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CINE, FELANUMA, *ET AL.* (PETITIONERS)

v.

THE STATE OF ESMERALDA (RESPONDENT)

MEMORIAL FOR THE COMMISSION

Team No. 84

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STATEMENT OF FACTS

I. The Numa People.

1. The Numa are an indigenous people who have lived from earliest times in the transmontane area of the Santa Ana River basin in present-day Esmeralda. They were originally considered a part of the neighboring Lanta group, but for about forty years have mutually deemed themselves separate peoples. The Numa's 15 communities, comprising about 800 people, live on the right bank of the Santa Ana River in a portion of their traditional territory which is now part of a "protected natural preserve." Under Esmeralda law, the purpose of these protected areas is to conserve both the biological and human resources located there, including respect for the presence, needs, and traditions of local indigenous peoples. The Numa and Lanta both engage in an essentially hunting-gathering economy, with some subsistence farming. Though sharing a common language, history, hunting range, and religious practices, the Numa are distinct from the Lanta living to their west and maintain a more informal system of government—the Numa Council—where decisions are reached by consensus.
2. Though previously left to themselves, the indigenous peoples of the region suffered abuse and exploitation during earlier periods of rubber and lumber industry development. In accordance with Article 19 of the 1972 Constitution of Esmeralda, which acknowledged the national cultural importance of the indigenous communities and entitled them to have their ancestral lands demarcated and title recognized, Law 555-76 (1976) lays out a procedure for recognition of indigenous groups and granting title to land. The Law defines an indigenous group as one

- “originating from, and identifying themselves with, a native people.” They must have a common culture and language, and must occupy ancestral lands while maintaining their traditional institutions and government. Recognized groups are entitled to demarcation of, and title to, lands they have settled and worked to support their social, physical, and cultural survival. The Law requires the State adopt all measures necessary to safeguard the rights and resources necessary for survival, and sets up a procedure for consultation intended to comply with the requirements of the ILO Convention No. 169 (Indigenous and Tribal Peoples Convention) [ILO C169], as interpreted by the ILO Committee of Experts.
3. Under Law 555-76, the Lanta were officially recognized in 1985 after a 30-month process and accorded collective land rights. The State also provided basic health care, bilingual primary education, and internal autonomy as to justice and law enforcement.
 4. On the other hand, the Numa’s efforts since 1995 to secure official recognition have been rebuffed. In administrative proceedings, the Numa’s claim was rejected because: they were considered a recent off-shoot of the Lanta; the Numa had relocated to an area outside the Lanta reservation, in a nature reserve; three communities of non-indigenes had settled in the same area; and the Lanta government had accepted the boundaries delineated in 1985. The process of recognition has continued, however, with frequent delays, as each side has sought to marshal more research for its case. To date the Numa enjoy none of the benefits of recognition as do the Lanta. The State has nonetheless periodically consulted with the Numa Council on some matters.

II. The State's Santa Ana Project.

5. The 1972 Constitution transferred ownership rights to subsoil resources in Esmeralda to the State. During the 1970s, studies indicated that large oil and natural gas deposits may exist in the Santa Ana River basin in the area occupied by the Numa and Lanta. Under the 1995 Law for Development of Hydrocarbon Resources, the State established a system for granting concessions to extract oil and gas resources nationalized by the State. The procedures prior to awarding a concession require the concessionaire to prepare an environmental and social impact assessment (ESIA) detailing the expected consequences and indicating mitigation measures for adverse effects to the area in order to protect community rights and the environment. After the ESIA is submitted to the Ministry of Development and Energy (MIDSEEN), a four-month public comment period begins. After final approval of the ESIA by MIDSEEN, seismic prospecting will be conducted to determine the size of the deposits, followed by erection of camps, drilling rigs, storage and refining plants, and dedication of rights of way for oil and gas pipelines.
6. In 1998, the State adopted a National Energy Plan which identified the Santa Ana River basin as a site for concession under the Hydrocarbon Law. The Santa Ana Project (SAP) was proposed for an area of 100,000 hectares overlapping both sides of the Santa Ana River and including a portion of the nature preserve occupied by the Numa, as well as a portion of Lanta territory. SAP specifications envision seismic prospecting over the entire area and direct occupation of about 1,000 hectares: 300 for drilling; 100 for pipelines; and 600 for the workers' camp, storage, and refining. The camp will be built adjacent to the Lanta territory on the

River. Because of unsuitability for road building, the Santa Ana River will be used as the main transportation route. A pipeline is planned to extend over the mountains to the coast. The terms and conditions of bidding on the SAP concession included an assessment of environmental issues and the rights of affected indigenous communities.

III. Implementation of the Santa Ana Project.

7. In June, 2000, the State accepted the bid of Intertropic Group, a consortium of domestic and transnational companies, to develop SAP.
8. Only after award of the concession, Intertropic and the State began consultation with groups representing indigenous communities in the area affected by SAP, including Confederacion Indígena Nacional de Esmeralda (CINE), the League of Lanta Communities (LILANTA), and FELANUMA, an association of Lanta and Numa of which most Numa communities are members. The public consultations were held in various indigenous communities under the auspices of local leaders and included participation of representatives of the Numa Council. Officials of the State and Intertropic attended these meetings and discussed the details of SAP, including planned safeguards, resulting temporary and permanent damage to the environment, compensation procedures for damage to land use, installation of the pipeline, camp construction, and temporary damage to the Numa and Lanta economic base in hunting and fishing and to their forest and water resources.
9. During the meetings, the indigenous groups objected frequently to SAP as harmful to their traditional activities and livelihood. The Numa Council in particular

- expressed hostility toward SAP and could not achieve consensus regarding it, but a majority opposed SAP and supported taking legal action to stop its implementation.
10. Following the consultations, Intertropic finalized its ESIA in March 2001 and submitted it for public comment. During the four-month comment period, FELANUMA, CINE, and other environmental and indigenous peoples' groups expressed strong opposition to SAP. FELANUMA argued that the State erred in soliciting bids on SAP before it was prepared to ensure the rights of the affected groups. Citing the irreparable harm to the ecosystem and to the communities themselves, FELANUMA charged that the project violated the groups' rights to self-determination and to property and threatened their very existence. Instead, it proposed a delay in implementing SAP until the State had negotiated directly with the Numa and Lanta and established measures to protect their rights and the environment.
 11. Despite these objections, MIDESEN approved the ESIA in August 2001, giving Intertropic the green light to proceed with SAP.

IV. Numa Opposition to the Project.

12. The Numa, represented by FELANUMA, along with CINE and other activist groups, petitioned the government in October 2001 to revoke approval of the ESIA because of the permanent damage to indigenous rights and irreparable harm to their property arising from SAP. In particular, the petition cited the delay in recognizing the Numa as denying them legal status and title to their land. The

- haste and lack of groundwork for approval of the complex issues in the ESIA were also noted. MIDESEN denied the petition in December 2001.
13. The petitioners filed suit in Federal Court in February 2002, claiming violations of the Constitution, Law 555-76, the American Convention on Human Rights [Convention], the American Declaration of the Rights and Duties of Man [Declaration], and ILO C169, all of which are binding domestic law in Esmeralda. Petitioners stressed the prejudice to the Numa's interests from failure to recognize them and settle their boundaries, to denying them due process of law. Petitioners sought an injunction to avoid irreparable harm from the inroads of new settlers occasioned by the project and the destruction of the Numa's environment. The court denied the injunction on April 10, 2002, and dismissed the suit on September 18, 2002.
 14. The case was appealed to the Court of Appeals and on October 30, 2002, the court granted the injunction until the administrative process on Numa recognition was complete. The court also revoked the approval of the ESIA on the ground that the recognition of the Numa should have been resolved first to preserve their eventual full participation in the decision making. The court also ordered the recognition of the Numa.
 15. The State appealed this decision to the Supreme Court, arguing approval of SAP did not interfere with the recognition process of the Numa; there was insufficient evidence that SAP would endanger the communities' livelihood or welfare; and that enjoining SAP would infringe the State's right to develop the resources

needed to benefit the economy and other sectors of society, whose larger numbers justified favoring their interests. The Supreme Court ruled in favor of the State. While acknowledging the constitutional and statutory protections for indigenous peoples, including a right to compensation and restitution for “unnecessary damage,” the court found allegations of damage speculative, because the State had observed these protections. It reversed the decree of recognition of the Numa, saying this was a matter for the Executive, and finding there was no evidence of non-compliance with the law. It held that the Numa had sufficiently participated in the consultations with the assistance of FELANUMA.

