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CASE OF THE CHUPANKY COMMUNITY ET AL. V. ATLANTIS [*]

BENCH MEMORANDUM

GUIDE FOR JUDGES - CONFIDENTIAL

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INTRODUCTION

The purpose of this guide is to provide judges with some of the main discussion points that may be addressed in the arguments of the participants. However, it is not intended to limit other arguments that may be presented. This guide should be read in conjunction with the hypothetical case and the clarification questions and answers.

This case presents various issues in the current debate on indigenous rights, and therefore lays out points of analysis that require the development of national and international law standards. It also aims to raise points of controversy that favor the arguments of one party or another.

The key issues in the case are: **a) standards of protection for indigenous peoples and peasant communities facing development projects; b) State responsibility for the actions of private corporations; c) discrimination against indigenous women; and d) authorities' control for conformity with international treaties**. It is suggested that the judges focus mainly on these issues.

The case also raises other issues, including: e) violations of the personal and cultural integrity of the community; f) dignified existence; g) freedom of movement and residence; h) provisional measures; i) standing of the community as a party before the Court; and j) reparations from indigenous, gender, and environmental perspectives.

It is important to mention that in accordance with the hypothetical case, the representatives asserted various rights before the Inter-American Commission (IACHR). However, in its report on the merits, the IACHR found violations with respect to some of those rights and identified different violations for each community. The case suggests that the IACHR treated the *Chupanky* community as an indigenous community and the community of *La Loma*—from a private property point of view—as a peasant community. The participants can argue with respect to all of the rights asserted by the representatives in their initial petition and in accordance with their own approaches to the case, or on the minimal basis of the rights established by the IACHR. This reflects the reality of litigation before the Court.

Accordingly, this guide addresses the main standards and lines of argument with respect to the entire catalogue of rights asserted in the instant case, in the order set forth in the table of contents (*supra*).

I. INTERPRETATION

It is important to note that on indigenous issues, the Inter-American Court of Human Rights (hereinafter "the Court") has (using legal hermeneutics) interpreted the meaning and scope of the rights set forth in the American Convention on Human Rights (hereinafter "the Convention" or "ACHR") in light of other international treaties and in keeping with the circumstances, cosmovision and context of the indigenous peoples. It is in this respect that the Court, starting with *Advisory Opinion No. OC-1-82*, on "Other Treaties," established that other treaties can be interpreted in light of universal doctrine and instruments in order to clarify and provide content to the Convention, but not to restrict rights. In this respect, in the case of indigenous peoples, the Court has used other treaties on the subject, such as Convention 169 of the International Labor Organization (ILO), the UN Declaration on the Rights of Indigenous Peoples, and different instruments and jurisprudence that make up the international *corpus juris* on the subject in order to interpret the Convention. These documents will be cited throughout this text.

The Court has also maintained that same interpretation in accordance with Article 31 of the 1969 Vienna Convention on the Law of Treaties, which establishes that: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

In addition, the bodies of the system have made such interpretations *pro persona*, in accordance with Article 29 of the American Convention, which regulates the forms of interpretation of the Convention. As such, in order for participants to be able to request that the Court broaden the content or scope of a right, they must make legal arguments based on the rules of treaty interpretation in accordance with international law and the Court's jurisprudence.

One of the central points that participants must understand is how to read the jurisprudence of the Court in general, and the cases involving indigenous communities in particular. Accordingly, they must understand the scope that the Court has given the general obligations of "respect" and "guarantee" enshrined in Article 1.1 of the American Convention.[1] It is in light of this provision that the Court will examine the scope of the right in question. Additionally, the legal and political consequences of a violation resulting from noncompliance with the duty to respect rights will be different from those arising from the failure to guarantee a right, which will also affect the request for reparations.

II. MERITS[2]

A. ARTICLE 21 OF THE ACHR: RIGHT TO PROPERTY

1. Communal property (Chupanky community)

Relevant facts (general)

The Hydroelectric Project on the Motompalmo River and the Chupanky Community

- The Chupanky community settlement and way of life is closely tied to the Motompalmo River (symbolic value, means of contact, and trade development).
- In 2003, the State opened a call for bids from national and foreign companies for the right to build the Black Swan Hydroelectric Power Plant.
- After a feasibility study was conducted, it was decided that the project would allow for the course of the Motompalmo River to be altered.
- The Energy and Development Commission reported in 2004 the area in which the project would be undertaken would cover approximately 10 km^2, affecting the territory of the *Chupanky* community.
- In January 2005, the Energy and Development Commission decided to grant the concession for the construction of the hydroelectric power plant to the TW Company, with 40% in state capital and 60% in foreign capital.
- The project was divided into three phases.
    - Phase 1 would involve reaching agreements with the owners of the affected territories;
    - Phase 2 would consist of drainage and the construction of reservoirs;
    - Phase 3 would involve irrigation, testing, and operation.
    - The project envisioned relocating the indigenous community (in Phase 3).

How should Article 21 of the ACHR be interpreted with regard to territories belonging to indigenous communities?

[1] Article 1.1: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[2] This section was written using extracts from the author's article: *Pueblos Indígenas y Medio Ambiente en la Jurisprudencia de la Corte Interamericana De Derechos Humanos: Un Desafío Verde.* Calderón Gamboa, Jorge. Published in Gonzalez Placencia et al. (Eds.) Derechos Humanos: Actualidad y Desafios, T. III. México, Fontamara, 2012 (at press).

Applicable law

a) Application of the right to private property to indigenous communities: general outline

The Inter-American Court's interpretation of the concept of communal property has made it possible, as a first step, to guarantee the rights of indigenous peoples to their territory.

In the case of the *Mayagna Community*, with respect to the lack of delimitation, demarcation, and titling of the community's ancestral territory—which was threatened by the granting of a logging concession to a private company—the Court for the first time interpreted Article 21 of the ACHR on private property from a broader perspective. It thus held that through an "evolutionary interpretation" of the Convention, taking into account applicable norms of interpretation and pursuant to Article 29(b) of the Convention—which precludes a restrictive interpretation of rights—"Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua."[3]

The Court also indicated that the States must bear in mind that indigenous territorial rights encompass a broader and different concept that is related to the collective right to survival as an organized people, with control over their habitat as a necessary condition for the reproduction of their culture, for their own development, and to carry out their life plans. Ownership of the land guarantees that the members of indigenous communities preserve their cultural heritage.[4] Additionally, the Inter-American Court held in other cases that the right to property enshrined in Article 21 of the ACHR must be understood broadly, in such a way that both the private property of individuals and the communal property of the members of indigenous or tribal communities are protected by that provision.[5]

Article 21 of the ACHR protects the lands of indigenous or tribal communities as well as the natural resources located therein that are necessary to their physical or cultural survival. With respect to this matter, the Court has held that indigenous peoples have the right to own the natural resources they have traditionally used within their territory. Without them, the economic, social, and cultural survival of those peoples would be at risk.[6] In the *Xákmok Kásek* case, the Court even found that the lack of access to and enjoyment of their natural resources had condemned the communities to conditions of extreme poverty and social exclusion.[7] In addition, the harm to natural resources can be manifested directly or indirectly. The Court stated as much in the *Saramaka* case with respect to clean and natural water for subsistence activities such as fishing, or the forests and their fruits as home to different animals they hunt for their survival.[8]

The most relevant facts relating to this section are set forth below.

b) Restrictions on the right to communal property

Relevant facts (specific)

Consultation and consent of the Chupanky community

- In November 2007 the State created an Intersectoral Committee between government authorities and the company, in order to carry out the prior consultation process.

[3] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148.
[4] *Ibid*. para. 146
[5] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 141.
[6] I/A Court H.R., *Yakye Axa*, *supra,* n.14, para. 137; *Sawhoyamaxa*, *supra,* n.15, paras. 118 & 121.
[7] I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, paras. 215 & 275.
[8] I/A Court H.R., *Case of the Saramaka People. v. Suriname.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 122.

- The guidelines to be followed were established at the first meeting with the Council of Elders, where it was agreed that the consultation process would be carried out in accordance with the customs and practices of the community, and using their native language.
- At the December 2007 meeting, by a majority vote of the consulted individuals, the first Phase of the project was approved and it was agreed to continue with the second Phase.
- The Council of Elders stated verbally to the Committee that once the second stage of the project was concluded they would convene another assembly in order to make a decision about the third stage of the project.
- On December 20, 2008, the Council of Elders decided to veto the continuation of Phases 2 and 3 of the project due to the various irregularities.
- In view of this situation, the company refused to stop its activities, and initiated proceedings before the pertinent authorities with the aim of removing the *Chupanky* Community to the alternative lands as soon as possible.

Shared benefits

- The Intersectoral Committee offered to grant the community alternative land located 35 kilometers from the eastern part of the Motompalmo River. The alternative land area exceeded the size of their current land, and was of good agricultural quality.
- In addition, in accordance with their traditions, all members of the community over the age of 16 were offered the opportunity to work on the construction of the hydroelectric power plant.
- Once the hydroelectric power plant was operating, the entire community would be provided with electrical power. They would also be given 3 computers, as well as 8 water wells in their new territory, which would be connected by a direct highway to the river in order for them to visit their deity.
- On February 28, 2008, the Ministry of the Environment and Natural Resources designated the organization Green Energy Resources to conduct the environmental impact studies with the participation of independent experts on the subject.

Environmental impact study

- The results of the May 14, 2008 report were favorable to the project, mainly in terms of the benefits of the generation of electrical power for the communities.
- However, with respect to the environment, it specified that the hydroelectric dams could cause minor geological damage, changing the ecosystem in the region, and producing some sediments in the water that are not harmful to human beings.
- In terms of the social aspect, it specified that due to the adjacent communities' relationship with the river, it would be advisable to secure direct access road from their alternative lands in order for them to hold their rituals. The *Chupanky* Community was made aware of the study.

What international standards are relevant to the restriction of an indigenous community's right to property?
What safeguards must the State put in place with regard to development projects?
What are the requirements for conducting a consultation?
What would be the international standard for requiring an indigenous community's consent to development projects in its territory?

Applicable law

The Inter-American Court has held that when States impose limitations or restrictions on the exercise of indigenous peoples' right to ownership of their lands, territories, and natural resources, they must follow certain guidelines. Thus, the Court has held that "when indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights."[9] Such restrictions must be

[9] I/A Court H.R., *Case of the Saramaka People*. *Supra,* para. 157.

established by law, necessary, proportionate, and must have the aim of achieving a legitimate objective in a democratic society without denying their survival as a people.[10] (See section A.2).

The Court has also specified with regard to natural resources located within the territory of an indigenous community that in addition to the abovementioned criteria, the State must ensure that such restrictions on the right to communal property do not amount to the denial of the survival of the indigenous community itself.[11] In the case of *Saramaka v. Suriname*, the Court established that in order for natural resources exploration or extraction not to constitute a denial of the survival of the indigenous people as such, the State had to comply with the following safeguards:[12]

i. Free and informed prior consultation[13]

First, the State must respect the community's right to be consulted, guaranteeing the effective participation of its members. Such consultation must be:[14]

- "prior" consultation, in good faith, and with the objective of reaching an agreement;
- it must be free and informed, which means that it must be free of pressures or conditions, it must be preceded by the disclosure of all potentially relevant information, and notice must be provided of the possible risks of the project or plan;
- consistent with the community's own customs and traditions and traditional decision-making methods, and
- at the initial phases of the project in question.[15]

In an interpretive judgment, the Court clarified that it is the community itself and not the State that must decide, according to its customs and traditions, who will represent the community in each consultation process.[16] The Court also specified the issues that were subject to prior consultation,[17] which included the results of the prior social and environmental impact studies and matters relating to any restriction on the property rights of the *Saramaka* people, particularly with respect to development or investment plans in their territory or affecting their territory.

Thus, indigenous peoples have the right to participate in the formulation, implementation, and evaluation of national or regional development plans that could affect them directly,[18] and in

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[10] I/A Court H.R., *Case of the Saramaka People*. *Supra*, n.1., para. 127; Similarly, see *Case of the Yakye Axa Indigenous Community*, *Supra*, para 144. *Saramaka*, para. 127.
[11] I/A Court H.R. *Saramaka*, *supra*, paras. 128 y 129.
[12] I/A Court H.R. *Saramaka*. *Ibid.*
[13] In developing this section we have also consulted unpublished research on prior consultation in cases of indigenous communities by Marina Brilman, a visiting professional at the Court, conducted in August 2011.
[14] I/A Court H.R. *Saramaka*. *Ibid.*, para. 133
[15] On the requirements of prior consultation, *see also* UN Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, E/C.19/2005/3, 17 February 2005; United Nations, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, A/HRC/15/37, 19 July 2010; United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Observations on the Situation of the Charco la Pava Community and Other Communities Affected by the Chan 75 Hydroelectric Project in Panama, U.N. Doc. A/HRC/12/34/Add.5, 7 September 2009; United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34, 15 July 2009; United Nations, Human Rights Committee, General Comment No 23: Rights of minorities (Article 27 of the ICCPR), CCPR/C/21/Rev.1/Add.5; United Nations Declaration on the Rights of Indigenous People, 13 September 2007; International Labor Organization ILO-CEACR. 2011 General Observation on the obligation of consultation.
[16] I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 18
[17] (1) the process of delimiting, demarcating and granting collective title over the territory of the *Saramaka* people; (2) the process of granting the members of the *Saramaka* people legal recognition of the collective [legal personality] pertaining to the community to which they belong; (3) the process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right of the members of the *Saramaka* people to the territory they have traditionally used and occupied; (4) the process of adopting legislative, administrative and other measures necessary to recognize and ensure the right of the *Saramaka* people to be effectively consulted, in accordance with their traditions and customs; *Ibid*. para. 16.
[18] ILO Convention No. 169, *supra,* n.7, Article 7: "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

every process awarding rights to their lands and territories.[19] The minimum content of the duty to consult, as it has been set forth by the inter-American jurisprudence and instruments and in international practice, defines consultation not as a single act but rather as a process of dialogue and negotiation involving the good faith of both parties and the objective of reaching a mutual agreement.[20]

Furthermore, the prior consultation requirement aims to prevent the imposition of a decision that could significantly affect the lives of individuals and of indigenous peoples, in accordance with the right to self-determination that is also protected by the United Nations Declaration on the Rights of Indigenous Peoples.[21]

These features of prior consultation with indigenous communities are also contained in the case law of national courts.[22]

ii. Benefit-sharing

Second, the Court held that the State must reasonably share the benefits resulting from the exploitation of the natural resources in indigenous territories as a form of just compensation pursuant to Article 21 of the ACHR[23] and derived from the exploitation of the lands and natural resources necessary to the survival of indigenous peoples.[24] The Court also specified that it is the

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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 programs 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." *See also* United Nations Human Rights Committee, Communication No. 1457/2006, 24 April 2009, Angela Poma Poma v. Peru, CCPR/C/95/D/1457/2006, para. 7.2; United Nations, Rio Declaration on Environment and Development, principle 22; International Labor Organization, Representation (Article 24) - Ecuador - C169 – 2001 - Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), para. 31.

[19] UN Declaration on the Rights of Indigenous People. Article 27: "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

[20] IACHR, Report: *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 298.

[21] United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Observations on the Situation of the Charco la Pava Community and Other Communities Affected by the Chan 75 Hydroelectric Project in Panama, A/HRC/12/34/Add.5, 7 September 2009, para. 20.

[22] Constitutional Court of Colombia, Judgment T-129/11, Judgment SU-039/97, Judgment C-030/08, Judgment T-769/09, Judgment C-461/08, Judgment C-169/01, Judgment C-208/07, Judgment 175/09; Constitutional Court of Ecuador, *Caso del cine IMAX en la parroquia de Cumbayá* (679-2003-RA & 034-2003-TC), *Caso Intag* (459-2003-RA), *Caso Nangaritza* (0334-2003-RA) and *Caso Yuma* (0544-06-RA), *Caso de los Pantanos Secos de Pastaza* (222-2004-RA), Judgment of June 9, 2004, Case No. 170-2002-RA, *Claudio Mueckay Arcos v. Dirección Regional de Minería de Pichincha: Director Regional*, Judgment of August 13, 2002, Judgment No. 001-10-SIN-CC, Cases No. 0008-09-IN & 0011-09-IN, Judgment of March 18, 2010; Constitutional Court of Bolivia, Judgment 0045/2006, June 2, 2006, Constitutional Judgment 2003/2010-R (October 25, 2010), Case File 2008-17547-36-RAC; Court of Appeals of Concepción, Chile (August 10, 2010); Constitutional Court of Peru, Judgment of the Constitutional Court, Case File No. 0023-2009-PI/TC, Judgment of the Constitutional Court, Case File No. 0022-2009-PI/TC, Judgment No. 06316-2008-PA/TC; Constitutional Court of Guatemala, December 21, 2009, Appeal of *Amparo* [Petition for a Constitutional Remedy] Judgment, Case File 3878-2007, and Argentina, Trial Court No. 2 for Civil, Commercial, Special Enforcement Proceedings, Labor and Mining Matters of the II Judicial Circuit seated in the city of Cutral Co. "*Petrolera piedra del Aguila SA c/ Curruhuinca Victorino y otros s/ acción de amparo,*" February 2011.

[23] I/A Court H.R., I/A Court H.R. *Saramaka*, Preliminary Objections, Merits, Reparations, and Costs, *supra*, para. 139.

[24] *Ibid*. para. 140.

community that must determine and decide who shall be the beneficiaries of any compensation, according to its customs and traditions and in accordance with what the Court orders.[25]

iii. Environmental impact study

Third, the Court also held that the authorities must perform or supervise the studies necessary to ensure that the projects carried out affect the community members' rights to the least extent possible. In this respect, the State must guarantee that no concession is issued unless and until independent and technically qualified entities, under the supervision of the State, perform a social and environmental impact study [EISA].[26] In particular, it held that "the ESIAs must conform to the relevant international standards and best practices,[27] and must respect the […] people's traditions and culture. […] One of the factors the environmental and social impact assessment should address is the cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people."[28] On this point, the Court noted that the acceptable level of impact demonstrated by the EISAs could differ in each case; nevertheless the main criterion is that it not deny the ability of the members of the community to survive as a people.[29]

The Inter-American Commission specified that the EISAs must: i) "identify and assess the potential environmental impacts of a proposed project, evaluate alternatives, and design appropriate mitigation, management, and monitoring measures;"[30] ii) refer not only to the impact upon the natural habitat of indigenous peoples' traditional territories, but also to the impact upon the special relationship that links these peoples to their territories, including their distinct forms of economic subsistence, their identities and cultures, and their forms of spirituality;[31] iii) identify possible alternatives or, failing such alternatives, measures to mitigate the negative impacts of the investment or development plan;[32] necessarily require the knowledge of the members of indigenous peoples to identify said impacts, as well as for the identification of possible alternatives and mitigation measures.[33]

The UN independent expert on the rights of indigenous peoples has specified that EIAs must also address the social, cultural, and spiritual aspects of indigenous community life.[34] The national standards and jurisprudence of the region's countries contain some of these standards with regard to EIAs.[35]

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[25] I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, paras. 26 & 27.
[26] I/A Court H.R., *Saramaka*, Preliminary Objections, Merits, Reparations, and Costs, *supra*. para. 129.
[27] One of the most complete and frequently used standards for EISAs in the context of indigenous and tribal peoples is known as *Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, which is available at: www.cbd.int/doc/publications/akwe-brochure-pdf
[28] I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment, para. 41.
[29] *Ibid.* para. 42
[30] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources – Norms and Jurisprudence of the Inter-American Human Rights System*, Doc. 56/09, 2010, para. 257.
[31] *Ibid.* para. 255
[32] *Ibid.* para. 263
[33] *Ibid.* para. 267
[34] United Nations, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, A/HRC/15/37, 19 July 2010, paras. 72-75. *See also* United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34, 15 July 2009, and International Labor Organization, Convention No. 169, Indigenous and Tribal Peoples Convention (1989), 7.3.
[35] Colombia Decree 1397 of 1996, arts. 7 & 10. Decree 1320 of 1998 Article 2; Chile Law No. 19.300 General Environmental Guidelines, arts. 26-31; Constitutional Court of Guatemala, December 21, 2009, Appeal of *Amparo* Judgment, Case File No. 3878-2007; Ecuador: Substitute Regulations to the Environmental Law for Hydrocarbon Operations in Ecuador, Executive Order 1215, Official Gazette No. 265 of February 13, 2001; Mining Law, Official Gazette No. 517, 2009, Decree 1040, April 22, 2008, Decree 3401, Official Gazette No. 728, December 19, 2002; Environmental Management Act, Official Gazette No. 245 of July 30, 1999; Peru: Supreme Decree No. 29103 of April 23, 2007, Regulations for the socio-environmental monitoring of hydrocarbon activities within the territory of native indigenous

iv. Consent in cases of large-scale development or investment plans

Finally, the Court held that in cases of large-scale development or investment plans, the State has the obligation to obtain the free, informed, and prior "consent" of the communities, according to its customs and traditions.[36] In relation thereto, the safeguard of effective participation is an additional requirement due to the profound impact that such plans could have on the right to property.[37]

In this respect, in order to prevent State power from becoming absolute and prior consultation from becoming a mere formality, some situations have been identified internationally in which consent is not only the objective of consultation but is a right in and of itself that becomes a mandatory precondition for the execution of the proposed measure, in such a way that the absence of consent requires the suspension of the project.[38]

The Inter-American Commission has held that the development of the international standards on the rights of indigenous peoples makes it possible to identify several circumstances in which obtaining the consent of the indigenous peoples is mandatory.[39] The first such situation is where there are development or investment plans or projects that involve the displacement of indigenous communities or peoples from their traditional territories—that is, their permanent relocation.[40] Furthermore, the consent of indigenous peoples is also required, in accordance with the jurisprudence of the Inter-American Court, in cases where the execution of investment or development plans or concessions for the exploitation of natural resources would deprive the indigenous peoples of their ability to use and enjoy their lands and other natural resources necessary for their subsistence.[41] Finally, it has been considered that the consent of indigenous peoples is required in cases involving the deposit or storage of hazardous materials on indigenous lands or territories,[42] as provided in Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples.

