

INTER-AMERICAN COURT OF HUMAN RIGHTS

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

JUDGMENT OF NOVEMBER 24, 2020

(Interpretation of the judgment on merits, reparations and costs)

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

the Inter-American Court of Human Rights (hereinafter “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 Article 67 of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”) and Article 68 of the Rules of Procedure of the Court (hereinafter also “the Rules of Procedure”), decides the request for interpretation of the judgment on merits, reparations and costs in the instant case delivered by the Court on February 6, 2020 (hereinafter also “the judgment”), filed by the representatives of the victims (hereinafter also “the representatives”) on August 13, 2020.

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

** The Deputy Secretary, Romina I. Sijniensky, did not take part in either the processing of this case or the deliberation and signature of this judgment.

I
REQUEST FOR INTERPRETATION AND PROCEEDINGS BEFORE THE COURT

1. On February 6, 2020, the Inter-American Court delivered judgment in the instant case and this was notified to the parties and to the Inter-American Commission on Human Rights (hereinafter also "the Commission") on April 2 that year.
2. On August 13, 2020, the victims' representatives¹ submitted a request for interpretation concerning the scope of the provisions in the fifteenth operative paragraph of the judgment ordering the State to adopt the necessary legislative and/or any other measures to provide legal certainty to the right to indigenous communal property.
3. On August 14, 2020, pursuant to Article 68(2) of the Rules of Procedure and on the instruction of the President of the Court, the Court's Secretariat forwarded the said request for interpretation to the Argentine Republic (hereinafter also "the State" or "Argentina") and the Commission, and granted them until September 15, 2020, to present any written observations they deemed pertinent. On September 14 and 15, 2020, the State and the Commission, respectively, submitted their observations.

II
JURISDICTION

4. Article 67 of the American Convention establishes:

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

5. Pursuant to this article, the Inter-American Court is competent to interpret its judgments. According to Article 68(3) of the Rules of Procedure, when examining requests for interpretation and making the corresponding decisions, the Court should, if possible, have the same composition it had when delivering the respective judgment. On this occasion, the Court is composed of the same judges who delivered the judgment the interpretation of which has been requested.²

III
ADMISSIBILITY

6. The Court must verify whether the request presented by the representatives complies with the requirements established in the rules applicable to a request for interpretation of judgment; namely, Article 67 of the aforementioned Convention, and Article 68 of the Rules of Procedure. Also, Article 31(3) of the Rules of Procedure establishes that "[j]udgments and orders of the Court may not be contested in any way."

7. The Court notes that the representatives presented their request for interpretation within the 90-day period established in Article 67 of the Convention. In

¹ The victims' representatives are the Lhaka Honhat (Our Land) Association of Aboriginal Communities and the Centro de Estudios Legales and Sociales (CELS).

² Owing to the exceptional circumstances resulting from the COVID-19 pandemic, this judgment was deliberated and adopted during the Court's 138th regular session, which was held virtually using technological resources as established in the Court's Rules of Procedure.

this regard, it should be clarified that, when the judgment was notified on April 2, 2020, the procedural time frames had been suspended since March 17, 2020, pursuant to the provisions of Decision 1/20 of the Court. This suspension of time frames as a result of the COVID-19 pandemic, a well-known situation, was later extended until May 20, 2020, by the Court's Decision 2/20. Therefore the request for interpretation presented on August 13, 2020, was admissible as regards the time frame for its presentation. Regarding the other requirements, the Inter-American Court will analyze the merits of this request in the following chapter.

IV ANALYSIS OF THE ADMISSIBILITY OF THE REQUEST FOR INTERPRETATION

8. The Court will examine the representatives' request to determine whether, based on the regulations and the standards developed in its case law, it is admissible to clarify the meaning or scope of any provision of the judgment.

9. The Court has indicated that a request for interpretation of judgment cannot be used as a means of contesting the decision whose interpretation is required. The exclusive purpose of this type of request is to determine the meaning of a ruling when any of the parties claims that the text of its operative paragraphs or of its considerations is unclear or imprecise, provided such considerations affect the said operative paragraphs. Consequently, a request for interpretation may not be used to seek the amendment or nullification of the judgment in question.³

10. The Court has also indicated that it is inadmissible to use a request for interpretation to submit considerations on factual and legal matters that have already been submitted at the proper procedural moment and on which the Court has already taken a decision,⁴ or to expect the Court to re-assess matters that have been decided in the judgment.⁵ Similarly, a request cannot be used to try and expand the scope of a measure of reparation that was ordered at the opportune procedural moment.⁶

11. The Inter-American Court will now examine the issue raised by the representatives. To this end, it will set out their arguments, as well as those of the State and the Commission, and then its own considerations.

