American University Washington College of Law
Center for Human Rights and Humanitarian Law

NINTH ANNUAL INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

CINE, FELANUMA, ET AL VS. STATE OF ESMERALDA

BENCH MEMORANDUM*

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I. INTRODUCTION

A. Focus of the Hypothetical Case

This year's hypothetical case is focused on three basic issues. The first concerns the scope of the right to property in the lands, territories, and resources of the indigenous peoples, and refers mainly to the State's property rights to the subsoil and its capacity to decide how to exploit it. The second refers to the participation of the indigenous peoples, individually and collectively, in making political or other decisions that affect their social and cultural survival, and has to do primarily with the processes of consultation and participation in the decisions on exploration and exploitation of the oil fields. Finally, the third issues addresses the right of indigenous people to demand recognition and operate as a collective juridical personality, with respect for property rights in their lands, territories, and resources, and their capacity as a collective to take action to defend their rights.

Since its establishment in 1959, the Inter-American Commission on Human Rights (hereinafter "Commission"), has recognized and fostered respect for the rights of indigenous peoples in this hemisphere. In its 1972 resolution on the problem of the *Human Rights Situation of the Indigenous People in the Americas*, the Commission proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.[1]" Since then, this concept of special protection has been considered in several countries and in individual reports approved by the Commission. In addition, it has been recognized and applied in the context of numerous rights and liberties enshrined in the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration") and the American Convention on Human Rights (hereinafter "American Convention"), including the right to life, the right to humane treatment, the right to judicial protection and to a fair trial, and the right to property.

The Commission and the Inter-American Court on Human Rights (hereinafter "Inter-American Court") have considered the issue of indigenous rights in numerous cases. In 1985, the Commission decided the case of the Yanomami in Brazil, which contributed to the recognition of their territories.[2] Most recently, the Inter-American Court decided the *Awas Tingni* case in 2001, establishing clear principles on the rights of indigenous peoples to their lands, which are applicable to this case.[3]

With respect to the applicability of the Draft American Declaration on the Rights of Indigenous Peoples, the Inter-American Court has indicated in the case of *Dann v. USA* that it is appropriate to consider the provisions of that draft declaration on interpreting and

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[1] *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, Doc. 62, 20 October 2000, Chapter 1, para. 1.

[2] I/A Comm. HR, *Coulter et al.*, Resolution No. 12/85, Case 7615, Brazil, March 5, 1985, OAS/Ser.L/V/II.66, doc.10 rev 1, October 1st, 1985.

[3] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case,* Judgment of August 31, 2001, Series C. No. 79.

applying the provisions of the American Declaration in the context of indigenous peoples[4]. This can be done, it said, to the extent that the basic principles reflected in the provisions of the draft declaration, including aspects related to Article XVIII, express general principles of international law emanating from the inter-American system that are applicable within and beyond it.[5]

B. Initial Considerations

The Inter-American Court has scheduled a public hearing to hear oral arguments in the case of CINE, FELANUMA et al. v. Esmeralda on (1) preliminary objections; (2) arguments on the merits; and (3) the request for provisional measures as submitted together with the referral of the case to the Court.

The petition that gives rise to this hypothetical case alleges:

- That the approval by the State of Esmeralda of an operation to extract hydrocarbons in the indigenous areas populated by the Lanta and Numa peoples violated the rights of those peoples to the resources on their lands and territories, and would cause harm to their habitat, their personal integrity, and their way of life.
- That the state has violated their rights by not allowing for their adequate participation in the approval process of the initial concession of the project and of the ESIAs, and having approved the ESIA through inadequate procedures.
- The State has violated the right of the Numa people and its members to receive timely recognition as an "indigenous people", and has failed to demarcate and grant them legal title to their land prior to the implementation of the Project.

The petitioners argue that the facts alleged constitute violations of Articles 1, 5, 16, 21, 23, and 25 of the American Convention; Articles XI and XIII of the American Declaration; and Articles 10 and 11 of the Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social and Cultural Rights "Protocol Of San Salvador" (hereinafter "the Protocol of San Salvador").

In addition, they argue that these rights should be interpreted in light of International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989) (hereinafter "ILO Convention 169"), in particular Articles 5, 6, 7, 13, 14, 15, and 16 as they relate to the consultation process; Articles 6 and 7 as they relate to the right to decide on their development priorities; Articles 13, 14, 15, and 16 as they relate to the rights to their ancestral lands, territories, and resources; and Article 5 as it relates to the protection by the state. It is alleged that all of these rights have been violated by the State of Esmeralda.

In its March 2003 admissibility report, the Inter-American Commission determined the admissibility of the complaints referring to Articles 1 (obligation to respect the rights), 21

[4] I/A Comm. H.R., Report No. 75/02. Case No. 11.140, *Mary and Carrie Dann v. USA*, December 27, 2002, OEA/SerL/V.II 116, Doc 46, para. 168

[5] *Id.*

(right to private property), 23 (political rights), and 25 (right to judicial protection) of the Convention; Article XIII (right to the benefits of culture) of the Declaration; and Article 11 (right to a healthy environment) of the Protocol of San Salvador. At the same time, it also considered inadmissible the allegations referring to Articles 5 (right to humane treatment) and 16 (right to association) of the Convention; Article XI (right to the preservation of health and well-being) of the Declaration; and Article 10 (right to health) of the Protocol of San Salvador.