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peoples and peasant farming communities, Environmental Control and Prevention Regulations; Supreme Decree No. 29033, February 16, 2007.

[36] I/A Court H.R., *Saramaka*, Merits, *supra*. para. 134.

[37] *Ibid.* para. 138.

[38] United Nations (UN), *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, A/HRC/12/34, 15 July 2009. *See also* United Nations, Convention on Biological Diversity (1992), arts. 7 & 15; United Nations, Human Rights Committee, Communication No. 1457/2006, 24 April 2009, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, para. 7.6; United Nations Commission on Human Rights, Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, Geneva, E/CN.4/Sub.2/AC.4/2002/3, 17 June 2002, paras. 20 & 52 & Conclusion 8; United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34, 15 July 2009, paras. 47-49 & 66; United Nations, United Nations Development Group Guidelines on Indigenous Peoples' Issues, February 2008; Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources – Norms and Jurisprudence of the Inter-American Human Rights System*, Doc. 56/09, 2010, paras. 281 & 334, African Commission on Human and Peoples' Rights, Communication 276/2003 – Centre for Minority Rights Development Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, para. 291.

[39] IACHR. *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 334.

[40] UN Declaration on the Rights of Indigenous People. Article 10: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

[41] I/A Court H.R., *Case of the Saramaka People*, *supra*.1. Para. 135.

[42] UN Declaration on the Rights of Indigenous Peoples, Article 29: "1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programs for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programs for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

In this same respect, the Committee on the Elimination of Racial Discrimination indicated that the State must obtain the consent of indigenous communities prior to the execution of projects involving the extraction of natural resources.[43]

Finally, Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples provides that "Indigenous peoples shall not be forcibly removed from their lands or territories," and that "no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

c) Political rights and gender perspective in the prior consultation process

Relevant facts

- At the first phase of construction of the hydroelectric power plant, an agreement was reached with the representatives de the *Chupanky* indigenous community.
- That community is patriarchal and its main authority is the Council of Elders.
- In order to proceed with the first phase, it was decided that the community's authorities and male heads of households would be consulted.
- Subsequently, a majority of the consulted individuals approved the first phase of the project and agreed to continue with the second phase.
- The women of the community complained that the consultation was held without their participation.
- The State argued that it followed the community's customs and practices when it engaged in consultation.

How are the requirements of community participation in a consultation process in accordance with its customs and practices, its political rights, and the rights of the indigenous women not to be subject to discrimination related?

Applicable law

It follows from the above that in order for a restriction on the right to communal property not to amount to a denial of the survival of the indigenous group as a people, the State must meet, *inter alia*, the requirement of free and informed prior consultation, ensuring the effective participation of the members of the community in accordance with their customs and practices. This includes ensuring that the community itself designates its representatives in accordance with its customs and traditions (*supra*).

With respect to political rights, Article 23.1.a of the ACHR states that all citizens shall enjoy the right "to take part in the conduct of public affairs, directly or through freely chosen representatives." In relation to indigenous peoples, the Court has established that the right to political participation includes the right to "participate […] in decision-making on matters and policies that affect or could affect their rights […] from within their own institutions and according to their values, practices, customs and forms of organization."[44]

In the *Chitay Nech* case, the Court held that "according to Articles 23, 24, 1(1) and 2 of the Convention, the State has the obligation of guarantying the enjoyment and application of such rights according to the principles of equality and non-discrimination, and shall adopt the necessary measures to guarantee its full exercise […], considering the situation of weakness and destitution of the members of certain sectors or social groups."[45] It also found that "in the

[43] United Nations, Committee on the Elimination of Racial Discrimination, Concluding Observations - Ecuador, General Recommendation No. 23 of 18 August 1997, paras. 4 & 5, United Nations, Committee on the Elimination of Racial Discrimination, Concluding Observations - Ecuador, 22 September 2008, CERD/C/ECU/CO/19.
[44] *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127 para. 225.
[45] *Case of Chitay Nech et al. v. Guatemala, supra,* para. 106; *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 201*. See Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18*,* para. 89*; Juridical*

development of the represented political participation, those elected exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as in the right of the community to be represented. In this sense, the violation of the first is echoed in the harm to the other right."[46]

In addition, the Inter-American Commission on Human Rights has indicated that the "right to consultation and the corresponding state duty are linked to several human rights, and in particular they are linked to the right of participation established in Article 23 of the American Convention, as interpreted by the Inter-American Court in the case of *Yatama v. Nicaragua*."[47]

In the case of the *Maya Indigenous Communities of the Toledo District*, the Commission found that the exploitation of natural resources in indigenous territories without consultation and without the consent of the affected indigenous people violates their right to property and their right to participate in government.[48] In the case of *Mary and Carrie Dann*, the Commission maintained that "Articles XVIII [sic] (legal personality) and XXIII (private property) 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 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 collectively."[49]

In the *Case of the Xákmok Kásek Indigenous Community*, the Court maintained that "whatever the origin or the form it takes, any conduct that could be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it […] the basic principle of equality and non-discrimination has entered the sphere of *jus cogens* […].The States are obliged to adopt positive measures to reverse or change discriminatory situations that exist in their societies and that prejudice a specific group of people. This includes the special obligation of protection that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations."[50]

In this same respect, the Permanent Forum on Indigenous Issues urged States "to ensure that the concerns and priorities of indigenous women are properly taken into account […] [and] increase indigenous women's capacity for decision-making and political participation." Such participation must be taken into account in the consultation process.[51]

Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002, para. 46; Human Rights Committee, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service*. HRI/GEN/1/Rev.7 at 194 (1996).

[46] *Case of Chitay Nech et al. v. Guatemala*, *supra,* para. 116.

[47] The IACHR added that any administrative decision that can legally affect indigenous and tribal peoples' rights or interests over their territories must be based on a process of full participation. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources – Norms and Jurisprudence of the Inter-American Human Rights System*, 2010, para. 274. *See also* UN Rapporteur, A/HRC/12/34 of 15 July 2009, para. 41.

[48] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, para. 144.

[49] Inter-American Commission on Human Rights, *supra*, para. 277; IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, para. 140

[50] *See also* Inter-American Commission on Human Rights, Office of the Special Rapporteur on the Rights of Women, *Access to Justice for Women Victims of Violence in the Americas*, OEA/SER.L/V/II. Doc. 68 January 20, 2007, para. 70. *See also* para. 72; Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into force on 3 September 1981 (Article 2).

[51] Permanent Forum on Indigenous Issues, Report on the third session (10-21 May 2004), Economic and Social Council Official Records, 2004 Supplement No. 23, E/C.19/2004/23, para. 14, 57. *See also* United Nations Economic and Social Council, Analysis prepared by the Secretariat of the Permanent Forum on Indigenous Issues: indigenous women

For their part, the Special Rapporteur on the Rights of Indigenous Peoples and the Inter-American Commission have noted that the United Nations Declaration on the Rights of Indigenous Peoples "recalls that the functioning of indigenous institutions should be 'in accordance with international human rights standards' (art. 34) and calls for particular attention 'to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities,' including in the elimination of all forms of discrimination and violence against indigenous children and women (art. 22)."[52]

Arguments of the Representatives and the State

Representatives

The representatives can argue that Article 21 of the Convention, as the Court held in the *Sawhoyamaxa* and *Yakye Axa* cases (*supra*), protects the community's land as well as the natural resources located therein. In this respect, it might be argued that the right to property cannot be separated from access to the resources that the community has traditionally used. Therefore, proceeding with the construction of the hydroelectric plant would deprive the community of access to the *Xuxani* River, given that it would be required to relocate several kilometers away from the river.

In addition to the above, as far as safeguard measures are concerned, the representatives could argue that the concession for the construction of the hydroelectric power plant is a large-scale development project, and therefore, following the jurisprudence of the Court in the *Saramaka* case (*supra*), the State must have the consent of the community to proceed with the subsequent phases of the project. Accordingly, the facts of the case amount to unlawful restrictions to the property rights of the members of the *Chupanky* community in that there was a denial of the community's survival to the extent that it was deprived of its ability to use and enjoy its lands and other natural resources necessary for its subsistence (*supra*). Additionally, in accordance with the international standards on the matter (*supra*), the State should have engaged in consultation at every stage of the project's development. In the instant case, the indigenous community granted its consent only for the first phase to be carried out.

The representatives can further argue that the subsequent phases of the hydroelectric project anticipated the displacement of the *Chupanky* community, and therefore, in keeping with the standards of the United Nations Declaration on the Rights of Indigenous Peoples (Article 10), the State should have had the consent of the community to implement the subsequent phases of the project.

As for the prior assessment of the environmental and social impact, the representatives can argue that the State failed to comply with this guarantee because it did not perform the environmental impact study until 2008. In addition, the State failed to meet the international standards on the subject (*supra*) given that the study was not translated into the native language of the members of the *Chupanky* community. It might also be argued that the EIA did not consider all of the environmental and social harm that was subsequently verified.

In terms of the link between prior consultation and political rights, the representatives can cite the *Yatama* case, which held that the right to political participation includes the right to take part in decision-making on issues and policies that affect or may affect their rights from within their

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E/C.19/2009/8. P. 3, 4. International Indigenous Women Forum (IIWF), Analysis and Follow Up of the United Nations Permanent Forum on Indigenous Issues Recommendations Related to Indigenous Women, E/C.19/2009/CRP. 15 Permanent Forum on Indigenous Issues, New York, (18-29 May 2009), p. 9

[52] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34. Paras. 52 & 69. In this respect, *see also* IACHR, Office of the Special Rapporteur on the Rights of Women, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc. 68 January 20, 2007.

own institutions and according to their values, practices, customs and forms of organization (*supra*). There are also several reports from international bodies that link the political rights of indigenous communities to the prior consultation process (*supra*).

The representatives might address the discrimination against the indigenous women in this case by arguing that although the State is required to respect the customs and practices of the native communities in a prior consultation process, it must also respect and guarantee other individual rights in accordance with the *pro homine* principle (enshrined in Article 29 of the ACHR). In this respect, the women's right to participate in representing the community must not be diminished on the basis of *the customs and traditions* by which the community is governed. Thus, the State action meant to preserve and guarantee respect for human rights was necessary because of the obligation to eradicate the discrimination against the women of the community. As such, it could be argued that the State violated Article 1.1 in relation to Article 23 of the ACHR.

Furthermore, using the jurisprudence of the Court, the representatives could argue that the fundamental principle of equality and nondiscrimination is a mandatory rule of international law (*supra Chitay Nech* case) that must be guaranteed by the State. The United Nations Declaration on the Rights of Indigenous Peoples, the Inter-American Commission, and United Nations Rapporteur James Anaya, are consistent with this line of argument. They could examine the possibility of weighing this principle against the principle of the self-determination of the *Chupanky* community; it might be possible to conclude that guaranteeing the women's political rights is a *lawful, legitimate, necessary, and proportional* restriction to the self-determination of the indigenous people (these competing rights could also be weighed by means of a restrictions test).

State

With respect to the restriction of the right to communal property, the State might argue that the decision to build the hydroelectric power plant was made in compliance with Article 21 of the American Convention. The decision met the requirements of legality, insofar as the project has been implemented in observance of the laws of the State of Atlantis. It has also met the requirement of pursuing a legitimate aim, because the measure is based on the State's policy of delivering energy to the entire country. They are suitable measures, given that they are designed to meet the legitimate aim pursued. Furthermore, they are necessary because there are no other measures less harmful to the rights of the community that can be used to meet the legitimate aim. Finally, the measure meets the proportionality requirement given that on one hand, the harm to rights of the members of the *Chupanky* community is compensated by the benefits that were granted to them, and on the other hand, because the 2003 feasibility study predicted minimal environmental impact.

With regard to the consultation process, the State might argue that it complied with all the required guarantees. The consultation was "prior," as it began in November 2007. Moreover, through the Intersectoral Committee, the State undertook a consultation process in which it provided all necessary information to the community. The process was also carried out in accordance with the customs and practices of the community, and even provided Rapstaní language interpreters. All of the information was provided, and the community's forms of representation were respected as stipulated in the jurisprudence of the Inter-American Court. In this respect, the community expressed its agreement with the project.

With regard to consent, the State might argue that consent does not constitute a right to veto. Convention No. 169 of the International Labor Organization does not mention consent, and the UN Declaration on the Rights of Indigenous Peoples considers consent to be a requirement in cases involving the storage or disposal of hazardous materials in the lands or territories of indigenous peoples (Article 29) or in the case of forced displacement (Article 10). The State might argue that in the instant case the *Chupanky* community has not been displaced, but rather negotiated alternative lands that are more extensive and of better quality. As such, no unlawful restriction of property rights would exist on those grounds.

The State might further argue that the consent granted to implement the first phase of the project is related to consent for the project in its entirety, since that phase never would have been executed without the certainty that the rest of the project would also be carried out. The purpose of dividing the development plan into phases was to follow a logistical and methodological plan, but in no way can it be considered that they were separate projects that are independent of each other, or that one phase would make sense and be sustainable in the absence of the other phases (given that the first phase, by itself, would not be of any use to the other party to the agreement). On this point, the State can also argue that the principle of *pacta sunt servanda*[53] should be applied, since the community gave its consent for the first phases of the project, and therefore must follow through with this agreement to its final phase.

Additionally, the State can argue that the representatives of the *Chupanky* community should have been aware of that circumstance, as it was reasonable to think that Phase One did not have any purpose on its own. Furthermore, in accordance with the standards on free and informed prior consultation, it must be governed by the principles of good faith (*supra*), which is a two-way circumstance.

With regard to the shared benefits, the State might argue that the Intersectoral Committee offered the community alternative lands that were larger than what they currently had, and of better agricultural quality. They were also given the opportunity to work on the construction of the hydroelectric plant, and were offered benefits such as electrical power, computers, and water wells in their new territory.

The State can refute the arguments pertaining to the EIA by arguing that it performed the appropriate environmental impact study prior to authorizing the commencement of the project. The State also made sure that independent and technically qualified entities would take part in the study, consistent with the Court's holding in the *Saramaka* case (*supra*). Additionally, the members of the *Chupanky* community were notified of the results of the EIA.

As for the allegation of discrimination against the indigenous women with regard to the exercise of their rights, the State might argue that in accordance with the aforementioned jurisprudence of the Court, the State must engage in prior consultation with the representatives of the indigenous communities selected in accordance with their customs and traditions (*supra* interpretation of the *Saramaka* Judgment). Furthermore, the jurisprudence of the Court and the international standards on the matter are clear in establishing that it is the indigenous community—and not the State—that must decide who will represent the community in each consultation process in keeping with its customs and traditions.[54]

Accordingly, the State could conclude that the prior consultation in the instant case was done following the customs and practices of the community, meaning that the State satisfied its duty to consult with the community ensuring its participation in decision-making regarding measures that could affect its territory. Additionally, the community's free and informed prior consent for the implementation of the first phase of the project was obtained in accordance with its customs and traditions. Social and environmental impact studies were also performed, and benefits and jobs were shared with the community; therefore, the international standards developed for such purpose were met.

2. Property (Community of La Loma)

Relevant facts

- During the implementation of the assimilation policy, the government divided the *Rapstaní* communities and promoted interracial marriages. This led to the expulsion of women who settled on the western side

[53] According to this principle, the parties promise to observe their agreement in good faith and in accordance with its stated object and purpose.
[54] *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 18.

of the Motompalmo River, forming the community of *La Loma*. They currently preserve many of their cultural traditions; however, they have lost others.

- Under the Decrees of 1985, the State granted the *La Loma* community official recognition as a peasant farming community, which enabled its members at that time to receive government subsidies and public benefits.
- In 2005, the State declared the project area to be of public utility and made a deposit of 50% of the assessed value of the lots in the *La Loma* community, and began negotiations with various individuals from the community of *La Loma*, offering to give them alternative agricultural land located approximately 25 km west of the Motompalmo River. 25% of the property owners from the community of *La Loma* accepted the offer; the rest of the community rejected it, asserting their cultural ties to the *Xuxani* River.
- In 2006, 75% of the dissenting property owners requested before the civil court that recognition of the international standards relative to prior consultation procedures and the distribution of benefits be applied to them, and that environmental impact studies be performed. However, the trial court judge determined that those standards were applicable only to indigenous or tribal communities, and that *La Loma* was a peasant farming community.
- In January 2012, the Civil Judge in the case set the total fair compensation amount at US $6 per square meter for each lot expropriated in *La Loma*, for those who did not accept alternative lands previously. The beneficiaries of that payment have again opposed receiving it (supervening fact, clarification answer 86).[55]
- Expropriation proceedings in Atlantis. See clarification answer 54.[56]

What is the scope of the right to private property enshrined in Article 21 ACHR with respect to peasant farming communities?
How is just compensation determined in accordance with the standards of the Inter-American Court?
Can the safeguard standards for indigenous communities be applied to peasant or semi-tribal communities?

Note: In this case there are three possible lines of analysis applicable to the *La Loma* community with respect to the alleged violation of its right to property: i) examining the expropriation of an asset from a private law perspective; ii) applying the consultation standards to the members of the *La Loma* community as a "tribal" people; iii) applying national and international standards on indigenous and tribal peoples to a peasant community. The participants may explore the case from any of these approaches.

