>120</sup> Argentina listed the following acts: Act of December 5, 1991, Decrees 2609/91, 18/93 and 3097/95, agreement of April 1996, Decree 461/99, the friendly settlement procedure, Decree 295/02, establishment of the “Working Group” on October 4, 2002, provincial proposals of November 16 and December 22, 2004, working meeting before the Commission on March 2, 2005, meeting of March 14, 2006, Decrees 2786/07, 2398/12 and 1498/14, and the comprehensive work plan proposed in 2017.

<sup>121</sup> It also indicated that Salta “has always respected the political rights of the [communities]” by “facilitating the free election of their authorities, the caciques.”



111. Argentina explained that it was developing a participatory working method in agreement with the parties (*criollos* and indigenous peoples), based on the map presented by the “petitioners.” The “methodology” involved a “dialogue” between the indigenous communities and the *criollo* families. Argentina asked the Court to “take into account the characteristics of the conflict and the realistic way of resolving it, noting the progress that had been made towards finding a peaceful and participatory solution.” It emphasized that “owing to the agreements reached, it had been possible to delimit the territory” and that “demarcation required the participation of all those concerned.”<sup>122</sup> It explained that, in order to “grant the single title to the indigenous communities in which the *criollo* families do not appear as co-owners, [...] it is essential that all the agreements between the parties have been signed, and this involves the active participation of the communities and the *criollos*, so that achieving this depends to a great extent on the willingness of the said parties.” It added that “[t]he survey and demarcation were also indispensable, as well as the signature of the deed transferring ownership to the *criollo* families. Once this formal act has been completed, the *criollo* families will cease to appear registered as titleholders of Lots [14 and 55].” It also indicated that difficulties had been encountered in the “relocation” process.<sup>123</sup>

112. The State recalled that Article 21 of the Convention indicated the possibility of subordinating the use and enjoyment of property to “the interests of society,” and understood that such interests are “constituted” in this case not only for the indigenous communities affiliated with Lhaka Honhat, but also for other communities who are not affiliated and for *criollo* families. It alleged that the *criollo* families are “vulnerable rural settlers.” It indicated that it was necessary to harmonize the rights of the indigenous communities affiliated with the Lhaka Honhat Association with those of the indigenous communities that were not represented by this Association,<sup>124</sup> as well as the *criollo* population. Hence, it argued that the State “also has to guarantee the right of the settlers to obtain title to the lands that they have historically inhabited” and that the said right was “guaranteed by responding to the claims of [the indigenous communities] and reaching total agreement with them.”

113. Responding to the arguments concerning the presumed violation of the rights to juridical personality and to freedom of association, Argentina explained that the Re.No.Pi. was created to register organizations of indigenous peoples and that Lhaka Honhat had never applied for registration. It also indicated that “the actual organizational structure does not affect [Lhaka Honhat].” Argentina argued that the fact that Salta had recognized the right of the indigenous communities to communal property

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<sup>122</sup> “The methodology,” explained the State, “consists basically in the dialogue between the indigenous communities and the *criollo* families, guaranteed and coordinated by the UEP.”

<sup>123</sup> It explained that “relocation is the process by which the *criollo* families who are in the territory claimed by the communities [...] move to the area where there are no indigenous claims, [...] and where the State must guarantee [...] the minimum conditions for the living and production units required in order to carry out the relocation. The process entails changing the livestock farming habits of each *criollo* family, preparing the new surface area by investments, especially in the production unit to enclose the animals, pastures, fencing, technical assistance and training, and also [...] to guarantee [...] access to water for animal and human consumption. The description of each stage of the process does not take into account the trauma suffered by the *criollo* settlers, as described in their testimonies. This relates to the uncertainty of parents about their children’s education, the implications for the older settlers of recommencing life at such a late stage and, evidently, the animals’ survival of the stress of relocation on land that does not necessarily have the appropriate environmental conditions.”

<sup>124</sup> The State emphasized that “currently there are different opinions on property titles, because some [communities] are asking for a single indivisible title [and] other would like to obtain a communal property title for each community to avoid future conflicts.”

by Decree 1,498/14, as well as the “permanent” dialogue between the UEP and the communities revealed the absence of a violation of juridical personality. In its final written arguments dated June 3, 2019, the State indicated that “for approximately 10 years, the presumed victims had been able to register themselves, adopting the organizational structure in keeping with their traditions, without needing to organize under associative forms that were alien to their culture.”

## **B.2 Considerations of the Court**

### B.2.1 Description of the State’s actions in this case and the corresponding analysis

114. It has been established that the indigenous communities’ right to ownership of their ancestral territory is not in discussion and this has been recognized in different State acts (*supra* para. 89). This will also be referred to below (*infra* paras. 130, 145, 146, 149, 156 and 167). However, the Court must determine whether the State’s actions in this case have provided adequate legal certainty to the right to communal property and have permitted the free exercise and enjoyment of that right by the indigenous communities.

115. In this regard, based on the standards previously mentioned (*supra* paras. 93 to 98), the Court has indicated that the indigenous communities have the right to be granted a “formal property title, or other similar State recognition, that grants legal certainty to the indigenous ownership of land *vis-à-vis* the action or third parties or of agents of the State itself.”<sup>125</sup> In this context, the diverse and specific ways and means of control, ownership, use and enjoyment of the territories by the communities should be acknowledged,<sup>126</sup> without interference from third parties (*supra* para. 98).

116. As already indicated (*supra* para. 97), in order to implement the territorial rights of the indigenous peoples protected by Article 21 of the Convention, States must provide an effective mechanism by the adoption of the necessary legislative and administrative measures. These must meet the requirements of due process established in Articles 8 and 25 of the American Convention.<sup>127</sup> In light of Article 2 of the Convention, States must adapt their domestic laws to ensure that such mechanisms exist and are adequate<sup>128</sup> and effective: thus, they must provide a real possibility for the communities

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<sup>125</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 143, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 133.

<sup>126</sup> In this regard, the Court has indicated that: “(1) the indigenous peoples’ traditional possession of their lands has effects that are equal to the ownership title granted by the State; (2) traditional possession grants the indigenous peoples the right to claim official recognition of ownership and its registration” (*Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 128).

<sup>127</sup> *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 138, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 130.

<sup>128</sup> “In relation to Article 2 of the American Convention, the Court has indicated that this obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as are necessary to give effect to the rights and freedoms enshrined in the Convention. In other words, ‘the general obligation [derived from this article] entails the adoption of measures in two areas. On the one hand, it must eliminate the norms and practices of any kind that entail a violation of the guarantees established in the Convention; and, on the other hand, it must enact norms and develop practices leading to the effective observance of those guarantees” (*Case of the Garifuna Community of Punta Piedra and its members v. Honduras*, para. 206. Citing: *Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 51; *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 207; *Case of the Kuna*

to be able to defend their rights and exercise effective control of their territory without any external interference.<sup>129</sup> In addition, it should be established that the indigenous peoples have a right not to be subjected to an unreasonable delay in the final settlement of their claims.<sup>130</sup>

117. What happened in this case must be assessed in relation to the preceding parameters. The Court notes that, as will be explained, the State has recognized the communal property, but it must now analyze whether this was done adequately and in a way that was compatible with the Convention. The State has taken various measures with regard to the recognition of property; however, such measures have not been the result of the implementation of a regulated procedure, previously established by law. What occurred was a property claim by the indigenous communities in 1991, followed by an interaction between the communities and the government. Over the years, this has been marked by various events in which the *criollo* population has intervened and several agreements have been reached with the latter, ratified by pieces of State legislation. That interaction, which was not conducted in keeping with legally established procedural standards resulted in various government acts – basically decrees issued by the Salta Executive – that, in different ways, advanced the recognition of ownership.

118. That said, the Court has indicated that, in light of Articles 2, 8, 21 and 25 of the Convention, considered as a whole, States must establish appropriate procedures to facilitate indigenous territorial claims in their domestic law (*supra* para. 116). However, if, in a specific case, the State has realized the right to communal property in another way, it is not necessary to examine whether its domestic laws are adapted to this right. To the contrary, if it is concluded that the right has not been realized, it would be relevant to analyze whether relevant aspects of the legal system have had an impact on this.

119. Consequently, first the Court will examine whether Argentina has adequately ensured the right to property under Article 21 of the Convention and then, if this is so, the compatibility of the State's laws with the Convention. The Court will not take into account Articles 8 and 25 of the Convention when making this initial analysis, because they are not applicable since, as indicated, the actions were not part of a previously regulated procedure (*supra* para. 117). Thus, it will not analyze whether a reasonable time was ensured as a procedural guarantee, although it may take into account the impact of time on the exercise of the right to property.

120. It should also be clarified that the Court will examine compliance with Article 21 of the Convention in relation to the obligation to ensure rights established in Article 1(1) of this instrument, but also with regard to Article 2, although in a different sense to that indicated previously. Article 2 relates not only to the formal adaptation of domestic law to the Convention by the adoption of "legislative measures," but also to the adoption of "other measures" to give effect to the rights. Such measures may include those

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*Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, para. 192, and *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of October 15, 2014. Series C No. 286, para. 153).

<sup>129</sup> Cf. *Case of Godínez Cruz v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 3, para. 92, and *Case of the Xucuru Indigenous People and its members v. Brazil*, paras. 130 and 132.

<sup>130</sup> To assess this, it should be considered that, in certain circumstances, effective control of the territory, without interference, may be complex based on factors such as the dimension of the territory, its geographical characteristics, the number of third parties present on it, and their profile and characteristics, among other matters (Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 85. Similarly, *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 139).

addressed at implementing the laws that the State has adopted in order to realize a right.<sup>131</sup> Hence the Court will assess the State's conduct considering its actions that have formally made progress in the recognition of the property rights, but also the measures taken to implement this.

121. On this basis, the Court will therefore evaluate whether the State has adequately facilitated the recognition of property rights. As will be described (*infra* para. 130), it is clear that, at least since 2007, based on agreements between the *criollo* and indigenous populations, ratified by the State, it has been determined that an area of 400,000 ha in Lots 14 and 55 corresponds to the indigenous communities. The facts also reveal that, despite this, the separation of indigenous property from the land corresponding to the *criollo* population has still not been completed; the presence of *criollos* continues and the "dialogue" methodology (which will be described below, *infra* paras. 131 and 140 to 144) to reach agreement on the different "relocation" sites and transfer the *criollos* has not concluded.<sup>132</sup>

122. Based on the above, the Court will now analyze the State's conduct reviewing the events in chronological order.

### B.2.2 Actions taken towards recognition of ownership

#### B.2.2.1 Prior to 1999

123. As the description of the facts reveals, the original indigenous claims over Lots 14 and 55 were made more than 35 years ago. However, based on the information provided to the Court, within its temporal jurisdiction (*supra* para. 13 and footnote 45) it was in July 1991 when, for the first time, a claim was formally made (*supra* para. 59). The State's conduct will be evaluated as of that time.

124. In December 1991, Decree No 2609/91 was issued ordering the merger of Lots 14 and 55 so that they could then be "adjudicated" by a "single property title" (*supra* para. 60). Although this objective was not met at that time, the Court does not find that, prior to 1999, the State acted in a way that was contrary to its substantive international obligations.<sup>133</sup> Nevertheless, it should be considered that, between 1996 and 1998, Lhaka Honhat sent several letters to the authorities asking them to give effect to the

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<sup>131</sup> The Court has indicated that Article 2 of the Convention not only calls for the "adoption of legislation," but also for "the implementation of practices leading to the effective realization" of the "guarantees" under the Convention (*Cf. Case of Cantoral Benavides v. Peru. Preliminary objections*. Judgment of September 3, 1998. Series C No. 40, para. 178, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 243). The State's actions to enforce its domestic laws when they refer to adequate realization of a Convention right is a "practice" in the sense indicated. The concept of "practice," or measures other than legislative measures, in the terms of Article 2 of the Convention, is not the same as the mere act of direct or specific application of a legal provision.

<sup>132</sup> Interference in the enjoyment of the right to property has been indicated not only owing to the *criollo* presence, but also owing to the livestock farming, the installation of fencing, and illegal logging; issues that will be examined in Chapter VII.2 of this judgment.

<sup>133</sup> The recognition of the communities' right to property in Decree 2609/91 was, in itself, insufficient. Subsequent actions reveal that the State considered this so. Decree 18/93 was issued because the Provincial Institute for Aboriginal Affairs had been unable "to implement the intended objective." To achieve this, the decree created an advisory committee for the "regularization" of the settlements on Lot 55. Then, in April 1996, a memorandum of understanding was signed in which the province agreed to the creation of a coordinating unit to move forward in the "regularization" and, in September 1996, the Governor made a similar commitment.

formalization of the communal ownership of the territory,<sup>134</sup> without any record of progress at that time.

#### *B.2.2.2 From 1999 to 2004*

125. A change in the State's conduct can be noted in 1999 following Decree 461/99, by which the province adjudicated parcels within Lot 55 to some individuals and indigenous communities settled there.<sup>135</sup> The decree sought to allocate parcels that contravened the unity of the indigenous territory and the terms that had been established by the State itself in Decree 2609/91 (*supra* paras. 60 and 124). In 2007, the Salta Court of Justice declared that Decree 461/99 was "null and void" (*infra* para. 300), indicating that it had been issued without the preceding process complying with the "safeguard of the fundamental rights of the aboriginal peoples" because it "prevented [...] them from having adequate opportunity to make known their opinions in defense of the rights that they claim over the land."<sup>136</sup>

126. Following the issue of Decree 461 in 1999, other State actions were taken to the same effect; that is, contrary to the unity and continuity of the territory. These actions included, in particular, the publication of edicts to adjudicate land in Lots 14 and 55, and governmental proposals to transfer ownership in a fragmented manner (*supra* paras. 65 and 66). Also, even though in themselves they did not infringe the right to property, Decree No. 339/01 issued to complete the "mapping" of Lots 55 and 14, and the surveys conducted in 2001 and the following years (*supra* paras. 67 and 68) reveal – from an analysis of all the facts of the case – that they formed part of State actions contrary to the unified recognition of indigenous territory.

127. Those actions contravened acts relating to indigenous property that the State itself had implemented following Decree 2609/91 establishing the unity of the territory.

#### *B.2.2.3 2005 and 2006*

128. In 2005 a referendum was held and this has been described in Chapter VI of this judgment (*supra* paras. 71 to 73).

129. The Court notes that, as the State has indicated, the result of the referendum had no effect because, as will be explained below, subsequent orders were issued that, disregarding the result of this consultation, signified the State's recognition of ownership by the indigenous communities. The Court understands that, in principle, it could be contrary to respect for the right to indigenous communal property that its recognition be submitted to the majority decision of the citizenship. However, in this case, the Court considers that it is not necessary to rule on the referendum because it had no effect. Therefore, it is not necessary to examine the representatives' arguments in relation to

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<sup>134</sup> The Inter-American Commission indicated that, in January 2001, the Ombudsman of the Argentine Republic sent it a copy of 18 communications sent to the Governor of Salta, the Minister of the Interior and the President of the Republic, among others, between 1996 and 1998.

<sup>135</sup> As indicated (*supra* para. 65 and footnote 56), land was adjudicated to at least three individuals and five indigenous communities.

<sup>136</sup> Case "Lhaka Honhat Association of Aboriginal Communities v. Executive of the province of Salta," judgment of the CJS of May 8, 2007 (evidence file, annex F.6 to the pleadings and motions brief, fs. 30,875 to 30,881). Since Decree 461/99 was annulled, there is no need for the Inter-American Court to rule on its compatibility with the Convention; suffice it to say that it did not officialize a valid recognition of the indigenous communities' ownership of their territory.

the referendum concerning the presumed violation of political rights established in Article 23 of the Convention.

#### *B.2.2.4 The agreements reached starting in 2007*

130. As revealed by the facts, following the referendum and unrelated to its result, discussions between the parties continued. Meetings were held in 2006 and 2007, and on October 23, 2007, Decree 2786/07 was issued formally adopting the Memorandum of Understanding of October 17 that year, which, in turn, had been preceded by other agreements (*supra* paras. 74 and 75). Based on this Decree and on Decree 1498/14, issued in 2014, the State recognized the indigenous communities' property rights over their 400,000 ha area in legal instruments.

131. Decree 2786/07 called for a series of subsequent actions, which it indicated were required for "transferring" the land ownership title and drawing up the corresponding public deeds. It established a method for negotiating agreements between the parties on the exact territorial boundaries and also that, when "all the necessary procedures" had been concluded, the corresponding government agencies would intervene to carry out any "procedures [that] were required." The foregoing was addressed at achieving the "final transfer of the land ownership title" and "granting of the respective public deed to the beneficiaries without any cost to them." From 2007 to date, a process has been implemented characterized by the State's intervention through the UEP and the dialogue between the *criollo* and indigenous populations to reach agreements for the final demarcation of the property and the relocation of the *criollo* population.

132. This process has not concluded. Since it began, Decree 2398/12 was issued in 2012, establishing that each community would determine "the type of [land] title," even though, among its premises, it cited Decree 2786/07, which – referring to the Memorandum of Understanding that preceded it – ordered that the "continuity" of the land should be "respected," and the Inter-American Commission's recommendations urging the State "to formalize" ownership, considering the "right to a continuous territory." The Court considers that this reference to "the type of [land] title" in article 1 of Decree 2398/12 was contrary to the legal certainty required to realize the right to property of the indigenous communities. In 2014, Decree 1498/14 established that the territory would be delimited and the lots would be specifically determined through the intervention of the UEP and agreements between the parties.

133. It should be stressed that the State has indicated that the "transfer" of the single communal title depends on the conclusion of this process of "agreements" (*supra* para. 111). The representatives have argued that the guarantee of the indigenous territorial rights cannot be dependent on the willingness of third parties, so that an "alternative mechanism" was required to overcome the absence of agreements (*supra* para. 106).

134. The Court finds it appropriate to include some considerations in order to adequately assess the dialogue process and the agreements. This is due, above all, to the characteristics of the case in which not only indigenous communities are involved, but also a significant number of "*criollo*" families whose connection to the land is determinant for their way of life.

##### *B.2.2.4.1 The dialogue with the criollo population*

135. The State has characterized the *criollo* families as "vulnerable rural settlers" (*supra* para. 112). Expert witness Buliubasich referred to them as an "impoverished"

group. The insight gained from the on-site visit was consistent with these characterizations.<sup>137</sup>

136. The State's remarks on the *criollo* settlers who inhabit Lots 14 and 55 correspond to the considerations included in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (hereinafter "Declaration on the Rights of Peasants"),<sup>138</sup> The document states that, in general, peasants "suffer disproportionately from poverty, hunger and malnutrition"; that "several factors make it difficult for peasants [...] to make their voices heard [and] to defend their human rights," and to "gain access to courts, police officers, prosecutors and lawyers." In particular, the Declaration indicates that "access to land" and natural resources is an "increasing challenge" for the "rural people" and that there are "several factors that make it difficult" for them to be able to "defend their [...] tenure rights and to secure the sustainable use of the natural resources on which they depend." The Declaration states that "States shall elaborate and apply relevant international agreements and standards [...] in a manner consistent with their human rights obligations as applicable to peasants and other people working in rural areas." The Court clarifies that it is not assessing State responsibility based on the Declaration on the Rights of Peasants, but is alluding to it merely as a supplementary reference that, in keeping with Argentina's comments on the vulnerability of the *criollo* population, reveals the pertinence of taking into account the particular situation of this population in order to safeguard their rights.

137. The Court cannot ignore that the State has obligations towards the *criollo* population, because, given their vulnerable situation, the State must take positive steps to ensure their rights.

138. That said, as already indicated, there is no doubt about the indigenous communities' ownership of 400,000 ha of Lots 14 and 55. To guarantee this right, the State should have demarcated the indigenous property and taken steps to transfer or relocate the *criollo* population outside it. Nevertheless, the way in which the State must comply with this obligation cannot be ignored. Thus, the actions taken by Argentina should respect the rights of the *criollo* population (*infra* para. 329(d) and footnote 323).

139. This is relevant because it provides necessary input when considering the procedure to be followed. In light of the land area and the number of people involved, with their different characteristics and problems, it is evident that the situation is

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<sup>137</sup> In this regard, as already indicated (*supra* para. 10), the Court's delegation met with representatives of *criollo* families and organizations. In particular, the *criollo* representatives stated that they had taken part in the processes and agreements and that the central problem was that the area corresponding to each *criollo* family has not been completely defined. They mentioned that the relocation of the *criollo* settlers who are on land claimed by indigenous communities was linked to the State's commitment to ensure the appropriate improvements to the areas identified and that the parcels needed to be defined more clearly, so that all the families might benefit. They also considered that the State had not proposed a "serious" action plan that provided guarantees to all the families that must move. They stressed the importance of the "support" of the State, at both the provincial and the national level, so that they could complete the agreements, and also for the adaptation of the activities of the *criollo* population because, as they indicated, the livestock would have to be managed in a different way in a smaller area.

<sup>138</sup> UN. General Assembly Resolution A/RES/73/165, adopted on December 17, 2018. *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*. Article 1 defines a peasant as "any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land." It should be underscored that the text clarifies that its content also applies, among others, to "indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities."

complex. The Court highlights and appreciates the dialogue process that is underway in this case between the State, *criollo* settlers and indigenous communities, because it understands that this type of procedure has the potential to allow the State to comply with its diverse obligations and realize the rights involved.

#### B.2.2.4.2 The procedure followed in this case

140. During the aforementioned process, which has not concluded, various actions were taken, including the following. In 2008, a technical team within the UEP was created to move forward with the transfer of the land. Previously, various meetings had been held, and then one in 2009, to define how land ownership would be recognized. That year, a work timetable was drawn up and also a list of *criollo* settlers who met the requirements to prove they occupied land. In 2013, Salta signed agreements with INAI to ensure the support of this national institution for the process. The same year the Salta government issued Decree 2001/13 establishing a "program" to "implement communal ownership" which included a "work plan" based on "participatory workshops" for the *criollo* and the indigenous populations; the government also agreed to carry out work based on a map prepared by the indigenous communities. In 2014, the previously mentioned Decree 1498/14 was issued, and also Resolution No. 654, which approved agreements for a "work plan" and, in mid-2015, the "demarcation" of part of the northern area of Lots 14 and 55 was carried out.

141. The process has also encountered difficulties and disagreements, and it is useful to indicate some examples. In April 2009, representatives of communities that are members of Lhaka Honhat questioned the land distribution that the UEP had intended to implement, and also the fact that the UEP had not allowed indigenous communities to participate in the technical team. In May that year, the representatives indicated that the State had tried to transfer land "unilaterally." In 2012, after the Merits Report had been notified, Decree 2398/12 was issued and, as previously explained, was not designed to establish a "single property title." According to information provided by the representatives, in 2013, 93% of the work of agreements, demarcation and delimitation remained pending and, in July that year, *criollos* and members of indigenous communities noted the "inaction" of the UEP. At the end of 2013, work in the area was suspended due to a process of restructuration in the UEP. According to the representatives, budgetary problems affected the transfers from September 2015 to June 2016.

142. The representatives have described the methodology being following at the present time, through the UEP, referring to the stages of the procedure as follows: (1) agreements (between the indigenous peoples and the *criollos*), diagram and notarization; (2) survey; (3) titling; (4) relocation of family and livestock (and "in parallel," "carrying out the necessary infrastructure work").<sup>139</sup>

143. The representatives have alleged that "[o]ne of the most important errors in the work of the UEP" was the failure to "guarantee" "the indigenous territorial rights" when *criollo* families on indigenous territory indicated that "they would not move and they

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<sup>139</sup> The representatives explained that "both the definition of the limits of the ancestral territory and the relocation of *criollo* families require agreements between the indigenous and *criollo* populations. If agreements are reached on borders and relocation, a deed is signed by the parties that includes a diagram; then this is notarized with the intervention of an official notary of the province of Salta. Based on this information, the surveying stage commences to define the precise delimitation of the agreement reached; this is inserted on a special map with corresponding coordinates so that the General Property Directorate of the province of Salta can register the information on the respective parcels."



would not reach agreements,<sup>140</sup> because this “completely paralyzed” the “delimitation [and] demarcation [...] of the territory.” They indicated that, under the procedure established in Decree 2786/07, the State “subordinate[d] the handing over of the lands to the agreements [...] without providing any solution for cases in which [...] these were not obtained.”

144. Although it appreciates the agreement process, the Court considers that the procedures should evidently be appropriate to guarantee the indigenous communities’ ownership of their territory. The State cannot subordinate this guarantee to the willingness of private individuals.<sup>141</sup> The Memorandum of Understanding approved by Decree 2786/07 indicated that “if agreement cannot be reached, the parties shall be invited to submit to an arbitral procedure” and that if they did not do so, “the corresponding judicial decision will be taken.” There is no record that a mechanism was established to determine when the attempt to achieve an agreement had finally failed, or that the said arbitral or judicial procedures have been attempted. Based on the above, the Court has no evidence to conclude that the State, for the reason indicated by the representatives, rendered the agreement procedures ineffective.

145. The most recent act that signifies an official recognition of ownership, and which is still in force, is Decree 1498/14 of 2014. The decree states that its purpose is to “give effect to the titling of the lands.” Its articles grant the “communal ownership” of 58.27% of the “land identified with the cadastral registration numbers 175 and 5557 of the department of Rivadavia (Lots 14 and 55) to 71 indigenous communities, and “co-ownership,” pursuant to the provisions of the Civil Code, of the same lots, in favor of *criollo* “applicants.” In addition, it “reserved” 6.34% of the land for Salta, for necessary infrastructure work, and also for “any other purpose necessary for obtaining the agreements of the parties and for the specific determination of the lots allocated.” It also provided for the future “delimitation” and “specific determination of the territories and lots,” and that this “would be carried out through the UEP.”

146. Decree 1498/14 clearly recognizes the indigenous communities’ ownership of their territory. However, it also establishes a “co-ownership” over the same land in favor of *criollo* settlers. Therefore, and according to the text, which establishes a property right for *criollos* and indigenous communities over the same land and provides for future actions “to determine” and “to delimit,” it cannot be understood as a definitive act that fulfills the State’s obligation to ensure the communities’ right to property. Also, although the State has argued that Decree 1498/14 constituted the “single title” claimed by the communities, it has also affirmed that “to grant the single title” it was necessary to conclude agreements (*supra* paras. 110, 111 and 133). Consequently, although it is possible to understand Decree 1498/14 as an act that recognizes the communities’ right to property and provides them with greater legal certainty, this is only so insofar as it is understood as an act that provides for the subsequent modification of the situation it establishes.<sup>142</sup> However, the situation has remained unaltered to date.

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<sup>140</sup> The representatives have alleged that “numerous *criollo* families have indicated their decision not to move and not to reach an agreement.”

<sup>141</sup> The Court shares the opinion of expert witness Yáñez Fuenzalida: that the relocation of the *criollos* “is a State obligation and means that the State must execute public policies to implement this. The State fails to comply with this obligation if it transfers this obligation to private individuals [...] submitting the process to the unilateral will of the parties.” The *amicus curiae* brief presented by the Pontificia Universidad Católica del Ecuador included similar considerations based on a review of international standards.

<sup>142</sup> In this regard, the *amicus curiae* presented by DPLF and other entities pointed out that the ILO had “recognized the complexities and demands on everyone’s time required to regularize the ownership of the land

147. The Court notes the complexity of the case and the difficulties encountered by the State to implement the actions required to adequately guarantee the right to property. Argentina has stressed the complexity entailed, among other matters, by “the relocation of *criollo* settlers, adults, adolescents, children, entire families with their livestock and economic subsistence units, which make it necessary, first, [...] to install the necessary infrastructure to guarantee access to potable water, health care, safety, education, electricity and roads, as well as fencing for the livestock so that it does not invade the communities’ territory.” The State also advised that the “participatory process to regularize ownership” had required “redoubling efforts in terms of time and human resources.” In addition, even though not all its aspects are necessarily linked to the guarantee of communal property, the Court takes note that the State has indicated that it has made progress on a “public works plan” for the area that entails significant financial disbursements, and that is “underway” to ensure “not only the right to property,” but also “access to health care and education and the improvement of access to the area, among other matters.”

148. On this basis, the Court observes and appreciates the State’s actions but must note that the right to indigenous communal property has not been fully implemented and guaranteed, even though more than 28 years have passed since the first claims that the Court is able to examine.

149. Consequently, the Court understands that the State has recognized, in legal acts, the right to property of the indigenous communities. In this regard, there is a title or legal recognition of ownership; thus, the State has “unequivocally recognized” this right. Nevertheless, the Court cannot ignore the fact that recognition of indigenous ownership should be carried out providing the right with legal certainty, so that it is enforceable *vis-à-vis* third parties. The actions to this end have not been completed. Decree 1498/14 should be understood as an act that has not yet been implemented because its text provides for future actions. Therefore, the existing legal recognition is not yet adequate or sufficient for the full exercise of the right to property. Even though this Court appreciates the progress made by the State, it must conclude that the indigenous communities’ right to ownership of their territory has not been realized.

150. In this regard, despite some differences in the information presented by the representatives and the State, according to information provided by both parties, the procedures that Argentina indicated are necessary for “granting” the “single title” have not concluded, and a significant part of the actions required to achieve this have not yet been completed.<sup>143</sup> The representatives have indicated that more than 99% of the

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and recommended the adoption of transitory measures to protect the rights over the land of the indigenous peoples while a final settlement is reached.” In addition, the Court clarifies that, as indicated, Decree 1498/14 is an act that provides for actions that have not yet been completed and, also, it is the latest of other acts that, in this specific case, signified a recognition of ownership. Therefore, it is not necessary to make a detailed examination of the compatibility of each of these acts with the Convention; it is sufficient to examine the whole process followed in this case, which comprised the said acts. This method of analysis is common to all the aspects of the merits examined in this judgment; the succession of acts over more than 28 years is examined together, taking into account their results and the actual situation.

<sup>143</sup> The representatives indicated that (a) 282 *criollo* families must be relocated; (b) in several cases an agreement has been reached, but neither the diagram nor the following steps have been completed; (c) neither surveys nor their notarization have been carried out in the case of 192 *criollo* families who are on the territory corresponding to indigenous communities; (d) surveys have been completed for another 90 families, and (e) 42 families already possess the title corresponding to the land to which they should move. They also indicated that only in the northern part of Lots 14 and 55 had some progress been made in relocations, and nine families will be relocated there; of these three had already moved (one only partially, because some of the livestock

relocations still have to be implemented (*supra* para. 108), and the State, in 2017, indicated that it would need eight more years to complete the process (*supra* paras. 85 and *infra* paras. 315 and 323). Also, the State has indicated that the tasks relating to demarcation remain pending (*supra* para. 111).

### B.2.3 Assessment of the actions taken by the State

151. As already indicated, it is clear that the procedures established have not been sufficient because, more than 28 years after the initial claims for recognition of ownership, the indigenous communities living on Lots 14 and 55 have not achieved the full guarantee of that right over their territory.

152. That said, in order to assess the full dimension of the characteristics of the failure to ensure the right to property, some particularities of its relationship to the right to juridical personality and general provisions of domestic law should be noted.

#### *B.2.3.1 Alleged violation of juridical personality in this case*

153. It should be underlined that the adequate guarantee of communal property does not entail merely its nominal recognition, but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory.

154. It should be recalled that “international law on indigenous and tribal peoples and communities recognizes rights to them as collective subjects of international law, rather than merely to their members; [...] indigenous and tribal peoples and communities, unified by their particular way of life and identity, exercise some of the rights recognized in the Convention collectively”; these include the right to ownership of the land.<sup>144</sup> The Court has referred to the indigenous peoples’ right to self-determination in relation to the ability to “freely dispose [...] of their natural resources and wealth,” which is necessary to ensure that they are not deprived of “their inherent means of subsistence.”<sup>145</sup> It has already been noted that the right to communal property must be ensured in order to guarantee the control by the indigenous peoples of the natural resources on the territory, and also their way of life (*supra* para. 94). Both Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples recognize that indigenous peoples are holders of human rights. Articles VI and IX, respectively, of the American Declaration on the Rights of Indigenous Peoples establish the obligation of

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still had to be moved). In conclusion, they noted that less than 1% of the total of 282 *criollo* families who must relocate have completed the process. The State, in its answering brief of September 4, 2018, advised the following: “Situation of the *criollo* families”: “to be relocated: 123”; “with the surveys completed: 130”; “with deeds handed over: 42”; “with deeds ready to be handed over: 57”; “with deeds being drawn up: 31.” In addition, the State has recognized that “demarcation” has not been completed. From Decree 1498/14 it is clear that, when it was issued, actions “to determine” and “to delimit” remained pending. Subsequently, in 2015, some “demarcations” actions were taken. The State indicated that in September 2018 (date of its answering brief), some “progress” had been made in the “demarcation of 70% the 400,000 hectares (indigenous).” In their final written arguments, the representatives stated that the work of demarcation and delimitation had not ended, and the State indicated that some “survey work” and “demarcation” were pending.

<sup>144</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 149; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, paras. 145 and 231, and *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 And 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) And (B) of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 2, para. 75.

<sup>145</sup> *Case of the Saramaka People v. Suriname*, para. 93, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 122.

States to recognize “the right of indigenous peoples to their collective action,” and “the juridical personality of indigenous peoples, respecting indigenous forms of organization and promoting the full exercise of the rights recognized in this Declaration.”

155. This is relevant because the Court has indicated that “the right to have their juridical personality recognized by the State is one of the special measures that should be provided to indigenous and tribal groups to ensure that they are able to enjoy their territories in accordance with their traditions.”<sup>146</sup> To this end, the juridical personality should be recognized to the communities to enable them to take decision on the land in accordance with their traditions and forms of organization.<sup>147</sup>

156. Decree 1498/14 provided for actions to recognize the land ownership of the indigenous communities who live on Lots 14 and 55. It is true that it refers to 71 communities, but in light of the “fission-fusion” process that characterizes them, it should be understood that the increase in the number of communities since the issue of Decree 1498/14 is simply a derivation of those 71. Therefore, all the indigenous communities who live on Lots 14 and 55 that have formed based on the said 71 should be considered included in the recognition of ownership in Decree 1498/14, in the understanding that it covers all the communities identified as presumed victims (*supra* para. 35 and Annex V). The Court notes that any other interpretation of Decree 1498/14, that might imply denying the communities’ ownership under the pretext that they are not explicitly named in that decree would be contrary to the Convention. The State should refrain from actions or a biased or excessively rigorous interpretation of the norms that could result in causing artificial divisions among the indigenous communities involved in this case. In the context of the appropriate understanding of Decree 1498/14, it cannot be concluded that the State, in the way in which it has recognized ownership, would prevent the collective action of all the communities that are entitled to this right. Accordingly, as the State has recognized the ownership of all the indigenous communities, there appears to be no violation of the right to the recognition of their juridical personality. However, it is quite another matter whether, over and above this formal recognition, the right to property has been complied with as regards the effective implementation of the actions necessary for the definition, legal certainty and free enjoyment of property. This will also be examined in the judgment, but is not relevant to the issue of juridical personality.

157. It should be clarified that the establishment of Lhaka Honhat as a civil association was not imposed by the State; rather, it was the result of a valid act of association determined by the people concerned, and then recognized by the State. This State recognition, arising from a free and voluntary act, did not entail a violation of juridical

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<sup>146</sup> *Case of the Saramaka People v. Suriname*, para. 172, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 107.

<sup>147</sup> In this regard, it is illustrative to recall the Court’s considerations on certain circumstances in the case of the *Saramaka People v. Suriname*: “a recognition of the right to juridical personality of the Saramaka people as a whole would help prevent [... conflictual] situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory would be the responsibility of those representatives, and not of the individual members.” In that case, the State concerned had “objected to whether the twelve captains of the twelve Saramaka clans (lös) truly represent[ed] the will of the community as a whole [...]. The State additionally asserted that the true representative of the community should be [one] and not others.” The Court understood that “[t]his dispute over who actually represent[ed] the Saramaka people [was] precisely a natural consequence of the lack of recognition of their juridical personality” (*Case of the Saramaka People v. Suriname*, paras. 169 and 170).

personality, which as indicated was not violated in any other way.<sup>148</sup> Furthermore, the Court finds no reason to determine a violation of the right to freedom of association.

#### *B.2.3.2 Impact of domestic law*

158. As indicated, the State has been unable to implement the right to communal property and, in this context, it failed to respect the directives of its own domestic law, especially of Salta Executive Decrees 2609/91, 2786/07 and 1498/14. The latter ordered subsequent actions that were not completed and no other provision has been issued that makes adequate progress on the recognition of property ownership. This implementation failure has resulted in the lack of an adequate guarantee of the right to communal property. As indicated (*supra* paras. 120 and 151), this entails a violation not only of the right to property and the obligation to ensure this, pursuant to Articles 21 and 1(1) of the Convention, but also of the obligation to adopt the measures established in Article 2 of this instrument.

159. In consequence, as already explained (*supra* paras. 118 and 119), it is appropriate to assess whether the said absence of adequate titling was only related to the State's failure to implement certain actions or the delay in doing so, or whether it was also related to deficiencies in Argentine law.

160. It should be understood that, pursuant to laws of a constitutional rank (*supra* para. 54), there can be no doubt that the State recognizes the right to indigenous communal property<sup>149</sup> and that this, as expert witness Solá has also indicated, should be understood to be operative inasmuch as the State has the immediate and unconditional obligation to respect this. The possible absence of domestic laws does not excuse the State. Nevertheless, it is appropriate to consider whether the particularities of the State's legal system have represented an additional obstacle to the safeguard of the relevant right to property in this case.

161. In light of the federal system in Argentina, first, it should be established that it is relevant to evaluate both the provincial and the national laws. As can be seen from the description of the norms given in the chapter on "Facts" of this judgment (*supra* paras. 54 and 55), the Civil and Commercial Code, applicable in both the national and the provincial sphere, establishes the right to communal property. In addition, the provincial and national powers in relation to the rights of indigenous peoples are "concurrent" – in other words, common to both levels of the State – and the highest courts of the nation and of Salta have indicated that the national norms represent a "minimum standard" in this regard.<sup>150</sup> Accordingly, even though the Salta authorities have intervened in this

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<sup>148</sup> It is a fact that, in 2017, the Lhaka Honhat Civil Association asked the Salta authorities to recognize it as an indigenous organization and that this request has not been resolved (*supra* para. 88). Based on what it has already determined, the Court understands that it is not pertinent to examine this circumstance in relation to the rights to juridical personality or to freedom of association. Moreover, neither is it pertinent to examine it in relation to other rights that were alleged to have been violated. In this regard, it should be clarified, in particular, that the representatives did not present arguments that linked this issue to the rights to judicial guarantees and to judicial protection in their pleadings and motions brief.

<sup>149</sup> The Court notes that the wording of article 15 of the Salta Constitution (*supra* para. 55) appears to restrict the recognition of the right to indigenous communal property only to "fiscal" lands; however, it will not examine this presumed limitation specifically, as it is not relevant to this case.

<sup>150</sup> The CSJN has indicated that "the text of the [national] Constitution offers no doubt that it clearly authorizes the provincial states to exercise attributes that are concurrent with the Nation in relation to recognition of the juridical personality of the indigenous communities and the pertinence of registering them." The CSJN explained that "both the Nation and the provinces have sufficient competence to regulate the rights

case and it has been the provincial state that has issued norms addressed at the recognition of ownership, it is relevant to examine the national legislation.

162. Nevertheless, the inadequacy of the existing Argentine laws in relation to procedures for claiming indigenous lands should be pointed out. As already indicated (*supra* paras. 116 and 118), the way in which those procedures are established relates to Articles 2, 21, 8 and 25 of the Convention.

163. It should be noted that Salta Law 6,681 conformed to national Law 23,302 (*supra* para. 55). The latter, as well as its regulatory decree 155/1989 (*supra* para. 54), does not establish a procedure that allows the right to communal property to be claimed as a fundamental right that must be recognized. The said laws only establish that the authorities should take “steps” to transfer lands.<sup>151</sup> Meanwhile, Salta Law 7,121 (*supra* para. 55) indicates that communal ownership must be adapted to “one of the different forms admitted by law”;<sup>152</sup> however, according to the information received by the Court, the general legislation does not include regulations on a particular form for communal ownership or specific procedures to this end.

164. The failure of these norms to address the issue of indigenous property adequately and sufficiently can be inferred from national legislation following the 1994 constitutional reform (*supra* para. 54). As will be explained below, those laws pointed to an “emergency” situation in relation to indigenous property and the need to adopt specific legislation and procedures in this regard. Thus, it is based on the comments made by the State itself on the provisions indicated below that the Court understands that the State’s existing legal system is not appropriate to ensure the right to communal property.

165. Indeed, the State itself has noted the insufficiency of its legal system, as follows:

- a) Law 26,160 and its extensions recognize that an “emergency” situation exists with regard to indigenous property and provides for actions to be taken over a specific period of time that do not modify the existing legal regime on procedures for the recognition of property ownership;

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of the original peoples in their respective jurisdictions, provided that this does not involve a contradiction or a reduction in the standards established in the federal legislation by the provincial states. [...] Consequently, the federal legislation, that is the National Constitution [CN], the international human rights treaties with constitutional rank (pursuant to art. 75,22, CN), the international treaties to which the Nation is a party, and the federal laws and regulations are a ‘minimum standard’ applicable throughout Argentine territory (*Neuquén Indigenous Confederation v. Province of Neuquén ref/action on unconstitutionality*, Judgment of December 10, 2013, evidence file, evidence incorporated *ex officio*). This was also asserted by the CJS (*Cf. Aguas Blancas Aboriginal Community v. Province of Salta – Amparo*. Judgment of September 19, 2016. Case file No. CJS 37,010/14. Volume 207:289/306 (evidence file, evidence incorporated *ex officio*). Expert witness Solá has also indicated that the “attributes” indicated in the National Constitution with regard to indigenous peoples are exercised concurrently by the national State and the provincial states. The *amicus curiae* brief submitted by the CDH-UBA, citing CSJN judgments, indicates that “it is essential to have federal legislation that respects and is adapted to the international obligations [on] the rights of the indigenous peoples, because the minimum standards that the provinces must respect are derived from them.” The Inter-American Court notes, also, that some national provisions refer to the adjudication of provincial lands. Also, as indicated below (*infra* para. 163), Salta Law 7,121 establishes that communal ownership should be in keeping with “one of the different forms admitted by law” and the province has “conformed to” certain national standards on this issue.

<sup>151</sup> Cf. Law 23,302 and Decree 155/1989, articles 8 and 5, respectively (evidence file, annex M.3 to the pleadings and motions brief, fs. 35,152 to 35,377).

<sup>152</sup> Cf. Law 7,121, article 16 (evidence file, annex N.1 to the pleadings and motions brief, fs. 36,208 to 36,214).

b) Law 26,994, adopting the Civil and Commercial Code, indicated that “the rights of the indigenous peoples,” including that of communal property, “shall be the subject of a special law,” and the Code, similarly, recognizes that right, but “as established by law,” and

c) National Executive Decree 700/2010 expressly recognizes the need to draw up a law to “implement a procedure” to give effect to the right in question. The reasoning for the law indicates that article 75.17 of the National Constitution was directly operational, but that “the absence of legal procedures to facilitate the effective implementation of the constitutional provisions endangers the effectiveness of the guarantee that it recognizes” and that, “since their recognition in the Constitution, the indigenous communities have been in danger of erroneous judicial interpretations or interpretations that fail to recognize the constitutional intentions.”<sup>153</sup> Expert witness Solá also noted that Argentina’s national legal system was insufficient.<sup>154</sup>

166. The Court understands that, owing to the legal problems described, the right to property of the indigenous communities in this case has not received effective protection and they have, therefore, been dependent on the progress made through government negotiations and decisions on their property that, in the practice, 28 years after the first claim for the recognition of property rights, have not implemented their right adequately.

#### *B.2.3.3 Conclusion on recognition and determination of ownership*

167. In conclusion to the above, the Court notes that Decrees 2786/07 and 1498/14 were acts that recognized the communal ownership of the land claimed. However, the State has not provided adequate title to this land to provide it with legal certainty. The land has not been demarcated and the presence of third parties continues. Also, Argentina does not have appropriate laws to guarantee the right to communal property satisfactorily.

168. Based on the above, the Court finds that the State violated, to the detriment of the indigenous communities victims in this case (*supra* para. 35 and Annex V to this judgment), the right to property in relation to the right to have access to adequate procedures and to the obligation to guarantee rights, and to adopt domestic legal provisions. Therefore, Argentina failed to comply with Article 21 of the Convention in relation to its Articles 8(1), 25(1), 1(1) and 2.

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<sup>153</sup> Collaterally, this Court notes that – as is clear from a 2018 domestic judicial decision – even after the 1994 constitutional reform that expressly recognized rights of indigenous peoples (*supra* para. 54), the PEN affirmed before the jurisdictional authorities that, in themselves, INAI’s attributes (established under the system instituted by Law 23,302 and Decree 155/89) were insufficient to implement full recognition of indigenous property and that the national Legislature needed to enact a law. The said judgment indicated that the PEN had argued that “INAI does not have a special law on communal titles that regulates a plan for land adjudication,” and that a “special law” was necessary (although there is no record that such a law has been enacted) to recognize the right to communal property. In this case, when addressing the property claim of an indigenous community, the PEN affirmed that it had done everything that “was incumbent on it by law; in other words, it had complied with the technical, legal and cadastral survey, and that it was for Congress to enact a special law to implement possession and communal ownership” (*Cf. Federal Administrative Contentious Chamber, Chamber III, Mapuche Trypayantu Community v. National State–INAI ref/ Recognition procedure. Judgment of November 22, 2018, consideranda I and II*). The AADI and the SERPAJ agreed with this in their *amicus curiae* brief, indicating that, despite the suspension of the evictions ordered by Law 26,160, evictions had continued because “not all provincial judges interpret the law in the same way.”

<sup>154</sup> Similarly, the *amicus curiae* brief submitted by AADI and SERPAJ affirms that “at the present time, there is no law at either the national level or of the province of Salta that regulates and implements indigenous communal ownership, or creates any procedure, whether administrative or judicial, establishing clear and simple rules for the indigenous peoples to be able to process the recognition of their traditional territories, by proposing their demarcation, titling and registration.”

**C) The right to participate in relation to projects or works on communal property**

169. It remains for the Court to consider, in relation to the right to property, the projects and works that it is alleged have been implemented without respecting the rights of the indigenous communities.

**C.1 Arguments of the Commission and of the parties**

170. The **Commission** argued that the State had violated the communities' right to property "as well as their rights of access to information and to participation, by failing to meet its obligations when carrying out public works or granting concessions on indigenous territory." It considered that "none of the public works undertaken by the State [...] on ancestral territory" complied with the obligation to ensure that it was preceded by a social and environmental impact assessment, and that it guaranteed adequate participation and benefits for the indigenous communities.<sup>155</sup> It alleged that, in addition, the State had not complied with its obligation to conduct a prior, free and informed consultation, and to allow and facilitate access to the corresponding public information to the indigenous communities concerned. It pointed out that the State "failed to conduct an appropriate consultation that complied with the said standards" and that "Argentina does not possess a law on prior, free and informed consultation."

171. The **representatives** argued that the absence of a single title "had serious consequences because various public works were executed (bridges, roads, etc.) without first consulting the communities." They understood that the State was responsible for "planning and executing work on the ancestral territory," because it had failed to comply with the corresponding standards and requirements regarding free, prior and informed consultation and the participation of the communities in the projects. They added that the communities had not received any type of benefit from the works and that these were implemented without social and environmental impact assessments.<sup>156</sup> The representatives also argued that "in order to determine the existence of a violation, it was irrelevant whether or not – due to reasons unrelated to the communities' land claims – the works were executed." They indicated that "some works were completed and others, even if they were abandoned, [...] were executed to the point that they had diverse impacts on the territory." The representatives understood that "the effects of the unconsulted construction of route 54 on the La Estrella community, among others, were devastating."

172. The **State** noted that "the works about which [the representatives] are complaining were not implemented and, therefore, their arguments have become theoretical."<sup>157</sup> Also, in its answering brief, it alleged that, at that time, no public work

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<sup>155</sup> Specifically, the Commission alleged that the following did not comply with the requirements indicated: "the construction of the international bridge over the Pilcomayo River[;...] the public tender for the construction of highway 86[;...] the works to improve the provincial highway between Santa Victoria Este and La Paz, [and] the granting of the oil and gas concession."

<sup>156</sup> The representatives identified the following "projects" that, they alleged, had been "carried out" by the State without meeting the corresponding requirements: "(i) the international bridge; (ii) plans for parts of highway 86; (iii) work on provincial route 54, and (iv) oil and gas exploration.