On September 21, 2003, the Commission adopted its Report on the Merits in the case, finding that the facts alleged constituted violations of Articles 1(1), 3, 21, 23, and 25 of the Convention, Article XIII of the Declaration, and Article 11 of the Protocol of San Salvador. Accordingly, the Commission submitted a report in compliance with American Convention Article 50, recommending that the State of Esmeralda: (1) investigate and correct the circumstances constituting the violations; and (2) take the necessary measures to ensure full respect of the rights of the indigenous peoples affected, including suspending all the work previously authorized on the Santa Ana Project until the foregoing violations are corrected. The State did not respond to the Article 50 report.

It is expected that in their final written and oral arguments the teams will each focus on the main issues raised with respect to Articles 1(1), 3, 21, 23, and 25 of the Convention, Article XIII of the Declaration, and Article 11 of the Protocol of San Salvador. It is up to the participants to determine how to frame their positions.

The purpose of this memorandum is to delineate the main legal issues and arguments the parties may present. It is a guide and does not claim to be exhaustive. While the teams will have various perspectives and points of emphasis, and though they may not cover all the arguments suggested by or relating to the applicable case-law, it is expected that they will refer to each of the main legal issues arising from the hypothetical.

In terms of methodology, this memorandum will first address two issues of international law that permeate the discussion of the merits, namely the right of self-determination and its obligations and duties, and the applicability of international instruments in the Inter-American system. Then it will provide a brief review of the State's preliminary objection that all domestic remedies have not been exhausted as it relates to the Numa's request for certification as a distinct "indigenous people" as prescribed by Esmeralda law. Finally, the memorandum will focus on the merits of the case. We will present a brief summary of the issue and the applicable law to provide you with a general context for the arguments, and then present the potential arguments of the Inter-American Commission, followed by the potential arguments of the State.

II. GENERAL ISSUES OF INTERNATIONAL LAW

A. The Right to Self-Determination

The status of indigenous peoples as a "people" is an emerging concept that finds support in positive international law in ILO Convention 169 (though restricted to the scope of that convention), in the Declaration against Racial Discrimination of the Santiago Preparatory Conference, and in the draft declarations on the rights of indigenous peoples at

both the United Nations and the OAS. In particular, Article 1(1) of the International Covenant on Civil and Political Rights, states "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

For indigenous peoples, the principle of self-determination establishes a right to control their lands and natural resources, and to participate genuinely in the whole process of decision-making that affects them. This is clear from the declarations of the Human Rights Committee of the United Nations in relation to the situation of the indigenous peoples of Canada, in which the Committee has noted "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence."[6]

ILO Convention 169, at Article 7, provides as follows:

> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
>
> 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
>
> 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
>
> 4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

The issue of respect for the right of self-determination lies at the base of the petition before the Inter-American Court. The recognition of "internal" self-determination arises from at least two sources in the Inter-American system: the rights recognized in the American Convention (among them the rights to association, juridical personality, and political rights) and in the American Declaration (among them the right to culture). The Draft Declaration on the Rights of Indigenous Peoples also addresses this right of self-determination. Another source has been the decision by the Court in the *Awas Tingni* case, in

[6] *Concluding Observations of the Human Rights Committee, Canada*, CCPR/C/79/Add. 105, para. 8 (April 7, 1999).

which it recognized the juridical personality, right to integrity, and right to communal property of that Mayagna group. Given that other international instruments have spoken succinctly on this issue as it relates to indigenous peoples, there is a strong argument that the interpretation of the inter-American instruments should be interpreted in light of other international human rights instruments, and the evolution of international law. The recognition of this right of the indigenous peoples, understood as "internal self-determination" within the nation-state, is generally accepted.

On the other hand, the State has the constitutional right to property in the resources of the subsoil and their exploitation for the benefit of its people, including the indigenous peoples. This higher interest coincides with the recognition of that decision-making power bestowed on it by ILO Convention 169, which specifically recognizes that right, and at the same time imposes conditions for its exercise. It is also recognized by the Draft American Declaration on the Rights of Indigenous Peoples approved by the Inter-American Commission in 1997, and the proposal by the Chairman of the Working Group of the Permanent Council in 2003. While this Declaration has not been adopted by the political organs of the OAS, it is an indicator of the position adopted by the Inter-American Commission and upheld by those leading the debate on the question in the political organs of the OAS.

B. Applicability of ILO Convention 169 and Other International Instruments in the Inter-American Human Rights System

The Inter-American bodies have long debated the use of other human rights instruments within the Inter-American system. In *Las Palmeras Preliminary Objections*, the Court drew the distinction between applying other treaties and using other treaties as interpretive instruments, advocating the latter while prohibiting the former.[7] This rationale, although difficult to understand, pervades the Court's jurisprudence.

The Inter-American Court has used a variety of treaty instruments as interpretive tools, reasoning that the Court should consider the full range of human rights instruments in order to inform its analysis and provide the most complete protection of the rights elaborated in the American Declaration and American Convention.[8] In *Cantoral-Benavides*, the Court intimated that different conventions can re-enforce and complement one another to help understand the content of a right. In exploring the proposition that psychological abuse can be considered torture for the purposes of the Convention, the Court looked to the definition of torture included in both the Inter-American and the UN Conventions on that subject.[9] It was clearly the explanatory power of those other conventions that made them

[7] I/A Court H.R., *Las Palmeras Case Preliminary Objections,* Judgment of February 4, 2000, Series C No. 67, at paras. 30 - 31.