Applicable law

a) Restrictions to the right to private property and expropriation standards

Article 21 of the American Convention establishes that "everyone has the right to the use and enjoyment of his property," and that "the law may subordinate such use and enjoyment to the interest of society." Clause 2 states that "no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and

[55] *According to an article published in the newspaper El Oscurín Pegri on January 20, 2012, the Civil Judge in the case set the total fair compensation amount at US $6 per square meter for each lot expropriated in La Loma, for those who did not accept alternative lands previously. The beneficiaries of that payment have again opposed receiving it. The Minister of the Interior stated that "the main delays in setting the amount were due to the fact that members of the La Loma community refused the government's offer of alternative lands, and the subsequent negotiations aimed at reaching a friendly settlement before Inter-American Commission greatly delayed the domestic proceedings." The newspaper underscored that, "the State is thereby attempting to avoid being held liable for the first time before the highest Human Rights Court."*

[56] *In Atlantis the assessed value is not the market value. Chapter IV of the Civil Code requires the judicial deposit which, among other requirements, makes it possible to order the urgent occupation of the land if necessary. Also, it opens up the possibility of seeking a friendly settlement. The expropriated party may dispose of that deposit and agree to delivery of the balance. Nevertheless, in the absence of an agreement on the appraised value, it goes to expropriation proceedings for purposes of setting the real and final price. The Judge will issue a judgment after hearing from the relevant experts. The proceedings are not subject to motions.*

according to the forms established by law."[57]

Throughout its jurisprudence, the Inter-American Court has developed a broad concept of property[58] that includes all real and personal property, tangible and intangible items, and any other intangible object capable of having value.[59] It has also specified that the right to property is not absolute.[60]

In this respect, in the *Case of Salvador Chiriboga v. Ecuador,* the Court examined the requirements for limiting the right to property in view of Article 21 ACHR, stating first that this right "must be understood within the context of a democratic society where in order for the public welfare and collective rights to prevail there must be proportional measures that guarantee individual rights." It held that the State "can limit or restrict the right to property, always respecting the cases contained in Article 21 of the Convention and the general principles of international law," in accordance with "the social role of property."[61] The Court held that any limitation to this right must be exceptional, which means that any restrictive measure must be necessary to accomplish a legitimate aim in a democratic society.[62]

With respect to the requirements for the restriction of the right, the Court has held that *the reasons of public utility and social interest* comprise all those legally protected interests that, for the use assigned to them, allow for the better development of democratic society. To such end, the States must consider all possible means to affect other rights as little as possible and to assume the obligations that entails.[63] The Court held that once the legitimacy of the reasons of public utility and social interest are established, it must be determined whether the deprivation of property was accompanied by the payment of just compensation,[64] which must be prompt, adequate and effective.[65]

In the above-cited *Salvador Chiriboga* case, the Court examined the restriction of this right in the context of an expropriation, recalling that in such cases the payment of compensation is a general principle of international law[66] derived from the need to strike a balance between the public interest and the owner's interest.[67] Such a procedure requires compliance with, and the faithful implementation of, the requirements already enshrined in Article 21.2 of the Convention.[68]

Thus, in determining just compensation, the commercial value that the property subject to expropriation had prior to the State's declaration of public utility should be used as a reference,

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[57] According to the Court, the right to property is not an absolute right, since Article 21(2) of the Convention states that for the deprivation of a person's property to be in keeping with the right to property, such deprivation must be based on reasons of public utility or social interest, subject to the payment of a fair compensation and restricted to the cases and forms established by law and must be carried out according to the Convention (*Case of Salvador Chiriboga*, Merits, para. 61).

[58] I/A Court H.R., *Case of Chaparro-Álvarez and Lapo-Íñiguez. v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 174.

[59] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 144; *Case of Palamara-Iribarne v. Chile.* Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para.102; *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137; *Case of the Moiwana Community v. Suriname.* Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 129.

[60] I/A Court H.R., *Case of Chaparro-Álvarez and Lapo-Íñiguez. v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 174.

[61] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Preliminary Objections and Merits. Judgment of May 6, 2008 Series C No. 179, para. 60.

[62] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Preliminary Objections and Merits. *supra,* para. 65; *Case of Chaparro-Álvarez and Lapo-Íñiguez supra*, para. 93. *See also* I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 28.

[63] I/A Court H.R., *Case of Salvador-Chiriboga*. *supra,* para. 73.

[64] *Ibid. supra,* para. 91.

[65] *Ibid. supra,* para. 97.

[66] Article 1 of Protocol No. 1 to the European Convention; Permanent Court of International Justice (PCIJ), Judgment No. 7 (May 25th, 1926), para. 68.

[67] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Reparations, and Costs. Judgment of March 3, 2011 Series C No. 222, para. 60.

[68] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Preliminary Objections and Merits. *supra,* para. 63.

and the fair balance between public and private interests must be kept in mind.[69] The Court additionally stated that to set the value of property subject to expropriation, its essential (that is, natural and legal) characteristics[70] must be taken into account.[71]

With respect to a fair balance, the Court stated that "in order for the State to legitimately satisfy a social interest and find [said] fair balance, […] it must use proportional means in order to infringe, to the least extent possible, the property rights of the person subject to the restriction."[72] As such, it is essential to observe the "just demands" of a "democratic society," and assess the different interests at play, and the need to preserve the object and purpose of the Convention.[73] All this will be weighed when determining the value of the property for purposes of just compensation, especially regarding properties that are of environmental interest.[74]

Additionally, in the Judgment on the Merits in the *Salvador Chiriboga* case, the Court established the existence of a legitimate interest to justify expropriation for reasons of public interest based on the protection of the environment, which resulted in the social benefit provided by the Metropolitan Park. The park is vitally important to the city of Quito, and the expropriated land is an important contribution not only to the park itself but to the entire society and the environment in general. However, to the detriment of the victim, the State failed to make the payment required in Article 21(2) of the Convention and to comply with the standard of reasonable time periods.[75]

The Court in the *Chiriboga* case—which we have cited amply—also takes into account international practice in cases of expropriation (*See* Reparations Judgment, paras. 57-59).

b) International scope of standards on prior consultation applied to non-indigenous communities

The issue of prior consultation was developed in section II.A.1.b; nevertheless, the following approach aims to examine the potential options for the protection of a peasant community facing development projects.

ILO Convention No. 169 on Indigenous and Tribal Peoples (1989) applies, *inter alia*, to "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."[76] Article 9 regulates the right of such peoples to consultation in cases involving measures that may affect them.[77]

Article 1 of *ILO Convention 107 on Indigenous and Tribal Populations (1957),* subsequently revised by ILO Convention No. 169, defines the intended beneficiaries of the standard, which include the members of members of "*tribal or semi-tribal"* populations whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. Clause 2 of that article establishes that For the purposes of this Convention, the term '*semi-tribal*' includes groups and persons who, although

[69] *Ibid. supra,* para. 98; *Case of Salvador-Chiriboga v. Ecuador.* Reparations and Costs. *supra,* para. 62.
[70] ECHR. *Kozacioglu v. Turkey.* Judgment of February 19, paras. 71 & 72.
[71] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Reparations and Costs. *supra,* para. 67.
[72] *Case of Salvador-Chiriboga v. Ecuador*, *supra*, para. 63.
[73] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights),* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 67; *The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 31; *Case of Salvador-Chiriboga v. Ecuador*, *supra,* n.24, para. 75.
[74] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Reparations and Costs. *supra,* para. 76
[75] *Ibid*. para. 83
[76] ILO, *Indigenous and Tribal Populations Convention, 1957.* Article 1.1.
[77] Articles 13 - 17 are especially relevant, as they refer to peoples' rights to their land and territories.

they are in the process of losing their *tribal* characteristics, are not yet integrated into the national community."[78]

In addition, various international law instruments state that *self-identification* is the principal criterion for determining the indigenous status of the members of such peoples, both individually and collectively.[79]

Moreover, the *corpus juris* contains different instruments comprising the current standard on the issue, including in particular the *ILO Reports*, which have developed the obligations contained Convention No. 169 and defined the characteristics of indigenous and tribal peoples. For example, the report entitled *"Indigenous and Tribal Peoples' Rights in Practice,"* explains that the Convention does not strictly define strictly define who are indigenous and tribal peoples but rather describes the peoples it aims to protect and addresses the characteristics of each one of those peoples. Elements of tribal peoples include: i) Culture, social organization, economic conditions and way of life different from other segments of the national population, e.g. in their ways of making a living, language, etc.; ii) Own traditions and customs and/or special legal recognition. Elements of indigenous peoples include: i) Historical continuity, i.e. they are preconquest/colonization societies; ii) Territorial connection (their ancestors inhabited the country or region); iii) Distinct social, economic, cultural and political institutions (they retain some or all of their own institutions).[80]

In the *Case of the Saramaka People v. Suriname*, the Court observed that that the *Saramaka* people are not indigenous to the region they inhabit; they were instead brought to what is now known as Suriname during the colonization period as slaves from Africa. Nevertheless, their ancestors escaped to the interior regions of the country where they established autonomous communities, and therefore they "share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions."[81] In this respect, the Court affirmed what its jurisprudence has held with respect to the special measures that indigenous and tribal peoples require to guarantee the full exercise of their rights, especially with respect to the enjoyment of their property rights, in order to ensure their physical and cultural survival.[82]

In the *Saramaka* case, the Court also held that the fact that some individual members of that community lived outside the traditional territory and in a manner that differed from other *Saramaka*s living within the traditional territory and in accordance with the customs of their people "does not affect the distinctiveness of this tribal group nor its communal use and enjoyment of their property." It further found that the question of whether certain self-identified

[78] Article 11 of this instrument establishes the State's duty to recognize "the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy." Article 12.1 stipulates that "the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations."

[79] Article 1.2. of ILO Convention No. 169 establishes the criteria of application of the term "indigenous," in the following terms: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." In addition, Article 9 of the United Nations Declaration on the Rights of Indigenous Peoples provides that "indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned," and Article 33(1) establishes that "indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions." For its part, Article 1.2 of the Draft American Declaration on the Rights of Indigenous Peoples states that "Self-identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this Declaration apply. The States shall respect the right to such self-identification as indigenous, individually or collectively, in keeping with the practices and institutions of each indigenous people."

[80] ILO *Indigenous and Tribal Peoples' Rights in Practice*, p. 9.

[81] I/A Court H.R., *Case of the Saramaka People. supra* paras. 79, 84; *Case of the Moiwana Community v. Suriname.* Preliminary Objections, *supra,* para. 133.

[82] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 148-149 & 151; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118-121, & 131 & *Case of the Yakye Axa Indigenous Community, supra*, paras. 124, 131, 135-137 & 154.

members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people "is a question that must be resolved by the *Saramaka* people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case." In addition, the lack of individual identification with the traditions and laws of the *Saramaka* by some members of the community may not be used as a pretext to deny the *Saramaka* people their rights.[83]

With respect to the members of one of the beneficiary families in the *Yakye Axa* case, who were later claimed as beneficiaries in the *Sawhoyamaxa* case, the Court stated that "the Court cannot but respect the decision of these families to leave the *Yakye Axa* Community to join the Sawhoyamaxa Community, both indigenous communities of the *Enxet-Lengua* people, and the decision of the members of the *Sawhoyamaxa* Community to accept those families into their group."[84]

In its analysis of the violation of Article 21 of the ACHR in the cases of the *Yakye Axa* and *Sawhoyamaxa* Communities against Paraguay, the Inter-American Court referred to Article 13 of ILO Convention No. 169, citing "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.'"[85]

In this context, the States must consult indigenous and tribal peoples in order to ensure their participation in decisions relating to any measures that may affect their territories, taking account of the special relationship between indigenous and tribal peoples and the land and natural resources[86] (*supra* section II.A.1). The Court also made clear that it is the community and not the State that must decide who will represent the community in each consultation process in accordance with its customs and traditions (*supra*).

Also, there are a number of precedents in comparative law where the domestic courts have applied the aforementioned standards to communities other than traditional indigenous communities[87] and which, in some cases, have made use of the concept of *self-identification* for that purpose.[88]

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[83] I/A Court H.R., *Case of the Saramaka People, supra.* Para. 164

[84] *Sawhoyamaxa*, *supra,* para. 206.

[85] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 136; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 119.

[86] IACHR. *Democracy and Human Rights in Venezuela.* Doc.OEA/Ser.L/V/II,Doc.54, December 30, 2009, para. 1071.

[87] Constitutional Court of Colombia. Judgment C-030 of 2008. Opinion delivered by: J. Rodrigo Escobar Gil. The Constitutional Court examines the constitutional challenge to the General Forestry Act (Law 1021 of 2006) brought by the indigenous and Afrodescendant communities who were not consulted prior to the enactment of the law. The Court concluded that, given the potential harm to the rights or interests of the indigenous and Afrodescendant peoples, Congress should have engaged in consultation; *See also Sentencia del Quinto Juzgado Federal de primera instancia, sección Judicial de maranhão (Justiça Federal de 1ª instância, seção Judiciária do maranhão, 5ª vara).* The Court protected this traditional Afrodescendant community, underscoring the intention of the Brazilian State to establish public policies aimed at combating discrimination against the traditional ways of life of indigenous and tribal peoples. The case was related to the adverse effects on the traditional forms of production of an Afrodescendant community whose members were prevented from accessing their crop-growing areas because of the activities of an aerospace base. *See also* Constitutional Judgment 0045/2006 of June 2, 2006, Case File No. 2005-12440-25-rdL. In this judgment, the Constitutional Court of Bolivia ruled on a direct constitutional challenge to Articles 114 and 115 of the Hydrocarbons Act, among others, which provided for timely, mandatory, prior consultation with peasant, indigenous, and native communities for the development of any hydrocarbons operations. The Court indicated that that article reflects the duty to consult enshrined in Article 15.2 of ILO Convention No. 169. Nevertheless, it determined that upon establishing that the purpose of such consultation, in addition to determining whether and how the interests of the indigenous or peasant peoples might be adversely affected, is to obtain their consent, it deviates from the standards of constitutionality; this is because art. 15.2 does not have that purpose—especially when, as previously noted, the hydrocarbons are State-owned.

[88] Trial Court No. 5 for Civil, Commercial, and Mining Matters, sole Office of the Clerk, III Judicial District of Río Negro in Argentina used self-identification as a criterion to verify the defendants' membership in the indigenous community, indicating that, "many criteria have been tested, but the broad criterion of Article 1 of ILO Convention No. 169/1989 (law 24.071) and Articles 2 and 3 of provincial law 2.287, which have also prevailed internationally, govern under our law. *See*: *Sede, Alfredo y otros c/ Vila, Herminia y otro s/desalojo* (Case File No. 14012-238-99), August 12, 2004.

Finally, with respect to the consequences of the assimilation policy and discrimination against a group, in the *Lovelace* case, the Human Rights Committee[89] examined a situation in which the act of entering into an intercultural marriage meant that Sandra Lovelace lost her rights and status as an indigenous person under the *Indian Act* in Canada, which would not happen in the case of a man. The Committee determined that persons who are born and raised on a reservation, maintain ties, and wish to continue maintaining ties to that indigenous community are considered part of the minority group according to the meaning of Article 27. As such, under that definition, Mrs. Lovelace was a member of the Maliseet tribe, given that she had grown up on the reservation and had left it only during the few years that her marriage lasted. The Committee also held that Mrs. Lovelace's right to enjoy her own culture was infringed because there were no communities outside the reservation that shared her language and culture. Finally, the Committee decided that denying Mrs. Lovelace access to live on the reservation was neither reasonable not necessary to preserve the identity of the group and, therefore, to deprive her of her status as an indigenous person was tantamount to denying her rights under Article 27 and was a violation of the ICCPR.[90]

Arguments of the Representatives and the State

Below we will discuss three possible approaches to examining the alleged violation of the community of *La Loma*'s right to property.

- *Expropriation*

This approach to the case entails recognizing the community of *La Loma* as a peasant community, using the standards established in the *Salvador Chiriboga* case regarding restrictions on the right to private property, specifically those relating to expropriation.

The representatives should use arguments that demonstrate the State's failure to comply with the requirements for restricting the right to property. First, they could call into question the reasons of *public utility and social interest* asserted in the "Black Swan" hydroelectric power plant construction project. They could also examine in this specific case: whether the restriction was established in a prior law; whether just compensation was paid in a manner that was prompt, adequate and effective; and whether there was a fair balance between the public interest and the private interest. The representatives could also argue for the application of the proportionality test adopted in the jurisprudence of the Court with respect to lawfulness, purpose, necessity, and strict proportionality. With respect to the purpose of pursuing a legitimate aim in a democratic society, the representatives can again question the extent to which the restriction of the right to property based on a private project is justified according to collective objectives that take account of the rights of a community. They can also argue that the restriction was disproportionate, given that it has interfered dramatically with the rights of the community to the extent that it was forced to relocate to camps under poor conditions and become detached from its traditional culture.

The State could respond to these allegations by asserting the right to development and demonstrating that the construction of the hydroelectric project, especially because of the chronic energy shortage in the State of Atlantis, is of public utility and social interest. The State's representatives must demonstrate that the possibility of restricting the right to property through expropriation is not only enshrined in the law but also is necessary in this specific case, as it is intended to satisfy the right of the entire population to have energy. They can argue that it was proportionate, since it does not interfere in the community's exercise of its right to property; not only is just compensation being offered as called for under Article 21 of the ACHR but also alternative, productive land is being offered. Finally, the State should argue that it was carried out

[89] UN Human Rights Committee. *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977. The Individual Opinion of Mr. Néjib Bouri held that, in addition to Article 27, Articles 2, 3 and 23 of the Covenant were also violated because some of the law's provisions are discriminatory, particularly based on reasons of sex. Cited on ESCR-Net.

[90] Article 27 of the ICCPR establishes that the States may not deny minority groups the right to enjoy their own culture.

in the pursuit of a legitimate aim in a democratic society, as the welfare of all of society in Atlantis reflects a fair balance between the public interest and the private interest of the peasant community. Additionally, the State followed all of the domestic procedures to carry out the expropriation and the occupation of the land. As such, the delay in payment is due to the community's refusal to receive it, as is the case with the alternative lands offered. It bears noting that the trial court judge set the total value of the lots based on the Inter-American Court's holding in the *Salvador Chiriboga* case, and therefore the State has met the just compensation requirement.

- *Restriction of communal property as indigenous or tribal community*

According to clarification answer 2 of the case, Article 9 of the Constitution of Atlantis establishes that indigenous peoples are:

> *1) Descendants of peoples that inhabited their territory prior to colonization, and preserve most of their economic, cultural, and political institutions.*
>
> *2) Indigenous peoples are those that form a social, economic, and cultural life rooted in a traditional territory and recognize their own authorities in accordance with their customs and practices. They also share ethno-linguistic criteria and an awareness of their indigenous identity.*

This approach requires the representatives to discuss why the international standards on the rights of indigenous or tribal peoples are applicable to the Community of *La Loma*, and to allege the violation of its right to communal property and of its right to be consulted before the State made the decision to go forward with the expropriation process. To argue this point, the representatives should cite the facts relating to the indigenous origin of this community, the responsibility of the State in the context of the assimilation policy and division of the communities, and the preservation of some of its cultural traditions and its special relationship to the land and the river. This is demonstrated, for example, by the fact that the women of *La Loma* have preserved the *Rapstaní* tradition of cremating their dead on the banks of the river and throwing their ashes into the *Xuxani* for their transmutation. Those criteria could fall within the scope of Article 9 of the Constitution of Atlantis. In this context, and consistent with ILO Conventions 169 and 107, they would also have the possibility of framing this community as a tribal community, demonstrating its tribal characteristics, and making use of the concept of self-identification and self-determination contained in the pertinent instruments and related jurisprudence of the *Saramaka* and *Sawhoyamaxa* cases. Based on the *Lovelace v. Canada* case, they could further argue that the Community of *La Loma* maintains the traditions and ties to the *Rapstaní* culture—taken from them by the State's assimilation policy—which favored discrimination against the community's women, and that the connection therefore remains.