<sup>157</sup> However, Argentina, when entering into details about those arguments, did not indicate only public works that "were not implemented." It also referred to: (1) "The Misión la Paz International Bridge: designed, constructed and completed in 1995 and 1996." (2) Parts of highway 86: "not yet started." (3) Work on provincial route 54: carried out on the "existing route without modifying the territory of the communities," and (4) oil and gas exploration: "exploration on the territory of the communities not yet started."



or concession was planned for the area. It also indicated that the representatives of Lhaka Honhat were systematically invited to each UEP activity and were periodically advised of the progress made in matters relating to their territory and resources.<sup>158</sup>

## **C.2 Considerations of the Court**

173. To ensure the use and enjoyment of collective property, the State should ensure certain safeguards that will be described in the following paragraph. Their purpose is to protect the property and they are also based on the right of the indigenous peoples to take part in decisions that affect their rights. As the Court has indicated, based on the “political rights” relating to participation recognized in Article 23 of the Convention, in matters concerning their lands, the indigenous peoples must be consulted adequately through institutions that represent them.<sup>159</sup>

174. As already indicated by the Court in relation to works or activities on indigenous territory, the State must observe the requirements that are the same for any limitation of the right to property “for reasons of public utility or social interest” according to Article 21 of the Convention, which entails the payment of compensation.<sup>160</sup> In addition, it must comply “with the following three guarantees”: First, “ensure the effective participation” of the peoples or communities, “in conformity with their customs and traditions,” an obligation that requires the State to receive and provide information and also to ensure constant communication between the parties. The consultations should be conducted in good faith, using culturally acceptable procedures and should be aimed at reaching an agreement.<sup>161</sup> Second, it should be “guaranteed that no concession will be granted on

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<sup>158</sup> The State indicated that, “at the end of August 2016, the UEP sent the petitioners a draft prior, free and informed consultation procedure for former Lots 55 and 14 for their analysis and consideration.” It argued that “the draft procedure complied with international standards on the rights of indigenous peoples, in order to work together to approve a consultation process that was appropriate for the area. The presumed victims never responded to this proposal” (Cf. evidence file, annex J.31 to the pleadings and motions brief, fs. 33,555 to 33,560).

<sup>159</sup> Cf. *Case of the Kaliña and Lokono Peoples v. Suriname*, paras. 202 and 203 and 230.

<sup>160</sup> The Court has indicated that “the right to receive compensation pursuant to Article 21(2) of the Convention extends not only to the total deprivation of a property title owing to expropriation by the State, for example, but also includes deprivation of the normal use and enjoyment of the said property” (*Case of the Saramaka People v. Suriname*, para. 139). Expert witness Yáñez Fuenzalida also indicated this.

<sup>161</sup> Good faith “calls for the absence of any type of coercion by the State or by agents or third parties acting with its authorization or acquiescence, [and] is incompatible with practices such as attempts to destroy the social cohesion of the communities concerned, by either corrupting the community leaders or establishing parallel leaderships, or by negotiating with individual members of the communities.” In addition, the said communities “must be consulted in accordance with their traditions during the initial stages of the development or investment plan.” “Time must be allowed for internal discussions within the communities so that they may provide an adequate response to the State. In addition, the State must ensure that members of [indigenous and tribal peoples] are aware of the possible risks, including environmental and health risks” (*Case of the Saramaka People v. Suriname*, para. 133; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 186, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 201.) Similarly, expert witness Yáñez Fuenzalida referred to the prior nature of consultations: she explained that according to the ILO, consultations are “compulsory before undertaking any activity to explore for or to exploit [...] natural resources on the land of [indigenous or tribal] peoples, or whenever it is necessary to move indigenous [or] tribal communities from their traditional lands to another place, and before designing and executing public policies or programs addressed at these peoples.” The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has indicated that “the State itself has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples’ rights and lands. [...This duty] is not one that can be avoided through delegation to a private company or other entity.” (Human Rights Council, Twelfth session. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of

the territory unless and until independent and technically capable entities, under the State's supervision, have made a prior environmental impact assessment."<sup>162</sup> Third, the State must ensure that the indigenous communities "receive reasonable benefit from the projects implemented on their territory."<sup>163</sup>

175. The said requirements seek "to preserve, protect and guarantee the special relationship" that the indigenous peoples have with their territory which, in turn, guarantees their subsistence. Even though the Convention cannot be interpreted in a way that prevents the State from carrying out, itself or through third parties, projects and public work on the territory, the impact of such activities must never negate the ability of members of indigenous and tribal peoples to ensure their own survival.<sup>164</sup>

176. In the instant case, the Court will limit its analysis to those public works or projects that fall within the factual framework of the case and regarding which there are sufficient arguments and evidence to make their examination possible. However, the Court understands that the Commission and the parties have not presented sufficient precise information and arguments to enable the Court to evaluate aspects relating to the work on parts of national highway 86,<sup>165</sup> or the alleged oil and gas exploration.<sup>166</sup>

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indigenous peoples. July 15, 2009. Doc. A/HRC/12/34, para. 54). FARN expressed a similar opinion in its *amicus curiae* brief.

<sup>162</sup> *Case of the Saramaka People v. Suriname*, para. 129, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 201. The requirement of a prior environmental impact assessment has been indicated in Art. 7(3) of Convention 169 and also in other instruments such as the World Charter for Nature adopted by the United Nations in 1982 (UN, General Assembly Resolution 37/7, of October 28, 1982, Principle 11(c), or the 1992 Rio Declaration on Environment and Development (Principle 17). This should not be conducted as a mere formality, but should make it possible to evaluate alternatives and the adoption of impact mitigation measures, and be executed as part of an assessment of environmental and social impacts that must: (a) be prior to the decision to implement the project or execute the activity; (b) be prepared by independent entities under State supervision; (c) consider, as applicable, the accumulated impacts of other existing or proposed projects, and (d) permit the participation of interested persons or communities and those who are possibly affected. This participation in the social and environmental assessment is specific to this end, and is not the same as the exercise of the right to free, prior and informed consultation of the indigenous peoples or communities mentioned previously, which is more wide-ranging. (See, in this regard, *Case of the Kaliña and Lokono Peoples v. Suriname*, paras. 201, 207 and 215, and *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 162. FARN expressed a similar opinion in its *amicus curiae* brief.)

<sup>163</sup> *Case of the Saramaka People v. Suriname*, para. 129, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 201.

<sup>164</sup> *Cf. Case of the Saramaka People v. Suriname*, para. 129, and *Case of the Kaliña and Lokono Peoples v. Suriname*, paras. 201 and 214.

<sup>165</sup> In paragraph 137 of its Merits Report, when describing the facts relating to the "construction and widening of public roads in the disputed area" the Commission mentioned that "the repair of a road had started" in July 2001." In their pleadings and motions brief, the representatives made no mention of this in the case of national highway 86. They provided details of the presumed progress made on the highway, but merely indicated that they had requested a suspension of the work and that the work had been halted. The Court considers that the information provided by the Commission and the representatives is insufficient to understand that relevant construction activities took place on stretches of national highway 86 and, in general, it considers that it has insufficient evidence to evaluate aspects relating to this project or construction.

<sup>166</sup> Although the representatives indicated that exploration activities had begun in 2001, they did not specify where, and the State has indicated that "the process of exploration in the communities' territory never started." The Court also notes that, following the representatives' request, the State decided to relocate the work outside indigenous territory, and the representatives confirmed this.

Nevertheless, the Court will make the pertinent examination of: (1) the work on provincial route 54 and (2) the construction of the international bridge and adjacent works, and it will then (3) set out its conclusions.

### *C.2.1 Provincial route 54*

177. In 2001, work was done to provide provincial route 54 with a gravel surface between Santa Victoria Este and the highway to La Paz. The work was terminated the same year. At the beginning of 2005, the Provincial Highway Directorate once again started work on the part of provincial route 54 that runs between Tartagal and the international bridge over the Pilcomayo River. On February 8, 2005, the representatives reported this situation to the Ministry of Foreign Affairs and the Governor of Salta.<sup>167</sup> In 2014, more work was carried out and the representatives filed a request for information.<sup>168</sup> The project continued and was concluded.

178. The representatives indicated that this intervention resulted in tree felling for the production of fired bricks in Misión La Paz, and that they had not received an answer to their request for information. The Court notes that the State has clarified that the work was carried out on the existing layout of route 54. In other words, the work was not exactly new, but rather an improvement of work that already existed. In a communication, the Secretary General of Governance of Salta explained that “the work was not related to the opening up of a new route, but rather to improving the actual one” and that the work was carried out “in agreement with the inhabitants” and was “necessary and urgent to permit the population’s continued access to the health care and education services provided by the State – fundamental rights [...] in a region with a high rate of poverty.”<sup>169</sup>

179. The Court understands that, bearing in mind the circumstances, it may be pertinent – in relation to the right to consultation – to distinguish between maintenance or improvement of existing infrastructure and the execution of new projects or public works. Activities merely to adequately maintain or improve public works do not always require the intervention of prior consultation procedures. The contrary could entail an unreasonable or excessive understanding of the State’s obligations with regard to the rights to consultation and participation, a matter that must be evaluated based on the specific circumstances. In this case, even though the representatives mentioned that the work required the felling of some trees, they did not specify the magnitude of the impact. Also, even though it appears that the authorities did not respond promptly to the representatives’ note asking for information, they indicated that the work was being done “in agreement with the inhabitants.” However, this indication is insufficient to know whether any consultation procedures might have taken place; the information and arguments submitted by the representatives are also insufficient. Consequently, and taking into account that the situation relates to the maintenance or improvement of existing work, the Court considers that it has insufficient evidence to determine that the right of the indigenous communities to participation and consultation was violated.

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<sup>167</sup> Cf. Note to the Ministry of Foreign Affairs and to the Governor of Salta of February 8, 2005 (evidence file, annex I.18 to the pleadings and motions brief, fs. 32,008 to 32,010).

<sup>168</sup> Cf. Note to the Human Rights Secretariat of September 19, 2014 (evidence file, annex I.20 to the pleadings and motions brief, fs. 32,016 and 32,017).

<sup>169</sup> Cf. note of the General Secretariat of Governance to the Minister for Foreign Affairs of February 21, 2005 (evidence file, annex I.19 to the pleadings and motions brief, fs. 32,012 to 32,014).

### C.2.2 International bridge and related civil works

180. The facts reveal that the bridge construction began in 1995. Between August 25 and September 16, 1996, members of indigenous communities peacefully occupied the international bridge. The bridge construction concluded in 1995 and 1996 but construction of roads and infrastructure works continued.<sup>170</sup>

181. The Court underlines that the work in question was an international bridge and, therefore, it was an important undertaking for border transit and international trade. A civil work of this kind involves State policies and administration of territorial borders, as well as decisions with implications for the economy. Thus, the interests of the State and its sovereignty are involved, as well as the government's management of the interests of the Argentine population in general.

182. Therefore, the Court recognizes that the importance of the work warranted a careful evaluation that took into account the said implications. However, this does not authorize the State to disregard the communities' right to be consulted. It should be stressed that, in its answering brief, Argentina indicated that the National Institute for Indigenous Affairs had "considered that the construction of the international bridge over the Pilcomayo River from Misión La Paz (Argentina) to Pozo Hondo (Paraguay), as well as other roads and various buildings would have a significant impact on the way of life of the indigenous communities and that it would have been desirable to hold consultations, and have an assessment of the environmental impact of these constructions."

183. The Court notes that there is no record that a prior consultation procedure was conducted.

### C.2.3 Conclusion

184. Based on the above, regarding the construction of the international bridge, the Court concludes that the State did not comply with its obligation to ensure adequate mechanisms for a free, prior and informed consultation of the indigenous communities concerned. Consequently, it violated their right to property and to participation in relation to the State obligations to respect and to ensure these rights. Consequently, it failed to comply with Articles 21 and 23(1) of the Convention, in relation to Article 1(1) of this instrument.

185. The Court considers that it does not have specific evidence to determine whether there was a violation of the right to information in addition to the violation of the right to participation. Therefore, it finds that it is not in a position to rule on the alleged violation of Article 13 of the Convention.

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<sup>170</sup> The representatives indicated that, at the beginning of 1999, Salta "began to construct houses and buildings to establish a post of the National Gendarmerie." They added that "also, in 2000, it began to significantly increase the illegal felling of trees for the production of fired bricks for the construction works, which had a substantial impact on the way of life of the communities." On April 6, 2000, the Secretariat of Public Works and Services of the province of Salta issued Resolution No. 138 approving the technical documentation and re-programming of the construction of the Misión La Paz, department of Rivadavia, Border Post. On April 27, 2011, representatives of the province of Salta advised that housing had been constructed by agreement with the communities (*Cf.* Communication from Lhaka Honhat to the Director for Human Rights advising him that they would not attend the meetings of April 27, 2011; evidence file, annex to the procedure before the Commission, fs. 15,890 to 15,892).

**VII.2**  
**RIGHTS TO MOVEMENT AND RESIDENCE, TO A HEALTHY ENVIRONMENT, TO**  
**ADEQUATE FOOD, TO WATER AND TO TAKE PART IN CULTURAL LIFE IN**  
**RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE THE RIGHTS**<sup>171</sup>

***A) Arguments of the parties***<sup>172</sup>

186. The **representatives** alleged that the installation of fencing by third parties involved “illegitimate and unjustified interference” in the exercise of the freedom of movement of the indigenous communities that the authorities failed to respond to. They indicated that this violated Article 22 of the Convention. They also argued that the State had violated “the rights to a [healthy] environment, cultural identity and [adequate] food,” as autonomous rights that they understood were contained in Article 26 of the Convention.<sup>173</sup> They argued that these rights had been violated because the State was aware of and had failed to act appropriately with regard to the presence and the actions of private individuals that had harmed the integrity of the territory by installing fencing and grazing their cattle, and also by illegal logging.

187. In particular, regarding the *right to a healthy environment*, they argued that “the environmental degradation of the territory claimed” had been “a continuous and significant process” that “started at the beginning of the twentieth century with the introduction of cattle by the *criollo* settlers.” They argued that “as a result of over-grazing by the cattle,” the “illegal logging of the forests” and the “fences put up by the *criollo* families” the environment had been “degraded”; moreover, “[t]he cattle have destroyed the herbaceous and arboreal vegetation, and this has ruined the irrigation and regeneration capacity of the land,” which “has resulted in desertification and fissures.” They added that “the illegal logging of native forests, using ‘mining’ methods –

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<sup>171</sup> Articles 22, 26 and 1(1) of the American Convention.

<sup>172</sup> The Commission did not determine violations of Article 26 of the Convention in its Merits Report 2/12, issued in 2012. Nevertheless, in its final written arguments it indicated that it “considers it important that, in light of recent developments in the Court’s case law, [the Court] is able to develop, for the first time, the violation of Article 26 in relation to the territorial rights of the indigenous peoples, in particular as regards the right to food and other pertinent rights.” However, in its Merits Report, the Commission had noted that “the close relationship between indigenous and tribal peoples and their traditional territories and the natural resources these contain is a constitutive element of their culture, understood as a particular way of life[. ...] Therefore, since territory and natural resources are constitutive elements of the worldview, spiritual life and means of subsistence of indigenous and tribal peoples, they form an intrinsic part of their members’ right to cultural identity.” It also asserted that the State authorities must “implement national and international environmental protection standards,” and this is “of special importance” in relation to “non-State actors.” It added that States should “prevent environmental damage in indigenous territories.” In this regard, in the Merits Report, the Commission referred to the “deforestation” in this case, stating that “[d]espite the signature of successive substantial agreements and assuming other formal commitments by which State authorities announced they would conduct actions to control illegal logging it has not been proved [...] that such actions were adopted in a manner that was effective and proportionate to the serious danger of deforestation caused by irregular loggers within the territory.” The Commission did not allege a violation of Article 22 of the Convention either (*supra* footnote 2).

<sup>173</sup> In addition to Article 26, the representatives alleged, in relation to that article and based on the referral it makes to the provisions of the Charter of the Organization of American States: (a) as a normative basis for the right to a healthy environment, Articles 30, 31, 33 and 34 of the Charter; (b) as a normative basis for the right to “cultural identity”, Articles 2, 3, 17, 19, 30, 45, 48 and 52 of the Charter and Article XIII of the American Declaration on the Rights and Duties of Man, and (c) as a normative basis for the right to food, also the said Charter and Declaration, in their Articles 34.j and XI, respectively. Also, although, in general, it mentioned Articles 1 and 2 of the Convention in the case of the three rights, when indicating which articles it considered had been violated with regard to each of these three rights it did not cite Article 2. The Court will not examine the rights in question in relation to Article 2 of the Convention.

indiscriminate and unsustainable extraction – significantly affects the resilience and renewal capacity of tracts of forest.” They also indicated that the loss of flora had had an impact on the natural habitat of the wildlife, which also had to compete with the cattle for food and water, adding that the loss of autochthonous flora and fauna was also related to the installation of fencing in the territory, which “constitutes a natural obstacle” to their development.<sup>174</sup>

188. The representatives also argued that “as a result of the environmental degradation” and the “fencing” installed by the *criollos*, “the communities’ *right to food* is also violated.” They specified that the livestock of the *criollo* settlers: (a) “eat the same fruits as the indigenous communities, including carob, *mistol* [*Ziziphus mistol*] and *chañar* [*Geoffroea decorticans*]”; (b) “browse [...] on palatable trees such as the carob and the *quebracho* [*Schinopsis spp.*]” and eat “the new growth, preventing regeneration”; (c) “consume the water that the communities themselves need for their subsistence and there have been situations in which the water has been contaminated by animal feces”; (d) lead to the decrease in wildlife, “which has traditionally been hunted and is an important part of the communities’ diet,” and (e) “destroy the fences that the indigenous communities erect to protect their family vegetable plots.” They also indicated that the fencing installed by the *criollo* families: (a) “affects the transit of wildlife confining it to distant locations”; (b) “restricts the free movement of the communities obstructing their traditional displacement and hunting routes,” and (c) “frequently [...] encloses water reservoirs [...] and complete stands of carob trees.”

189. The representatives added that “the presence of hundreds of *criollo* families on [the] ancestral territory, the environmental degradation, [...] and the alteration of the hunting and gathering lands of the [indigenous] communities has had a profound impact on their *cultural identity* and traditional practices.” They argued that, for the communities, this had resulted in “significant changes” in “their customs, their social and individual habits, their economic practices and their conception of the world and their own life.” They observed that, given the special relationship of the communities with their land, “the degradation of the environment and the changes in the flora and fauna go beyond the merely economic and subsistence aspects, affecting their [cultural] identity.”

190. The representatives also indicated that the State “was fully aware of the details of the environmental degradation” and had failed to take steps to prevent the process or to reverse it, or “to reinforce the peoples’ access to and use of the resources and means that safeguard their way of life,” reproducing a phrase used by the United Nations Committee on Economic, Social and Cultural Rights (hereinafter also “the CESCR”).

191. The **State** argued, with regard to the right to a *healthy environment*, that a “disproportionate or impossible burden” should not be placed on it, and that the awareness of a situation of risk should be proved in order to result in a positive obligation. It also listed measures it had taken and indicated that “it had provided technical and financial assistance for the implementation and management of projects of the Comprehensive Community Plan, under the Forests and Communities Fund.”<sup>175</sup> It

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<sup>174</sup> The representatives indicated that “in the first formal request made by the Lhaka Honhat Association to the government of the province of Salta in 1991, they described the severe environmental degradation of the territory as a result of overgrazing, illegal logging, and the *criollo* fences.” Consequently, they argued that the State was fully aware of the environmental degradation and, even so, did not take the necessary measures “to prevent and reverse” this.

<sup>175</sup> It explained that “[t]he purpose of these projects is to improve forest management and to increase the access of small-scale producers, including the indigenous peoples, to markets and basic services.”

also indicated that the Salta Ministry of the Environment “is ensuring compliance with the environmental regulations in force,” including control of illegal logging and deforestation. It asserted that it was “constantly monitoring and supervising the territory using remote sensing with satellite imagery.”

192. Regarding *the right to food*, the State argued that the representatives’ allegations had not been proved and that there was no “technical opinion or report indicating that malnutrition levels or food shortages had increased due to the presence of the *criollos*’ livestock and activities.” It added that many members of the indigenous communities “practice livestock farming as a result of a historical process of coexistence with the *criollos*.”<sup>176</sup>

193. Argentina added that “there was no truth” in the allegations of the violation of cultural identity because: (a) “it had used all available means to ensure that, despite the complexity of the matter, [...] the communities could truly exercise the right that had already been recognized,” and (b) the communities themselves had “introduced changes into their behavior and ways of life.”<sup>177</sup>

### **B) Considerations of the Court**

194. First, the Court establishes that Article 22 of the Convention, which relates to the right to freedom of movement and residence, refers to the right to choose the place of residence, and to enter, leave and move about in national territory,<sup>178</sup> and is not applicable in this case. The ability of a person to move about in lands that belong to him is, in principle, included in the right to property, which has already been examined. Also, the alleged specific or particular impact of the installation of fencing in this case will be examined below in relation to the rights contained in Article 26 of the American Convention.

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<sup>176</sup> Regarding the presence of fencing in the area, it added that it prevented the displacement of the indigenous communities to gather food and that “administrative and judicial actions had been instituted when it had been made aware [...] of the existence of new fencing put up in the area of the indigenous claim.”

<sup>177</sup> The allusion to the “right that had already been recognized” appears in the answering brief and refers to the right to property. Later, in this brief, the State expanded the explanation of its position indicating that “the granting of [...] Lots 55 and 14 relates to the adjudication of lands that, once the property has been demarcated and the borders between the community land and that of the *criollo* families delimited, this will protect their complete cultural development.” Regarding the changes in the communities’ way of life, Argentina mentioned requests by the communities for housing and service infrastructure “that are characteristic of a sedentary way of life.” It added that it had received “four requests for logging guidelines from [...] caciques.” The State also referred to investments and public works in the area, including paving roads, building schools, construction of multi-purpose centers and recreational spaces, as well as actions to extend or improve the services of electricity, sewerage and primary health care.

<sup>178</sup> The Court has indicated that Article 22 of the Convention includes: (a) the right of every person lawfully in the territory of a State Party to move about in it, and to choose his place of residence, and (b) the right of every person to enter his country and to remain there. The enjoyment of this right is not dependent on any particular purpose or reason for the person wanting to move or stay in a place. It also protects the right not to be forcibly displaced within a State Party and not to be forced to leave the territory of the State in which he is residing lawfully. The Court has also stated that the right to freedom of movement and residence may be violated formally or by *de facto* restrictions if the State has not established the conditions or provided the means to exercise this right” (*Case of Omeara Carrascal et al. v. Colombia. Merits, reparations and costs.* Judgment of November 21, 2018. Series C No. 368, para. 272; see also, *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 115; *Case of the Moiwana Community v. Suriname*, paras. 119 and 120; *Case of the “Mapiripán Massacre” v. Colombia*, para. 188, and *Case of Alvarado Espinoza et al. v. Mexico. Merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 370, para. 274).

195. The Court has asserted its competence to determine violations of Article 26 of the American Convention<sup>179</sup> and has indicated that this protects those economic, social, cultural and environmental rights (ESCR) derived from the Charter of the Organization of American States (hereinafter “the OAS Charter” or “the Charter”), and the norms of interpretation established in Article 29 of the Convention are pertinent for their interpretation.<sup>180</sup>

196. The Court has explained that “to identify those rights that may be derived by interpretation from Article 26, it should be considered that this makes a direct referral to the economic, social, educational, scientific and cultural standards contained in the OAS Charter.”<sup>181</sup> Consequently, once it has been established that it is understood that a right should be included in Article 26 of the Convention, its scope must be established in light of the corresponding international *corpus iuris*.<sup>182</sup> It is pertinent to underscore that the Court has recalled that:

The Convention itself makes explicit reference to the norms of international law for its interpretation and application, specifically Article 29, which establishes the *pro persona* principle.<sup>183</sup> In this way, as has been the consistent practice of the Court,<sup>184</sup> when determining the compatibility of the acts and

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<sup>179</sup> Cf. *Case of Acevedo Buendía et al. (“Discharged ad Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, paras. 16, 17 and 97; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 142; *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 170 to 208; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, para. 155, and *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 54.

<sup>180</sup> Cf. *Case of Lagos del Campo v. Peru*, para. 144, and *Case of Hernández v. Argentina*, para. 62.

<sup>181</sup> Cf. *Case of Lagos del Campo v. Peru*, para. 145; *Case of Poblete Vilches et al. v. Chile*, para. 103, and *Case of Hernández v. Argentina*, para. 62.

<sup>182</sup> This does not exclude also having recourse to relevant domestic law (Cf. *Case of Poblete Vilches et al. v. Chile*, para. 103, and *Case of Hernández v. Argentina*, para. 62).

<sup>183</sup> Cf. *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 143, and *Case of Hernández v. Argentina*, para. 65. When determining the respective rights, if appropriate, the Court gives special emphasis to the American Declaration on the Rights and Duties of Man, because, as this Court has established, “the Member States have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration” (Cf. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989. Series A No. 10, para. 43, and *Case of Hernández v. Argentina*, para. 66).

<sup>184</sup> Cf. *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 78 and 121; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 83; *Case of the Pacheco Tineo family v. Bolivia*, para. 129; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 168; *Case of Lagos del Campo v. Peru*, para. 145; *Case of Poblete Vilches et al. v. Chile*, para. 103; *Case of Cuscul Pivaral et al. v. Guatemala*, para. 100, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, para. 158, and *Case of Hernández v. Argentina*, para. 65.



omission of the State, or of its laws, with the Convention or other treaties for which the Court has jurisdiction, the Court is able to interpret the obligations and rights they contain in light of other pertinent norms and treaties.<sup>185</sup>

197. Similarly, the Court has indicated that:

Human rights treaties are living instruments the interpretation of which must evolve with the times and current conditions. This evolutive interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties.<sup>186</sup> [...] Furthermore, the third paragraph of Article 31 of the Vienna Convention authorizes the use of means of interpretation such as the agreements or practice or relevant rules of international law applicable in the relations between the parties, which are some of the methods related to an evolutive perspective of the treaty.<sup>187</sup>

198. Thus, in order to determine the scope of the respective rights included in Article 26 of the Convention, the Court will refer to the relevant instruments of the international *corpus iuris*.

199. By proceeding in this way, the Court makes an interpretation that allows it to update the meaning of the rights derived from the Charter that are recognized in Article 26 of the Convention.<sup>188</sup> This is why what it does is an application of this norm and, as explained previously, "it is not assuming competence over treaties for which it does not have this, and it is not according Convention rank to provisions contained in other national or international instruments concerning the [economic, social, cultural and environmental rights]."<sup>189</sup>

200. The Court will now proceed, based on the preceding considerations, to verify the pertinent content and recognition of the rights included in Article 26 of the Convention involved in this case. The Court notes that the representatives of the indigenous communities have not alleged the violation of the human right to water. However, based on the following considerations, the facts of the case relate to the enjoyment of this right. The Court is able to examine this right because it has competence, based on the *iura novit curia* principle, to analyze the possible violation of provisions of the Convention that have not been alleged in the understanding that the parties have been able to express their respective positions in relation to the facts that support this.<sup>190</sup>

201. The Court notes that this is the first contentious case in which it must rule on the rights to a healthy environment, to adequate food, to water and to take part in cultural life based on Article 26 of the Convention. Consequently, it finds it useful to include some

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<sup>185</sup> Cf. *Case of Muelle Flores v. Peru*, para. 176, and *Case of Hernández v. Argentina*, para. 65.

<sup>186</sup> Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114, and *Case of Hernández v. Argentina*, para. 67.

<sup>187</sup> *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, para. 160, and *Case of Hernández v. Argentina*, para. 67.

<sup>188</sup> The Court has also indicated this previously (Cf. *Case of Cuscul Pivaral et al. v. Guatemala*, para. 101, and *Case of Hernández v. Argentina*, para. 66).

<sup>189</sup> Cf. *Case of the Pacheco Tineo family v. Bolivia*, para. 143, and *Case of Hernández v. Argentina*, para. 66.

<sup>190</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 163, and *Case of Hernández v. Argentina*, para. 54.

considerations on these rights, as well as on their impact and particularities in the case of indigenous peoples. To this end: (1) in the following section it will examine: (a) first, the legal recognition and, as relevant for the case, the content of the said rights, and (b) second, the interdependence of the four rights and their relevant particularities in the case of indigenous peoples. Then (2) in the second section, (a) it will describe the relevant facts of the case, and (b) it will analyze whether they reveal State responsibility.

### ***B.1 The rights to a healthy environment, to adequate food, to water and to take part in cultural life***

#### ***B.1.1 Legal recognition and relevant content***

##### ***B.1.1.1 The right to a healthy environment***

202. This Court has already stated that the right to a *healthy environment* “must be considered one of the rights [...] protected by Article 26 of the American Convention,” given the obligation of the State to ensure “integral development for their peoples,” as revealed by Articles 30, 31, 33 and 34 of the Charter.<sup>191</sup>

203. The Court has already referred to the content and scope of this right based on various relevant norms in its *Advisory Opinion OC-23/17*, and therefore refers back to that opinion.<sup>192</sup> On that occasion, it stated that the right to a healthy environment “constitutes a universal value”; it “is a fundamental right for the existence of humankind,” and that “as an autonomous right [...] it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that nature must be protected, not only because of its benefits or effects for humanity, “but because of its importance for the other living organisms with which we share the planet.” This

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<sup>191</sup> Cf. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, para. 57 and footnote 85. On that occasion, the Court explained that “Articles 30, 31, 33 and 34 of the Charter establish an obligation for the States to ensure ‘integral development for their peoples,’ a concept that has been defined by the OAS Executive Secretariat for Integral Development (SEDI) as ‘the general name given to a series of policies that work together to promote sustainable development, one of [whose] dimensions [...] is precisely the environmental sphere.’” In paragraphs 52 and 53 of this Advisory Opinion, the Court referred to a series of instruments issued in the international sphere which reveal that the protection of the environment should be understood as an “integral part” of the development process, because it is one of the “pillars” of sustainable development, together with “economic development” and “social development.” The Court recalled that within the framework of the United Nations it has been recognized that “the scope of the human rights of everyone depends on achieving the three [said] dimensions of sustainable development,” and that, “similarly, several inter-American instruments have referred to the protection of the environment and sustainable development.” The instruments referred to in the two paragraphs mentioned are: the Stockholm Declaration on the Human Environment (United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 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, June 3 to 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1); the Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development (World Summit on Sustainable Development, Johannesburg, September 4, 2002, UN Doc. A/CONF. 199/20); “*Transforming our world: the 2030 Agenda for Sustainable Development*,” September 25, 2015, UN Doc. A/RES/70/1, and the Inter-American Democratic Charter (adopted at the first plenary session of the OAS General Assembly on September 11, 2001, during the twenty-eighth period of sessions).

<sup>192</sup> Cf. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, particularly, paras. 56 to 68.

evidently does not mean that other human rights will not be violated as a result of damage to the environment.<sup>193</sup>

204. It is relevant to establish that Argentina recognizes the right to a healthy environment in its Constitution. Article 41 of the National Constitution stipulates that:

Every inhabitant enjoys the right to a healthy balanced environment that is appropriate for human development and so that productive activities may meet present needs without compromising those of future generations, and has the obligation to preserve it. [...] The authorities will provide for the protection of this right, for the rational use of natural resources, for the conservation of the natural and cultural heritage and of biological diversity, and for environmental information and education.

Meanwhile, article 30 of the Salta Constitution establishes that: “[e]veryone has the obligation to conserve a balanced and harmonious environment, as well as the right to enjoy it. The public authorities shall defend and safeguard the environment in order to improve the quality of life, prevent environmental contamination, and punish any offense against this.” Also, article 80 stipulated that: “[i]t is an obligation of the state and of everyone to protect the essential ecological processes and living systems on which human development and survival depend.”

205. In addition, Argentina has ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (hereinafter “Protocol of San Salvador”),<sup>194</sup> and its Article 11, entitled “Right to a Healthy Environment” establishes that: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment.”

206. Additionally, the Court notes that the right to a healthy environment has been recognized by various countries of the Americas and, as the Court has already noted, at least 16 States of the hemisphere include this in their Constitutions.<sup>195</sup>

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<sup>193</sup> Cf. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, paras. 59, 62 and 64. As highlighted by the *amicus curiae* brief submitted by DPLF and other entities, given the economic, social and environmental dimensions of sustainable development indicated previously (*supra* footnote 191), the right to a healthy environment should not be impaired by the dimension of economic development; rather it should be guaranteed and, therefore, there are obligations that must be met by the States. The same *amicus curiae* brief noted that the OAS General Assembly has issued various resolutions urging the 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. (For example, it referred to the resolutions on *Human Rights and the Environment in the Americas* AG/RES. 1926 (XXXIII-O/03), which acknowledges “a growing awareness of the need to manage the environment in a sustainable manner 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 protection of the environment and human rights and emphasizes that climate change has an impact on the full enjoyment of human rights, and the *Inter-American Program for Sustainable Development* AG/RES. 2882 (XLVI-O/16), which recognizes three dimensions of development in keeping with Agenda 2030.

<sup>194</sup> The Protocol of San Salvador was signed by Argentina on November 17, 1988, and then adopted by national Law 24,658, promulgated on July 15, 1996. The instrument of ratification was deposited on October 23, 2003.

<sup>195</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, footnote 88. This indicates that, in addition to the Constitution of Argentina, the Constitutions of the following countries recognize the right to a health environment: Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.

207. Regarding the right to a healthy environment, for the purposes of this case it should be pointed out States not only have the obligation to respect this,<sup>196</sup> but also the obligation established in Article 1(1) of the Convention to ensure it, and one of the ways of complying with this is by preventing violations. This obligation extends to the “private sphere” in order to avoid “third parties violating the protected rights,” and “encompasses all those legal, political, administrative and cultural measures that promote the safeguard of human rights and that ensure that eventual violations of those rights are examined and dealt with as wrongful acts.”<sup>197</sup> In this regard, the Court has indicated that, at times, the States have the obligation to establish adequate mechanisms to monitor and supervise certain activities in order to ensure human rights, protecting them from actions of public entities and also private individuals.<sup>198</sup> The obligation to prevent is an obligation “of means or conduct and non-compliance is not proved by the mere fact that a right has been violated.”<sup>199</sup> Since the foregoing is applicable to all the rights included in the American Convention, it is useful to establish that it also refers to the rights to adequate food, to water and to take part in cultural life.

208. Nevertheless, specifically with regard to the environment, it should be stressed that the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation. Based on the duty of prevention, the Court has pointed out that “States are bound to use all the means at their disposal to avoid activities under its

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<sup>196</sup> The Court has indicated that in light of the obligation to respect and to ensure human rights established in Article 1(1) of the Convention, States “must refrain” from, among other conducts, “unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a decent life; for example, by dumping waste from State-owned facilities in ways that affect access to or the quality of potable water and/or sources of food” (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*). Advisory Opinion OC-23/17, para. 117. In support of this, the Court referred to the CESCR (*General Comment 15: The right to water (Arts. 11 and 12 of the Covenant)*). January 20, 2003. UN Doc. E/C.12/2002/11, paras. 17 to 19, and *General Comment 14: The right to the highest attainable standard of health (Art. 12 of the Covenant)*. UN Doc. E/C.12/2000/4, August 11, 2000, para. 34).

<sup>197</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, para. 118.

<sup>198</sup> See, *inter alia*, *Case of Ximenes Lopes v. Brazil. Merits, reparations and costs*. Judgment of July 4, 2006. Series C No. 149, paras. 86, 89 and 99, and *Case of I.V. v. Bolivia*, paras. 154 and 208. Similarly, *Case of Ramirez Escobar et al. v. Guatemala*, para. 355.

<sup>199</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, para. 118. The Court has expressed the same concept, even though not directly related to the right to a healthy environment, in other judgments: *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, paras. 165 and 166, and *Case of López Soto et al. v. Venezuela. Merits, reparations and costs*. Judgment of September 26, 2018. Series C No. 36, para. 130. Similarly, the African Commission on Human and Peoples’ Rights has emphasized that the right to a healthy environment imposes on States the obligation “to take reasonable [...] measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources” (*Cf. African Commission on Human and Peoples’ Rights, Case of Ogoni v. Nigeria*, Communication 155/96. Decision of May 27, 2002, para. 52).

jurisdiction causing significant harm to the environment.”<sup>200</sup> This obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm.<sup>201</sup> Even though it is not possible to include a detailed list of all the measures that States could take to comply with this obligation, the following are some measures that must be taken in relation to activities that could potentially cause harm: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred.<sup>202</sup>

209. The Court has also taken into account that several rights may be affected as a result of environmental problems,<sup>203</sup> and that this “may be felt with greater intensity by certain groups in vulnerable situations”; these include indigenous peoples and “communities that, essentially, depend economically or for their survival on environmental resources[, such as] from the marine environment, forested areas and river basins.” Hence, “pursuant to ‘human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination.’”<sup>204</sup>

#### *B.1.1.2 The right to adequate food*

210. Regarding *the right to adequate food*, Article 34(j) of the Charter indicates that “[t]he Member States agree [...] to devote their utmost efforts to accomplishing the following basic goals: [...] proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food.”

211. The right to food can also be identified in Article XI of the American Declaration of the Rights and Duties of Man (hereinafter also “the American Declaration”),<sup>205</sup> which, among other aspects, establishes that: “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food.”

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<sup>200</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, footnote 247 and para. 142.

<sup>201</sup> *Cf. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, para. 142.

<sup>202</sup> *Cf. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, para. 145.

<sup>203</sup> Including to adequate food, to water and to take part in cultural life.

<sup>204</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, paras. 66 and 67. The citation in the text transcribed corresponds to: “Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 42, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81.”

<sup>205</sup> Adopted at the Ninth International Conference of American States, Bogotá, Colombia, 1948.

212. Also, Article 12(1) of the Protocol of San Salvador states that: “[e]veryone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.”

213. In the universal sphere, Article 25(1) of the Universal Declaration of Human Rights,<sup>206</sup> establishes that: “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food” and other aspects indicated in the article. While Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also establishes that “[t]he States Parties [...] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food,”<sup>207</sup> among other factors.

214. In addition, article 75.22 of the Argentine National Constitution adopted on December 15, 1994, indicates that “[t]he American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights[, and] the International Covenant on Economic, Social and Cultural Rights,” among other international instruments, “have constitutional rank.” Consequently, the right to food, as established in those instruments, has “constitutional rank.” Meanwhile, the Constitution of Salta recognizes the right to health in general terms, closely related to food, and has specific provisions on food in relation to “childhood” and “older persons.”<sup>208</sup>

215. Additionally, the Court points out that several countries have recognized the right to food in their domestic law. The Working Group to examine the national reports envisioned in the Protocol of San Salvador (hereinafter “WGPSS”) has indicated that “a growing number of States have explicitly recognized the right to adequate food in their political constitutions and increasingly in their domestic legislation (by means of both framework laws and sectoral laws). Latin America is at the leading edge of this world trend.”<sup>209</sup>

216. From Article 34(j) of the Charter, interpreted in light of the American Declaration, and considering the other instruments cited, it is possible to derive elements that constitute the right to adequate food. The Court considers that, essentially, this right protects access to food that permits nutrition that is adequate and appropriate to ensure

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<sup>206</sup> Proclaimed by the United Nations General Assembly in Paris, on December 10, 1948, in its Resolution 217 A (III).

<sup>207</sup> The ICESCR entered into force on January 3, 1976. Argentina signed this treaty on February 19, 1968, and ratified it on August 8, 1986. Since the reform of the National Constitution adopted in 1994 (*supra* para. 54), this instrument enjoys constitutional rank in Argentina (*infra* para. 214).

<sup>208</sup> Article 41, entitled “Right to health,” states: “Health is a right that is inherent to life and its preservation is an obligation for everyone. It is a social right. The State is responsible for providing care for the physical, mental and social health of everyone, and ensuring that everyone receives the same services for the same needs.” Article 33 establishes “[t]he State shall ensure the protection of childhood, covering its needs [...] for [...] food.” Article 35 “recognizes that older persons have the right to a decent existence,” and establishes that “[t]he province shall ensure that the older inhabitants have: [...] food.”

<sup>209</sup> The Working Group of the Protocol of San Salvador (WGPSS). *Progress Indicators for Measuring Rights under the Protocol of San Salvador*. November 5, 2013. Doc. OEA/Ser.L/XXV.2.1 GT/PSS/doc.9/13. Second group of rights, para. 18. Footnote 7, corresponding to this paragraph, indicates that: “Bolivia (Art. 16), Brazil (Art. 10), Ecuador (Art. 13), Guatemala (99), Guyana (Art. 40), Haiti (Art.22), and Nicaragua (Art. 63) recognize the right to food for all in their constitutions; Colombia (Art. 44), Cuba (Art. 9), and Honduras (Arts. 142-146) recognize the right of children to food; Suriname (Art. 24) recognizes the right to food in the context of the right to work. Argentina, El Salvador and Costa Rica implicitly recognize the right to food in their constitutions by granting constitutional or supra-constitutional status to the International Covenant on Economic, Social and Cultural Rights.”

health. As the CESCR has indicated, this right is realized when everyone has “physical and economic access at all times to adequate food or means for its procurement [...] and shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.”<sup>210</sup>

217. Even though the right to food is widely recognized in the international *corpus iuris*,<sup>211</sup> based on the ICESCR, the CESCR has developed the content of the right to food very clearly and this has facilitated the Court’s interpretation of the content of this right.<sup>212</sup>

218. In its *General Comment No. 12*, the CESCR indicated that the “core content” of the right to food implied “[t]he *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture” and “[t]he *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”<sup>213</sup>

219. The Committee underlined that *availability* should be understood as “the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.” It also explained that *accessibility* “encompasses both economic and physical accessibility.”<sup>214</sup>

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<sup>210</sup> CESCR, *General Comment No. 12. The right to adequate food (Art. 11)*. Twentieth session (1999). Doc. E/C.12/1995/5, para. 6. The WGPSS has indicated similar considerations (*Cf. Progress Indicators for Measuring Rights under the Protocol of San Salvador – Second group of rights*, para. 19). As indicated in the *amicus curiae* brief of DPLF and other entities, the Charter provides a minimum standard for the satisfaction of the right to food when establishing that the State must ensure access to “proper nutrition”; this obligations is reinforced by Article XI of the American Declaration, and although it mentions the “preservation of [...] health,” this should not be confused with the “right to health” because it refers separately to measures relating to “medical care” and “measures relating to food.”

<sup>211</sup> Added to the foregoing, the relevant instruments also include the following: the Convention on the Elimination of All Forms of Discrimination against Women, art. 12; the Convention on the Rights of the Child, arts. 24 and 27, and the Convention on the Rights of Persons with Disabilities, arts. 25 and 28 (Argentina ratified the Convention on the Elimination of All Forms of Discrimination against Women on July 15, 1985; the Convention on the Rights of the Child on December 4, 1990, and the Convention on the Rights of Persons with Disabilities on September 2, 2008). Additionally, the following documents can be indicated: the 1974 Universal Declaration on the Eradication of Hunger and Malnutrition; the 1996 Rome Declaration on World Food Security; the 2002 Declaration of the World Food Summit, or the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security adopted by the Council of the Food and Agriculture Organization of the United Nations (FAO) in 2004.

<sup>212</sup> The Court has proceeded in this way with regard to other rights; for example, the judgment in the case of *Poblete Vilches et al. v. Chile* regarding the right to health, or the judgment in the case of *Muelle Flores v. Peru*, regarding the right to social security (*Cf. Case of Poblete Vilches et al. v. Chile*, paras. 115, 118 and 120, and *Case of Muelle Flores v. Peru*, para. 184). The WGPSS has taken a similar approach, based on the indications of the CESCR (*Cf. Progress Indicators for Measuring Rights under the Protocol of San Salvador – Second group of rights*).

<sup>213</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, para. 8.

<sup>214</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, paras. 12 and 13. In this last paragraph, the CESCR also states that: (a) “[e]conomic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes,” and (b) “[p]hysical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people,

220. It is also relevant to underline for the purposes of this case that the concepts of “adequacy” and “food security” are particularly important in relation to the right to food. The former serves to underline that it is not just any type of food that satisfies the right; rather there are a number of factors that must be taken into account when determining whether particular food is “appropriate.” The second concept relates to “sustainability” and “implies food being accessible for both present and future generations.” The CESCR also explained the need for “*cultural or consumer acceptability*, [which] implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption.”<sup>215</sup>

221. States have the obligation not only to respect,<sup>216</sup> but also to ensure the right to food, and should understand that this obligation includes the obligation to “protect” this right as this was conceived by the CESCR: “[t]he obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.” Accordingly, the right is violated by a State’s “failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others.”<sup>217</sup>

#### *B.1.1.3 The right to water*

222. The *right to water* is protected by Article 26 of the American Convention and this is revealed by the provisions of the OAS Charter that permit deriving rights from which, in turn, the right to water can be understood.<sup>218</sup> These include, for example, the right to a healthy environment and the right to adequate food, and their inclusions in the said Article 26 has already been established in this judgment, as has the right to health,

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the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.”

<sup>215</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, paras. 7 and 11.

<sup>216</sup> The Court has indicated that, in light of the obligation of “respect” established in Article 1(1) of the Convention, “States must refrain from [...] any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life such as adequate food” (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*). Advisory Opinion OC-23/17, para. 117).

<sup>217</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, paras. 15 and 19. In addition, it should be underlined that the Court has also indicated that “in specific cases of individuals or groups of individuals who are unable to access [...] adequate food by themselves for reasons beyond their control, States must guarantee the essential minimum of food” (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*). Advisory Opinion OC-23/17, para. 121).

<sup>218</sup> This Court has previously taken decisions founded on noting the existence of rights based on the content of others revealed by applicable conventions. For example, it has done this with regard to the “right to the truth.” The Court has indicated that “everyone, including the next of kin of the victims of serious human rights violations, has, pursuant to Articles 1(1), 8(1), 25, and in certain circumstances Article 13 of the Convention, the right to know the truth” (*Case of Gelman v. Uruguay*, para. 243, and *Case of the Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C No. 252, para. 298; similarly, *Case of Trujillo Oroza v. Bolivia. Reparations and costs*. Judgment of February 27, 2002. Series C No. 92, para. 114, and *Case of Omeara Carrascal et al. v. Colombia*, para. 256).



which the Court has also indicated is included in this article.<sup>219</sup> The right to water may be connected to other rights, even the right to take part in cultural life, which is also addressed in this judgment (*infra* paras. 231 to 242).<sup>220</sup>

223. It should also be underlined that the Article 25 of the Universal Declaration of Human Rights establishes the right to an adequate standard of living, as does Article 11

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<sup>219</sup> It should be made clear that the Court has already indicated that the right to health is included in Article 26 because it is derived from Articles 31(i), 31(l) and 45(h) of the Charter (*Cf. Case of Poblete Vilches et al. v. Chile*, para. 106, and *Case of Hernández v. Argentina*, para. 64). That said, the relationship between food, health and water is evident. It has been explicitly noted by the CESCR, which has indicated that “The right to water is [...] inextricably related to the right to the highest attainable standards of health [...] and to] adequate food” (CESCR. *General Comment 15. The right to water (Arts. 11 and 12 of the Covenant)*, para. 3). Meanwhile, this Court has recalled that “[a]mong the conditions required for a decent life [...] are] access to, and the quality of, water, food and health, and their content has been defined in the Court’s case law, indicating that these conditions have a significant impact on the right to a decent existence and the basic conditions for the exercise of other human rights. The Court has also included environmental protection as a condition for a decent life.” It has noted that “[a]mong these conditions, it should be underlined that health requires certain essential elements to ensure a healthy life; hence, it is directly related to access to food and water,” and that “environmental pollution may affect an individual’s health” so that environmental protection is directly related to access to food, water and health (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, paras. 109 and 110.) This cites the Court’s case law in the following cases: *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 163 and 167; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, paras. 156 to 178; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, paras. 187 and 195 to 213; *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 148; *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 172, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312, para. 168. It also cites: CESCR. *General Comment 14: The right to the highest attainable standard of health (Art. 12 of the Covenant)*, paras. 4 and 34 and the European Committee of Social Rights, *Collective complaint No. 30/2005, Marangopoulos Foundation for Human Rights v. Greece* (Merits). Decision of December 6, 2006, para. 195. The Court has also indicated that: (a) the right to “water” is among “the rights that are particularly vulnerable to environmental impact”; (b) “the Human Rights Council has identified environmental threats that may affect, directly or indirectly, the effective enjoyment of specific human rights, [including the right to] water,” and (c) “access to food and water may be affected if pollution limits their availability in sufficient amounts or affects their quality” (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, paras. 66, 54 and 111. The mention of the Human Rights Council cited: “Human Rights Council, Resolution 35, entitled “Human rights and climate change,” adopted on June 19, 2017, UN Doc. A/HRC/35/L.32; Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, paras. 9 and 23; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 18 and 24, and Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, December 16, 2001, UN Doc. A/HRC/19/34, para 7.”)

<sup>220</sup> It should be noted that the CESCR has indicated that “[w]ater is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life)” and that “The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. [...] The right to water is also inextricably related to [...] the rights to adequate housing and food. [...] The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.” The CESCR has also noted that “[t]he right to water has been recognized in a wide range of international documents, including treaties, declarations and other standard,” referring not to general human rights instruments, but to different documents on specific issues that do not need to be described here (*Cf. CESCR. General Comment 15. The right to water (Arts. 11 and 12 of the Covenant)*, paras. 6, 3 and 4, and footnote 5, respectively). On this basis, the connection between the right to water and the right to life, established in Article 4 of the Convention should be emphasized. The foregoing also reveals that the right to water may be derived from and/or be related to other rights. For the purposes of this case, it is not necessary to include further considerations in this regard.

of the ICESCR. It should be considered that this right includes the right to water, as pointed out by the CESCR which has also considered its relationship to other rights. Thus, the existence of the right to water has also been determined in the universal sphere despite the absence of general explicit recognition.<sup>221</sup> However, some treaties of the universal system relating to specific areas of human rights protection do refer expressly to water; for example, the Convention on the Rights of the Child (Article 24), or the Convention on the Elimination of All Forms of Discrimination against Women (Article 14), which relates to “the particular problems faced by rural women.”