16. The Numa and their allies brought a petition before the Inter-American Commission for Human Rights on January 2, 2003. They alleged the damage to environment and culture flowing from SAP violates Articles 5 and 21 of the Convention, Articles XI and XIII of the Declaration, and Articles 10 and 11 of the Protocol to the Convention on Economic, Social, and Cultural Rights [San Salvador Protocol]. The inadequate consultation process on the ESIA, including failure to make special provisions for preparing the indigenous populations to consider the issues, violated Articles 1, 16, 23, and 25 of the Convention. The failure to recognize the Numa and to demarcate their boundaries violated Articles 3 and 23 of the Convention. Furthermore, in light of the State’s commitments under ILO C169—particularly Articles 5, 6, 7, 13, 14, 15, and 16—and the Inter-American Democratic Charter, the special rights of indigenous people would be violated by continuing with SAP. Petitioners asked the Commission to indicate provisional measures halting SAP until Numa recognition was decided.

17. In March 2003 the Commission ruled the case admissible and proposed negotiation. It also urged this Court to provide the provisional measures sought by the Numa. After an unsuccessful attempt at settlement, the Commission issued its Article 50 Report in September 2003. The Commission found the State had violated Article 21 of the Convention, Article XIII of the Declaration, and Article 11 of the San Salvador Protocol in failing to respect the Numa rights to their underground resources and to protect against damage to their habitat, personal integrity, and lifestyle. The State also violated Articles 1, 23, and 25 of the Convention because of inadequate participation by all affected indigenous groups in the consultation and deficient procedures for approving the ESIA. Furthermore, Articles 3 and 23 of the Convention were violated by failing to recognize the Numa officially and define their boundaries prior to implementing SAP.

18. After the State failed to respond to the Commission's Report or remedy the violations, the Commission submitted the case to this Court in December 2003. The matter is set for hearing before the Court in May 2004.

LEGAL ANALYSIS

I. JURISDICTION OF THE COURT.

This Honorable Court has jurisdiction to hear this case. The State of Esmeralda is a Member State of the Organization of the American States and has fully ratified all instruments of the Inter-American System.¹ The State has accepted the compulsory jurisdiction of the Inter-American Court of Human Rights.²

A. Exhaustion of Domestic Remedies.

Pursuant to Article 46 of the American Convention and Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights, the petitioners have exhausted all domestic remedies.

The petitioners' case, alleging violations to their land and political rights, went through the entire judicial process, and the Supreme Court did not give adequate weight to their concerns and ruled in favor of the Government.³ The Commission has found that the judicial protections were inadequate and have been exhausted.

In regards to the Numa's claims to recognition as a people, they have also exhausted domestic remedies. The Numa have followed all required procedures and have

¹ Hypo ¶ 6. Those instruments include: the American Convention on Human Rights [Convention], the American Declaration of the Rights and Duties of Man [Declaration], and the Additional Protocol to the Convention on Economic, Social, and Cultural Rights [San Salvador Protocol].

² *Id.* It should be noted that, even though, Article 11 of the San Salvador Protocol is not subject to the Court's mandatory jurisdiction, the *Abella* case and Article 29(b) of the Convention require that the Court apply the most favorable human rights regime binding on the state. *Abella v. Argentina*, Case 11.137, ¶¶ 164-165, OEA/Ser.L/V/II.98, doc. 7 rev. (1997).

³ Hypo ¶ 38.

been denied recognition.⁴ The Supreme Court denied their request and referred back to the Executive.⁵ Thus, the Numa people have exhausted all domestic remedies.

B. Timeliness.

In accordance with Article 32(1) of the Rules of Procedure of the Inter-American Commission, the petitioners have satisfied the timeliness requirement. The Supreme Court made its final decision after the Court of Appeals decree in October 2002.⁶ Petitioners filed their claim immediately after with the Commission, which declared the case admissible in March 2003.⁷ This complies with the timeliness requirements.

II. THE STATE'S SANTA ANA PROJECT THREATENS SERIOUS AND PERMANENT DETRIMENT TO THE ENVIRONMENTAL HEALTH AND QUALITY OF NUMA TERRITORY IN VIOLATION OF RIGHTS TO A HEALTHY ENVIRONMENT UNDER THE SAN SALVADOR PROTOCOL ARTICLE 11.

A. Human Rights Guarantees to Health and Healthy Environment.

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [San Salvador Protocol] provides in Article 11 for protection of the environment as a human right.⁸ Similarly, the Declaration

⁴ *Id.*

⁵ *Id.* The Commission found this to amount to a denial of judicial protection and that is supported by the *Bentham* case by the European Court on Human Rights, which emphasized that administrative review does not amount to an effective judicial remedy. Eur. Ct. H.R., *Bentham Case*, ¶¶ 40-44, Judgment of October 23, 1985, Series A, No. 97.

⁶ Hypo ¶¶ 36-38.

⁷ *Id.* ¶ 43.

⁸ “Everyone shall have the right to live in a healthy environment and to have access to basic public services. [¶] The States Parties shall promote the protection, preservation, and improvement of the environment.” The Inter-American system is one of two which provide such express protection of the environment and its healthful quality as human rights. See B. Oxman & D. Shelton, *Decision Regarding Communication 155/96*, 96 AM. J. INT’L L. 937, 941 n.33 (2002). The African Charter on Human and Peoples’ Rights, art. 24 (1981) provides: “All peoples have the right to a general satisfactory environment favorable to their development.”

guarantees the right to the preservation of health and well-being.⁹ Environmental protection is identified as characteristic of democratic society in the Inter-American Democratic Charter.¹⁰ The International Covenant on Economic, Social, and Cultural Rights [ICESCR] recognizes a right to the “highest attainable standard of ... health” and commits states to achieving this right through improvement of all aspects of environmental hygiene.¹¹

B. Special Protections for Indigenous Peoples’ Environmental Rights.

Given the intimate connection of indigenes with the land (*See* Argument III *infra.*), international instruments on indigenous peoples’ rights stress the right to maintain the natural environment in particular, for the very livelihood of such groups depends on the conservation of a healthy natural ecosystem.¹² Thus, International Labor Organization Convention No. 169 (Indigenous and Tribal Peoples Convention) (1989) [ILO C169] requires special measures to safeguard the total environment of indigenous peoples’ territory, their traditional connection with the land, and allowing for mitigating the difficulties of adapting to changes in conditions of life.¹³ Numerous international resolutions and statements recognize the particular duty of preserving the environment for the benefit of indigenous cultures, because their survival is dependant on a healthy environment.¹⁴

⁹ Declaration, art. XI

¹⁰ Inter-American Democratic Charter, art. 15 (2001).

¹¹ ICESCR, art. 12. Article 1(2) of ICESCR and the International Covenant on Civil and Political Rights [ICCPR] also prohibit denying a people its means of subsistence.

¹² *See* Proposed American Declaration on the Rights of Indigenous Peoples, Preamble ¶¶ 2, 3, and 5, OEA/Ser.L/V/II.95, doc. 7 rev. (1997) [Proposed American Declaration].

¹³ ILO C169, arts. 4(1), 5(c), 7(4), 13, and 19.

¹⁴ Proposed American Declaration, arts. XII, XIII, XXI; Draft U.N. Declaration on the Rights of Indigenous Peoples, arts. 21, 24, 25, 28, 29, E/CN.4/Sub.2/RES/1994/45 (1994) [UN Draft Declaration]; Carta Internacional Americana de Garantías Sociales, arto. 39

A healthy environment is the key to the enjoyment of all other rights of indigenous groups. Because of the intimate connection of indigenes with their land and their dependence on their natural surroundings, detriment to the environment threatens not just their physical existence, but their traditional lifestyles, on which depends the preservation of their culture and spiritual heritage.¹⁵ For instance, this Court has noted the potentially ruinous consequences on the physical and spiritual values of the Awas Tingni indigenous community caused by a proposed logging concession.¹⁶ Even the building of a single highway through indigenous territory has been found to wreak expansive havoc on traditional communities.¹⁷

C. Case Histories of Environmental Degradation from Petroleum Extraction.

The damage to indigenous people caused by oil exploration has been particularly well documented. The Commission has investigated the detrimental effects on the indigenous communities of the Oriente department of Ecuador following the government's opening of the area to petroleum concessions.¹⁸ Deprivations directly following from the oil extraction operations in the Oriente include improper handling of toxic wastes,

(1948); U.N. Convention on Biological Diversity, art. 8(j), June 5, 1992, 1760 U.N.T.S. 79; Rio Declaration on Environment and Development, Principle 22, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (1992).