The State could refute this position by arguing that the Community of *La Loma* is not a tribal community, since in 1985 it was granted official recognition as a peasant community and received benefits. They can also assert the loss of their customs, as they currently preserve their dialect only partially; they do not use their traditional clothing, and they have not continued the production of handicrafts. Therefore, they do not meet the requirements established in Article 9 of the Constitution of Atlantis. They also do not share the characteristics of a tribal community that has traditionally identified *Afrodescendant* peoples. Once this theory has been refuted, the State can address the standards on private property and demonstrate its compliance with the requirements for restricting that right in this specific case.

- *Communal protection of peasant farming communities*

This approach requires a creative exercise and complex arguments on the part the representatives, to the extent that they can assert the necessity of extending the standards of protection intended for indigenous and tribal communities to peasant farming communities. This

theory finds support in the *pro persona* principle enshrined in Article 29 of the Convention and in the Constitution of Atlantis. They can also avail themselves of the definition of "*semitribal"* community established in ILO Convention 107, claiming that the Community of *La Loma*, although close to losing its *tribal* characteristics, is still not integrated into mainstream society in the State of Atlantis. Finally, they might avail themselves of other types of theoretical frameworks that take account of the similarities between peasant farming communities—specifically, the community of *La Loma*—and indigenous communities, and address the current debate on the issue. In this way, they will be able to call attention to the advancements in jurisprudence at the national level in several countries of the region, in terms of raising the possibility of extending the standards in question to other types of communities, such as Judgment 0045/2006 of June 2, 2006 of the Constitutional Court of Bolivia or Judgment C - 030 of 2008 of the Constitutional Court of Colombia.

The State will be able to refute these arguments by asserting that currently the right of peasant farmers does not enjoy specific protection under international law and that therefore, those communities only enjoy protection of the rights contained in the general human rights instruments. Additionally, ILO Convention 107 regarding "*semitribal"* communities was subsequently revised by ILO Convention No. 169. Once this theory has been refuted, the discussion can turn to the standards on private property.

B. ARTICLE 6 OF THE ACHR: FREEDOM FROM SLAVERY

Relevant facts

- The TW Company offered 350 positions to members of the community. They designated 7 divers and 215 masons, who were offered wages of US $4.50 per day. More than 100 women were offered the jobs of collecting and cooking food for their husbands and other company personnel, as well as cleaning the area and washing the workers' clothes, for US $2.00 per day, including food. The amounts offered corresponded to payments agreed upon for purposes of meeting the requirement of sharing benefits with the community.
- During the first 2 months, everyone was assigned a 9-hour workday, with 1 hour for lunch. Later, however, due to the demands of the job, the men's workday was extended to approximately 15 hours a day, without overtime pay. The women's schedule varied constantly.
- Due to a lack of specialized, good quality equipment, 4 of the divers reported problems stemming from decompression syndrome. This resulted in their partial disability.
- The women of the *Chupanky* community filed a complaint alleging that the members of the community had been subjected to forced labor.
- In view of these irregularities, the Council of Elders decided to veto the continuation of the project. The company reacted by refusing to stop its activities, and threatened to fire the employees, sue them for breach of contract, and have the community relocated to the alternative lands.
- Atlantis has signed the main ILO treaties on the subject. The minimum wage is US $250 per month, consistent of regular workdays. Clarification answer 50.
- See also: clarification answers 16, 49 & 107.

What are the constituent elements of forced labor? Can State responsibility arise if the acts are committed by private parties? Was there gender-based discrimination in the jobs offered to the women?

Applicable law

a) Standards on forced labor

The prohibition against forced labor is enshrined in *Article 6.2 of the American Convention,* which establishes that "No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence

imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner."

Similarly, *ILO Convention 29 on forced labor (1930)* defines forced or compulsory labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[91]

Article 1 of the *ILO Convention 105 on the abolition of forced labor (1957)* establishes that "Each Member of the International Labor Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labor […] b) as a method of mobilizing and using labor for purposes of economic development; […] e) as a means of racial, social, national or religious discrimination."[92]

The prohibition against forced labor is also enshrined in several international instruments,[93] and in this respect, are part of customary international law, and the pertinent standards have the status of *jus cogens.*[94]

In addition, Article 6 of the Protocol of San Salvador establishes that*:*

> 1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
>
> 2. The State Parties undertake to adopt measures that will make the right to work fully effective […] The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work [underlining added].

Article 7 of the Protocol of San Salvador holds that:

The States must guarantee "fair and equal wages for equal work, without distinction, [as well as]

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[91] International Labor Organization. Forced Labor Convention, 1930 (1930). Article 2.1. The ILO's Committee of Experts on the Application of Conventions and Recommendations has developed the issue of forced labor extensively. As such, it is particularly relevant to take account of the following points developed: i) the element of "any penalty" established in the definition of forced labor need not be in the form of penal sanctions but might take the form also of the loss of rights or privileges." *See*, ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations* 2001; ii) The prohibition against forced labor extends to all work that is not offered voluntarily, whether or not it is remunerated. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 2003, p. 156; iii) a frequent characteristic of forced labor is that the perpetrator of the violation is a person or group not linked to the State, such as landowners, corporations, or even independent armed groups; OHCHR, *Derecho Internacional de los Derechos Humanos. Normativa, jurisprudencia y doctrina de los sistemas universal e interamericano*. Bogotá. 2004, p. 257. For this reason, it is insisted that the State has the obligation to impose truly effective criminal sanctions that are applied strictly. The obligations of the State include "the full investigation" of alleged cases of forced labor, and administrative measures do not meet the requirements of the Convention." OHCHR, *Derecho Internacional de los Derechos Humanos. Normativa, jurisprudencia y doctrina de los sistemas universal e interamericano*. Bogotá. 2004, pp. 167 – 168. (underlining added).

[92] International Labor Organization, Abolition of Forced Labor Convention (1957). Article 1.

[93] International Labor Organization, Convention (169) on Indigenous and Tribal People in Independent Countries (1989). Article 20. This provision establishes that the States shall adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of indigenous workers, as well as to prevent any discrimination against indigenous workers as regards admission to employment, equal remuneration for work of equal value, medical and social assistance, and the right of association. These measures must guarantee, *inter alia*, that "that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labor and other forms of debt servitude"; *See also* Article 4.2 of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* which states that "No one shall be required to perform forced or compulsory labor"; Article 5 of the *African Charter on Human and Peoples' Rights*, which establishes that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"; Article 17 of the *United Nations Declaration on the Rights of Indigenous People of 2007*, which states that "Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labor law"; Article 8.3.a. of the *International Covenant on Civil and Political Rights,* which holds that "No one shall be required to perform forced or compulsory labor"; and *The Universal Declaration of Human Rights* which provides that "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

[94]Human Rights Committee, *General Comment 24,* Para. 8.

a reasonable limitation of working hours, both daily and weekly," among other things.[95]

In the context of the Inter-American Human Rights System, the Court in the *Case of the Ituango Massacres v. Colombia* used ILO Convention No. 29 regarding forced labor to interpret Article 6 of the ACHR, in accordance with the evolution of the Inter-American System. In that case, the Court noted that the definition of forced or compulsory labor consists of two basic elements, to wit: i) the work or service is exacted "under the menace of a penalty"; and, ii) it is performed involuntarily.[96]

In that case the Court adopted the concept of the "menace of a penalty" can consist of "the real and actual presence of a threat, which can assume different forms and degrees, of which the most extreme are those that imply coercion, physical violence, isolation or confinement, or the threat to kill the victim or his next of kin."[97] In addition, it defined "unwillingness to perform the work or service"" as "the absence of consent or free choice when the situation of forced labor begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception or psychological coercion."[98]

Both the Inter-American Commission[99] and the European Court have rendered decisions on this issue. The European Court has been clear in establishing that Article 4 of the European Convention enshrines one of the fundamental values of democratic societies, and it allows for no exceptions and no derogation from it, even in the event of a public emergency threatening the life of the nation.[100] In interpreting Article 4, the European Court has availed itself repeatedly of the relevant ILO Conventions.[101]

In the cases of *Van der Mussele v. Belgium* and *Siliadin v. France*, the European Court referred specifically to forced labor in the context of Article 4 del European Convention on Human Rights, indicating that the definition of forced labor requires some type of *"physical or mental constraint, as well as some overriding of the person's will."*[102] Additionally, in the case of *Rantsev v. Cyprus and Russia*, the European Court of Human Rights ruled on the issue within the framework of a case of human trafficking. In that case, the Court underscored the State's positive obligation to prosecute and punish any act that places a person in conditions of slavery, servitude, or forced labor. The State is required to put in place a legislative and administrative framework to prohibit and punish such acts.[103]

In relation to the international State responsibility arising from these human rights violations

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[95] Article 7, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"; Article 20, ILO Convention No. 169 - C169 Indigenous and Tribal Peoples Convention, 1989; *see also* Article 3 of that Convention; Article 7, International Covenant on Economic, Social and Cultural Rights.

[96] I/A Court H.R., *Case of the Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 157 & 160.

[97] *See* Global report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, "A Global Alliance against Forced Labor," International Labor Conference, 93rd session, 2005, *cited in* I/A Court H.R., *Case of the Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 161.

[98] I/A Court H.R., *Case of the Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148. Para. 164.

[99] The European Commission has addressed this point in the cases of *X v. Federal Republic of Germany* and *X v. The Netherlands,* in which it specified two elements that must be taken into consideration with respect to forced or compulsory labor. First, "the work and service be performed by someone against his/her will, and the conditions/demands for fulfillment of this service or work are unjust or oppressive or the work itself implies insupportable avoidable hardships." *See* European Commission HR, *X v. Federal Republic of Germany*, Petition 4653/70, Yearbook XVII, 1974, p. 172. On another occasion, in the case of *X and Y v. Federal Republic of Germany,* the Commission referred to the five categories enumerated in ILO Convention 105 to define the concept of "forced labor"; *See* European Commission HR, *X and Y v. Federal Republic of Germany*, Petition 7641/76, Decisions and Reports, Vol. 10. 1978, p. 230.

[100] ECHR, Stummer *v. Austria*, Application No. 37452/02. 2011, para. 116.

[101] ECHR, *Van der Mussele v. Belgium*, Application No. 8919/80. 1983, para. 32; *Siliadin v. France*, Application No. 73316/01. 2005, para. 115; *Graziani-Weiss v. Austria*, Application No. 31950/06. 2011, para. 36.

[102] ECHR, *Van der Mussele v. Belgium*, Application No. 8919/80. 1983, para.34; *Siliadin v. France*, Application No. 73316/01. 2005, para. 117.

[103] ECHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04.2010, para. 285; *Siliadin v. France*, Application No. 73316/01, 2005. Paras. 89 & 112.

committed by private persons, the Inter-American Court has established that the State's failure to comply with its duty of prevention can give rise to its international responsibility for acts committed by private individuals,[104] provided that the State is aware of the real and imminent risk to the victim, and there were reasonable opportunities to prevent or avert the violation.[105]

In the same respect, the Court has held in cases such as *Ximenes Lopes v. Brazil* and *Albán Cornejo v. Ecuador* that State responsibility may also arise as a result of the acts of private individuals not initially attributable to the State, when the State omits to prevent or avert the acts of third parties who violate legally protected interests.[106] In those cases the Court pointed to the State's obligation to *regulate and supervise* private healthcare provider entities. In this respect, it held that "under the American Convention international liability comprises the acts performed by private entities acting in a State capacity, as well as the acts committed by third parties when the State fails to fulfill its duty to regulate and supervise them."[107]

Although the Inter-American Court has referred to private entities as guarantors of human rights in its decisions and judgments,[108] it has also done so in the context of provisional measures to protect members of groups or communities from acts or threats caused by state agents or private third-party individuals.[109]

Forced labor has also been addressed under international criminal law.[110] On this point, it bears noting that neither the 1998 Rome Statute nor the 1993 Statute of the ICTY expressly define forced labor as a war crime or a crime against humanity.[111] Nevertheless, there are ICTY decisions that have addressed forced labor specifically as a crime against humanity under the category of persecution, for example in the *Krnojelac*[112] case and in the *Simic, Tadic, and Zaric*

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[104] I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia.* Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134. para. 111.

[105] *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006*; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146. paras. 123 & 155; *Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205*, para. 280. *See also* ECHR, *Case of Kiliç v. Turkey*. Judgment of 28 March. 2000, paras. 62 and 63; *Case of Osman v. the United Kingdom*. Judgment of 28 October, 1998, paras. 115 & 116.

[106] I/A Court H.R., *Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171*, para. 119. *Case of Ximenes-Lopes v. Brazil.* Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, para. 85

[107] I/A Court H.R., *Case of Ximenes Lopes v. Brazil. supra*, para. 90.

[108] *See I*/A Court H.R., *Case of the Moiwana Community, supra*, para. 211; *Case of Tibi v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 108; *Case of the Gómez-Paquiyauri Brothers v. Peru.* Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 91; *Case of the 19 Tradesmen v. Colombia.* Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para. 183; *Case of Maritza Urrutia v. Guatemala.* Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103. para. 71; *Case of Bulacio v. Argentina.* Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 81.

[109] *See* I/A Court H.R., *Matter of the Sarayaku Indigenous People,* Provisional Measures, Order of July 6, 2004; *Matter of the Kankuamo Community*, Provisional Measures, Order of July 5, 2004; *Matter of the Communities of Jiguamiandó and Curbaradó*, Provisional Measures, Order of March 6, 2003, Series E No. 4, p. 169; *Matter of the Paz de San José Apartadó Community*, Provisional Measures, Order of June 18, 2002, Series E No. 4, p. 141.

[110] The UN Office of the High Commissioner for Human Rights maintained in its report *Abolishing Slavery and its Contemporary Forms* that slavery, slave-related practices, and forced labor constitute: i) A "war crime" when committed by a belligerent against the nationals of another belligerent; ii) A "crime against humanity" when committed by public officials against any person irrespective of circumstances and diversity of nationality; iii) A common international crime when committed by public officials or private persons against any person. OHCHR, *Abolishing Slavery and its Contemporary Forms*, HR/PUB/02/4, p. 4.

[111] Although it is not classified specifically in the statutes, it has been considered that the crime of "enslavement" covers forced labor as a crime against humanity. On this point, see: ILO, *Forced Labor and Human Trafficking*, p. 17. Notwithstanding the above, there is ICTY case law in which it has been argued that forced labor can constitute the offense of persecution.

[112] In the *Krnojelac* case, the Appeals Chamber examined the subjection of non-Serbian detainees to forced labor and other crimes at the Kp Dom prison in Foca. The Chamber held that forced labor is part of several acts comprising the unlawful detention and beatings, the cumulative effects of which is sufficiently serious to be considered a crime of persecution. *Prosecutor v. Milorad Krnojelac (Appeal Judgment)*, IT-97-25-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 September 2003.

Case.[113]

Likewise, there are decisions from domestic courts in which forced labor has been considered a punishable crime, even if it has been committed by corporations (See *Doe v. Unocal, U.S. Court of Appeals 9th Circuit (2002)).*[114]

b) Human rights standards applicable to corporations

In 2003 the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.*[115] This initiative was the most important precedent for the principal *soft law* instrument that developed human rights protection standards for corporations, the *Guiding Principles on Business and Human Rights, prepared by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.* These principles are based on the obligations of the States to respect, protect, and remedy human rights and fundamental freedoms, as well as on the role of corporations in complying with all applicable laws and respecting human rights.[116] They underscore Principles 1, 4 and 11.[117]

In the United Nations system, the *Global Compact* should also be mentioned, as a voluntary initiative whereby corporations undertake to align their strategies and operations with the "*Ten Principles*." These principles cover four thematic areas: human rights, labor standards, environment, and anti-corruption.[118]

In addition to the above, several *soft law* instruments establish obligations for third parties such

[113] The Court held that "the charge of 'forced labor assignments' may constitute the basis of the crime of enslavement as a crime against humanity under Article 5(c), and the offence of slavery as a violation of the laws or customs of war under Article 3 of the Statute, and as such this offence is of sufficient gravity to support a charge of persecution". On that occasion, the Court found that the "forced labor assignments which result in exposing civilians to dangerous or humiliating conditions amounts to cruel and inhumane treatment. These acts reach the same level of gravity as other crimes against humanity and if performed with the *requisite discriminatory intent* may constitute persecution." *Prosecutor v. Simic, Tadic and Zaric (Trial Judgment*), IT-95-9-T, International Criminal Tribunal for the former Yugoslavia (ICTY), October 17, 2003.

[114] *See, e.g., Doe v. Unocal*, U.S. Court of Appeals 9th Circuit (2002). The *Doe v. Unocal* case began in 1996 with the complaint filed in a United States federal court by a group of Burmese peasants against the company, alleging that they were subjected to human rights violations such as forced labor, forced displacement, murder, rape, and torture for purposes of benefitting the "Yadana Project." These acts were committed by the Burmese Army, hired directly by the corporation to guard the project, which was for the construction of a gas pipeline in Burmese territory. In this case, the Ninth Circuit Court of Appeals held that forced labor is widely rejected in the international community because it has acquired the status of *jus cogens*. Additionally, it adopted the standards of international criminal law to determine Unocal's alleged complicity in violating the human rights of the Burmese peasants. This judgment examined whether there was forced labor in connection with the project that Unocal was carrying out.

[115] United Nations, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

[116] Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework."* A/HRC/17/31. 21 March 2011.

[117] The first principle establishes that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication"; Principle 4 says, "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence"; Principle 11 establishes that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved," [and Principle 12 states that] "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work." *See also* Principle 2, Organization for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises*. Principles 11 & 12.

[118] See *The Ten Principles of the UN Global Compact.* Available as of 11 March 2012 at: http://www.unglobalcompact.org/Languages/spanish/Los_Diez_Principios.html

as corporations in relation to the respect and guarantee of the human rights of their employees. The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy mentions that corporations should "should provide […] wages, benefits and conditions of work [that are] at least adequate to satisfy basic needs of the workers and their families."[119] That Declaration also maintains that both governments and corporations should "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labor Organization and its principles."[120] There are also other relevant instruments on the subject in the *corpus juris* of international law.[121]

Additionally, the UN Special Rapporteur on the Rights of Indigenous Peoples has noted that in order for private corporations to meaningfully comply with relevant human rights norms within their respective spheres of influence, it is necessary for them to identify, fully incorporate and effectively apply the norms concerning the rights of indigenous peoples within every aspect of their work related to the projects they undertake.[122]

c) Gender perspective in the work performed

The Inter-American Court has applied gender perspective in its jurisprudence[123] in light of the ACHR itself and the interpretation of the Convention of Belém do Pará. Additionally, it has declared its contentious jurisdiction *rationae materiae* to examine alleged violations of Article 7 of the Convention of Belém do Pará, but lacks contentious jurisdiction *rationae materiae* to examine alleged violations of Articles 8 and 9 of that Convention.[124] Nevertheless, the various articles of the Convention of Belém do Pará can be used in the interpretation of it and other pertinent inter-American instruments.[125] On this point, the following articles are most relevant:

> Article 1 establishes that for the purposes of that Convention, "violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." Additionally, Article 4 establishes that "Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments." In Article 6, the Convention states that "The right of every woman to be free from violence includes, among others: a. the right of women to be free from all forms of discrimination; and b. the right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination."[126]

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[119] *See* Principle 34, International Labor Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Date of publication: January 1, 2006. (adopted by the Governing Body of the International Labor Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006)). *See also* ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the ILO of 1977, amended in 2000.*

[120] Principle 8, International Labor Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,* Date of publication: January 1, 2006. (adopted by the Governing Body of the International Labor Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006)).

[121] The Organization for Economic Cooperation and Development (OECD) drafted the *"OECD Guidelines for Multinational Enterprises."* These are recommendations by the States for multinational corporations. They establish voluntary standards and principles on responsible corporate conduct and good practices consistent with the law and the relevant international standards. *OECD Guidelines for Multinational Enterprises*, OECD Publishing. Guideline IV. Numbers 1,2,3 & 4.

