Organization of American States

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Inter-American Commission on Human Rights

Application to the Inter-American Court of Human Rights
in the case of
Kichwa People of Sarayaku and its members
(Case 12.465)
against Ecuador

DELEGATES:

Luz Patricia Mejí, Commissioner
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April 26, 2010
1889 F Street, N.W.
Washington, D.C., 20006

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**APPLICATION FILED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
WITH THE INTER-AMERICAN COURT OF HUMAN RIGHTS AGAINST
THE REPUBLIC OF ECUADOR**

**CASE 12,465
KICHWA PEOPLE OF SARAYAKU AND ITS MEMBERS**

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission" or "the IACHR") hereby submits to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") its application in Case No. 12,465, Kichwa Indigenous People of Sarayaku and Its Members. The case is being brought against the State of Ecuador (hereinafter "the Ecuadorian State," "the State" or "Ecuador") for actions and omissions that were detrimental to the Kichwa People of Sarayaku and its members (hereinafter "the victims"). By having allowed a private oil company to operate within the ancestral territory of the Kichwa People of Sarayaku, without consulting them beforehand, the State created a situation hazardous to the Kichwa People, leaving them unable to practice their traditional means of subsistence within their territory and limiting their freedom of movement within that territory. The case also concerns the fact that the Kichwa People of Sarayaku were denied judicial protection and the right to due process of law.

2. The Inter-American Commission respectfully requests the Court to adjudge and declare the international responsibility of the State of Ecuador for violation of the human rights protected in the following provisions:

- Article 21 of the American Convention, in relation to articles 13, 23 and 1(1) thereof, to the detriment of the Kichwa People of Sarayaku and its members.

- Articles 4, 8 and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kichwa People of Sarayaku and its members.

- Article 22 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the members of the Kichwa People of Sarayaku.

- Article 5 of the American Convention, in relation to articles 1(1), to the detriment of twenty members of the Kichwa People of Sarayaku.

The Commission also finds that the State is responsible for failure to comply with Article 2 of the American Convention.

3. This case has been processed in accordance with the terms of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and is submitted to the Inter-American Court pursuant to the transitory provision contained in Article 79(2) and other relevant provisions of the Court's Rules of Procedure. Attached as an appendix to this application is a copy of Report No. 138/09,[1] which the Commission adopted on December 18, 2009, and the explanation of the vote of Commissioner Luz Patricia Mejía.

1 Merits Report No. 138/09, of December 18, 2009, KIchwa Indigenous People of Sarayaku and its members, Appendix 1.

4. The referral of this case to the Court is predicated on the need to ensure that the State respects and guarantees the right of the Kichwa Indigenous People of Sarayaku to use, enjoy, and dispose of its territory. The IACHR also believes that the present case is an opportunity for the Inter-American System to elaborate more fully on the matter of prior consultation with indigenous peoples, and the possible effect of the decision on the domestic legal provisions regarding prior consultation and free and informed consent.

II. PURPOSE OF THE APPLICATION

5. The purpose of the present application is to petition the Court to adjudge and declare that:

- Article 21 of the American Convention, in relation to articles 13, 23 and 1(1) thereof, to the detriment of the Kichwa People of Sarayaku and its members.

- Articles 4, 8 and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kichwa People of Sarayaku and its members.

- Article 22 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the members of the Kichwa People of Sarayaku.

- Article 5 of the American Convention, in relation to articles 1(1), to the detriment of twenty members of the Kichwa People of Sarayaku.

The Commission also finds that the State is responsible for failure to comply with Article 2 of the American Convention.

6. In consideration of the above, the Inter-American Commission is asking the Court to order that the State:

- Adopt the measures necessary to ensure and protect the right to property of the Kichwa Indigenous People of Sarayaku and its members with respect to their ancestral territory, taking particular care to ensure the relationship that they have to their land.

- Guarantee to the members of the Kichwa Indigenous People of Sarayaku their right to practice their traditional subsistence activities by removing the explosives planted on their territory.

- Ensure that indigenous representatives have a meaningful and effective role in the decision-making on the project and other issues that affect them and their cultural survival.