[8] *See* I/A Court H.R., *Case of Villagrán Morales, et al., (*The "Street Children" Case), Judgment of November 19, 1999, at para. 239, where the Inter-American Court, in holding that Guatemala violated Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, accepted the Commission's argument that the Convention Against Torture defines "more precisely and extensively the mechanisms of protection established in Article 5 of the American Convention."

[9] I/A Court H.R., *Cantoral Benavides Case*, Judgment of August 18, 2000, Series C No. 69, at para. 101, stating that "[b]oth the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

useful to the Court. The distinction can then be understood as the difference between the justiciability of the rights contained in those instruments and the explanatory power of those instruments.

In its Advisory Opinion 1/82, the Inter-American Court held that the Inter-American Commission "properly invoked other treaties concerning the protection of human rights in the American states, regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the Inter-American system."[10] Similarly, in its Advisory Opinion 10/89, the Court mentioned that American law of human rights "must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation," which naturally includes international treaties.[11]

The Inter-American Court has consistently adhered to this principle in its opinions in contentious cases. In *Baena Ricardo et. al.*, the Court, in its discussion of the alleged violation of Article 16 (freedom of association) of the American Convention, made reference to both the ILO Constitution, ILO Convention 87 Concerning Freedom of Association and Protection of the Right to Organize, and ILO Convention 98 Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively.[12] The Court also cited the reasoning of the ILO Committee of Experts, the official treaty body that monitors compliance with ILO conventions, in the resolution of one of its own cases.[13] These examples are not unique, but they effectively show the extent to which the Inter-American Court will rely on "other treaties" and the decisions of the bodies that monitor those treaties as persuasive interpretations of rights protected by the American Convention.

Although the Court has never itself used ILO Convention 169 as an interpretive tool, in its reparations decision in *Aloeboetoe* it briefly makes reference to ILO 169. This language seems to imply that the Court would have applied ILO 169 if Suriname had been party to the convention.[14] The Inter-American Commission, on the other hand, has spoken specifically about the applicability of ILO 169. The Commission wrote in its Second Report on the Situation of Human Rights in Peru that "[t]he international human rights instruments of both the inter-American and universal systems contain provisions relevant to the analysis of the situation of indigenous communities."[15] The Commission goes on to say that

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Punishment, and the Inter-American Convention on the same subject, make reference to this possibility."

[10] Advisory Opinion OC-1/82. *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights),* September 24, 1982. Series A No. 1, at para. 43.

[11] Advisory Opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. July 14, 1989, Series A No. 10, at para. 37.

[12] I/A Court H.R., *Baena Ricardo et. al. case*. Judgment of February 2, 2001. C Series No. 72, at para. 157, note 59.

[13] *Id.*

[14] I/A Court H.R., *Aloeboetoe et al. Case*, Reparations (Art. 63(1) American Convention on Human Rights) Judgment of September 10, 1993, (Ser. C) No. 15 (1994), at para 61.

[15] I/A Commission H.R., *Second Report on the Human Rights Situation in Peru*, Chapter X: The Rights of Indigenous Communities, June 2, 2000, OEA/Ser.L/V/II.106, Doc. 59 rev., at para. 4.

> [t]he most relevant international instrument is ILO Convention 169 on indigenous and tribal peoples, ratified by Peru on February 2, 1994. That Convention establishes obligations to consult and include the participation of indigenous peoples in respect of matters that affect them…On ratifying this instrument, the Peruvian State undertook to take special measures to guarantee the indigenous peoples of Peru the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to make efforts to improve living conditions, participation, and development in the context of respect for their cultural and religious values.[16]

All of this jurisprudence would seem to permit using ILO 169 as an interpretive tool.

In *Las Palmeras Preliminary Objections*, the Inter-American Court articulated a general rule that contentious cases within the Inter-American system should refer to rights elaborated in the American Convention.

> Although the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (*cf.* Articles 33, 44, 48.1 and 48).[17]

The Court therefore distinguishes between the protocols for the analysis of the human rights situations within OAS member states by the Commission in its supervisory role and the analysis of contentious cases that are brought before the adjudicatory bodies of the Inter-American system. The application of Convention ILO 169 in the instant case, a contentious case culminating in an application before the Inter-American Court, would violate this rule.

There does exist, however, an exception to this rule, namely that a convention itself may confer competence on the Inter-American Court or Commission to hear violations of the rights protected by that convention.[18] This exception, however, does not cover ILO 169. Though Esmeralda ratified ILO 169, ILO 169 does not confer competence on the Inter-American Court or Commission to hear violations of the rights it purports to protect. Indeed, the ILO established the Committee of Experts as the adjudicatory body charged with judging violations of Convention ILO 169 and consideration of those violations should be reserved for that body.

C. Status of Indigenous Communities in National Protected Areas

It is important to note two other international treaties briefly here. The first is the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (hereinafter "Western Hemisphere Convention" or "WHC") and the other is the Convention on Biological Diversity (hereinafter "Biodiversity Convention"). The WHC is particularly relevant because it was created in the 1940s under the auspices of what is now

[16] *Id.* at para. 7.

[17] I/A Court H.R., *Las Palmeras Case Preliminary Objections*, Judgment of February 4, 2000, Series C No. 67, at para. 34.

[18] *Id.*

the OAS. This makes it an Inter-American treaty of sorts and suggests that it was in effect in the 1970s when Esmeralda enacted its 1972 Constitution and when the Numa moved into the National Protected Area. The Biodiversity Convention in turn was signed by most countries in 1992 during the UN Conference on Environment and Development and would therefore cover questions of law raised contemporaneous with the administrative proceedings for Numa recognition, but nothing before that.