224. Furthermore, it should be underlined that, on July 28, 2010, the United Nations General Assembly issued Resolution 64/292 entitled “The human right to water and sanitation,” which recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” Likewise, article 9 in Chapter III of the Social Charter of the Americas asserts that “[t]he [...] States recognize that water is fundamental for life and central to socioeconomic development and environmental sustainability” and that they “undertake to continue working to ensure access to safe drinking water and sanitation services for present and future generations.” Also, in 2007 and 2012, the OAS General Assembly adopted resolutions 2349/07 and 2760/12, entitled, respectively, “Water, health and human rights” and “The human right to safe drinking water and sanitation.” In its articles 1 and 4, the former resolves “to recognize that water is essential for life and health” and “indispensable for a life with human dignity,” as well as “to recognize and respect, in accordance with national law, the ancestral use of water by urban, rural and indigenous communities in the framework of their habits and customs on water use.” The second, in its first article resolves “to invite” States “to continue working to ensure access to safe drinking water and sanitation services for present and future generations.” The right is also established in Article 12 of the Inter-American Convention on Protecting the Human Rights of Older Persons.<sup>222</sup>

225. Additionally, it is pertinent to mention the relevant constitutional provisions in this case. The Argentine National Constitution includes the right to a healthy environment and, since it accords human rights instruments “constitutional rank,” also the rights to food and to health, among others, which are closely related to the right to water. Article 83 of the Salta Constitution indicates that “[t]he use of water in the public domain destined for the needs of consumption of the population is its right.” In addition, as already indicated, it establishes the right to a healthy environment and to health, and has specific provisions concerning food (*supra* paras. 204 and 214).

226. Having described the legal provisions that support this right, it is relevant to indicate its content. The CESCR has indicated that:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.<sup>223</sup>

Similarly, the Court, following the guidance of the CESCR has stated that “access to [...] water [...] includes `consumption, sanitation, laundry, food preparation, and personal

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<sup>221</sup> Cf. CESCR. *General Comment. 15. The right to water ((Arts. 11 and 12 of the Covenant), )*, paras. 3 and 4.

<sup>222</sup> Ratified by Argentina on October 27, 2017.

<sup>223</sup> CESCR. *General Comment 15. The right to water ((Arts. 11 and 12 of the Covenant), )*, para. 2.

and domestic hygiene,' and for some individuals and groups it will also include 'additional water resources based on health, climate and working conditions.'"<sup>224</sup>

227. The CESCR has indicated that "[t]he right to water contains both freedoms and entitlements." The former "include the right to maintain access to existing water supplies" and "to be free from interferences," including the possible "contamination of water supplies." Meanwhile, the entitlements are related to "a system of water supply and management that provides equality of opportunity for people to enjoy the right to water." It also emphasized that "[w]ater should be treated as a social and cultural good, and not primarily as an economic good,"<sup>225</sup> and that "the following factors apply in all circumstances:

- (a) *Availability*. The water supply for each person must be sufficient and continuous for personal and domestic uses [...].
- (b) *Quality*. The water required for each personal or domestic use must be safe [...]. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use
- (c) *Accessibility*. Water and water facilities and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party."<sup>226</sup>

228. When explaining how the right to water is related to other rights, the CESCR noted "the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food." It added that "States [...] should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples." It asserted that "[e]nvironmental hygiene, as an aspect of the right to health [...], encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions."<sup>227</sup> Similarly, the Court has already noted that "the right to water" (as also the rights to food and to take part in cultural life) are "among the rights that are especially vulnerable to environmental impact."<sup>228</sup>

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<sup>224</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 111. See also, *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 195.

<sup>225</sup> It added that "[t]he manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations."

<sup>226</sup> CESCR. *General Comment 15. The right to water (Arts. 11 and 12 of the Covenant)*, paras. 10, 11 and 12. Regarding "accessibility," in the final paragraph, the CESCR explained that it "has four overlapping dimensions: (i) *Physical accessibility*: Water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. [...]. (ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other (ICESCR) rights. (iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. (iv) *Information accessibility*: Accessibility includes the right to seek, receive and impart information concerning water issues."

<sup>227</sup> CESCR. *General Comment 15. The right to water ((Arts. 11 and 12 of the Covenant)*, ), paras. 7 and 8.

<sup>228</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017, para. 66. The Court has indicated that "health is directly related to access to food and water" (*Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 167; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, paras. 156 to 178; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*,

229. Regarding the obligations entailed by the right to water, it is worth adding some more specific elements. Clearly, there is an obligation to respect the exercise of this right,<sup>229</sup> as well as the obligation to ensure it, as indicated in Article 1(1) of the Convention. This Court has indicated that “access to water” involves “obligations to be realized progressively”; “however, States have immediate obligations such as ensuring [access] without discrimination and taking measures to achieve [its] full realization.”<sup>230</sup> The State duties that it can be understood are contained in the obligation to ensure this right include providing protection against actions by private individuals, and this requires the States to prevent third parties from impairing the enjoyment of the right to water, as well as “ensuring an essential minimum of water” in “specific cases of individuals or groups of individuals who are unable to access water [...] by themselves for reasons beyond their control.”<sup>231</sup>

230. The Court agrees with the CESCR that, in compliance with their obligations in relation to the right to water, States “should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including [...] indigenous peoples.” And should ensure that “[i]ndigenous peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution [...] and] provide resources for indigenous peoples to design, deliver and control their access to water,” and also that “Nomadic and traveller communities have access to adequate water at traditional [...] halting sites.”<sup>232</sup>

#### *B.1.1.4 The right to take part in cultural life*

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paras. 195 to 213, and *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 110) and that “access to water and food may be affected, for example, if contamination limits their availability in sufficient quantities, or impacts their quality” (Cf. *Case of the Saramaka People v. Suriname*, para. 126; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, paras. 195 and 198 and *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 11).

<sup>229</sup> Pursuant to the obligation to respect rights ordered by Article 1(1) of the Convention, “States must refrain from [...] any practice or activity that denies or restricts access, in equal conditions, to the requirements for a decent life, such as [...] water” (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 117).

<sup>230</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017, para. 111.

<sup>231</sup> The Court noted that the same consideration corresponds to food (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 121).

<sup>232</sup> CESCR. *General Comment 15. The right to water (Arts. 11 and 12 of the Covenant)*, para. 16.

231. Regarding the *right to take part in cultural life*, which includes the right to *cultural identity*,<sup>233</sup> Articles 30, 45(f), 47 and 48 of the Charter establish the commitment of the States to ensure: (a) the integral development [of] their people [... which] encompasses the [...] cultural [aspect]"; (b) "the incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the [...] cultural [...] life of the nation, in order to achieve the full integration of the national community"; (c) the "encouragement of [...] culture," and (d) the "preserv[ation] and enrich[ment of] the cultural heritage of the American peoples."<sup>234</sup>

232. In addition, Article XIII of the American Declaration indicates that "[e]very person has the right to take part in the cultural life of the community."

233. Article 14(1)(a) of the Protocol of San Salvador recognizes "the right of everyone: [...] to take part in the cultural [...] life of the community."

234. In the universal sphere, Article 27(1) of the Universal Declaration of Human Rights stipulates that: "[e]veryone has the right freely to participate in the cultural life of the community." And, Article 15(1)(a) of the ICESCR indicates "the right of everyone [...] to take part in cultural life." Furthermore, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) establishes that "[i]n those States in which ethnic,

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<sup>233</sup> In this judgment, given the characteristics of the relevant facts that are examined and the corresponding arguments, the right "to participate in cultural life" will be addressed from one specific angle: the right to "cultural identity." In this case, it is alleged that the characteristic or representative cultural features of culture as a "way of life" have been violated. The notion of "cultural identity" is found in ILO Convention 169 and in the American Declaration on the Rights of Indigenous Peoples, and it can be understood to be incorporated in the United Nations Declaration on the Rights of Indigenous Peoples, which expresses similar concepts and has been used by the Court with regard to indigenous communities. The Court has stated that "cultural identity" is a "fundamental collective human right of indigenous communities that must be respected in a multicultural pluralist and democratic society" (*The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 113; similarly, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 217.) The right to cultural identity is relevant for indigenous peoples, but not only for them; it is closely related to the right of everyone "to take part in cultural life" and to the right of "people belonging to [...] minorities [...] to enjoy their own culture," pursuant to Articles 15 and 27, respectively, of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (*infra* para. 234), as indicated also by their corresponding Committees (*Cf.* CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*. Forty-third session (2009) Doc. E/C.12/GC/21, paras. 3, 7, 9, 13, 15, 32, 33, 36, 37, 42, 43, 49, 53 and 55, and Human Rights Committee. *CCPR, General Comment 23. Rights of minorities (Art. 27)*. Fiftieth session (1994). Doc. CCPR/C/21/Rev.1/Add.5, paras. 1 and 3). In addition, the Court clarifies that cultural rights are not limited to the foregoing. It is not necessary to go into this matter further; suffice it to say that Article XIII of the American Declaration also refers to the right "to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries [and] likewise [...] to the protection of [...] moral and material interests as regards [...] inventions or any literary, scientific or artistic works." Furthermore, in paragraph 2 of the aforementioned General Comment 21, the CESCR clearly refers to "the right of everyone to take part in cultural life [...] and] other cultural rights."

<sup>234</sup> The Court finds it relevant to establish that the provisions indicated should be understood and applied in harmony with other international commitments made by the States, such as those that arise from Article 15 of the International Covenant on Economic, Social and Cultural Rights and Article 27 of the International Covenant on Civil and Political Rights (*infra* para. 234), or Convention 169. Therefore, it should not be understood that such norms call for State policies that encourage the assimilation of minorities or groups with their own cultural patterns into a culture that is considered majority or dominant. To the contrary, the mandates to ensure "integral development," "to incorporate" and to increase the "participation" of sectors of the population to seek their "full integration," "to stimulate culture" and "to preserve and enrich" the cultural heritage, should be understood in the context of respect for the characteristic cultural life of the different groups such as indigenous communities. Therefore, "participation," "integration" or "incorporation" into "cultural life" should be sought respecting cultural diversity and the rights of the different groups and their members.

religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

235. Meanwhile, the Argentine National Constitution, as already indicated, has assigned “constitutional rank” to the Universal Declaration of Human Rights, the American Declaration, the American Convention, the ICESCR and the ICCPR. In particular, with regard to indigenous peoples and as already indicated (*supra* para. 54), article 75 of the Constitution establishes that “[i]t shall correspond to Congress [... t]o recognize the ethnic and cultural pre-existence of the Argentine indigenous peoples” and, among other obligations, “to ensure respect for their identity.” Article 52 of the Constitution of Salta “ensures to all the inhabitants the right to accede to culture” and indicates that the State “promotes collective cultural expressions.” Also, specifically with regard to indigenous peoples, article 15 of the Salta Constitution indicates, among other matters, that “[t]he province recognizes the ethnic and cultural pre-existence of the indigenous peoples who reside in the territory of Salta [and] recognizes and guarantees respect for their identity.”

236. The constitutional texts of various countries in the region, using different expressions (including “cultural identity” and “cultural diversity”), in general, and/or with regard to indigenous or tribal peoples, protect cultural identity and/or participation in cultural life. The relevant provisions include: article 30 of the Constitution of Bolivia; articles 215 and 231 of the Constitution of Brazil; article 7 of the Constitution of Colombia; articles 21 and 23 of the Constitution of Ecuador; articles 57, 58 and 66 of the Constitution of Guatemala; article 4 of the Constitution of Mexico; articles 5 and 89 to 91 of the Constitution of Nicaragua; article 90 of the Constitution of Panama; articles 63 and 65 of the Constitution of Paraguay; articles 2 and 89 of the Constitution of Peru, and article 121 of the Constitution of Venezuela.

237. That said, regarding the concept of “culture,” it is useful to take into account the definition of the United Nations Educational, Scientific and Cultural Organization (UNESCO), that this is “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>235</sup>

238. Cultural diversity and its richness should be protected by the States because, in the words of UNESCO, it “is as necessary for humankind as biodiversity is for nature[;] it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.” States are obliged to protect and promote cultural diversity and “[p]olicies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace.” Therefore, “cultural pluralism gives policy expression to the reality of cultural diversity.”<sup>236</sup>

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<sup>235</sup> Preamble to the UNESCO Universal Declaration on Cultural Diversity of November 2, 2001, which indicates that “[t]his definition is in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), of the World Commission on Culture and Development Our Creative Diversity, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998).”

<sup>236</sup> UNESCO Universal Declaration on Cultural Diversity, arts. 1 and 2. Article 4 adds that: “[t]he defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”

239. The CESCR has indicated that:

The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificity and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.<sup>237</sup>

240. The Court understands that the right to cultural identity protects the freedom of individuals, including when they are acting together or as a community, to identify with one or several societies, communities or social groups, to follow a way of life connected to the culture to which they belong and to take part in its development. Thus, this right protects the distinctive features that characterize a social group without denying the historical, dynamic and evolutive nature of culture.<sup>238</sup>

241. It is useful to stress that, among the “necessary conditions for the full realization of the right of everyone to take part in cultural life,” the CESCR has highlighted the following:

- (a) *Availability*, which it conceives as the “presence of cultural goods and services,” among which it includes “nature’s gifts, such as [...], rivers, mountains, forests [...] flora and fauna” as well as “intangible cultural goods, such as [...] customs [and] traditions, [...] as well as values, which make up identity and contribute to the cultural diversity of individuals and communities”;
- (b) *Accessibility*, which “consists of effective and concrete opportunities for individuals and communities to enjoy culture fully”;
- (c) *Acceptability*, which “entails that the laws, policies, strategies, programmes and measures adopted by the State [...] for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved”;

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<sup>237</sup> CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*. para. 12.

<sup>238</sup> In the same vein, it is possible to indicate the concepts expressed by UNESCO (*supra* paras. 237 and 238), the Human Rights Committee and the CESCR. Regarding Article 27 of the ICCPR (*supra* para. 234), the Human Rights Committee has indicated that “individuals belonging to [...] minorities should not be denied the right, in community with members of their group, to enjoy their own culture” (Human Rights Committee. *General Comment 23. Rights of minorities (art. 27)*, para 5). Similarly, the CESCR, referring to Article 15(1)(a) of the ICESCR (*supra* para. 234), indicated that “culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression “cultural life” is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.” It added that “culture,” in the pertinent sense, “encompasses [...] ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.” It also indicated that “[p]articipation covers in particular the right of everyone — alone, or in association with others or as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities [...] and] to engage in one’s own cultural practices”; and that “[a]ccess covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right [...] to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities.” It added that, among other aspects, “[c]ontribution to cultural life refers to the right of everyone [...] to take part in the development of the community to which a person belongs” (CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*, paras. 11, 13 and 15.)

(d) *Adaptability*, which “refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State [...] in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities,” and  
(e) *Appropriateness*, which “refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous people.” In this regard, the CESCR “stress[ed ...] the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption [and] the use of water.”<sup>239</sup>

242. Among the State obligations relating to the right to take part in cultural life, the CESCR has indicated “the obligation to fulfill” that “requires States [...] to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right,” and “the obligation to protect” that “requires States [...] to take steps to prevent third parties from interfering in the right to take part in cultural life.” The CESCR explained that the States have “minimum core obligations,” which include “[t]o protect the right of everyone to engage in their own cultural practices.” It also indicated the right is violated “through the omission or failure of a State party to take the necessary measures to comply with its [respective] legal obligations.”<sup>240</sup>

*B.1.2 Interdependence between the rights to a healthy environment, adequate food, water and cultural identity and specificity in relation to indigenous peoples*

243. The rights referred to above are closely related, so that some aspects related to the observance of one of them may overlap with the realization of others.

244. Referring to diverse statements made by international bodies,<sup>241</sup> the Court has underlined the “close” relationship or “interdependence” between the environment and human rights. This is because the latter may be adversely affected by environmental degradation and, in turn, because – as United Nations agencies have indicated – “effective environmental protection often depends on the exercise of human rights.”<sup>242</sup>

245. In this context, there are threats to the environment that may have an impact on food. The right to food, and also the right to take part in cultural life and the right to

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<sup>239</sup> CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*, para. 16.

<sup>240</sup> CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*, paras. 48, 55 and 63.

<sup>241</sup> Among these, the Court has cited documents issued by the Inter-American Commission on Human Rights, the OAS General Assembly, the European Court of Human Rights, the African Commission on Human and Peoples’ Rights and the United Nations Independent Expert (now Special Rapporteur) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (*Cf. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*). Advisory Opinion OC-23/17, paras. 49 to 51).

<sup>242</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, paras. 54 and 51. This citation corresponds to the Independent Expert referred to in the preceding footnote in the following document: Human Rights Council, *Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 10.



water, are “particularly vulnerable” to “environmental impact” (*supra* para. 228). The CESCR has indicated that the “policies” that should be “adopted” owing to the right to food include “environmental” policies.<sup>243</sup> Likewise, it has indicated that “in economic development and environmental policies and programs” the States should “[r]espect and protect the cultural heritage of all the groups and communities, in particular the most disadvantaged and marginalized individuals and groups.”<sup>244</sup>

246. The CESCR has also pointed out that:

the right to adequate food is [...] indispensable for the fulfilment of other human rights [...] and] also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.<sup>245</sup>

It added that the “the precise meaning of ‘adequacy’ is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions.”<sup>246</sup> The WGPSS has indicated, similarly, that it is “necessary to consider” the “cultural dimension” of the right to adequate food and that “because food is a cultural manifestation of peoples, it is necessary to adopt an integral approach and with a direct interdependence between civil and political rights and economic, social and cultural rights.”<sup>247</sup>

247. Regarding the indigenous peoples in particular, it should be pointed out that Articles 4(1), 7(1), 15(1) and 23 of Convention 169 establish, respectively: the State obligation that “special measures shall be adopted as appropriate for safeguarding the [...] cultures and environment of [indigenous and tribal] peoples”; the right of such peoples “to decide their own priorities for the process of development as it affects their lives, [...] and the lands they occupy or otherwise use”; “the rights of [these] peoples to the natural resources pertaining to their lands,” which “include the right of these peoples to participate in the use, management and conservation of these resources,” and that “subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognizes as important factors in the maintenance of their cultures and in their economic self-reliance and development.”

248. Likewise, articles 20(1), 29(1) and 32(1) of the United Nations Declaration on the Rights of Indigenous Peoples indicate the rights of the indigenous peoples “to be secure in the enjoyment of their own means of subsistence and development”; “to the conservation and protection of the environment and the productive capacity of their

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<sup>243</sup> CESCR. *General Comment. 12. The right to adequate food (Art. 11)*, para. 4.

<sup>244</sup> CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*, para. 50.

<sup>245</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, para. 4.

<sup>246</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, para. 7.

<sup>247</sup> WGPSS. *Progress Indicators for Measuring Rights under the Protocol of San Salvador. Second group of rights*, para. 21. In its *amicus curiae* brief, ACIJ stated that “[t]he right to food can be realized when there is a social process in which everyone, women and men equally, have options available to decide how to relate to nature, transform resources into food, especially local produce, based on agroecological principles, that constitute a diversified diet that is adequate, safe and nutritive. This idea is necessary so that everyone achieves nutritional well-being, and support for cultural identity and is able to lead a healthy, active and social life. It also applies, particularly, to vulnerable groups, such as the indigenous peoples.” It noted that the FAO considered that “the right to food of the indigenous peoples is inseparable from their right to land, territories and resources, culture and self-determination.”

lands or territories and resources” and “to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.” Meanwhile, article XIX of the American Declaration on the Rights of Indigenous Peoples refers to the “the right to protection of a health environment,” which includes the right of the “indigenous peoples” “to live in harmony with nature and to a healthy, safe, and sustainable environment”; “to conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way,” and “to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>248</sup>

249. In this regard, it is pertinent to bear in mind that the CESCR has indicated that:

The strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.<sup>249</sup>

250. It is also important to emphasize that the management by the indigenous communities of the resources that exist in their territories should be understood in pragmatic terms, favorable to environmental preservation. The Court has considered that:

In general, indigenous peoples play a significant role in the conservation of nature because certain traditional customs result in sustainable practices and are considered essential for effective conservation strategies. Hence, respect for the rights of indigenous peoples may have a positive effects on environmental conservation. Consequently, the rights of such communities and the international environmental standards should be understood as complementary and non-exclusive rights.<sup>250</sup>

Principle 22 of the Rio Declaration is very clear in this regard when it indicates that “indigenous people and their communities [...] have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”<sup>251</sup>

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<sup>248</sup> Additionally, the Court notes that other international instruments have referred to the relationship between the indigenous peoples and the environment. In this regard, the Convention on Biological Diversity (adopted by Argentina by Law 24,375, promulgated on October 3, 1994) can be mentioned; under its article 8(j), States shall “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.” Also, Agenda 21, signed at the 1992 United Nations Conference on Environment and Development; its Chapter 26 underlines the role of the indigenous peoples in the definition of sustainable development.

<sup>249</sup> CESCR. *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*, para. 36.

<sup>250</sup> *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 173.

<sup>251</sup> On this point, Article 10(c) of the Convention on Biological Diversity indicates that States shall “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” Similarly, FARN, in its *amicus curiae* brief stressed “[t]he role played by indigenous peoples in comprehensive strategies for mitigation and adaptation to climate change is their world view, their way of life, which contributes to the system of sustainable subsistence and to the conservation of biodiversity, resulting in a necessary tool to curb the

251. Additionally, it is necessary to take into account the indications of the Human Rights Committee that the right of the people to enjoy a particular culture “may consist in a way of life closely associated with territory and the use of its resources” as in the case of members of indigenous communities.<sup>252</sup> The right to cultural identity may be expressed in different ways; in the case of indigenous peoples this includes “a particular way of life associated with the use of land resources [...]. That right may include such traditional activities a fishing or hunting and the right to live in reserves protected by law.”<sup>253</sup> In this regard, the Court has had occasion to note that the right to collective ownership of indigenous people is connected to the protection of and access to the natural resources that are on their territories (*supra* para. 94). Likewise, the WGPSS has noted that “the physical, spiritual, and cultural well-being of indigenous communities is closely tied to the quality of the environment where they live.”<sup>254</sup>

252. The Court has also had occasion to examine circumstances which reveal that “the relationship of the members of a community with their territories” is “essential and an integral part of their cultural and nutritional survival.”<sup>255</sup> In this understanding, the United Nations Special Rapporteur on the right to food has referred to vital issues relating to the enjoyment of that right that frequently concern indigenous peoples. He stated that:

The realization of indigenous peoples’ right to food often depends crucially on their access to and control over the natural resources in the land and territories they occupy or use. Only then can they maintain traditional economic and subsistence activities such as hunting, gathering or fishing that enable them to feed themselves and preserve their culture and distinct identity.<sup>256</sup>

253. Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has stated that “land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples,”<sup>257</sup> and the Organization for Food and Agriculture of the United Nations (FAO) has indicated that “States should take measures to promote and protect the security of land tenure, [...] promot[ing] conservation and sustainable use of land,” and “[s]pecial consideration should be given to the situation of indigenous communities.”<sup>258</sup> While, the CESCR has underlined that “many indigenous population

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catastrophic effects of climate change.” FARN underscored the “active role of indigenous women, whose special traditional ecological knowledge should be considered one of the most appropriate solutions to climate change.”

<sup>252</sup> Human Rights Committee. *General Comment 23. Rights of minorities (Art. 27)*, para. 3.

<sup>253</sup> Human Rights Committee. *General Comment 23. Rights of minorities (Art. 27)*, para. 7.

<sup>254</sup> WGPSS. *Progress Indicators for Measuring Rights under the Protocol of San Salvador – Second group of rights*, para. 36.

<sup>255</sup> *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 282.

<sup>256</sup> United Nations Special Rapporteur on the right to food. *The right to food*. September 12, 2005. Doc. A/60/350, para. 23.

<sup>257</sup> *Human rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. February 4, 2002. Doc. E/CN.4/2002/97, para. 57.

<sup>258</sup> FAO. *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* adopted by the FAO Council at its 127<sup>th</sup> session, November 2004. Guideline 8B. Land.

groups whose access to their ancestral lands may be threatened<sup>259</sup> are particularly vulnerable to their enjoyment of their right to food being violated.

254. The right to food should not be understood in a restrictive sense. What is being protected by the right is not mere physical subsistence and, particularly in the case of indigenous peoples, it has a significant cultural dimension. The Special Rapporteur on the right to food has explained that:

Understanding what the right to food means to indigenous peoples is however far more complex than merely examining statistics on hunger, malnutrition or poverty. Many indigenous peoples have their own particular conceptions of food, hunger, and subsistence. In general, it is difficult to conceptually separate indigenous peoples' relationships with food from their relationships to land, resources, culture, values and social organization. Food, procurement and consumption of food are often an important part of culture, as well as of social, economic and political organization. Many indigenous peoples understand the right to adequate food as a collective right. They often see subsistence activities such as hunting, fishing and gathering as essential not only to their right to food, but to nurturing their cultures, languages, social life and identity. Their right to food often depends closely on their access to and control over their lands and other natural resources in their territories.<sup>260</sup>

## **B.2. Relevant facts of the case and analysis of State responsibility**

### **B.2.1 Facts**

255. Regarding the relevant facts of the case, it should be emphasized that there is no dispute concerning the fact that cattle-raising activities are being carried out on Lots 14 and 55 by the *criollo* population, who have installed fencing and also carried out illegal logging activities. In this regard, it is interesting to underscore that Argentina has stated that "fences of [...] *criollo* families exist," indicating that "they were erected prior to the Merits Report." Also, the State had proposed actions to move the livestock in the 2017 "Comprehensive Work Plan." Added to this, the State took several measures to prevent illegal logging, when it became aware that "exploitation of the forest" was being carried out without "legal authorization" (*infra* paras. 269 to 271).

256. Consequently, it is a fact that the indigenous communities do not possess their territory, free of interference. This is not limited merely to the presence of non-indigenous settlers, but also to the said activities. The Court will now describe these activities and their impact.

#### ***B.2.1.1 Livestock, illegal logging and fencing***

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<sup>259</sup> CESCR. *General Comment No. 12. The right to adequate food (Art. 11)*, para. 13.

<sup>260</sup> United Nations Special Rapporteur on the right to food. *The right to food*, para. 21. Also, in paragraph 19 of this document, the Special Rapporteur indicated that "due to long historical processes of colonization, exploitation and political and economic exclusion, indigenous peoples are among the most vulnerable to poverty, hunger and malnutrition. The right to food is directly linked to the situation of extreme poverty under which many indigenous peoples live." While, in the preceding paragraph, he stated that "inappropriate development efforts often intensify the marginalization, poverty and food insecurity of indigenous peoples, failing to recognize indigenous ways of securing their own subsistence and ignoring their right to define their own path toward development." Similarly, in his *amicus curiae* submission, Mr. De Schutter, former United Nations Special Rapporteur on the right to food, explained that "culture takes many forms, including a particular form of collective life with the use of the resources of the land, especially in the case of indigenous peoples," and that, in this regard, "the right to food cannot be isolated from the control and sovereignty over their territories." The *amicus curiae* brief presented by DPLF and other entities also indicates that preventing an indigenous community from procuring the food it requires for its survival in keeping with its own culture is also violating the right to adequate food, owing to the absence of acceptable food.

257. *Livestock*. According to the documentary evidence provided by the representatives, a serious environmental problem for the Wichí people has been the "introduction of livestock, overgrazing, and contamination of sources of water with animal feces."<sup>261</sup> Documentation issued by Salta explains that, before 1860, the indigenous communities "based their economy on hunting-fishing-gathering and some primitive agricultural practices, without having stable population settlements, [and that] they had only incorporated sheep and horses, which they reared in relatively small numbers." The same document indicates that, after the 1860s, the *criollo* population settled in the department of Rivadavia introduced cattle, and that, since the beginning of the twentieth century, this has "led to the deteriorated of bushes and herbaceous forage crops and to the expansion of invasive woody species."<sup>262</sup>

258. More specifically, the State has indicated that the *criollo* settlers raise "livestock" in open terrain. The Honorary Advisory Committee created by Decree 18/93 in 1993 to regularize the settlements on Fiscal Lot 55 indicated that "uncontrolled cattle grazing has led to the destruction of the resources, and about fifty herbaceous species and bushes have disappeared within a very short time." It also stressed that, as a result of uncontrolled grazing, there had been "a general loss of biodiversity because cattle are selective in their eating habits, while the countryside has been transformed by the elimination of areas of open grasslands."<sup>263</sup>

259. A document presented by the national State in 2006 explicitly recognized the serious environmental degradation owing to the anthropogenic activity in the territory of the communities. It indicated that the cattle-raising activities "had an impact on the composition and abundance of the wildlife that was a major source of protein for the indigenous population."<sup>264</sup> According to the testimony of Cacique Francisco Pérez, the cattle consume foodstuffs that the indigenous population would use.

260. Reports forwarded as documentary evidence also note that "the cattle of the *criollo* population eat the same fruits as the communities, such as the carob, the *mistol* and the *chañar*; they eat the edible shoots of the trees such as the carob and the *quebracho*; they destroy the communities' fences and eat the produce of indigenous

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<sup>261</sup> Cf. "Etnobotánica wichí del bosque xerófito en el Chaco semiárido Salteño." by Suárez, María Eugencia. 1st ed. Don Torcuato: Autores de Argentina, 2014 (evidence file, annex M.1 to the pleadings and motions brief, f. 34,618 to 35,141).

<sup>262</sup> Cf. Report of the Honorary Advisory Committee, p. 182 (evidence file, annex M.3 to the pleadings and motions brief, fs. 35,152 to 35,377).

<sup>263</sup> Cf. Report of the Honorary Advisory Committee. Furthermore, this report indicated that "trampling by the cattle has resulted in the soil compaction in the areas between the bushes, which, in turn, reduces the content of organic material and closes the pore space, and this reduces infiltration, increases the runoff, and causes increased water erosion, while reducing the availability of groundwater for plants." The *amicus curiae* brief of DPLF and other entities refers to the 2015 FAO Technical Report on the *Status of the World's Soil Resources*, which indicates that "soil degradation constitutes a great threat to [...] sustainable food production and security" in some regions of the world. Among the sources of this degradation, the FAO includes soil compaction, which, in Latin America, is mainly "caused by overgrazing and intensive agricultural traffic" (Food and Agriculture Organization of the United Nations (FAO), *Status of the World's Soil Resources, Technical Summary*, pp. 37 and 50).

<sup>264</sup> Cf. Draft proposal for distribution of the land of Fiscal Lots 55 and 14 - "Lhaka Honhat" Petition before the IACHR, presented by the national State to the Commission on September 5, 2006, and forwarded to the petitioners at the time on September 27, 2006 (evidence file, annex M.4 to the pleadings and motions brief, fs. 35,378 to 35,401).

horticulture.<sup>265</sup> Moreover, reference has been made to “the importance of the ‘carob’ for the Wichís and for the different ethnic groups of the Chaco in general, because it is a basic component of the alimentation of the people of the region and a motive of important traditional celebrations, such as the “carob festivals” held in the past.”<sup>266</sup> In addition, the native species are used by the original peoples of the region in the preparation of traditional medicines.

261. In addition, access to water has also been affected.<sup>267</sup> In certain areas, the increased pressure due to cattle-grazing has produced desertification (formation of “bare patches”).<sup>268</sup> In addition, the cattle consume the water that the communities also require for their subsistence,<sup>269</sup> and it has been verified that the water is frequently contaminated by animal feces. Added to this, as indicated by expert witness Naharro, “[i]n view of the scarcity of water, at times the communities are banned from access to water storage facilities, because the *criollo* families erect fencing around them, preventing the indigenous people from using this water.”<sup>270</sup>

262. *Illegal logging.* Another aspect indicated by the representatives is illegal logging. According to the representatives, the “illegal” nature of the logging activity is based on various provisions that, as of 1991, restrict logging activities (*infra* para. 269). State documents have indicated that one of the causes of the “bio-socio-economic degradation of the department of Rivadavia” is “logging” which “is carried out without applying minimum standards of reasonableness or foresight that would ensure the future of the woodlands and, above all, be compatible with livestock use and the requirements of the fauna. The [vast] environmental legislation in force has had no positive effect, [...] the clandestine logging activity is almost the norm.”<sup>271</sup>

263. The indigenous communities pointed out that the environmental degradation of the territory began at the start of the twentieth century with the introduction of animals by the *criollo* settlers. They argued that the activities developed over time had the immediate consequences of forest clearance and the use of the wood in the logging and charcoal industries and for the enclosures and fences erected by the *criollo* families.

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<sup>265</sup> Cf. “Uso tradicional de la tierra y sus recursos: Presiones sobre este uso en el contexto moderno,” by Wallis, Cristóbal. Paper presented at the Seminar on Indigenous Issues, organized by the Center for Canadian Studies, Universidad de Rosario, October 1994 (evidence file, annex M.5 to the pleadings and motions brief, fs. 35,402 to 35,419).

<sup>266</sup> Cf. “Etnobotánica wichí del bosque xerófito en el Chaco semiárido salteño,” by Suárez, María Eugenia. 1st ed. Don Torcuato: Autores de Argentina, 2014.

<sup>267</sup> The representatives have indicated that “[a]ccording to the national State, the settlers, encouraged by state polices, have settled on indigenous territory since 1902 with the founding of Colonia Buenaventura, making extensive use of the land and the sources of water for the subsistence of livestock.”

<sup>268</sup> The constant trampling by the cattle prevents the renewal of the flora (Cf. Presentation by Lhaka Honhat before the Commission on January 4, 2007 (evidence file, annex 6 to the Merits Report, fs. 47 to 101. Expert witness Naharro also mentioned this).

<sup>269</sup> Cf. Expert opinion of Ms. Buliubasich.

<sup>270</sup> In its *amicus curiae* brief, FARN indicated that “[t]he anthropomorphic activity in the area [of the case] is carried out without any type of supervision or foresight, and its impact on the river and on the community is a cause of concern.” It considered that the “activities with an impact on the river, [...] could affect [the] right to water.”

<sup>271</sup> Cf. Report of the Honorary Advisory Committee (evidence file, annex M.3 to the pleadings and motions brief, fs. 35,152 to 35,377).

264. The Inter-American Commission indicated that “the petitioner indigenous communities had constantly and consistently reported the occurrence of illegal logging and extraction of wood and other natural resources in their territories,” and that different State authorities had been made aware of such activities, particularly during the procedure before the Commission. The representatives have described the methods used in this practice: trees are felled in the forests, and then tractors and trucks are used to go in and take out the logs by different trails. State authorities have acknowledged the existence of this problem, as revealed by the actions described below (*infra* paras. 269 to 271)<sup>272</sup> and, during the processing of this case, they have undertaken to take steps to prevent it from occurring.

265. During the public hearing before this Court, Cacique Rogelio Segundo explained that logging “causes extensive harm to the territory” because “it destroys the forests,” “there are no flowers or fruit,” the animals leave and there are less bee colonies for the collection of honey. He added that, despite the complaints made to the State, it has not been possible to curb this activity and that, one of the results has been flooding. Cacique Francisco Pérez indicated that “the State does not exercise control; the *criollos* cut down the trees and we, the caciques, tell them ‘we are going to complain,’ and nothing happens; complain, complain and nothing happens; there is no response.” When he was asked, during the public hearing, how they obtained their medicines owing to the scarcity of typical tree species, Mr. Pérez indicated that their medicine system depended on the woodlands and that, “when it rains, the plants grow, but the problem is that when the plant grows and they are young and tender the animals come and eat them; that is why there are no plants. We think that if they take away all the animals immediately, in two years we could have a beautiful forest.”

266. *Fencing.* Regarding the aforementioned fencing, already in 1991, the communities had indicated that the *criollos* had erected these fences. At that time, they indicated that over the ten previous years, the *criollos* [had put up] kilometers [...] of wire fencing, blocking the paths to the river and the forest.<sup>273</sup> Cacique Rogelio Segundo declared that the fencing affects the indigenous peoples because it prevents them from “walking around freely [...] to seek food.” Various records, including some issued by the State (*infra* paras. 267 and 268), denote the presence of fencing over the years.

#### *B.2.1.2 Steps taken by the State*

267. On different occasions, the State undertook to take steps with regard to the fencing. In December 2000, it indicated that it would take measures to prevent its installation and “establish” controls in this regard.<sup>274</sup> Subsequently, on February 6, 2001, the province undertook to present a report on the illegal erection of fencing;<sup>275</sup> however,

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<sup>272</sup> Additionally, a note from the petitioners addressed to the Commission provides information on a meeting held on February 6, 2001, during which “[t]he Ministry of the Environment and Sustainable Development expressly acknowledged that the logging carried out on Lots [...] 55 and 14 is illegal (*Cf.* note from the Lhaka Honhat Indigenous Community to the Commission (Annex L.2 to the pleadings and motions brief of February 21, 2001, fs. 34,047 to 34,050).

<sup>273</sup> *Cf.* Lhaka Honhat land claim of July 28, 1991 (evidence file, annex K.2 to the pleadings and motions brief, fs. 33,573 to 33,582).

<sup>274</sup> *Cf.* Minutes of meeting of December 15, 2000 (evidence file, annex K.4 to the pleadings and motions brief, fs. 33,586 to 33,588).

<sup>275</sup> *Cf.* Note to the Commission of February 21, 2001 (evidence file, annex K.5 to the pleadings and motions brief, fs. 33,589 to 33,592).

there is no record that this was done. On August 2, 2002, the Salta Ministry of Production and Employment issued Resolution 295 prohibiting the installation of fencing on Fiscal Lots 14 and 55 until the land regularization process had been completed.<sup>276</sup> Additionally, in 2014, Decree 1498/14 was adopted (*supra* para. 80), article 8 of which stipulated that “[u]ntil the territory that corresponds to the indigenous communities and the lots of the *criollo* families have been delimited, no new fencing may be erected and no forestry resources may be exploited, beyond those necessary for subsistence.”

268. In its answering brief, the State advised that it “continued working on prevention and control of the erection of new fencing, which is prohibited in the area claimed by the indigenous peoples,” and that, following the issue of the Merits Report, provincial authorities had adopted a protocol of actions to reinforce control of the fencing that established prevention and control actions based on formal complaints. The State indicated that, “[a]t December 2017,” it had not received any complaint concerning the installation of new fencing, and that “in the different cases in which it was aware [...] of the existence of new fences erected in the area claimed by the indigenous peoples, it had taken administrative and judicial actions. The State did not provide any information on the number or the results of these actions. In April 2018, there were numerous fences on indigenous territory,<sup>277</sup> and fencing was observed during the on-site visit in May 2019 (*supra* para. 10).

269. Regarding illegal logging, the State has adopted various legal provisions: in 1991 and 1995, the province issued two decrees, Nos. 2609 and 3097, ordering the suspension of logging permits on Fiscal Lots 14 and 55 and declared the lots an area of environmental conservation and recovery until the delivery of the permanent titles to the indigenous communities and to the *criollos*. In December 2000, it undertook to ensure that the provincial police force and the Ministry of the Environment, and also the national gendarmerie would monitor the situation.<sup>278</sup> On October 10, 2007, the Salta Ministry of the Environment and Sustainable Development adopted Resolution 948 in which it confirmed that “it had found numerous instances of logging of Palo Santo (*lignum vitae*) on the fiscal lots, some without legal authorization,” and had therefore ordered measures to be taken in this regard.<sup>279</sup> The same year, Decree 2786/07 (*supra* para. 75) established that the provincial state should install checkpoints to prevent people breaking the law in force concerning logging. Subsequently, in July 2012, Decree 2398/12 (*supra* para. 78) ordered provincial ministries to take “all necessary measures

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<sup>276</sup> Cf. Resolution 295 of August 2, 2002 (evidence file, annex K.6 to the pleadings and motions brief, fs. 33,593 to 33,594). This is also indicated in its article 1: “To establish that, due to the process of the territorial regularization of Fiscal Lots Nos. 55 and 14, the occupants shall refrain from erecting any new enclosures with barbed wire or similar materials until the said process of regularizing the situation of the land has concluded.”

<sup>277</sup> Cf. Videos of May 2018 – submitted as Annexes K.41, K.42, K.43, K.44, K.45 and K.46 to the pleadings and motions brief – of the communities Bajo Grande, Misión La Paz, Pozo La China, Rancho El Ñato and San Luis. See also complaints of September 2008 (evidence file, Annexes K.39 and K.40 to the pleadings and motions brief, fs. 34,024 to 34,025 and 34,026 to 34,029). In addition, during interviews with the indigenous population of the territory, it was indicated that the creeks where the communities fish had been closed off by fencing (Cf. interview with a member of the San Miguel community; evidence file, annex K.46 to the pleadings and motions brief). Also, the representatives indicated that there is fencing over a surface area of approximately 20,000 ha of vacant land claimed by the indigenous peoples, which prevents the transfer and relocation of the *criollo* families. They understood that the existence of this fencing prevents the relocation of the *criollos* and therefore affects the rights of the communities, and clarified that this fencing is also illegal.

<sup>278</sup> Minutes of meeting of December 15, 2000.

<sup>279</sup> It established that “in all cases of authorizations for land clearance and/or logging, the volume and origin of the product harvested of the Palo Santo species shall be verified *in situ*,” together with the presentation of sworn statements concerning the logs.



to ensure the preservation of natural resources and the effective control of deforestation on Lots [...] 55 and 14." In 2014, Decree 1498/14 (*supra* para. 80) stipulated that "until the territory corresponding to the indigenous communities and to the lots of the *criollo* families has been delimited, no new fencing may be erected or any forestry resources exploited beyond those necessary for subsistence." In January that year, provincial authorities handed control posts and vehicles for the work of controlling deforestation over to State officials.<sup>280</sup> On October 17, that year, the Salta Ministries of Security and of Human Rights signed an undertaking to deal with the issue of deforestation.<sup>281</sup>

270. Despite this, on January 4, 2007, the representatives forwarded a report prepared by the civil organization ASOCIANA to the Commission, confirming that the illegal logging situation had worsened.<sup>282</sup> In August that year, Lhaka Honhat and the OFC signed a memorandum of understanding<sup>283</sup> establishing that they would require the government to ensure the total cessation of indiscriminate logging, in compliance with Decree 3097/95 and Provincial Law 7,070 on environmental protection.<sup>284</sup> In 2010 and 2013, the OFC and Lhaka Honhat made presentations requiring the authorities to ensure effective implementation of the systems to control illegal logging in the region.<sup>285</sup> The representatives asserted that the control posts stipulated in Decree 2786/07 had not been installed. They also advised that several complaints had been filed.<sup>286</sup> In a note of April 26, 2017, addressed to the Commission, the representatives indicated that illegal logging was being carried out in: (a) the border near "Puesto Azuquilar" claimed by the Pozo El Toro Community, which was within the 400,000 ha recognized to the petitioners; (b) Puesto el Anta, of the Pereyra family, south of the Pozo El Bravo Community; (c) Desemboque; (d) San Miguel; (e) Vertientes Chicas and Pozo La China, and (f) Rancho El Ñato.

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<sup>280</sup> Report of April 24, 2014, presented by Lhaka Honhat, represented by CELS, on the status of demarcation and transfers, deforestation, presence of the State in the area, visit to relocated settlers, reparations and consultations on infrastructure projects, and unrest in the area since the end of 2013 (evidence file, annex L. 29 to the pleadings and motions brief, fs. 34,456 to 34,460).

<sup>281</sup> Response of November 27, 2014, sent by Lhaka Honhat, represented by CELS, to the Commission, with regard to the information submitted by the State on November 18, 2014 (evidence file, annex L. 34 to the pleadings and motions brief, fs. 34,495 to 34,499).

<sup>282</sup> ASOCIANA report on illegal logging (evidence file, annex L.10 to the pleadings and motions brief, fs. 34,117 to 34,133). The report indicates that some members of the indigenous communities take part in the logging paid by *criollos* or other entrepreneurs, but clarifies that they do so because it is the only work they can obtain.

<sup>283</sup> Memorandum of understanding signed by Lhaka Honhat and the OFC on June 1, 2007 (evidence file, annex L.11 to the pleadings and motions brief, fs. 34,134 to 34,135).

<sup>284</sup> Salta had also assumed the obligation to protect the natural resources in the fourth paragraph of the memorandum of understanding signed on October 17, 2007 (*Cf.* Memorandum of Understanding of October 17, 2007; evidence file, annex L.15 to the pleadings and motions brief, fs. 34,179 to 34,183). This established that "[s]ince it is essential for the viability and implementation of this agreement that the natural resources of Lots 55 and 14 are protected, the parties undertake to prevent any type of logging and forestry use on the two lots."

<sup>285</sup> Memorandum of the OFC and Lhaka Honhat of May 9, 2013 (evidence file, Annexes L. 24 to the pleadings and motions brief, fs. 34,296 to 34,298).

<sup>286</sup> For example, on December 11, 2008, and in February 2009 (*Cf.* Complaint filed by Francisco Pérez before the Environmental Policy Secretariat, and by Calixto Ceballos with the Police of the province of Salta (evidence file, Annexes L.16 and L.17 to the pleadings and motions brief, fs. 34,184 to 34,187).

271. According to the representatives, illegal logging and extraction continues. The State argued that it was “constantly monitoring and controlling the territory using remote sensing (satellite imagery),” either *ex officio* or based on complaints.

### B.2.2 Analysis of State responsibility

272. When examining State responsibility it is necessary to establish that, as revealed by the foregoing, notwithstanding the obligation to adopt measures to achieve “progressively” the “full realization” of the rights included in Article 26 of the Convention, the content of such rights includes aspects that are enforceable immediately. The Court has already indicated that, in this regard, the obligations established in Articles 1(1) and 2 of the Convention apply.<sup>287</sup> In this case, the arguments submitted by the parties allude to the State obligation to ensure the enjoyment of the rights by preventing or avoiding their violation by private individuals. The Court will focus its analysis on this point. The case does not call for an examination of the State conduct in relation to “progressive” development towards the “full realization” of the rights.

273. The Court notes that the facts described reveal the presence of *criollos* on indigenous territory, as well as different activities that have had an impact. The issue to be determined is whether, in this case, that impact involved the violation of specific rights, in addition to the simple interference in the enjoyment of property, a matter that has been examined in the preceding chapter of this judgment. Also, if appropriate, the Court must determine whether the harm that occurred can be attributed to the State.

274. The Court understands that it must take into consideration the interdependence of the rights analyzed and the correlation that the enjoyment of these rights has, in the circumstances of the case. In addition, these right should not be understood restrictively. The Court has already indicated (*supra* paras. 203, 209, 222, 228, 243 to 247 and 251) that the environment is connected to other rights and that there are “threats to the environment” that may have an impact on food, water and cultural life. Furthermore, it is not just any food that meets the requirements of the respective right, but it must be acceptable to a specific culture, which means that values that are unrelated to nutrition must be taken into account. At the same time, food is essential for the enjoyment of other rights and, for it to be “adequate,” this may depend on environmental and cultural factors. Thus, food may be considered as one of the “distinctive features” that characterize a social group and, consequently, included in the protection of the right to cultural identity by the safeguard of such features, without this entailing a denial of the historical, dynamic and evolutive nature of culture.

275. This is even more evident in the case of indigenous peoples, regarding whom there are specific laws that require the safeguard of their environment, the protection of the productive capacity of their lands and resources, and considering traditional activities and those related to their subsistence economy such as hunting, gathering and others as “important factors for preserving their culture” (*supra* paras. 247 and 248). The Court has emphasized that “the lack of access to the territories and corresponding natural resources may expose the indigenous communities to [...] several violations of their human rights in addition to causing them suffering and prejudicing the preservation of their way of life, customs and language.” In addition, it has noted that States must

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<sup>287</sup> Cf. *Case of Muelle Flores v. Peru*, paras. 174 and 190, and *Case of Hernández v. Argentina*, para. 65.

protect “the close relationship that [indigenous peoples] have with the land” and “their life project, in both its individual and its collective dimensions.”<sup>288</sup>

276. That said, the State has not admitted that there has been environmental harm, and has argued, with regard to food and cultural identity, that there is no evidence of malnutrition or food deficit, and that it is the communities themselves that have introduced changes into their way of life (*supra* paras. 192 and 193).

277. The Court understands that the State’s argument entails a restrictive or limited understanding of the rights in question that fails to consider their interdependence and particularities in the case of indigenous peoples.

278. Based on the standards indicated previously, the Court understands that there has been a relevant impact on the way of life of the indigenous communities in relation to their territory and it is necessary to clarify the characteristics of that impact.

279. Expert witness Yáñez Fuenzalida, referring to the “cultural pertinence” that the “title recognizing indigenous collective property and ownership of their ancestral lands” should have, explained that this meant that the title should be appropriate to recognize the “specific [forms] of the right to the use and enjoyment of property based on the culture, traditions, customs and beliefs of each people.” Thus, she asserted that, in this case, the State should provide a “property title that recognizes [the] ethnic and cultural specificity of the communities [...] who use the territory in nomadic circuits that they follow based on their cultural tradition and the effective availability of natural resources for their subsistence, occupying the entire habitat that constitutes their traditional territory where the trails [...] are superimposed, overlap and cut across each other.” The expert witness concluded that “if the indigenous communal property is not recognized, other related rights could be violated, such as the right to cultural identity, to their organized survival as a people [and] to food.”<sup>289</sup> This is relevant because, as already determined in this judgment, the State has not adequately guaranteed the right to property.

280. Expert witness Naharro referred to reports indicating that it is “highly probable” that the “livestock are accelerating environmental deterioration processes,” and that the “spatial distribution of grazing [...] is leading to [...] deterioration of the ecosystem.” In her expert opinion, she also indicated that “[a]s the number of cattle increase, this is gradually destroying the indigenous peoples’ means of subsistence.” She explained that the cattle affect the wildlife and, also, feed on the fruits that are part of the “aboriginal

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<sup>288</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 163, and *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, para. 48. In this understanding, the *amicus curiae* brief of DPLF and other entities indicated that “the right to a healthy environment, not only signifies the possibility of access to vital material resources for the subsistence and economic development of indigenous peoples; it should also be considered that there is a special connection between the communities, a healthy environment, and their culture. The subsistence of the environment forms part of their religious activities, rituals, ways of life, beliefs and, consequently, of their more extensive right to cultural life.”