- Adopt, pursuant to its domestic procedures and with the indigenous peoples' participation, the legislative or other measures necessary to give effect to the right to prior consultation, in good faith and with the representative institutions of those peoples, in accordance with the standards of international human rights law.

- Take the measures necessary to prevent a recurrence of similar events in the future, in keeping with the State's duty to prevent violations of human rights and its duty to respect and ensure the fundamental rights recognized in the American Convention.

- To order full individual and communal reparations for the Kichwa People of Sarayaku and its members, to include not only pecuniary and non-pecuniary damages and the costs and

expenses of litigation at the domestic and international levels, but also certain acts of symbolic importance that guarantee that the crimes committed in the present case are not repeated.

III. REPRESENTATION

7. In accordance with the provisions of articles 23 and 34 of the amended Rules of Court, the Commission has appointed Commissioner Luz Patricia Mejía and Executive Secretary Santiago A. Canton to serve as its delegates in this case. Assistant Executive Secretary Elizabeth Abi-Mershed and attorneys Karla I. Quintana Osuna, and Isabel Madariaga, specialists with the IACHR's Executive Secretariat, have been appointed to serve as legal advisers.

IV. JURISDICTION OF THE COURT

8. Under Article 62(3) of the American Convention, the Inter-American Court is competent to hear all cases submitted to it regarding interpretation and application of the provisions of this Convention, provided that the states parties to the case recognize or have recognized its jurisdiction.

9. The Court has jurisdiction to take up the present case. The State ratified the American Convention on December 8, 1977, and accepted the Court's binding jurisdiction on July 24, 1984. Considering the date on which the State ratified the Convention and in application of the Court's jurisprudence, this application concerns acts that constitute independent facts and specific and autonomous violations that occurred subsequent to the acceptance of the Court's jurisdiction.

V. PROCESSING BY THE INTER-AMERICAN COMMISSION

In connection with the case

On December 19, 2003, the Inter-American Commission received a petition lodged by the Association of the Kichwa People of Sarayaku [*Asociación del Pueblo Kichwa de Sarayaku*] (*Tayjasaruta*), the Center for Economic and Social Rights [*Centro de Derechos Económicos y Sociales*] (CDES) and the Center for Justice and International Law (CEJIL) (hereinafter the "petitioners"), which was classified as number P167/03.

7. On February 18, 2004, the Commission forwarded the relevant parts of the petition to the State, which was asked to present its observations within 60 days, in keeping with Article 30(2) of the Commission's Rules of Procedure. On April 30, 2004, the Commission granted the State a one-month extension to present its observations.

8. The State submitted its observations on June 2, 2004. The latter were forwarded to the petitioners on June 7, 2004, who were given 30 days in which to submit their observations. The petitioners submitted their observations on July 2, 2004. Those observations were forwarded to the State on July 8, 2004. The State was to present its observations within 30 days.

9. On June 15, 2004, the Commission submitted a request to the Inter-American Court seeking provisional measures for the Kichwa Indigenous People of Sarayaku and its members (*infra*). The Commission had granted precautionary measures on May 5, 2003. By an order dated July 6, 2004, the Inter-American Court ordered implementation of provisional measures, calling upon the State to adopt, forthwith, the measures necessary to protect the life and integrity of person of the members of the Kichwa indigenous community of Sarayaku, to guarantee their right to freedom of movement, and to investigate the facts that necessitated the adoption of the provisional measures.

2. On October 13, 2004, the Commission approved admissibility report No. 62/04,[2] where it concluded that it had competence to hear the complaint filed by the petitioners and, based on the arguments of fact and of law and without prejudging the merits of the case, decided to declare the petitioners' complaint admissible with respect to the alleged violations of articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 22, 23, 24, 25 and 26 of the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention"), in relation to articles 1(1) and 2 thereof, to the detriment of the Kichwa People of Sarayaku and its members. The Commission declared the allegation made with respect to Article 3 of the Convention to be inadmissible.

3. The Commission approved admissibility report No. 62/04 on October 13, 2004, during its 121st regular session. By a communication dated November 4, 2004, the parties were notified that the admissibility report had been adopted. The petitioners were asked to submit the arguments on the merits that they deemed relevant within two months. The Commission offered its good offices to the parties with a view to reaching a friendly settlement of the matter.