A. Arguments of the parties and the Commission

12. The **representatives** requested clarification of the measure of reparation ordered in the fifteenth operative paragraph of the judgment, consisting in the adoption of "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 th[e] judgment." When doing so, they indicated that their request was for the

³ Cf. *Case of Loayza Tamayo v. Peru. Interpretation of the judgment on merits*. Order of the Court of March 8, 1998. Series C No. 47, paras. 12 and 16, and *Case of Rosadio Villavicencio v. Peru. Interpretation of the judgment on preliminary objections, merits, reparations and costs*. Judgment of October 8, 2020. Series C No. 414, para. 11.

⁴ Cf. *Case of Loayza Tamayo v. Peru*, para. 15, and *Case of Rosadio Villavicencio v. Peru*, para. 12.

⁵ Cf. *Case of Salvador Chiriboga v. Ecuador. Interpretation of the judgment on reparations and costs*. Judgment of August 29, 2011. Series C No. 230, para. 30, and *Case of Rosadio Villavicencio v. Peru*, para. 12.

⁶ Cf. *Case of Escher et al. v. Brazil. Interpretation of the judgment on Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 208, para. 11, and *Case of Rosadio Villavicencio v. Peru*, para. 12.

Court to “clarify” whether what it had ordered “should specifically include the indigenous peoples’ right to consultation.” In this regard, “in order to avoid different interpretations of the State’s obligations,” they asked that the Court clarify the paragraphs of the judgment to which the fifteenth operative paragraph referred, as well as its paragraph 353.

13. The representatives indicated that “[t]he indigenous communities’ right to consultation, in addition to its intrinsic significance, is critically important for the protection of the right to indigenous property, as well as for the protection of their other rights.” They noted that the Court had determined violations of the right to property and to consultation of the indigenous communities who were the victims in the case. Therefore, they understood that it should be inferred that the legislative and/or other measures that the Court had ordered to ensure the right to property should “contain a specific section on the right to consultation,” because the former right could not be ensured without the latter. They indicated that, despite this, “the judgment did not expressly mention this,” which was the reason for the interpretation they were requesting.⁷

14. The **State** argued that the fact “that the Argentine Republic has the obligation to ensure the right to consultation of the indigenous communities is not in dispute, in light of the applicable commitments under international human rights law.” It indicated that, nevertheless, the Court “has not include the duty of the Argentine State to legislate the right to consultation in general terms, so that the claim of the victims’ representatives exceeds the scope of interpretation of judgment,” because “it seeks to repeat the debate in order to expand the reparations that have already been ordered.”

15. Argentina also argued that judgment should be understood in a “harmonious way, integrating [their] considerations and conclusions, [...] and it was inadmissible to do this in a biased manner.” It considered that the Court:

Throughout its judgment, had taken a very clear position with regard to the right to free, prior and informed consultation of the indigenous communities in the case of projects to be executed on their territories, [...] and also had determined the need to adapt or enact laws and regulations that establish an adequate procedure to this end according to the circumstances of each case.⁸

Therefore, it argued that the decision adopted in the eight operative paragraph⁹ “complements the considerations and reasoning included throughout the judgment.” Consequently, it understood that the representatives’ request for interpretation was “inadmissible.”

16. The **Commission** understood that the representatives’ request sought to determine the “meaning or scope” of the fifteenth operative paragraph of the judgment and therefore “fell within the parameters” established by Article 68 of the Court’s Rules

⁷ The representatives also recalled that, during the proceedings, they had requested that the Court order, as a measure of reparation, the enactment of norms that ensured the right to consultation. They noted that their request was set forth in paragraph 351 of the judgment and was not explicitly denied therein.

⁸ The State supported its assertion recalling the Court’s considerations in paragraphs 173, 174, 175, 179, 328, 351, 352, 353 and 354, in footnote 334 corresponding to paragraph 355, and in the eighth operative paragraph.

⁹ The eighth operative paragraph of the judgment states: “The State shall refrain from implementing actions, public works or undertakings on the indigenous territory or that might affects 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.

of Procedure. It noted that, in paragraph 184 of the judgment, the Court had concluded that Argentina had failed to comply with the obligation to ensure adequate consultation mechanisms and that, in paragraph 328 of the judgment, the Court ordered the State to abstain from carrying out certain actions on the territory of the indigenous communities victims without prior and adequate consultation procedures. It also noted that “the Court determined, in paragraph 353 of the judgment that existing legal regulations in Argentina are insufficient to provide legal certainty to the right to indigenous communal property.” Nevertheless, the Commission indicated that those determinations “do not have a specific parallel mention” in the fifteenth operative paragraph, which orders the adoption of legislative and/or other measures. Therefore, it “agree[d with the representatives in] the pertinence of clarifying the scope of the reparation ordered so as to have greater certainty and to facilitate its execution.”