<sup>289</sup> Similarly, the *amicus curiae* brief of DPLF and other entities stressed the connection between food and the proper titling of the land. It indicated that although the violation of the right to have access to culturally appropriate food was closely linked to the violation of the territorial aspect and could arise from the same act that triggered State responsibility (such as the failure to issue a property title in favor of the community), it was important to maintain a conceptual distinction between the two aspects in order to “perceive, holistically, the severity” of the violation of the rights.

diet,” and that cattle-raising has “prejudiced” the “way the indigenous communities have of moving around the territory and taking advantage of communal resources.” She also noted that, according to different experts, “cattle-raising has had an impact on the Pilcomayo River” owing to the “erosion” around the “headwaters” and along its “path due to overgrazing,” which has “had an impact on the survival of the aboriginal cultures that live beside and depend on the river.” The expert witness indicated that reports have indicated that “logging” increases the harmful effects, because it contributes to the “disappearance of the vegetation and, consequently, the animals in the area.” She indicated that fieldwork conducted in September 2017 revealed that “illegal logging has had negative consequences for the environment and for the indigenous communities.”<sup>290</sup> The evidence submitted shows that there has been an impact on the resources protected by the rights cited.

281. Expert witness Buliubasich stressed that the “degradation of the environment as a result of the livestock and logging activities” has affected the indigenous way of life and that “cattle-raising and the traditional indigenous activities are incompatible.” She noted that “environmental erosion has been progressive so that [*criollos* and indigenous people] require an ever-increasing area of land, leading to mounting competitive exclusion.”

282. Expert witness Naharro also explained that “[g]iven the scarcity of water, the [indigenous communities] are sometimes prevented from having access to the water storage facilities, because the *criollo* families erect fences around them, preventing the indigenous people from using them.” She added that the “food situation of the hunter-gatherer peoples of the area of the Pilcomayo [River] should be understood in relation to the changes that have had an impact on the provision of food.” In this regard, “[a]s a result of environmental degradation, the resources available in the forest are increasingly insufficient, meaning that the indigenous peoples have had to incorporate new industrialized foods into their diet. And, as these have to be obtained with cash earnings that are extremely scarce, [...] they are insufficient to complete their food needs.” She also indicated that “most of the communities do not have potable water and even though they may have a well and a pump, the water obtained [...] is untreated. Human waste is disposed of in the open as many communities have no waste treatment facilities.” She added that “the water for human consumption has to be shared with [...] *criollos*,” and that the water to which the communities have access is “insufficient.”

283. In this regard, the Court notes that both the State and the representatives agree that there have been changes in the way of life of the indigenous communities, and the representatives have referred to “alterations” in their “customs,” “individual and social habits,” “economic practices” and “conceptions” (*supra* paras. 189 and 193).

284. First, it should be made clear that, given the evolutive and dynamic nature of culture, the inherent cultural patterns of the indigenous peoples may change over time and based on their contact with other human groups. Evidently, this does not take away the indigenous nature of the respective peoples. In addition, this dynamic characteristic cannot, in itself, lead to denying the occurrence, when applicable, of real harm to cultural identity. In the circumstances of this case, the changes in the way of life of the communities, noted by both the State and the representatives, have been related to the interference in their territory by non-indigenous settlers and activities alien to their traditional customs. This interference, which was never agreed to by the communities,

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<sup>290</sup> She emphasized that this “illegality” included “other persons hiring the indigenous people, as ill-paid workers, to extract wood from their own lands,” and that the “communities were prevented from implementing a forestry management plan and could not apply for technical support to plan their own land management.”

but occurred in a context of a violation of the free enjoyment of their ancestral territory, affected natural or environmental resources on this territory that had an impact on the indigenous communities traditional means of feeding themselves and on their access to water. In this context, the alterations to the indigenous way of life cannot be considered, as the State claims, as introduced by the communities themselves, as if they had been the result of a deliberate and voluntary decision. Consequently, there has been harm to cultural identity related to natural and food resources.

285. Expert witness Buliubasich called attention to the seriousness of the situation, indicating that, while it is not resolved, *criollos* and indigenous peoples require increasing amounts of land. She stated that:

The main victim [of the above] is the aboriginal who, deprived of forest food resources cannot survive. Furthermore, he is unable to migrate because he has already reached a point where he can go no further, and he is not prepared to migrate to urban centers. [...] His destiny is simply hunger, with its stages of malnutrition, diseases and death. In a degraded environment, there will be no animals or food plants, or fruit to exploit and sell [...]. In that scenario, a culturally significant territory, a world vision and linguistic diversity are destroyed.

According to the expert witness the "second victim" was the "*criollo*" who is impoverished and whose foreseeable future is migration to urban centers; as the "third victim," she identified the "environment [...] with the forest becoming a desert, with the loss of valuable resources and biodiversity."

286. Having established the foregoing, the Court must now analyze whether the State bears any responsibility for this harm.

287. Based on the facts, it is evident that the State has been aware of all the said activities. It is also clear that the State has taken different actions (*supra* paras. 267 to 269); but they have not been effective to detain the harmful activities. The facts reveal that, more than 28 years after the original indigenous territorial claim, the livestock and fences are still present. Regarding the illegal logging, its clandestine nature means that it is impossible to be certain to what extent it continues. However, the State has not denied that these acts have taken place, and they have been reported by the representatives at least up until 2017.

288. In this case, the ineffectiveness of the State's actions has occurred in a context in which the State has failed to guarantee the indigenous communities the possibility of deciding, freely or by adequate consultation, the activities on their territory.

289. Consequently, the Court finds that Argentina has violated to the detriment of the indigenous communities victims in this case their interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water contained in Article 26 of the American Convention, in relation to the obligation to ensure the rights established in Article 1(1) of this instrument.

### VII.3

#### **RIGHTS TO JUDICIAL GUARANTEES AND PROTECTION IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE THESE RIGHTS WITH REGARD TO THE JUDICIAL ACTIONS FILED BY LHAKA HONHAT<sup>291</sup>**

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<sup>291</sup> Articles 8, 25 and 1(1) of the Convention.

290. The Court will now examine the arguments of the parties regarding different actions filed in relation to some of the circumstances revealed in this case. First, it will summarize the arguments of the parties and then proceed to outline its considerations.

#### **A) Arguments of the parties**

291. The **representatives** alleged the violation of judicial guarantees and judicial protection, established in Articles 8 and 25 of the Convention, in light of the inadequacy and lack of effectiveness of the remedies available to safeguard the rights of the indigenous communities when these were threatened or had been violated. They described various situations in which, they argued, there had been "complete [...] ineffectiveness," alluding to the "judicial proceedings" in relation to: (a) the construction of the international bridge by the province of Salta in 1995;<sup>292</sup> (b) the partial adjudications of lands in December 1999,<sup>293</sup> and (c) the attempts to stop the referendum in 1995.<sup>294</sup> They indicated that "[a]t a time of extreme vulnerability, the courts of justice played a major role in the violation of rights, and increased that vulnerability."

292. The **State** argued that, as acknowledged by the "petitioners" themselves, they had access to legally established judicial remedies and, in one case, had obtained a judgment in their favor. It also asserted that the referendum had produced no effects and argued that it was not possible to invoke the violation of the articles cited because, over the years, the indigenous communities had been able to have recourse to provincial, national and international justice.

#### **B) Considerations of the Court**

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<sup>292</sup> They explained that, on September 11, 1995, Lhaka Honhat had filed an application for amparo and a request for an injunction requiring the suspension of the bridge construction. They added that on November 8, 1995, and April 29, 1996, respectively, the Salta Court of Justice had rejected both the requested injunction and the amparo, understanding that the matter would require greater "discussion and more evidence" than was permitted by the fast-track procedure of amparo. Then, on December 10, 1997, the Supreme Court of Justice of the Nation rejected the appeal that had been filed, understanding that it was inadmissible because it was not an appeal against a final judgment. The representatives explained that "[a]lthough the final judgment was delivered in 1997, by then the province had already completed the bridge construction without taking any measures in favor of the indigenous communities."

<sup>293</sup> In November 1999, Salta issued Resolution 423/99, which established procedures for the adjudication of lands (*supra* para. 65). The representatives indicated that, following a ruling of the Supreme Court of Justice of the Nation of June 15, 2004, on May 8, 2007, the Salta Court of Justice declared the nullification of Resolution 423/99 (and of Decree 461/99). They argued that, despite the result, the judicial remedy was neither "prompt nor appropriate" because "almost eight years passed before the administrative acts were annulled."

<sup>294</sup> The representatives stated that Law 7,352, which called for the referendum gave rise to three judicial actions: one by Lhaka Honhat before the Supreme Court of Justice of the Nation; another, by a local human rights group before the Salta Court of Justice, and the third, by the "government of Salta" through a "cacique who had no part in the conflict [...] and who was politically aligned with the Governor at the time," against Lhaka Honhat, before the Salta courts, requiring Lhaka Honhat to withdraw its actions. According to the relevant information provided by the representatives, this is what happened. First, an action requesting "a declaratory judgment" was rejected by the Supreme Court of Justice of the Nation on September 27, 2005, because it understood that the Constitution was not concerned and that the national State was not involved, and therefore declared itself incompetent. The second action was rejected on September 29, 2005: the Salta Court of Justice asserted that Law 7,352 was not manifestly arbitrary and it could not "preclude the presumption of its legality." The third action was received favorably on September 7, 2005, by a trial judge, understanding that the judicial and extrajudicial submissions by Lhaka Honhat were "arbitrary." This decision was appealed and the Salta Court of Justice rejected the appeal on February 14, 2006, four months after the referendum had been held, indicating that "the matter had become theoretical."

293. First, the Court will make some general consideration with regard to Articles 8(1) and 25(1) of the Convention and, then, it will examine the specific case and, lastly, set out its conclusions.

### **B.1. General considerations**

294. Regarding the judicial guarantees contained in Article 8(1) of the Convention, this Court has understood that due process of law "includes the conditions that must be met to ensure the adequate defense of those whose rights or obligations are being considered by the court."<sup>295</sup> Meanwhile, Article 25 of the Convention establishes "the obligation of the States Parties to ensure, to all persons subject to their jurisdiction, a simple, prompt and effective remedy before a competent judge or court."<sup>296</sup> Articles 8, 25 and 1 are interrelated insofar as "effective judicial remedies [...] must be substantiated pursuant to the rules of due process of law, [...] under the general obligation of the [...] States to ensure the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1)."<sup>297</sup> The effectiveness of the remedies should be assessed in each specific case taking into account whether "domestic remedies exist that guarantee real access to justice to claim reparation for a violation."<sup>298</sup>

295. The Court has stipulated that the State is obliged to provide effective remedies that allow individuals to dispute those acts of the authorities that they consider have violated their rights, "regardless of whether the judicial authority declares the claim of the individual who files the remedy inadmissible because it is not included in the norm he invokes or does not find a violation of the right that is alleged to have been violated."<sup>299</sup> The Court notes that Articles 8 and 25 of the Convention also recognize the right to obtain a response to the claims and requests filed before the judicial authorities because the efficacy of the remedy entails a positive obligation to provide a response within a reasonable time.<sup>300</sup>

296. On this basis, the Court will examine the different judicial remedies indicated by the representatives.

### **B.2 Examination of the circumstances of the case**

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<sup>295</sup> Cf. *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001, Series C No. 71, paras. 69 and 108, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 199.

<sup>296</sup> Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of López et al. v. Argentina*, para. 209.

<sup>297</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 393, para. 64.

<sup>298</sup> *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, para. 120, and *Case of García Lucero et al. v. Chile. Preliminary objection, merits and Reparations*. Judgment of August 28, 2013. Series C No. 267, para. 182.

<sup>299</sup> *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 101.

<sup>300</sup> Cf. *Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 57. Similarly, indicating that the State responsibility in relation to the right to judicial protection involves the issue of a decision, *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, para. 103.

B.2.1 Application for amparo regarding the construction of the international bridge

297. *Facts.* The construction of the international bridge began in 1995 (*supra* para. 63). On September 11, 1995, a legal representative of Lhaka Honhat filed an application for amparo with the Salta Court of Justice (CJS) requesting it to order the immediate suspension of the work.<sup>301</sup> The request for an injunction and the application for amparo were rejected on November 8, 1995, and April 29, 1996, respectively. The CJS understood that the contested act lacked “manifest arbitrariness or illegitimacy” and required “greater discussion and evidence” than allowed by the remedy filed. On May 14, 1996, Lhaka Honhat filed a federal special remedy that was rejected. On February 27, 1997, the Association’s representatives filed a remedy of complaint against the rejection of the federal special remedy. This appeal was dismissed by the National Supreme Court of Justice (CSJN) in a ruling of December 10, 1997, notified on February 5, 1998, because it had not been filed against a final judgment.<sup>302</sup> By then the bridge had been built.

298. *Considerations.* As has already been pointed out, the rights recognized in Articles 25 and 8 of the Convention should be examined in relation to whether, in the specific case, there was a real possibility of access to justice and whether the guarantees of due process have been respected. The Court observes that the application for amparo did not have the result that Lhaka Honhat expected, but this, alone, does not prove that the State has not provide adequate and effective judicial remedies.

299. In this regard, the CJS understood that the application was not admissible and that the claim filed required another type of remedy. Subsequently, the CSJN understood that, since it was not challenging a final judgment, the appeal filed before it was inadmissible. The decision of the CJS indicated that the procedural remedy filed by Lhaka Honhat was not appropriate. The Inter-American Court has not received arguments indicating the ineffectiveness or inexistence of other remedies. Consequently, the Court cannot understand that the rejection of the application for amparo signified the denial of the right to judicial protection. In addition, the decision of the CSJN was based on procedural aspects regarding the admissibility of the special remedy inherent in the Argentine system of justice, and the Inter-American Court has no evidence to consider that this was contrary to the Convention. In conclusion, the Court has not received the arguments required to determine that there has been a violation of judicial protection or judicial guarantees.

B.2.2 Actions relating to Decree 461/99 and Resolution 423/99

300. *Facts.* As already indicated, in 1999, Salta issued Decree 461/99 and Resolution 423/99, with regard to the adjudication of parcels of land (*supra* para. 65). On March 8, 2000, Lhaka Honhat filed an application for amparo against these government acts.<sup>303</sup> The application was rejected by the provincial court. Following the filing of a federal

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<sup>301</sup> Application for amparo of September 11, 1995 (evidence file, annex I.3 to the pleadings and motions brief, fs. 31,823 to 31,844).

<sup>302</sup> Initial petition of August 4, 1998 (evidence file, annex 2 to the Merits Report, fs. 7 to 33).

<sup>303</sup> Lhaka Honhat had previously filed an administrative remedy against this resolution that was rejected (*Cf.* Resolution 500/99 of the General Secretariat of Governance; evidence file, annex 14 to the Merits Report, fs. 279 to 291).



special appeal,<sup>304</sup> the CSJN revoked the rejection on June 15, 2004, ruling that the provincial court should adopt a new decision.<sup>305</sup> On May 8, 2007, the CJS revoked the resolution and the decree.<sup>306</sup>

301. *Considerations.* In its case law, this Court has indicated that “the obligation to provide adequate and effective judicial remedies signifies that the proceedings must be held within a reasonable time.”<sup>307</sup> The Court has considered that, based on “a significant delay in the proceedings [...] without a justified explanation,” it is not “necessary to analyze the [different] criteria [for evaluating the time taken].”<sup>308</sup>

302. In this case, the Court notes that, in all, the judicial proceedings lasted nearly seven years. In particular, around three years elapsed after the CSJN had ordered the provincial court to issue a new ruling. The Inter-American Court does not observe any justification for this three-year delay and the State has presented no explanation in this regard.<sup>309</sup> Consequently, the Court observes that there is sufficient reason to understand that the length of time mentioned has been excessive and unjustified and, therefore, cannot be considered reasonable in the terms of Article 8(1) of the Convention.

### *B.2.3. Judicial action against the 2005 referendum*<sup>310</sup>

303. *Facts.* On August 11, 2005, Lhaka Honhat filed an action for a declaratory judgment with the CSJN against the referendum law, asking the CSJN to declare it unconstitutional. In a judgment of September 27, 2005,<sup>311</sup> the CSJN rejected the appeal considering that it did not have competence to rule on acts of the provincial legal system.

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<sup>304</sup> On March 14, 2001, the Salta Court of Justice rejected the admissibility of the special appeal; consequently, Lhaka Honhat filed a complaint directly before the CSJN, which admitted the appeal.

<sup>305</sup> CSJN, Lhaka Honhat Association of Aboriginal Communities v/Executive Branch of the province of Salta, Appeal, A.182.XXXVII (evidence file, annex 18 to the Merits Report, fs. 329 to 335).

<sup>306</sup> CJS, Judgment of May 8, 2007 (evidence file, annex F.6. to the pleadings and motions brief, fs. 30,874 to 30,881).

<sup>307</sup> *Case of Ramírez Escobar et al. v. Guatemala*, para. 257, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs.* Judgment of February 4, 2019. Series C No. 373, para. 118.

<sup>308</sup> *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 107. The Court has consistently taken four factors into account to determine whether the time is reasonable: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the effects on the legal situation of the person involved in the proceedings (*Cf. Case of Ramírez Escobar et al. v. Guatemala*, para. 257, and *Case of Colindres Schonenberg v. El Salvador*, para. 118).

<sup>309</sup> It is for the State to explain the reason why it has required this amount of time; in the absence of such an explanation the Court has broad authority to draw its own conclusions in this regard (*Cf. Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2015. Series C No. 293, para. 255, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 422). In light of the failure to explain the three-year delay by the provincial court, it is not necessary to make a specific evaluation of the time taken by the CSJN to adopt its decision.

<sup>310</sup> The representatives mentioned that additional judicial actions related to the referendum were filed by persons other than Lhaka Honhat, (*supra* footnote 294). The Court will only analyze the judicial action filed by the organization that represents the indigenous communities, because the others are not related to the rights to judicial guarantees and protection of these communities.

<sup>311</sup> CSJN, Lhaka Honhat Association of Aboriginal Communities v/province of Salta and another (national State) ref/ declaratory judgment. Case No. A 1596/05 (evidence file, annex D.22 to the pleadings and motions brief, fs. 30,481 to 30,502).

304. *Considerations.* As mentioned previously (*supra* paras. 295 and 298), the fact that the response of a domestic court is not favorable to the petitioners' claims does not necessarily violate Articles 8 and 25 of the Convention. In this case, the rejection of the appeal for a declaratory judgment was based on procedural reasons: lack of competence. The circumstances in which the CSJN has competence relate to domestic procedural matters, and it is not for the Inter-American Court to determine them. However, having established this, it should be clarified that the fact that the CSJN declared itself incompetent does not, in itself, reveal that there were no other appropriate judicial remedies. Consequently, the Inter-American Court cannot find the State responsible.

### **B.3. Conclusion**

305. Based on the foregoing in relation to the actions against Decree 461/99 and Resolution 423/99, the Court determines that the State violated the guarantee of a reasonable time. Consequently, it violated Article 8(1) of the Convention, in relation to its Article 1(1), to the detriment of the indigenous communities that inhabit Lots 14 and 55.<sup>312</sup>

## **VIII REPARATIONS**

306. On the basis of the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to repair this adequately, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.<sup>313</sup>

307. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of the violations. Based on the case, the Court has considered the need to grant diverse measures of reparation. Thus, pecuniary measures, and measures of restitution, rehabilitation and satisfaction as well as guarantees of non-repetition may have special relevance for the harm caused. The reparations must have a causal nexus to the facts of the case, the violations declared, and the damage proved, and also be related to the measures requested.<sup>314</sup>

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<sup>312</sup> The actions were filed by Lhaka Honhat. According to the Association's statute, it is constituted of members who are over the age of 18 and who belong to the communities that inhabit Lots 14 and 55. The Court understands that it can reasonably be assumed that all the said communities (*supra* para. 35 and Annex V) have a relevant interest in the proceedings filed by Lhaka Honhat. Consequently, it considers that the violation declared prejudiced all these communities. (Similarly, *Case of Coc Max et al. (Xamán Massacre) v. Guatemala*, para. 92, footnote 144.)

<sup>313</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, paras. 25 to 27, and *Case of Jenkins v. Argentina*, para. 122.

<sup>314</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 and 26; *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110; *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Jenkins v. Argentina*, paras. 123 and 124.

308. Taking into consideration the violations declared in the preceding chapter, the Court will now analyze the claims submitted by the Commission and the victims' representatives, as well as the arguments of the State.

**A) Injured party**

309. Pursuant to Article 63(1) of the Convention, the injured party is considered to be anyone who has been declared a victim of the violation of any right recognized therein.<sup>315</sup> Therefore, based on the foregoing, this Court considers as "injured party" the 132 indigenous communities identified in Annex V of this judgment, settled on the territory identified previously as Fiscal Lots 14 and 55 and currently identified with the cadastral registration numbers 175 and 5557 of the department of Rivadavia, in the Argentine province of Salta, in the understanding that this includes the communities that, increasing or decreasing the total number, may derive from the said 132 through the process of "fission-fusion" referred to in this judgment (*supra* paras. 33, 35, 50 and 156 and footnotes 22 and 23).

**B) Measures of restitution**

310. The **Commission** indicated, when submitting the case to the Court, that a pertinent measure of reparation would be "to finalize process conducted" on Fiscal Lots 14 and 55. It then specified that it understood that it would be appropriate for the Court to order the *delimitation, demarcation and titling, free of all encumbrances*, of all the indigenous territory. It also asked the Court to require the State to make the necessary human and financial resources available to *relocate the criollo families*. It understood that if the Court established a specific timetable, this would facilitate compliance with the judgment.

311. The **representatives** asked the Court to require the State: (a) within no more than six months: (i) to carry out the *delimitation, demarcation and titling* of the 400,000 ha claimed in Lots 14 and 55 in a single collective title in the name of all the indigenous communities that inhabit those lots; (ii) to ensure the elimination of all the *fencing* and to take the necessary steps to prevent the erection of new enclosures, including the elaboration and implementation, in consultation with the communities, of a protocol for the actions to be taken by the State in this regard; (iii) to guarantee, the provision to the indigenous communities of *an adequate, sufficient, accessible and permanent supply of water* apt for human consumption, and (iv) to halt the *illegal logging* on indigenous territory and, to this end, (a) "create a State agency, with the permanent presence of environmental police, and a model for the control of deforestation in the region," and (b) within no more than two years, complete *the relocation of all the criollo population*, as well as all their livestock.<sup>316</sup> The representatives understood that legal measures

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<sup>315</sup> Cf. *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of Jenkins v. Argentina*, para. 126.

<sup>316</sup> The representatives considered that "regarding the on-site work methodology, it was essential: in cases in which no agreement was reached with the *criollos*, to take the necessary administrative and legal measures urgently, in keeping with the standards of the inter-American human rights system, to reconstitute, within the shortest time possible, the property and ownership to the indigenous communities; to increase teams with sufficient and stable personnel to allow the technical fieldwork (delimitation and demarcation) to be concluded urgently; to design work strategies, in consultation with and with the participation of the indigenous communities, that allow all the efforts to be increased [...] outside the summer months; in the cases in which agreements have been reached with *criollo* families that require relocation, to facilitate this by formalizing the agreements by having them notarized by the Government Notary, and by conducting the tasks of delimitation and demarcation with the intervention of surveyors to indicate the precise locations on a map to be registered with the General Property Directorate of the province of Salta."

would have to be taken to “restore” the “possession and ownership” of the indigenous peoples if agreement could not be reached with the *criollo* settlers.

312. It also considered that it was necessary to “prohibit” the State from undertaking “any project in the [indigenous] territory” without, first, “fully complying with the standards of the inter-American system.

313. The representatives also asked the Court to “require the State to provide reports every two months on the progress made in the measures of restitution, including by presenting them on an indicator matrix.

314. Furthermore, they requested the *creation of a community development fund* for the indigenous communities that inhabit former Fiscal Lots 14 and 55. They argued that this was pertinent in light of the deterioration of the natural resources owing to the presence of fences and livestock on the territory as well as the illegal logging, which, they alleged, had caused significant environmental damage and harmed the communities’ food sources and cultural identity. They considered that the fund “would provide a great opportunity for implementing programs in the area of education, health care, food security, crop-growing techniques, the history of community traditions, land management workshops, and publications on the land claim process, among many other possible uses.” The representatives expressed their “commitment” to present “specific information” on the possible allocation of the funds “within two months of delivery of the judgment.” They asked the Court to determine the amount of the fund and that a committee be created to administer it, with representatives of the State, academe and Lhaka Honhat.

315. The **State** argued that “the time frame of [six] months” for the *delimitation, demarcation and titling* was very short, because it was the agreements between the *criollo* families and the communities that required most time, and this did not depend merely on the willingness of the State. It considered that up to a year would be required to demarcate the territory, up to 18 months to conduct the surveys,<sup>317</sup> and up to two years to “hand over the final title.” Despite this, Argentina also indicated that a prerequisite for the “demarcation, delimitation and titling” was the *relocation of the criollo families and their livestock*, and this would require approximately eight years, given the different actions and infrastructure work that had to be carried out.<sup>318</sup> Argentina understood that the request to establish six-month and two-year time frames, respectively for the delimitation, demarcation and titling of the territory and for the relocation of the *criollo* families were “incongruous.” In this regard, it stressed the importance of “insisting upon the process of agreements between the parties (indigenous population and *criollos*).” It asked that the Court “take into account the time frames proposed in the comprehensive plan” submitted to the Commission (*supra* para. 85), which are the same as those indicated at this stage.

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<sup>317</sup> Cf. “Comprehensive Work Plan.”

<sup>318</sup> Among these, Argentina indicated: (a) “completion of the process of relocating the *criollo* families”; (b) “laying the foundations for developing action protocols for consultation and for environmental assessments in the case of infrastructure work or concessions that might be carried out on community lands in the future”; (c) respecting the time required for the *criollo* families to adopt new production models and technology. Also, that “the transfer of the animals had to be the last component of the production module, because [...] it was essential to guarantee water, enclosures and pastures.” It indicated that the time frame indicated was necessary owing to the time “that [the *criollo* families] would need to adapt their production systems in keeping with the relocation and the new surface areas.” Cf. “Comprehensive Work Plan”.

316. In addition, the State indicated that the *fences* of the *criollo* families would be removed “as the families are effectively relocated.”<sup>319</sup> Argentina also indicated that the construction of wells and the installation of *water* tanks had been confirmed. Regarding *illegal logging*, it argued that it now had the relevant agencies to prevent this.

317. In relation to future *projects in the territory*, Argentina recalled that the communities still have to give their opinion on a consultation protocol that the State had sent them.

318. With regard to the request for a community development fund, the State argued that it had been shown that the province of Salta and the national State had consistently allocated economic and human resources to improve the access to education, health care, security and infrastructure of the communities that inhabit the region. It indicated that the representatives had not determined the purpose of this fund.

319. The Court has declared that Argentina violated the right to property of the indigenous communities that inhabit Lots 14 and 55. The State has failed to take the appropriate measures to guarantee the right to property and, also, has carried out activities on the territory without the corresponding prior consultation process. Consequently, it is pertinent for the Court to order measures to restore the right to property, and other rights that have been infringed.

320. The Court finds it necessary to note that, when establishing the appropriate measures of reparation, it has taken into consideration the particular characteristics of the case. This is due to the vast territory that it covers, as well as the large number of persons, both indigenous and *criollo*, that inhabit this area. In this context, the Court takes into account the complexity of the case as regards the actions that the State must undertake to redress the violations related to property, as well as their impact on the different human groups that inhabit the region.

321. The Court: (a) will indicate, first, the time frame for compliance with the measures of restitution; (b) then, it will refer to these measures in relation to the right to property and to the rights to a healthy environment, food, water and cultural identity, and (c) lastly, it will include some considerations on the State obligation to report on compliance with the measures of restitution, and on actions to monitor them.

### ***B.1 Time frame for complying with the measures of restitution ordered***

322. The arguments of the parties reveal that a dispute exists with regard to the time needed to carry out the corresponding actions. Consequently, the Court finds it relevant to rule in this regard. While the representatives ask that the different actions be carried out within two years or less, depending on the action involved, the State affirms that it would require eight years to complete the whole process (*supra* paras. 311 and 315).

323. The Court understands that the case is extremely complex (*supra* paras. 90, 139, 147 and 320, and footnote 130) and appreciates the steps taken by the State to date, which have involved economic disbursements and the actions of different government departments. Argentina had indicated the total time of eight years in its document of November 24, 2017 (*supra* footnote 87).

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<sup>319</sup> The State explained that “eliminating the enclosures where the livestock are would lead to increased invasion of the territory dedicated to the traditional uses of the communities by these animals.”

324. The Court also understands that it must establish a time frame that takes into account the State's obligation to restore the enjoyment of their rights to the victims, but this must also be materially feasible.

325. Based on the above, the Court orders that the State carry out each of the measures of restitution established below within a maximum period of six years from notification of this judgment and, immediately following this notification, the State must begin to take the corresponding actions to implement them as rapidly as possible, notwithstanding the maximum time indicated and the specific time frames and other clarifications described below.

## ***B.2 Measures for the restitution of the right to property***

### ***B.2.1 Delimitation, demarcation and titling***

326. The Court has understood that, although Decree 1498/14 is an act that acknowledges the right to property, it required subsequent actions for the "determination" and "delimitation" of the property that have not yet been undertaken.

327. Therefore, the Court orders that the State adopt and conclude the necessary actions, whether these be legislative, administrative, judicial, registration, notarial or of any other type, in order to *delimit, demarcate and grant a collective title* that recognizes the ownership of their territory to all the indigenous communities identified as victims (*supra* para. 309); in other words, over a surface area of 400,000 hectares on the land identified as lots with the cadastral registration numbers 175 and 5557 of the department of Rivadavia, in the Argentine province of Salta, previously identified as Fiscal Lots 14 and 55 (*supra* paras. 1, 47, 80, 145 and footnotes 30 and 79). The following guidelines shall be following in order to comply with this measure:

1. A single title must be granted; that is, one for all the indigenous communities victims and for all the territory without subdivisions or fragmentation. Despite this, the Court finds it pertinent to clarify that the "single" nature of this title does not prevent any agreements that the communities victims may reach among themselves with regard to the use of their common territory.<sup>320</sup>
2. This title must guarantee the collective or communal nature of the ownership of the said surface area, the administration of which must be autonomous, and this title cannot be taken away by proscription, seized or transferred, or subject to liens or attachments.
3. For compliance with this measure, the map submitted by Lhaka Honhat, mentioned in the considerations of Decree 1498/14 (*supra* para. 81) should be used as a reference.

### ***B.2.2 Obligation of prior consultation***

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<sup>320</sup> This clarification is relevant because although the Court has indicated that the unity of the territory is connected to the cultural identity and way of life of the communities victims in this case (*Cf.* expert opinions of Ms. Naharro and Ms. Yáñez Fuenzalida), it has received some statements by members of indigenous communities insisting that separate titles should be given to each community (for example, the statements of Víctor González, Francisco Gomez and Humberto Chenes (merits file, fs. 938 to 941, 954 to 958 and 963 to 966). The Court understands that this does not alter the State obligation to recognize the ownership collectively as determined and ordered in this judgment. However, this does not prevent possible agreements by the communities regarding the use of their territory, a matter that, if applicable, they must decide, and not the State authorities or this Court. In this regard, the oral statement of Cacique Rogelio Segundo during the public hearing should be recalled. When asking the State to "delimit the 400,000 [ha], demarcate them and [grant] title," he affirmed that, when this has been done, "the work of the State ends" and that "on the territory, [... the communities] would resolve matters, according to unwritten laws [that] endured in [...] the communities."

328. The State must *abstain from carrying out actions, infrastructure works or undertakings on indigenous territory* that could affect its existence, value, use or enjoyment by the communities victims, or ordering, requiring, authorizing, tolerating or allowing third parties to do this.<sup>321</sup> If any of the said actions are carried out, they must be preceded, as appropriate, by providing information to the indigenous communities victims, and conducting prior, adequate, free and informed consultations, in keeping with the standards indicated by the Court in this judgment (*supra* paras. 174 and 175). The State must respect these parameters immediately on notification of this judgment, and the Court will monitor this until it has determined that the measure ordered above consisting in delimiting, demarcating and granting a collective title that recognizes the ownership of the territory (*supra* para. 327) has been complied with.

### B.2.3 Relocation of the criollo population

329. To ensure the full exercise of the right to property of the indigenous communities victims over their territory, and as revealed by the agreements reached between these communities, the State and the Organization of *Criollo* Families in 2007, ratified by Decree 2786/07 and considered as precedents by Decree 1498/14, actions must be taken to relocate the *criollo* population outside the indigenous territories defined as ordered above (*supra* para. 327). To achieve this, the Court requires the State to *implement the relocation of the criollo population*, based on the following guidelines:

- a) The State must facilitate procedures aimed at the voluntary relocation of the *criollo* population, endeavoring to avoid compulsory evictions.<sup>322</sup>
- b) To guarantee this, during the first three years following notification of this judgment, the State, judicial, administrative and any other authorities, whether provincial or national, may not execute compulsory or enforced evictions of *criollo* settlers.<sup>323</sup>
- c) Notwithstanding the process of agreements established following Decree 2786/07 of 2007 and described in this judgment, the State must make mediation or arbitral procedures available to interested parties to determine relocation conditions; if such procedures are not used, recourse may be had to the corresponding legal proceedings.<sup>324</sup> During these procedures, those concerned may argue their claims and

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<sup>321</sup> Cf. Similarly, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153.2, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 282.

<sup>322</sup> It should be noted that this is consistent with one of the aspects indicated by the *criollo* families in the "proposal" that they submitted to the Court, in which they stated that "time should be established for undertaking discussions in the areas where agreements have not been reached." In addition, the document recalls that "[i]n the State's proposal [...] it was established that this would be done within one year" and "it is considered that this is sufficient time to conclude the remaining agreements and surveys by means of the dialogue method used in the land process" (*Criollo* proposal, merits file, fs. 1823 to 1841).

<sup>323</sup> In this judgment, the Court has indicated that the *criollo* population is a vulnerable population and that the State has duties towards it. The Court clarifies that compliance with this judgment, in particular with regard to the relocation of the *criollo* population must be implemented in a way that respects their rights. In the context of these guidelines, the Court understands that it is pertinent for the State to take into account the following indications of the CESCR: "[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available" (*General Comment No. 7. The right to adequate housing (Art. 11.1): forced evictions*. Sixteenth session (1997). Doc. E/1998/22, annex IV, para. 16).

<sup>324</sup> The Court takes into account that a similar mechanism was established in the memorandum of understanding adopted by Decree 2786/07 (*supra* paras. 75 and 144).

the rights they consider they possess, but they may not challenge the right to indigenous communal property determined in this judgment and, consequently, the admissibility of their relocation outside indigenous territory. The authorities that have to decide these procedures may not take decisions that prevent compliance with this judgment.

d) In any case, the competent administrative, judicial or other authorities must ensure that the relocation of the *criollo* population is implemented, safeguarding their rights. Accordingly, provision should be made for resettlement and access to productive land with adequate property infrastructure (including implanting pasture and access to sufficient water for production and consumption, as well as the installation of the necessary fencing) and, if necessary, technical assistance and training for productive activities.

330. The State must *remove from indigenous territory the fences and livestock* that belong to the *criollo* settlers.

### ***B.3 Measures for restitution of the rights to a healthy environment, food, water and cultural identity***

331. In this judgment, the Court has indicated that the presence of livestock on the territory of the indigenous communities victims, and activities implemented by the *criollo* population have affected the water that exists on this land and the indigenous communities' access to drinking water. It has also referred to the environmental degradation produced by illegal logging. Thus, it has determined that the rights to a healthy environment, adequate food, water and cultural identity have been violated.

#### ***B.3.1. Actions relating to water, food and forestry resources***

332. Notwithstanding any actions that the State may take to respond to urgent situations, the Court orders the State, within six months of notification of this judgment, to submit a report to the Court identifying, from among all the individuals who are members of the indigenous communities victims, critical situations of lack of access to drinking water or to food that could endanger their health or their life, and to draw up an action plan establishing the actions that the State will take, which must be appropriate to respond adequately to such critical situations, indicating the implementation timetable. The State must begin to implement the actions set out in the action plan as soon as this has been submitted to the Court. The Court will transmit the said report to the Commission and the representatives so that they may forward any comments they deem pertinent. Based on the opinions of the parties and the Commission, the Court will evaluate whether this report and action plan are adequate and meet the terms of this judgment, and may require that they be completed or expanded. The Court will monitor the implementation of the respective actions until it considers that it has sufficient information to consider that this measure of reparation has been completed.

333. In addition to the actions required in the preceding paragraph, in order to guarantee that the provision of basic goods and services is adequate, periodic, and permanent in nature, and to ensure reasonable conservation and improvement of the environmental resources, the State must draw up a report, within one year of notification of this judgment, setting out the actions that should be taken:



- a) to conserve the surface and groundwater in the indigenous territory within Lots 14 and 55 that is used by the indigenous communities victims, as well as to avoid its contamination or to rectify any contamination that exists;
- b) to guarantee permanent access to drinking water for all the members of the indigenous communities victims in this case;
- c) to avoid a continuation of the loss of, or decrease in, forestry resources in the said territory, as well as to endeavor to ensure its gradual recovery, and
- d) to provide permanent access to nutritional and culturally appropriate food to all the members of the indigenous communities victims in this case.<sup>325</sup>

334. Regarding the preparation of the report mentioned in the preceding paragraph, the experts responsible for this must have the specific technical expertise required for each task. Also, these experts must always seek the opinion of the indigenous communities victims, to be provided in keeping with their own forms of decision-making.

335. When the State has sent the report to the Court, it will be forwarded to the Commission and the representatives so that they may submit any observations they deem pertinent. The Court, taking into account the views of the Commission and the parties, and pursuant to the terms of this judgment, may establish that the State must require the experts to complete or expand the report. When, having evaluated the report in accordance with the foregoing, the Court determines, the State must implement the actions indicated in the report. The Court will monitor the implementation of the respective actions until it considers that it has sufficient information to consider that the measure of reparation ordered has been completed.

336. Regarding illegal logging, the Court notes that the State has indicated that it is implementing "monitoring" and "follow-up" tasks, including as a result of "denunciations." Therefore, notwithstanding the measures ordered, the Court urges the State to continue its monitoring and follow-up actions, and to take any other steps that would be effective to this end. In particular, the Court calls on the State to install or maintain control posts as established by Decree 2786/07. The Court will not supervise these actions.

### B.3.2 Community Development Fund for the indigenous culture

337. The Court recalls that it has determined that the interrelated rights to cultural identity, a healthy environment, adequate food, and water have been harmed.

338. Consequently, the Court finds it appropriate, as it has in previous cases,<sup>326</sup> to order the State to set up a community development fund (hereinafter also the "Fund"), especially to redress the harm to cultural identity, and considering that it also serves to

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<sup>325</sup> It should not be understood that the measures ordered in section B.3.1 of Chapter VIII of this judgment ("Actions relating to water, food and forestry resources") necessarily signify that the State authorities must provide food and water directly and/or free of charge; the State may comply with the measure ordered in this way or another, while the measures it decides to take are appropriate to effectively guarantee the access to drinking water and food as required, in keeping with State public policies, government plans, and the pertinent provincial or national laws. In addition, it should be clarified that the Court will not monitor the implementation of "any actions that the State may take to respond to urgent situations," pursuant to paragraph 332 of this judgment, that differ from those arising from the action plan indicated in the same paragraph.

<sup>326</sup> Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 205, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 295.

compensate the pecuniary and non-pecuniary damage suffered. This Fund is additional to any other present or future benefit that corresponds to the communities based on the State's general development obligations.<sup>327</sup>

339. In this judgment, the Court has established a violation of the cultural identity of the indigenous communities victims related to natural and food resources. Consequently, the Court orders that the Community Development Fund be earmarked for actions addressed at the recovery of the indigenous culture, including among its uses, without prejudice to any others, the implementation of programs relating to food security, and the documentation, teaching and dissemination of the history of the traditions of the indigenous communities victims. The determination of the specific uses of the Fund, which should include those indicated, must be decided by the indigenous communities victims and communicated to the State authorities and to the Court within six months of notification of this judgement. The indigenous communities victims and their representatives must play an active role in the design and execution of the respective programs, based on pre-established objectives.

340. The State must take all the administrative, legislative, financial, human resource and any other measures necessary for the prompt constitution of this Fund so that the funds allocated to it may be invested in the corresponding programs and actions, within their respective time frames and, in any case, within four years at the most of notification of this judgment. The Fund will be administered by a Committee created to this end, to be composed of one person designated by the indigenous communities victims in this case, one person designated by the State, and a third person designated by mutual agreement between the first two. This Committee must be established within six months of notification of this judgment.

341. Possible non-compliance with the time limits established in the two preceding paragraphs to determine the uses to which the Fund will be put and with regard to the Committee, does not exempt the State from complying with the measure ordered. If appropriate, the State authorities are authorized to take the corresponding decisions and must take the necessary steps to ensure the effective use of the sum allocated to the Fund within the time frame indicated.

342. The State must allocate the sum of US\$2,000,000.00 (two million United States dollars) to this Fund, to be invested in accordance with the proposed objectives within four years of notification of this judgment. When determining the amount allocated to the Fund, the Court has taken into account the need for this to be reasonable to comply with the purpose of the measure and also the other measures ordered and the complexity and costs entailed.

***B.4. Additional considerations, State reports, work plan and actions to monitor the measures ordered***

343. All the measures ordered in the preceding paragraphs commit the State as a whole, in the terms of Article 28 of the Convention. The State cannot argue its federal system as an obstacle to compliance with any of the measures ordered in this judgment.

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<sup>327</sup> Cf. *Case of the Garifuna Community of Punta Piedra and its members v. Honduras*, paras. 332 to 336, and *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 295.

344. To facilitate monitoring compliance with the measures ordered to restore the right to property (*supra* paras. 327 to 330), and based on the time frames established to this end, the Court considers it useful that the State provide it with information periodically for six years from notification of this judgment. Therefore, it orders the State, following the said notification, to present a report detailing the actions taken and the progress made in compliance with each measure of restitution of the right to property every six months. The first bi-annual report provided by Argentina, in addition to including a description of any progress made, must contain a detailed work plan to be completed within six years of the date on which this judgment is notified to the State, for each of the actions or steps to be taken by the State to achieve full compliance with each measure to restore the right to property. In addition to the said actions or steps, this work plan should indicate the State organs, institutions or authorities responsible for implementing them, and the time frame for each action. The State is responsible for presenting the work plan to the Court but, before this, Argentina should allow the representatives, if they so wish, to submit considerations or proposals to the authorities responsible for drawing up the plan. The following bi-annual reports provided by the State must provide an updated and detailed description of the progress made in the execution of each measure to restore the right to property based on the work plan presented in the initial bi-annual report. The presentation of these State reports is independent of the submission of the reports and plan of action ordered in paragraphs 332 to 335 of this judgment, the reports established in paragraphs 348 and 349 on the publications and radio broadcasts ordered, and the one-year time limit established in the eighteenth operative paragraph for the presentation of information on compliance with all the measures of reparation ordered in this judgment.

345. In addition to the foregoing, the Court underscores the actions taken by the Inter-American Commission in the process implemented since the publication of the Merits Report, following which it has made three on-site visits and facilitated progress. The Court finds it desirable that the Inter-American Commission continue playing an active role in the process of ensuring compliance with the measures of restitution established in this judgment. Consequently, the Court encourages the Inter-American Commission to assume the role of facilitator between the parties, within the framework of its functions and possibilities, in order to contribute to compliance with the measures of restitution ordered herein. This is supplementary to the normal tasks of the Commission in the context of the monitoring of compliance with judgment carried out by the Court and, in no way, excludes this.

### **C) Measures of satisfaction**

346. The **representatives** considered that it was extremely important that the international responsibility of the State should be made public by different means. Therefore, they asked the Court to order the State to comply with the following measures within one year of notification of the judgment: translation into the languages of the indigenous communities and distribution of the official summary of the judgment; publication of the whole official summary of the judgment, in Spanish, in the following media: the Salta newspaper "*El Tribuno*" and in a national newspaper, as well as in the official gazette of the Argentine Republic and in that of the province of Salta; publication of the whole judgment, in Spanish, in State institutions, and the broadcast of the official summary of the judgment, in Spanish and in the languages of the indigenous communities, by a radio station.<sup>328</sup>

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<sup>328</sup> Regarding the measures indicated, the representatives asked: (a) in the case of the official summary: that its printed version be distributed among the communities members of Lhaka Honhat; (b) in the case of the publications in provincial and national newspapers: that the State advise them one week before this takes

347. The **State** considered that the measures of satisfaction requested by the representatives were unnecessary. It indicated that, on numerous occasions by decrees and resolutions, it had acknowledged that the indigenous communities victims in this case had the right to their ancestral territory.

348. The **Court** finds it pertinent to order, as it has in other cases,<sup>329</sup> that, within six months of notification of this judgment, the State: (a) publish this judgment, in its entirety, in a legible font size, so that it is available for at least one year on the INAI official website and on the website of the government of Salta, so that it is accessible to the public from the respective homepage; (b) publish, once, the official summary of the judgment prepared in Spanish by the Court in a legible and appropriate font, in: (i) the official gazette of the Argentine Republic; (ii) the official gazette of the province of Salta; (iii) a newspaper distributed in the province of Salta, and (iv) a newspaper with widespread national coverage; (c) disseminate the official summary of this judgment prepared by the Court, in indigenous languages and in Spanish, among the population that currently inhabits Lots 14 and 55, including each of the communities victims. To comply with this measures, the State shall be responsible for translating the official summary of this judgment, but must reach agreement with the representatives with regard to the indigenous languages into which the summary will be translated and enable them to verify that the translations are correct before they are disseminated. In addition, the State must give the representatives one week's notice of the realization of the publications ordered in points (a) and (b) above, and of the actions ordered in point (c).

349. Furthermore, the Court finds it pertinent, as it has in other cases,<sup>330</sup> that the State broadcast, via a radio station with widespread coverage that reaches every corner of Fiscal Lots 14 and 55 of the department of Rivadavia, in the province of Salta, the official summary of the judgment in Spanish and, with the prior approval of the representatives, in languages of the indigenous communities victims. The radio broadcast must be made on the first Sunday of the month for at least four months after 8 a.m. and before 10 p.m. Two weeks before the State orders the first broadcast, it must advise the Court and the representatives in writing of the date, hour and radio station on which this will take place. The State must comply with this measure within six months of notification of this judgment. Argentina must advise the Court immediately when it has made each broadcast ordered in this paragraph and the publications ordered in the preceding paragraph.

#### **D) Measures of non-repetition**

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place, so that they "are able to communicate this to the indigenous communities, considering the immense difficulties in communication that exist at times"; (c) in the case of the publication of the entire judgment: that this is for one year: (i) for Salta, on the official websites of the government, the Ministry of Indigenous Affairs and Social Development, and the Judiciary; (ii) for the national State, on the official websites of the CSJN Judicial Information Center and of INAI, and (d) in the case of the radio broadcast, that this should be made the first Sunday of every month for four months, and that the State be ordered to give them at least three weeks' notice of the date and time, and the station that will make the broadcast.

<sup>329</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Jenkins v. Argentina*, para. 134.

<sup>330</sup> Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 227, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 14, 2014. Series C No. 287, para. 573.

350. The **Commission** asked the Court to require the State to take any necessary legislative, administrative or other measures to establish an effective mechanism for the indigenous peoples to claim their ancestral lands.

351. The **representatives** asked the Court to require the State to establish provincial and national laws on the free, prior and informed consultation of indigenous communities in relation to projects to be executed on their territories. They also asked the Court to require the State to enact and implement provincial and national laws that permit the appropriate registration of the Lhaka Honhat Association and other similar indigenous organizations and association. They added that the State should be required to enact and implement provincial and national laws that guarantee the right to communal property.

352. The **State** considered that its domestic laws were pertinent and adapted to international standards. It also argued that the provincial state had proposed protocols for prior consultations and that the representatives had not responded or commented on them.

353. The **Court** determined that the existing legal regulations are insufficient to provide legal certainty to the right to indigenous communal property since they failed to establish specific procedures that are appropriate for this purpose. The considerations included in this judgment reveal that the Argentine authorities themselves have noted the insufficiency of their domestic laws and the need to take measures in relation to indigenous property (*supra* paras. 54 and 165). Moreover, expert witness Solá indicated that “there are no adequate provincial or national procedures for receiving the land claims of indigenous peoples in keeping with the standards of the inter-American system.”<sup>331</sup>

354. Consequently, as it has on other occasions,<sup>332</sup> the Court orders the State, within a reasonable time, to adopt the legislative and/or other measures necessary, pursuant to the guidelines indicated in this judgment (*supra* paras. 93 to 98, 115 and 116), to provide legal certainty to the human right to indigenous communal property, establishing specific procedures that are adapted to this end

355. This Court notes that Article XXIII of the American Declaration on the Rights of Indigenous Peoples stipulates that: “[i]ndigenous peoples have the right to full and

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<sup>331</sup> In addition, expert witness Solá, after describing a 2018 survey of more than 1,500 indigenous communities, indicated that, in 2017, in the whole country, only 110 “possessed a communal property title,” obtained by “procedures other than indigenous law, such as expropriations, acquisitive prescription, or donation by private individuals.” He added that “[e]xceptionally, communal property titles have been adjudicated [...] in cases of fiscal lands, especially in the province of Jujuy.” He also advised that, in February 2019, at the national level, three bills “related to formalizing indigenous communal property” were being “processed by the legislature,” but indicated that none of them “had been considered yet [...] and they are all on the point of lapsing [in the context of this] procedure.” Similarly, the CDH-UBA indicated, in its *amicus curiae* brief, that “the obstacles faced by the communities [victims] to exercise their right to the territory provides an example of the reality of hundreds of other indigenous communities in the country”; it understood that the “inadequacy of federal legislation” is one of the main obstacles and recalled that, in 2012, the United Nations Special Rapporteur on the rights of indigenous peoples at the time had noted, with regard to Argentina, that “[t]he majority of indigenous communities in the country have not received legal recognition of their lands in line with their traditional ways of using and occupying those lands.”