4. On December 21, 2004, the petitioners requested an extension in order to submit their observations on the merits. By note dated January 5, 2005, the Commission granted them a 30-day extension.

5. On January 12, 2005, the petitioners asked the Commission to hold a hearing during its 122nd regular session. By note dated February 10, 2005, the Commission informed the petitioners that because its calendar of hearings for that session was already heavy, it would be unable to accede to their request.

6. By note dated February 5, 2005, received at the Commission on February 7 of that year, the petitioners submitted their observations on the merits.

7. On March 15, 2005, the petitioners sent the Commission an anthropological-legal research report done by researchers at the *Facultad Latinoamericana de Ciencias Sociales* [Latin American School of Social Sciences], FLACSO, the Ecuador office.

8. On May 18, 2005, the petitioners asked the State to submit its observations on their brief of February 5, 2005. On June 20, 2005, the Commission forwarded the pertinent parts of that communication to the State.

9. By note dated July 21, 2005, received on July 26 of that year, the State informed the Commission that it had not been notified of the observations that the petitioners submitted to the Commission on the merits and thus could not submit its brief of observations.

10. By note of August 4, 2005, the Commission forwarded to the State the anthropological-legal research report prepared by FLACSO and the petitioners' observations on the merits.

11. On October 14, 2005, the State asked the Commission to conduct an *in loco* visit. In its note the State indicated that the purpose of the visit would be for the Commission to see firsthand what was happening in Sarayaku.

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[2] IACHR, Admissibility Report No. 62/04, of October 13, 2004, Petition 167-2003, Kichwa Indigenous People of Sarayaku and its members. Appendix 2.

12. On September 1, 2005, the petitioners requested that the Commission hold a hearing. On October 21, 2005, during its 123rd regular session, the Commission held a hearing to hear testimony with the parties present.

13. By a brief dated December 28, 2005 and received at the Commission on January 5, 2006, the State submitted its observations on the merits. The Commission forwarded those observations to the petitioners on February 17, 2006.

14. On January 20, 2006, the State asked the Commission to hold a hearing. On March 13, 2006, during its 124th regular session, a second testimonial hearing was held with the parties present. At the end of the hearing the State's representative expressed its interest in clarifying the facts alleged and presented a friendly settlement proposal.

15. The State submitted additional information by a communication dated March 17, 2006, received at the Commission on March 23 of that year.

16. On March 29, 2006, the Commission forwarded the pertinent parts of this report to the petitioners and requested that they submit their observations within one month. In its communication, the Commission informed the petitioners that the State had submitted the "ECORAE" 2006 Plan of Operations.

17. On May 3, 2006, the petitioners advised the Commission of the decision taken by the Kichwa People of Sarayaku not to enter into a friendly settlement process. According to the petitioners, the decision was based on the fact that a number of agreements concluded between the State and the Kichwa People of Sarayaku had not been honored. This information was relayed to the State on May 4, 2006.

18. On August 17, 2006, the State filed a report on the circumstances surrounding the detention of 5 members of the Kichwa People of the Sarayaku.

19. On April 4, 2007, the Commission asked the State to present up-to-date information on the case; it later repeated that request in a communication dated November 15, 2007. That same day, the Commission asked the petitioners to present updated information.

20. On December 18, 2007, the petitioners submitted additional information, which was forwarded to the State on December 21, 2007.

21. On January 11, 2008, the State presented additional information concerning activities it had undertaken for the Kichwa People of Sarayaku.

22. The State sent a communication on April 8, 2008, enclosing a copy of Memorandum No. 009400 and an attachment titled "Technical Report on the Activities Conducted in the Sarayaku Sector." On April 11, 2008, the State submitted its observations on the additional observations submitted by the petitioners on December 18, 2007. The pertinent parts of both communications were forwarded to the petitioners on May 8, 2008.

23. On April 17, 2008, the State sent the original copy of Memorandum No. 009400, mentioned above.

24. On April 19, 2008, the petitioners submitted their observations on the State's April 8 communication, which were the petitioners' observations on the State's reports regarding compliance with the provisional measures ordered by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court").

25. On June 10, 2008, the petitioners submitted their observations on the State's communication of April 11, 2008.

26. On July 29, 2009, the State filed information concerning the resumption of certain activities under the partnership agreements.