¹⁵ Thus environmental degradation at once deprives indigenous peoples of rights to life, family, livelihood, use of property, culture, and religion. *See* Convention, arts. 4 (right to life), 12 (freedom of religion), 17 (rights of the family); Declaration, arts. I (life), III (religion), VI (family), IX (inviolability of home), XI (health), XIV (right to work and subsistence); San Salvador Protocol, arts. 6 (work), 12 (food), 15 (family).

¹⁶ Inter-Am. Ct. H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, ¶ 149, Ser. C, No. 79 [*Awas Tingni*].

¹⁷ IACHR, Resolution N° 12/85, Case N° 7615 (Brazil), March 5, 1985, Considerations, ¶ 2; Recommendations ¶¶ 10(a), (c) [*Yanomami Case*].

¹⁸ IACHR, Report on the Situation of Human Rights in Ecuador, ch. VIII, OEA/Ser.L/V/II.96, doc.10 rev. 1 (1997) [*Ecuador Report*].

which have polluted the water, soil, and air. Contamination arises from “improper treatment and disposal of toxic wastes, collapsed or leaching waste pits, and oil spills.”¹⁹ The locals’ lives are crucially affected by surface water and aquifer pollution, as they depend on these sources for all personal uses, and for watering livestock and wildlife on which their livelihoods depend. Untreated burn-offs of natural gas, a by-product of all oil extraction, have polluted the air, and waste crude is used for dust control on the access roads, leading to direct contact exposure to people walking on the roads.²⁰ These environmental insults have led to reports of serious health conditions (skin diseases, rashes, chronic infection, gastrointestinal problems, and chronic infantile diarrhea) at levels in excess of those found in areas not adjacent to the oil fields.²¹ Locals report increasing difficulty in securing adequate subsistence from the fish and wildlife critical to their nutrition. The Commission has observed environmental deterioration is inherent in petroleum mining:

Oil development and exploitation do, in fact, alter the physical environment and generate a substantial quantity of toxic byproducts and waste. Oil development activities include the cutting of trails through the jungle and seismic blasting. Substantial tracts of land must be deforested in order to construct roads and build landing facilities to bring in workers and equipment. Installations are built, and exploratory and production wells drilled. Oil exploitation then generates byproducts and toxic wastes through each stage of operations: exploratory drilling, production, transportation and refining.²²

Evidence that such deleterious effects are inherent in petroleum operations, like

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* The Commission also noted deficiencies in governmental oversight of the regulations and protections which are in place. Given the frontier status of areas left to indigenous groups like the Numa, ineffective enforcement of legal protections is to be expected.

proposed here, is seen in the recent ground-breaking decision by the African Commission on Human and Peoples' Rights. This case concerned the Nigerian government's failure to protect the rights of the Ogoni people from the impact of oil exploitation in their region.²³ There, a consortium, including the state oil company and transnational oil firms, operated extraction and processing facilities in the Ogoniland region of the country. In finding violations of protections relating to property, health, and a clean environment,²⁴ the African Commission cited the state's direct involvement through the consortium and use of security forces to protect the petroleum fields in the ecological degradation of the area, but also its failure to provide even scientific testing of pollution levels or to monitor or regulate the activities of the consortium.²⁵ The result was toxic pollution of waterways and land causing "skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems."²⁶ While acknowledging the state's right to exploit the national resources for the benefit of society as a whole, it found this cannot be done at the expense of basic human rights of the local population.²⁷

Legal scholars researching the interaction of development projects with the rights of minorities confirm that such environmental degradation has been the inevitable concomitant of petroleum extraction, ranging over all phases of extraction.²⁸ Prof. Kimerling

²³ Afr. C.H.P.R., *SERAC & CESR v. Nigeria*, Communication 155/96, 15th Annual Activity Report (2001-02) [*SERAC & CESR*]. See also Oxman & Shelton, *supra* note 8.

²⁴ African Charter on Human and Peoples' Rights, arts. 14, 16, and 24 (1981).

²⁵ *SERAC & CESR, supra*, ¶¶ 50-53.

²⁶ *Id.* ¶ 2.

²⁷ *Id.* ¶¶ 54, 69.

²⁸ See Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas And Indigenous Homelands in the Ecuadorian Amazon*, 14 HAST. COMP. & INT'L. L. REV. 849, 866-71 (1991). See also Gerald P. Neugebauer III,

sums up the *human* effect of these environmental impacts in Ecuador thus:

Petroleum development is fueling what could become the final conquest of Amazonia. The oil boom accelerates the destruction of Oriente cultures and undercuts traditional indigenous economies and land rights. Without control over their lands, indigenous people will not be able to adapt in their own ways to a changing world. Loss of land and oil pollution also threaten the health and, in some cases, the physical survival of these people.²⁹

D. Proof of Prospective Harm to the Numa People Flowing from SAP.

In light of the inherent nature of the product and process of petroleum extraction and the case histories from different continents showing oil drilling leading to long-lasting and devastating effects on the environment, health, and livelihood of local populations, there can be little doubt that the same sorts of deprivation will inherently follow in the wake of the State's Santa Ana Project [SAP].³⁰

Because SAP has not yet been fully implemented, much of the damage to Numa life, land, and culture is currently prospective only. Yet the consistent course of other case histories shows that the envisioned harm is inevitable. To all appearances SAP will utilize the same facilities and operational techniques typical of the petroleum indus-

Indigenous Peoples As Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America, 78 N.Y. UNIV. L. REV. 1227, 1227-32 (2003) ["Those familiar with the indigenous rights movement in Latin America know all too well how petroleum development can subject local indigenous populations to deplorable atrocities of grave proportions."]; Judith Kimerling, *Rio+10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVIR'L. L. 523, 532-82 (2002).

²⁹ Kimerling, *Disregarding Environmental Law*, *supra* note 28, at 877.

³⁰ In addition, the State's own ESIA concedes temporary disruption of local wildlife and water resources, as well as more long-term environmental alteration due to the pipeline installation. Clarification ¶ 8.

try,³¹

³¹ SAP will consist of settled camps for workers, storage facilities, refining plant, work roads, and pipelines to transport the oil and gas. Hypo. ¶¶ 17F, 19-21; Clarification ¶ 3.

the same facilities and activities documented in the Oriente and Ogoniland cases, which led to habitat loss, pollution from leaching and spills, and wide-spread health problems from exposure. Although seismic prospecting has presently been completed,³² it is still unclear how large an area will ultimately be affected. In any event, even seismic prospecting, the seemingly least intrusive part of the entire process, can lead to significant environmental impacts on indigenous lifestyles.³³ And as the other case histories also clearly demonstrate, because of the enforcement difficulties involved, even good faith promises by the State to protect indigenous groups and to monitor concessionaires' compliance with regulations are unlikely to avoid irreparable environmental damage.³⁴

It is in the very nature of this claim that the harm to the Numa's right to a healthy environment cannot, at this point, be definitively proved. However, that does not mean that the harm is "speculative." The Numa seek to prevent an imminent threat to their environment which is on track to occur if the State's plans are not altered. Although the Numa cannot demonstrate as a matter of fact the present existence of the harm, the Court should adapt the standard of proof to the realities of this type of human rights violation.³⁵ The evidence from prior case histories and identity of methods in the present project meet a standard of reasonable probability that the current form of SAP will result in wide-spread and long-lasting detriment to Numa rights.

³² Clarification ¶ 3.

³³ See Kimerling, *Disregarding Environmental Law*, *supra* note 28, at 861.

³⁴ Clarification ¶¶ 19, 51.

³⁵ See Inara K. Scott, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?*, 19 VA. ENVTL. L. J. 197, 216-220 (2000) (arguing for standard of proof in environmental rights cases commensurate with the practical evidentiary difficulties, comparing to adjustments made in the Court's forced disappearance cases).

III. THE STATE'S SANTA ANA PROJECT VIOLATES THE RIGHT TO PROPERTY UNDER ARTICLE 21 OF THE AMERICAN CONVENTION BY FAILING TO RESPECT GENERAL AND SPECIAL INDIGENOUS PROTECTIONS TO USE AND ENJOYMENT OF THE LAND.