The WHC distinguishes among three types of reserves and applies different protective standards to each. The first is the national park, which, according to Article III, has set boundaries and un-exploitable natural resources. The second is the wilderness reserve, which, according to Article IV, permits scientific investigation, government inspection, or other uses consistent with the purpose for which the area was established. The third is a national reserve, which, under Article I, is different because it is not established for strict preservation, but rather "for conservation and utilization of natural resources under government control."

The Biodiversity Convention, although more recent, does not supercede the WHC. According to Article 22(1) of the Biodiversity Convention, "[t]he provisions of the Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement…" This provision seems to give priority to earlier treaties under Article 30(2) of the Vienna Convention on Treaties. Since it covers the same subject matter as the WHC, the WHC would be the dominant authority. It is worth noting however that Article 3 of the Biodiversity Convention declares as a general principle that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies…"

III. PRELIMINARY OBJECTIONS

A. Preliminary Considerations and Applicable Law

The Inter-American Court's capacity to consider a matter depends on the admissibility of the case. In the Inter-American system, a case is admissible only if domestic remedies have been exhausted. In this case, the domestic procedure for delimiting and titling the lands of the Numa people has been ongoing for approximately eight years.

Article 46(1)(a) of the American Convention establishes that domestic remedies must be exhausted in order to submit a petition under Articles 44 and 45. The Inter-American Court said in *Awas Tingni Preliminary Objections* that

> of the generally recognized principles of international law referred to in the rule on exhaustion of domestic remedies, the foremost is that the State defendant may expressly or tacitly waive invocation of this rule. Second, in order to be timely, the objection that domestic remedies have not been exhausted must be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has waived its use tacitly. Thirdly, the State that alleges non-

exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness.[19]

A remedy is considered exhausted if there has been unjustified delay. Although the Commission has not defined the exact criterion that allows one to decide whether a specific remedy has been exhausted, it has said that a government cannot allege failure to exhaust domestic remedies if the internal investigation in a case has been subject to unwarranted delay.[20] The Commission, for example, has admitted a case on the violation of personal liberty in which the victims were tried by the State for six years and detained for more than two years without a final decision from the domestic court.[21] The Commission has also admitted a case which, two years after the fact, was still in the preliminary phase.[22]

In general, the decision on exhaustion of domestic remedies is considered, according to the Rules of Procedure (Article 31), as one falling exclusively within the Commission's jurisdiction. The Court, after a case has been submitted to its jurisdiction, will hear the case and decide the issues of exhaustion of domestic remedies as violations of Articles 8 and 25, and the reasonable time in which domestic legal proceedings should take place.[23]

B. The Commission's Arguments

The Commission will likely argue that the State has tacitly waived its right to object that all domestic remedies have not been exhausted for two reasons. First, the decision to recognize the Numa people has been delayed for a longer-than-reasonable period (8 years), mainly because of requests and delays on the part of the State and its representatives. Also, the rule is being invoked for the first time in front of the Inter-American Court, which is considered a later stage in the proceedings. Even if the Court does not find that the State has tacitly waived its right to invoke the rule, the State is required to present evidence that such a remedy is accessible and effective, which it has not done.

They will argue that the other procedures were handled judicially without delays. The fact that the case has been declared admissible by the Commission and that it has reached the Court means that there is substance to the allegations and that the Court should consider, as a merits issue, whether there has been a violation of Article 25. This preliminary objection pursued by the State will have the effect of delaying the process even more. The Court should decide this issue now, in favor of the Inter-American Commission, or later, together with the merits.

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[19] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment on the Preliminary Objections, February 1, 2000, (Ser. C) No. 66 (2000), at para. 53.

[20] Report No. 1/92 in Case 10,235 (Colombia), of February 6, 1992, in the Annual Report of the Inter-American Commission on Human Rights, 1991, Washington, D.C., 1992.

[21] Resolution No. 2/84, in Case 9,058 (Venezuela), of May 17, 1984, in Annual Report of the Inter-American Commission on Human Rights, 1984-1985, Washington, D.C., 1985.

[22] Resolution No. 17/87, in Case 9,425 (Peru), of March 28, 1987, in Annual Report of the Inter-American Commission on Human Rights, 1986-1987, Washington, D.C., 1987.

[23] *See* I/A Court H.R., *Myrna Mack Chang Case*, Judgment of November 25, 2003, Series C No. 101, at paras. 212-218.

C. The State's Arguments

The State will likely argue that the exercise of jurisdiction by the Inter-American Court in this case would violate the basic principle of the mechanisms for international law, namely that they are subsidiary to the national mechanisms. First, the domestic remedies in Esmeralda are accessible and effective. Second, the authorities are continuing the pertinent procedures for the possible recognition of the Numa as a people and of their land rights. The premature admission of this petition would deprive the State of an adequate and reasonable opportunity to resolve this situation.

The State will probably indicate that the process for recognizing the Numa as a people is being carried out through normal procedures, with full judicial guarantees and based on technical considerations. They will argue that this application for recognition by those who call themselves Numa is especially complex and requires studies and analyses beyond what would be required in those cases in which the historical existence of the people in question is clear.