27. On December 18, 2009, the IACHR approved Report No. 138/09 on the merits of the present case, which was adopted pursuant to Article 50 of the American Convention. In that report it set forth a series of conclusions and made recommendations to the Ecuadorian State.[3] The report and Commissioner Mejía's explanation of her vote were transmitted to the State on January 26, 2010. The State was given two months in which to report on the measures taken to comply with the recommendations made in the report.

28. On that same date, the Commission forwarded the pertinent parts of the report to the victims' representatives and, pursuant to Article 43(3) of the Rules of Procedure, asked that they present their position as to whether the case should be submitted to the Inter-American Court. By a communication dated February 26, 2010, the representatives of the victims expressed their interest in having the case submitted to the Court.

29. By note dated March 25, 2010, the State submitted a brief on the progress made toward implementation of the recommendations made in the report on the merits. The brief was sent to the petitioners on April 8, 2010.

30. On April 20, 2010, the petitioners presented their observations on the State's brief of March 25, 2010.

31. After considering the information supplied by the parties with respect to implementation of the recommendations contained in the report on the merits, and given the lack of any substantive progress made toward their effective fulfillment, the Commission decided to refer the present case to the Inter-American Court.

- *Precautionary and provisional measures*

32. On March 3, 2003, the President of the Sarayaku Indigenous Community and the organization called the Ecuadorian Inter-institutional Commission requested that the Commission adopt precautionary measures to protect the rights to life, personal integrity, due process, and private property of the Sarayaku indigenous community, and specifically the life and personal integrity of community leaders Franco Viteri, José Gualinga Santi, Francisco Santi and Cristina Gualinga.

33. On March 7, 2003, the Commission requested information from the Ecuadorian State regarding the application seeking precautionary measures. In a note received on March 13, 2003, the Inter-American Commission was informed that, as of that date, the Center for Economic and Social Rights (CDES) and the Center for Justice and International Law (CEJIL) would be the petitioners' representatives. On April 23, 2003, the State requested an extension of the deadline for submitting information.

34. On April 24, 2003, the petitioners reiterated their application for precautionary measures and enclosed additional information. That information was forwarded to the State on April

3 IACHR, Merits Report No. 138/09, December 18, 2009, Kichwa Indigenous People of Sarayaku and its members, Appendix 1.

25, 2003, which was given a specific period of time in which to present its observations. The State did not respond.

35. On May 5, 2003, the IACHR requested that the Ecuadorian State adopt the following precautionary measures:

> 1. Adopt all measures deemed necessary to ensure the life and physical, psychological, and moral integrity of the members of the Sarayaku indigenous community and particularly of Franco Viteri, José Gualinga, Francisco Santi, Cristina Gualinga, Reinaldo Alejandro Gualinga, and of the girls who might be subject to threats or intimidation by army personnel or by civilians from outside the community.
>
> 2. Investigate the incidents that occurred on January 26, 2003 in the Sarayaku Community's *Tiutilhualli Paz y Vida Camp* and its consequences. Prosecute and punish those responsible.
>
> 3. Adopt all necessary measures to protect the special relationship between the Sarayaku Community and its territory.
>
> 4. Agree on precautionary measures, in consultation with the community and its representatives [in the case] before the inter-American human rights system. The measures would be in place for six months. Once that six-month period had elapsed and the observations submitted by the parties had been considered, the Commission would decide whether the precautionary measures should remain in place.

36. Between June and September 2003, the petitioners and the State submitted additional information and observations in connection with the precautionary measures.

37. On October 16, 2003, during the Commission's 118th regular session, the petitioners requested that the precautionary measures be extended. On December 17, 2003, the Commission informed the State that the precautionary measures had been extended for six months. It asked that the State provide information regarding their implementation.

38. On March 3, 2003, the Commission notified the parties that they were invited to attend a working meeting that would be held during the 119th regular session. The State did not attend the meeting.

39. On April 8, 2004, the petitioners submitted additional information and asked the Commission to apply for provisional measures from the Inter-American Court. That same day, the Commission sent the pertinent parts of the request to the State, and asked it to submit information on the matter.