A. The Right to Use and Enjoyment of Property.

The Convention recognizes that “[e]veryone has a right to the use and enjoyment of his property.”³⁶ While this right may be subordinated to the interests of society, no one can be thus deprived of property without just compensation.³⁷ The right to own property includes the right to exploit the resources of that property to obtain one’s livelihood, i.e., the right to “use and enjoyment.”³⁸ Moreover, the right to property can be both an individual and a group right.³⁹

B. Special Property Rights of Indigenous Peoples.

The right to property raises special considerations when applied to indigenous peoples. Because of the intimate and essential connection between indigenes and their land, international agreements have widely recognized that indigenous peoples’ right to property involves special protections and privileges. First, indigenous peoples have a

³⁶ Convention, art. 21(1).

³⁷ *Id.* art. 21(1), (2).

³⁸ Declaration, art. XXIII (“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”); ICCPR, art. 1(2); ICESCR, art. 1(2).

³⁹ Universal Declaration of Human Rights, art. 17(1) (1948); African Charter on Human and Peoples’ Rights, art. 21 (1981); U.N. Declaration on the Right to Development, art. 1(2), G.A. Res. 128, UN GAOR, 41st Sess., Supp. 53 at 186, UN Doc. A/RES/4/128 (1986).

right to recognition of their communal and other traditional land tenure forms.⁴⁰ Second, in view of the dependence of indigenous peoples on a healthy environment for their survival (*See* Argument II *supra.*), they have specially recognized rights as regards development in their territory.⁴¹ Third, in recognition of their unique connection to the land, they have a right of return to lands traditionally occupied if removed there from.⁴² The instruments place on states the duty to take special measures to protect and advance such rights of indigenous peoples.⁴³

The right to property guaranteed by Article 21 has been judicially construed consistently with these particular principles regarding indigenous peoples. For instance, the Numa's plight compares to that of the Awas Tingni community of the Mayagna group of Sumo in eastern Nicaragua. There the government proposed to grant development concessions in the Awas Tingni territory. This Court interpreted Article 21 under an evolving understanding of international law which required the state to recognize the communal form of property tenure characteristic of indigenous peoples.⁴⁴ Noting the delay in both official recognition and boundary demarcation, as well as an equation of possession with

⁴⁰ ILO C169, arts. 5, 13, 14, and 17; Proposed American Declaration, Preamble ¶ 5 and art. XVIII(1)-(4); UN Draft Declaration, arts. 21, 25, and 26.

⁴¹ ILO C169, arts. 7, 15, and 19; Proposed American Declaration, Preamble ¶ 2, arts. XVIII(5) and XXI; UN Draft Declaration, arts. 3, 21, 23, 26, and 30.

⁴² ILO C169, art. 16; Proposed American Declaration, art. XVIII(6), (7); UN Draft Declaration, art. 27.

⁴³ ILO C169, art. 4(1); Proposed American Declaration, art. VI; UN Draft Declaration, art. 22.

⁴⁴ *Awas Tingni*, ¶¶ 148, 149. This is consistent with the requirement that the Convention not be interpreted to derogate from rights accorded by other international agreements, such as ILO C169. Convention, art. 29.

title in customary indigenous law,⁴⁵ the Court found the Awas Tingni had a right under Article 21 to have their traditional territory respected by the government through its withholding development concessions until the legal status and land boundaries of the Awas Tingni were settled.⁴⁶

C. Violations of Numa Property Rights by the State.

Like Nicaragua in *Awas Tingni*, the State here has bound itself legally to recognize the Numa traditional land tenure forms.⁴⁷ The domestic law of Esmeralda is thus consistent with this Court's interpretation of Article 21 of the Convention. The State must therefore, under the binding effect of these provisions and ILO C169, recognize the special indigenous rights regarding traditional tenure, resource development, and rights of return.

1. Failure to Recognize Traditional Numa Forms of Land Tenure.

The State has done none of these things in the case of the Numa people. The State fails to respect Numa land tenure and boundaries most directly by delaying recognition of the Numa people, so that the demarcation of territory envisioned by the Constitution and implemented by Law 555-76 has not been carried through. The effect of non-recognition is to ignore entirely the Numa's communal right to the land and its resources, including any legal standing to challenge the State's actions. The failure to recognize the Numa and demarcate their territory makes it impossible to properly determine the detriments to their

⁴⁵ *Awas Tingni*, ¶¶ 151-53.

⁴⁶ *Id.* ¶ 153.

⁴⁷ 1972 CONST. art. 19; Law 555-76 (1976).

rights, since it is still uncertain where those rights extend to. Before legal title is granted, it is likewise impossible to determine the extent of impingement on Numa riparian rights along the Santa Ana River, slated to be the main thoroughfare for development.⁴⁸ The State's action directly impairs Numa rights to occupation and use of the land's resources for their own livelihood. (*See* Argument II *supra*.) Finally, delay in recognition threatens massive confusion in determining respective rights and obligations later on, when it may result in *de facto* forfeiture of many of those rights and protections.⁴⁹

2. Failure to Provide Special Protections Regarding Resource Development.

The inadequate consultation procedure and the delay in recognition also violate the Numa's right to particular protection and control as regards to the use of the natural resources on their lands. (*See* Arguments V and VI *infra*.) Lack of formal recognition has deprived the Numa of a proper voice during the State's approval of the ESIA, contrary to the special measures which should be emplaced for indigenous groups during resource allocation decisions.⁵⁰ Far from providing enhanced protections in this regard, the State has in fact violated domestic law by not respecting the importance of conservation of cultural values and guaranteeing the presence of, and traditional use by, indigenous communities in areas set aside as natural reserves.⁵¹

⁴⁸ Hypo. ¶ 20.

⁴⁹ *Cf.* Inter-Am. Ct. H.R., *Order on Provisional Measures Requested by the Awas Tingni Community*, September 6, 2002, Considerations, ¶¶ 4-8, Ser. E.

⁵⁰ ILO C169, arts. 7, 15, and 19; Proposed American Declaration, Preamble ¶ 2, arts. XVIII(5) and XXI; UN Draft Declaration, arts. 3, 21, 23, 26, and 30.

⁵¹ Hypo. fn. 1. A large part of the concession area—indeed a crucial portion adjacent to the Santa Ana River—overlaps the Nature Reserve on the right bank of the river; this also intersects a significant portion of the traditional Numa territory. Hypo. ¶¶ 12, 19; Annex to Hypo: Map of the Santa Ana River Basin.

3. Denial of the Right of Return to Traditional Territories or Compensation.

The failure to complete the process of official recognition also skews the determination of the proper range of Numa territory. International agreements recognize the right of return and the consideration of traditional range in setting the boundaries of lands allotted to indigenous peoples.⁵² Recognition of the Numa people would afford them special property rights under Article 21 beyond standard adverse possession claims, since indigenous peoples' rights take account of the effects of transhumance in traditional economies when setting boundaries. Without official recognition coming before the implementation of the State's proposal, determination of boundaries and compensation calculations will not properly take into account special traits of the Numa as an indigenous people.

Evidence of such disregard is already in the record. Despite special considerations for the right of indigenous peoples to control and participate in the exploitation of the subsurface resources of their lands,⁵³ the 1972 Constitution transferred ownership of subsoil resources to the State.⁵⁴ The State has not negotiated compensation for this wholesale annihilation of vested property rights. So far, only *discussions* have occurred for awarding compensation for partial mitigation of *environmental damage*, after SAP is wound up.⁵⁵

⁵² ILO C169, art. 16; Proposed American Declaration, art. XVIII(6), (7); UN Draft Declaration, art. 27.

⁵³ ILO C169, art. 7(1) and 15(2); Proposed American Declaration, art. XVIII(5); UN Draft Declaration, art. 30.

⁵⁴ Hypo. ¶ 4.

⁵⁵ Hypo. ¶ 26; Clarification ¶ 50. The Esmeralda Supreme Court has held that the law currently provides for "compensation and restitution in the event that the Project causes unnecessary damage." Hypo. ¶ 38 (emphasis added). It said nothing about compensation for

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D. Conclusion.

The Commission has previously recognized “[t]hat for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.”⁵⁶ Failure to settle claims on indigenous status and rights has led in the past to “a situation of inevitable economic dependence on the Government, as they have been deprived of their traditional means of subsistence....”⁵⁷ SAP will impair irremediably the Numa’s ability fruitfully to use their traditional lands in their customary, communal fashion.