IV. MERITS

A. The Right of Affected Indigenous Peoples to the Underground Natural Resources Located on Their Indigenous Lands

i. Preliminary considerations and applicable law

There is broad acceptance that the ancestral lands of indigenous peoples should be recognized as their property and that such property is *sui generis*, encompassing elements that go beyond those established by civil law generally. Fifteen of the 24 Latin American republics have recognized indigenous rights in their constitutions. Central to that recognition are the provisions related to their lands, territories, and natural resources. These indigenous rights are related to the collective right to survival as organized peoples with control over their habitat, as a necessary condition for reproducing their culture, and for their own development and that of their institutions.

With respect to the State's ownership of the resources of the subsoil and its capacity to exploit them, that right is specifically referenced in several Latin American constitutions. It is also recognized by ILO Convention 169 Article 18, which establishes the conditions for minimizing the impact of such exploitation on the rights of indigenous peoples. The Draft American Declaration on the Rights of Indigenous Peoples reproduces that sentiment in similar terms.

The Inter-American Court has acknowledged the right of indigenous peoples to their lands and territories. In the *Awas Tingni* case, the Inter-American Court confirmed that the territorial rights of indigenous peoples arise from their traditional occupation, various uses, and land tenure, not from donations, recognition, or registration by the state.[24] The Court

[24] I/A Court H.R., *Awas Tingni,* Judgment of August 31, 2001, para. 149.

ruled in favor of the indigenous peoples' right to the lands and resources as well as the need for their consent, and not just to be consulted.[25] More recently, in the *Mary and Carrie Dann* case, the Commission, citing numerous international standards and cases, held that

> general international legal principles applicable in the context of indigenous human rights include:
> - the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
> - the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
> - where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.[26]

ILO Convention 169, in keeping with all the doctrine and international law in this respect, indicates that "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."[27] It notes in Article 14 that the rights of ownership and possession over the lands that they traditionally occupy should vest in the interested peoples. In addition, where appropriate, measures should be taken to safeguard the right of the indigenous peoples concerned to use lands not occupied exclusively by them, but to which they have traditionally had access for their subsistence and traditional activities.[28]

ILO Convention 169 article 15 recognizes the right of indigenous people "to participate in the use, management, and conservation" of resources over which they have rights. It should be clarified that these rights do not extend to all the resources that may exist on indigenous lands and territories, but only to those over which they have rights. Accordingly, they exclude those (such as the hydrocarbons in the subsoil) owned by the State as a matter of constitutional disposition. It includes the rights to forest resources, plant and animal wildlife, environmental and water resources, as well as easements and rights-of-way that are included as such in the legislation on native communities and communal

[25] *Id.* at para. 153.

[26] I/A Commission H.R., Report No. 75/02, Case 11,140, *Mary and Carrie Dann* (United States), December 27, 2002, OEA/Ser.L/V/II.116, doc. 46, para. 130.

[27] International Labor Organization, Convention No. 169 *Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, reprinted in 28 I.L.M. 1382, (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169] at art. 13(1).

[28] ILO Convention 169 at art. 14(1), stating in part that "[p]articular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

reserves.[29]

ILO Convention 169 also requires that the State (and by extension, those who receive the concession for such exploration or exploitation) "maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced" prior to approving the concession.[30] In any event the State, even if the consultations are done by concessionaires, retains its responsibility and therefore has to supervise and ensure that such consultations are held in timely and proper fashion. It also recognizes the right of indigenous peoples to "receive fair compensation for any damages which they may sustain as a result of such activities.[31]"

Similar declarations have been made by the Human Rights Committee of the United Nations, and by the United Nations Committee on the Rights of the Child.[32]

ii. The Commission's Arguments

The Commission will argue that traditional land tenure is tied to a historical continuity, but not necessarily to a single place and a single social formation over the centuries. In this regard, the traditional practices and ancestral occupation of the land give rise to a property right protected by Article 21 of the American Convention, and not recognizing it would be contrary to the principle of non-discrimination in Article 1(1).

The Constitution of Esmeralda recognizes those rights arising from the customary land tenure system and international conventions. The State has not demarcated the lands of the Numa by its own negligent non-recognition of the Numa as a people. As the life of the Numa members depends primarily on farming, hunting, and fishing, those rights are protected by other articles of the American Convention on life, honor and dignity, freedom of thought and religion, the freedom of association, the right to protection of the family, and the freedom of movement and residence.

The Commission will argue that the Numa reached the place where they now have their main settlement in the 1960s, having come from their ancient ancestral homeland to the west of the river. This constitutes movement within their ancestral territory. The complexity of the matter is no excuse for the State to breach its obligations to recognize and to decide on indigenous lands as if they were state lands.

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[29] ILO Convention 169 at article 15(2).

[30] ILO Convention 169 at article 7.

[31] ILO Convention 169 at article 15 (2).

[32] The Human Rights Committee of the United Nations held that the right to self-determination requires, among others, that all peoples be capable of freely disposing of their natural wealth and resources, and that they cannot be deprived of their means of subsistence. *Concluding Observations of the Human Rights Committee: Canada. 07/04/99,* at para. 8. UN Doc. CCPR/C/79/Add.105. *In accord*, *see also*: *Concluding observations of the Human Rights Committee: Mexico.* UN Doc. CCPR/C/79/Add.109 (1999), at para. 19; *Concluding observations of the Human Rights Committee: Norway*. UN Doc. CCPR/C/79/Add.112 (1999), at paras. 10 and 17; and *Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments),* at paras. 9-12. *See also Day of General Discussion on the Rights of Indigenous Children, Recommendations*, Committee on the Rights of the Child, 34th Session, 15 Sept. – 3 Oct., 2003, at para. 4.