40. On April 29, 2004, the petitioners again asked that provisional measures be sought. They also asked for precautionary measures for José Serrano Salgado, the legal representative of the Sarayaku Community. On April 30, 2004, the Commission requested that the State expand the precautionary measures to include José Serrano Salgado and the members of the CDES. It also asked the State to report on the implementation of the precautionary measures. The State submitted its response on May 28, 2004, which was sent to the petitioners on June 8, 2004. The petitioners submitted their observations on June 9, 2004.

41. On June 15, 2004, pursuant to Article 63(2) of the Convention and Article 25 of the Court's Rules of Procedure, the Commission filed a request with the Inter-American Court seeking provisional measures for the Kichwa indigenous people of Sarayaku and its members. By an order issued on July 6, 2004, the Inter-American Court ordered the requested provisional measures and resolved:

1. To call upon the State to adopt, forthwith, the measures necessary to protect the life and integrity of person of the members of the Kichwa indigenous community of Sarayaku and of those who represent and defend them in proceedings ordered before the authorities.

2. To call upon the State to guarantee the right to freedom of movement of the members of the Kichwa community of Sarayaku.

3. To call upon the State to investigate the facts that necessitated the adoption of these provisional measures so as to identify those responsible and impose the appropriate punishments.

4. To call upon the State to allow the beneficiaries of these measures to participate in their planning and implementation and, in general, to keep them informed of the progress made with execution of the measures ordered by the Inter-American Court of Human Rights.

[...].

42. On May 11, 2005, during the Commission's special session held in Paraguay, a public hearing on the provisional measures requested in this case was held.

43. On June 17, 2005, the Inter-American Court decided to maintain the provisional measures indicated in the Order of July 6, 2004. It specifically ordered that the explosive material planted on the territory of the Kichwa Indigenous People be removed. The measures ordered by the Court are still in force.

44. After holding a public hearing on February 2, 2010, the Court issued an order concerning the provisional measures on February 28, 2010. The measures ordered by the Court are still in effect.

IV. ANALYSIS OF THE MERITS

A. Assessment of the evidence

45. In application of Article 42(1) of the Commission's Rules of Procedure (hereinafter "the Commission's Rules), it will now examine the arguments, the evidence presented by the parties, and the information obtained during hearings held during its 123rd and 124th regular session. It will also take into account other information that is a matter of public knowledge.[4]

46. Furthermore, because the Commission processed an application seeking precautionary measures for the members of the Sarayaku Indigenous Community and because the Court is currently seized of provisional measures in the same case, the Commission would point out that the Inter-American Court has held that "The evidence submitted during all stages of the proceeding has been included in a single body of evidence, for it to be considered as a whole, which means that the documents supplied by the parties with regard to the preliminary objections and the provisional measures are also part of the body of evidence in the instant case."[5]

47. The Commission therefore finds that having been a party to both proceedings, the State has had ample opportunity to challenge and object to the evidence the petitioners supplied; thus, a procedural balance exists between the parties. Given that procedural balance, the

[4] Article 42(1) of the Commission's Rules of Procedure reads as follows: The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.

[5] I/A Court H.R., *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, paragraph 68.

Commission is adding the evidence supplied by the parties during the proceedings on the precautionary and provisional measures to the whole body of evidence.

B. Facts

1. Background information on the Kichwa Indigenous People of Sarayaku

48. The Kichwa nationality[6] from the Ecuadorian Amazon Basin consists of two Peoples who share the same language and cultural tradition: the Napo-Kichwa People and the Kichwa People of Pastaza. The fact that the Kichwa of Pastaza province identify themselves as *runas* (persons or human beings) means that they see themselves as belonging to the same intra-ethnic identity class, separate and apart from the other non-Kichwa Indigenous Peoples.[7] According to the *Consejo de Desarrollo de Nacionalidades y Pueblos del Ecuador* [Ecuador's Nationalities and Peoples Development Council] (hereinafter CODENPE")[8], the Kichwa of the Amazon Basin have organized themselves in various federations to defend their rights.[9]

49. Sarayaku is one of the largest and most heavily populated Kichwa communities and is made up of five populated areas: Sarayaku Centro, Cali Cali, Sarayakillo, Shiwacocha and Chontayacu.[10] According to the census of the Community, it has a population of 1,235. The Kichwa People of Sarayaku is considered one of the Kichwa Indigenous People's oldest settlements in the Amazonian province of Pastaza.[11]