B. Considerations of the Court

17. The representatives asked the Court to clarify whether, pursuant to the measure ordered in the fifteenth operative paragraph of the judgment, the right to prior consultation was included among the aspects that should be established in the legislative and/or other measures that the State must adopt to provide legal certainty to the right to indigenous communal property. In particular, the representatives’ request referred to whether the measures indicated should “contain a specific section on the right to consultation” (*supra* para. 13).

18. This Court understands that the request for interpretation is admissible and will now respond to it.¹⁰ To this end, it recalls that, in its judgment it determined two aspects of the violation of the right to indigenous communal property: (a) the first, as can be seen from paragraphs 167 and 168 of the judgment, based on the failure to provide adequate title to the land, the failure to demarcate the property, and the continued presence of third parties, as well as the lack of appropriate laws to guarantee the right to communal property satisfactorily, and (b) the second, as established in its paragraph 184, owing to Argentina’s failure to comply with “its obligation to ensure appropriate mechanisms for free, prior and informed consultation of the indigenous communities concerned,” in relation to the construction of an international bridge. Then, among the diverse measures of reparation ordered, the Court established, in the fifteenth operative paragraph, the duty of the State to “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 th[e] judgment.”

19. First, the Court, will review the order given to adopt legislative and/or other measures, the reasons for this order and its scope. Then, it will set forth its conclusion and clarification requested.

B.1 The order to adopt legislative and/or other measures

¹⁰ Additionally, the Court emphasizes that, although the State has argued the inadmissibility of the request for interpretation, it has done so while providing a response to it; namely, that the order given in the fifteenth operative paragraph does not include the duty “to legislate” on prior consultation (*supra* para. 14). However, while asserting the foregoing, Argentina argued that, in relation to the right to consultation, the judgment “has established the need to adapt or to issue regulations and laws that establish an adequate procedure” (*supra* para. 15). This leads to the understanding that the interpretation of the decision is appropriate and useful to ensure correct compliance with what was ordered.

20. The Court noted, in paragraph 166 of the judgment, that, owing to “legal problems [...], the right to property of the indigenous communities in this case has not received effective protection.” According to paragraphs 164 and 162 of the judgment, respectively, these legal problems consist in “[t]he failure of these [State] norms to address the issue of indigenous property adequately and sufficiently [as] inferred from national legislation following the 1994 constitutional reform”; in particular, with regard to “procedures for claiming indigenous lands.” Therefore, in paragraph 168 of the judgment, the Court determined a violation of the right to indigenous communal property in relation not only to the obligations to respect and to ensure rights established in Article 1(1) of the Convention, but also in relation to the adoption of domestic legal provisions, established in Article 2 of this instrument.¹¹

21. It was on this basis that, when establishing the corresponding measures of reparation, the Court found it appropriate to order the adoption of legislative and/or other measures, recalling, in paragraph 353 of the judgment – in the chapter on reparations – “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.”

22. Consequently in its fifteenth operative paragraph, the judgment established: “[t]he 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 th[e] judgment.”

23. Accordingly, the purpose of this measure is to redress the insufficiency of domestic law that the Court had noted in relation to the right to indigenous communal property. This insufficiency refers to the measures to claim indigenous communal property and to its recognition. As already indicated (*supra* para. 20), this is in accordance with the analysis made in paragraphs 158 to 166 of the judgment, under the heading “Impact of domestic law,” and also, pursuant to the conclusion presented in the following paragraphs, 167 and 168.

24. Evidently, and notwithstanding the foregoing, the order given to adopt the necessary legislative and/or any other measures to provide legal certainty to the right to indigenous communal property, could not be executed adequately if this were to be done in a way that was incompatible with the right of the indigenous peoples and communities to prior, adequate, free and informed consultations, or disregarding this right. Therefore, in order to ensure the effective participation of indigenous peoples or communities in actions that may affect their territories, including by adequate consultation processes, it is a necessary element to guarantee the right to indigenous communal property.

25. The foregoing results from the terms of the judgment, paragraph 354 of which, while establishing the “order” to the State “within a reasonable time, to adopt the legislative and/or other measures necessary [...] to provide legal certainty to the human right to indigenous communal property,” indicates that this should be done

¹¹ It also did so in relation to the rights to judicial guarantees and to judicial protection, the standards for which establish the due process of law that must be observed in the mechanisms that the State must adopt to implement indigenous territorial rights. In this regard, paragraph 116 of the judgment indicates that, “in order to implement the territorial rights of the indigenous peoples, States must provide an effective mechanism by the adoption of the necessary legislative and administrative measures,” and that this mechanism must “meet the requirements of due process established in Articles 8 and 25 of the American Convention.”

“pursuant to the guidelines indicated in th[e] judgment,” expressing referring to its paragraphs 93 to 98, 115 and 116.