The Commission will also argue that the Inter-American Court has considered that in the *Awas Tingni* case, one should render an evolutionary interpretation of the American Convention, by which Article 21 protects the right to property so as to take in the members of the indigenous communities in the context of communal property.[33] The Court also decided in that case that the indigenous peoples, by their very existence, have the right to live freely in their own territories and that the close relationship of the indigenous peoples with their land should be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity, and economic survival. It is not just a question of possession and production, but a material and spiritual element that they should fully enjoy, even for preserving their cultural legacy and transmitting it to future generations.[34] The customary law of indigenous peoples should be given special consideration, especially for the purposes in question, as resulting from custom; possession of the land should suffice for the indigenous communities that lack real title to the land to obtain official recognition of that property right and its consequent registration.[35]

What the Inter-American Court ordered in *Awas Tingni* applies to this case, as regards the rights to the land, territories, and resources. In other words, the Inter-American Court should order Esmeralda to delimit, demarcate, and title the lands of the Numa as soon as possible, with their full participation and taking into account the customary law, values, uses and customs of the Numa community. So long as those lands are not delimited, demarcated, and titled, Esmeralda should refrain from any acts that could lead the agents of the State, including contractors, to have a negative impact on the existence, value, use or enjoyment of the property located in the geographic area where the Numa live and carry out their activities.[36]

iii. The State's Arguments

The State will argue, as regards the right to property, that there are specific circumstances that place the Numa's claim outside the normal scope of the rights of indigenous peoples. The Numa community is a small group of indigenous people whose independence resulted from the communal separation and displacement in search of new lands. They are in precarious possession of those lands, but they are not ancestral. There is a body of law, including the Constitution, statutes, and regulations, and provisions of agencies that all bear on the titling of indigenous property, which have been the basis for several indigenous groups to have their land rights recognized and titled, including the Lanta.

The Numa have recognized that it was not until the 1960s that they went to the lands they occupy today. Previously, they had only made annual pilgrimages hitherto, to a mountain considered sacred, and some sporadic incursions on the territory for hunting. The State considered the Numa a group that broke away for personal and pragmatic reasons

[33] *Awas Tingni*, Judgment of August 31, 2001, at para 148.

[34] *Id.* at para. 149.

[35] *Id.* at para. 151.

[36] *Id.* at para. 164.

related to obtaining more land from their "mother" indigenous group, and who claimed separate and independent title over lands they have not possessed ancestrally, but to which they had precarious possession similar to other non-indigenous occupants of those lands.

No matter who holds title to the topsoil, the property rights to the subsoil resources vest in the State, according to the Constitution, for the benefit of all inhabitants of Esmeralda. This is an unquestionable right established in numerous constitutions in Latin America and worldwide, and is accepted without question by the law and international practice. The State's right to exploit those hydrocarbons by itself or by third persons is explicitly accepted by ILO Convention 169; the State will argue that all the requirements and guarantees required in terms of consulting and minimizing impact, as well as compensation and reparation due its owners, in this case the Lanta and Numa indigenous communities, have met with strict compliance, and that guarantees have been put in place to ensure they will continue to meet with strict compliance in the future.

B. Guarantees of Participation and Consultation for the Indigenous Peoples with Respect to the Decisions on the Santa Ana Project

In this case there are two aspects in which the observance of judicial protection and the judicial guarantees that the State should provide are at issue: (1) the unwarranted delay in the process whereby the Numa are seeking recognition, which will be discussed below and (2) whether the participation and right to consultation of the indigenous peoples have been guaranteed in the procedures for awarding the concession for exploitation of the Santa Ana Project, and in those approving the environmental and social impact assessments (ESIAs).

i. Preliminary Considerations and Applicable Law

Both the American Convention and ILO Convention 169 address the State's duty to consult with its indigenous citizens. In particular, American Convention articles 1, 23 (right to participate in government) and 25 (right to judicial protection) should be read with Article 6 of ILO Convention 169, which states that governments must "[c]onsult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly[37]" and those consultations "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.[38]"

In addition to these treaty references, the Commission noted in the *Dann* case that:

> [t]he Commission first considers that Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a

[37] ILO Convention 169 at article 6(1)(a).

[38] ILO Convention 169 at article 6(2).

> whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[39]

The spirit of consultation and participation is the cornerstone of ILO Convention 169, on which all of its provisions are based.[40] On the basis of this fundamental principle, the Committee of Experts of the ILO established a clear structure of application with respect to consultation and participation. While Article 6 does not require that one achieve consensus in the process of prior consultation, it does provide that the interested peoples should have the opportunity to participate freely at all levels in the formulation, implementation, and evaluation of measures and programs that directly affect them.[41]

The consultations required should not necessarily result in an agreement or in consent to the matter that is the subject of consultation, but rather express an objective for the consultations. Nonetheless, this should be considered in light of: (1) the right of indigenous peoples to decide their own priorities in relation to their development process, to the extent that it affects their lives, beliefs, institutions, and spiritual well-being, and the lands they occupy or use in some way; and (2) the need to undertake studies to evaluate that impact, the results of which should be considered fundamental for executing the development activities mentioned.[42]

The concept of consulting the indigenous communities that might be affected by exploration or exploitation of natural resources comports with the need to establish a genuine dialogue between both parties characterized by communication and understanding, mutual respect, and good faith, and with the sincere desire to reach a common agreement.[43] Article 6 requires that the consultation be prior, which implies that the communities affected participate to the extent possible in the process, including in undertaking environmental impact studies.[44] The obligation of prior consultation implies that one must consult the interested peoples before finalizing the environmental study and environmental management plan.