[122] UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, 15 July 2009, A/HRC/12/34, Par. 57.

[123] *See: Case of the Miguel Castro-Castro Prison v. Peru, González et al. ("Cotton Field") v. Mexico; Case of the "Las Dos Erres" Massacre; Case of Fernández Ortega et al. v. Mexico; Case of Rosendo-Cantú et al. v. Mexico.*

[124] *Case of González et al. ("Cotton Field"), supra*, para. 80.

[125] *Ibid*. para. 79.

[126] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará."

The Court has also held that "not all human right violation committed against a woman implies necessarily a violation of the provisions established in the Convention of Belém do Pará."[127] Thus, in the *Perozo* case, the Court there would be a violation of the Convention if attacks were directed especially at women because of their gender, or if women became special targets by reason of their gender.[128]

In its report on captive communities in the case of the Guaraní Indigenous People and in the Bolivian Chaco, the Inter-American Commission examined facts similar to the fact pattern in the *Chupanky* community, specifically, the assignment of work to women, "based on gender stereotypes."[129] It also describes the notorious pay disparity between men and women for the work performed,[130] as well as the exhausting working hours, which "generally more than 12 hours a day, and in many cases they are assigned to perform a specific task that must be finished that same work day, which is normally impossible […]."[131] Among the recommendations for preventing, investigating, and punishing the contemporary forms of slavery in the Bolivian Chaco, the Commission recommended that the State: "Design public policies for eradicating all forms of discrimination against the Guaraní workers [and for eradicating] all forms of discrimination against Guaraní indigenous women in the Chaco, and in particular see to the strict enforcement of labor laws on length of the workday and equality of pay compared to men."[132]

In addition to the standard of nondiscrimination applied to indigenous peoples, indigenous women cannot be subjected to a dual discrimination on the basis of their sex.[133] In order to effectively meet that obligation, the States must also implement the necessary measures to eliminate employment discrimination by private actors.[134]

Arguments of the Representatives and the State

Representatives

The representatives can allege the international responsibility of the State of Atlantis for the alleged subjection of the members of the community to forced labor by the private company.

First, they must demonstrate why the elements of forced labor have been satisfied in this particular case, especially as it pertains to the threat of a penalty and the involuntariness of providing the service according to the provisions of ILO Convention 29. Accordingly, they must use the criteria set forth in the *Case of the Ituango Massacres v. Colombia*, claiming, for example, that the company's threats to fire the workers and sue them for breach of contract, as well as the threat of relocation, entail a real and present threat to the workers. On this point, the representatives must demonstrate that these facts are sufficient to satisfy the "penalty" element.

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[127] I/A Court H.R., *Case of Perozo et al. v. Venezuela.* Preliminary Objections, Merits, Reparations, and Costs, para. 295, cited in: *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 227.
[128] I/A Court H.R., *Case of Perozo et al. v. Venezuela,* para. 295.
[129] Inter-American Commission on Human Rights, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, IACHR, OEA/Ser.L/V/II, December 24, 2009. http://www.oas.org/es/IACHR/indigenas/docs/pdf/COMUNIDADES%20CAUTIVAS.pdf. Para. 96.
[130] *Ibid*. 97 & 120.
[131] *Ibid.* paras. 97 & 100.
[132] *Ibid*. para. 221.
[133] Article 11, Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into force on 3 September 1981. *See also* Article 22, United Nations Declaration on the Rights of Indigenous People, United Nations General Assembly; *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34, para. 52; IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, IACHR, OEA/Ser.L/V/II, December 24, 2009. para. 62.
[134] General Comment No. 28: Equality of rights between men and women (article 3), 03/29/2000. CCPR/C/21/Rev.1/Add.10. Para. 31. *See also* Article 20 of ILO Convention No. 169. *See also* Articles 6 & 7, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador."

They could argue that according to the *ILO Committee of Experts on the Application of Conventions and Recommendations*, the element of "any penalty" set forth in the definition of forced labor does not necessarily mean a criminal penalty, but rather can be the deprivation of any right or benefit.

To demonstrate the element of involuntariness, they can argue that the changes to the working conditions amount to a form of psychological coercion that entails the continued performance of services involuntarily and, under the criteria established by the European Court in the *Van der Mussele v. Belgium* and *Siliadin v. France* cases, would invalidate the willingness of the workers. Similarly, they could argue that the long working hours, the amount of remuneration, and the lack of adequate equipment demonstrate the unjust and oppressive nature of the work, in the terms indicated by the European Commission on Human Rights in the cases of *X v. Federal Republic of Germany* and *X v. The Netherlands*. They could note that according to the *ILO Committee of Experts on the Application of Conventions and Recommendations,* the prohibition against forced labor extends to all work not performed voluntarily, whether or not it is remunerated. On this point, they could maintain that there is a lack of remuneration in any case, since the pay received by the workers is not even the minimum wage in Atlantis, but rather corresponds to requirement to share benefits with the community—in addition to having accepted that benefit for fewer hours than agreed.

They must also demonstrate that State responsibility arises in this case from the acts of private individuals. To do so, they must use the relevant standards established in the jurisprudence of the Inter-American Court to prove that the State was aware of the real and imminent risk that the employees of the TW Company would be exploited, and that it had a reasonable opportunity to prevent such violation from occurring. This is supported by the complaints lodged by the women of the community, the statements of the company's employees and the Council of Elders, as well as the company's consistent and evident failure to comply with the working hours and minimum labor standards. They can also support this claim using the criteria established in the *Ximenes Lopes v. Brazil* and *Albán Cornejo v. Ecuador* cases*,* indicating that Atlantis in any case had the obligation to regulate, oversee, and supervise the actions of this private company, which it failed to do. On this point, the representatives of the victims can allege that such State obligations must be interpreted in light of the *Guiding Principles on Business and Human Rights, prepared by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,* since it is the main *soft law* instrument applicable to the issue. In this respect, it would be particularly relevant to mention the "protection" component established in that instrument, which amounts to the State's obligation to offer protection from human rights abuses committed by third parties, including corporations, through adequate policies, regulation, and prosecution. Furthermore, in light of Principle 4, and taking account of the fact that 40% of the TW Company's capital is public, the State should have taken additional protection measures against the human rights violations committed by the company.

As for the argument on *gender perspective*, the representatives could submit that the jobs assigned to the women of the community were based on stereotypes about the role of women, that the wages set for the women and the extended working hours were unfair to their detriment.

In conclusion, the State could incur responsibility for the violation of Article 6 of the ACHR in relation to Article 26 of the ACHR, interpreted in view of Articles 6 and 7 of the Protocol of San Salvador and Article 6 of the Convention de Belém do Pará.

State

The State can respond to these allegations by first refuting the forced labor claim, arguing that the alleged company threats are not sufficiently serious to meet the "menace of a penalty" requirement established in ILO Convention 29 and in the *Ituango Massacres v. Colombia* case, as this threat is hypothetical rather than real; furthermore, it does not entail coercion or physical violence as required under the jurisprudence of the European Court. It can also maintain that the second element of forced labor has not been met, as the workers decided to join the company voluntarily, and the agreed remuneration was even the result of a dialogue with the community.

It may also be argued that the workers are free to quit their jobs at any time, and that there is no evidence that would lead to the conclusion that the company might retaliate if they were to do so. Additionally, it is the company's opinion that the employees from the community breached the agreement.

With respect to the attribution of responsibility, the State could argue that the complaints filed by the community do not mean that the State was aware of a real or imminent risk to the workers, bearing in mind that there was no evidence, only assertions. With respect to the regulation, oversight, and supervision obligations, the State might allege that it has complied fully through institutions such as the Energy and Development Commission and the Ministry of the Environment and Natural Resources (including through the EIAs), as well as through the Intersectoral Committee, which has participated actively at every stage of development of the TW Company's project. The State can also argue that no inconsistencies have been demonstrated in its domestic laws on the subject. With respect to the use of the *Guiding Principles on Business and Human Rights* in the case, it can reiterate that that normative framework is not internationally binding upon the State or upon corporations.

As for the alleged discrimination against the women, the State could argue that it was the Council of Elders itself that invited the women to take part in the jobs designated by the company, and the company provided this opportunity, with which all of the members of the community agreed. The wage difference is due to logical technical issues involved in the labor needs between construction and diving work and cooking and cleaning work. Furthermore, the Court lacks jurisdiction to declare a violation of Article 6 of the Convention of Belém do Pará, and there was certainly no violence against women.

Finally, with respect to the alleged labor violations, those facts were not complained of at the domestic level before the competent labor authority, and Articles 6 and 7 of the Protocol of San Salvador are not justiciable; therefore, none of the violations alleged in that respect can be said to exist.

C. ARTICLES 4 AND 5 OF THE ACHR: RIGHT TO LIFE AND PERSONAL INTEGRITY

Given that the facts relating to those rights are connected, this section addresses both.

Relevant facts

- Some of the members of the community of *La Loma* stated to the press that the living conditions were poor in the temporary camps and that they wished to return to their place of origin and traditions (see facts as found).
- According to a medical report, 4 of the divers reported problems stemming from decompression syndrome, which resulted in their partial disability.
- The results of the environmental impact study were favorable to the project, mainly in terms of the benefits of the generation of electrical power for the communities.
- However, with respect to the environment, it specified that the hydroelectric dams could cause minor geological damage, changing the ecosystem in the region, and producing some sediments in the water that are not harmful to human beings. The Ministry of the Environment and Natural Resources sent a copy of the report in Spanish to the *Chupanky* community.
- Addressing the social aspect, it specified that due to the adjacent communities' relationship with the river, it would be advisable to secure direct access road from their alternative lands in order for them to hold their rituals.
- The indigenous people working on the construction project have to comply with extended work schedules, and their working hours and duties were even increased without any proportional adjustment in pay for the extra work they were performing.
- According to the community, all of the above has adversely affected family dynamics and the traditional indigenous way of life. It is also their opinion that the other social and environmental changes that have taken place as a result of the construction of the dam have negatively affected their cultural integrity.

What does the obligation to guarantee the right to life consist of in the instant case?
Do the conditions of poverty at the temporary caps violate the right to a dignified existence?
How do the environmental and social impacts of the development project relate to the concept of dignified existence? How does this relate to Article 26 of the ACHR?
Is there State responsibility for the violation of the personal integrity of the divers?
In what does an indigenous community's right to cultural integrity consist?
Is it possible to assign responsibility to the State for the violation of the personal integrity of the relatives of individuals who are victims of mistreatment under the working conditions?

1. Right to life

Applicable law

Based on a literal interpretation of Article 4 of the ACHR,[135] clause 1 is focused on the *duty to respect* the right to life, and the other clauses restrict the practice of the death penalty. However, in cases of groups in vulnerable situations where Article 4.1 has been interpreted in relation to Article 1.1 (*duty to guarantee*), as well as Article 29 of the ACHR, the Court has developed the concept of "dignified existence," giving content to its interpretation in light of other national and international instruments. Likewise, "the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority."[136]

In the Paraguayan cases on indigenous peoples, arising from the deprivation of their ancestral territory, the members of the communities were living in extreme poverty with deplorable living conditions, lacking potable water, food, healthcare, housing, and so on. With regard to this issue, the Court developed the concept of dignified existence in greater depth through an evolutionary interpretation of the right to life in relation to the general duty to guarantee contained in Article 1.1 of the ACHR and the right to progressive development set forth in Article 26, as well as Articles 10 (Right to Health); 11 (Right to a Healthy Environment);[137] 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Protocol of San Salvador (ESCR), and the relevant provisions of ILO Convention No. 169.[138] The Court also referenced General Comment No. 14 of the United Nations Committee on Economic, Social and Cultural Rights.[139]

The Court in *Yakye Axa* thus observed that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found therein is closely linked to obtaining food and access to clean water.[140] It therefore concluded that the deprivation of their right to communal property had infringed the community members' right to a dignified existence. This was because it had deprived them of the possibility of accessing their traditional means of subsistence, and of using and enjoying the natural resources they needed to obtain clean water, and to practice traditional medicine to prevent and cure illnesses.[141] Consequently, it found that the State had not taken measures to address the conditions that negatively impacted their possibilities for a dignified existence, in violation of Articles 4.1 and 1.1 of the ACHR.

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[135] Article 4. *Right to Life*. 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
[136] I/A Court H.R., *Yakye Axa*. *supra* para.162.
[137] Article 11. Right to a Healthy Environment 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.
[138] I/A Court H.R., *Yakye Axa*, *supra*. para. 163.
[139] *Ibid*. para. 166, citing the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12.
[140] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16.
[141] *Yakye Axa*, *supra,* n.14, paras. 167, 168 & 176.

Later, in the *Sawhoyamaxa* case the Court specified that in order to find State responsibility for risks to life, it must be determined that at the time of the events, the authorities knew about the existence of a situation posing a real and imminent risk to life, and failed to take the necessary measures to prevent or avoid such risk.[142] In the *Xákmok Kásek* case, in which the State had already provided certain humanitarian assistance to the community, the Court underscored that the state assistance provided in terms of water access and quality, food, healthcare services, and education had not been sufficient to overcome the conditions of special vulnerability in which the community was living. It also held that the situation of the members of the Community was closely tied to the fact that it had been deprived of its lands. Indeed, the absence of possibilities for the members to provide for and support themselves, according to their ancestral traditions, led them to depend almost exclusively on State actions and be forced to live not only in a way that was different from their cultural patterns, but in extreme poverty.[143]

With respect to the justiciability of economic, social, and cultural rights (ESCR), the Court has stated that "even though Article 26 is in chapter III of the Convention, entitled 'Economic, Social and Cultural Rights,' it is also found in Part I of said instrument, entitled 'State Obligations and Rights Protected' and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in chapter I (entitled 'General Obligations'), as well as Articles 3 to 25 mentioned in chapter II (entitled 'Civil and Political Rights')." In this respect, the Court also found it appropriate to recall the interdependence that exists among civil and political rights and economic, social and cultural rights, as they should be fully understood as human rights, without any hierarchical rank, and enforceable in all the cases before competent authorities" (*Acevedo Buendía et al. v. Peru*, paras. 100 & 101). For its part, the Inter-American Commission has considered that in order to evaluate whether a regressive measure is compatible with the American Convention, it is necessary to "determine whether it was justified by sufficiently strong reasons" (*Acevedo Buendía et al. v. Peru*, para. 102).

The Inter-American Commission has further indicated that "By virtue of the obligation to adopt progressive measures, in principle, states are forbidden to adopt policies, measures, and laws that, without proper justification, worsen the situation of economic, social, and cultural rights that existed at the time of adoption of the Protocol or that exist subsequently in the wake of each 'progressive' step forward. To the extent that the State undertakes to improve the situation of these rights, it simultaneously accepts the prohibition to reduce the levels of protection for rights in force or, as applicable, to abolish existing rights without sufficient cause." In this respect, it determined that there are three types of indicators that make it possible to infer whether or not an ESCR has regressed: structural indicators ("seek to determine what measures the State would be able to adopt to implement the rights contained in the Protocol"), process indicators ("seek to measure the quality and extent of state efforts to implement right,") and outcome indicators ("seek to measure the actual impact of government strategies, programs, and interventions"). (IACHR, *Guidelines for the Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, paras. 6, 30, 31 & 32).

2. Right to personal integrity

Applicable law

a) Physical integrity

With respect to State responsibility relative to the working conditions of members of an indigenous community, the Inter-American Commission admitted the petition of *Opario Lemoth Morris et al. (Miskito Divers) v. Honduras,* concerning the alleged violation of the rights contained in Article 5 of the American Convention, among others. The Commission found that the facts of that case are related "to the alleged responsibility of the State of Honduras for the lack of social security, health, and labor measures to guarantee the [right to life and personal integrity] of the

[142] *Sawhoyamaxa*, *supra,* n.15, para. 155.
[143] *Xákmok Kásek*, *supra,* n.19, paras. 215 & 216.

Miskito divers," which has resulted in the partial disability or even death of a substantial number of indigenous Miskito people.[144] The Commission also found that the facts described also gave rise to a violation of Article 26 of the American Convention, in that the working conditions of the Miskito divers failed to meet even the minimum conditions to ensure their right to life and personal integrity.[145]

b) Cultural Integrity - Identity

With regard to the concept of "cultural integrity," it bears mentioning that in the case of the *Xákmok Kásek* community, the Court held that the claim regarding cultural integrity was subordinate to the analysis of the violations of Articles 4 and 21 of the Convention. In this respect, the Court held that the failure to restore their traditional lands had adversely affected the cultural identity of the members of the community, which corresponds to a specific way of life, of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are an integral element of their cosmovision, their spirituality and, consequently, their cultural identity. Nevertheless, although it did not find a violation of Article 5.1 of the ACHR on the basis of an infringement of the community's right to its cultural integrity, the Court did find that Article 5.1 (personal integrity) had been violated, based on the suffering that necessarily affected the mental and emotional integrity of all of the members of the community as a result of the general absence of protection. In this respect, the Court has indicated that the gradual loss of the culture of indigenous communities causes a form of suffering that necessarily affects the mental and emotional integrity of all members of the community. The Court also concluded that the members of the *Xákmok Kásek* community have suffered various harms to their cultural identity, primarily because they are deprived of their own territory and the natural resources found therein.[146]

Nevertheless, with respect to "cultural integrity," Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples maintains that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. […] States shall provide effective mechanisms for prevention of, and redress for: […] Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities […]."Article XII of the Draft American Declaration on the Rights of Indigenous Peoples states that indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations.[147] Similarly, Article VII of the Draft American Declaration on the Rights of Indigenous Peoples states provides that Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members."

c) Family integrity

Article 17.1 of the ACHR states that "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state." Additionally, Article 7 of the Protocol of San Salvador establishes that "the States Parties […] undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real

[144] Inter-American Commission on Human Rights, *Oparío Lemoth Morris et al. (Miskito Divers),* Honduras. Report No. 121/09, Petition 1186-04 Admissibility. November 12, 2009, para. 48
[145] Inter-American Commission on Human Rights, *Oparío Lemoth Morris et al. (Miskito Divers),* Honduras. Report No. 121/09, Petition 1186-04 Admissibility. November 12, 2009, para. 50
[146] I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay,* para. 244
[147] Article XII, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 6 corr. 1, March 20, 2011. Thirteenth Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington D.C. – January 18 to January 20, 2011).

opportunity to exercise the right to work.[148] Article 15 establishes the right to the protection of the family, according to which, The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions. […] The States Parties hereby undertake to accord adequate protection to the family unit […].”[149] Other international instruments also recognize the significance of protection of the family.[150]

Arguments of the Representatives and the State

Representatives

With respect to *Article 4*, the representatives could argue that the minimum standards for a dignified existence established by the Court in the *Xákmok Kásek* case are not being met on behalf of the members of the Community of *La Loma*, who are living at the temporary camps in extreme poverty. In this respect, the State has been the guarantor of this right after those people were displaced without any consultation process. The State has also been aware of this situation of extreme poverty and the absence of protection of a vulnerable group without providing the necessary conditions for a dignified existence, and therefore the State is responsible for the duty to guarantee under Article 4.1 in relation to Article 26 and in light of the other cited rights under the Protocol of San Salvador. In relation the *Chupanky* community, the potential social and environmental effects could be violating the community’s access to its natural resources and a dignified existence.

With respect to the *safety of the divers*, the representatives could argue that the partial disability experienced by the divers due to the lack of specialized, good quality equipment with which to work implies a violation of the right to have their physical integrity guaranteed in accordance with Articles 4 and 5 of the Convention and in relation to Article 1.1 of the Convention, to the extent that the State failed to regulate or supervise the company in order to guarantee respect for the safety conditions of the company’s workers.