Nor does it matter that the Numa are only a small portion of the national population: “From the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives....”⁵⁸ Protection of intrinsic rights of the small and powerless indigenous populations against the often entirely separate economic interests of the “civilized” majority is precisely the purpose of guaranteeing to indigenous peoples full and equal enjoyment of all human rights.⁵⁹

the original expropriation of Numa subsoil property rights under the 1972 Constitution. Articles 15 and 16 of ILO C169, however, oblige the State to provide full compensation for such deprivation.

⁵⁶ Yanomami Case, Considerations, ¶ 8. The Yanomami Case represented “the first time an inter-governmental organization had issued a resolution requesting...demarcation” of traditional indigenous territory. IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, ch. III, Part I, Section 2, OEA/Ser.L/V/II.108, doc. 62 (2000) [Indigenous Peoples Report].

⁵⁷ IACHR, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, Part Two, A, ¶ 10, OEA/Ser.L/V/II.62, doc.10 rev. 3 (1983) [Miskito Report].

⁵⁸ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, at 36, *quoted in* *Indigenous Peoples Report*, ch. III, Part I, Section 2.

⁵⁹ ILO C169, art. 3; Proposed American Declaration, art. II; UN Draft Declaration, art. 1.

IV. THE STATE'S PROPOSED SANTA ANA PROJECT AND ITS INACTION IN RECOGNIZING NUMA INDIGENOUS STATUS ENDANGER THE CULTURAL EXISTENCE OF THE NUMA PEOPLE IN VIOLATION OF THE DECLARATION ARTICLE XIII.

A. Rights to Culture in International Human Rights Instruments.

The Declaration guarantees cultural participation, which correlates with the widespread recognition of the right to maintain and preserve one's native culture against external erosion and internal attrition.⁶⁰ This is recognized in Article 26 of the Convention, committing the State to adopting measures to achieve progressively the rights implicit in the OAS Charter's cultural standards.⁶¹ Likewise the San Salvador Protocol recognizes the right to take part in the cultural life of the community.⁶² The Inter-American Democratic Charter treats respect for cultural rights as "inherently linked" to development, equitable growth, and the consolidation of democracy in the Americas.⁶³

International accords likewise treat protection of culture and cultural integrity as primary human rights. The Universal Declaration of Human Rights, Article 27(1) provides that "Everyone has the right freely to participate in the cultural life of the community...." Numerous other international instruments acknowledge rights to culture.⁶⁴ Part

⁶⁰ Declaration, art. XIII ("Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.").

⁶¹ Although the Convention concerns only rights of individuals, read in conjunction with ICCPR, art. 27, the rights to culture must also be enforced as a group right. Miskito Report, Part Two, B, ¶¶ 1-4; Indigenous Peoples Report, ch. III, sec. I.

⁶² Art. 14(1)(a). Paragraph 2 of that article commits the State to take steps "to ensure the full exercise of this right [including] those necessary for the conservation, development and dissemination of...culture."

⁶³ Inter-American Democratic Charter, art. 13.

⁶⁴ *See also* ICCPR, art. 27 (requires that no ethnic, religious or linguistic minority be denied the right to enjoy their own culture in community with other members of their group); art. 1 (grants all peoples the right to self-determination in matters of cultural development); ICESCR, art. 15(1)(a) (the right of everyone to take part in cultural life is

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of the right to participate in culture is the right to preserve and transmit one's culture.⁶⁵

B. Particular Rights of Indigenous Peoples to Preserve Their Culture.

The State is obliged to give particular protection to indigenous cultures. The 1972 Constitution⁶⁶ recognizes indigenous groups and acknowledges their national cultural importance is to be “valued, respected and protected by law.” The promotion and protection of the human rights of indigenous peoples is identified as key to promoting democracy in the Inter-American Democratic Charter.⁶⁷ Preservation of and respect for the culture and customs of indigenous populations is mandated in ILO C169.⁶⁸ Agreements relating to indigenous people in fact call on all states to provide special measures in order to protect the particularly endangered indigenous cultures.⁶⁹

guaranteed); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(vi) (1965) (prohibits racial or ethnic discrimination in protecting the right to equal participation in cultural activities). *See also* African Charter on Human and People's Rights, art. 17(2) (1981).

⁶⁵ Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 1(2), G.A. Res. 135, U.N. GAOR, 47th Sess., Supp. 49 at 210, U.N. Doc. A/RES/47/135 (1992). This instrument requires that “states shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.” This includes adopting appropriate legislation and other measures.

⁶⁶ 1972 CONST. art. 19.

⁶⁷ Inter-American Democratic Charter, art. 9.

⁶⁸ ILO C169, arts. 2(2)(b); 4(1); 5(a) and (b); 7(1); 23(1); and 27(1); The Proposed American Declaration recognizes the centrality of cultural rights for indigenous peoples in Article II(2), the right against forced assimilation in Article V, and the right to cultural integrity—including respect and recognition of indigenous customs and traditions—in Article VII. Similarly, the UN Draft Declaration contains numerous provisions respecting the rights to practice and maintain indigenous culture and traditional social structures. (arts. 3-5, 7(a) and (d), 8, 9, 12, 14, 21, 29, 31, 32.)

⁶⁹ ILO C169, art. 4(1); Proposed American Declaration, art. VI; UN Draft Declaration, art. 22.

C. Threats to Numa Cultural Rights from SAP.

The State's approval of SAP invades both the general cultural rights of the Numa and the specific, special protections due them as an indigenous group.

1. Cultural Loss from Destruction of Traditional Livelihood and Economic Base.

The physical development of infrastructure necessary for SAP, including occupation of land for drilling wells, setting up worker camps, storage and processing facilities, and running of pipelines, all threaten to destroy the environment in the Numa territory. (*See* Argument II *supra*.) Such environmental deprivation will undermine traditional Numa subsistence livelihoods, which are dependent on conservation of natural resources in the flora and fauna of the region. The particular dependence of indigenous culture and lifestyle on the physical environment has been recognized in international human rights instruments, which also grant indigenous groups particular rights of self-determination regarding their lands and resources.⁷⁰ (*See* Arguments II and III *supra*.) This Court also recognized the intimate connection of environment and cultural integrity in the *Awat Tingni* case, where it concluded the right to property for indigenous peoples must include recognition of land tenure modalities traditional in their cultures.⁷¹ Detriment to the environment and resources of an indigenous group like the Numa is a direct assault on the cultural and spiritual heritage of the group, undermining the ability to practice its culture in the present and to transmit that heritage to the future generations.

⁷⁰ ILO C169, arts. 4(1), 7(1) and (3), 13(1), 15; Proposed American Declaration, Preamble ¶ 3, arts. XIII, XVIII, XXI; UN Draft Declaration, arts. 7(b), 23, 25, 26, 28, 30, 31.

⁷¹ *Awat Tingni*, ¶ 148.

2. Loss from Accelerated Cultural Attrition.

Opening the Numa lands to exploitation will expose the Numa to outside influences which threaten cultural erosion and will speed defection of younger generations to the dominant culture. Exposure to the technology and culture of the dominant community through contact with the imported work force threatens to undermine Numa traditional values and economic pursuits. Such has been the documented effect of dominant culture exposure in several other development scenarios similar to SAP.⁷²

3. Loss from Permanent Cultural Dilution

The temporary use of the territory for petroleum extraction will inevitably lead to opening the region to permanent settlements by non-Numa groups, as shown again by previous cases.⁷³ Already three such communities have been established in the Numa territory,⁷⁴ but development will inevitably lead to further inroads. Settlement by non-Numa brings the same risks of dominant culture exposure as temporary workers, but on a continuing basis. It also threatens to ‘dilute’ the region as a Numa cultural zone, tipping the demographic makeup of the area by an inevitable increase in numbers of non-Numa immigrants to lands now made accessible by SAP. Settlement tends to snowball by making once remote areas more attractive to larger numbers who would not have considered migration to a less developed region.⁷⁵

⁷² Ecuador Report, ch. IX; Yanomami Case, Background, ¶ 3; Indigenous Peoples Report, ch. III, sec. I, ¶ 2.

⁷³ Ecuador Report, ch. IX; Yanomami Case, Background, ¶3(a); Indigenous Peoples Report, ch. III, sec. I, ¶ 2.

⁷⁴ Hypo. ¶ 12.