This consultation obligation could be read into Article 15 to require that when the mineral or subsurface resources of land occupied by a group of people are retained by the State, the government shall establish procedures to consult those people before undertaking any projects for exploration or exploitation of those resources. The State would be required to determine if and to what extent the people will be prejudiced before undertaking any activities. If they are harmed by these activities, the State shall compensate them.

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[39] I/A Comm. HR, Report No. 75/02, Case No. 11,140, *Mary and Carrie Dann* (United States), December 27, 2002, OEA/Ser.L/V/II.116, doc. 46, at para. 140.

[40] International Labor Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR): Report on Shuar Case, Ecuador, 1999, at para. 31. (*Documents on file with Author*)

[41] CEACR, Fourth Supplementary Report, Colombia, at para. 78. (*Documents on file with author*).

[42] *Id.* at para. 59.

[43] CEACR Report on Shuar Case at para. 38.

[44] *Id.*

The principle of representativity is an essential component of the obligation to consult, even when it is recognized that it could be difficult in many circumstances to determine who represents a particular community. If an adequate process of consultation does not develop with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the consultation would not comply with the requirements of ILO Convention 169.[45]

Finally, one must again consider ILO Convention 169 article 7 as being authoritative on this subject, especially as it relates to the initial concession and the subsequent ESIA process.

ii. The Commission's Arguments

The Commission will argue that in considering the Santa Ana Project and in the decisions with respect to it, there has not been adequate consultation with the indigenous peoples, and that the State has violated Articles 1, 23, and 25 of the American Convention.

In particular, it will argue that the initial decision to consider the project to be of priority national interest, without any consultation whatsoever of the Lanta or the Numa, was made by the technical policy agencies of Esmeralda, without the participation of the indigenous authorities or representatives. The consultations regarding the environmental and social impact assessments were done without the prior participation of those peoples and their authorities, which were required to enable them to understand the complex technical issues involved in exploration and/or exploitation of that sort, and to be able to anticipate its harm to and impacts on the indigenous groups' social, productive, spiritual life, and habitat.

The Commission will argue that the exploration activities include seismic studies that involve several detonations close to one another that are to take place throughout the area covered by the concession to locate the deposits and drilling areas, and that they are extremely disruptive to the life of the indigenous peoples, and to the fauna in those areas. In addition, the activities entailed in opening the right-of-way for the oil pipelines will cause much damage to the forests of the indigenous peoples, as will the establishment of permanent areas for exploitation, and the discharges of materials, gases, etc., with the consequent pollution of waterways and water tables, the air, and the land.

Likewise, the transportation of materials for prospecting and exploitation, involving hundreds of tons of equipment and materials, will be by river, which, in addition to causing water pollution, will decimate and chase off the fish, which constitute an essential part of the indigenous diet, as well as other disruptions such as noise at all hours, and wakes that pose dangers to those navigating in canoes.

iii. The State's Arguments

The State will argue that with respect to the Numa communities, they have been

[45] *Id.*

consulted using the same methodology as the rest of the Lanta communities, and their positions and suggestions have been taken into account and accorded equal weight in reviewing the ESIAs.

The declaration that the Santa Ana Project is of national interest and priority is part of a government economic plan geared to improving the conditions of all inhabitants of Esmeralda. This plan was extensively debated beforehand and adopted by a statute of Congress, which was democratically elected by all the country's citizens, including the members of the indigenous communities.

They may further argue that the indigenous peoples were consulted systematically from the first steps of the preparation of the environmental and social impact assessments in meetings with methodologies previously established to ensure the consultation would be serious and effective. In those consultations, the indigenous peoples had the advisory services of the federations (FENALUMA and FELANTA) and of experts from human rights and environmental organizations, which provided them with all the information and advisory services needed to ensure their adequate understanding and participation. Those consultations gave rise to numerous proposals, complaints and concerns that were taken into account by the authorities and led to the modification of the ESIAs in several respects. The ESIAs contain provisions to prevent or minimize the impact of the project activities so that they do not cause major or essential damage that would modify the nature or lifestyle of the indigenous peoples affected.

The Government will also point out that it has also drawn up protocols, in consultation with the indigenous peoples that govern the activities of the Santa Ana Project (or similar ones) to regulate the exploration, transportation, discharges, exploitation, etc., and to comply with the respective international standards. In addition, the indigenous peoples themselves will play a direct role in monitoring the project's activities, and they will have the ability to report irregularities or prevent negative situations. The consultations will continue throughout the life of the project, including the process of exploration, exploitation, and with respect to new situations that may arise in the construction or maintenance that may affect them. Finally, mechanisms and criteria for compensation or reparation for the use of indigenous lands and territories, rights-of-way, harm to the forests, and other disruptions that may be caused by the project are provided for and were determined in consultation with the indigenous peoples.

C. Lack of Timely Recognition of the Numa People

i. Definition of Indigenous People

There is a doctrinal debate as to the definition of what constitutes an indigenous people. In this case, the definition has direct consequences for the Numa in connection with the applicability of other rights that arise from their recognition as a people different from other indigenous peoples and the national society as a whole.