With respect to *cultural integrity*, the representatives should argue that in accordance with an evolutionary interpretation and the most favorable interpretation, in cases of indigenous communities, Article 5 must be construed in favor of the cultural integrity of the community and in accordance with the international instruments (*supra*), based on the multiple adverse social and environmental effects on the *Chupanky* community. In this respect, they should refute the theory maintained by the Court in the *Xákmok Kásek* case, *supra*. The negative impact of the project would affect the holding of rituals such as Day One, a date with enormous symbolic importance to the community—which it will not be able to perform on December 21, 2012—and the disturbance of fishing products as a consequence of the construction of the dam. In addition, the community’s loss of its means of waterway transportation, together with the adverse effects

[148] Article 7, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador”.

[149] Article 15, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador”. *See also* Article 23.1, International Covenant on Civil and Political Rights; Article 10 of the International Covenant on Economic, Social and Cultural Rights.

[150] Article 7 of the International Covenant on Economic, Social and Cultural Rights indicates that “The States Parties […] recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: […] a decent living for themselves and their families in accordance with the provisions of the present Covenant.” Article 10 of the same instrument establishes that “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.” Finally, Article 11 of the ICESCR adds that the States “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” Similar provisions are found in the International Covenant on Civil and Political Rights of 1966, Article 23 of which states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Similarly, the Constitutional Court of Colombia has stated that “[…] the common good undoubtedly encompasses the comprehensive protection of the family, and the corporation therefore has the obligation to recognize the existence of the family unit of its workers and employees, and to participate in the comprehensive protection of those communities.” Constitutional Court of Colombia, Judgment T-503/99, July 13, 1999.

on its way of life, which is closely tied to the river, and the deterioration of labor conditions that have altered community dynamics, violates its cultural integrity and therefore the mental and emotional integrity of its members pursuant to Article 5 in conjunction with Article 1.1 of the American Convention.

With regard to *family integrity,* the representatives would argue that based on the forced labor and the inconsistent schedules between the men and the women, family dynamics have been changed, adversely affecting the integrity of the family in light of Article 17 of the ACHR.

State

The State could argue with respect to *Article 4* that in accordance with the right to private property, the State has the authority to expropriate, and that it has met the necessary requirements to restrict this right *(supra).* These requirements do not stipulate that the State has to provide supplemental housing to the expropriated party; rather, they require the payment of just compensation. Accordingly, the State made a good faith offer of good quality alternative lands and, in spite of the fact that some of the community members rejected this offer, relocated them in good faith to temporary camps. Therefore, the State has not only met the essential requirements but it has also provided additional guarantees to protect groups of this kind. With respect to the *Chupanky* community, there are no reported threats to their dignified existence; on the contrary, the benefits granted to them have been intended to improve their living conditions, through progressive measures such as employment, electrical power, food, and so on.

With respect to the *right to safety of the community's divers,* the State could indicate that it was not aware of the situation of risk, and therefore, in accordance with the applicable jurisprudence (*Sawhoyamaxa* and *Xákmok Kásek*), responsibility cannot be attributed to the State. Also, those facts were not reported to the appropriate authorities.

On the issue of *cultural integrity*, the State should maintain that this is not an autonomous right, as the Court in the *Xákmok Kásek* case held that this claim was subordinate to the examination of the violations of Articles 4 and 21 of the Convention. Furthermore, it has not been proven that the harm to the culture of the community is such that it entails a denial of culture in accordance with the jurisprudence of the Human Rights Committee de United Nations.[151] The State can additionally argue that no causal nexus has been demonstrated between the development project and the disturbance of fishing in the area.

The State could argue that the employment contracts were agreed to by the parties and were not imposed by the State. In addition, the concept of *family integrity* bears no relation to personal integrity. The right to family life is protected under Article 17 of the ACHR, and none of the parties has asserted this right.

D. ARTICLE 22 OF THE ACHR.- FREEDOM OF MOVEMENT AND RESIDENCE

Relevant facts:

- In 2006, the court issued an order for the immediate occupation of the land in the territories of *La Loma*. The community members were dispossessed of the land, and relocated to temporary camps, since they refused to accept the alternative lands.
- Members of the community have stated that the living conditions are poor in the temporary camps and that they wish to return to their place of origin, and therefore will accept neither compensation nor alternative lands.

[151] United Nations, CCPR, Communication No. 671/1995, *Jouni E. Länsman* et al. *v. Finland*, para. 10.3: "Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee previously in its Views on case No. 511/1992, however, measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27." *See also* Jouni E. Länsman et al., Communication No. 1023/2001; Ilmari Länsman et al., Communication No. 511/1992 (there was consultation as well); Communication No. 760/1997, J.G.A. Diergaardt v. Namibia.

- The Black Swan Hydroelectric Power Plant is being built in the middle of the Chupuncué region, a location that would allow for the course of the river to be altered, and will cover an area of approximately 10 km^2.
- The *Xuxani* River is their means of waterway transportation that connects them to the other Rapstan communities to the north and south. It also connects them to the east coast, where they can access markets to sell the products they obtain from fishing, hunting, and farming.
- The Intersectoral Committee offered to grant the consulted individuals alternative land located 35 kilometers from the eastern part of the Motompalmo River.
- The Council of Elders stated verbally to the Committee that once the second stage of the project was concluded they would convene another assembly in order to make a decision about the third stage of the project.
- In December 2008, the Council of Elders decided to veto the continuation of Phases 2 and 3 of the project.
- The TW Company conducted proceedings before the pertinent authorities with the aim of removing the Chupanky Community to the alternative lands as soon as possible.

Are the members of the communities of: a) *La Loma*, and b) *Chupanky* internally displaced persons? What measures should the State have taken: a) prior to relocating the members of the *La Loma* community; b) after their relocation? Was there any violation of the communities' right to freedom of movement and residence?

Applicable law

Article 22[152] of the Convention recognizes freedom of movement and residence. The Court has established that this article protects, *inter alia*: the right not to be forcibly displaced within a State Party[153] and b) the right of persons lawfully in the territory of a State to move about freely and choose his or her place of residence.[154]

a) Internal displacement

With regard to the right not to be forcibly displaced, the Inter-American Court has considered[155] that the United Nations Guiding Principles on Internal Displacement "are particularly relevant to determining the content and scope of Article 22 of the Convention."[156] In accordance with those Principles, the Court has understood internally displaced persons as,[157] "*the persons or groups of persons that have been forced or obligated to escape or run from their homes or their place of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of their human rights […], and who have not crossed an internationally recognized State border.*"[158] Nevertheless, those Principles also refer

[152] Article 22 provides, in pertinent part: 1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. […] 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
[153] I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia,* para. 188; *Case of the Ituango Massacres v. Colombia,* para. 207; *Case of Chitay Nech et al. v. Guatemala,* para. 139.
[154] The enjoyment of this right does not depend upon any particular objective or motive of the person wishing to move or remain in a place. *See Case of Ricardo Canese*, para. 115; *Case of the Moiwana Community v. Suriname,* para. 110. O.N.U., Human Rights Committee, General Comment No. 27 of November 2, 1999, paras. 1,4,5,19.
[155] UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 of 11 February 1998. *Case of the Mapiripán Massacre v. Colombia,* para. 171; *Case of the Ituango Massacres v. Colombia,* para. 209; *Case of Chitay Nech et al. v. Guatemala,* para. 140.
[156] *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124*, para. 111; *Case of the Mapiripán Massacre v. Colombia,* para. 171; *Case of the Ituango Massacres v. Colombia,* para. 209; *Case of Chitay Nech et al. v. Guatemala,* para. 140.
[157] *Case of Chitay Nech et al. v. Guatemala*, para. 140.
[158] UN Commission on Human Rights, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 of 11 February 1998, para. 2. *Available as of March 11, 2012 at:* http://www.hchr.org.co/documentosereports/documentos/html/reports/onu/resdi/E-CN-4-1998-53-ADD-2.html...

to displacement caused, among other things, by "large-scale development projects, which are not justified by compelling and overriding public interests."[159]

Additionally, the Inter-American Court has held that the situation of displaced persons can be understood as a *de facto* condition of vulnerability, requiring States to take positive measures to reverse the effects thereof, including *vis-à-vis* the acts of private third parties.[160] As such, it is pertinent to note that the Guiding Principles establish obligations for the States: a) relating to protection from displacement;[161] b) relating to protection during displacement;[162] c) relating to humanitarian assistance;[163] and d) relating to return, resettlement and reintegration of displaced persons.[164] It bears noting that Principle 9 of that normative framework imposes upon the States "to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."

In this respect, both Article 16 of ILO Convention No. 169[165] and Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples[166] provide that indigenous peoples shall not be moved from their territories without their free, prior, informed consent, nor without a prior agreement on just and equitable compensation and, whenever possible, the option of return.

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[159] Guiding Principle 6.2.c.

[160] *See Case of the Mapiripán Massacre v. Colombia,* paras. 177 & 179; *Case of the Ituango Massacres v. Colombia,* para. 210; *Case of Chitay Nech et al. v. Guatemala,* paras. 140 & 142.

[161] Section II. Principles Relating to Protection from Displacement, Principles 5 - 9. "Principle 5: All authorities […] shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons. Principle 6: 1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence. […] Principle 7: 1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects. 2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated. 3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with: a) A specific decision shall be taken by a State authority empowered by law to order such measures; […]"

[162] Section III. Principles Relating to Protection during Displacement. Principles 10 - 23. "Principle 18: 1. All internally displaced persons have the right to an adequate standard of living. 2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: a) Essential food and potable water; b) Basic shelter and housing; c) Appropriate clothing; and d) Essential medical services and sanitation. […]."

[163] Section IV. Principles Relating to Humanitarian Assistance, Principles 24 - 27. "Principle 25: The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities." Likewise, Principle 3 establishes, in pertinent part: "National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction. […]"

[164] Section V. Principles Relating to Return, Resettlement and Reintegration, Principles 28 - 30. "Principle 28: 1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. […] [Principle 29]: 2. […]When recovery of [the] property and possessions [of which displaced persons were dispossessed] is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."

[165] ILO Convention No. 169. Article 16.1. 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned. 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

[166] Article 10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Convention No. 169 clarifies that when consent cannot be obtained, relocation shall take place only following appropriate proceedings in which the people concerned are duly represented.

b) Freedom of movement and the right to choose one's place of residence

The Inter-American Court has established that the rights to freedom of movement and residence may be restricted pursuant to the provisions of Articles 22 and 30 of the Convention.[167] Such restrictions must be expressly established by law and imposed only in specific areas, for reasons of public interest. In addition, the Court has cited General Comment No. 27 of the UN Human Rights Committee regarding freedom of movement (art. 12 of the ICCPR) in defining the scope of these rights.[168] Thus, although the Court has not ruled on the standards referred to below, it bears noting that General Comment No. 27 indicates that the rights to freedom of movement and residence may be restricted only "only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others." Such restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in the ICCPR.[169] Moreover, restrictions to such rights must "must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[170] Such restrictions must also be consistent with the fundamental principles of equality and nondiscrimination.[171]

Additionally, the United Nations Office of the High Commissioner for Human Rights has stated that forced evictions[172] violate the rights to freedom of movement and to choose one's residence, among others.[173] In this same respect, el Committee on Economic, Social and Cultural Rights has held that forced evictions are *prima facie* incompatible with the requirements of the ICESCR.[174] Thus, underscoring several international declarations against this practice,[175] in General Comment No. 7 on the right to adequate housing (art. 11.1 del ICESCR), the Committee set forth guidelines for "determining the circumstances under which forced evictions are permissible" and "of spelling out the types of protection required to ensure respect for the relevant provisions of the [ICESCR]."[176] The Committee indicated that any limitations to the right of protection from forced eviction must be "determined by law,[177] only insofar as this may be compatible with the nature of

[167] *See Case of Ricardo Canese v. Paraguay,* para. 117.
[168] *See Case of the Moiwana Community v. Suriname,* para. 110.
[169] *See* General Comment No. 27 of the UN Human Rights Committee, para. 11.
[170] *Ibid.*, para. 14.
[171] *Ibid.* para. 18.
[172] Fact Sheet No. 25 of the United Nations Office of the High Commissioner for Human Rights states that: "The practice of forced eviction involves the involuntary removal of persons from their homes or land, directly or indirectly attributable to the State. It entails the effective elimination of the possibility of an individual or group living in a particular house, residence or place, and the assisted (in the case of resettlement) or unassisted (without resettlement) movement of evicted persons or groups to other areas."
[173] United Nations Office of the High Commissioner for Human Rights, Fact Sheet No. 25.
[174] *See* UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, paras. 13 & 14.
[175] Report of Habitat: United Nations Conference on Human Settlements, Vancouver, 31 May-11 June 1976 (A/CONF.70/15), Ch. II, recommendation B.8, para. c) ii); Report of the Commission on Human Settlements on the work of its eleventh session, Addendum (A/43/8/Add.1), para. 13; Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. I (A/CONF.151/26/Rev.1(vol. I)), annex II, Agenda 21, Ch. 7, para. 9 b); Report on the United Nations Conference on Human Settlements (Habitat II) (A/CONF.165/14), annex II, Habitat Agenda, para. 40 n); Commission on Human Rights, Resolution 1993/77, para. 1.
[176] *See* UN Committee on Economic, Social and Cultural Rights. General Comment No. 4, the right to adequate housing (Article 11.1 of the ICESCR), para. 18; General Comment No. 7, para. 2.
[177] "Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out." General Comment No. 7, para. 9. States must also implement procedural protections in the context of forced evictions, such as: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified;

[economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society," consistent with Article 4 of the ICESCR.[178]

The Committee also underscored that States parties [to the ICESCR] shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force. […] In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality."[179] Furthermore, given that indigenous peoples and ethnic and other minorities "suffer disproportionately from the practice of forced evictions," the Committee underscored the additional obligation of governments "to ensure that, where evictions do occur, appropriate measures are taken to ensure that no forms of discrimination are involved."[180]

The Committee also stated that Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[181] Finally, the Committee underscored the importance of the full observance of guidelines on relocation and/or resettlement developed by institutions such as the World Bank and the Organization for Economic Cooperation and Development (OECD), "with a view to limiting the scale and human suffering associated with the practice of forced eviction."[182]

Arguments of the Representatives and the State

a) In relation to the Community of La Loma

The representatives could argue that the members of the Community of *La Loma* are internally displaced persons in accordance with the UN Guiding Principles on Internal Displacement, given that they were forcibly moved from their lands to relocation camps because of the hydroelectric dam that is planned to be built on the *Xuxani* River. They could thus argue that the State violated Article 22 of the Convention, on one hand, for failing to adequately protect them from forced eviction and relocation, taking account of their condition as peasant farmers who maintain a special connection to the river; and on the other hand, for dispossessing the community members of their land and resettling them in temporary camps in conditions of poverty (obligations to respect and guarantee rights under the ACHR and the Guiding Principles, the ICCPR, the ICESCR and, depending on the line of argument employed, under ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples). In this way, they can stress the greater protection obligations imposed upon the States with regard to internally displaced persons.

The State could argue that the situation of the members of the Community of *La Loma* does not fit the definition of "internally displaced" accepted by the Inter-American Court in accordance with the Guiding Principles on Internal Displacement. It could also argue that the eviction of the members of the *La Loma* community was carried out according to law and in the pursuit of

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(f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.¨ General Comment No. 7, para. 15.

[178] According to the Committee, "Article 17.1 of the International Covenant on Civil and Political Rights […] complements the right not to be forcefully evicted without adequate protection. That provision recognizes, *inter alia,* the right to be protected against 'arbitrary or unlawful interference' with one's home." General Comment No. 4, para. 18; General Comment No. 7, para. 8.

[179] UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, para. 18; General Comment No. 7, paras. 14 & 15.

[180] UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, para. 11.

[181] *Ibid.* para. 17.

[182] *Ibid.* para. 19.

objectives that are permissible under international law (obligations derived from Article 1.1 of the ACHR and from the ICCPR and the ICESCR). On this point, the State could emphasize the fact that it offered alternative land of good agricultural qualities to its members, relocated those who refused the alternative lands in temporary camps, and determined the amount of the fair compensation. It could argue, additionally, that the international standards for the protection of indigenous peoples are inapplicable to the Community of *La Loma*, which is a peasant community (*supra* section II.A.2).

b) In relation to the Chupanky community

The representatives could argue that the State violated Article 22 of the Convention by failing to adequately protect the members of the community from the risk of eviction and the forced displacement they will undergo when relocated to alternative lands more than 35 kilometers from their traditional territory and their river. Given that the Chupanky community is part of an indigenous people with a special relationship to the *Xuxani* River, the State had the special obligation to ensure that any restriction to the rights of its members to freedom of movement and residence is carried out in accordance with the international law on the subject (obligation to guarantee rights under the ACHR, ILO Convention No. 169, the Declaration on the Rights of Indigenous Peoples, the Guiding Principles on Internal Displacement and the ICESCR). Likewise, the construction of the hydroelectric plant hinders their freedom of movement from the north to the south of their territory, in relation to the other Rapstán communities, and with the East coast in order to sell their products. Finally, their removal would prevent the Celebration of Day One in their ancestral territory on December 21, 2012, seriously affecting their commitment to the other communities and to the land.

The State could argue that the members of the *Chupanky* community are not internally displaced persons and that they have not been forcibly evicted, since they are still in their traditional territory at this time. It could further argue that it provided adequate protection to the community from restrictions to their right to freedom of movement and residence, given that, before the hydroelectric project began, it held prior consultation proceedings with the community in keeping with its customs and practices, performed a social and environmental impact study, and came to an agreement with the community regarding its relocation on alternative lands that are larger in area and have direct access to the *Xuxani* River; it also complied with the requirement to share benefits derived from the construction of the dam (obligations arising from the ICCPR, the ICESCR, ILO Convention No. 169, and the Declaration on the Rights of Indigenous Peoples). The State has complied with all of the aforementioned international standards, and ILO Convention No. 169 even authorizes relocation following a consultation process *supra*.

E. ARTICLES 8 AND 25 OF THE ACHR: RIGHT OF ACCESS TO JUSTICE

Relevant facts

- In November 2005 expropriation proceedings were initiated against the various landowners of the *La Loma* community.
- In February 2006, the court issued an order for the immediate occupation of the land declared to be of public interest in *La Loma* so that preparation and drainage work could begin.
- In March 2006, 75% of the dissenting property owners requested before the civil court that recognition of the international standards relative to prior consultation procedures and the distribution of benefits be applied to them. They also requested that environmental impact studies be performed.
- In May 2006, the trial court judge determined that [certain] standards were applicable to indigenous or tribal communities according to the various instruments on the subject, [but] that the community of *La Loma* was not entitled to those rights.
- On January 9, 2009, the Council of Elders, through the non-governmental organization "Morpho Azul," filed an administrative claim before the Energy and Development Commission (EDC) on behalf of the community to request the cancellation of the project. The claim alleged defects in the

concession contract and other irregularities in the consultation process and project execution contrary to international standards. It also alleged adverse effects on the environment.

- On April 28, 2009, Morpho Azul brought their claim before the Court for the Judicial Review of Administrative Acts, which handed down a judgment on August 10, 2009, dismissing the claims of the members of the *Chupanky* community based on its finding that the State's actions were consistent with the American Convention on Human Rights.
- In January 2012, the Civil Judge in the case set the total fair compensation amount at US $6 per square meter for each lot expropriated in *La Loma*, for those who did not accept alternative lands previously. The beneficiaries of that payment have again opposed receiving it (supervening fact, clarification answer 86).
- Expropriation proceedings in Atlantis (See clarification answer 54 and footnote 63).
- The State decided not to file preliminary objections regarding the failure to exhaust domestic remedies, and decided to proceed to the examination of the merits.