50. The Kichwa People of Sarayaku and other Kichwa-speaking groups in the province of Pastaza are part of the Canelos-Kichwa cultural group, who are part of a nascent culture that is the product of a combination of the native inhabitants of the northern region of the Bobonaza.[12]

51. The families and communities that have settled within the territory of Sarayaku live from subsistence agriculture, hunting and gathering, and fishing, all of which they practice within their territory, following their ancestral traditions and customs. Some 90% of their basic food needs are met with products gathered, hunted, fished or grown on their own territory while the remaining 10% of their food needs are products brought in from places outside Sarayaku territory.[13]

52. For the members of the Kichwa People of Sarayaku, their land is associated with a set of meanings, where all the elements of nature have a spirit (*Supay* in Kichwa). The presence of

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[6] Constitution of Ecuador. Annex 1. Article 63 provides that the Indigenous Peoples define themselves as nationalities with ancestral roots

[7] Ecuador's Nationalities and Peoples Development Council http://www.codenpe.gov.ec/kichwaama.htm and Ministry of Education and Culture of Ecuador, www.mec.gov.ec Annex 3.

[8] Ecuador's Nationalities and Peoples Development Council, CODENPE, was created by Executive Decree No. 386, published in Official Record No. 86 of December 11, 1998. CODENPE is a decentralized and participatory State agency.

[9] Ecuador's Nationalities and Peoples Development Council. Annex 2.

[10] These are not independent communities but parts of the Community of Sarayaku. Each of these parts of Sarayaku is home to extended families or *ayllus* which are in turn divided into *huasi.* The latter are homes made up of a couple and their children. See anthropological-legal report on the social and cultural impact of the presence of the CGC company in Sarayaku, prepared by Gina Chávez, Rommel Lara and María Moreno, researchers with the Latin American School of Social Sciences – FLACSO, Ecuador office, May 2005, Quito. Copyright No. 022219. ISBN-9978-334-02-5 (hereinafter "FLACSO anthropological-legal report). Annex 4.

[11] FLACSO anthropological-legal report. Annex 4.

[12] Idem.

[13] Ibid.

the *Supay* makes places sacred, and only the *Yachak* [shaman] may enter these sacred places and interact with their inhabitants.[14]

53. Decisions on serious matters or issues of special importance to the Kichwa People of Sarayaku are taken in the traditional community Assembly,[15] which is called the *Tayja Saruta-Sarayaku.*[16] The latter, in turn, has a Governing Council composed of traditional leaders, community leaders, former major leaders, shamans, groups of advisors and technicians who are part of the Kichwa People. This council has decision-making authority with respect to a certain type of internal and external dispute. However, its main purpose is to serve as an interlocutor with actors outside of Sarayaku, on the basis of the decisions taken in the assemblies.[17]

54. The *Organización del Pueblo Kichwa de Sarayaku* [Organization of Kichwa People of Sarayaku] is part of the *Organización de Pueblos Indígenas de Pastaza* [Organization of Indigenous Peoples of Pastaza] (OPIP).[18] OPIP, in turn, is part of the *Confederación de las Nacionalidades Indígenas de la Amazonía ecuatoriana* [Confederation of Indigenous Nationalities of the Ecuadorian Amazon] (CONFENIAE) and of the *Confederación de Nacionalidades Indígenas de Ecuador* [Confederation of Indigenous Nationalities of Ecuador] (CONAIE).[19]

55. The territory of the Sarayaku Community is not easily accessible. Depending on the weather conditions, the trip via the Bobonaza River from Puyo –the closest city- to Sarayaku takes approximately three days; overland, it is an eight-day trip. The overland trip must be made by way of the system of trails inside the jungle because there is no road that is passable for vehicles. To enter Sarayaku territory, whether by way of the river or overland, one has to pass through Canelos Parish.[20] Sarayaku also has a landing strip.[21]

2. Background information on oil exploration in Ecuador

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[14] Ibid.