<sup>332</sup> Cf. Among other decisions, *Case of Loayza Tamayo v. Peru. Reparations and costs*. Judgment of November 27, 1998. Series C No. 42, para. 171 and fifth operative paragraph; *Case of the Moiwana Community v. Suriname*, para. 209; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 235, and *Case of López et al. v. Argentina*, para. 247.

effective participation in decision-making, through representatives chosen by themselves in accordance with their own institutions, in matters which affect their rights, and which are related to the development and execution of laws, public policies, programs, plans, and actions related to indigenous matters.” In this regard, the Argentine National Executive has noted the appropriateness and importance of the participation of the indigenous peoples in matters that affect them, as revealed by Decree 672/2016.<sup>333</sup> The Court orders the State, prior to adopting the legislative and/or any other measures ordered (*supra* para. 354), to establish actions that permit the participation of the country’s indigenous peoples and/or communities (not only the victims in this case) in consultation processes in relation to such measures.<sup>334</sup>

356. The Court recalls that, pursuant to Article 28 of the American Convention, a State cannot validly argue that it has a federal system to fail to comply with the provisions of the Convention. Added to this, the Court notes that the highest judicial authorities of Argentina and Salta have indicated, based on constitutional texts, that, in matters relating to the rights of indigenous peoples, the provincial and national powers are “concurrent,” and that national laws operate as a “minimum level” (*supra* para. 161). Thus, the Court understands that in order to guarantee the non-repetition of the violations declared in this case effectively, it is pertinent that the legislative and/or other types of regulations whose adoption has been ordered are applicable throughout national territory, by both the national State and by all the federative state entities that comprise

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<sup>333</sup> Cf. Decree 672/2016, issued on May 12, 2016. The reasoning indicates that “consultation is the right of the indigenous peoples [...] to be able to intervene, previously, in legislative or administrative measures that directly affect their collective rights.” This decree created the “Consultative and Participatory Council of the Indigenous Peoples,” and its article 2 established that this “will contribute to creating conditions to implement an intercultural dialogue to ensure that the indigenous peoples and/or communities have previously been able to intervene in the legislative and/or administrative measures that directly affect them, including the decision-making processes.” This decree cites as a precedent a resolution that “recognized” a “Working group for political dialogue between the indigenous peoples of Argentina with the national State.” The Court clarifies that the purpose of mentioning this is merely to record that the Argentine authorities considered it relevant to provide mechanisms to enable the participation of indigenous peoples. Furthermore, it is pertinent to note that expert witness Solá indicated that “Argentina adopted the American Declaration on the Rights of Indigenous Peoples, during the forty-sixth General Assembly of the Organization of American States on June 15, 2016.”

<sup>334</sup> The Court orders this measure taking note of the said precedents and considering it appropriate and useful for the effectiveness of the legislative and/or other types of measures ordered, taking into account also previous events that have occurred in Argentina. For example, the *amicus curiae* brief presented by AADI and SERPAJ indicated that, during the processing – initiated in 2012 – of the draft Unified Civil and Commercial Code, an “attempt” was made to “regulate the right to indigenous communal property” but, during the public hearings held in this context, a “general rejection” of the idea became evident, because there had been “no type of consultation with the [indigenous] communities or with the institutions that represent the indigenous peoples.” The same document described the processing of one of the three bills mentioned by expert witness Solá (*supra* footnote 331), and indicated that this “had encountered various obstacles in its processing and consultation because the mechanism for consultation with the indigenous peoples have not been duly regulated in the Argentine Republic.” The authors explained that, despite this situation, “the Senate’s Special Committee on Indigenous Peoples [...] had held a series of workshops and activities to socialize, debate and analyze this bill throughout the country.” The text, received on March 28, 2018, described these activities and explained that the bill in question “ha[d] recently lapsed; however, despite this, work has been done on a new draft in different parts of the country, through the Special Committee of Indigenous Peoples created in the Nation’s Senate in 2017, and its contributions will be presented once again in a new bill.” In addition, in 2018, in the context of the United Nations Universal Periodic Review, Argentina was recommended to “[e]nsure that indigenous peoples are fully involved in the process of drafting legislative or administrative measures that could affect them” (Human Rights Council, thirty-seventh session, February 26 to March 23, 2018. Report of the Working Group on the Universal Periodic Review. Argentina. Doc. A/HRC/37/5, para. 107.175).

the Argentine federation; in other words, all the provinces and the autonomous City of Buenos Aires.<sup>335</sup>

357. Consequently, the State, within the framework of the competencies and functions inherent in its federal organization system, must adopt the pertinent measures to ensure that: (a) the legislative and/or other types of measures ordered (*supra* para. 354) are enforceable both with regard to the national State and to all the federative entities, and (b) regarding the actions to acknowledge, implement or guarantee the rights of indigenous peoples or communities to recognition of communal property, there is coordination between the federal sphere and the federative entities so that the actions taken in either of those sectors is valid in the other and duplication, overlapping and contradiction in the legal acts or procedures is avoided.

#### **E) Other measures requested**

358. The **representatives** asked the Court to require that the State “reimburse, immediately, the *expenses relating to providing support*” to the Lhaka Honhat Association of Aboriginal Communities, so that “the on-site support to Lhaka Honhat can continue.” It also requested that the State be ordered to carry out a public act acknowledging its responsibility.

359. The **State** argued that the “expenses relating to providing support” to Lhaka Honhat “are included,” although not explicitly, in an agreement between INAI and Salta. Also, as already indicated, it contested the measures of satisfaction requested (*supra* para. 347).

360. The Court rejects the representatives’ request that it order the State to pay “the *expenses relating to providing support*” to Lhaka Honhat. The Lhaka Honhat Association is not, in itself, a victim in this case (*supra* paras. 35 and 309, and Annex V to this judgment), and it has not been explained how this payment to Lhaka Honhat by the State would be connected to the violation of the rights of the communities victims or necessary to redress them. Also, the Court understands that the measures of satisfaction it has ordered are sufficient and does not find it pertinent in this case to require a public act to acknowledge responsibility.

#### **F) Costs and expenses**

361. The representatives recalled that the case originated in the 1980s, and indicated that due to its “complexity and magnitude,” CELS had formed a team of several people, who “have had to undertake numerous tasks.” They indicated that although they have documentary support for expenditure incurred, they “do not find it prudent to request a set amount” and asked the Court to determine this.

362. The State, when referring to the costs and expenses claimed, recalled that both the national State and the provincial State are executing a land regularization plan and allocating funds to this end.

363. The Court reiterates that:

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<sup>335</sup> In this regard, the *amicus curiae* brief presented by AADI and SERPAJ indicated that, currently, the right to indigenous communal property lacks “specific legislation that regulates it and standardizes it adequately for the whole of the Argentine Republic” and that “different political sectors have been proposing the need to enact a basic law” in this regard.

Pursuant to its case law, costs and expenses form part of the concept of reparation, because the activity deployed by the victims in order to obtain justice, at both the national and the international level, entails disbursements that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to assess their scope prudently, and this includes the expenses generated before the authorities of the domestic jurisdiction and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provided the *quantum* is reasonable.<sup>336</sup>

364. This Court notes that the representatives have not requested a specific sum for reimbursement of costs and expenses, or duly provided justifying evidence for all the disbursements made. However, the State's argument is unrelated to this matter.

365. The Court decides, understanding that this is reasonable, to establish the payment of US\$50,000.00 (fifty thousand United States dollars) for costs and expenses. This amount shall be delivered, within six months of notification of this judgment, to the *Centro de Estudios Legales y Sociales* (CELS).<sup>337</sup> During the proceedings on monitoring compliance with this judgment, the Court may order the State to reimburse any reasonable and duly authenticated expenses incurred at that procedural stage to the victims or their representatives.<sup>338</sup>

### ***G) Method of compliance***

366. The State shall comply with its monetary obligations by payment in United States dollars or, if this is not possible, in the equivalent in Argentine currency, using the rate in force at the time of payment that is highest and most beneficial to the beneficiaries permitted by domestic law to make the calculation. At the stage of monitoring compliance with judgment, the Court may make a prudent adjustment of the amounts in Argentine currency in order to avoid variations in currency exchange substantially affecting their purchasing power.

367. If, for causes that can be attributed to the beneficiaries, it is not possible to pay the amount established within the indicated time, the State shall deposit this amount in their favor in a deposit certificate or account in a solvent Argentine financial institution, in United States dollars and in the most favorable financial conditions allowed by banking law and practice. If the corresponding amount is not claimed within ten years, the amounts shall be returned to the State with the interest accrued.

368. The amounts allocated in this judgment as a measures of reparation for the harm caused and to reimburse costs and expenses shall be delivered integrally, without any deductions resulting from possible taxes or charges.

369. If the State should incur in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in the Argentine Republic.

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<sup>336</sup> *Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, paras. 79 and 82, and *Case of Muelle Flores v. Peru*, para. 271.

<sup>337</sup> The Court notes that it has not been indicated that Lhaka Honhat had procedural expenses, and the claim for this reimbursement was limited to CELS.

<sup>338</sup> *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 331, and *Case of Muelle Flores v. Peru*, para. 274.



**IX  
OPERATIVE PARAGRAPHS**

370. Therefore,

**THE COURT**

**DECLARES:**

Unanimously, that:

1. The State is responsible for the violation of the right to property established in Article 21 of the American Convention on Human Rights, in relation to the rights to judicial guarantees and judicial protection, established in Articles 8(1) and 25(1) of this instrument, and the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V to this judgment, pursuant to paragraphs 92 to 98, 114 to 152 and 158 to 168.

Unanimously, that:

2. The State is responsible for the violation of the right to property and to political rights established in Articles 21 and 23(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V to this judgment, pursuant to paragraphs 173 to 184.

By three votes, including the President of the Court, to three,<sup>339</sup> that:

3. The State is responsible for the violation of the right to take part in cultural life as this relates to cultural identity, a healthy environment, adequate food and water, established in Article 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V to this judgment, pursuant to paragraphs 195 to 289.

Dissenting Judges Eduardo Vio Grossi, Humberto Antonio Sierra Porto and Ricardo Pérez Manrique

Unanimously, that:

4. The State is responsible for the violation of the right to judicial guarantees, established in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V of this judgment, pursuant to paragraphs 294, 295, 300 to 302 and 305.

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<sup>339</sup> Paragraphs 2 and 3 of Article 23 of the Court's Statute, entitled "*Quorum*," indicate that "[d]ecisions of the Court shall be taken by a majority vote of the judges present," and that "[i]n the event of a tie, the President shall cast the deciding vote." Paragraphs 3 and 4 of Article 16 of the Court's Rules of Procedure, entitled "Decisions and voting" establish that "[t]he decisions of the Court shall be adopted by a majority of the judges present" and that "[i]n the event of a tie, the President shall cast the deciding vote."

Unanimously, that:

5. The State is not responsible for the violation of the right to recognition of juridical personality or the rights to freedom of thought and expression, freedom of association, and freedom of movement and residence established in Articles 3, 13, 16 and 22(1) of the American Convention on Human Rights, as established in paragraphs 153 to 157, 185 and 194 of this judgment.

**AND ESTABLISHES,**

Unanimously, that:

6. This judgment constitutes, *per se*, a form of reparation.

Unanimously, that:

7. The State, within six years of notification of this judgment, shall adopt and conclude the necessary actions to delimit, demarcate and grant a title that recognizes the ownership of the 132 indigenous communities identified as victims in this case, and indicated in Annex V of this judgment, of their territory, as established in paragraphs 325, 327 and 343 of this judgment.

Unanimously, that:

8. The State shall refrain from implementing actions, public works or undertakings on the indigenous territory or that might affect its existence, value, use and enjoyment, without previously informing the indigenous communities that have been identified as victims, and conducting adequate, free and informed prior consultation, pursuant to the standards established in this judgment, as established in paragraphs 328 and 343 of this judgment.

Unanimously, that:

9. The State, within six years of notification of this judgment, shall arrange the removal of the *criollo* population from the indigenous territory, as established in paragraphs 325, 329 and 343 of this judgment.

Unanimously, that:

10. The State, within six years of notification of this judgment, shall remove from the indigenous territory the fencing and the livestock belonging to the *criollo* settlers, as established in paragraphs 325, 330 and 343 of this judgment.

By five votes to one, that:

11. The State, within six months of notification of this judgment, shall submit a report to the Court identifying critical situations of lack of access to drinking water or food and shall draw up and implement an action plan, as established in paragraphs 332 and 343 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

By five votes to one, that:

12. The State, within one year of notification of this judgment, shall prepare a report establishing the actions that must be implemented to conserve water and to avoid and rectify its contamination; to guarantee permanent access to drinking water; to avoid the persistence of the loss or decrease in forestry resources and endeavor to recover them, and to facilitate access to nutritional and culturally acceptable food, as established in paragraphs 333 to 335 and 343 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

By five votes to one, that:

13. The State shall create a community development fund and shall ensure its execution within no more than four years of notification of this judgment, as established in paragraphs 338 to 343 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously, that:

14. The State shall, within six months of notification of this judgment, make the publications and radio broadcasts indicated, as established in paragraphs 348 and 349 of this judgment.

By five votes to one, that:

15. The State, within a reasonable time, shall adopt the necessary legislative and/or any other measures to provide legal certainty to the right to indigenous communal property, pursuant to paragraphs 354 to 357 of this judgment.

Dissenting Judge Humberto Antonio Sierra Porto.

Unanimously, that:

16. The State shall, within six months of notification of this judgment, pay the amount established in its paragraph 365 to reimburse costs and expenses, as established in paragraphs 366 to 369 of this judgment.

By five votes to one, that:

17. The State shall provide the Court with the bi-annual reports ordered in paragraph 344 of this judgment.

Dissenting Judge Humberto Antonio Sierra Porto.

Unanimously, that:

18. The State shall advise the Court, within one year of notification of this judgment, of the actions taken to comply with the measures ordered herein, notwithstanding the measure indicated in the seventeenth operative paragraph and paragraphs 344 and 349 of this judgment.

Unanimously, that:

19. The Court will monitor complete compliance with this judgment, in exercise of its attributes and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judges L. Patricio Pazmiño Freire and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their concurring opinions. Judges Eduardo Vio Grossi, Humberto Antonio Sierra Porto and Ricardo Pérez Manrique advised the Court of their partially dissenting opinions.

DONE, at San José, Costa Rica, on February 6, 2020, in the Spanish language.

I/A Court HR. *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*. Merits, reparations and costs. Judgment of February 6, 2020.

Elizabeth Odio Benito  
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri  
Secretary

So ordered,

Elizabeth Odio Benito  
President

Pablo Saavedra Alessandri  
Secretary

## ANNEX I

### INDIGENOUS COMMUNITIES INCLUDED IN THE INITIAL PETITION ACCORDING TO MERITS REPORT NO. 2/12

1. Alto La Sierra
2. Bajo Grande
3. Bella Vista
4. Cañaveral
5. El Pin Pin
6. La Bolsa
7. La Curvita
8. La Gracia
9. La Merced Nueva
10. La Merced Vieja
11. La Puntana
12. Las Vertientes
13. Misión la paz km. 1 and 2
14. Monte Carmelo
15. Pozo El Mulato
16. Pozo El Toro
17. Pozo del Tigre- San Ignacio
18. Pozo La China
19. Rancho del Ñato
20. San Luis
21. Santa María

## ANNEX II

### INDIGENOUS COMMUNITIES CONSIDERED VICTIMS IN MERITS REPORT NO. 2/12

1. Bella Vista
2. El Cañaveral 1
3. El Cercado
4. El Cruce
5. Km 1
6. Km 2
7. Kom Lañoko - Misión Toba - Monte Carmelo
8. La Bolsa
9. La Curvita
10. Las Juntas
11. La Merced Nueva
12. La Merced Vieja
13. La Puntana I
14. Las Vertientes
15. Lantawos - Alto La Sierra
16. Misión La Gracia
17. Misión La Paz
18. Misión San Luis
19. Padre Coll
20. Pin Pin
21. Pozo El Mulato
22. Pozo El Tigre
23. Pozo El Toro
24. Pozo La China
25. Rancho El Ñato
26. Santa María
27. Santa Victoria 2

### ANNEX III

#### INDIGENOUS COMMUNITIES INCLUDED IN DECREE 1498/14 OF THE PROVINCE OF SALTA

1. Al Pu-Mision Las Juntas
2. Arenales (Hoot)
3. Bella Vista
4. Bajo Grande
5. Cañaverl 1
6. Cho"way Alto de la Sierra
7. Ebeneser
8. El Bordo
9. El Cañaverl II
10. El Cruce- Santa María
11. El Desemboque
12. Golondrina
13. Inhate Alto La Sierra
14. Kilómetro 1
15. Kilómetro 2
16. Kom La Chaca- Monte Carmelo
17. La Bolsa
18. La Bolsa II
19. La Curvita
20. La Esperanza
21. La Esperanza 2 (La Puntana)
22. La Estrella
23. La Merced Chica
24. La Merced Nueva
25. La Merced Vieja
26. Las Mojarras
27. La Puntana I
28. Las Vertientes
29. Las Vertientes 2
30. Lantawos Alto La Sierra
31. Larguero
32. Madre Esperanza
33. Misión Algarrobal
34. Misión Anselmo
35. Misión Grande De Santa María (Molhatati)
36. Misión La Gracia
37. Misión La Paz
38. Misión La Paz- B- (Chica)
39. Misión San Luis
40. Molathati
41. Molathati 3
42. Monte Carmelo (toba)
43. Monte Carmelo (wichí)
44. Monte Verde
45. Nahakwet (Vertientes Chica)



46. Nueva Esperanza
47. Nueva Vida
48. Padre Coll
49. Padre Coll 2
50. Pim-Pim
51. Pomis Jiwet
52. Pozo El Bravo
53. Pozo El Mulato
54. Pozo El Tigre
55. Pozo El Tigre III
56. Pozo El Toro
57. Pozo La China
58. Pozo de las Víboras
59. Puesto Nuevo
60. Puntana Chica
61. Quebrachal 1
62. Quebrachal 2
63. Rancho El Ñato
64. Roberto Romero
65. San Andrés
66. San Bernardo
67. San Ignacio
68. San Lorenzo
69. San Miguel
70. Santa Victoria Este I
71. Santa Victoria 2

#### ANNEX IV

### INDIGENOUS COMMUNITIES INDICATED IN THE BRIEF WITH PLEADINGS, MOTIONS AND EVIDENCE

1. Algarrobal 2
2. Al PU – Misión Las Juntas
3. Anglicana 2
4. Arenales (Hoot)
5. Bajo Grande (Sopak – Wen’hi)
6. Barrio Pozo el Tigre
7. Bella Vista
8. Buen Destino 1
9. Buen Destino 2
10. Cañada Larga
11. Cho” way Alto La Sierra
12. Cruce Buena Fe
13. Cruce Santa Victoria Este
14. Ebeneser
15. El Bordo
16. El Cañaveral I
17. El Cañaveral II
18. El Cruce – Santa María
19. El Desemboque
20. El Porvenir
21. Golondrina
22. Inhate Alto La Sierra
23. Kilómetro I
24. Kilómetro 2
25. Kilómetro 2 (2)
26. Kilómetro 2 (3)
27. Kom La Chaca – Monte Carmelo
28. La Banda
29. La Bolsa
30. La Bolsa II
31. La Curvita
32. La Esperanza
33. La Esperanza 2 (La Puntana)
34. La Estrella
35. La Merced Chica
36. La Merced Nueva 1
37. La Merced Vieja
38. La Puntana I
39. La Sardina
40. Larguero
41. Las Lomitas
42. Las Vertientes 1
43. Las Vertientes 2
44. Latawos Alto La Sierra
45. Lhaka Honhat Nueva
46. Misión Algarrobal

47. Misión Anselmo
48. Misión Anselmo*
49. Misión Grande Santa María (Molthatí)
50. Misión La Gracia
51. Misión La Paz
52. Misión La Paz -B- (Chica)
53. Misión San Luis
54. Misión Vieja Santa María
55. Misión Vieja (Santa María)
56. Mistolar
57. Molathati
58. Molathati 2
59. Monteverde
60. Monte Carmelo (toba)
61. Monte Carmelo (wichí)
62. Nahakwet (Vertientes Chica)
63. Nueva Esperanza
64. Nueva Vida
65. Padre Coll 1
66. Padre Coll 2
67. Palmar
68. Pelicano
69. Pim-Pim
70. PomisJiwet
71. Pozo El Bravo
72. Pozo El Mulato
73. Pozo El Tigre
74. Pozo El Tigre III
75. Pozo El Toro
76. Pozo La China
77. Puesto Nuevo
78. Puntana Chica
79. Quebrachal 1
80. Quebrachal 2
81. Rancho El Ñato
82. Rincón de la Paz
83. Roberto Romero
84. San Andrés
85. San Bernardo
86. San Ignacio
87. San Martín
88. San Martín (Misión Vieja)
89. San Miguel
90. Santa Victoria Este I
91. Santa Victoria 2
92. Sepak Comunidad Wichí

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\* Regarding the reference to two communities with the same name, "Misión Anselmo," the Court clarifies that this is what was indicated in the pleadings and motions brief.

## ANNEX V

<b>INDIGENOUS COMMUNITIES INDICATED IN THE REPRESENTATIVES' FINAL WRITTEN ARGUMENTS THAT ARE VICTIMS IN THIS CASE PURSUANT TO THE JUDGMENT ISSUE BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS*</b>
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1. Algarrobal 2 (Algarrobalito - San Luis)
2. Alto de la Sierra - Inhate Lhais (Cho'way)
3. Anglicana II
4. Anglicana III
5. Arenales (Hoot)
6. Arrozal
7. Avenida Pilcomayo
8. Bajo Grande (Sop'ak wen')
9. Bella Vista (Nakwojay)
10. Betel
11. Buen Destino 1 (Honhat Tais)
12. Buen Destino 2
13. Campo Verde (Ex Lhaka Honhat Nueva) (Lhip ta is)
14. Cañada Larga (Fwitenukitaj)
15. Cañaveral 1 (KanoHis)
16. Cañaveral 2
17. Cañaveral - KanoHis
18. Chelhyuk Quebrachal (Santa María)
19. Chowhay Km 2
20. Comunidad Nueva Sta. María
21. Comunidad Emanuel
22. Cruce Buena Fe
23. Cruce Santa Victoria
24. Desemboque (Wosotsuk)
25. Ebenezer (Isten')
26. El Bordo
27. El Cruce - Santa María (Tsofwa Tanu (1))
28. El Cruce Viejo
29. El Indio - La Puntana
30. El Paraiso
31. El Pim Pim
32. El Pim Pim 2
33. El Porvenir (Imak Tanek Hila)
34. El Rincón La Paz
35. Golondrina
36. Guayacan
37. Inhate - Alto De La Sierra
38. Kilómetro 1 (Onhaichuy)

\* According to paragraphs 35 and 309 of the judgment and footnotes 22 and 23, the victims in this case are the communities listed in this Annex V to the judgment, understanding that this includes the communities of the Wichí (Mataco), Iyjawaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) indigenous peoples who live on the lots identified with the cadastral registration numbers 175 and 5557 of the department of Rivadavia, in the Argentine province of Salta, previously known as Fiscal Lots 14 and 55, and those that may derive from these 132 communities indicated owing to the "fission-fusion" process."

39. Kilómetro 2 Central (Ex 3)
40. Kilómetro 2 "H'okad" (Nop'ok W'et)
41. Kilómetro 12 (Ex Km 2)
42. Kom La Chaca – Monte Carmelo
43. La Banda
44. La Bolsa (Tewuk Iliyi)
45. La Bolsa 2
46. La Curvita
47. La Esperanza (Fewj Wen'i)
48. La Esperanza 2 (La Puntana)
49. La Estrella (Kates)
50. La Gracia (Pomis Ji'wet)
51. La Junta (Alpu)
52. Las Lomitas
53. La Merced Chica
54. La Merced Nueva
55. La Merced Vieja
56. La Paz B
57. La Paz Chica
58. La Puntana 1 (Tsetwo P'itsek)
59. La Sardina
60. Las Vertientes 1 (Waj Ch'inha)
61. Las Vertientes III
62. Larguero
63. Lantawos - Alto De La Sierra
64. Los 6 Hermanos (Padre Coll 3)
65. Madre Esperanza
66. Misión Algarrobal
67. Misión Anselmo
68. Misión Grande Santa María (Mola Lhat hi)
69. Misión la Paz (Nop'ok W'et)
70. Misión Las Vertientes
71. Misión Nueva Vida (Tsofwa Tanu (2))
72. Misión Pozo El Tigre (Ex Barrio Pozo El Tigre)
73. Misión Rancho El Ñato
74. Misión San Andrés
75. Misión San Luis (Sop'antes W'et)
76. Misión Vieja Sta María
77. Mistolar
78. Monte Carmelo (Toba)
79. Monteverde
80. Nahak'wek (Vertientes Chica) (Nahak' wek)
81. Nueva Esperanza
82. Padre Coll 1 (Mola Lhat hi)
83. Padre Coll 2
84. Palmar
85. Pelicano
86. Pomis Jiwet
87. Pozo El Bravo (Kacha)
88. Pozo El Mulato (Nowej Lhile)
89. Pozo El Tigre (Hayäj Lhokwe)

90. Pozo El Tigre III
91. Pozo El Toro (Sich'et t'i)
92. Pozo La China (Pa'i his)
93. Pozo La China I
94. Pozo La China II
95. Pozo La Yegua (Molalhaty)
96. Puesto Nuevo
97. Puesto Nuevo 1 - San Luis
98. Puntana Central
99. Puntana Chica (Wichí w'et wumek)
100. Puntana Nueva
101. Puntana II
102. Quebrachal 1 (Awutsojakas)
103. Quebrachal 2 (Chelhchat)
104. Quebrachal III
105. Rancho El Ñato (Ho'o Cha'a)
106. Retiro
107. Roberto Romero
108. Sauce (Sichuyukat)
109. San Bernardo
110. San Emilio
111. San Ignacio
112. San Ignacio 2
113. San Lorenzo
114. San Luis Central
115. San Martin (La Invernada)
116. San Miguel (Waj Lhokwe)
117. San Miguel Chico
118. San Rafael
119. Santa María Chica
120. Santa Victoria Este I (Notsoj)
121. Santa Victoria II
122. Sepak
123. Tewok Wichí
124. Vertientes IV
125. Yuchan
126. 2 De Agosto Ruta 54
127. 3 De Febrero
128. 3 De Septiembre
129. 12 De Agosto
130. 13 De Enero "Mecle"
131. June 23
132. 27 De Junio

**CONCURRING OPINION OF  
JUDGE PATRICIO PAZMIÑO FREIRE**

**JUDGMENT OF FEBRUARY 6, 2020  
INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT  
(OUR LAND) ASSOCIATION V. ARGENTINA**

FIRST. The judgment in the case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (hereinafter "the judgment") incorporates the line of case law adopted by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court") since the case of *Lagos del Campo v. Peru*, following which it began to declare the violation of the economic, social, cultural and environmental rights (hereinafter "the ESCER"), directly and autonomously, using Article 26 of the American Convention on Human Rights (hereinafter "the American Convention"). I developed some elements that form part of this opinion in my partially dissenting opinion in the case of *Hernandez v. Argentina*, in which I also described how, prior to the precedent of *Lagos del Campo v. Peru*, the Inter-American Court examined the ESCER indirectly and subordinated their violation to the existence of a violation of the civil and political rights recognized in Articles 3 to 25 of the American Convention.

SECOND. The innovative contribution of this judgment stems from the fact that, for the first time, the Inter-American Court declares the responsibility of the State for violating the rights to participate in cultural life, as this relates to cultural identity, to a healthy environment and to adequate food and water, directly and as autonomous rights based on Article 26 of the American Convention which establishes:

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

THIRD. I should stress that there are sufficient normative elements arising from Article 26 of the American Convention to reach the conclusion, even from a rigid perspective of exegetical interpretation, that subjective rights are derived from the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of the American States (hereinafter "the OAS Charter"). Even if this observation might appear to be a platitude, the literal meaning of the article, notwithstanding the valid criticism about its wording, does not allow us to consider valid those positions that indicate that only "goals," "expectations," "objectives," "principles," "mechanisms" or "intentions" of the States for the development of their inhabitants can be derived from the OAS Charter. The justification for this assertion stems from the verification that the signatory States, by means of the exegesis of the article, recognize that, indeed, rights are derived from the provisions of the OAS Charter.

FOURTH. Following its judgment in *Lagos del Campo v. Peru*, the Inter-American Court has been refining application criteria<sup>1</sup> which now allow us to determine, among other matters, that the referral we make to Article 26 is directly related to the OAS Charter. Thus, verification of the justiciability of the ESCER will be subject to explicit or implicit derivation from the right arising from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. In addition, we can categorically affirm that this derivation does not result in “creating” or “innovating” international obligations, or broad or abstract standards because, clearly, this would not only violate the principle of legal certainty, but would also make it impossible for States to anticipate the conduct they should adopt in relation to their international undertakings.

FIFTH. In this judgment, the Inter-American Court has recognized and argued that the rights to a healthy environment, adequate food, water and cultural identity are derived from the OAS Charter.<sup>2</sup> Also, regarding the rights to adequate food and to cultural identity, it indicated that these are referred to in the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”),<sup>3</sup> which is acquiring relevance in light of its interpretation by the Inter-American Court<sup>4</sup> and the rule of interpretation under Article 29(d) of the American Convention. Pursuant to judicial practice and the development of precedents, these arguments, which are being used for the first time, must evidently continue to be refined and achieve a greater degree of precision and conceptual and hermeneutic exactitude as specific new cases are submitted to the Court.

SIXTH. In the context of this reflection, and more as a starting point – without seeking to exhaust the issue – recalling a maxim of universal law that to every right there corresponds a duty, the Inter-American Court has interpreted that the rights derived from a referral to Article 26 of the American Convention give rise to obligations of both an immediate and a progressive nature.<sup>5</sup> And, lastly, it has indicated that the said article is subject to the general obligations contained in Articles 1(1) and 2 of the American Convention, as are the civil and political rights contained in Articles 3 to 25.<sup>6</sup>

### **Additional hermeneutics**

SEVENTH. Notwithstanding the normative elements that I have indicated in the preceding section, I find it important to underline that a superior international hierarchy has gradually been established of principles and values that constitute an ontological basis for the previous arguments on the interpretation and application of the provisions of international human rights law.

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<sup>1</sup> This application criteria are found, in part, developed in the section of the judgment entitled “Considerations of the Court,” specifically in paras. 194 to 201.

<sup>2</sup> Paras. 202, 210, 222 and 231 respectively (of this judgment).

<sup>3</sup> Paras. 211 and 232 respectively.

<sup>4</sup> Advisory Opinion OC-10/89. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, paras. 46 and 47.

<sup>5</sup> *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 98, and *mutatis mutandis*, *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190.

<sup>6</sup> *Cf. Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No 198, para. 100, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 100.



EIGHTH. The *corpus juris* is supported by founding principles, systematizing values and, evidently, written rules and regulations, which I understand from a literal perspective, provided their meaning and comprehension are clear and sufficient. However, when this is not possible, or it is insufficient, I am aided by a teleological appraisal that seeks support in the origin and spirit of the texts, trying to discover what the drafters were trying to transmit, in the context of a systemic reflection of the norm, in its living evolutive version, but always interrelated with the hierarchic order of the normative to which it belongs and, lastly, I seek support in the generally accepted rules of interpretation.

NINTH. I point out that this idea is similar to the development of international human rights law in general, and inter-American law in particular. The interpretation standards used in relation to human rights is based on the Vienna Convention on the Law of Treaties, with its rules that outline literal, systematic and teleological interpretation. However, regarding human rights, great importance has also been given to other principles such as the practical effects (*effet utile*), the *pro personae* principle, and evolutive interpretation. These standards are based on Convention provisions (for example, Article 29 of the Convention) and on international practice (the European Court of Human Rights has also developed the concept of evolutive interpretation), allowing international human rights instruments to become a more effective mechanism for safeguarding human dignity and that of the peoples of the Americas, over and above the excessive protection of the principle of sovereignty. And, to this extent, they also allow the object and purpose of the American Convention to be met, which is the effective protection of human rights.

TENTH. One of the important consequences of this reflection, forces me to consider that, to read this opinion favorably and to agree with it, we must first agree that the work of the Court, in its hermeneutic task, is directly related to and soundly based on the principles, purposes and values that constitute the regional and global superior hierarchical order described above. From this perspective, by mandate of the Charter of the United Nations, the signatory States of the OAS Charter have accepted and submitted themselves to the said superior hierarchical order in their instruments of ratification.

ELEVENTH. Therefore, the Court, when exercising its functions and applying its interpretive approach, has generally acted based on solid and sufficient legal grounds, in keeping with its extremely important responsibility to ensure and protect the human rights of every person in the States that have signed, first, the OAS Charter and, then, the American Convention on Human Rights. Thus, in certain circumstances, and on this basis, at times, it is necessary to make a more expansive interpretation of the provisions to ensure a greater protection for the human being.

TWELFTH. In this way, the majority of the Court's judges, when interpreting the ESCER in general and, in particular in this case the rights of indigenous peoples to take part in cultural life in relation to their cultural identity, to a healthy environment, to adequate food and to water, by declaring, directly, that these are autonomous rights pursuant to Article 26 of the American Convention, have merely developed the said postulates and principles in this specific case.

THIRTEENTH. However, it is important to recognize that, owing to the newness and innovative content of the Court's decisions, and the measures of reparation and non-repetition, as well as the interpretation made, a necessary expansion and more detailed examination remains pending to contribute to and consolidate more precisely the application of the decisions, and the monitoring and verification of compliance with them and, in this way, to contribute adequately to materializing the effective and useful effects and results of the Court's decisions in relation to the ESCER.

FOURTEENTH. In its analysis of Article 26, it is not the first time that the Inter-American Court has assumed a position of “guarantor” and protector of human rights, making an expansive, non-restrictive, interpretation of the specific text of the American Convention: the cases of Lagos del Campo, Poblete Vilches, Cuscul Pivaral and others attest to this.

FIFTEENTH. Examining further what the Inter-American Court has indicated previously, it would appear that an interpretation contrary to the direct and autonomous justiciability of Article 26 of the American Convention would be contrary to the rules of interpretation established in Article 29 of this instrument; especially the *pro personae* principle. This article establishes that:

No provision of this Convention shall be interpreted as:

- a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

SIXTEENTH. Preventing the Inter-American Court from addressing an economic, social, cultural or environmental right fully and comprehensively when this has possibly been violated, and obliging it to make an indirect analysis, subordinated to the prior violation of a civil and political right, would represent a possible exclusion or limitation of the effects of the American Declaration (if the right was included in it) and/or a limitation of the enjoyment and exercise of the right if it was recognized by the State either by a domestic law or by another convention. It is easy to understand, even in the abstract, how much greater a protection is if it is addressed directly, for example, based on the right to health, than if it is addressed from the perspective of the right to life, in which case the interpretation restrictions imposed by Article 29(b) and (d) would be implicated.

SEVENTEENTH. As already mentioned, the judgment indicated, for example, that the rights to adequate food and to cultural identity are reflected in the American Convention. It also indicated that the rights to a healthy environment,<sup>7</sup> adequate food,<sup>8</sup> water,<sup>9</sup> and cultural identity<sup>10</sup> are recognized in constitutional provisions and the provisions of conventions with constitutional rank in the Argentine State.

EIGHTEENTH. The Court has recalled and affirmed the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights in different judgments. And this allows us to assume that they should be understood integrally as rights without any specific hierarchy that are enforceable in all cases before the competent authorities.<sup>11</sup> This reiterated precedent of the Court has established that the discriminatory

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<sup>7</sup> Para. 204 of the judgment.

<sup>8</sup> Para. 214 of the judgment.

<sup>9</sup> Para. 225 of the judgment.

<sup>10</sup> Para. 235 of the judgment.

<sup>11</sup> *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 172. Similarly: *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 131, and *Case of Lagos del Campo*

hierarchy between the rights has been overcome. Thus, the Court has placed them all on an equal footing, overcoming the restrictive narrative that excluded them from being the sole subject of allegations and claims before the courts of justice of the region.

NINETEENTH. Arguing in favor of indirect justiciability, subordinated to the violation of the right to life or to personal integrity, would be a restrictive interpretation of the Convention that would again exclude the ESCER from the sphere of autonomous rights that can be judicialized directly, representing a retrogressive understanding contrary to the explicit text of Article 29(c) of the American Convention and its literal interpretation.

TWENTIETH. With this opinion, my intention is to join and support the majority position adopted by the Inter-American Court, which is to prosecute violations of the ESCER directly. The Inter-American Court has been systematically implementing important expansive and evolutive exercises in hermeneutics that have made it possible to develop this case law. Evidently, it must be stressed, this assertion does not mean assuming that this approach and legal development have been fully achieved. To the contrary, the achievements made cannot obscure the need for an effort to be made to strengthen the arguments and assumptions that support this judicial thought in the jurisprudential debate.

L. Patricio Pazmiño Freire  
Judge

Pablo Saavedra Alessandri  
Secretary

**PARTIALLY DISSENTING OPINION OF EDUARDO VIO GROSSI**

**INTER-AMERICAN COURT OF HUMAN RIGHTS  
CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT  
ASSOCIATION (OUR LAND) V. ARGENTINA**

**JUDGMENT OF FEBRUARY 6, 2020  
(Merits, reparations and costs)**

**I. INTRODUCTION**

1. This partially dissenting opinion is issued<sup>1</sup> with regard to the above judgment<sup>2</sup> in order to explain the reasons why the author disagrees with operative paragraphs 3,<sup>3</sup> 11,<sup>4</sup> 12<sup>5</sup> and 13<sup>6</sup> of the judgment, which, based on the provisions of Article 26 of the American Convention on Human Rights,<sup>7</sup> declare, in the first, the violation of the rights to cultural identity, a healthy environment, adequate food, and water, and establish in the following paragraphs measures of reparation in relation to these violations, thereby making them justiciable before the Inter-American Court of Human Rights.<sup>8</sup> Evidently, my basic disagreement relates to the content of the said third operative paragraph, because the contents of the eleventh, twelfth and thirteenth operative paragraphs are merely its consequences.

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<sup>1</sup> Art. 66(2) of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

Art. 24(3) of the Court's Statute: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."

Art.65(2) of the Court's Rules of Procedure: "Any judge who has taken part in the consideration of a case is entitled to append a separate concurring or dissenting opinion to the judgment. These opinions shall be submitted within a time frame established by the President so that the other judges may take cognizance thereof before notice of the judgment is served. Such opinions shall only refer to the issues covered in the judgment."

Hereinafter, each time a provision is cited without indicating the corresponding legal instrument, it should be understood that it refers to the American Convention on Human Rights.

<sup>2</sup> Hereinafter, the judgment.

<sup>3</sup> "The State is responsible for the violation of the right to take part in cultural life as this relates to cultural identity, a healthy environment, adequate food and water, established in Article 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V to this judgment, pursuant to paragraphs 195 to 289."

<sup>4</sup> "The State, within six months of notification of this judgment, shall submit a report to the Court identifying critical situations of lack of access to drinking water or food and shall draw up and implement an action plan, as established in paragraphs 332 and 343 of this judgment"

<sup>5</sup> "The State, within one year of notification of this judgment, shall prepare a report establishing the actions that must be implemented to conserve water and to avoid and rectify its contamination; to guarantee permanent access to drinking water; to avoid the persistence of the loss or decrease in forestry resources and endeavor to recover them, and to facilitate access to nutritional and culturally acceptable food, as established in paragraphs 333 to 335 and 343 of this judgment."

<sup>6</sup> "The State shall create a community development fund and shall ensure its execution within no more than four years of notification of this judgment, as established in paragraphs 338 to 343 of this judgment."

<sup>7</sup> Hereinafter, the Convention.

<sup>8</sup> Hereinafter, the Court.

2. First, it is necessary to indicate that the author is repeating what he has already stated in previous separate opinions<sup>9</sup> regarding the use of that article of the Convention in the corresponding judgments, including the general and preliminary considerations included in some of these opinions.

3. However, it should also be indicated that since the adoption of the third operative paragraph – where the tie was broken by the casting vote of the President – constitutes an innovation in the Court’s case law, this opinion clarifies or expands and even modifies certain aspects of the said partially dissenting opinions.

4. Moreover, it is extremely relevant to indicate at once that this opinion does not refer to the existence of the rights to cultural identity, a healthy environment, adequate food, and water, or to the other economic, social and cultural rights. The existence of those rights is not the purpose of this brief. Rather, the author is merely asserting that the Court, contrary to what is indicated in the judgment, lacks competence to examine the violation of such rights under the provisions of Article 26 of the Convention;<sup>10</sup> in other words, that the presumed violation of these rights is not justiciable before the Court.

5. This does not mean, however, that the violations of the said rights cannot be justiciable before the corresponding domestic jurisdictions. This will depend on the provisions of the respective domestic law, a matter that falls outside the purpose of this opinion and that is part of the internal, domestic or exclusive jurisdiction of the States Parties to the Convention.<sup>11</sup>

6. This opinion contends that it is necessary to distinguish between human rights in general, which, in all circumstances, must be respected pursuant to international law, and those that, in addition, are justiciable before an international jurisdiction. In this regard, it is worth noting that there are only three international human rights courts; the Inter-America Court of Human Rights, the European Court of Human Rights, and the African Court on Human and Peoples’ Rights. Also, not all the States of the respective

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<sup>9</sup> *Partially dissenting opinion of Judge Eduardo Vio Grossi to the judgment of November 22, 2019, Inter-American Court of Human Rights, Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Muelle Flores v. Peru, Judgment of March 6, 2019, Preliminary objections, merits, reparations and costs; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of San Miguel Sosa et al. v. Venezuela, Judgment of February 8, 2018. Merits, reparations and costs; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Lagos del Campo v. Peru, Judgment of August 31, 2017. Preliminary objection, merits, reparations and costs, and Separate opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of the Dismissed Employees of PetroPeru et al. v. Peru, Judgment of November 23, 2017. Preliminary objections, merits, reparations and costs.*

<sup>10</sup> Hereinafter, Article 26

<sup>11</sup> “The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.” Permanent Court of International Justice, Advisory opinion on Nationality Decrees Issued in Tunis and Morocco (French Zone), Series B No. 4, p. 24.

Protocol No. 15 amending the [European] Convention for the Protection of Human Rights and Fundamental Freedoms. Art.1: “At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

regions have accepted the jurisdiction of the corresponding court. Moreover, not all the regions of the world have an international human rights jurisdiction, and no universal human rights court has been created.

7. Thus, the fact that a State has not agreed to be subject to an international jurisdictional human rights body does not mean that human rights do not exist and that they may eventually be violated. The State must always respect them, even if there is no international court to which recourse may be had if they are violated and, especially, if they are established in a treaty to which the State is party. In that case, international society may use diplomatic or political measures to achieve the restoration of respect for the rights involved. Thus, the international recognition of human rights is one matter and the international instrument used to achieve the restoration of their realization in situations in which they are violated is another.

8. Bearing in mind the foregoing, this text will be divided into the interpretation of Article 26, the provisions of the Charter of the Organization of American States,<sup>12</sup> the provisions of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and the Conclusions.

## **II. INTERPRETATION OF ARTICLE 26**

9. In view of the fact that the Convention is an inter-State treaty and, consequently, governed by public international law,<sup>13</sup> the reasons that substantiate this dissent relate, above all, to how Article 26 should be interpreted based on the rules for the interpretation of treaties established in the Vienna Convention on the Law of Treaties.<sup>14</sup> These rules relate to good faith, the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose.<sup>15</sup>

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<sup>12</sup> Hereinafter, the OAS.

<sup>13</sup> Art. 2 of the Vienna Convention on the Law of Treaties: "*Use of terms. 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*"

<sup>14</sup> Hereinafter, the Vienna Convention.

<sup>15</sup> Art.31: "General rule of interpretation.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Art.32. Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order

10. Accordingly, the matter in hand is to interpret Article 26 using these rules. This article establishes:

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

#### **A. Good faith**

11. The method supported by good faith means that what has been agreed by the States Parties to the treaty in question should be understood based on what they truly intended to agree, so that it is applied effectively and has practical effects. Thus, good faith is closely related to the principle of “*pacta sunt servanda*” established in Article 26<sup>16</sup> of the Vienna Convention.<sup>17</sup>

12. From this perspective, it is extremely clear that the practical effect of this rule is that the States Parties to the Convention truly take measures to achieve progressively the full effectiveness of the rights derived from the provisions of the OAS that it mentions and this, subject to available resources. Article 26 does not establish, contrary to what is asserted in a ruling cited in the judgment,<sup>18</sup> that “the States undertake to make effective ‘rights’ derived from the economic, social, educational, scientific, and cultural standards” to which it refers.

13. It should also be pointed out that the provisions of Article 26 are similar to those of Article 2 of the Convention; in other words, that the States undertake to adopt, in the first, measures if the exercise of the rights established in Article 1 of the Convention are not already ensured<sup>19</sup> and, in the second, measures to achieving progressively, the full realization of the rights implicit in the said standards of the OAS, even though the two articles differ in that the latter conditions compliance with its provisions to the availability of the necessary resources.

14. Bearing in mind the above, it is therefore necessary to ask oneself why Article 26 was adopted and, therefore, why were the rights to which it refers not addressed in the same way as the civil and political rights. The answer, based on good faith, can only be that the Convention established that both types of human rights, although they are

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to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

<sup>16</sup> “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>17</sup> It should be recalled that the principle of good faith inspires both the whole process of concluding treaties, whether traditional or solemn (that is, the negotiation, signature, ratification, and exchange or deposit of the ratification instruments) or simple and abbreviated (that is, the negotiation and the signature or the exchange of texts or notes, and their application).

<sup>18</sup> Para.78, *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*, 2018.

<sup>19</sup> Art. 2: “Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

closely related owing to the ideal aspired to – which, according to the Preamble, is to create the conditions for their “enjoyment”<sup>20</sup> – are different and, in particular, developed differently in the sphere of public international law; therefore, they should be subject to a differentiated treatment, which is precisely what the Convention does on the basis of what is also indicated in its Preamble.<sup>21</sup>

15. Consequently, good faith leads us to consider Article 26 on its own merits. This means that it should be interpreted, not as recognizing rights that it does not establish or develop, but as referring to norms other than those of the Convention such as those of the OAS Charter (in order to acknowledge them). Consequently, its specific practical effects are, let us repeat, that the States Parties to the Convention undertake to adopt measures to make the rights derived from those standards effective progressively, and subject to available resources.

16. It is also fundamental to note that it is surprising that the judgment did not refer more extensively to good faith as a factor that is as essential as the other elements established in Article 31(1) of the Vienna Convention on the Law of Treaties, all of which should be used simultaneously and harmoniously, without favoring or downplaying any of them. It is also unusual that no explanation was given for including Article 26 in a separate chapter from the political and civil rights and, in particular, with regard to its *raison d'être* and its practical effects. The judgment has provided no answer with regard to why Article 26 was included as a norm that differs from those established with regard to the civil and political rights.

17. In sum, and based on the principle of good faith, it should be stressed that it cannot be inferred from the fact that the Preamble to the Convention affirms that the individual should enjoy both his economic, social and cultural rights and his civil and political rights that the practical effect of Article 26 is that the violation of the rights to which that article alludes are justiciable before the Court, but rather that the States must adopt the pertinent measures to make those rights effective progressively.

## **B. Textual or literal rule**

18. When interpreting Article 26 in light of the literal method of interpreting a treaty, it may be concluded that this article:

a) does not list, describe or specify the rights that it alludes to; it merely identifies them as those “that are derived<sup>22</sup> from the economic, social, educational, scientific and cultural standards contained in the Charter of the” OAS; namely, rights that are revealed by or may be inferred from<sup>23</sup> the latter’s provisions;

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<sup>20</sup> Para. 4: “Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”

<sup>21</sup> Para 5: “Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters.”

<sup>22</sup> “*Derivar*: Dicho de una cosa: Traer su origen de otra” [Derive: originate from something else], Diccionario of the Lengua Española, Real Academia Española, 2018

<sup>23</sup> “*Inferir*: Deducir algo o sacarlo como conclusión de otra cosa” [Infer: deduce something or conclude it from something else]: Idem.



- b) it does not establish respect for human rights or that this respect should be ensured;
- c) it does not recognize or establish the rights to which it refers;
- d) it does not make those rights effective or enforceable because, if it had wished to do so, it would have stated this clearly and without ambiguity;
- e) to the contrary, it establishes an obligation of conduct, but not of results, consisting in that the States Parties to the Convention should "adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...] the full realization of the rights" to which it refers;
- f) it indicates that the obligation of conduct that it establishes should be complied with "subject to available resources, by legislation or other appropriate means," which not only reinforces the lack of effectiveness of such rights, but conditions the possibility of complying with the obligation to the existence of the resources that the State concerned may have available to this end, and
- g) it makes the adoption of the corresponding measures dependent not only on the unilateral will of the respective State, but on the agreement that it can reach with other States, also sovereign, and with international cooperation organizations.