26. According to paragraph 98 of the judgment, the Court notes that States must refrain from carrying out actions that may “adversely affect the existence, value, use and enjoyment of [indigenous] territory,” and “guarantee the right of the indigenous peoples to truly control and use their territory and natural resources [...] without any type of external interference from third parties.”¹² As paragraph 94 of the judgment indicates:

[A]ny 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 assessment.¹³

27. Later, the judgment makes it clear that to “ensure the effective participation” of the indigenous peoples or communities, “in conformity with their customs and traditions,” in the corresponding circumstances the State is required to conduct consultations, in good faith, using culturally acceptable procedures aimed at reaching agreements.¹⁴ Due to the failure to comply with this obligation in relation to the construction of an international bridge, the Court determined that the State had failed to respect the process of prior, free and informed consultation and had therefore violated the rights to indigenous communal property and to the participation of the communities victims.¹⁵ These considerations should be taken into account because, as this Court has already indicated, the correct procedure is “to make an integral reading of the judgment rather than considering each paragraph of the judgment as if it was independent from the others.”¹⁶

28. Therefore, the guidelines referred to in paragraph 354 of the judgment (*supra* para. 25) include the effective participation of the indigenous communities with regard to the implementation of activities that could affect the integrity of the lands and natural resources, which, in the pertinent circumstances, results in the realization of prior, adequate, free and informed consultations.

¹² Similarly, later, in paragraph 115 of the judgment, the Court indicated, *inter alia*, that, in the “context” of the “legal certainty [of] the indigenous ownership of land,” “the diverse and specific ways and means of control, ownership, use and enjoyment of the territories by the communities should be acknowledged, without interference from third parties.”

¹³ Paragraph 94 of the judgment, regarding the part transcribed, cites previous case law of the Court: *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007, Series C No. 173, para. 129 and footnote 124.

¹⁴ *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, paras. 174. This paragraph, in the part transcribed, cites, *inter alia*, previous case law of the Court: *Case of the Saramaka People v. Suriname*, para. 133; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 186, and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs*. Judgment of November 25, 2015. Series C No. 309, para. 201.

¹⁵ *Cf. Case of the Indigenous Communities members of the Lhaka Honhat (Our Land) Association v. Argentina*, paras. 180 to 184.

¹⁶ *Case of Pollo Rivera et al. v. Peru. Request for interpretation of the judgment on merits, reparations and costs*. Judgment of May 25, 2017. Series C No. 335, para. 26, and *Case of Alvarado Espinoza et al. v. Mexico. Interpretation of the judgment on merits, reparations and costs*. Judgment of August 30, 2019. Series C No. 381, para. 18.

29. Consequently, the legislative and/or other measures that the State should adopt, according to the fifteenth operative paragraph of the judgment, must be appropriate to provide adequate means for claiming and for recognition of indigenous communal property, in a way that ensures legal certainty to the right to communal property considering its different elements, which include the implementation of consultations and participation in them, pursuant to the preceding paragraphs.

B.2 Conclusion

30. Therefore, the Court, responding to the request for interpretation presented by the victims' representatives, stipulates the following: the measures that the State should adopt, pursuant to the fifteenth operative paragraph and paragraph 354 of the judgment, must be appropriate to provide adequate means for claiming and for recognition of indigenous communal property in a way that ensures legal certainty to the right to communal property considering the different elements that compose this right, and those established in the judgment pursuant to its paragraphs 93 to 98, 115 and 116, including, the "garant[ee of] the effective participation" of indigenous communities, through prior, free and informed consultation based on the considerations made in this judgment on interpretation.

V OPERATIVE PARAGRAPHS

31. Therefore,

THE COURT,

pursuant to Article 67 of the American Convention on Human Rights and Articles 31(3) and 68 of its Rules of Procedure,

DECIDES:

Unanimously,

1. To declare admissible the request presented by the victims' representatives for interpretation of the judgment on merits, reparations and costs delivered in the *Case of the Indigenous Communities members of the Lhaka Honhat (Our Land) Association v. Argentina*, pursuant to paragraphs 6, 7, 17 and 18 of this judgment on interpretation.

2. To clarify, by interpretation, the judgment on merits, reparations and costs delivered in the *Case of the Indigenous Communities members of the Lhaka Honhat (Our Land) Association v. Argentina*, with regard to the reparation ordered in the fifteenth operative paragraph of that judgment, in the sense that the legislative and/or other measures that the State should adopt to provide legal certainty to the right to indigenous communal property should include, among the different elements that this right encompasses, prior, free and informed consultation, pursuant to the considerations contained in paragraphs 20 to 30 of this judgment on interpretation.

3. To require the Secretariat of the Court to notify this interpretation judgment to the Argentine Republic, the representatives of the victims and the Inter-American Commission on Human Rights.

I/A Court HR. *Case of the Indigenous Communities members of the Lhaka Honhat (Our Land) Association v. Argentina. Interpretation of the judgment on merits, reparations and costs.* Judgment of November 24, 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