1. What are the standards that the Inter-American Court has established with regard to authoities' duty to control for conformity with the Convention?
2. How should the provisions of Article 8 of the ACHR be interpreted in cases involving expropriation proceedings?
3. How should access to justice be interpreted in cases involving indigenous communities?
4. Can it be said that authorities properly controlled for conformity with the Convention in this specific case?

Applicable law

The Inter-American Court of Human Rights has held that the States have the obligation to provide effective judicial remedies to the victims of human rights violations (Article 25), and those remedies must be realized in accordance with the due process rules defined in Article 8.1 of the Convention. All of this falls within the framework of the general state obligation to ensure to all persons subject to their jurisdiction the free and full exercise of those rights recognized in the Convention (Article 1.1).[183]

a) Expropriation Proceedings

In relation to expropriation proceedings, the laws of Atlantis establish that:

> *Chapter IV of the Civil Code requires the judicial deposit which, among other requirements, makes it possible to order the urgent occupation of the land if necessary. Also, it opens up the possibility of seeking a friendly settlement. The expropriated party may dispose of that deposit and agree to delivery of the balance. Nevertheless, in the absence of an agreement on the appraised value, it goes to expropriation proceedings for purposes of setting the real and final price. The Judge will issue a judgment after hearing from the relevant experts. The proceedings are not subject to motions.*

It should be noted that this proceeding is analogous to the legal framework discussed in the *Case of Salvador Chiriboga v. Ecuador*, with respect to which the Court found that "in consideration of the domestic legislation, the condemnation proceeding is not a complex process but a prompt one. The purpose of the proceeding is simple; mainly to ascertain the value of the condemned property where the domestic judge is the person that must determine the price of the property."

Accordingly, the Court applied the reasonable time test from Article 8 of the Convention, using the following criteria: a) complexity of the case, b) procedural activities carried out by the

[183] I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras.* Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; *Case of Castañeda-Gutman v. Mexico.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 34.

interested party; c) behavior of judicial authorities,[184] and d) harm to the victim. Those criteria should be argued in the instant case.

In conclusion, the Court found a violation of Articles 21.1 in relation to Articles 8 and 25 of the ACHR because, although the expropriation took place for legitimate reasons of public utility for the protection of the environment, the State failed in its duty to decide the expropriation case within a reasonable period of time, and therefore the judicial remedy was ineffective.[185]

With respect to the violation of Article 25, Judges Medina and Rodríguez-Pinzón held in their concurring opinions in that case that there was access to adequate and effective remedies, and therefore there was no violation of Article 25 of the ACHR as an automatic complement to Article 8.[186]

b) Controlling for conformity with the Convention

With respect to control for conformity with the Covnention, the Inter-American Court has established that "when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise, *sua sponte*, 'control for conformity' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention."[187]

In terms of national legal systems, the Constitution of Mexico—which has legal features similar to those of the State of Atlantis—establishes that the human rights standards contained in international treaties shall be incorporated into Mexican constitutional law and shall be granted constitutional status (Article 1). In the decision in the case *Varios 912/2010*, handed down by the Supreme Court of Justice of the Nation to determine the steps to be taken following the Inter-American Court's judgment in the *Radilla Pacheco v. Mexico* case, it established the *ex officio* obligation of Mexican judges, who must provide the basis and reasoning for their decisions, to

[184] *Case of García-Asto and Ramírez-Rojas v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, para. 166; *Case of Acosta Calderón, supra*, para. 105; *Case of the Serrano-Cruz Sisters v. El Salvador.* Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of September 9, 2005. Series C No. 131, para. 67; *Case of López Álvarez, supra*, para. 132. As to the procedural [activities conducted by] the victim in the instant case, Mrs. Salvador Chiriboga is the only person affected by the expropriation of her property and as is evident from the analysis of the case, there is no proof that her actions may have obstructed or delayed the proceeding." *Chiriboga*, paras. 78, 106.

[185] I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Preliminary Objections and Merits, paras. 117 & 118. "The State deprived Mrs. María Salvador Chiriboga of the right to property for legal and well-grounded reasons of public utility, which consisted in the protection of the environment through the building of the Metropolitan Park. Notwithstanding, the State did not comply with the requirements necessary to restrict the right to property […] [Specifically], the State failed to comply with the [legally established procedures], by violating judicial protection and guarantees, given the fact that the remedies filed [have been pending decision for longer than a reasonable amount of time, and have been] ineffective. The foregoing has indefinitely deprived the victim of her property, as well as of the payment of just compensation, which has caused an uncertainty of fact and of law that has resulted in excessive charges imposed on the victim, turning such condemnation in an arbitrary procedure."

[186] Partially Dissenting Opinion of Judge Rodríguez Pinzón. Para. 9. I/A Court H.R., *Case of Salvador-Chiriboga v. Ecuador.* Preliminary Objections and Merits. "I came to the foregoing conclusion based on the opinion that Article 8(1) and 25(1) are complementary provisions that protect the crucial judicial structure upon which the protection of human rights recognized in the Convention, the constitutions and other domestic rules rest. The proven claims in relation to the judicial problems in the instant case specifically refer to the unwarranted delay in the processing of the subjective remedies and the condemnation proceeding. This situation, in my opinion, only affects the right to due process established in Article 8(1) that the Court correctly considered violated. But this delay is not automatically translated into a violation of Article 25(1) which, as I briefly described, refers to other aspects of the judicial protection of rights."

[187] I/A Court H.R., *Case of Almonacid-Arellano et al. v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006, para. 124; I/A Court H.R., *Case of Cabrera-García and Montiel-Flores v. Mexico.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010. Series C No. 220, para. 225.

take account of international treaties. It also ordered the transition to a system of widespread constitutional control, which incorporates regular courts into the scheme of human rights protection defined in the international instruments. That decision further held that judges cannot make general declarations invalidating or eliminating the rules considered contrary to the human rights contained in the Constitution and in treaties from the legal system; however, they are required to refrain from applying those inferior standards and give preference to the content of the Constitution and the relevant treaties. There have also been important jurisprudential developments on this issue in other countries of the region.[188]

Arguments of the Representatives and the State

Representatives

With respect to the expropriation case, the representatives can argue that the expropriation proceedings were ineffective given that the domestic courts took more than 7 years to determine the just compensation. Here they should apply the "reasonable time" test. They can also argue against the immediate occupation action based on the standards developed in the chapter on Article 22 with respect to forced eviction, and thereby determine that the expropriation was arbitrary. As such, the rights recognized in Articles 8 and 25 of the ACHR were violated.

With respect to the administrative proceedings, the representatives might observe that the State of Atlantis has a body of constitutional law that has defined the interpretation most consistent with constitutional norms and the *pro persona* principle as its interpretive guidelines. In addition, the Supreme Court has established that control for conformity with the Convention is mandatory. In this respect, they can assert that the national judge did not adequately apply the requisite control, in violation of the right to access to justice pursuant to Articles 8 and 25 of the ACHR.

First, the court determined that in the instant case the consultation "met the requirements established under the standard, and that the indigenous communities did not have the right to veto this project," citing the *Case of the Saramaka People v. Suriname*. The representatives can argue that this interpretation rendered by the national judge and the reference to the *Saramaka* case are erroneous, given that, contrary to the assertion of the national court, the cited judgment of the Inter-American Court indicates that the State had to have had the consent of the community in cases of large-scale development projects, or in cases of projects that involve displacement from the ancestral lands of indigenous communities (*supra* section II.A.1), as in this case.

Second, the national court held that the consultation process was conducted in accordance with customs and practices of the community, through which the community itself designated its authorities, and that any alleged discriminatory practices against women were the responsibility of the community itself and the result of its autonomy and self-determination as a people. In this case, the representatives can argue that although the *Yatama* judgment recognizes that the right to political participation includes the right to "participate, […] in decision-making on matters and policies that affect or could affect their rights […] from within their own institutions and according to their values, practices, customs and forms of organization,"[189] that judgment makes no

[188] In other countries such as Argentina, conventionality control is based on Article 75, which expressly establishes the constitutional status of human rights treaties and specifies which international instruments are included in the body of constitutional law. In a judgment handed down by the Argentine Supreme Court on December 23, 2004 in the case of "*Espósito, Miguel Angel s/ incidente de prescripción de la acción penal promovido por su defensa*" [defense motion alleging expiration of the statute of limitations in a criminal case], the Court held that the decisions of the Inter-American Court are binding upon the Argentine State, and in conclusion of law No. 6, it stated that "in principle, the content of its decisions should be subordinate to the decisions of the international court." In the case of Colombia, Article 94 of the Constitution provides the basis for conventionality control. In Judgment C-010/00 of January 19, 2000, issued by the Constitutional Court, the Court held that constitutional rights and duties must be interpreted "in accordance with the international human rights treaties ratified by Colombia," reasoning that "the jurisprudence of the international courts charged with interpreting those treaties is a relevant interpretive criterion for establishing the meaning of the constitutional provisions on fundamental rights."

[189] I/A Court H.R., *Yatama*, *supra*, para. 225.

reference to a free and informed prior consultation process. The references to the prior consultation requirements are in other decisions of the Court.[190]

The representatives can also argue that the national judge did not concern himself with rendering a harmonic interpretation of inter-American law, given that the same *Yatama* judgment indicates that the fundamental principles of equality and nondiscrimination have attained the status of *jus cogens* (*supra* section II.A.1). Nor was it taken into consideration in the *Chitay Nech* case, which held that the State has the obligation to guarantee "the enjoyment and application of such rights according to the principles of equality and nondiscrimination, and shall adopt the necessary measures to guarantee their full exercise."

Finally, referring to the *Aleboetoe* case*,* the representatives can argue that while it is true that in that judgment,[191] the Court decided to take account of the customs and practices of the community for purposes of determining who would be the victims' next-of-kin and thus beneficiaries of reparations in the case —since each victim had several wives— it is also true that the Court's consideration was based on general principles of law, given that there was no provision of international law that would provide a solution in this specific situation. Thus, the Court decided to adopt the customs and practices of the community in order to ensure the greatest protection for the widows. However, in the instant case, that type of reasoning on the part of the national court in its *control for conformity with the Convention* would be inconsistent for two reasons: in this case there is no lacuna or *absence of a decision* under international law on the subject of nondiscrimination toward the women of the indigenous community (*supra* section II.A.1), so it would not be necessary to refer to the local customs in order to resolve the issue; and secondly, in this specific case, the judge who exercises control for conformity with the Convention must also take account of the *pro persona* principle (Article 29 of the ACHR) when weighing the community's right to self-determination and the *Chupanky* indigenous women's right to equality.

State

With respect to the expropriation case, the State must demonstrate that it met the requirements established under the ACHR and in the *Salvador Chiriboga* case. It can additionally show that the delay in the reasonable time period is clearly attributable to the petitioners and not to the State. For its part, the State attempted to negotiate and offered alternative lands to the members of the community, and following the urgent occupation it provided them with temporary camps, in accordance with General Comment No. 7 of the UN Committee on Economic, Social and Cultural Rights. Finally, the judge in the case set the amount of just compensation, which they have refused to receive. In any case, it is inadmissible to allege a violation of Article 25 of the ACHR, as the IACHR acknowledged in its report on the merits and in accordance with the concurring opinions of Judges Medina and Rodríguez-Pinzón in the *Salvador Chiriboga* case.

With respect to the administrative proceedings, the State can argue that in the instant case the national judge exercised control for conformity with the Convention bearing in mind the jurisprudence of the Inter-American Court. In particular, it can be construed that, indeed, the national court considered the principle of *pacta sunt servanda* and that the community accepted and must complete the project through its final phase. To say otherwise would be contrary to the Inter-American Court's consistent interpretation of the Convention in its jurisprudence. As for the *Saramaka v. Surinam*e judgment, the judge cannot infer from the holding in that case that the indigenous community has the right to veto the project under development at any phase of its execution once consent has been given for that execution (*supra* section II.A.1). That judgment held that the State must obtain the consent of the community to carry out large-scale projects (without specifying their nature), but it did not hold that the community itself has veto power at any stage.

[190] I/A Court H.R., *Saramaka*, Preliminary Objections, Merits, Reparations, and Costs. *supra*.
[191] I/A Court H.R., *Case of Aloeboetoe, supra,* para. 58, 61 & 62.

Addressing the issue of control for conformity with the Convention in relation to the discrimination against the indigenous women in the exercise of their political rights, the State can argue that the Court for the Judicial Review of Administrative Acts exercised proper control to the extent that it observed the international standard contained in *Yatama* and *Saramaka*. According to that standard, the indigenous communities themselves choose, in accordance with their customs and practices, the individuals who will represent them in a prior consultation process. To go against that provision would amount to violating the principle of self-determination of the community; the free and informed prior consultation process would be rendered defective and the State would therefore be in violation of the right to communal property established in Article 21 of the ACHR.

In addition, with respect to the control for conformity with the Convention excercised, the State might point to the fact that in the *Aleboetoe*[192] case, the Court decided to acknowledge the customs and practices with regard to the issue of family over the provisions of the nation laws of Suriname for the purposes of granting broader reparations to the members of the victims' families. Therefore, it is perfectly consistent and logical that in the instant case the national judge who exercised control for conformity with the Convention would arrive at the same type of conclusion as the Inter-American Court and decide to protect the principle of self-determination of the indigenous community above the other individual rights of the members of the community.

III. PROVISIONAL MEASURES

Relevant facts

- The members of the *La Loma* community have stated that as a result of the construction of the hydroelectric plant, they were dispossessed of their lands and are currently living in temporary camps under very poor conditions, and that they wish to return to their place of origin.
- The *Chupanky* community decided to oppose the continuation of the project, since it was causing harm to the environment.
- The members of the communities indicated that fishing had been disturbed in the area as a result of the construction of the dam.
- Several workers exhibited health problems and expressed their dissatisfaction with the exploitative labor conditions.
- On March 9, 2011, the Commission issued its report on admissibility and merits and, pursuant to Article 25 of its Rules of Procedure, requested that the State adopt precautionary measures in order to halt the company's work on the project until a decision is issued on the merits.
- On March 9, 2011, in its report on the merits, the Commission requested that the State adopt precautionary measures in order to halt the company's work on the project until a decision is issued on the merits.
- On October 4, 2011, the Inter-American Commission on Human Rights requested that the Court adopt provisional measures on behalf of the *Chupanky* community, in order to suspend the project until the Court issues its decision on the case.

Were the requirements necessary for the Court to order provisional measures on behalf of the *Chupanky* community (extreme seriousness, urgency, and irreparability of the harm to the persons in question) met in this case?
What does the protective and precautionary nature of the provisional measures entail?
What types of measures could the Court take in this case?

Applicable law

Article 63.2 of the American Convention provides that "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration."

[192] I/A Court H.R., *Case of Aloeboetoe, supra,* para. 58 & 61.

The imposition of provisional measures by the Court requires that the case be extremely serious and urgent, and the measures must be necessary to prevent irreparable harm. In this respect, the Court has indicated that "[…] urgent character of the situation subject to the request for provisional measures implies that the risk or threat involved must be imminent, requiring the remediation response to be immediate."[193] It further stated that "regarding damages, there must be reasonable probability that the damages will occur."[194] The Court has also held that the requirements set forth in the preceding paragraph "[…] must coincide and must be present in every situation in which the intervention of the Court is requested."[195]

Additionally, regarding the requirement of "seriousness" for purposes of the adoption of provisional measures, the Convention requires that it be "extreme," that is, at its most intense or heightened degree.[196] As for harm, there must be a reasonable likelihood that it will occur, and the harm to the legally protected interests or assets must not be reparable.[197]

The Court has likewise specified that under international human rights law provisional measures are not only precautionary in nature, in that they preserve a legal status, but also fundamentally protective, insofar as they safeguard human rights by seeking to prevent irreparable harm to individuals.[198] The Court has stated that "the precautionary nature of provisional measures is linked to the framework of international disputes. In that respect, these measures are aimed at preserving the rights potentially at risk until such time as the controversy is resolved. Their aim and purpose are to ensure the integrity and effectiveness of the decision on the merits and thus to prevent harm to the rights at issue, as this could distort or render moot the real effect of the final decision. Provisional measures thus enable the State in question to comply with the final decision and, where appropriate, proceed to the remedies ordered."[199] With regard to their protective nature, the Court has said that "provided that the basic requirements of extreme gravity and urgency and the need to avoid irreparable harm to persons are met, provisional measures become a true preventive judicial guarantee, as they protect human rights insofar as they are intended to prevent irreparable harm to persons."[200]

In *Mayagna v. Nicaragua,* the Court granted provisional measures on behalf of the community for purposes of protecting its territory, even from third parties (with respect to logging and agricultural operations), while the land was being titled.[201] In the *Matter of the Sarayaku*

[193] I/A Court H.R., *Matter of Four Ngöbe Indigenous Communities and its members,* Provisional Measures regarding Panama, Order of May 28, 2010, para. 9
[194] *Ibid*, para. 10
[195] I/A Court H.R., *Matter of Rosendo Cantú et al.,* Provisional Measures regarding Mexico, Order of February 2, 2010, para. 10.
[196] *Matter of Four Ngöbe Indigenous Communities, supra*, Conclusion of law No. 8.
[197] *Ibid*, Conclusion of law No. 10.
[198] *I/A Court H.R., Case of Herrera-Ulloa ["La Nación" Newspaper Case],* Provisional Measures regarding Costa Rica, Order of September 7, 2001, conclusion of law No. 4; *I/A Court H.R., Matter of the Aragua Penitentiary Center "Tocorón Jail,"* Provisional Measures regarding Venezuela. Order of November 24, 2010, conclusion of law No. 6; *I/A Court H.R., Matter of Alvarado Reyes et al*., Provisional Measures regarding Mexico, Order of November 26, 2010, conclusion of law No. 5.
[199] *I/A Court H.R., Matter of Belfort Istúriz et al.*, Provisional Measures regarding Venezuela, Order of April 15, 2010, conclusion of law No. 6; *I/A Court H.R., Matter of Wong Ho Wing*, Provisional Measures regarding Peru, Order of May 28, 2010, conclusion of law No. 10; *I/A Court H.R., Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center*, Provisional Measures regarding Venezuela, Order of February 8, 2008, conclusion of law No. 7; *I/A Court H.R., Matter of "El Nacional" and "Así es la Noticia" Newspapers*, Provisional Measures regarding Venezuela, Order of November 25, 2008, conclusion of law No. 23; *I/A Court H.R., Matter of Luis Uzcátegui,* Provisional Measures regarding Venezuela, Order of January 27, 2009, conclusion of law No. 19.
[200] *Matter of Luis Uzcátegui, supra*, conclusion of law No. 20; *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center*, *supra*, conclusion of law No. 8; *Matter of "El Nacional" and "Así es la Noticia" Newspapers*, *supra*, conclusion of law No. 24.
[201] *See* I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Provisional Measures, Orders of September 6, 2002 & November 26, 2007. With regard to the precautionary nature of the measure, *see also Matter of L.M. regarding Paraguay*, which provided for the adoption of measures with the understanding that the delay or lack of a response in the context of the custody and paternity proceedings that took place in Paraguay could entail "an irreparable harm to the rights to psychological integrity, identity, and protection of the family of the child L.M." Accordingly, in this matter, while the court proceedings to determine the child's legal status were still pending, the Court found it appropriate to order, "as a provisional measure to prevent the child's rights from being affected, that the State take the necessary,

Indigenous People regarding Ecuador, the facts of which are similar to this case,[202] the Court granted provisional measures in order for the State to provide protections for the community members' rights to life, integrity, and freedom of movement, and to remove the explosive materials from the territory, conduct runway maintenance to ensure air transportation, and provide protection from third parties.[203]

In the *Matter of Four Ngöbe Indigenous Communities and its members regarding Panama*, in relation to a hydroelectric power plant concession,[204] the IACHR requested that the Court grant measures for the protection of the rights to life, integrity, and freedom of movement, as well as for the suspension of the construction works and other operations of the hydroelectric project, and to protect the relationship of the communities to their natural resources.