19. It can also be concluded that the rights in question are not, in the terms used by the Convention, “recognized,”<sup>24</sup> “set forth,”<sup>25</sup> “guaranteed,”<sup>26</sup> “protected” [*consagrado*]<sup>27</sup> or “protected” [*protegido*]<sup>28</sup> in it or by it and, furthermore, they are not, as the judgment asserts, “rights contained in Article 26”<sup>29</sup> or “included” in this article<sup>30</sup> or “included in the Convention,”<sup>31</sup> in other words, contained or included in the latter;<sup>32</sup> rather, they are “rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the” OAS; in other words, they are rights that originate<sup>33</sup> in the latter and not in the Convention.

20. The foregoing also reveals that it is the Convention itself that makes a clear distinction between the human rights, when establishing, in its Part I, “State Obligations and Rights Protected,” Chapter I “General Obligations,” Chapter II “Civil and Political

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24 Art. 1(1): “Obligation to Respect Rights. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

Art. 22(4): “Freedom of Movement and Residence. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.”

Art. 25(1): “Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Art. 29(a): “Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”

Art. 30: “Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

Art. 31: “Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.”

Art. 48(1)(f): “1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: ...The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”

<sup>25</sup> Art. 45(1): Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.”

<sup>26</sup> Art 47(b): “The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: ... the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;

<sup>27</sup> *Supra*, Art. 48(1)(f), footnote 24.

<sup>28</sup> Art. 4(1): “Right to life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Art. 63(1): “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

<sup>29</sup> Para. 194. Hereinafter, each time a paragraph is indicated without indicating the legal document to which it corresponds, it shall be understood that it is from the judgment.

<sup>30</sup> Paras. 196, 202 and 222.

<sup>31</sup> Para. 207.

<sup>32</sup> *Diccionario of the Lengua Española, Real Academia Española, 2019.*

<sup>33</sup> *Idem.*

Rights” and Chapter III, “Economic, Social and Cultural Rights”;<sup>34</sup> thus, considering each of the last two categories of rights in a special and different manner.

21. As an additional comment, it appears rather curious that the judgment indicates that it makes an interpretation that “allows it to update the meaning of the rights derived from the Charter that are recognized in Article 26 of the Convention.”<sup>35</sup> Thus, according to the Court, the said rights would not only be derived from the OAS Charter, but would also be “recognized” in Article 26 and “updated” by the Court. This is what permits the judgment to tacitly conclude that the presumed violation of those rights may be examined and decided by the Court.

22. It is also surprising that, in the judgment, the Court affirms that, since Article 26 “makes a direct referral to the economic, social, educational, scientific and cultural standards contained in the OAS Charter,”<sup>36</sup> once it is “established that it is understood that a right should be included in” that article, “its scope must be established [by the Court] in light of the corresponding international *corpus iuris*.”

23. Evidently, the author cannot share these affirmations. In particular, because Article 26 does not recognize any right, but merely refers to the OAS norms that it indicates, and also because what the judgment asserts diverges totally from what the article explicitly establishes, without providing any grounds whatsoever for this approach; merely explanations that appear to be elaborated in order to interpret the article in a way that is totally contrary to what it clearly and textually indicates.

24. By taking this approach, the judgment evidently ignores the literal meaning of Article 26 and, consequently, does not apply the provisions of Article 31(1) of the Vienna Convention to it harmoniously or even, strictly, interpret it. It would appear that, for the judgment, the literal meaning of what was agreed is totally irrelevant and, consequently, that it is considered a mere formalism, allowing the judgment to attribute a meaning and scope to this provision that is unrelated to what the States expressly agreed, as if they really meant to agree something else, which is evidently illogical.

25. To the contrary, it can authoritatively be affirmed that, according to its literal meaning and the principle of good faith, Article 26 does not establish several possibilities of application – that is, doubts about its meaning and scope that, consequently, justify an interpretation that ostensibly diverges from what has been agreed – and does not establish any human right and, in particular, one that is enforceable before the Court. Rather it alludes to obligations of conduct, and not of result, assumed by the States Parties to the Convention.

26. Consequently, it can be concluded that “in accordance with the ordinary meaning to be given to the terms of the treaty,” Article 26 does not provide sufficient grounds to having recourse to the Court to safeguard the rights that “derive” from the OAS Charter and that, consequently, are not “recognized,” “established,” “guaranteed,” or “protected” in or by the Convention.

### **C. Subjective method**

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<sup>34</sup> Chapter IV of Part I is entitled “Suspension of Guarantees, Interpretation, and Application,” and Chapter V, “Personal Responsibilities.”

<sup>35</sup> Para. 199.

<sup>36</sup> Para. 196.

27. When attempting to discover the intention of the States Parties to the Convention with regard to Article 26 – always in accordance with the provisions of the Vienna Convention – reference must be made to the context of the terms, so that it is necessary to refer to the system established in the Convention in which this article is inserted, which means that:

a) this system is composed of the obligations and rights that it establishes, the organs responsible for ensuring their respect and requiring compliance with them, and provisions relating to the Convention;<sup>37</sup>

b) regarding the obligations, there are two, namely: the "Obligation to Respect Rights"<sup>38</sup> and "Domestic Legal Effects"<sup>39</sup> and, regarding the rights, they are the "Civil and Political Rights" and the "Economic, Social and Cultural Rights";<sup>40</sup> and

c) in the case of the organs, these are the Inter-American Commission on Human Rights, the Court<sup>41</sup> and the OAS General Assembly. The Commission is responsible for the promotion and defense of human rights,<sup>42</sup> the Court for interpreting and applying

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<sup>37</sup> "Part III, "General and Transitory Provisions."

<sup>38</sup> *Supra*, footnote 24.

<sup>39</sup> Art.2: "Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

<sup>40</sup> Part I, Chapter II, Arts.3 to 25. Right to recognition of juridical personality (Art. 3), right to life, (Art. 4), right to personal integrity (Art. 5), freedom from slavery (Art. 6), right to personal liberty (Art. 7), right to a fair trial (Art. 8), freedom from *ex-post facto* laws (Art. 9), right to compensation (Art. 10), right to privacy (Art. 11), freedom of conscience and religion (Art. 12), freedom of thought and expression (Art. 13), right of reply (Art. 14), right of assembly (Art. 15), freedom of association (Art. 16), rights of the family (Art. 17), right to a name (Art. 18), rights of the child (Art. 19), right to nationality (Art. 20), right to property (Art. 21), freedom of movement and residence (Art. 22), right to participate in government (Art. 23), right to equal protection (Art. 24) and right to judicial protection (Art. 25). Art. 26 *cit*.

<sup>41</sup> "Part II - Means of Protection. Art. 33: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

a) the Inter-American Commission on Human Rights, referred to as "the Commission," and

b) the Inter-American Court of Human Rights, referred to as "the Court."

<sup>42</sup> Art.41: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

a) to develop an awareness of human rights among the peoples of America;

b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

c) to prepare such studies or reports as it considers advisable in the performance of its duties;

d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

g) to submit an annual report to the General Assembly of the Organization of American States."

Hereinafter, each time there is a reference to the Commission, it shall be understood that this is the Inter-American Commission on Human Rights.

the Convention,<sup>43</sup> and the OAS General Assembly for adopting the necessary measures to ensure compliance with the pertinent decision.<sup>44</sup>

28. From the harmonious interpretation of these norms, it can be understood that the States that have accepted the Court's contentious jurisdiction can only be required – in relation to a case that has been submitted to the Court – to ensure due respect for the civil and political rights “recognized,” “established,” “guaranteed,” or “protected” by the Convention, and also – if this should be necessary – to adopt “in accordance with their constitutional processes and the provisions of this Convention such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

29. To the contrary, in the case of “the rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires,” the States Parties to the Convention can only be required to “adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, [...] by legislation or other appropriate means, the[ir] full realization” and this “subject to available resources.”

30. That said, it should be noted, for the purposes of the application of this method of interpretation that, according to the fifth preambular paragraph of the Convention,<sup>45</sup> the OAS Charter incorporated “broader standards with respect to economic, social, and educational rights” and that the Convention determined “the structure, competence, and procedure of the organs responsible for these matters.”

31. In other words, it was the Convention itself that, in compliance with this mandate and as already indicated, gave the civil and political rights a differentiated treatment from the economic, social and cultural rights, the former in Chapter II of Part I of the Convention and the latter in Chapter III of the same part of this instrument. Thus, the indivisibility of the civil and political rights and the economic, social and cultural rights mentioned in the Preamble to the Convention refers to the “enjoyment” of both types of human rights and not that they should be subject to the same rules for their exercise and international control.

32. It should also be recalled that there is no treaty or instrument, in force or in preparation “in connection with the conclusion of the [Convention]” that addresses its interpretation, nor is there any subsequent agreement or practice of its States Parties regarding their interpretation of it, as mandated by Article 31(2) and 3 of the Vienna Convention.<sup>46</sup> Consequently, it is not acceptable that, on the pretext of the absence of what is known as the “authentic interpretation”<sup>47</sup> of the Convention, the Court determines a meaning and scope distinct from, and even in contradiction with, what was

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<sup>43</sup> Art. 62.3: “The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.”

<sup>44</sup> Art. 65: “To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.”

<sup>45</sup> *Supra*, footnote 21.

<sup>46</sup> *Supra*, footnote 14.

<sup>47</sup> Designation given by doctrine.

agreed by its States Parties. The Convention, as any treaty, only exists within the bounds of what the States Parties expressly agreed.

33. This is particularly true with regard to the presumed violation of the rights to cultural identity, a healthy environment, adequate food and water and, in general, to the other economic, social and cultural rights; rights the meaning of which, contrary to what the judgment indicates, it is not the Court's task "to update"; rather, pursuant to the rules of the Vienna Convention, its role is to interpret what the Convention establishes. Above all, with the pretext of updating<sup>48</sup> such rights, the Court cannot conclude that it is able to examine and declare their violation.

34. Furthermore, in its attempt to justify the judicialization before the Court of the rights to cultural identity, a healthy environment, adequate food and water, the judgment does not use autonomous sources of international law; namely, those that create rights, such as international conventions, international custom, the general principles of law, or unilateral legal acts, or even other sources of international law – that is, those that help to determine the applicable rules of law, such as judicial decisions, doctrine or the legal declarative statements of international organizations.<sup>49</sup> Rather it uses the decisions of international organizations; that is, mere recommendations that are non-binding for the States, that do not interpret the Convention, and that are not designed to interpret it.

35. The truth is that these instruments merely constitute expressions of aspirations for the change or development of international law on the corresponding matter, legitimate in themselves, but some of them are not even issued by an official or an international organ of the inter-American system of human rights.

36. This is the case, in particular, of the allusions made in the judgment, to support its position, to the Committee on Economic, Social and Cultural Rights of the United Nations Economic and Social Council;<sup>50</sup> to the 2001 UNESCO Universal Declaration on Cultural Diversity;<sup>51</sup> to the decisions of the UN Human Rights Committee;<sup>52</sup> to a report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people;<sup>53</sup> to the United Nations Declaration on the Rights of Indigenous Peoples,<sup>54</sup> and to Principle 22 of the Rio Declaration.<sup>55</sup>

37. However, there is a difference with the references to the International Covenant on Economic, Social and Cultural Rights;<sup>56</sup> Convention 169 of the International Labour

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<sup>48</sup> "Actualizar," Diccionario of the Lengua Española, Real Academia Española, 2019.

<sup>49</sup> Article 38 of the Statute of the International Court of Justice: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provisions shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto."

<sup>50</sup> Paras. 217 to 221, 223, 226 to 230, 239 to 242, 245, 246 and 249.

<sup>51</sup> Paras. 224 and 238.

<sup>52</sup> Para. 251.

<sup>53</sup> Para. 252.

<sup>54</sup> Para. 248.

<sup>55</sup> Para. 250.

<sup>56</sup> Paras. 213, 214 and 234.

Organization,<sup>57</sup> the Convention on the Rights of the Child;<sup>58</sup> the Convention on the Elimination of All Forms of Discrimination against Women;<sup>59</sup> the 1948 Universal Declaration of Human Rights,<sup>60</sup> and United Nations General Assembly Resolution 64/292 of July 29, 2010, entitled "The human right to water and sanitation."<sup>61</sup> Indeed, while the first three instruments are treaties and, consequently, binding *per se*, the last two are international legal declarative statements and, therefore, constitute supplementary sources of international law insofar as they reflect customary norms or general principles of law in relation to the matters to which they refer.

38. Something similar occurs in the inter-American sphere. Here, the judgment mentions Resolutions 2349/07 and 2760/12 of the General Assembly of the Organization of American States<sup>62</sup> and the Social Charter of the Americas.<sup>63</sup> It also refers, on the one hand, to the Protocol of San Salvador<sup>64</sup> and the Inter-American Convention on Protecting the Human Rights of Older Persons<sup>65</sup> and, on the other, to the 1948 American Declaration of the Rights and Duties of Man,<sup>66</sup> the 2016 American Declaration on the Rights of Indigenous Peoples,<sup>67</sup> and Advisory Opinion OC-23/17 of the Court of November 15, 2017, entitled "The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)."<sup>68</sup> The first two texts are treaties and, therefore binding on the States; the Protocol of San Salvador will be analyzed below.<sup>69</sup>

39. Regarding the American Declaration of the Rights and Duties of Man and the American Declaration on the Rights of Indigenous Peoples, they are also international legal declarative statements; that is, they are supplementary sources of international law because they reflect general principles of law applicable to the corresponding issues; and, in the case of the former, this is recognized by the Convention when declaring that "the essential rights of man [...] are based upon attributes of the human personality," and that they are "principles ... set forth" in it.<sup>70</sup>

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<sup>57</sup> Para. 247.

<sup>58</sup> Para. 223.

<sup>59</sup> *Idem*.

<sup>60</sup> Paras. 213 and 223.

<sup>61</sup> Para. 224.

<sup>62</sup> Para. 224

<sup>63</sup> *Idem*.

<sup>64</sup> Paras. 205 and 212.

<sup>65</sup> Para. 224.

<sup>66</sup> Paras. 211 and 232.

<sup>67</sup> Para. 248.

<sup>68</sup> Para. 203.

<sup>69</sup> *Infra*, IV.

<sup>70</sup> Paras. 2 and 3 of the Preamble: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope."

40. In the case of OC 23/17, which – as part of case law – is a supplementary source of international law and, consequently, non-binding, it should be indicated that, as in the case of all the documents cited, nowhere does it indicate that presumed violations of the economic, social and cultural rights may be examined and decided by the Court. That was not its purpose. Moreover, it could not declare this, because it was not trying to interpret any norm that established the justiciable nature of such rights.

41. It should also be recalled that, to support its competence in relation to the provisions of Article 26, the judgment had recourse, in particular, to the case law of the Court itself,<sup>71</sup> which, in turn, is based on the provisions of the instruments cited above and even, with regard to the right to water, on the *iura novit curia* principle.<sup>72</sup> This reveals that, ultimately, the support for its position is provided by the said instruments and not its own case law.

42. From this perspective, and bearing in mind that the judgment cites the aforementioned texts to substantiate its position that the Court has competence to examine and decide eventual violations of the rights to cultural identity, a healthy environment, adequate food and water, it can be categorically stated that, at best, it could be considered that those instruments recognize the existence of the said rights, but not the Court's competence. It is undeniable that none of them, I repeat, none, makes any mention or establishes that the presumed violation of the said rights makes it possible to submit them to the consideration of the Court, and for the Court to take a decision on them.

43. Furthermore, it should be noted that even the references made in the judgment to the domestic laws of the State concerned and of other States,<sup>73</sup> does not justify the judgment's thesis that they authorize recourse to the Court based on the violation of the said rights. The Court derives its competence from the authority granted by the Convention and not from a provision of the respective State's domestic law, even though, as indicated in Article 29 of the Convention, that domestic law should evidently be taken into account when interpreting the Convention so that it does not limit the enjoyment and exercise of a right recognized therein.<sup>74</sup>

44. In this regard, and due to the respective mention in the judgment,<sup>75</sup> it is worth recalling that the said Article 29 is exclusively applicable to the interpretation of the Convention. However, it is insufficient since it does not relieve the Court from having to resort to the provisions of the Vienna Convention. In this regard, it should be stressed that this article tends to place a limit on the conclusions that could be reached by applying only the rules of interpretation contained in the latter. In other words, what

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<sup>71</sup> Paras. 195 to 197, 203, 206 to 209, 216, 226, 244 and 252.

<sup>72</sup> Para. 200.

<sup>73</sup> Paras. 204, 214, 225, 235 and 236

<sup>74</sup> "Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

<sup>75</sup> Para. 195.



that article establishes is that, if that interpretation leads to the conclusion that a legal instrument other than the Convention guarantees a human right in a broader and/or more complete way, what that instrument establishes should prevail over what is established in the Convention. It is on this basis that it is considered that the said provision establishes the “*pro personae* principle” and, I insist, it is not the only rule of interpretation that should be used.

45. It should also be indicated that the interpretation of Article 26 should refer to its meaning and scope in accordance with how it will be applied. In this case, as revealed by the judgment, this would consist in inferring from this article that violations of the human rights derived from the economic, social, educational, scientific and cultural standards contained in the OAS Charter can be examined and decided by the Court. From this perspective, the international *corpus iuris*<sup>76</sup> that should have been used is that which relates to this interpretation. Therefore, it would have been necessary to select from among the different instruments that constitute this *corpus iuris*, based on their status as sources of international law, so that the meaning and scope of the respective norm could be clearly revealed by such instruments pursuant to the objective sought. Evidently, none of this occurred in the instant case because, as already indicated, the instruments cited are unrelated to the Court’s competence in relation to violations of the said rights.

46. It is also necessary to comment on the reference made in the judgment to Article 1 of the Convention.<sup>77</sup> That article establishes that the States Parties to the Convention must respect and ensure respect for the human rights. Therefore, contrary to what the judgment appears to maintain, this article does not indicate – nor can it be inferred from it – that violations of all the human rights should or may be examined and decided by the Court. This is appropriate only and exclusively in those cases that are submitted to the Court, “provided that the States Parties to the case recognize or have recognized such jurisdiction.”<sup>78</sup>

47. From the foregoing it can be concluded that application of the subjective method of treaty interpretation, which signifies considering treaties as a whole, as well as any subsequent agreements and practices of the States parties, and other international norms applicable between the States parties leads to the result described above; namely, that at no time were the economic, social and cultural rights “derived” from the standards of the OAS Charter – among them the rights to cultural identity, a healthy environment, adequate food and water – included in the protection system established in the Convention

48. Moreover, with regard to citing Article 26 as a source that authorizes recourse to the Court, it should be noted that this had never been considered until the case of *Lagos del Campo v. Peru*.<sup>79</sup> Previously, cases relating to the violation of economic and social rights had been dealt with based on, or as part of, the violation of a political or civil right. It was only in that case that the representatives of the presumed victims cited Article 26 as grounds for the Court’s intervention. The Court admitted their petition, but on the basis of the *iura novit curia* principle; thus, the State and the Commission were unable to express an opinion in this regard. In the instant case, it was the victims’ representatives and the Commission who requested the application of Article 26.

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<sup>76</sup> Paras. 196 and 198.

<sup>77</sup> *Supra*, footnotes 23 and 38, and paras. 207 and 208.

<sup>78</sup> *Supra*, footnote 43.

<sup>79</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*, 2017.

49. However, the Court has now gone a step further. Indeed, up until now the reference to the said article has been linked to norms that establish a political or civil right. In the instant case, the judgment declares the violation of the rights to cultural identity, a healthy environment, adequate food and water, based exclusively on the provisions of this article. Thus, for the Court, it may be considered an autonomous source to declare the violation of any human right that it considers is derived from the provisions of the OAS Charter, a position that, for the reasons set out in this brief, I am unable to share.

50. It should also be noted that, in other judgments, the Court has achieved a similar result to the one sought in this case without the need to resort to Article 26, by applying only the articles of the Convention that relate to the rights that this instrument recognizes and, logically, within the limits of those provisions – for example, those that protect the right to personal integrity, to property, or to judicial guarantees and judicial protection. Thus, it is difficult to see why the Court insists on indicating Article 26 as grounds for violations of the human rights “derived” from the OAS Charter that it is examining, when it is evident that this is superfluous.

51. This is especially true when it is noted that the judgment, when declaring the violation of the rights to cultural identity, a healthy environment, adequate food and water on the basis of Article 26 considered autonomously, by fragmenting its analysis, ultimately weakens or contradicts its own thesis or conception of the interdependence and indivisibility of the human rights, because, in this case, the protection of the right to property is exactly what would have permitted guaranteeing the other rights that are declared to have been violated.

#### **D. Functional or teleological method**

52. When trying to define the object and purpose of the article of the Convention in question, it can be affirmed that:

a) the purpose of the States when signing the Convention was “to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;”<sup>80</sup>

b) to this end, and as already indicated,<sup>81</sup> “the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization (of American States) itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters”;

c) thus, it is evident that what was established at the said Conference was realized with the Protocol of Buenos Aires in relation to the economic, social and educational rights, and with the Convention as regards the structure, competence, and procedure of the organs responsible for these matters; and

d) therefore, it was in compliance with this mandate that Article 26 was included in the Convention in a separate chapter from the one on political and civil rights and,

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<sup>80</sup> Para.1 of the Preamble.

<sup>81</sup> *Supra*, footnote 20.

also, establishing a special obligation for the States Parties to the Convention, which did not exist with regard to the aforementioned rights; namely that of adopting “measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively subject to available resources, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

53. In other words, while it is true that the ultimate object and purpose of the Convention is, as the Court has indicated, “the protection of the fundamental rights of the human being,”<sup>82</sup> it is also true that each of its provisions has a specific object and purpose in keeping with those of a general scope. Thus, it is undisputable that the object and purpose of Article 26 is that the measures it indicates be adopted to achieve the realization of the rights mentioned and not that those rights are enforceable immediately and, in particular, that they are justiciable before the Court.

54. If we accept that, to interpret a specific provision of the Convention, it would be sufficient to cite its general object and purpose – which is extremely vague and imprecise – this would affect the legal certainty and security that should characterize every ruling of the Court because it would provide it with a wide margin of discretion to determine – or what the judgement refers to as “to update”<sup>83</sup> – the rights derived from the said standards of the OAS Charter and, therefore, the States Parties to the Convention would not know which these were in advance of the corresponding litigations.

55. Moreover, proceeding as referred to above, would mean that the Court was assuming the international normative function that, in the case of the Convention, corresponds only to the States Parties.<sup>84</sup> And this is because, in the absence of a definition of the rights that are derived from the standards of the OAS Charter and with their updating that, in consequence, the judgment attributes to the Court, the Court could well establish rights that are not expressly prescribed in the said standards and determine that they are justiciable before it, as occurred in this case.

56. In addition to the above, a certain nuance should be added to a citation from a previous ruling referred to in the judgment, that human rights treaties “are not traditional multilateral treaties concluded on the basis of a reciprocal exchange of rights for the benefit of the contracting parties; rather, their object and purpose are the protection of human rights before the State and before other States.”<sup>85</sup> Indeed, this

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<sup>82</sup> Para. 92, *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*, 2018.

<sup>83</sup> Para. 199.

<sup>84</sup> Art. 31: “Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.”

Art. 76: “1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.”

Art. 77: “1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection. 2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it..”

<sup>85</sup> Para. 77, *Case of Cuscul Pivaral et al. v. Guatemala*, 2018.

statement should be nuanced in the sense, first, that there are also multilateral treaties that are not concluded on the basis of reciprocal exchanges, but rather in order to establish legal norms that are valid for all their States parties, as in the case, for example, of the United Nations Charter or the OAS Charter and, evidently, the Convention. Second, because there are multilateral treaties that grant the individual a certain international legal subjectivity, as in the case of the Investment Protection and Promotion Treaties, the Treaty of Rome and, evidently, the Convention. Thus, it is not precisely the object and purpose that distinguishes the latter, but rather the circumstance that it grants the individual international legal subjectivity consisting in the authority to lodge petitions against the States Parties to it before the Commission; although, if the corresponding case is submitted to the Court, the representation of the petitioner is assumed by the Commission itself, in representation of the OAS States.<sup>86</sup> Therefore, the particularity of the Convention is not, fundamentally, the object and purpose of protecting human rights; rather it guarantees the presumed victims of violations of those rights that the obligations assumed by its States Parties are based on norms that are valid for all of them and, consequently, that in the event of non-compliance of any of those obligations by one of the States Parties, compliance with it is enforceable by the others. If this were not so, the asymmetry and imbalance between, on the one hand, the respondent State, and on the other, the presumed victims, would be enormous and impossible to overcome.

57. In sum, the application of the functional or teleological method of treaty interpretation in relation to Article 26 of the Convention leads to the same conclusion as that reached with the use of the other means of treaty interpretation; namely, that the purpose of this article is not to establish any human right, but rather merely to set forth the obligation of the States Parties to the Convention to adopt measures to realize the economic, social and cultural rights "derived" from the OAS Charter.

#### **E. Supplementary means**

58. Regarding the supplementary means of treaty interpretation, it is worth noting that, during the 1969 Inter-American Specialized Conference on Human Rights, at which the final text of the Convention was adopted, two articles on this matter were proposed. One was Article 26 in the terms that appear in the Convention. This article was adopted.<sup>87</sup>

59. The other proposed article, number 27, indicated:

Monitoring Compliance with Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of other rights enshrined in this Convention.

60. It should be noted that this draft article 27, which was not adopted,<sup>88</sup> referred to "reports and studies" for the Commission to verify whether the said obligations were being met and, thus distinguished between, "the "obligations determined previously," obviously in Article 26; in other words, those relating to the rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of

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<sup>86</sup> Art. 35: "The Commission shall represent all the member countries of the Organization of American States."

<sup>87</sup> Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

<sup>88</sup> Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

the Organization of American States as amended by the Protocol of Buenos Aires," and "the other rights establishes in this Convention"; that is, the "civil and political rights."

61. Accordingly, when adopting Article 26, the States did not intend to incorporate the economic, social and cultural rights into the protection system established in the Convention. The only intention they had in this regard was that compliance with the obligations relating to those rights should be subject to examination by the organs of the OAS, considering that this compliance was the basis for the exercise of the civil and political rights. And, as indicated, this proposal was not accepted. Therefore, this confirms that the States Parties to the Convention had no intention to incorporate the economic, social and cultural rights into the protection system that, to the contrary, it establishes for the civil and political rights.<sup>89</sup>

### **III. THE OAS CHARTER.**

62. That said, based on the fact that Article 26 refers to the "the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires," it is essential, in order to discover its scope, to refer to the content of the said standards and, in particular, to those cited in the judgment.

63. With regard to the right to a healthy environment, the judgment refers to Articles 30,<sup>90</sup> 31,<sup>91</sup> 32,<sup>92</sup> 33<sup>93</sup> and 34<sup>94</sup> of the OAS Charter. In the case of the right to food, it

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<sup>89</sup> Concurring opinion of Judge Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador*, Judgment of September 1, 2015 (Preliminary objections, merits, reparations and costs).

<sup>90</sup> "The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved."

<sup>91</sup> "Inter-American cooperation for integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system. It should include the economic, social, educational, cultural, scientific, and technological fields, support the achievement of national objectives of the Member States, and respect the priorities established by each country in its development plans, without political ties or conditions."

<sup>92</sup> "Inter-American cooperation for integral development should be continuous and preferably channeled through multilateral organizations, without prejudice to bilateral cooperation between Member States.

The Member States shall contribute to inter-American cooperation for integral development in accordance with their resources and capabilities and in conformity with their laws."

<sup>93</sup> "Development is a primary responsibility of each country and should constitute an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfillment of the individual."

<sup>94</sup> "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:

- a) Substantial and self-sustained increase of per capita national product;
- b) Equitable distribution of national income;
- c) Adequate and equitable systems of taxation;
- d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends;
- e) Accelerated and diversified industrialization, especially of capital and intermediate goods.

cites Article 34(j)<sup>95</sup> of the Charter. Regarding the right to water, it indicates that this is revealed by rights that, in turn, derive from others, mentioning the rights to a healthy environment and to adequate food and adding that this right also stems from the provisions of Articles 34(i),<sup>96</sup> 34(l)<sup>97</sup> and 45(h)<sup>98</sup> of the Charter. Finally, with regard to the right to cultural identity, it mentions Articles 30,<sup>99</sup> 45(f),<sup>100</sup> 47<sup>101</sup> and 48<sup>102</sup> of the Charter.

64. However, a simple reading of the said provisions is sufficient to verify, clearly and without any doubt, that they establish "principles," "goals" or "mechanisms" that, through a united effort of the States Parties to the OAS Charter, "ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security." It should not be forgotten that all the provisions cited are in Chapter VII of the Charter entitled "Integral Development." Thus, these provisions establish obligations of action, consisting in cooperation and the adoption of public policies addressed at achieving the development of the peoples of the Americas.

65. Accordingly, the corresponding human rights would be derived from the objectives of these provisions relating to "international social justice," "integral

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f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice;

g) Fair wages, employment opportunities, and acceptable working conditions for all;

h) Rapid eradication of illiteracy and expansion of educational opportunities for all;

i) Protection of man's potential through the extension and application of modern medical science;

j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food;

k) Adequate housing for all sectors of the population;

l) Urban conditions that offer the opportunity for a healthful, productive, and full life;

m) Promotion of private initiative and investment in harmony with action in the public sector; and

n) Expansion and diversification of exports."

<sup>95</sup> *Idem*, (j).

<sup>96</sup> *Idem*, (i).

<sup>97</sup> *Idem*, (l).

<sup>98</sup> "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: ... (h) Development of an efficient social security policy."

<sup>99</sup> ""The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved."

<sup>100</sup> "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: ... (f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. The encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community."

<sup>101</sup> "The Member States will give primary importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress."

<sup>102</sup> "The Member States will cooperate with one another to meet their educational needs, to promote scientific research, and to encourage technological progress for their integral development. They will consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples."

development," a "just social order," "economic development and true peace," the "full integration of the national community," its "development and progress" and to be a developed country, according to the interpretation proposed in the judgment. And the same would be true of the corresponding "basic goals"; for example, the "substantial and self-sustained increase of per capita national product" or the "equitable distribution of national income" or the "modernization of rural life" or the "accelerated and diversified industrialization" or the "stability of domestic price levels" or "urban conditions" or "private initiative and investment" or the "expansion and diversification of exports." In other words, the range of possibilities from which the interpreter could "derive" or "update" human rights that were not expressly established in any international provisions would be enormous, even unlimited.

66. And this is what is actually happening. Previously, the Court decided cases under Article 26, but related to other articles of the Convention; cases concerning the rights to health, social security, work, and job stability. Now it is deciding cases concerning the rights to cultural identity, a healthy environment, adequate food and water, but based only on this provision. If this tendency continues and is taken to its extremes, all the States Parties to the Convention that have accepted the Court's jurisdiction could eventually be brought before it because they are under-developed or developing countries; in other words, because they have not fully achieved integral development or some of its aspects – namely, "principles," "goals" or "mechanisms" established in the OAS Charter from which the judgment derives rights.

67. In this regard, it should be stressed that the judgment has advanced in this direction. Indeed, it affirms that it is "the obligation of the States to ensure 'integral development for their peoples,' as revealed by Articles 30, 31, 33 and 34 of the Charter."<sup>103</sup> Consequently, according to the judgment, it can logically be supposed that, in view of this obligation, there is a corresponding right to development and that non-compliance with this could result in litigation before the Court owing to violation of the correlative human right. If this were to occur, it would appear to be very far from what the States Parties intended when they signed the Convention or, at least, from the logic implicit therein; especially, owing to the way in which the said Chapter VII was drafted.

68. It is therefore evident that it is not possible to infer from "the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires" referred to in Article 26, that the Court has competence to examine and decide eventual violations derived from them.

#### **IV. PROTOCOL OF SAN SALVADOR.**

69. Reference must also be made to the "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – Protocol of San Salvador,"<sup>104</sup> which is also cited in the judgment to support its interpretation of Article 26. However, the undersigned considers that, to the contrary, its signature and application support what is maintained in this opinion.

70. This instrument was adopted pursuant to Articles 31, 76 and 77<sup>105</sup> of the Convention. This is indicated in its Preamble, which states that:

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<sup>103</sup> Para. 202.

<sup>104</sup> *Supra*, footnote 64.

<sup>105</sup> *Supra*, footnote 84.

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and [c]onsidering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof.”

71. The foregoing reveals that this is an agreement “additional to the Convention” with the specific purpose of reaffirming, developing, perfecting and protecting the economic, social and cultural rights and including them progressively in the Convention’s protection system and achieving their full realization.

72. In other words, the Protocol is adopted because, at the date of its signature, the economic, social and cultural rights had not been reaffirmed, developed, perfected and protected or included in the protection system of the Convention, which means that they were not fully realized under Article 26. Otherwise, neither the purpose of, nor the need for, this Protocol could be understood.

73. That said, the Protocol of San Salvador recognizes,<sup>106</sup> establishes,<sup>107</sup> sets forth [enuncia]<sup>108</sup> or sets forth [consagra]<sup>109</sup> the following rights: Right to Work (Art.6), Just, Equitable, and Satisfactory Conditions of Work (Art. 7), Trade Union Rights (Art. 8), Right to Social Security (Art. 9), Right to Health (Art. 10), Right to a Healthy Environment (Art. 11), Right to Food (Art. 12), Right to Education (Art. 13), Right to the Benefits of Culture (Art. 14), Right to the Formation and Protection of Families (Art. 15), Rights of Children (Art. 16), Protection of the Elderly (Art. 17) and Protection of the Handicapped (Art. 18). It should be recalled that, to the contrary, Article 26 does not establish or set forth any right, it merely refers to those that are “derived” from the OAS Charter.

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<sup>106</sup> Art. 1: “Obligation to Adopt Measures. The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol

Art. 4: “Inadmissibility of Restrictions. A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.”

<sup>107</sup> Art. 2: “Obligation to Enact Domestic Legislation. If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.”

Art.5: “Scope of Restrictions and Limitations. The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.”

Art.19(6), *infra* footnote 96.

<sup>108</sup> Art. 3: Obligation of Non-discrimination. The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”

<sup>109</sup> *Infra*, footnote 110. Art.19(1).



74. In the case of the rights recognized by the Protocol of San Salvador, the States Parties undertake to adopt, progressively, the necessary measure to ensure their full realization (Arts. 6(2), 10(2), 11(2) and 12(2)). This is in keeping with the provisions of Article 26; in other words, both the Protocol of San Salvador and Article 26 refer to rights that have not yet been realized or, at least, not fully.

75. The Protocol of San Salvador also includes a provision, Article 19, concerning the means of protecting the above rights. This consists in the reports that the States Parties must submit to the OAS General Assembly "on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol"; in the treatment accorded by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture to those reports, and in the opinion that could eventually be provided by the Commission in this regard.<sup>110</sup> It should be noted that this provision is similar to the draft article 27 of the Convention, which was rejected in the corresponding Conference.

76. All the above signifies, first, that, for the States Parties to the Protocol, realization of the economic, social and cultural rights is of a "progressive nature"; in other words, *a contrario sensu*, they have not been realized or, at least, nor fully realized, a similar situation to that established in Article 26 with regard to the rights derived from the OAS Charter.

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<sup>110</sup> Art. 19: "Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

77. Second, and consequently, this signifies that, for the said States, the provisions of Article 26 do not mean that the said rights are included among those incorporated into the protection system established in the Convention or those that are enforceable.

78. It should also be recalled that the OAS has created the Working Group to Examine the National Reports envisioned in the Protocol of San Salvador,<sup>111</sup> as a mechanism to follow-up on compliance with the corresponding undertakings made in this instrument. This confirms that the intention of the said States was, undoubtedly, to create a non-judicial mechanism for the international supervision of compliance with the Protocol of San Salvador.

79. The only exception to this procedure is established in Article 19(6); namely, that:

"Any instance in which the rights established in paragraph a) of Article 8<sup>112</sup> and in Article 13<sup>113</sup> are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

80. Third, this means that it is only if the said rights relating to education and trade unions are violated that the respective cases are justiciable before the Court. To the contrary, in the case of violations of the other rights, including the rights to a healthy environment and to adequate food, it is only the system of reports established in Article 19 of the Protocol of San Salvador that is in effect.

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<sup>111</sup> AG/RES. 2262 (XXXVII-O/07), of 05/06/2007.

<sup>112</sup> Art. 8: "Trade Union Rights. 1. The States Parties. The States Parties shall ensure: (a) The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

<sup>113</sup> Art. 13: "Right to Education. 1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

a. Primary education should be compulsory and accessible to all without cost;

b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

81. Consequently, the indication in another judgment<sup>114</sup> – which this judgment cites<sup>115</sup> – that “there are no indications that, with the adoption of the Protocol of San Salvador, the States sought to limit the Court’s competence to examine violations of Article 26 of the American Convention” is erroneous. According to that judgment, “there are no indications” because “if the American Convention is not expressly amended by a subsequent act of the States, the corresponding interpretation should not be less restrictive as regards its scope in relation to the protection of human rights,” adding that “Article 76 of the American Convention establishes a specific procedure for amendments, which require the ratification of two-thirds of the States Parties to the Convention” and concluding that “it would be contradictory to consider that the adoption of the Additional Protocol, which did not require such a high number of ratifications as an amendment to the American Convention, could modify the content and scope of the latter’s effects.” Moreover, the said judgment confuses an amendment to the Convention with an additional protocol to it. According to the Vienna Convention, an amendment is a change to the respective treaty that may be adopted by agreement between all its States Parties and, therefore, may be binding for all of them.<sup>116</sup> A modification is a change in the treaty agreed to by two or more States Parties and is only binding for them.<sup>117</sup>

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<sup>114</sup> Para. 66, *Case of Cuscul Pivaral et al. v. Guatemala*, para. 101.

<sup>115</sup> Footnote 188 of the judgment.

<sup>116</sup> Art. 39: “General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Art. 40 of the Vienna Convention: “Amendment of multilateral treaties. 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;  
(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and  
(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

<sup>117</sup> Art. 41: “Agreements to modify multilateral treaties between certain of the parties only. 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or  
(b) the modification in question is not prohibited by the treaty and:  
(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;  
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”

82. That said, the Protocol of San Salvador is an amendment. This is revealed by the text itself which contains all the elements of an amendment.<sup>118</sup> However, in addition, it expressly establishes that the Protocol itself may be amended.<sup>119</sup> At the same time and as a type of amendment, it is a protocol, a mechanism established in the Convention.<sup>120</sup> It should be stressed that, in its Preamble, the Protocol of San Salvador indicates that it is adopted considering that the Convention provides for this possibility.<sup>121</sup> Thus, it is an "additional protocol" signed "for the purpose of gradually incorporating other rights and freedoms into the protective system" of the Convention that, therefore, were not previously included in it.

83. Consequently, when establishing the Court's competence to examine eventual violations of the right to education and trade union rights in its Article 19, this instrument is not limiting the Court's competence; to the contrary, it is expanding it. If the Protocol of San Salvador did not exist, the Court could not even examine the possible violation of those rights.

84. Additionally, the aforementioned judgment erred when affirming that "there are no indications that, with the adoption of the Protocol of San Salvador, the States sought to limit the Court's competence to examine violations of Article 26 of the American Convention,"<sup>122</sup> because, to the contrary, what Article 19(6) of this instrument establishes is that, of the possible violations of all the rights that the Protocol recognizes, establishes, or sets forth, the Court can only examine those relating to the "right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests" and the right to education.<sup>123</sup> All the presumed violations of the other rights that the Protocol of San Salvador recognizes, establishes, or sets forth including, consequently, those relating to the right to cultural identity (Art. 14), to a healthy environment (Art. 11) to adequate food (Art. 12) and to water, are therefore subject to the mechanism established in Article 19<sup>124</sup> and, thus, fall outside the Court's sphere of competence.

85. Interpreting the Protocol of San Salvador as the said judgment did, would mean that this instrument had not been signed "for the purpose of gradually incorporating

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<sup>118</sup> Art. 21: "Signature, Ratification or Accession. Entry into Effect 1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.

2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.

3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.

4. The Secretary General shall notify all the member states of the Organization of American States of the entry of the Protocol into effect."

<sup>119</sup> Art. 22: "Inclusion of other Rights and Expansion of those Recognized. 1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.

2. Such amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification"

<sup>120</sup> *Supra*, footnote 84

<sup>121</sup> *Supra*, para.70.

<sup>122</sup> Para. 89, *Case of Cuscul Pivaral et al. v. Guatemala*,

<sup>123</sup> *Supra*, para. 79.

<sup>124</sup> *Supra*, footnote 110.

other rights and freedoms into the protection system” of the Convention, but rather, to limit the Court’s competence with regard to them, which, pursuant to Article 32 of the Vienna Convention would be manifestly absurd or unreasonable; that is, irrational or meaningless.

86. Consequently, all the above is clear evidence that, for the States Parties to this Protocol, the provisions of Article 26 of the Convention cannot be interpreted to establish or recognize economic, social and cultural rights or that it authorizes cases involving a violation of such rights to be submitted to the consideration of the Court. If it had established this or legitimized the intervention of the Court in this regard, the Protocol would not have been signed. This is why it was necessary to adopt it. Its signature cannot be explained in any other way.

87. All this leads to the conclusion that the Protocol of San Salvador is the clear demonstration that the provisions of Article 26 do not establish any human right or give the Court legal standing in the case of violations of the economic, social and cultural rights to which it refers.

## **V. CONCLUSIONS**

88. As can be concluded from the foregoing, I dissent from the judgment because the failure to use the means of interpretation established in the Vienna Convention appropriately leads to a result that is contrary to logic and never intended or established in the Convention, which is that the violations of the economic, social and cultural rights including the rights to cultural identity, a healthy environment, adequate food and water, are justiciable before the Court.

89. Indeed, although the judgment refers briefly and in very general terms to previous judgments,<sup>125</sup> it really favors some means of interpretation of treaties – especially the context of the terms of the treaty and its object and purpose – over others.<sup>126</sup> Thus it modifies the simultaneous and harmonious nature of all the means of interpretation that the Vienna Convention establishes by mentioning them together in the same paragraph. And even the means of interpretation that the judgment applies are not applied properly.<sup>127</sup>

90. Above all, I do not agree with the judgment because all its arguments are addressed exclusively at demonstrating the existence of the rights to cultural identity, a healthy environment, adequate food and water, and to this end it cites different international and even national instruments, most of which are non-binding, but without being able to substantiate its opinion that violations of those rights are justiciable before the Court.

91. I also disagree with the judgment because the interdependence, indivisibility, and interrelationship or close or indissoluble ties between the political and civil rights and the economic, social and cultural rights, is not a valid argument to justify that the latter are justiciable before the Court. Human rights exist before they are established in treaties, irrespective of whether their eventual violation may be examined and decided by an international court. This is revealed by the Convention itself, when it indicates that “they are based upon attributes of the human personality” and that they have been “set forth in

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<sup>125</sup> Para. 195.

<sup>126</sup> Paras. 196 and 198.

<sup>127</sup> *Supra*, II, C and D.

the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.”<sup>128</sup>

92. But, also, I dissent from judgment because the Convention itself makes a clear distinction between the political and civil rights and the economic, social and cultural rights and also because, for the latter, including the rights to cultural identity, a healthy environment, adequate food and water, to be justiciable before the Court, the signature of a supplementary protocol would be required, as in the case of the Protocol of San Salvador with regard to the right to organize and to join trade unions and the right to education.

93. I must also insist, once again, that this opinion does not question the existence of the rights to cultural identity, a healthy environment, adequate food and water. That is not its purpose. It merely maintains that their possible violation cannot be submitted to the consideration of the Court to be examined and ruled on.

94. In addition, it should not be understood that this opinion is opposed to violations of the economic, social and cultural rights eventually being submitted to the Court. I consider that, in that case, it should be by those responsible for the international normative function.<sup>129</sup> It does not appear desirable that the organ responsible for the inter-American judicial function assume the international normative function, especially when the States are democratic and their respect for human rights is governed by the Inter-American Democratic Charter, which establishes the separation of powers and civic participation in public affairs,<sup>130</sup> a separation that should also be reflected with regard to the international normative function, particularly of those norms that concern the citizen most directly.

95. From this perspective, it is worth insisting that interpretation does not consist in determining that the meaning and scope of a norm establish what the interpreter would like, but rather what it objectively establishes. In the case of the Convention, this means defining how what was agreed by the States Parties can be applied at the time and in the circumstances in which the respective dispute is filed; in other words, how to make the “*pacta sunt servanda*” principle applicable to the time and circumstances in which the dispute occurs. The issue is how to ensure that human rights treaties are, *per se*, truly living instruments; in other words, able to encompass or be applicable to the new realities encountered and not that it is their interpretation - as if it was a separate entity - that evolves with the time and circumstances, altering what such treaties establish.

96. Lastly, it is essential to repeat that, if the Court insists in following the line adopted by this judgment,<sup>131</sup> the inter-American human rights system, as a whole, could

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<sup>128</sup> Para. 3 of its Preamble

<sup>129</sup> *Supra*, footnote 119.

<sup>130</sup> Adopted at the twenty-eighth special period of sessions of the OAS General Assembly, September 11, 2001, Lima, Peru.

Art. 3: “Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”

Art. 6: “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

<sup>131</sup> *Supra*, para. 67.

be severely restricted. This is because very probably, on the one hand, it would not motivate, but rather deter, the accession to the Convention of other States, and the acceptance of the Court's contentious jurisdiction by those States that have not yet done so and, on the other hand, it could renew or increase the tendency among the States Parties to the Convention not to comply fully and promptly with its judgments. In sum, it would weaken the principle of legal certainty or security, which, in the case of human rights, also benefits the victims of their violation by ensuring compliance with the Court's judgments because the said system is solidly based on the sovereign commitments made by the States.

97. In this regard, it should not be forgotten that, in practice and over and above any theoretical consideration, the function of the Court is to deliver judgments that re-establish respect for the human rights that have been violated as promptly as possible.<sup>132</sup> It is not certain that this can be achieved in relation to violations of human rights that were not considered justiciable before the Court in the Convention.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>132</sup> Art. 63(1), *supra*, footnote 27.

**PARTIALLY DISSENTING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT  
(OUR LAND) ASSOCIATION V. ARGENTINA**

**JUDGMENT OF FEBRUARY 6, 2020  
(Merits, reparations and costs)**

1. While reiterating my respect for the decisions of the Inter-American Court of Human Rights (hereinafter also “the Inter-American Court” or “the Court”), I am presenting this partially dissenting opinion. The opinion focuses on an analysis of the merits made by the Court in relation to the international responsibility of the State (hereinafter “the State,” “the Argentine Republic” or “Argentina”) for the violation of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”). On the one hand, I consider it opportune to reaffirm and examine the logical and legal inconsistencies of the theory of the direct and autonomous justiciability of the economic, social, cultural and environmental rights (hereinafter “the ESCER”) using Article 26 of the American Convention, that has been adopted by the majority of the Court’s judges since the case of *Lagos del Campo v. Peru*. On the other hand, I find it pertinent to reflect on the measures of reparations, their degree of specificity and detail, as well as the challenges and complexities involved in monitoring compliance with measures granted under the innovative logic of the autonomy of Article 26.

2. In particular, I will explain my discrepancy with regard to operative paragraphs 3,<sup>1</sup> 15<sup>2</sup> and 17.<sup>3</sup> My analysis will be made as follows: (A) Some general consideration on the justiciability of Article 26 of the American Convention and the ESCER; (B) the need to weigh and balance the rights of indigenous and tribal peoples against the rights of third parties; (C) the problems of construing the meaning and scope of the right to communal property contained in Article 21 of the American Convention in order to protect the rights of indigenous and tribal peoples; (D) the direct legal effectiveness of the rights of indigenous and tribal peoples without the need for laws that regulate this, and (E) the problems of monitoring compliance with the measures of reparation on the restitution of the lands as regards timing and details.

**A) General consideration on the justiciability of Article 26 of the American Convention and the ESCER**

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<sup>1</sup> The State is responsible for the violation of the right to take part in cultural life as this relates to cultural identity, a healthy environment, adequate food and water, established in Article 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V to this judgment, pursuant to paragraphs 195 to 289.

<sup>2</sup> The State, within a reasonable time, shall adopt the necessary legislative and/or any other measures to provide legal certainty to the right to indigenous communal property, pursuant to paragraphs 354 to 357 of this judgment.

<sup>3</sup> The State shall provide the Court with the bi-annual reports ordered in paragraph 344 of this judgment.



3. In this opinion, I do not intend to elaborate on my position concerning the complex judicial dynamics in relation to Article 26 initiated by the case of *Lagos del Campo v. Peru* and regarding which I have had occasion to express my views in partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,<sup>4</sup> *Dismissed Employees of PetroPeru et al. v. Peru*,<sup>5</sup> *San Miguel Sosa et al. v. Venezuela*,<sup>6</sup> *Cuscul Pivaral et al. v. Guatemala*,<sup>7</sup> *Muelle Flores v. Peru*,<sup>8</sup> *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*,<sup>9</sup> and *Hernández v. Argentina*,<sup>10</sup> and also in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*,<sup>11</sup> *Poblete Vilches et al. v. Chile*,<sup>12</sup> and *Rodríguez Revolorio et al. v. Guatemala*,<sup>13</sup> as well as in my concurring opinion in *Advisory Opinion OC-23/17 on the Environment and Human Rights*.<sup>14</sup>

4. My purpose in referring to Article 26 in this specific case is to show how, three years after the first judgment that initiated the new interpretation, what was predicted at the time, has become a reality. Thus, in my concurring opinion in the case of *Lagos del Campo v. Peru* I stated:

I hope that this opinion makes a contribution to understanding the magnitude of the decision that the majority of the Inter-American Court adopted in this case, and reveals the main problems arising from the judgment. **Only sincere criticism and open and public debate can help mitigate, up to a certain point, the risks to legitimacy and legal certainty that may arise from this judgment.**

5. The judgment delivered by the Inter-American Court in this case reveals that the misgivings that I felt at that time have materialized and, what is worse, would appear to have no limits. In this regard, I find it necessary to reiterate four specific aspects before making a thorough analysis of the problems arising from the change in case law undertaken by the Court in its approach to the rights of indigenous and tribal peoples.