⁷⁵ Article 16 of the European Framework for the Protection of National Minorities, February 1, 1995, E.T.S. No. 157 calls on states to refrain from taking measures that would alter the population proportions in minority-occupied areas. States are required to avert

4. Loss from State Action and Inaction.

The State has denied the Numa their cultural rights by failing to honor in full the traditional governmental forms of the Numa people. The state has not only failed to recognize the Numa Council as the governing body of the Numa people, but it has not respected the Numa tradition of decision by consensus by approving the ESIA before the Numa Council had resolved itself on a stand.⁷⁶ (*See* Arguments V and VI *infra*.)

The State's failure to recognize the Numa people and grant them full status as an indigenous people (*See* Argument VI *infra*.) also impinges on their cultural rights. By virtue of the 'legal limbo' in which the Numa find themselves, they are severely restricted in their ability to assert and enforce their general rights as a people and their substantial specific protections as an indigenous group. These cultural protections to which they are entitled are suspended, allowing continuing in-roads on their cultural identity with impunity.

D. Conclusion.

Cultural rights are among the most fragile and susceptible to swift and irreversible erosion:

In the view of the Commission, for an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all the rights set forth by the American Convention on Human Rights, since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity. ... Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous.⁷⁷

and punish invasions of traditional indigenous territory by intruders. *See* ILO C169, art. 18; Proposed American Declaration, art. XVIII(8); Carta Internacional Americana de Garantías Sociales, arto. 39 (1948); World Bank Operational Directive 4.20, ¶ 15(a) (1991).

⁷⁶ Hypo. ¶¶ 11, 25.

⁷⁷ Miskito Report, Part Two, B, ¶¶ 14 and 15.

The State's proposed project, combined with prior inaction on Numa recognition, threatens just such a cultural disaster.

V. THE STATE VIOLATED ARTICLES 1, 23, AND 25 OF THE CONVENTION WITH RESPECT TO THE LACK OF ADEQUATE PARTICIPATION AND JUDICIAL PROTECTION AFFORDED THE NUMA IN THE APPROVAL OF THE SANTA ANA PROJECT.

The State violated the rights of the Numa under Articles 1, 23, and 25 of the Convention.⁷⁸ When Esmeralda violated the indigenous peoples' rights to participate in government (Article 23) and their right to judicial protection (Article 25), the State also violated Article 1 of the Convention.

A. State Failure to Provide Sufficient Consultation and Participation in the Approval of SAP Violated Numa Rights under Article 23 of the Convention.

Article 23 of the Convention guarantees every citizen the right to participate in government. The ICCPR likewise guarantees the right and opportunity of participation.⁷⁹ This requires that the tribes be able to participate either directly or through elected representatives in the approval of the Project.

ILO C169 expands and clarifies these rights in regards to indigenous groups; it is an extension of what is required by the State to ensure the indigenous populations' right to participate in government. The State is required to apply the most favorable human

⁷⁸ Article 1 of the Convention places an affirmative duty on the State: "...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...."

⁷⁹ ICCPR, art. 25(a) ensures the right to "take part in the conduct of public affairs, directly or through freely chosen representatives." The ICCPR is the leading treaty protecting people's rights to participate in government.

rights regime binding on the state.⁸⁰ Article 6 obligates states to involve indigenous peoples in official decision making.⁸¹ Indigenous peoples are entitled to special participation as regards to development of natural resources.⁸² ILO C169 also provides that when states retain ownership of mineral or sub-surface resources or rights, they should consult with the peoples concerned with the objective of ascertaining how their interests will be affected and, where possible, the people should participate in the benefits of the activities and receive fair compensation for any damages that may result.⁸³

The State implemented the National Energy Plan as an attempt to create the appearance that it was acting in accordance with its own laws and those of controlling international treaties. The National Energy Plan establishes the procedures for exploration and development of the Santa Ana River Basin.⁸⁴ The only groups that have any influence on the decision-making process are the government and the interested company. There is only one provision that allows any involvement by the tribes, and it merely al-

⁸⁰ Convention, art. 29(b); Inter-Am. Ct. H.R., *Abella v. Argentina*, Case 11.137, ¶¶ 164-165, OEA/Ser.L./V/II.98, doc. 7 rev. (1997).

⁸¹ Article 6 requires states “consult with the peoples concerned ... whenever consideration is being given to legislative or administrative measures which may affect them directly,” to “establish means by which these people can freely participate ... at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them,” and requires that “the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

⁸² Article 7(1) states “the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives ... and the lands they occupy or otherwise use.... In addition, they shall participate in the formulation, implementation, and evaluation of plans and programs for national and regional development which may affect them directly.”

⁸³ *Id.* art. 15(2).

⁸⁴ Hypo ¶ 18.

lows them to review and comment on the ESIA, but their opinions or complaints have no binding effect on the approval process.⁸⁵

This plan of action violates the State's duties to the affected indigenous populations.⁸⁶ The Numa people have six communities that will be directly affected by the project.⁸⁷ SAP will also use the Santa Ana River as the primary means of transportation.⁸⁸ At a minimum, the rights in the Convention and ILO 169 require states to adequately weigh the concerns and interests of the indigenous peoples affected.⁸⁹ Also, when the right to consultation is mentioned, the conventions require that they be more than formalities or processes which are merely providing information about the development projects to the affected communities.⁹⁰ The Commission has also recommended that when developmental projects will affect an indigenous area or their habitat or culture, to be consistent with the ILO C169 the decision to implement such projects must be made with their participation, consultation, and with the view of obtaining their consent.⁹¹

During the short, four-month period proscribed in the law, the State did consult with the indigenous peoples, but it seems clear that four months is not adequate time to inform the tribes of such foreign intrusions on their land and what the harm to them will be. Even though the CINE, FELANUMA, and forest activists raised many objections to

⁸⁵ *Id.* ¶ 17.

⁸⁶ Convention, art. 23; ICCPR, art. 25(a); ILO C169, arts. 6, 7, and 15.

⁸⁷ Hypo ¶¶ 9, 11.

⁸⁸ *Id.* ¶ 19.

⁸⁹ See Robert A. Williams, *The Protection of Indigenous People's Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 78 (2001).

⁹⁰ *Id.* at 80.

⁹¹ IACHR, Report on the Situation of Human Rights in Peru, ch. X, OEA/Ser.L/V/II.106 doc.59 rev. (June 2, 2000).

SAP, MIDESEN still approved the ESIA a month after the four-month period had ended.⁹² Furthermore, MIDESEN rejected a petition filed by CINE, FELANUMA, and the forest activists to revoke the approval because MIDESEN backed the ESIA.⁹³ Thus, not only did MIDESEN not show any concern for the objections that were being made, but actively fought the tribes' claims all along. This process effectively left out the affected tribes from any direct decision-making position; it merely gave them a chance to express their views, but there is no evidence that MIDESEN ever appropriately took their concerns into account.

The ESIA was prepared by the consortium awarded the contract for the job, so the credibility of the information on the environmental impact to the tribes has to be called into question.⁹⁴ Furthermore, MIDESEN, which is the sole decision maker in the approval process of the SAP, is an extension of the government and does not contain any members from any of the parties that would be affected by SAP. The meetings with the Numa were merely informative and allowed them to “voice” their concerns (a formality). In reality their opinions did not affect the ultimate decision of MIDESEN to approve SAP because no actions were taken to appease the objectors or modify the ESIA, even though there was “strong opposition.”⁹⁵ Without requiring the affected people's approval in some manner or properly requiring MIDESEN to take their interests into account, their rights under Article 23 of the Convention were violated.

⁹² Hypo ¶¶ 24, 29, 31.

⁹³ *Id.* ¶ 32.

⁹⁴ Hypo ¶ 17(B). Also, the African Commission in *SERAC & CESR v. Nigeria* says that compliance with the African Charter requires the ordering or permitting of independent scientific monitoring. *SERAC & CESR*, ¶ 53.

⁹⁵ Hypo ¶¶ 26, 29.

B. The State Has Provided Insufficient Protection of the Numa's Rights Regarding SAP and Its Effect on Their Communities, Violating Their Right to an Adequate Remedy in Law.