The main elements commonly recognized in the various definitions are: that they are descendants of the native peoples of the territories on which they live, existing prior to the formation of the present nation-states, with a form of organization, authorities, culture, and

institutions of their own. Another element that is important but obviously not sufficient is self-identification as an indigenous people. This is precisely to keep any random group of persons from identifying themselves as indigenous, for spiritual reasons or reasons of material interest, to obtain benefits reserved to the ancestral peoples. The different countries of the Americas have different systems for recognizing indigenous peoples, but they generally follow the abovementioned standards.

An additional issue that is important in this case refers to the subgroups that constitute a larger indigenous group (i.e. the Western Shoshone, as a subgroup of the Shoshone recognized as a people constituting a subject at law in the *Dann* case).

ii. Preliminary Considerations and Applicable Law

Article 25 of the American Convention provides in part that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal..." The Inter-American Court has ruled that this guarantee "is one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention [...]." [46]

The Court has also stated that "it is not enough for the remedies to exist formally, as they must yield positive results or responses to human rights violations, for them to be deemed effective. In other words, every person must have access to simple and prompt recourse before competent courts or judges that protect their fundamental rights.[47]" The Court also states that these remedies are illusory if there has been an unwarranted delay in rendering a judgment.[48]

To highlight the importance of this protection, the Inter-American Court indicated in its advisory opinion on judicial guarantees in states of emergency, that Article 25(1)

> establishes in broad terms the obligation of the States to provide to all persons within their jurisdiction an effective judicial remedy to violations of their fundamental rights. It provides, moreover, for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution or laws.[49]

The Court thus concluded that judicial guarantees are not subject to suspension of guarantees during a state of emergency.[50]

Finally, Law 555-76 of Esmeralda states that "indigenous peoples are entitled to government recognition and the lands and territories where they have settled and labored to

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[46] I/A Court HR, *Cantos Case*, Judgement of November 28, 2002, Series C No. 97, at para. 52.

[47] *Las Palmeras Case*, Judgment of December 6, 2001 at para. 58.

[48] *Id.*

[49] *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R., Ser. A No. 9, (1987) at para. 23.

[50] *Id.* at para. 38.

derive the resources necessary for their social, physical, and cultural survival."[51]

iii. The Commission's Arguments

The Commission will cite the *Awas Tingni* case in which the Inter-American Court concluded that the Nicaraguan State had violated Articles 21 and 25 with respect to the community of *Awas Tingni*, and

> as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores....[52]

This is important because it defines a reasonable period for a process of demarcation and titling, and that period is much less than eight years.

The Commission will also argue that as a result of the shortcomings and negligence of the State in the administrative processing of the recognition sought by the Numa people, more than eight years after it had begun there has still not been a decision with respect to a factual aspect, which is their existence as a separate people. The State is continuously calling for more studies, research, and testimony, unnecessarily delaying the decision, in many cases forcing the administrative petitioners themselves to request the studies and evidence to establish scientifically and objectively their position and rights. This constitutes an unwarranted delay in the process of recognizing the Numa. Moreover, the State has the responsibility to abide by Law 555-76, to ensure the Numa their property rights and their right to be a people recognized by the government to realize their right to participation.

That lack of recognition keeps them from exercising their rights, among them the property rights over their lands, territories, and resources. On not having title to their lands, they cannot undertake the improvements for their development with juridical security, and thus they remain in a precarious situation. That same situation has impeded them from bringing *amparo* or other actions, to keep non-indigenous groups from establishing settlements in the territory they occupy. In particular, the administrative delay keeps them from negotiating and defending their rights vis-à-vis the concession to exploit hydrocarbons. In addition, during that time, the State has taken advantage of the indeterminate situation to go forward with its plans for granting a concession for the Santa Ana Project.

The State deals with the Lanta authorities and negotiates with them, while the Numa are merely consulted, as a part of the Lanta people. Given that part of the concession and the oil field are on Numa lands that the Lanta do not share, the Numa cannot adequately defend their rights, and the State is not adequately ensuring them.

iv. The State's Arguments

[51] Hypothetical Case, *CINE, FELANUMA, et al vs. State of Esmeralda*, at para. 14.

[52] *Awas Tingni,* Judgment of August 31, 2001 at para. 164.

The State will argue that the government began the administrative process for recognizing the Numa in 1995 to comply with Law 555-76, and it is being carried out with full guarantees of impartiality and objectivity. The State has an orderly legal procedure for recognizing an "indigenous people," and the self-styled Numa are exercising their right to so petition in normal fashion. This is an effective process, but it is complicated.

If the Numa were an indigenous people constituted from time immemorial, with a clearly distinct culture of its own, with the typical characteristics of a differentiated culture such as a language of its own, ceremonies, histories, forms of organization, etc., proving their character as a distinct people would have been simple. However, the origin of the Numa when separating from the Lanta in contemporary times, and the nature of their prior activities in the territory to the east of the river, require special studies that necessarily draw out the procedure for recognition. That procedure works effectively, and in a short term for other "normal" cases, including that involving the recognition of the Lanta.

The Inter-American Court cannot compare this situation with *Awas Tingni* because it is much more complicated and has to be judged by different standards, standards developed specifically for this situation. The time elapsed is more than justified, bearing in mind the studies that must be carried out, and moreover it is evidence that the State gives them the full opportunity to prepare new evidence or studies, and that the State is making every effort to obtain them scientifically. Moreover, the time spent on these studies is evidence that the State is providing the Numa the full opportunity to prepare new evidence or studies, and that the State is making every effort to obtain them scientifically. The problem has to do with the difficulty acquiring all the information needed, and that the Numa continuously requested new studies and research. These additional studies requested by the Numa themselves take time and delay the decision.