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<sup>4</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

<sup>5</sup> Cf. *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

<sup>6</sup> Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>7</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>8</sup> Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>9</sup> Cf. *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>10</sup> Cf. *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>11</sup> Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

<sup>12</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

<sup>13</sup> Cf. *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 14, 2019. Series C No. 387. Concurring opinion of Judge Humberto Antonio Sierra Porto.

<sup>14</sup> *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23.

6. First, in keeping with my position in relation to the ESCER, the lack of legal support for the fact that violations of these rights are being determined autonomously using the mechanism of individual petitions cannot be ignored. I repeat that the Court does not have this competence explicitly under either the American Convention or Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador"), interpreted in light of Articles 30 and 31 of the Vienna Convention on the Law of Treaties.

7. Hence, I should point out that, in the sections of the judgment on the right to a healthy environment and the right to adequate food, Articles 11 and 12 of the Protocol of San Salvador are expressly cited to affirm that the Argentine State has recognized the existence of these rights. However, the Court continues to totally disregard that, both Argentina and also the other States that have ratified the Protocol decided, in its Article 19, to admit the lodging of individual petitions only with regard to the rights contained in Articles 8(a) and 13 of that instrument. On this point, I am no longer sure which line of argument I consider most problematic; whether the one under which the existence of the Protocol of San Salvador within the legal framework of the inter-American system of human rights is entirely disregarded, or the one under which international instruments of soft law are referred to as convenience dictates. In any case, in this judgment, as in others in which the responsibility of a State has been determined for the direct violation of Article 26, there has been no extensive analysis of the grounds for the justiciability of the ESCER and the limits – clearly defined in the treaties establishing the contentious jurisdiction of this Court – have been contravened.

8. Second, following in the steps of its recent practice in relation to the ESCER, once again the majority makes an improper use of the *iura novit curiae* principle to analyze the possible violation of provisions of the Convention that have not been alleged, particularly with regard to the right to water supposedly contained in Article 26 of the Convention. We had understood that the misuse of this principle in judgments on the ESCER had been overcome, with the decision in the case of *Hernández v. Argentina*. In that case, which related to the violation of the personal integrity of a prisoner who contracted tubercular meningitis and failed to receive adequate medical care, the Court did not apply the *iura novit curiae* principle. In that case, in which the judgment was handed down on November 29, 2019, the Court did not analyze the violations that had occurred from the perspective of the right to health and the right to food, supposedly contained in Article 26, but, to the contrary, it analyzed them, as it had been doing before the change in its case law in 2017, from the perspective of the right to personal integrity. Thus, it appeared that the Court had returned to the sensible path of analyzing the ESCER in connectivity with other articles of the Convention. However, this judgment returns to the logic of the autonomous violation of the ESCER and also reiterates the use of the *iura novit curiae* principle in relation to the right to water without including criteria of reasonableness and pertinence.

9. Added to the improper use of the *iura novit curiae* principle, there are significant problems in the substantiation of the right to water in this judgment. In some of the judgments in which the Court has declared the violation of the ESCER, it has based itself on an erroneous interpretation of the referral made by Article 26 of the American Convention to the OAS Charter. According to this interpretation, the establishment of the list of rights on which the analysis of State responsibility is founded is left to the discretion of the judges of the Court, based on the aspirations expressed by the States in the OAS Charter. I have already mentioned on several occasions that the Charter does not contain a list of rights and, in practice, this means that the agent of justice ends up justifying the direct justiciability of the right based on a vague mention made of it in that text. Thus, for example, the word "health" is sought within a list of goals established in the OAS Charter; a large number of references to instruments that form part of the international "*corpus iuris*" are added and, based on this

simple mention, it is declared that the subjective right is part of Article 26 of the Convention and, therefore, enforceable before the Inter-American Court.

10. However, in this judgment, the Court goes much further. The OAS Charter does not contain any reference to the right to water, which does not permit the line of argument that I have been describing. Consequently, the Court has decided that it is no longer necessary to look for even a mention of the right that it claims is justiciable in the OAS Charter, if its existence can be extracted from other rights that are mentioned in the latter. Thus, paragraph 222 states: "The *right to water* is protected by Article 26 of the American Convention and this is revealed by the provisions of the OAS Charter that permit deriving rights from which, in turn, the right to water can be understood." Based on this interpretation, it could be argued that Article 26 of the Convention contains all the rights that the Court would like to make justiciable in a specific case and that it is not necessary for them to be alleged by the parties or that there is brief mention of them in the OAS Charter. It will be sufficient to include numerous citations of other declarations, treaties or soft law documents, in addition to referring to "a vast *corpus iuris*" to create an international obligation for the States. This is precisely what I was referring to in my opinion in the case of *Lagos del Campo v. Peru* when I spoke of the lack of legal certainty that arises from this type of interpretation. At the present time, the State have no way in which to be aware of, anticipate or even defend themselves from possible violations of Article 26 of the Convention for which they could be sentenced by the Inter-American Court.

11. Fourth, and irrespective of the problems that I will describe in relation to the scope of Article 21 of the Convention, I would like to point out the problems that arise from the definition and analysis of the interdependence of the rights made in this judgment. A whole section is dedicated to showing how the "new" rights contained in Article 26 are so interrelated that it is not necessary to make a specific analysis of the State's responsibility for each one. Therefore, mention is made of the proven facts of the case and it is considered that the rights to a healthy environment, to food, to water and "to participate in cultural life" have been violated collectively. In this regard, I would just like to stress that the fact that human rights are interrelated, and even considered indivisible, does not mean that there are no differences between them and that, consequently, each one has its own scope. By making a collective analysis of the rights, without distinguishing between them, it is unclear what are the obligations that each one entails and the specific actions that a State can undertake to avoid violating them. Moreover, such an unfettered perspective of the interdependence of the rights could give rise to the paradox of understanding that, since they are all related in some way, any type of violation would entail the violation of all the rights contained in the Convention. Providing content to and establishing the scope of the rights is extremely important so that everyone can understand them and the States can respect them, but it is even more relevant in these cases in which, as I have already mentioned, new rights are being generated under Article 26 of the American Convention

## **B) Need to weigh and balance the rights of indigenous and tribal peoples against the rights of third parties**

12. In this case, there is no discussion on the right of the indigenous peoples to the territory claimed. The dispute centers on the actions taken by the State to ensure this right and, in particular, implementation of the agreement reached between the State, the settlers and the indigenous communities. Hence, this is a sentence *sui generis* because the dispute does not lie in the territory claimed, but rather in the measures taken by the State to implement the claim: a series of public policies and State actions that were supposed to create the conditions for the settlers to be able to move to lots on which they would be granted property rights.

13. In addition to the State's failure to comply with what had been agreed previously with those involved, the judgment determined a series of violations of the human rights of the indigenous communities. However, I consider it important not to lose sight of the fact that, in this case, the non-compliance by the Argentine State also affected the rights of the peasant farmers who live in this territory in similar conditions of poverty and precarity. During the on-site procedure conducted when processing this case, I was able to witness these conditions firsthand. However, owing to the limitations to the Court's jurisdiction in contentious cases, this group of individuals were unable to participate in the case because they were not alleged as victims in the proceedings.

14. Even though the Court has received and assessed all the evidence submitted during the proceedings and has been very aware of the situation of vulnerability of these settlers, it is necessary to rethink the dynamics of proceedings relating to the rights of indigenous and tribal peoples. In particular, when deciding situations derived from Article 21 of the Convention that affect or involve groups of non-indigenous settlers or peasant farmers who, as third parties, do not have a direct participation in the proceedings; especially, taking into account that these problems are usually accompanied by acts of violence, harassment, deaths or displacement. Such decisions should always be weighed, and seek a balance with the rights of third parties, in a context of dialogue, conciliation and the exclusion of factors that may contribute to causing or increasing situations of violence.

**C) Problems of construing the meaning and scope of the right to communal property (Article 21 of the American Convention) in order to protect the rights of indigenous and tribal peoples**

15. Possibly one of the Court's most significant and most innovative jurisprudential developments has been its case law on indigenous and tribal peoples. With rulings that have no precedent by an international court, the Inter-American Court has delimited the State's obligations in relation to the rights to communal property, prior consultation, political rights, and the principle of non-discrimination, among others; rights that are essential for the members of these communities. This is why, with much surprise and disappointment, I note how the intention of extending the case law on the justiciability of the ESCER has had an unfavorable result for the rights of indigenous and tribal peoples. Up until this judgment, the Court's constant and reiterated position was to protect these rights in connectivity with Article 21 of the Convention. On this occasion, the majority of the Court has chosen to increase the trend of its case law on the ESCER so that the rights to participate in cultural life in relation to their cultural identity, to a healthy environment, to adequate food and to water are established autonomously in Article 26. This new interpretation of Article 26 of the Convention as a source of autonomous and justiciable rights involves a transcendental change in the substantiation of the rights of indigenous and tribal peoples.

16. In no way should my position be understood as contrary to the recognition of the rights to cultural life, a healthy environment, adequate food and water of the indigenous peoples. On the contrary, I consider that, in this case in particular their violation occurred in connectivity with the right to communal property recognized in Article 21 of the Convention, and not independently, as a violation of Article 26. In my opinion this unfortunate change in case law not only has an impact, indirectly, on a greater lack of protection for the rights of indigenous peoples, but also supposes an elevated level of unawareness of the essential characteristics of the rights of indigenous peoples for the following reasons.

17. First, using the excuse of a supposed direct protection of these rights from the perspective of Article 26 of the American Convention, the undisputable development and

protection that this Court has been giving to the rights of indigenous and tribal peoples in the course of its case law is being overlooked. As I have pointed out, in this case the dispute does not lie in the right of the indigenous communities to the territories claimed, but rather in the State's actions to implement what has been agreed. Perhaps this is why it appears that the importance given by the Court in its case law to communal property, its content and scope, has not been taken into account. This right, contained in Article 21 of the Convention, as the Court had understood up until this judgment, not only included "geographical certainty," in addition to the demarcation, delimitation, titling<sup>15</sup> and recognition of a territory in practice,<sup>16</sup> but also a larger series of other rights, such as the right to cultural identity, the right to prior consultation and the right to a healthy environment.

18. Starting with its first judgment in relation to the right to communal property in the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court, in an evolutive interpretation, understood that the right to private property included the relationship between indigenous property and cultural identity. Specifically, it determined that "the close relationship that indigenous peoples maintain with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival."<sup>17</sup> Since then, the Court has been developing the meaning and scope of this right to cultural identity and a healthy environment always tied to the right to communal property, insofar as this notion of property includes "the natural resources linked to their culture [...], as well as the incorporeal elements that are derived from such resources."<sup>18</sup> The right to cultural identity and environmental rights have always been considered as inherent and inseparable elements of the right to communal property; they constitute two sides of the same coin. The axiom land, culture and resources to ensure the survival, both material and spiritual, of indigenous and tribal peoples, had become an essential element of the case law of the Inter-American Court.<sup>19</sup> Thus, an approach that does not take Article 21 of the Convention into account, such as the one that this judgment proposes, is not only legally incorrect, but also diverges from essential anthropological and sociological principles that describe and substantiate the particularity of indigenous and tribal peoples. These were revealed, even in this specific case, by the expert opinions and evidence. For example, expert witness Yáñez Fuenzalida concluded that "if indigenous communal property is not recognized, other connected rights could be violated such as the right to cultural identity, to survival as a people, and to food."<sup>20</sup>

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<sup>15</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153.

<sup>16</sup> *Case of Pueblos Kaliña and Lokono v. Surinam*, para. 133.

<sup>17</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, paras. 148, 149 and 151. Also, similarly: *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 131 and 132; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006, Series C No. 146, para. 118, and *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007, Series C No. 173, para. 90.

<sup>18</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 137. Similarly *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 145*; *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs. Judgment of October 14, 2014. Series C No. 284, para. 111 and 112*; *Case of the Punta Piedra Garifuna People and its members v. Honduras. Preliminary objections, merits, reparations and costs. Judgment of October 8, 2015. Series C No. 304, para. 165*; *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras. Merits, reparations and costs. Judgment of October 8, 2015. Series C No. 324, para. 100*; *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs. Judgment of November 25, 2015. Series C No. 309, para. 129*, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 115.

<sup>19</sup> Cf. *Human rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission Resolution 2001/57*. February 4, 2002. Doc. E/CN.4/2002/97, para. 57.

<sup>20</sup> Similarly, the *amicus curiae* brief of DPLF and other organisations underlined the connection between food and adequate land titles. It indicated that although the violation of the right of access to culturally appropriate food was

19. Second, by removing the rights to cultural identity and a healthy environment from the support of Article 21 of the Convention, there is a risk of weakening the singularity of the rights of indigenous and tribal peoples. Using the excuse of a direct and autonomous protection of the ESCER under Article 26 of the Convention subjects such peoples to the same conditions as the general population, disregarding their unique, inherent and differentiated characteristics. In this regard, the Court's case law has been clear in indicating that the right of indigenous peoples to their territory is not a privilege to use the land, but rather a right that must be respected to ensure their very existence.<sup>21</sup> Without doubt, what was needed in this case, if the intention was to provide them with multi-level protection, was not to disassociate the possession of the land so comprehensively from the environmental and cultural rights, but rather to determine the violation of Article 21 in relation to Article 26 of the Convention.

20. Third, this change in the legal framework from Article 21 to Article 26 of the Convention not only constitutes an erroneous understanding of the particularities of the rights of indigenous and tribal peoples, but also opens up a hazardous pathway towards an incorrect approach as regards the effectiveness of the State obligations towards them. There is no doubt that, if a violation had been declared of Article 21 of the Convention in connectivity with the rights to cultural life, as regards their cultural identity, to a healthy environment, to adequate food, and to water, there would have been an immediate and effective obligation for the State to comply with this. However, the literal wording of Article 26 of the Convention establishes specifically that the obligations it contains are of a "progressive" nature. In other words, they are enforceable based on the adequacy of public policies and of the State's capacity to implement them. The ESCER, by their nature, are rights that depend for their realization on the existence of the material conditions. Also, they are not "homogeneous" rights, because they have a varied scope according to the economic capabilities and the characteristics of the State and its bureaucratic apparatus. Consequently, there is no uniform standard for compliance with these obligations; rather their content may depend on the specific actions that each State is able to implement. The error of disconnecting the justification for indigenous rights from Article 21 of the Convention is that it lessens their peremptory nature. We understand, as did the Court up until this time, that the human rights of members of indigenous and tribal peoples cannot be subject to conditions that relate to the progressivity of their rights; rather they are rights that must be complied with immediately and effectively.

21. Fourth, another factor to stress is the fragility of the majority that took the decision, ratified by the qualifying vote of the President. Despite the validity and the sufficiency of the majority to take the decision based on the Court's statutory and regulatory provisions, this particular way of achieving a majority reveals that the issue merited consensus and greater consistency in its development, to the extent that its purpose is the effective protection of rights rather than an apparently innovative advance in case law that, in any case, is far from being consolidated.

22. Fifth, as I have maintained in my concurring and dissenting opinions on the issue of the ESCER, the analysis of the violations by connectivity may have the same practical result

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closely linked to the violation of the territorial aspect and may derive from the same act that results in State responsibility (such as the failure to issue a land title in favor of the community), it was important to maintain a conceptual distinction between the two aspects in order to "perceive holistically the severity" of the violation of the rights.

<sup>21</sup> Cf. *Case of the Moiwana Community v. Suriname*, para. 211, and *Case of the Xucuru Indigenous People and its members v. Brazil*, para. 117.

as the “autonomous” analysis proposed by the majority in recent judgments. Evidently, the advantage of the analysis by connectivity is that it protects rights without generating institutional attrition and the argumentative and evidentiary weakness that gives rise to an analysis that draws different conclusions.

**D) The rights of indigenous and tribal peoples have direct legal effectiveness and do not “require” domestic laws that develop them to give them effect**

23. The rights of indigenous and tribal peoples to property demarcation, delimitation and titling – as the other rights of the indigenous population in general – are rights with direct and immediate legal effect. In other words, they do not require laws to give them effect. Thus, international responsibility arises when these rights are violated; consequently, the international judgment cannot be subordinated to the enactment of laws. In this regard, the majority decision may lead to numerous difficulties. The judgment establishes, in paragraphs 54 and 160 that, “there can be no doubt that the State recognizes the right to indigenous communal property” and that this “should be understood to be operative inasmuch as the State has the immediate and unconditional obligation to respect this.” It even adds the logical consequence of this premise which is that “[t]he possible absence of domestic laws does not excuse the State.” However, in contradiction to this it establishes that “the existing legal regulations are insufficient to provide legal certainty to the right to indigenous communal property since they fail to establish specific procedures that are appropriate for this purpose.”<sup>22</sup>

24. The Court has indicated that Article 2 of the Convention “obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms protected by the Convention.”<sup>23</sup> However, in this case, as mentioned above, the dispute lay in the actions taken by the State in the domestic sphere – that is, it referred to the lack of due diligence of the authorities that resulted in their ineffectiveness – and not necessarily in the difficulties resulting from the design of the legislative measures.

25. In this regard, the criteria adopted by the Court in similar circumstances is illustrative. In the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, the victims’ representatives and the Inter-American Commission also alleged the absence of an adequate and effective procedure for the protection of indigenous territories vis-à-vis third parties.<sup>24</sup> The Court verified that, indeed, in Panama there was no specific procedure for removing third parties who occupied the collective territories of the indigenous communities. However, it considered that it was neither essential nor necessary based on Article 2 of the Convention to create specific legal instances or actions or laws to ensure the rights of the indigenous population. The previous criteria should have been followed in this case because considering that the legal certainty of indigenous communal property is contingent upon the existence of legislative regulation ends up by generating an effect of lack of protection and lack of the direct legal effect of this right.

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<sup>22</sup> Paragraph 353.

<sup>23</sup> Cf. *Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 51, and *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 140.

<sup>24</sup> *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 284, paras. 188 to 198

26. I should point out with concern that, from the perspective of case law precedent, it would appear that an exception has been introduced, or at least a reason for delaying the State's obligations in relation to the indigenous and tribal communities of our countries. Evidently, the appropriateness of enacting laws to protect them is a completely different issue. Without doubt it is desirable and opportune that legal protection mechanisms are developed, but we cannot wait for the existence of a legal structure or architecture for human rights to be effective at the domestic level.

### **E) Problems of monitoring compliance with the measures of reparation on the restitution of the lands as regards timing and details**

27. Lastly, but no less important, I wish to refer to the problems arising from the seventeenth operative paragraph, which imposes on the State the obligation to present bi-annual reports on compliance with the State obligation to "adopt and conclude the necessary actions, whether these be legislative, administrative, judicial, registration, notarial or of any other type, in order to delimit, demarcate and grant a collective title that recognizes the ownership of their territory to all the indigenous communities identified as victims."<sup>25</sup>

28. First, I should point out that I do not disagree with the adoption of this measure of reparation, because I consider that, in this case, there was a violation of Article 21 of the Convention. Nevertheless, I consider that the criteria based on which it is sought to monitor this measure are disproportionate. In general terms, my disagreement is based on the way in which, recently, the Court is monitoring compliance with its judgments by activities that are not appropriate due to the principle of complementarity. In this case, the Court determined that "it will monitor" in detail and very frequently – every six months – compliance with this measure of reparation. I consider that, if it does this, the Court will lose sight of the goal, in between actions plans, concrete activities and short-, medium- and long-term objectives. All the foregoing are absolutely necessary actions to ensure the effectiveness of the rights, but they do not require the direct oversight of a court, especially an international court. Ultimately, this measure introduces just one more element that could render the excellent objectives sought by the judgment inoperable.

29. In addition, I should point out that the level of specificity or responsibility of the Court when monitoring this measure is unclear. In other words, is it the Court that will approve the specific plans? Will the Court issue a new order on monitoring compliance every six months giving the green light to or rejecting specific actions? Over and above the theoretical and legal limitations that arise from the text of the Convention establishing the Court's competences and their complementary nature, are the practical restrictions: that this complex interaction between the State and the Court, converts the Court into a sort of comptrollership of the State's activities. Similarly, in the case of *Carvajal Carvajal et al. v. Colombia* relating to the international responsibility of the State for the violation of the rights to life and to freedom of expression of a journalist, the Court ordered the State to forward the periodic reports that it sends to the specialized bodies of the OAS and the United Nations concerning the measures implemented for the protection of journalists in Colombia, without establishing a temporal limit.

30. One may wonder whether these measures are being ordered in a quest for institutional protagonism that will disproportionately increase the activities of monitoring compliance. Moreover, this could directly conflict with the functions of other institutions such as the Inter-American Commission, whose work of monitoring, prevention and advocacy are fundamental within the framework of the respective competences of the organs of the inter-American

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<sup>25</sup> Paragraph 327.



system of human rights. I am obliged to note that this tendency to seek structural approaches, without specific violations of rights, in both monitoring compliance and in provisional measures, does not correspond to the functions of this Court and may end up undermining the effectiveness of its decisions.

Humberto Antonio Sierra Porto  
Judge

Pablo Saavedra Alessandri  
Secretary

**SEPARATE OPINION OF  
JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

**CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT  
ASSOCIATION (OUR LAND) V. ARGENTINA**

**JUDGMENT OF FEBRUARY 6, 2020  
(Merits, reparations and costs)**

**INTRODUCTION**

1. Almost 20 years have passed since the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) decided the first case in which it addressed indigenous communal property and referred to the special relationship that the indigenous peoples and communities have with their lands, territories and natural resources.<sup>1</sup>

2. Since then, and in subsequent cases,<sup>2</sup> the Inter-American Court has adopted a broad vision of what “land” and “territory” signify for the original communities that inhabit the States that compose the inter-American system. And, even though the Inter-American Court was not the first international organ to address territoriality as part of the life of the indigenous and tribal peoples,<sup>3</sup> in each of the cases in which it has had occasion to rule on the issue, it has made a consistent and considerable effort to conceptualize comprehensively the obligations that States must comply with to respect and ensure the rights of these peoples and communities.

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<sup>1</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 71. The *preliminary objections* had previously been decided in a judgment of February 1, 2000.

<sup>2</sup> The Inter-American Court has extensive case law on the rights of indigenous and tribal peoples and communities in relation to their territories. The Court has addressed this issue following the leading case – the said *Case of the Mayagna (Sumo) Awas Tingni Community* – in: *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125; *Case of the Sawhoyamaya Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172; *Case of the Xákmok Kásek Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245; *Case of the Afro-descendant Communities displaced from Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2013. Series C No. 270; *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 284; *Case of the Garifuna Community of Punta Piedra and its members v. Honduras. Preliminary objections, merits, reparations and costs.* Judgment of October 8, 2015. Series C No. 304; *Case of the Garifuna Community of Triunfo de la Cruz and its members v. Honduras, Merits, reparations and costs.* Judgment of October 8, 2015. Series C No. 305; *Case of the Kaliña and Lokono Peoples v. Suriname, Merits, reparations and costs.* Judgment of November 25, 2015. Series C No. 309, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 5, 2018. Series C No. 346.

It is important to stress that the indigenous and tribal case law is not exhausted by these cases related to their territory, and the list is merely illustrative of that issue. No reference is made to cases concerning sexual violence, political participation, forced displacement, deprivation of liberty, extrajudicial executions or massacres.

<sup>3</sup> For example, the United Nations Human Rights Committee, at least starting with the 1990 case of *Lubicon Lake Band v. Canada*, has ruled on the rights of indigenous peoples with regard to natural resources.

3. The case of the *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina* (hereinafter “the judgment” or “the *Lhaka Honhat* case”)<sup>4</sup> adds to the precedents that have addressed the direct justiciability of the economic, social, cultural and environmental rights (hereinafter “the ESCER” or “the social rights”)<sup>5</sup> and reaffirms that, in relation to the civil and political rights, the former have their own content and scope that may be protected autonomously, but interdependently and indivisibly, a position that I have maintained since the case of *Suarez Peralta et al.*<sup>6</sup>

4. The *Lhaka Honhat* case represents a milestone in inter-American case law for three reasons fundamentally. First, it is the first occasion on which the Inter-American Court rules autonomously on ESCER related to indigenous peoples and communities. Second, contrary to the precedents that the Court has had the occasion to examine, the judgment declares the violation of four ESCER that may be derived from and protected by Article 26 of the Pact of San José: the right to cultural identity, regarding participation in cultural life; the right to a healthy environment; the right to food, and the right to water.<sup>7</sup> Third, the reparations ordered have a differentiated focus, attempting to redress the violation of each of the social, cultural and environmental rights that the judgment declared had been violated.

5. It should not be overlooked that, in their “brief with pleadings, motions and evidence,” the victims’ representatives emphasized that they were asking the Court to “declare the violation of Article 26 of the American Convention owing to the violation of the rights to a healthy environment, to cultural identity, and to food, *as autonomous rights*,” all rights that – they asserted – were derived from the economic, social, educational, scientific and cultural norms contained in the Charter of the Organization of American States” (hereinafter “the OAS Charter”).<sup>8</sup>

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<sup>4</sup> *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400.

<sup>5</sup> *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340; *Advisory Opinion OC-23/17* of November 15, 2017. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights).* *Advisory Opinion OC-23/17* of November 15, 2017. Series A No. 23; *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344; *Case of San Miguel Sosa et al. v. Venezuela, Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348; *Case of Poblete Vilches et al. v. Chile, Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, and *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395.

<sup>6</sup> In my concurring opinion in the case of *Suárez Peralta*, I stated that: “15. The possibility that this Inter-American Court rule on [the justiciability of the ESCER] derives, first, from the ‘interdependence and indivisibility’ that exists between the civil and political rights and the economic, social and cultural rights. Indeed, [in the *Suárez Peralta* case,] the Court expressly recognized this characteristic, because all rights must be understood integrally as human rights, without any specific hierarchy, and enforceable at all times before the competent authorities.”

<sup>7</sup> This matter is of particular relevance because the judgment indicates that several rights may be derived simultaneously from the OAS Charter in a specific case.

<sup>8</sup> As indicated in footnote 173 of the judgment: “In addition to Article 26 [of the American Convention], the representatives alleged, in relation to that article and based on the referral it makes to the provisions of the Charter of the Organization of American States: (a) as a normative basis for the right to a healthy environment, Articles 30, 31, 33 and 34 of the Charter; (b) as a normative basis for the right to “cultural

6. Following this claim, the State, in its answering brief, did not file a preliminary objection on the Inter-American Court's competence to examine alleged violations of the ESCER contained in Article 26 of the Pact of San José. To the contrary, it set out the reasons why they were not violated in this specific case, which reveals that there was no dispute with regard to the justiciability of these rights under this article of the American Convention. It is also worth emphasizing that, in its brief with "final observations," the Inter-American Commission indicated that:<sup>9</sup>

Although the Commission did not determine a violation of Article 26 of the Convention in its Merits Report 2/12, in view of recent developments in the Court's case law, it considers it important that the Court develop, for the first time, the violation of Article 26, with regard to the territorial rights of indigenous peoples, in particular as regards the right to food and other pertinent rights.

7. It should be stressed that this is not the first time that the Inter-American Court has been asked – either by the Inter-American Commission or by the victims' representatives – to rule on the content of Article 26 in relation to the rights of indigenous communities, over and above the protection that Article 21 of the American Convention may grant in relation to their lands. In the *Yakye Axa* (2005)<sup>10</sup> and *Sarayaku* (2012)<sup>11</sup> cases, the Inter-American Court had already examined the alleged violation of Article 26 of the Pact of San José, without considering that this article has been violated. Thus, the relevance of this case for inter-American and international case law by settling a pending debt with the indigenous and tribal peoples and communities of our region.

8. Furthermore, it is important to underline the special interest that the *Lhaka Honhat* case has aroused in civil society, as revealed by the numerous and appreciated *amicus curiae* briefs submitted by associations, institutions and individuals,<sup>12</sup> which were extremely useful and cited throughout the judgment as noted below.<sup>13</sup> Several of them referred to the competence to examine the autonomous violation of the ESCER protected by Article 26 of the American Convention, in light of the methodology adopted

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identity", Articles 2, 3, 17, 19, 30, 45, 48 and 52 of the Charter and Article XIII of the American Declaration on the Rights and Duties of Man, and (c) as a normative basis for the right to food, also the said Charter and Declaration, in their Articles 34.j and XI, respectively."

<sup>9</sup> Brief with final observations presented by the Inter-American Commission on Human Rights in this case, para. 41. It is understandable that the Commission did not determine the violation of 26 of the Pact of San José in the Merits Report, because this report was issued in 2012, several years before the change in case law, in the 2017 *Case of Lagos del Campo*, regarding the direct justiciability of the ESCER.

<sup>10</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125.

<sup>11</sup> *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245.

<sup>12</sup> The *amicus curiae* briefs were presented by: (i) Asociación de Abogados y Abogadas de Derecho Indígena (AADI) and the Servicio Paz y Justicia (SERPAJ), (ii) the Human Rights Center of the Jurisprudence Faculty of the Pontificia Universidad Católica del Ecuador; (iii) the Fundación Ambiente y Recursos Naturales (FARN); (iv) the Due Process of Law Foundation (DPLF), the Human Rights Clinic of the University of Ottawa, the Democracy and Human Rights Institute of the Pontificia Universidad Católica del Perú, the Center for Studies on International Human Rights Systems of the Universidade Federal do Paraná, the International Human Rights Clinic of the Universidad de Guadalajara, and the O'Neill Institute for National and Global Health Law at Georgetown University Law Center; (v) various organizations coordinated by the Secretariat of the International Economic, Social and Cultural Rights Network (ESCR-Net); (vi) Tierraviva a los pueblos indígenas del Chaco (hereinafter "Tierraviva"); (vii) the Legal Clinic of the Human Rights Center of the Law Faculty of the Universidad de Buenos Aires (CDH-UBA), and (viii) Oliver De Schutter, Professor at the Université catholique de Louvain (UCL) and former United Nations Special Rapporteur on the right to food (2008–2014).

<sup>13</sup> See *infra*, section IV of this opinion: "The *amici curiae* as a means of dialogue between civil society and the Inter-American Court".

by the Inter-American Court in its precedents on the issue since the changes made in its case law in 2017.

9. Based on the above, and on my opinions in other cases on this matter,<sup>14</sup> I am issuing this separate opinion in order to reflect on some relevant aspects for inter-American public order that arise from this judgment. To this end, I have divided this opinion as follows: **I.** The land and the territory: their differentiated protection based on the American Convention on Human Rights and the ESCER (*paras. 10 to 41*); **II.** Autonomy and interdependence of human rights (*paras. 42 to 59*); **III.** Reparations focused on economic, social, cultural and environmental rights (*paras. 60 to 69*), **IV.** The *amici curiae* as a means of dialogue between civil society and the Inter-American Court (*paras. 70 to 82*), and **V.** Conclusions (*paras. 83 to 87*).

### **I. THE LAND AND THE TERRITORY: THEIR DIFFERENTIATED PROTECTION BASED ON THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE ESCER**

10. The Inter-American Court, in the evolution of its case law, has substantiated rights of indigenous and tribal peoples and communities related to their land and territory through the right to property contained in Article 21 of the American Convention. This should not suggest that the territorial rights of indigenous peoples are circumscribed by or assimilate an aspect that is merely economic or patrimonial.

11. The Inter-American Court indicated this in the first judgment in which it addressed this matter as the central issue in dispute. Thus, in 2001, when deciding the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, it stated that “among indigenous peoples there is a communal tradition regarding a form of communal ownership of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.” It also clarified that “[f]or indigenous communities, their relationship to the land is not merely a matter of possession and production, but a physical and spiritual element that they must enjoy fully, even to preserve their cultural legacy and transmit this to future generations.”<sup>15</sup>

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<sup>14</sup> See the opinions on this matter that I have issued in the following judgments: *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261; *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 24, 2015. Series C No. 296; *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2016. Series C No. 329; *Case of Yarce et al. v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2016. Series C No. 325; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340; *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 341; *Case of San Miguel Sosa et al. v. Venezuela, Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375 and *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395.

<sup>15</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 149. In that decision and subsequently, the Inter-American Court stressed that “the close ties of the indigenous peoples to the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival and the preservation and transmittal of these to future generations” (*Case of the Plan de Sánchez Massacre. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 85, and *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 131.

On the same occasion, the Inter-American Court indicated the right of the indigenous peoples “to live freely in their own *territories*”;<sup>16</sup> Subsequently, it emphasized the “unique and lasting ties that unite the indigenous communities to their ancestral territory.”<sup>17</sup>

12. In my opinion, this important – and transcendental – precedent has different components that may be protected in a differentiated manner depending on the content of the right that has been violated. In this understanding, “the land” may include some aspects that are protected by Article 21 from the perspective of communal property. On the other hand, there is the more general concept of “the territory” (that although it includes the land as one of its elements, does not consist merely of this). Thus, the territory includes other more specific elements that can be protected – as occurred in the *Lhaka Honhat* case – by the rights protected by Article 26 of the American Convention in relation to the social, cultural and environmental rights. These elements include water, environmental protection, the resources on which the diet of indigenous peoples is based, and also their relationship with the territory as an expression of their cultural identity.

13. In this regard, the content of Article 13 of Convention No. 169 of the International Labour Organization is particularly important;<sup>18</sup> and this is a convention that has been signed and ratified by Argentina:<sup>19</sup>

#### Part II. Land

##### Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of **their relationship with the lands or territories, or both** as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. **The use of the term *lands* in Articles 15 and 16 shall include the concept of territories**, which covers the total environment of the areas which the peoples concerned occupy or otherwise use. (bold added)

14. As noted from the above article transcribed from ILO Convention No. 169, the first paragraph refers to “lands or territories” and then adds “or both”, while the second paragraph clarifies that the term “lands” in Articles 15 and 16 of this instrument – referring to rights over natural resources and standards for moving indigenous peoples from the lands they occupy – “shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” The ILO has indicated, when explaining Article 13 cited above that “[t]he territory is the

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<sup>16</sup> *Case of the Mayagna (Sumo) Awas Tingni Community Tingni v. Nicaragua, Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 149.

<sup>17</sup> *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 131.

<sup>18</sup> This important international treaty was adopted more than 30 years ago, on June 27, 1989, in Geneva, Switzerland, and entered into force on September 5, 1991. To date, according to information published by the International Labour Organization, it has been signed and ratified by 23 countries, 14 of them in Latin America: Argentina, Bolivia (Plurinational State of), Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Nicaragua, Norway, Netherlands, Paraguay, Peru, Spain and Venezuela, (Bolivarian Republic of).

<sup>19</sup> Argentina acceded to Convention No. 169 by national Law 24,071, enacted on March 4, 1992, and promulgated on April 7 that year. The State ratified the treaty on July 3, 2000. According to its Article 38(3), it entered into force for Argentina on July 3, 2001.

basis for most indigenous peoples' economies and livelihood strategies, traditional institutions, spiritual well-being and distinct cultural identity."<sup>20</sup>

15. The United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007, very clearly established the protection provided both to the land as part of the territory, in a differentiated manner, and without subsuming "the territory" to the concept of "land." Article 25 indicates:

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used **lands, territories, waters and coastal seas and other resources** and to uphold their responsibilities to future generations in this regard. (Bold added)

16. In addition, Article 26 of this Declaration clarifies:

Article 26

1. Indigenous peoples have the right to the **lands, territories and resources** which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control **the lands, territories and resources** that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these **lands, territories and resources**. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. (Bold added)

17. The concepts indicated by the United Nations Declaration were reaffirmed – with certain nuances – in the 2016 American Declaration on the Rights of Indigenous Peoples. In particular, the Declaration added as a differentiated element of the land and the territory, the environment. Thus, Article XIX stipulates:

Article XIX. Right to protection of a healthy environment

1. Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being.
2. Indigenous peoples have the right to conserve, restore, and protect **the environment and to manage their lands, territories and resources in a sustainable way**.
3. Indigenous peoples have the right to be protected against the introduction, abandonment, dispersion, transit, indiscriminate use, or deposit of any harmful substance that could adversely affect indigenous communities, lands, territories and resources.
4. Indigenous peoples have the right to the **conservation and protection of the environment and the productive capacity of their lands or territories and resources**. States shall establish and implement assistance programs for indigenous peoples for such conservation and protection, without discrimination. (Bold added)

18. In addition, and revealing the territory and the resources as aspects with a different content from the land, as well as their relationship to the ESCER, the American Declaration stipulates the "social, economic and property rights" in its fifth section, in which Article XXV indicates that:

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<sup>20</sup> International Labour Organization, "Indigenous and tribal peoples' rights in practice. A guide to ILO Convention No. 169." Programme to promote ILO Convention No. 169 (PRO 169). International Labour Standards Department, 2009, p. 91.

Article XXV. Traditional forms of property and cultural survival. Right to **land, territory, and resources**

1. Indigenous peoples have the right to **maintain and strengthen their distinctive spiritual, cultural, and material relationship with their lands, territories, and resources** and to uphold their responsibilities to preserve them for themselves and for future generations.
2. Indigenous peoples **have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.**
3. Indigenous peoples have the right **to own, use, develop and control the lands, territories and resources** that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
4. States shall give **legal recognition and protection to these lands, territories and resources.** Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
5. Indigenous peoples have **the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories, and resources, in accordance with the legal system of each State and the relevant international instruments.** States shall establish special regimes appropriate for such recognition and for their effective demarcation or titling. (Bold added)

19. As we can see, international normative development reveals that the land and the territory are two aspects that concern indigenous peoples and that may be protected in a differentiated although interrelated way in many cases. This is especially clear in the recent American Declaration on the Rights of Indigenous Peoples because it distinguishes “the land” and “the territory” in different paragraphs, but also adds the protection of the “environment” (Art. XIX).

20. The foregoing reveals that the two concepts (“land” and “territory”) are strongly interrelated, but not strictly the same. Indeed, when the international instruments cited refer to “land” and “territory” together (and also to “resources”), they adopt a mechanism that permits a protection that encompasses more completely the connection between the indigenous peoples and their environment. At the same time, it can be inferred from the same normative that the terms have nuances, and the concept of “territory” which denotes the exercise of autonomy or jurisdiction is more encompassing while that of “land” is related more to the notion of a material possession that may be occupied, possessed or owned. The territory encompasses a cultural dimension and a spiritual connection. The right of the indigenous and tribal peoples to determine freely their own social, cultural and economic development includes the right to “enjoy the particular spiritual relationship with the territory they have traditionally used and occupied.”<sup>21</sup>

21. The considerations of the Inter-American Court when ruling on the case of the *Saramaka People v. Suriname* in 2007 would appear to fall within this understanding. The Inter-American Court noted that the members of this people “had a strong spiritual relationship with the territory,” and clarified that “[w]hen using the term ‘territory, the Court refers to the totality of the land and resources that the Saramaka have traditionally used. Thus, the Saramaka territory belongs collectively to the members of the Saramaka people, while the lands within that territory are divided between the twelve Saramaka clans.”<sup>22</sup>

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<sup>21</sup> *Case of the Kaliña and Lokono Peoples v. Suriname, Merits, reparations and costs.* Judgment of November 25, 2015. Series C No. 309, para. 124.

<sup>22</sup> *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 82 and footnote 63. The meaning indicated appears



22. In another judgment, in 2012, the Inter-American Court referred to “incorporeal elements” linked to the territory, understanding that it was “pertinent to underline the deep cultural, intangible and spiritual ties that the community maintains with its territory, to understand more fully the harm caused in the [...] case.”<sup>23</sup>

23. Likewise, in 2014, in the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, the Inter-American Court noted how the “connection” between “territory” and “natural resources” used traditionally had implications for “physical and cultural survival, as well as for the continuity and development of their world view, [...] their traditional way of life, their cultural identity, social structure, economic system, customs, beliefs and traditions.”<sup>24</sup> Similarly, recalling its own precedents,<sup>25</sup> in 2018, the Inter-American Court stated that “[w]hen the ancestral right of the members of the indigenous communities over their territories ignored, other basic rights may be harmed, such as the right to cultural identity and the very survival of the indigenous communities and their members.”<sup>26</sup>

24. It is possible, therefore, based on the said examples, supported by international law, to differentiate the notions of “territory” and “land.” The latter concept would imply physical space, while “territory” should be understood as cultural life, in a broad sense related to that physical space. Thus, there is a connection between “territory” and indigenous “cultural identity.” In the words of the Inter-American Court:

The culture of the members of the indigenous communities corresponds to a particular way of life and to be, to see and to act in the world, constituted based on a close relationship with their traditional territories and the resources found on them, not only because such resources are their principal means of subsistence, but also because they constitute an element that is part of their world vision, spirituality and, consequently, their cultural identity.<sup>27</sup>

25. That said, when deciding the case of *Yakye Axa v. Paraguay* in 2005, the Inter-American Court indicated that “the close relationship of the indigenous peoples with their traditional territories and the natural resources connected to their culture found therein, as well as the incorporeal elements derived from them, should be safeguarded

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to be observed in the judgment delivered by the Court in 2010 in the case of the *Xákmok Kásek Indigenous Community v. Paraguay*. This refers to “lands” in paragraphs 108 to 111, when including consideration on “possession” or “ownership,” or related aspects, but then indicates (in paragraph 114) that “the Court observe[d] that the relationship of the members of the Community with its traditional territory is manifested, *inter alia*, by the development of their traditional activities on [the] lands” (*Case of the Xákmok Kásek Indigenous Community v. Paraguay, Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, paras. 108 to 111 and 114).

<sup>23</sup> Cf. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, paras. 145 and 149.

<sup>24</sup> *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*. Preliminary objections, merits, reparations and costs. Judgment of October 14, 2014. Series C No. 284, para. 112.

<sup>25</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 147, and *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 284, para. 18.

<sup>26</sup> *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 5, 2018. Series C No. 346, para. 115.

<sup>27</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 135.

by Article 21 of the American Convention” on the right to property.<sup>28</sup> This has subsequently been repeated with nuances.<sup>29</sup>

26. The safeguard of territorial elements founded on the right to property is based on the aforementioned relationship between “territory” and “land,” so that the right to property in relation to the land permitted the protection of the territory, by a broad understanding of collective property. This finds justification and has been effective in rulings of the Inter-American Court to protect rights of indigenous and tribal peoples, especially at the jurisprudential stage of the indirect protection, or protection by connectivity, of the ESCER.

27. However, this does not prevent noting that there are different aspects that may be related to the “territory” and that there are numerous rights that, in different cases, may be affected. Although the Inter-American Court had generally examined violations related to the “territory” based on Article 21 of the American Convention, there is no reason to exclude *a priori* the possibility of analyzing other rights. Depending on the case, this may even be more appropriate, considering the breadth of the notion of “territory” and the different rights that it encompasses. This has had special relevance since the case of *Lagos del Campo v. Peru*,<sup>30</sup> when the Inter-American Court has been analyzing the ESCER autonomously under Article 26 of the American Convention, and these rights may reflect territorial problems, as in the *Lhaka Honhat* case.

28. In my opinion, in the *Lhaka Honhat* case the Inter-American Court has clarified that, on the one hand, “the land” as indigenous ancestral collective property has a content that may be protected by Article 21 of the Pact of San José. On the other, when analyzing the ESCER in a separate chapter of the judgment, resources such as water, the products that form part of the traditional diet, and the natural environment are differentiated as a form of cultural expression and of identity; as elements that although they are connected to the “land” are, in reality, part of the concept of “territory,” an element that is much broader and more comprehensive from the point of view of the world view of the indigenous communities owing to their close relationship to their territory.

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<sup>28</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 137.

<sup>29</sup> For example, the case of the *Sawhoyamaya Indigenous Community v. Paraguay*, in which the Inter-American Court reiterated the above, although referring to “lands” instead of “territory” (*Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 118). The considerations included on Article 13 of ILO Convention 169, which refers to both concepts, should be borne in mind. Subsequently, the Inter-American Court has referred to the protection that the indigenous (or tribal) “territory” receives under Article 21 of the American Convention. See the following, among others, with regard to the protection of the territory based on the right to property: *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama.* Preliminary objections, merits, reparations and costs. Judgment of October 14, 2014. Series C No. 284, para. 112; *Case of the Garifuna Community of Punta Piedra and its members v. Honduras.* Preliminary objections, merits, reparations and costs. Judgment of October 8, 2015. Series C No. 304, para. 167; *Case of the Garifuna Community of Triunfo de la Cruz and its members v. Honduras, Merits, reparations and costs.* Judgment of October 8, 2015. Series C No. 305, para. 101; *Case of the Kaliña and Lokono Peoples v. Suriname, Merits, reparations and costs.* Judgment of November 25, 2015. Series C No. 309, para. 124; and *Case of the Xucuru Indigenous People and its members v. Brazil.* Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018. Series C No. 346, para. 116.

<sup>30</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340.

29. I therefore consider it appropriate that the judgment addresses, in a separate chapter, the violations related to the rights to a healthy environment, water and food and their particular impact on the right to cultural identity as a specific offshoot of the right to take part in cultural life.<sup>31</sup> Specifically, Chapter VII.2 of the judgment,<sup>32</sup> includes an autonomous analysis of each of the rights that is of vital importance in this case because the indigenous peoples have a special relationship with their territories, and especially with the elements that these territories contain.

30. Regarding this way of addressing the issue in the judgment, the Inter-American Court's decision to determine a violation of the right to water, which was not directly alleged by the parties or the Inter-American Commission, should be emphasized. It is true that this right – as the judgment stresses – is closely related to the others, such as the rights to a healthy environment and to food. However, it has its own specificity and has particular importance for the indigenous peoples and communities because access to, and the use of, water and the way in which this is implemented, is central not only because of its obvious implications for the physical survival of the peoples, but also owing to its relevance for the development of their cultural life, and the distinctive indigenous way of life.<sup>33</sup>

31. The judgment underlines how the presence on the territory of non-indigenous settlers and activities alien to the traditional practices of the communities, such as livestock farming, affect access to water – leading to desertification and contamination – as well as the possibilities of “survival of the aboriginal cultures that [...] depend on the [Pilcomayo] river,” as one of the expert witnesses indicated. And this is despite the fact that the State itself had considered that the area should be preserved and the environment protected. In this context, evidence submitted in the case indicated that most of the indigenous communities were unable to obtain potable water and sufficient food, and that their indigenous way of life had also been altered. Thus, in a case with the characteristics of the *Lhaka Honhat* case, the appropriate nature of an analysis such as the one made by the Court, which considered the interrelationship between water, the environment and food and cultural life. This analysis, by interrelating the different rights and considering the particular characteristics of the indigenous peoples, avoided

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<sup>31</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, paras. 202 to 242.*

<sup>32</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, paras. 186 to 289.*

<sup>33</sup> In this regard, in its paragraphs 227, 228 and 230, the judgment mentions comments made by the CESCR in relation to the importance of considering water a “cultural good,” and its implications for indigenous peoples, which entails the State obligation to protect the water resources that exist on ancestral lands. Also, in the sphere of the United Nations, the Office of the United Nations High Commissioner for Human Rights has indicated that “Water plays an important role in indigenous peoples’ day-to-day existence, as it is a central part of their traditions, culture and institutions. It is also a key element of their livelihood strategies.” Furthermore, that “[n]atural water sources traditionally used by indigenous peoples, such as lakes or rivers, may no longer be accessible because of land expropriation or encroachment. Access might also be threatened by unlawful pollution or over-extraction” (Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 35, “The Right to Water”, pp. 23 and 24). In particular with regard to Argentina, in 2012, the Special Rapporteur on the rights of indigenous peoples reported that numerous situations existed in the country, including in Salta, in which indigenous communities faced difficulties to obtain adequate access to water, and recommended that “[t]he federal and provincial governments should make greater efforts to respond to indigenous peoples’ demands for access to basic services in rural areas, especially water supply services.” He indicated that “[t]he Government should adopt a long-term vision for the social development of these areas, taking into account the importance of traditional lands to the lives and cultures of indigenous peoples” (Human Rights Council, 21st session. Report of the Special Rapporteur on the Rights of indigenous peoples, James Anaya. *The situation of indigenous peoples in Argentina*. July 4, 2012. Doc. A/HRC/21/47/Add.2, para. 111).

a restrictive or biased vision that could have led to a misunderstanding of the full dimension of the problem in this case and the human rights violations committed.<sup>34</sup>

32. In addition, I consider that the way in which this case was decided (that is, by analyzing the issues relating to indigenous communal property in a separate chapter from the analysis of the issues relating to the ESCER) was correct because, to the contrary, the Court would have run the risk of considering that it was only to the extent that indigenous communal property protected by Article 21 was declared violated that possible violations of ESCER related to the indigenous territory could be analyzed.

33. I should emphasize that the separate analysis of Articles 21 and 26 of the American Convention does not ignore the Court's previous case law in relation to the territory, which includes the land and the natural resources. To the contrary, it reinforces the thesis that, in the case of indigenous peoples who have a special relationship with their ancestral territories, it is necessary to make a detailed analysis of each and every element that forms part of their rights; in other words, both "their right to indigenous collective property" and their "right to the territory."