The Convention ensures the right of all people to effective and prompt judicial remedies for violations of their human rights.⁹⁶ Likewise the Declaration protects the right to adequate judicial relief.⁹⁷ The Proposed Declaration also confirms that indigenous peoples "have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands."⁹⁸

On its face, the State has enacted Law 555-76 to protect indigenous peoples' rights.⁹⁹ The law also proclaims to be acting in accordance with ILO C169 when it outlines procedures for consultation when "... any program, project, plan, or measures ... could affect the rights of indigenous peoples."¹⁰⁰

Although Esmeralda law provides for guarantees to respect the fundamental rights

⁹⁶ Convention, art. 25 ("1. 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. ¶ 2. The States Parties undertake: ¶ a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; ¶ b. to develop the possibilities of judicial remedy; and ¶ c. to ensure that the competent authorities shall enforce such remedies when granted.")

⁹⁷ Declaration, art. XVIII ("Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.")

⁹⁸ Proposed Declaration, art. XVIII(4).

⁹⁹ Hypo ¶ 14. This law provides that, "the government, working with the indigenous peoples, shall adopt all measures necessary to safeguard their rights and preserve the natural resources required for their survival and advancement."

¹⁰⁰ *Id.* ¶ 15.

of indigenous peoples, in practice, these rights are illusory and ineffective. This Court in the *Awes Tingni* case also referenced the rights for indigenous groups in Nicaragua's Constitution and laws, but found them to be insufficient in practice, and as such, futile in protecting the indigenous people's fundamental rights.¹⁰¹ The Convention requires that not only must the rights be recognized by constitution or by law, but "it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it."¹⁰² As mentioned above, the consultation process was completely ineffective in protecting the tribes' rights in the approval of SAP. However, the appeals process also proved to be useless in securing the tribes' fundamental rights.

The petitioners initially voiced their objections, and then attempted to appeal to MIDESEN to ask them to reconsider their approval of SAP by reiterating the damage that would be caused to the environment and to the Numa people.¹⁰³ MIDESEN denied the petition two months later without any reference to how the concerns brought by the groups would be resolved.¹⁰⁴

The groups next appealed to the court system alleging violations of Esmeralda law as well as violations under the Convention, the Declaration, and ILO C169.¹⁰⁵ The Federal Court Judge rejected the entire suit "after the brief legal proceedings customary in these types of cases."¹⁰⁶ Since these types of cases are customarily brief, it seems questionable if any group could receive the judicial protection required under the Con-

¹⁰¹ *Awes Tingni*, ¶¶ 113-14.

¹⁰² *Id.* ¶ 113.

¹⁰³ Hypo ¶ 32.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* ¶ 33.

¹⁰⁶ *Id.* ¶ 35.

vention, because when an entire community's existence is at stake, it seems that more than a "brief legal proceeding" is required to comply with the Convention.

Next, the groups petitioned the Court of Appeals. The Court of Appeals recognized the groups' rights and granted the injunction until the Numa people were recognized, stated that the recognition of the Numa people should have been accomplished before SAP was approved, and ordered the formal recognition of the Numa people.¹⁰⁷ It appears that the Court of Appeals acted in accordance with Esmeralda law and with international treaties.

This momentary recognition of the State's duties to the Numa was short-lived. The Supreme Court overturned the Court of Appeals, and said SAP doesn't interfere with the recognition of the Numa people, there is a lack of evidence that it will endanger the lives or welfare of village communities, SAP will particularly benefit the large urban population of Esmeralda, and the "alleged inconvenience caused by the Project to such a small percentage of population is justified, given its positive outcomes for the majority of the citizenry."¹⁰⁸ The Supreme Court also overturned the official recognition of the Numa People, stating that only the Executive could decide the matter.¹⁰⁹ Even though the Supreme Court acknowledges the Constitution and the laws protecting the indigenous people, it stated that any damages would be "speculative" before SAP begins.¹¹⁰

As a result, the Supreme Court failed to protect the rights of the indigenous populations, because the damage that will be caused is real and documented and the purpose

¹⁰⁷ *Id.* ¶ 36.

¹⁰⁸ *Id.* ¶ 37.

¹⁰⁹ *Id.* ¶ 38.

¹¹⁰ *Id.*

of the laws is to empower the judiciaries to prevent damage from happening. The Supreme Court has a duty to provide an effective legal remedy to the indigenous peoples when their fundamental rights are violated, and here the Supreme Court failed to recognize that their rights were clearly being violated.¹¹¹ The Supreme Court's own statements emphasize that it was acting in the best interests of the State regardless of the impact on such a "small percentage of society." It is apparent that the laws in Esmeralda are like those of Nicaragua in *Awas Tingni*: perhaps sufficient on their face, but nonexistent in practice.¹¹² The Supreme Court's decision demonstrates the illusoriness and ineffectiveness of the laws and the failure of the judiciary to protect the fundamental rights of the Numa people.

C. Conclusion.

Therefore, the State of Esmeralda violated articles 1, 23, and 25 of the Convention when it approved SAP without adequate participation from and judicial protection for the Numa peoples.

VI. THE STATE VIOLATED ARTICLES 3 AND 23 OF THE CONVENTION WITH RESPECT TO THE RECOGNITION OF THE NUMA PEOPLE AND THE FAILURE TO DEMARCATÉ AND GRANT THEM LEGAL TITLE TO THEIR LANDS PRIOR TO THE IMPLEMENTATION OF THE PROJECT.

The failure of the State to recognize the Numa people and to demarcate and grant them legal title to their land prior to the implementation of SAP violated their right to judicial personality and their right to participate.

¹¹¹ See *Awas Tingni*, ¶ 111.

¹¹² *Id.* ¶¶ 113-14

A. The State's Failure to Recognize the Numa People and to Demarcate and Grant Them Legal Title to Their Lands Violated Their Right to a Judicial Personality.

The Convention holds that "every person has the right to recognition as a person before the law."¹¹³ ILO C169 clarifies this group right by requiring states to give due regard to specific values of indigenous groups in the state's dealings with them.¹¹⁴

The Declaration also maintains in Article XVII that, "every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." The Proposed American Declaration enjoins states to "give maximum priority to the demarcation and recognition of properties and areas of indigenous use."¹¹⁵ Also, the UN Draft Declaration describes an "urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."¹¹⁶ The UN Draft Declaration provides that: "Indigenous peoples have the collective and individ-

¹¹³ Convention, art. 3. *See also* ICCPR, art. 16. Article 27 of the ICCPR states that minorities shall not be denied the right, "...to enjoy their own culture, to profess and practice their religion, or to use their own language," in community with the other members of their group. This extends the right of recognition beyond individuals to indigenous groups as well.

¹¹⁴ ILO C 169, art. 5 ("In applying the provisions of this Convention: [¶] (a) The social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; [¶] (b) The integrity of the values, practices and institutions of these peoples shall be respected; [¶] (c) Policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.").

¹¹⁵ Proposed American Declaration, art. XVIII(8).

¹¹⁶ UN Draft Declaration, art. 15(2).

ual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."¹¹⁷

The Esmeralda Constitution requires that the government delineate the boundaries of native peoples ancestral lands," and "grant them legal title to these lands...."¹¹⁸ Law 555-76 defines an indigenous group as "a group of individuals originating from, and identifying themselves with, a native people. They must share a common culture, have their own language, and should historically reside on ancestral lands maintaining their own institutions and traditional forms of government."¹¹⁹ The Law also states that all "indigenous peoples are entitled to government recognition and to the lands and territories where they have settled and labored to derive the resources necessary for their social, physical, and cultural survival." And the government "shall adopt all measures necessary to safeguard their rights and preserve the natural resources required for their survival and advancement."¹²⁰

The Numa broke off from the Lanta group in the 1960s, and settled on land that had been traditionally used by the whole Lanta group to gather food, hunt, and perform their annual pilgrimage to the holy mountain.¹²¹ The Numa have a total population of approximately 800 people and the Numa Council is the governing body.¹²² The State claims that it will not recognize the Numa as an "indigenous people" because the Numa

¹¹⁷ UN Draft Declaration, art. 8.

¹¹⁸ Hypo ¶ 5.

¹¹⁹ Hypo ¶ 13.

¹²⁰ *Id.* ¶ 14.

¹²¹ *Id.* ¶ 11.