In that case, the Court took various steps to request information from the parties. Among them it asked the *People's Ombudsman of Panama* to submit a report examining the potential impact that progress on the construction of a hydroelectric plant might have on the rights of the communities, and to provide its institutional opinion regarding the consultation processes that may have been conducted.[205] The State provided the requested information and forwarded information to prove compliance with the standards required by the Court on the subject. It claimed that 99% of the families were in agreement with the project and that it had complied with the payment of compensation. It further indicated that guidelines and recommendations to minimize the environmental impact were being followed, and that medical rounds were being made to respond to complaints of dust from the detonations and the noise of the sirens.[206] The Court ultimately ruled to deny the measures on the grounds that the IACHR had failed to demonstrate the extreme seriousness and urgency and had raised issues regarding the merits. Nevertheless, the Court recalled its jurisprudence on the subject of concessions and the requirements for legitimate restrictions of the right to communal property (*supra*),[207] and found that several allegations were related to the merits of the case.[208]

Arguments of the Representatives and the State

The representatives should substantiate the IACHR's request and demonstrate that it meets the requirements of extreme seriousness, urgency, and irreparability of the harm in this specific case. They should argue that they have requested these measures as both precautionary, to preserve the status quo pending the decision on the merits, and as protective with regard to the rights that are being violated and that affect the personal integrity of the members of the community as well as the cultural integrity of the community. The provisional measures granted in *Sarayaku v. Ecuador* could provide the basis for their request.

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adequate, and effective measures to allow him to maintain contact with his family of origin." I/A Court H.R., *Matter of L.M. regarding Paraguay.* Order of July 1, 2011, conclusion of law No. 18.

[202] The case is related to the alleged lack of protection of this community's territory from oil exploitation concessions (200,000 hectares of land, 65% of the community's territory), which were allegedly granted without any consultation process or the consent of the community. It also involved alleged attacks on members of the community and the storage of explosives on traditional lands that detonated, destroying forests, water sources, caves, subterranean rivers, and sacred sites, and causing the migration of animals.

[203] *See* I/A Court H.R., *Matter of the Sarayaku Indigenous People regarding Ecuador,* Order of February 4, 2010.

[204] This case deals with the 20-year concession of 6,215 hectares of land for the company *AES Changuinola* to manage the forest and build hydroelectric dams, allegedly without any consultation process. The Court was additionally informed that during 2011 the *Chan 75* dam would flood the communities, comprised by 1500 and 2000 individuals, and other affected communities.

[205] *See* I/A Court H.R., *Matter of Four Ngöbe Indigenous Communities and its members regarding Panama,* Order of May 28, 2010, whereas clause No. 6.

[206] *Ibid.*

[207] *I/A Court H.R., Matter of Four Ngöbe Indigenous Communities and its members regarding Panama.* conclusion of law No. 18.

[208] In addition, certain aspects alleged by the Commission and contested by the State, such as the validity of the agreements signed, the restrictions to freedom of movement, and the scope of the resettlements, appeared to refer to the merits of the case. Any other matter must be decided in the litigation of the merits during the respective adversarial proceedings. *Ngöbe*, *supra*, conclusion of law No. 13.

Also, because the case is pending before the Court, the representatives could request provisional measures on behalf of the community of *La Loma* based on Article 63.2 of the ACHR if they consider it appropriate. To do so, they must demonstrate that the abovementioned requirements have been met.

For its part, the State could argue that, with respect to the *Chupanky* community, the prior consultation process was conducted in accordance with international standards (ILO Convention No. 169), and resulted in an agreement consistent with the standards set forth in the jurisprudence of the Inter-American Court (*Saramaka* case). It could base its argument on the denial of the measures in the matter of the *Ngöbe Indigenous Communities* in Panama. It could also assert that the adoption of measures would entail the pre-judgment of the merits.

With respect to extreme seriousness and urgency, the State might argue that in neither of the communities is the situation at its most intense level, especially taking into account that both communities will be granted lands that are in better condition.

IV. STANDING OF THE COMMUNITY AS A PARTY BEFORE THE COURT

Relevant facts:

- Upon submitting the case to the Court, in order to protect the inter-American public interest, the IACHR requested that the Court recognize not only the members of the community as victims but also the indigenous community itself as a victim.

Applicable law

Can the ACHR recognize violations against an indigenous people as a group?

Article 44 of the ACHR establishes that "any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

Article 1 of the Convention indicates that the States agree to respect the rights and freedoms enshrined therein of *"all persons subject to their jurisdiction"* and that, for the purposes of the Convention, "person" means "*every human being.*"

In this respect, in cases involving indigenous communities, the Court has found the corresponding rights violated to the detriment of "members" of the community rather than of the community as such.[209] Groups such as trade unions or indigenous peoples and other political representations of ethnic minorities have thus been admitted as victims.

The concurring opinion of Judge Vío Grosi in the *Case of the Xákmok Kásek Indigenous Community* states that:

> […] applying the provisions of Article 29(b) and 29(d) of the Convention, it can be concluded that in keeping with the progressive development of international human rights law,[210] it would be appropriate, on the one hand, to include in the term "person" contained in several articles of the

[209] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Preliminary Objections. Judgment of February 1, 2000. Series C No. 66; *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

[210] Concurring Opinion. Paras. 24 – 26. He added that it could be argued that [the previously cited] international texts, autonomous sources of international law, such as treaties, and auxiliary sources such as the decisions of bodies of international organizations, refer to the human rights of the indigenous peoples and even of their members when dealing with the specific rights of either these groups or their members, which are, consequently, distinct or different from those in force for all human beings. Otherwise, the special or distinctive declaration in some of the legal instruments mentioned (those which seek precisely to have legal effect, in other words, to establish or to determine the international legal obligations derived from the rights thus declared), would be meaningless and lack justification.

> Convention and as victims of violations of rights established in it, not only the members of the indigenous peoples, considered individually, but also the indigenous peoples as such; and, on the other hand, consequently, to consider among these rights, those that concern these peoples, so that not only would justice be served, but, also, the jurisprudence would thus be situated, more clearly and without margin for error, in the modern trend that is emerging increasingly clearly in international law on this matter.

These cases give rise to an important dilemma with regard to inter-American litigation: If the litigant at the domestic level was the community, why should it be a natural person in the international context? Are remedies exhausted when a case is brought at the national level by the community? Likewise, most of the reparations granted by the Court in these cases are meant to benefit the group. Even the compensation is ordered to be paid through a fund that benefits the community.

In addition, the Court has required States to recognize the legal personality of indigenous communities under their domestic law. On this point, in the *Yakye Axa* case, the Court confirmed that under Paraguayan law, indigenous communities have ceased to be "a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity." Legal personality, in turn, "is the legal mechanism that grants them the necessary status to enjoy certain basic rights, such as communal property, and to demand their protection when they are abridged."[211] In the *Saramaka* case, the Court established that the recognition of their legal personality is a way—although not the only one—to ensure that the community, as a whole, can fully enjoy and exercise the right to property in accordance with their system communal property, as well as the right to equal judicial protection from any violation of that right.[212]

The 1986 African Charter on Human and Peoples' Rights recognizes the special protection of certain rights of indigenous peoples in terms of their exercise as collective rights. The United Nations Declaration on the Rights of Indigenous Peoples of 2007 considers that indigenous persons have the right—as peoples or as individuals—to the full enjoyment of all human rights, among others.

Nevertheless, the traditional interpretation has been affirmed by the Inter-American Commission. In a case relating to the expropriation of *Banco de Lima*,[213] the Commission observed that it did not have jurisdiction over the rights of legal entities such as companies or—in this case—banking institutions. In the same respect, in the case of *Tabacalera Boquerón, S.A.,* the Commission found that the protections granted by the Inter-American Human Rights System are limited to natural persons, to the exclusion of legal entities, since entities are not protected by the Convention and, as legal entities, cannot be the victims of a human rights violation.[214] Likewise, in relation to a complaint filed by the Argentine corporation MEVOPAL, S.A., when that company asserted its status as an alleged victim, the Commission concluded that it lacked jurisdiction *ratione persona*, since legal entities are excluded from protection under the Convention. It has held similarly in the cases of *Bendeck – Cohdinsa v. Honduras*[215] and *Bemard Merens v. Argentina.*[216]

The Inter-American Court also ruled on this issue in the cases of *Herrera Ulloa v. Costa Rica*[217] and *Usón Ramirez v. Venezuela,*[218] holding that "Article 1(2) of the Convention sets forth that the right recognized in such instrument correspond to persons, i.e. to human beings." In the case of

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[211] *Yakye Axa*, para. 83.
[212] *Case of the Saramaka People*, para. 171.
[213] IACHR. Report No. 10/91 (inadmissibility), Case 10.169. *Banco de Lima v. Peru*, February 22, 1999, conclusion of law No. 3.
[214] *See* Report No. 47/97, *Tabacalera Boquerón, S.A., Paraguay*, October 18, 1997, in the Annual Report of the Inter-American Commission on Human Rights, 1997, pp. 229 et seq., paras. 25 & 35.
[215] IACHR, Report No. 106/99 *Bendeck - Cohdinsa, Honduras*, September 27, 1999, para. 20.
[216] IACHR, Report No. 103/99, *Bemard Merens and Family, Argentina*, September 27, 1999, para. 3.
[217] I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica.* Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107.
[218] I/A Court H.R., *Case of Usón Ramírez v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 45.

Cantos v. Argentina,[219] the Court held that "the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or on their behalf."[220]

Arguments of the Representatives and the State

The representatives could argue that in order to protect the inter-American public interest, it agrees with the IACHR's request to recognize indigenous peoples as legal persons based on the previously described standards, which would be consistent with the international standard on the subject and with the standard that the Court requires of the States in their domestic law. It would also be consistent with the causal nexus for collective reparations ordered by the Court.

The State would refute that argument based on the consistent jurisprudence of the Commission and the Court specifying individually identified members of the community as victims, and based on the procedural rules established in the Rules of Procedure of the Court.

V. REPARATIONS

With respect to this section, the case intends for the participants to understand the main theoretical and practical elements of comprehensive reparations established by the Court and from indigenous, gender-based, and environmental perspectives. It is suggested that the judges verify the participants' knowledge of this topic.

Relevant facts:

- In their initial petition before the IACHR, they requested reparations from an indigenous and gender-based perspective.
- In its report on the merits the IACHR recommended that the State implement several comprehensive reparations measures, taking account of the cultural characteristics of both communities.

Who are the beneficiaries of reparations, and on the basis of what violation? Are any distinctions made in providing reparations to the affected communities? What do reparations from an indigenous perspective consist of in this specific case? What do reparations from a gender perspective consist of in this case? What do reparations from an environmental perspective consist of?

Applicable law

Based on Article 63.1 of the American Convention,[221] the Court has held that every violation of an international obligation that has resulted in harm entails the duty to make adequate reparations,[222] and that this provision "[embodies] a customary rule that constitutes one of the fundamental principles of contemporary International Law regarding the responsibility of a State."[223]

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[219] I/A Court H.R., *Case of Cantos v. Argentina*. Preliminary Objections. Judgment of September 7, 2001. Series C No. 85, paras. 27 & 29.

[220] The Court concluded that the fact that the concept of legal entities has not been expressly recognized by the American Convention does not mean that, in certain circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights.

[221] Article 63.1 of the Convention provides that "if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[222] *Case of Velásquez-Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25; *Case of Chitay Nech et al. v. Guatemala.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 227; *Case of Manuel Cepeda-Vargas v. Colombia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010, para. 211.

[223] *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 62; *Case of Chitay Nech et al. v. Guatemala.* Preliminary Objections, Merits, Reparations, and

The Court has established that reparations should have a causal nexus to the facts of the case, the violations found, the harm proven, and the measures requested to redress the respective damages. Accordingly, the Court should consider these factors simultaneously in order to render a proper decision according to law.[224]

The Court has considered the necessity of granting different reparations measures for purposes of the comprehensive recovery of damages whereby, in addition to monetary compensation, measures of satisfaction, restitution, rehabilitation, and guarantees of non-repetition are particularly relevant in light of the seriousness of the violations and the harm caused.[225]

As for the scope of the reparations in cases involving indigenous peoples, the Court has granted comprehensive reparations that are collective in nature and in keeping with the recognition of their ethnicity. In particular, these include socio-economic measures[226] implemented through communal programs benefitting the community. They also include measures for the restitution of ancestral territory,[227] measures of satisfaction benefitting the community with regard to its languages,[228] rehabilitation measures,[229] and guarantees of non-repetition with repercussions on the group,[230] among others.

The Court has granted reparations from a gender perspective, taking account of the different effects of violence on women and on men, and it has ordered that investigations of facts be conducted with the inclusion of a gender perspective.[231] Additionally, it has specified the relevance

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Costs. Judgment of May 25, 2010. Series C No. 212, para. 227; *Case of Manuel Cepeda-Vargas v. Colombia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 211.

[224] *Case of Ticona-Estrada et al. v. Bolivia.* Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, para. 110; *Case of Garibaldi v. Brazil.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 23, 2009. Series C No. 203, para. 186; *Case of the "Las Dos Erres" Massacre v. Guatemala.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 227

[225] *Case of the "Las Dos Erres" Massacre v. Guatemala.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para 396.

[226] As *socio-economic* measures: a) the creation of development programs that include the provision of potable water, *supra* a sanitation system, the implementation of education, housing, agricultural, and health programs for the community, as well as electrical power; b) maintenance and improvement of the road systems between the communities and the municipal capital. *Plan de Sánchez Massacre, supra,* n.70.

[227] As *restitution measures*: In the Paraguayan cases (*supra*), the Court ordered the State to return the community's traditional territory to it and, if appropriate, to provide alternative lands within the traditional territory of its ancestors. In the *Xakmok Kásek* case, the Court for the first time established a type of punitive sanction in the event of noncompliance with the deadlines ordered for guaranteeing the community its territory. The Court provided that if the deadline set in the Judgment expired or, if applicable, the extension expired or was denied by the Court without the State having turned over the traditional lands (or the alternative lands, if appropriate), it must pay the leaders of the community a specific sum for each month of delay. The Court has also ordered the State to ensure that the territory claimed by the community is not diminished by the State itself or by third parties. In the *Mayagna* case, the Court ordered the delimitation, demarcation, and titling of the traditional territory.

[228] As *measures of satisfaction*: a) holding a public ceremony to acknowledge the State's international responsibility; b) publishing the Judgment; c) publicizing the Judgment on a radio station with broad coverage in the region of the Judgment, for which a summary must be translated into the indigenous languages; and d) conducting awareness campaigns about defenders of the environment and creating a monument in memory of the defenders of the environment in a national park.

[229] As *measures of rehabilitation*: a) while the traditional territory or alternative lands are being turned over, take immediate, periodic, and ongoing measures regarding the provision of sufficient potable water; the provision of medical and psychological examinations and services for all members of the community; special medical attention for pregnant women; the delivery of food of adequate quality and quantity; the installation of adequate sanitation services, and the provision of materials and resources to the school in order to ensure access to basic education, ensuring respect for the traditional cultures and languages; b) establish a permanent health clinic with the necessary medicines and supplies to provide adequate health services; c) establish a communications system; d) ensure that the aforementioned health clinic and communications system are transferred to the place where the community settles permanently once it has recovered its traditional territory; and e) design health programs and medical and psychological treatment programs.

[230] As *guarantees of non-repetition*: a) adopt the legislative, administrative, and any other necessary measures in the domestic legal system to create an effective claims system for indigenous peoples' ancestral or traditional lands that enables them to realize their right to property; and b) remove obstacles to the return of traditional lands.

[231] *Case of González et al. ("Cotton Field")*; *Case of the "Las Dos Erres" Massacre*; *Case of Inés Fernández; Case of Rosendo Cantú.* Nevertheless, in *Plan de Sánchez* the Court did not consider the suffering experienced by female rape victims when it determined the monetary compensation. Nor did the Court acknowledge the need to provide specialize assistance to victims of sexual violence and pregnant women in the *Case of the Miguel Castro-Castro Prison*.

of this perspective in the context of structural discrimination, in which the reparations must be "designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable."[232] In such cases the Court has, for example, ordered that "taking into account the situation of discrimination against women acknowledged by the State, the State must offer a program of education for the general public […] in order to overcome this situation."[233]

Finally, the Court has ordered the protection of the natural resources of the community's traditional territory, and if appropriate, consultation processes and environmental impact studies.[234]

Arguments of the Representatives and the State

Both parties should make reference to the measures of *restitution, satisfaction, rehabilitation, and guarantees of non-repetition, among others,* demonstrating or refuting the causal nexus among the facts, the violations alleged, the damages, and the reparations requested. The participants are expected to expand their knowledge in the development of the issue of reparations from an indigenous perspective (*ethno-reparations)*, gender perspective, and environmental perspective, for which the proper grounds must be evaluated.

The representatives must prove individual, collective, socio-ethnic, environmental, and gender-based damages, in order to request the reparations measures they deem appropriate for the members of the respective communities. Possible measures include:

a. *Restitution:* (*Chupanky)* of their ancestral territory in the conditions it was in prior to the project; (*La Loma*) depending on the line or argument they have pursued with respect to their right to property, the restitution of their territory or just compensation for the expropriated lands;

b. *Rehabilitation:* of the territory, as well as measures providing for medical and psychological services for the community members whose rights have been violated, including rehabilitation of the family and social fabric;

c. *Satisfaction:* Public ceremony to recognize responsibility and public apologies for both communities (reaffirming the eradication of the assimilation policy). Publication of the official summary of the Judgment in the Rapstaní language and radio broadcasting of it in the area;

d. *Guarantees of non-repetition:* positive education and awareness measures to reverse the patterns of discrimination against women in indigenous communities as well as in Atlantis; Measures to guarantee access to free movement on the *Xuxani* River. Conduct new social and environmental impact studies and new consultation processes; Regulatory measures to protect the natural resources of indigenous and peasant communities, and

[232] *Case of González et al. ("Cotton Field") v. Mexico.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 450.
[233] *Case of González et al. ("Cotton Field") v. Mexico.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 543.
[234] In the *Saramaka* case, with respect to the concessions already granted within the community's traditional territory, c) the State was ordered to review them, in light of the Judgment, for purposes of in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the […] people"; e) "abstain from acts which might […] affect the existence, value, use or enjoyment of the territory to which the members of the […] people are entitled, unless the State obtains the free, informed and prior consent of the […] people"; f) ensure the right of the […] people to be effectively consulted, and to share the benefits of the projects; and g) perform environmental impact studies.

e. *Payment of compensation:* for the pecuniary and non-pecuniary damages in their territory, as well as to the members of the community, especially for the harm to their cultural integrity and right to personal integrity. Compensation for the extra hours worked. Non-pecuniary damages could include arguments regarding *family and community life plans.*[235] The creation of development funds for the community.

The State could argue against the requested reparations based on an analysis of the nexus of causality between each one of them. It can place special emphasis on the absence of any harm of a collective nature and its causal nexus to the violations alleged and the measures requested. In the instant case, the State complied with the Convention standards in all of its actions, even following the jurisprudence of the Court; this was confirmed by means of the control for conformity with the Convention exercised at the national level. Finally, it could argue that in any case, most of the rights that could have been violated would have been violated in their "guarantee" aspect and, therefore, it would be appropriate with regard to reparations measures to apply a lesser standard than one similar to what the Court has ordered in cases of massacres or deliberate noncompliance.

[235] See Concurring Opinion of Judge A.A. Cancado Trindade in the *Case of the Plan de Sánchez Massacre v. Guatemala*; and the Concurring Opinion of Judge García Ramírez in the case of *Tibi v. Ecuador*.