34. Consequently, when taking a decision on some of the elements included in the concept of "territory" by means of Article 26 of the American Convention – in other words, on the rights to a healthy environment, to water, to food and to take part in cultural life – the Inter-American Court is not disregarding the extensive case law on this matter. To the contrary, the Court is optimizing the way in which this concept should be understood, which goes beyond the traditional understanding of the property protected by Article 21 of the American Convention.

35. Similarly, when deciding the case of the *African Commission on Human and Peoples' Rights (on behalf of the Ogiek indigenous community) v. Kenya* in 2017, the African Court on Human and Peoples' Rights separated its analysis of the land (property) from the content of other rights, such as the right to culture and the right to dispose of natural resources. Regarding the former, it indicated that "in its classical conception, the right to property usually refers to three elements: namely the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is the right to transfer it (*abusos*)";<sup>35</sup> therefore "it follows in particular from Article 26(2) of the Declaration [of the United Nations on the Rights of Indigenous Peoples] that the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land."<sup>36</sup>

36. On the other hand, regarding the right of the peoples to enjoy their wealth and natural resources that are recognized autonomously in Article 21 of the African Charter on Human and Peoples' Rights, the African Court indicated that "[i]nsofar as [the right

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<sup>34</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020*. Series C No. 400, paras. 261, 269, 277, 278 and 280 to 284.

<sup>35</sup> *ACoHPR, African Commission on Human and Peoples' Rights (Ogiek) v. Kenya*, Application No. 006/2012. Judgment of May 26, 2017, para. 124

<sup>36</sup> *ACoHPR, African Commission on Human and Peoples' Rights (Ogiek) v. Kenya*, Application No. 006/2012, Judgment of May 26, 2017, para. 127.

to property] has been violated by the [State], the Court holds that the latter has also violated Article 21 of the Charter, since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands." In this understanding, the African Court, instead of subsuming the content of the right "to enjoy the natural resources" within the content of the right to property, analyzed each of the rights in its judgment, understanding that they each had their own content. As the judgment indicates, this does not deny the link that exists between the violations.

37. In the judgment in the *Ogiek* case, in keeping with this position of understanding the content of each right autonomously, the African Court made a distinction between "the right to religion" and the "right to culture." In this regard, the African Court indicated that "[t]he right to freedom of worship [or, in other words, the right to religion] offers protection to all forms of beliefs regardless of denominations: theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief." However, it clarified that "[t]he Court notes that, in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment." It also indicated that "[i]n indigenous societies, in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment. Any impediment to, or interference with accessing the natural environment, including land, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship." On this basis, the African Court concluded that Article 8 of the African Charter on the right to freedom of worship had been violated.<sup>37</sup>

38. The African Court also distinguished between the violation of Article 8 and the content of the violation of the cultural rights established in Article 17(2) and 17(3) of the Banjul Charter.<sup>38</sup> In this regard, that Court indicated that "[t]he right to culture enshrined in [...] the [African] Charter is to be considered in a dual dimension, in both its individual and collective nature. It ensures protection, on the one hand, of individuals' participation in the cultural life of their community and, on the other, obliges the State to promote and protect traditional values of the community."<sup>39</sup> In this judgment, it also added that:

The protection of the right to culture goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.<sup>40</sup>

In the instant case, the Court notes from the records available before it that the Ogiek population has a distinct way of life centered and dependent on the Mau Forest Complex. As a hunter-gatherer community, they get their means of survival through hunting animals and gathering

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<sup>37</sup> ACoHPR, *African Commission on Human and People's Rights (Ogiek) v. Kenya*, Application No. 006/2012, Judgment of May 26, 2017, para. 165.

<sup>38</sup> ACoHPR, *African Commission on Human and People's Rights (Ogiek) v. Kenya*, Application No. 006/2012, Judgment of May 26, 2017, para. 170.

<sup>39</sup> ACoHPR, *African Commission on Human and People's Rights (Ogiek) v. Kenya*, Application No. 006/2012, Judgment of May 26, 2017, para. 177.

<sup>40</sup> ACoHPR, *African Commission on Human and People's Rights (Ogiek) v. Kenya*, Application No. 006/2012, Judgment of May 26, 2017, para. 179.

honey and fruits; they have their own traditional clothes, their own language, distinct way of entombing the dead, practicing rituals and traditional medicine, and their own spiritual and traditional values, which distinguish them from other communities living around and outside the May Forest Complex, thereby demonstrating that the Ogieks have their own distinct culture.”<sup>41</sup>

39. These precedents of the African Court in the *Ogiek* case and, now, the Inter-American Court in the *Lakha Honhat* case position themselves as two precedents that show that each of the rights that can be analyzed in a case (in these judgments on indigenous and tribal issues) have specific connotations that should be observed and assessed autonomously to be able to understand and comprehend integrally the way in which the indigenous peoples relate to their environment. And, it is precisely the possibility of the autonomous justiciability of the ESCER by means of Article 26 of the Pact of San José, that allows the Inter-American Court to make this analysis without negating its previous case law.

40. Evidently, the difference between “land” and “territory” cannot be understood categorically in relation to indigenous and tribal peoples, as revealed by the Court’s case law. However, the use of the two concepts permits, among other matters, distinguishing and comprehending diverse characteristics that may harm the rights of indigenous peoples. Thus, many violations of their cultural life and associated rights may be linked to the free enjoyment of the territory, but not in all cases necessarily be related to the right to property. At times, violations of the rights of indigenous or tribal peoples, while related to the territory, may best be analyzed based on rights other than the right to property.

41. The evolution of inter-American case law, which has resulted in an autonomous understanding of the ESCER, helps to underscore the said differences and nuances and to make a more precise analysis: it will not always be necessary or pertinent to turn to the right to property in order to examine violations of rights associated with the territory. The judgment in the *Lhaka Honhat* case is an example of this. By examining rights under Article 26, the Court has not tried to deny the relationship between the rights to a healthy environment, adequate food, water and cultural identity and the territory. To the contrary, in the instant case, this relationship is undeniable, as well as the interdependence between them. But this has had a separate and differentiated impact on the said rights that allows them to be examined autonomously, in relation to the violation of the right to property

## **II. AUTONOMY AND INTERDEPENDENCE OF HUMAN RIGHTS**

42. The autonomy of rights (both ESCER and civil and political) in no way opposes their interdependence. Indeed, the concept of interdependence can only be understood based on autonomy. Interdependence is predicated with regard to autonomous entities; to the contrary, it would be meaningless. The meaning of these concepts, thus, should eliminate an understanding that, by emphasizing the connectivity between the rights, results in the enforceability of one of them being a necessary condition for the enforceability of others.

43. “Autonomy” refers to the fact that each right has its own legal content, that differs from that of others. The different rights refer to different entitlements (health, liberty, education, life, etc.), and a series of obligations must be complied with in order

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<sup>41</sup> ACoHPR, *African Commission on Human and People’s Rights (Ogiek) v. Kenya*, Application No. 006/2012, Judgment of May 26, 2017, para. 182.

to protect them. Each right contains particularities that give meaning to its differentiated legal recognition.

44. Thus, merely as an example, based on considerations of the United Nations Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR"), the right to social security, as it is established in the International Covenant on Economic, Social and Cultural Rights, entails, among other matters, the establishment by the States of "social security schemes that provide benefits to older persons starting at a specific age, to be prescribed by national law"; and that provide "benefits" to older persons who reach the prescribed age even if they "have not completed the qualifying period of contributions, or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income."

45. It would appear that this State obligation to provide old-age benefits, not necessarily related to employment, exceeds the obligations that might be derived from other rights, because it does not derive from them *a priori*. And this is despite the fact that, in different circumstances, the possible violation of the right to social security could have an impact on the enjoyment of other rights. The Committee itself has clarified that the content of the right to social security is different from that of other rights: "The right to social security plays an important role in supporting the realization of many of the rights in the Covenant, [...h]owever, the adoption of measures to realize other rights in the Covenant will not in itself act as a substitute for the creation of social security schemes."<sup>42</sup>

46. This latter concept, that a right can "play an important role in supporting the realization" of others is related to the interdependence of the rights. In 1993, the Vienna Declaration and Programme of Action, which established the international human rights agenda at the global level, stipulated that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally." In 2012, this was reaffirmed in the American sphere by the Social Charter of the Americas which indicates: "the universality, indivisibility, and interdependence of all human rights and their essential role in the promotion of social development and the realization of human potential."<sup>43</sup> No right can be enjoyed in isolation, its enjoyment depends on the enjoyment of all the other rights.

47. The concept of "interdependence" refers to the connection between the rights that means that the realization or satisfaction of some of them depends on that of the others. Thus, for example, it cannot be considered that freedom of conscience and religion can truly be realized if freedom of thought and expressions is not guaranteed.

48. The autonomy of the ESCER based on Article 26 does not deny (cannot deny) their interdependent nature, with each other and with other civil and political rights. When examining cases that involve rights protected by this article, the Court has frequently taken decisions based on this nature. Some examples of this may be mentioned.

49. In the case of *Poblete Vilches v. Chile*, the Inter-American Court noted that the failure to obtain informed consent for a medical act violated not only the exercise of the

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<sup>42</sup> CESCR. 39th session (2007). General Comment No. 19. The right to social security (Art. 9 of the Covenant), paras. 15 and 28.

<sup>43</sup> OAS. General Assembly. Social Charter of the Americas. Adopted in the second plenary session held on June 4, 2012. Doc. OEA/Ser.P AG/doc.5242/12 rev. 1.

right to health, but also the right of access to information and to freely take decisions about one's own body, which had an impact on personal autonomy, and on private and family life. Furthermore, since it was concluded that there had been a relationship between failures in the provision of health care and the suffering and death of the victim, the Court declared that the right to life and to personal integrity had been violated "in relation" to the right to health.<sup>44</sup>

50. In its decision in the case of *San Miguel Sosa et al. v. Venezuela*, the Court verified that the facts of the case revealed that the arbitrary termination of an employment relationship had been used as a form of reprisal and "political discrimination" owing to the exercise of the rights to political participation and to freedom of expression and that, in this regard, the victims were not guaranteed access to justice. The Court therefore determined that there had been a violation of the right to work (Article 26) "in relation" to "the right to political participation, freedom of expression, and access to justice, as well as the principle of non-discrimination."<sup>45</sup>

51. In the case of the *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, the Court also indicated that one "of the fundamental elements of social security is its relationship to the guarantee of other rights," and that the said right was "interrelated" with the right to a decent life, that was infringed in that case. In addition, it concluded that the failure to receive the sums to which the victims had a right, given their right to a pension, also violated the right to property. In that case, this was linked to delays and non-compliance with judgments on pensions. The Court determined that the right to social security, a decent life and property had been violated "in relation" to the rights to judicial guarantees and judicial protection.<sup>46</sup>

52. In the case of *Cuscul Pivaral et al. v. Guatemala*, the Court determined that there had been a violation of the right to health and, in relation to this right, non-compliance with the prohibition of discrimination and the principle of progressivity; but, also, that the lack of adequate medical care had a causal nexus with the suffering and death of certain persons, and it therefore declared that the rights to personal integrity and to life had been violated "in relation" to Article 26, which protects the right to health.<sup>47</sup>

53. In the case of *Hernández v. Argentina*, the Court noted that medical care had not been provided to an individual deprived of liberty and that "the suffering and deterioration of personal integrity caused by the lack of adequate medical care – and the consequent harm to health – of a person deprived of liberty may constitute, in themselves, cruel, inhuman and degrading treatment." It understood that there had been a violation of both personal integrity (which constituted degrading treatment) and the right to health.<sup>48</sup>

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<sup>44</sup> Cf. *Case of Poblete Vilches et al. v. Chile, Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, paras. 136 to 143, 156, 161 to 173 and 198.

<sup>45</sup> *Case of San Miguel Sosa et al. v. Venezuela, Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, paras. 221 and 222.

<sup>46</sup> Cf. *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394, paras. 149, 150 and 184 to 196.

<sup>47</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 127, 139, 148, 158, 159, 163 and 164 and operative paragraphs 5 and 6.

<sup>48</sup> Cf. *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2019. Series C No. 395, paras. 54 to 61 and 96.



54. That said, the examples cited (to which others could be added), differ from an understanding that, based on noting a connectivity between the rights, flatly denies their autonomy.

55. In the specific context of the application of Article 26 of the American Convention, if it is inferred, as the Court has, that this article protects the ESCER, and that the Court has competence to decide on presumed violations of such rights, there is no reason to then make their examination dependent on their connection to any of the other rights established in the American Convention or, eventually, in other treaties for which the Inter-American Court has competence.

56. An interpretation such as the one indicated would lead to an unjustified ranking of the rights established in Articles 3 to 25 of the American Convention, above those included in its Article 26. This would be contrary to the equal rank that, *a priori*, the two groups of rights possess, and that can be inferred from the Preamble to the American Convention itself, which indicates that “the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy *his economic, social, and cultural rights, as well as his civil and political rights.*”

57. On this basis, in the case of *Lagos del Campo v. Peru* in which direct violations of the ESCER were declared for the first time based on Article 26 of the Pact of San José, the Court “reiterated the interdependence and indivisibility that exists between the civil and political rights, and the economic, social and cultural rights because they should be understood integrally and comprehensively as human rights, *without any ranking among them and enforceable* in all cases before the competent authorities.”<sup>49</sup>

58. In addition, a form of analysis, even one that takes Article 26 of the Pact of San José into consideration, but that makes the application of this norm depend on the connectivity of a right recognized in this instrument with another that is not, would result in a partial and limited understanding of the ESCER. This is because the content of the rights included in Article 26 that would be justiciable before the Inter-American Court, would be limited to a right which could be related to the content of another civil or political right incorporated into other articles of the American Convention.

59. The result of this type of interpretation, which I consider cannot be justified, would, in practical terms, return matters to the situation before the change in case law resulting from the case of *Lagos del Campo* in 2017. Accordingly, it would result in the eventual determination of a violation of Article 26 of the Pact of San José only being found if some aspect of an ESCER included in that article could be inferred from other rights that had previously been declared to have been violated. In other words, the mention of Article 26 would be merely accessory and without substance, ranking and establishing categories among human rights.

### **III. REPARATIONS FOCUSED ON ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS**

60. From the perspective of the ESCER, a key aspect is the section of the chapter on reparations entitled “*Measures for the restitution of the rights to a healthy environment, to food, to water and to cultural identity.*” This is unique in inter-American case law on indigenous issues because it does not focus the reparations on the “land” as an element

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<sup>49</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 141.

of communal possession, but rather on the comprehensive restitution of differentiated elements of the "territory" which the Court declared had been violated autonomously in the judgment.

61. Indeed, the autonomous determination of the rights to a healthy environment, to adequate food, to water and to participation in cultural life had concrete consequences on the measures of reparation ordered in the judgment. Having proved the violation of those rights, it was appropriate to determine reparations aimed specifically at redressing these violations. A possible understanding to the contrary, that might have subsumed the violations within the right to property, could have led to more limited reparations aimed only at restoring that right.

62. Consequently, added to the measures requiring the delimitation, demarcation and titling of the property, as well as the removal of the non-indigenous population, the Court ordered other measures of restitution specifically addressed at the rights to a healthy environment, to adequate food, to water and to cultural identity: (a) elaboration by the State of a report identifying critical situations of lack of access to drinking water or to food and the preparation and implementation of an action plan in this regard; (b) preparation and presentation of another report establishing the actions required to achieve the permanent conservation of water resources on indigenous territory, and access to potable water and food, and to avoid the continued loss of the forest and achieve its gradual recovery, and (c) creation of a community development fund to finance actions to recover indigenous culture.<sup>50</sup>

63. It should be emphasized that in view of the complexity of the case and the actions ordered, the Inter-American Court has sought to ensure that the precise definition of the specific actions to be taken is decided subsequently, with the intervention of State authorities and the indigenous communities declared victims and their representatives., The judgment establishes an active intervention of the Inter-American Court in this process based on the assessment of the said reports.

64. Regarding the community development fund, the specific definition of its use – notwithstanding the basic standards established by the Inter-American Court – will also be determined with the intervention of both the State and the indigenous communities. Thus, the judgment established that: (a) the objectives for which the fund is used should be defined by the indigenous communities; (b) on this basis, program design and execution should be defined based on the "active participation" of the indigenous communities and their representatives, and (c) in order to comply with the foregoing, the fund would be administered by a committee on which the indigenous communities and the State would be represented.

65. This way of establishing measures of reparation that relate to the violations of the ESCER seeks to achieve different objectives. On the one hand, it ensures the due participation of the indigenous communities declared victims themselves, as well as through the intervention of their representatives, in the determination of actions that have an impact on the way in which they recover the enjoyment of their rights. On the other, it ensures that the measures are more effective, since the actions can be defined more precisely based on participatory interaction, technical reports and detailed workplans, as ordered in the judgment. Furthermore, this greater precision and effectiveness is sought in order to exercise what could be called a "dynamic control" of

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<sup>50</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*. Judgment of February 6, 2020. Series C No. 400, paras. 331 to 342.

compliance with the measures because some of the details could be decided during the process of monitoring compliance with the intervention of the different parties to the proceedings, including the Inter-American Commission. In this regard, the judgment indicates that the Court, following the observations of the victims' representatives and the Inter-American Commission, will assess the action plans presented by the State, and may request that they be expanded or completed, as appropriate.

66. The judgment also establishes an active role for the Inter-American Commission, encouraging it – always “within the framework of its functions and possibilities,” – “to assume the role of facilitator” between the parties, “to contribute” to compliance with the measures. Lastly, the Court has endeavored to respect the State’s functions and obligations in the determination of the actions. Here, it should be stressed that, not only is it the State that should, pursuant to the said standards, prepare the reports and plan the actions to be taken, but also the measures adopted should be adequate, and “in keeping with State public policies, government plans, and the pertinent provincial or national laws.”<sup>51</sup>

67. The intervention of courts in litigations involving the ESCER is frequently disputed, considering that these rights involve social benefits – which are not unrelated to the civil and political rights – based on reasons that, in different ways, refer to the lack of legitimacy or capacity of jurisdictional organs to define public policies. For example, it is said that the courts lack technical or budgetary information; that they are unable to evaluate such information adequately, and that they do not have legitimacy in this regard (which is usually attributed to executive or legislative organs). Aspects such as these pose – on a case-by-case basis – important challenges to the jurisdictional activity. However, they cannot negate or impair the justiciability or effectiveness of rights that are full in force and autonomous. In this regard, the judgment has attempted to take up this challenge, seeking a way of implementing the measures of reparation that truly restitutes the rights that have been violated and addresses the difficulties and complexity of the activities required to do this.

68. Thus, the Inter-American Court has tried to make an autonomous examination of the ESCER, to establish measures of reparation in keeping with the violation of these rights, and to ensure that these measures are truly appropriate. But also, enabling a subsequent more precise definition of these measures to facilitate their implementation, always under the supervision of the Inter-American Court and within a time frame considered sufficient for their execution.

69. Accordingly, as indicated in the respective chapter, the reparations are founded on social rights and seek to restore the enjoyment of the content of each of these rights that the judgment declared had been violated. I consider that the specificity of these measures of reparation constitutes an example of the Inter-American Court’s ability to establish reparations that are in keeping with the violations of the ESCER and in conformity with the particularities of each case.

#### **IV. THE *AMICI CURIAE* AS A MEANS OF DIALOGUE BETWEEN CIVIL SOCIETY AND THE INTER-AMERICAN COURT**

70. The Court’s first five Rules of Procedure did not include the mechanism of the *amicus curiae*. However, this did not prevent various non-governmental organizations

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<sup>51</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, para. 333, footnote 325.*

submitting *amici curiae* to the Court the first time it ruled on the merits of a contentious case,<sup>52</sup> and this paved the procedural way for this to continue to be the usual practice before the Inter-American Court. It was only in 2009 when, in an amendment to the Rules of Procedure at that time, the definition of this mechanism was included, together with the first specific regulation concerning its presentation.<sup>53</sup>

71. Accordingly, the expression *amicus curiae* refers to “the person or institution, who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing.”<sup>54</sup>

72. The Court’s current Rules of Procedure, in force since January 2010, establish the possibility of submitting an *amicus curiae* brief in contentious cases before the Inter-American Court, and also during the proceedings on monitoring compliance with judgment and on provisional measures.<sup>55</sup> In the case of the Court’s advisory function, the Rules of Procedure establish that “any interested party” may submit “a written opinion on the issues included in the request.”<sup>56</sup>

73. This mechanism has played a significant role in the case law of the Inter-American Court. This is reflected by the fact that *amicus curiae* briefs have been submitted in 143 contentious cases and written opinions have been presented in 23 advisory opinions. *Amicus curiae* briefs have also been submitted in proceedings on provisional measures and on monitoring compliance with judgment, although to a lesser extent.<sup>57</sup> In the words of the Inter-American Court on their utility:<sup>58</sup>

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<sup>52</sup> In the *Case of Velásquez Rodríguez v. Honduras (Merits)*. Judgment of July 29, 1988), the following non-governmental organizations presented *amicus curiae* briefs: Amnesty International, Association of the Bar of the City of New York, Lawyers Committee for Human Rights, and Minnesota Lawyers International Human Rights Committee.

<sup>53</sup> Rules of Procedure of the Inter-American Court of Human Rights, adopted by the Court at its forty-ninth regular session held from November 16 to 25, 2001, and partially amended by the Court at its eighty-second regular session held from January 19 to 31, 2009.

<sup>54</sup> Current Rules of Procedure of the Inter-American Court, Article 2(3).

<sup>55</sup> Article 44 of the Rules of Procedure of the Inter-American Court.

<sup>56</sup> Article 73(3) of the Rules of Procedure of the Inter-American Court.

<sup>57</sup> For example, the *Case of Durand and Ugarte v. Peru. Provisional measures*. Order of the Inter-American Court of Human Rights of February 8, 2018, para. 10; *Case of Barrios Altos v. Peru. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of September 7, 2012, para. 9; and *Cases of Barrios Altos and La Cantuta v. Peru. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of May 30, 2018, para. 15.

<sup>58</sup> Cf. *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 60. Additionally, in the cases of *Kimel v. Argentina*, and *Castañeda Gutman v. Mexico*, the Inter-American Court indicated that these briefs “[...] are presentations by third parties who are not involved in the dispute and who submit arguments or opinions to the Court that can serve as input on legal aspects that are aired before it. In this regard, they may be presented at any moment prior to the deliberation of the corresponding judgment. In addition, pursuant to this Court’s practice, the *amici curiae* may even refer to matters related to compliance with the judgment. The Court also stresses that the matters they examine have an importance or a general interest that justifies the greatest possible deliberation of arguments discussed publicly; therefore the *amici curiae* are important for the strengthening of the inter-American system of human rights by reflections provided by members of society that contribute to the debate and broaden the scope of the information provided to the Court.” Cf. *Case of Kimel v. Argentina, Merits, reparations and costs*. Judgment of May 2, 2008. Series C No. 177, para. 14; and *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 16.

60. The Court accords special importance to the submission of *amicus curiae*, recognizing their significant contribution to the inter-American system through the presentation of reasonings related to particular cases, legal considerations on the subject-matter of the proceedings, and other specific issues. Thus, as indicated by the Court on repeated occasions, they contribute arguments and opinions that may serve as input on aspects of the law that are aired before it.

74. Regarding indigenous and tribal issues, in the course of its contentious function, the Court has received *amicus curiae* briefs in ten cases that were essentially related to the land and the territory,<sup>59</sup> forced displacement,<sup>60</sup> political participation,<sup>61</sup> and massacres.<sup>62</sup> The case of *Lakha Honhat* adds to these. Their utility in this judgment is evident, because the helpful content of the *amici curiae* submitted by organisations, institutions and individuals has been incorporated into several sections.<sup>63</sup>

75. A total of eight briefs of this type were presented to the Court in the *Lakha Honhat* case by 20 different organisations, institutions and private individuals, who submitted different observations and set out substantive arguments on certain issues. Most of the briefs addressed the right of the indigenous peoples to their ancestral territory with special emphasis on the right to be consulted,<sup>64</sup> as well as on aspects relating to the partial occupation by settlers and the need for the territories of indigenous and tribal peoples to be sufficiently extensive and of good quality.<sup>65</sup>

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<sup>59</sup> Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79, paras. 38, 41, 42, 52 and 61; *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 19; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 13; *Case of the Garifuna Community of Triunfo de la Cruz and its members v. Honduras, Merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 305, para. 11; *Case of the Kaliña and Lokono Peoples v. Suriname, Merits, reparations and costs*. Judgment of November 25, 2015. Series C No. 309, para. 9, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 5, 2018. Series C No. 346, para. 11.

<sup>60</sup> Cf. *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of June 15, 2005. Series C No. 124, para. 16; and *Case of the Afro-descendant Communities displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 10.

<sup>61</sup> Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, paras. 17, 34, 38 and 42.

<sup>62</sup> Cf. *Case of the Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 328, para. 9.

<sup>63</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020*. Series C No. 400, para. 50, footnote 33; para. 54, footnote 42; para. 144, footnote 141; para. 146, footnote 142; para. 161, footnote 150; para. 165, footnote 153; para. 165, footnote 154; para. 174, footnote 161; para. 174, footnote 162; para. 203, footnote 193; para. 216, footnote 210; para. 246, footnote 247; para. 250, footnote 251; para. 254, footnote 260; para. 258, footnote 263; para. 261, footnote 270; para. 275, footnote 288; para. 279, footnote 289; para. 353, footnote 331; para. 355, footnote 334, and para. 356, footnote 335.

<sup>64</sup> In this regard, see the *amicus curiae* submitted by the *Fundación Ambiente and Recursos Naturales*, pp. 6 to 13.

<sup>65</sup> See the entire *amicus curiae* of the Human Rights Center at the Pontificia Universidad Católica del Ecuador; also, the *amicus curiae* prepared jointly by the Due Process of Law Foundation (DPLF), the Human Rights Clinic of the University of Ottawa, the Democracy and Human Rights Institute of the Pontificia Universidad Católica del Perú, the Center for Studies on International Human Rights Systems of the Universidade Federal do Paraná, the International Human Rights Clinic of the Universidad de Guadalajara, and the O'Neill Institute for National and Global Health Law at Georgetown University Law Center, pp. 9 to 23;

76. Another aspect of these briefs related to the direct justiciability and autonomous protection of the economic, social, cultural and environmental rights. In this regard, arguments were submitted to declare that the human rights to food, to cultural identity, to a healthy environment and even to water – the latter, which was not alleged by either the victims’ representatives or by the Inter-American Commission, but was incorporated in the judgment under the *iura novit curia* principle – were rights protected by Article 26 of the American Convention based on the methodology previously used in the Inter-American Court’s case law, which, according to these briefs, were violated by the Argentine State in this case.<sup>66</sup>

77. Furthermore, they proposed criteria that, based on its methodology since the 2017 case of *Lagos del Campo*, the Inter-American Court should use to interpret both the content of the said rights and the series of related obligations. In this way, these briefs reinforced the jurisprudential line initiated by the Court, but with a vision and a focus on the relationship that exists between the ESCER and the indigenous ancestral territories, which reveals the need and importance of continuing to address such problems autonomously, directly and integrally.

78. The *amici curiae* that were submitted also contributed important elements that were reflected in the judgment concerning the “fission-fusion” processes,<sup>67</sup> problems of the domestic legal system in relation to indigenous communal property,<sup>68</sup> the importance of environmental impact assessments made by independent and technically capable entities or on the rights to a healthy environment,<sup>69</sup> to food, to water, and to cultural identity of the indigenous peoples,<sup>70</sup> or on the importance of the right to a healthy environment as an essential component of development policies and in order to combat climate change, as well as its connection to the indigenous peoples in the 2030 Agenda of the United Nations.<sup>71</sup>

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and lastly, see the *amicus curiae* submitted by the NGO “Tierraviva a los pueblos indígenas del Chaco,” pp. 10 to 16.

<sup>66</sup> See the entire *amicus curiae* of Olivier De Schutter, in collaboration with the Human Rights Clinic of the Law Faculty of the University of Miami and the Environmental Law Clinic of the University of Saint Louis; also see the *amicus curiae* prepared jointly by the Due Process of Law Foundation (DPLF), the Human Rights Clinic of the University of Ottawa, the Democracy and Human Rights Institute of the Pontificia Universidad Católica del Perú, the Center for Studies on International Human Rights Systems of the Universidade Federal do Paraná, the International Human Rights Clinic of the Universidad de Guadalajara, and the O’Neill Institute for National and Global Health Law at Georgetown University Law Center, pp. 23 to 51; also see the entire *amici curiae* submitted jointly by the Asociación Civil por la Igualdad y la Justicia; Amnesty International; Interamerican Association for Environmental Defense; Comisión Colombiana de Juristas; Dejusticia; FIAN International; International Women’s Rights Action Watch-Asia Pacific, and Minority Rights Group International, coordinated by the Secretariat of the International Economic, Social and Cultural Rights Network (ESCR-Net).

<sup>67</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, footnote 33.*

<sup>68</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, footnote 154.*

<sup>69</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, footnotes 162, 193 and 288.*

<sup>70</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, footnotes 210, 247, 260, 263 and 270.*

<sup>71</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, footnote 193.*

79. Based on the above, it can be said that one of the fundamental pillars of the Inter-American Court's work is the permanent communication with organizations, institutions and society in general, which takes place in both directions – in other words, the Court, by establishing regional standards for human rights, and the organizations, institutions and individuals, by their active participation in procedures and proceedings using the mechanisms of the *amicus curiae* – and which strengthens the multidimensional dialogue in favor of inter-American public order in the region.

80. The *amicus curiae* mechanism has become an important tool of the Inter-American Court that enhances its jurisprudential work and the effective protection of human rights, and is increasingly being used by non-governmental organizations, academic institutions and members of civil society who have a legitimate interest in the issues discussed before the organs of the inter-American system. Even though such briefs are not binding and lack evidentiary value,<sup>72</sup> they allow the Court to benefit from greater insight regarding domestic and international law and, by drawing on valuable contributions from civil society, it can gain a panoramic view of the implications of its decisions.

81. The inter-American system not only encourages the use of the standards issued by the Inter-American Court, but also the Court's openness to receiving observations and opinions in the exercise of its contentious and advisory jurisdiction, and this ensures that there is a bi-directional, rather than an unidirectional, sharing of ideas.

82. The constructive and exemplary dialogue generated by the participation of organizations, institutions and individuals using the mechanism of *amicus curiae* submitted to the Court must continue to be encouraged, thereby creating an inclusive environment for ideas that promotes more and better protection for human rights in the region, and results in the permanent evolution American law.

## V. CONCLUSIONS

83. The case of *Lakha Honhat* constitutes the first contentious case in which the Inter-American Court has ruled directly and autonomously on the rights to a healthy environment, to food, to water and to cultural identity, the latter as an offshoot of the right to enjoy cultural life.<sup>73</sup>

84. In this regard, for each of the rights analyzed, the Court identified the provisions of both international law,<sup>74</sup> and comparative constitutional law;<sup>75</sup> but, in particular, the way in which these rights have been recognized and incorporated by Argentine

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<sup>72</sup> *Case of the Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2014. Series C No. 282, para. 15.*

<sup>73</sup> *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, para. 201.*

<sup>74</sup> *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, paras. 202, 210, 222 to 224 and 231.*

<sup>75</sup> *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, paras. 206, 215 and 236.*

constitutional law.<sup>76</sup> It is also relevant to emphasize that Argentina did not file a preliminary objection on the Court's competence to examine the autonomous violation of these rights; to the contrary, the State merely submitted arguments on why it considered that the rights had not been violated in this case, which reveals that there was no dispute about their justiciability.

85. It is also the first occasion on which the Court has declared the violation of Article 26 of the American Convention in a case relating to indigenous and tribal peoples and communities, based on the methodology used in the precedents on the direct justiciability of the ESCER. This case has underscored the close ties between the rights to take part in cultural life (as this relates to their cultural identity), to a healthy environment, to adequate food, and to water, which are analyzed from a perspective of guaranteeing the rights of the communities that were declared victims. In particular, the judgment focuses on the content of these rights based on the subject-matter involved: namely, indigenous peoples and communities. The judgment understands that they have, and express, a particular way of seeing and understanding their environment based on their specific world view, which called for a comprehensive assessment of the possible violations of the Pact of San José.

86. This judgment is a response to one of the major debts owed by the inter-American case law to indigenous issues, especially because it develops and places the "territory" as its central element, considering it a concept that includes not only the "land" but also other elements that were protected autonomously on this occasion, using Article 26 of the American Convention. This reasoning allows the indigenous and tribal peoples of the region to find greater access to justice and provides a holistic vision of the protection of their rights in this precedent, which should also be seen as harmonizing with the UN 2030 Agenda<sup>77</sup> and its Sustainable Development Goals (SDGs).<sup>78</sup>

87. In sum, the case of *Lakha Honhat* is one more element in the consolidation of the jurisprudential line on ESCER in the inter-American system and, in general, contributes to provide greater clarity to the content of these rights and to the State obligations in relation to the protection of social rights in our region. It reflects an approach taken by the Inter-American Court to ensure that all rights – civil, political,

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<sup>76</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020*. Series C No. 400, paras. 204, 214, 225 and 235.

<sup>77</sup> As indicated in a recent ILO document: "the 2030 Agenda recognizes that, if poverty is to be eliminated, development policies must also counter inequalities – including those that exist along gender and ethnic lines (UN, SDG 10) – through a simultaneous pursuit of economic growth and respect for rights. For this opportunity to be seized, it is essential that specific attention is paid to the situation of indigenous and tribal peoples, their participation and contributions, and integrated into actions taken towards achieving the SDGs. The next ten years *en route* to 2030 will be critical if existing patterns of disadvantage and exclusion are to be sustainably reversed." ILO, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future*, February 2020, p.37.

<sup>78</sup> For example, it has been indicated that the following SDGs of the 2030 Agenda are especially relevant to the development priorities of the indigenous peoples: "Goal 1. End poverty in all its forms everywhere; Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 3. Ensure healthy lives and promote well-being for all at all ages; Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; Goal 5. Achieve gender equality and empower all women and girls; Goal 13. Take urgent action to combat climate change and its impacts; Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss." See: UN, Economic and Social Council, Permanent Forum for Indigenous Issues, *Report of the Expert Group Meeting on Indigenous Peoples and the 2030 Agenda*, E/C.19/2016/2, February 18, 2016, para. 16.



economic, social, cultural and environmental – are seen as such, in light of their interdependence and indivisibility, without any hierarchy among them, so that the States comply with and implement their obligations to respect and to ensure human rights. This is especially important for certain vulnerable groups in the region, such as the indigenous and tribal communities and peoples (who continue to be “the poorest among the poor”<sup>79</sup>), suffering “historic injustices,”<sup>80</sup> and who not only depend physically on the resources in their territory, but also have a spiritual symbiosis with them.

Eduardo Ferrer Mac-Gregor Poisot  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>79</sup> ILO, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future*, February 2020, p. 20. The report notes the social inequality and inequity faced by these peoples in light of current social and environmental challenges. The UN has indicated, referring to this report, that the “Spectre of poverty’ hangs over tribes and indigenous groups” and that “Indigenous and tribal communities are around three times more likely to face extreme poverty than others with women “consistently at the bottom of all social and economic indicators.” Data from nine countries in this same region also showed that these indigenous communities constituted almost 30 per cent of the extreme poor – the highest proportion across all global regions.” See UN, February 3, 2020: <https://news.un.org/en/story/2020/02/1056612>

<sup>80</sup> As recognized in the *Preamble to the American Declaration on the Rights of Indigenous Peoples* – which took almost 20 years of negotiations – the States of the continent expressed their concern “that indigenous peoples have suffered from *historic injustices* as a result of, *inter alia*, their colonization and the dispossession of *their lands, territories and resources*, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests;” and therefore recognized the “urgent need to respect and promote the inherent rights of indigenous peoples, which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories, and resources.” *Preamble to the American Declaration on the Rights of Indigenous Peoples*, adopted at the second plenary session of the OAS General Assembly held on June 14, 2016.

**PARTIALLY DISSENTING OPINION OF  
JUDGE RICARDO C. PÉREZ MANRIQUE**

**TO THE JUDGMENT OF FEBRUARY 6, 2020,  
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**IN THE CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT  
(OUR LAND) ASSOCIATION V. ARGENTINA**

***I. Introduction***

1. In my concurring opinions in the cases of the *National Association of Discharged and Retired Members of the Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* and *Hernández v. Argentina*, I included two initial reflections on the way in which I consider that the Inter-American Court of Human Rights (hereinafter, "the Court") should address cases that involve violations of the economic, social, cultural and environmental rights (hereinafter "the ESCER"). My work as a national judge for almost 30 years reveals a commitment to the ESCER that is particularly relevant in the most unequal continent on the planet. The ideas I expressed in those opinions were the result of reflections I have had on this issue as a judge of the Court, a situation that has allowed me to examine more thoroughly the discussions that are taking place on the different ways in which the issue of violations of the ESCER can be addressed. The thesis set out in the said opinions is an idea in development that seeks to make a contribution to a better understanding of the issue and to reinforce future analyses of these rights. Consequently, in this opinion, I will repeat some of the ideas expressed in the opinion in the cases of *ANCEJUB* and *Hernández*, making the pertinent clarifications in relation to the case of *Lhaka Honhat*.

***II. The discussion within the Inter-American Court***

2. As I see it, a discussion has been going on within the Court concerning what we might refer to as two viewpoints on the justiciability of the ESCER: the first is that the analysis of individual violations of these rights should be made exclusively in relation to the rights recognized by Articles 3 to 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), or based on what is expressly permitted by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "Protocol of San Salvador"). I consider that this perspective was reflected in cases such as the *Case of the "Juvenile Re-education Institute" v. Paraguay* (2004) or the *Case of the Yakye Axa Indigenous Community v. Paraguay* (2005), just to mention two examples, and also in the *Case of González Lluy v. Ecuador* (2015).

3. The second is that the Court has competence to examine autonomous violations of the ESCER based on Article 26 of the Convention. Those rights – that, according to this point of view, are justiciable before the Court on an individual basis – are implicitly or explicitly derived from the Charter of the Organization of American States (hereinafter "the OAS Charter"), as well as from numerous national and international instruments such as the American Declaration on the Rights and Duties of Man, the Protocol of San Salvador, the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and even the Constitutions of the States Parties to the Convention, among others. This is the thesis that has prevailed in most of the cases related to the ESCER since *Lagos del Campo v. Peru* on the issue of

job stability, as well as in cases involving the rights to health and to social security. In such cases the Court has determined that the State is internationally responsible for the violation of social rights based on Article 26 of the Convention. This change in its case law has occurred since 2017.

### ***III. A third viewpoint: interdependence-simultaneity***

4. Article 26 of the Convention is what could be called a framework article that refers to the ESCER in general without specifying which rights they are and what they consist of. The article includes a referral to the OAS Charter for their analysis and content. Meanwhile, the Protocol of San Salvador, an instrument subsequent to the American Convention, individualizes and provides content to the ESCER. The Protocol is explicit in indicating that individual cases relating to the ESCER may be submitted to the consideration of the Court only with regard to trade union rights and the right to education. Other instruments of the inter-American *corpus juris* also mention the ESCER.

5. In my opinion in the *ANCEJUB-SUNAT* case, I set out my point of view on the indivisibility and interdependence of the human rights. This leads me to state that I consider that the Inter-American Court does have competence to examine and rule on the ESCER in relation to both their individual and collective aspect. These same principles allow me to make a systematic analysis of the Convention, the Protocol of San Salvador, the OAS Charter, and other instruments of the inter-American *corpus juris*. I will now try to explain my views concerning the grounds on which the Inter-American Court is competent to examine and rule on the ESCER.

6. Part II of the American Convention refers to the means of protection and its Article 44 indicates that “Any person or group of persons [...] may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.” Meanwhile, Article 48 indicates that “When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows ....” Also, Article 62(3) of the Convention indicates that: “The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it ...” [underlining added].

7. These articles of the Convention clearly indicate that any of the rights mentioned in the Convention, without any type of distinction (civil, political, economic, social, cultural and environmental) may be submitted to the consideration of both organs of protection and that these organs have competence to examine them. The said articles do not make any distinction between civil, political, economic, social, cultural and environmental rights as regards their protection. To claim that the inter-American organs of protection are only able to examine civil and political rights and not the ESCER would be contrary to the indivisibility and interdependence of the rights and would also result in a fragmentation of the international protection of the individual and of his or her entitlements as a subject of international law.

8. In this regard, it is interesting to emphasize the provisions of Article 4 of the Protocol of San Salvador which indicate that there can be no restrictions to the ESCER. On this point, this article indicates that: “A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree” [underlining added]. In my opinion, this article, read

together with the American Convention, leads to the conclusions that access to inter-American justice cannot be restricted in relation to alleged violations of the ESCER invoking the American Convention. To do so, would be acting in violation of the Protocol that does not allow restrictions and, as I mentioned previously, affecting the individual as a subject of rights. It would be violating the principle of the *pro persona* interpretation of human rights (Art. 29 of the American Convention).

9. However, it cannot be ignored that the adoption of the Protocol of San Salvador, while making advances in the content of the rights, also expressly delimited the use of the system of individual petitions to "trade union rights" and "the right to education." In my opinion, it is only in relation to these two rights (to freedom of association and to education) that the Court may consider an autonomous violation of the ESCER in light of the provisions of Article 19(6) of the Protocol of San Salvador. On this point, it is important to recall that Article 31 of the Vienna Convention on the Law of Treaties stipulates that the interpretation of treaties should include, in addition to the text, "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty." The Protocol of San Salvador is precisely a treaty adopted by the contracting parties to the American Convention "for the purpose of gradually incorporating other rights and freedoms into the protective system thereof" (Preamble to the "Protocol of San Salvador").

10. Nevertheless, in order to make a harmonious interpretation of the American instruments, nothing prevents the Court – by taking into consideration the interdependence and indivisibility of the civil and political rights on the one hand, and the economic, social and cultural rights on the other – from ruling on the ESCER and declaring the violation of both a right recognized in Articles 3 to 25 of the American Convention and Article 26. Because, owing to act or omission, one and the same action may signify simultaneously the violation of both a civil and political right and an ESCER, which can be examined owing to its significance. A possible formula to effect this type of analysis is to establish in the operative paragraphs of a judgment the violation of a right over which the Court has competence, in relation to Article 26 and the general obligations to respect and to ensure the rights. The formula – based on the principles of indivisibility and interdependence – would be simple but compelling: "the Court declares the violation of Article 21 of the Convention in relation to Articles 26 and 1(1) of this instrument"; and this is what has happened in the instant case as I will now explain.

11. It should be pointed out that, based on the position described, Article 26 and the rights it contains are justiciable before the Court; thus, eliminating definitively the thesis of their justiciability being restricted or limited exclusively to the provision of the Protocol of San Salvador. It allows the Court to analyze specific aspects that distinguish these rights, both individually and collectively, from their violation.

#### **IV. The Lhaka Honhat case**

12. In the instant case, the Court was also able to make an analysis such as the one I proposed for the cases of *ANCEJUB-SUNAT* and *Hernández*. The judgment reveals that the violations of the rights to a healthy environment, adequate food, access to water, and cultural identity were mainly the result of the activities that the *criollo* population (non-indigenous settlers) carried out on the territory, with the complicity of the State of the Argentine Republic at both the federal level and that of the Province of Salta and, as a result of which, the indigenous communities were unable to enjoy this territory free of interference. Those activities included

the presence of non-indigenous persons and actions such as unfenced livestock farming and the presence of wire fencing. Illegal logging was also verified. The impact was proved: on the flora and fauna (that contributed protein to the communities' diet); on the supply and quality of the water required for their subsistence; on biological and socio-economic degradation as a result of the logging activities and the presence of fences that eliminated access to rivers and forests. This demonstrated the existence of a causal nexus between the activities of the *criollo* settlers on the territories of the communities and the violation of the rights of the indigenous peoples to participate in cultural life, and to a healthy environment, adequate food, and water. Consequently, the Court declared the international responsibility of the State for the violation of Articles 26 and 1(1) of the Convention.

13. In essence, I agree with how the substantive content of the said rights was developed; nevertheless, I voted against the declaration of the autonomous violation of those rights in the judgment. This is because, as in the cases of *ANCEJUB-SUNAT and Hernández*, I considered that the most appropriate way to analyze the case would have been by the thesis of simultaneity. In this regard, it is not appropriate or necessary to declare an autonomous and separate violation of the rights to cultural life, a healthy environment, adequate food and water based on Article 26 of the Convention.<sup>1</sup> As mentioned previously, the appropriate course would have been to declare a violation of Article 21 in relation to Articles 26 and 1(1) of the Convention, with a restricted – and brief – analysis of the violation of the said social rights as a result of the State's failure to ensure effective protection of the right to property, which permitted the presence of third parties and the harm to other rights.<sup>2</sup> This type of analysis could also have avoided separating the analysis of communal property and other rights and, to the contrary, would have underscored the interdependence and indivisibility that exists between property and the guarantee of the ESCER of indigenous communities.

14. The analysis of simultaneity in this case would have resulted in the point of departure being the right to collective property recognized in Article 21 of the Convention. Specifically, the Court should have addressed the relationship that exists between the failure to ensure the indigenous communities' property rights and their participation in cultural life and the guarantee of other rights (such as to water, food and the environment). It is from this perspective that the judgment should have addressed the premise of the indissoluble relationship that exists between the land and the enjoyment of other rights, which is particularly relevant in the case of victims such as those of this case. The indissoluble relationship to which I refer is revealed from the numerous sources that the judgment cites when it refers to the interdependence between the rights "to a healthy environment, to adequate food, to water and to

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<sup>1</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*. Judgment of February 6, 2020. Series C No. 400, paras. 92 to 185 and 186 to 289. The Court decided to analyze, on the one hand, the right to indigenous communal property and, on the other, the rights to freedom of movement and residence, to a healthy environment, to adequate food, to water, and to take part in cultural life in separate chapters.

<sup>2</sup> Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79, para. 149. Starting with its first judgments on the communal property of indigenous communities, the Court had already recognized that "the close ties of the indigenous peoples to the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For the indigenous communities, their relationship to the land is not merely a matter of possession and production, but a physical and spiritual element that they must enjoy fully, even to preserve their cultural legacy and transmit this to future generations." The separation of the analysis of the violation of rights made in the judgment would appear to contradict the letter and spirit of recognizing the value of acknowledging and protecting the communal property of indigenous communities.

cultural identity in relation to the indigenous peoples”<sup>3</sup> (paras. 243 to 254). The judgment chose to declare an autonomous violation of Article 26 without taking into account that it is the right to land that is indissolubly linked to the violations of the ESCER.

15. An analysis founded on simultaneity such as I propose would have been based on the indissoluble relationship between the rights to the land, a healthy environment, water and cultural identity. In this way, the State’s obligations as guarantor of the rights of the indigenous communities would have an impact not only on the aspects related to communal property in the terms of Article 21 but also, in consequence, on the ESCER that are derived from Article 26. The simultaneous analysis of the rights would have allowed the Court to provide greater scope and content to the obligations in this case, emphasizing their interdependence and indivisibility.

### **V. Conclusion**

16. The Court should not lose sight of the fact that its main function is to examine cases submitted to it that require the interpretation and application of the provisions of the Convention in order to decide whether there has been a violation of a protected right or freedom, and to determine that the injured party must be guaranteed the enjoyment of the right or freedom that was violated. Thus, the Court has the Convention-based obligation to provide justice in specific cases within the limits established by treaty law. However, it also has a function of contributing to achieve the objectives of the Convention, and this involves addressing the problems that affect our societies. It is important to consider that the Court’s legitimacy is based on the solidity of its reasoning, its adherence to the law, and the prudence of its rulings. It is also based on the consensus of its members. The thesis of simultaneity – proposed in this opinion – would have been a way to achieve sounder arguments and consensus among the Court’s judges in this case. From this perspective, it was a lost opportunity to achieve agreement on how to address cases related to the justiciability of the ESCER.

17. In this case, the interventions of numerous *amicus curiae* and expert witnesses, and the different citations of both the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteurs of the universal system reveal that the indigenous peoples share a world vision centered on the relationship between human beings and the land they inhabit, which can be observed in the cultural, social and religious elements that define a way of life in which one cannot be realized without the other. Perhaps this is the case in which it is possible to observe most clearly the inadmissibility and needlessness of invoking the autonomy of the ESCER in the Court’s reasoning. Therefore, my position in no way differs from the position supported by the majority as regards the consequences of the violation of an ESCER. My position reinforces the justiciability of the ESCER. Therefore, it is possible to establish measures of reparation such as those determined in this judgment that I have voted in favor of, without the application and guarantee of those rights being affected in any way. As mentioned above, the issue is how to develop an argumentative theory of reasoning that allows the ESCER to be applied to their full extent without leaving the Inter-

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<sup>3</sup> Cf. United Nations Declaration on the Rights of Indigenous Peoples, Articles 20(1), 29(1) and 32(1); American Declaration on the Rights of Indigenous Peoples, Article XIX; CESCR, *General Comment 21. Right of everyone to take part in cultural life (art. 15, para 1 (a) of the ICESCR)*, para. 36; Human Rights Committee, *General Comment 23. Right of minorities (Art. 27)*, para. 3; *Human rights and indigenous matters. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission Resolution 2001/57*. February 4, 2002. Doc. E/CN.4/2002/97, para. 57.

American Court open to questions regarding its competence to decide these cases, and that rallies the greatest support among the members of the Court.

Ricardo C. Pérez Manrique  
Judge

Pablo Saavedra Alessandri  
Secretary