¹²² *Id.*

have settled on an area designated as a “protected natural reserve,” instead of an area of the Lanta people, and that in 1985 the Lanta people accepted the boundaries that the government had designated for them as suitable for the survival of the Lanta people.¹²³ However, the Numa people had already separated from the Lanta people, so of course the boundaries that would be suitable for them would not include land needed for the survival of the Numa people. Also, Nicaragua tried to make similar claims with respect to the Awas Tingni group (not residing on historical land and of mixed origins), and this Court ruled that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.”¹²⁴ The Court emphasized that this situation had created an atmosphere of uncertainty for the community that, subsequently, violated their rights under the Convention.¹²⁵

The Numa people comprise one of the oldest tribal groups residing in Esmeralda.¹²⁶ The area where they now reside had traditionally been used by both the Lanta and Numa tribes, and now is used by the Numa.¹²⁷ The Numa’s governing body, the Numa Council, acts similarly to the Lanta General Assembly, though not as formal, and the government has sent representatives to the meetings on occasion.¹²⁸ Furthermore, the law for demarcation and recognition says “should reside” not “must reside” on historical grounds; this Court has found the requirement of permanency in land to be an unfair bur-

¹²³ *Id.* ¶ 12.

¹²⁴ *Awas Tingni*, ¶ 151.

¹²⁵ *Id.* ¶ 153.

¹²⁶ Hypo ¶¶ 8, 11.

¹²⁷ *Id.* ¶ 11.

¹²⁸ *Id.*

den on indigenous peoples.¹²⁹ These facts prove that the Numa meet all the requirements under Esmeralda law and international law to be recognized as an indigenous people.

The failure of the State and its judiciary to provide for the demarcation and recognition of the Numa people represents a difficult and threatening condition to their way of life and represents a continuous threat to their fundamental rights as a people.¹³⁰ This is evidenced by the Supreme Court's recent denial to recognize the Numa people and to turn the matter over to the Executive. The matter has been pending before the Executive for nine years, and this continued denial of a judicial personality by the Supreme Court sentences the Numa to more indefiniteness in their status and land rights. The Supreme Court has a duty to provide an effective legal remedy to the indigenous peoples when their fundamental rights are violated, and here the Supreme Court failed to even recognize the Numa as a people.¹³¹ The Supreme Court's decision demonstrates the failure of the judiciary to act in accordance with the laws requiring it to recognize the Numa as a judicial personality.

Without official recognition, the Numa's claims to land rights cannot be adequately adjudicated before the courts or any other governmental body. The Numa people's continued denial for recognition denies them their right to a judicial personality.

B. The Failure of the State to Recognize the Numa People and to Demarcate and Grant Title Prior to the Implementation of SAP Denied Them Their Right to Participate as Guaranteed in the Convention, Article 23.

There cannot be a permissible approval of SAP without first recognizing the Numa people and their land because they will not be afforded a clear right to participate

¹²⁹ *Awas Tingni*, ¶ 151.

¹³⁰ Williams, *supra* note 89, at 77.

¹³¹ *See Awas Tingni*, ¶ 111.

without such recognition. Article 23 of the Convention requires that all people be guaranteed the right to participate in their government. The ICCPR also guarantees this right in Article 25(a) as to matters of public affairs.

ILO C169 requires that the government afford the indigenous peoples consultation and participation rights when a proposed project will affect their way of life (*See Argument V supra.*). The lack of recognition as a people effectively eliminates the Numa from any processes that may affect their people or land. Such has been the case with regards to the approval of SAP (*See Argument V supra.*). When the Supreme Court denied the recognition of the Numa and did not find their lack of recognition as a violation to their right to participate, the government effectively determined that the Numa have no right to influence the decision to approve the Project. This is an outrageous denial of the Numa's right to participate because they will be directly and adversely affected by SAP and therefore have a right to participate in the decision making process. Being able to voice their opinions is not sufficient because without recognition as a people and legal title to their lands, the Numa's arguments will go unheeded. Recognition and legal title to their lands is necessary for the Numa people to effectively exercise their right to participate.

C. Conclusion.

The failure of the State to clearly demarcate the territory of the Numa people and to recognize them as a "people" denied them their rights to a judicial personality (art. 3) and to participate in government (art. 23) as required under the Convention.

VII. PROVISIONAL MEASURES ARE NEEDED TO AVOID GRAVE AND IRREVERSIBLE DAMAGE TO THE NUMA’S PHYSICAL ENVIRONMENT, MEANS OF SUBSISTENCE, AND CULTURAL INTEGRITY.

A. Authority and Standard for Granting Provisional Measures.

This Court is empowered under Article 63(2) of the Convention to direct provisional measures in extremely grave and urgent cases where irreparable harm to persons could result.¹³²

B. Conditions Warranting Measures in This Case.

As the discussion in Argument II above demonstrated, the effects documented in other case histories of development within indigenous peoples’ territory—in Brazil, Ecuador, Nicaragua, and Nigeria—are long-term and sweeping in scope. Like other indigenous peoples, the Numa depend on their local environment completely for their subsistence. Dependent on hunting and gathering,¹³³ the Numa are at the mercy of forces that affect their environment. Loss of ecosystem health threatens not only immediate, direct hardship, but through loss of habitat forcing wildlife migration and outright extinction of fragile species from toxic pollution, the damage threatens to become permanent. Moreover, many of the Numa’s other rights depend directly on the maintenance of environmental integrity, such as the right to practice their religion, which is affected by planned disruption of the land adjacent and leading to Numa sacred sites.¹³⁴ Petroleum development will open the transmontane area to further settlement by the non-indigenous. This

¹³² Rules of Procedure of the Inter-American Court of Human Rights, art. 25(1) (2003).

¹³³ Hypo. ¶ 11.

¹³⁴ Clarification ¶ 41.

threatens to create vested property rights in settled areas that could severely prejudice the Numa's interests in future boundary determinations and land titling. (*See* Arguments III and IV *supra*.)

The ESIA for SAP has been approved by the State and confirmed by administrative review and judicial decree.¹³⁵ Despite concerted efforts to halt the process, the Project has proceeded apace while the legal battle has continued.¹³⁶ Thus there is every likelihood the State will move forward with implementing SAP in accordance with its National Energy Plan. This is particularly so given the State has made commitments to the Intertropic consortium by its approving the ESIA and would be exposed to potential liability should it unilaterally halt the project until the Numa's objections are addressed.¹³⁷

C. Analogous Precedent Supports the Granting of Provisional Measures.

The Numa's predicament is identical to that of the Awas Tingni community of Nicaragua. This Court found in a post-judgment request for provisional measures that the threats to the community's livelihood and property interests from government logging concessions warranted imposing a moratorium on the concession's operations until the state had implemented the Court's judgment ordering demarcation and titling of indigenous land affected by the concession.¹³⁸ Accordingly, the Court ordered Nicaragua to take measures to protect the land and natural resources of the Awas Tingni community,

¹³⁵ Hypo. ¶¶ 31, 32, 35-39.

¹³⁶ Clarification ¶ 3.

¹³⁷ *Id.* ¶ 27.

¹³⁸ Inter-Am. Ct. H.R., *Order on Provisional Measures Requested by the Awas Tingni Community*, September 6, 2002, Considerations, ¶¶ 4-8, Ser. E.

extending to third persons, until the final determination of land rights was accomplished. By the same token, the Numa's claims to the traditional land on which they live and derive their livelihood are threatened directly and indirectly by SAP. To avoid irrevocable harm similar to that facing the Awas Tingni community, SAP should be held in abeyance until this case is decided and any subsequent remedies regarding the 15 Numa communities' rights have been implemented.

D. Conclusion.

This Court has recognized “[t]he purpose of provisional measures, in International Human Rights Law, is to effectively protect fundamental rights, inasmuch as they seek to avoid irreparable damage to persons.”¹³⁹ In this case, the present protection of central human rights of the Numa people lies in the balance, weighed against the State's interest in its proposed energy project. Extracting petroleum deposits tens of millions of years old carries not a fraction of the urgency as does respect for the Numa's rights, on which their very existence as a people is largely dependent. Failure to determine those claims prior to putting SAP into action would result in irreparable damage to persons, and so as a matter of extreme gravity and urgency, provisional measures are appropriate.

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REQUEST FOR RELIEF

Wherefore Petitioners request this Court:

(1) Order the State to institute renewed consultation and negotiation proceedings with affected indigenous groups in full compliance with the above principles;

¹³⁹ *Id.* ¶ 9.

(2) Order the State to give immediate official recognition of the Numa as an indigenous people;

(3) Order the State to restore subsoil resource rights to the indigenous groups affected by SAP or to provide full and fair compensation for expropriated interests;

(4) Order immediate cessation of further implementation of SAP pending State satisfaction of the provisions of the Court's judgment;

(5) Grant such other relief as it shall deem necessary and appropriate.