[15] The political arm of the Kichwa People of Sarayaku was recognized by the Executive Secretary of Ecuador's Nationalities and Peoples Development Council (CODENPE) by agreement 24 of June 10, 2004. See FLACSO anthropological-legal report, document in the case file. Annex 4.

[16] The Assemblies are convened for election of authorities, presentation of the results of the measures taken, taking decisions that concern the entire Community and to resolve a certain type of internal dispute. It is important to point out that internal disputes are addressed by several methods before getting to the Assembly. Only the most serious disputes get as far as the Assembly. These disputes are of two types: the death of a member of the association, and failure to comply with the Assembly's decisions. See FLACSO anthropological-legal report. Annex 3.

[17] FLACSO anthropological-legal report. Annex 4.

[18] OPIP was created in 1979 and legally recognized in Ministerial Agreement No. 612 of July 16, 1984. See petition of constitutional *amparo,* filed by the Organization of Indigenous Peoples of Pastaza against the firm CGC and the firm Daymi Services. Annex 5.

[19] The following are among the organizations of the Kichwa of the Ecuadorian Amazon region: *Federación de Organizaciones Kichwa de Sucumbíos* [Federation of Kichwa Organizations of Sucumbios] (FOKISE), *Federación de Comunas de Nativos de la Amazonía Ecuatoriana* [Federation of *Comunas* of Native Peoples of the Ecuadorian Amazon Basin] (FCUNAE), *Federación de Organizaciones de la Nacionalidad Kichwa del Napo* [Federation of Organizations of the Kichwa Nationality of the Napo] (FONAKIN) and the *Organización de Pueblos Indígenas de Pastaza* [Organization of Indigenous Peoples of Pastaza] (OPIP). The combination of these federations forms the *Confederación de las Nacionalidades Indígenas de la Amazonía Ecuatoriana* [Confederation of Indigenous Nationalities of the Ecuadorian Amazon] (CONFENIAE), an affiliate of the *Confederación de Nacionalidades Indígenas de Ecuador* [Confederation of Indigenous Nationalities of Ecuador] (CONAIE). See Ecuador's Nationalities and Peoples Development Council. http://www.codenpe.gov.ec/kichwaama.htm; Statute of the Kichwa Native People of Sarayaku.

[20] Report prepared by Pastaza Provincial Police Command No. 16, No. 2004-029-P-2-CP-16. Annex 6.

[21] Reports that the State presented to the Inter-American Court in the proceedings on provisional measures in the matter of the Sarayaku People.

56. Among the Latin American countries, Ecuador ranks fifth in terms of oil production and fourth in oil exports. According to Ecuador's Ministry of Energy and Mines, in 2005 sales of crude oil accounted for roughly one fourth of the country's gross domestic product (GDP). Oil revenues represent nearly 40% of the national budget.[22]

57. Oil operations in Ecuador have exacted a high human and environmental toll. A number of studies examine the negative effects of oil exploration and exploitation.[23]

58. On July 30, 2001, Ecuador's Ministry of Defense signed a Military Security Cooperation Agreement (hereinafter "the military cooperation agreement") with the oil companies operating in the country. In it the State pledged to "guarantee the security of the oil facilities and the persons who work there."[24]

3. Territorial rights of the Kichwa People of Sarayaku

59. On May 12, 1992, the State of Ecuador, through its Institute of Agrarian Reform and Settlement and in response to "petitions from various indigenous organizations and peoples in the province of Pastaza seeking land grants," awarded a single, undivided parcel of land in the province of Pastaza, in a single deed, amounting to approximately 254,652 hectares. The grant went to the communities along the Bobonaza River, among them the following: Sarayaku, Sarayaquillo, Cali Cali, Shigua Cucha, Chontayacu, Nina Cucha, Palanda, Teresa Mama, Ramizuna, Tahuay Ñambi, Palizada, Muro Pishin, Mangaurco, Boberas, Santo Tomás, Puca Urcu, Liz Pungo, Yanda Playa, Chiyun Playa, Rumi Playa, Shawindia, Upa Lulun, Huagra Cucha, Tuntun Lan, Llanchamacocha, Alto Corrientes, Papaya, Chipahuari, Masaramu.[25]

60. According to the land title, the grant was made with the obligation to deliver the property free from encumbrances and subject to the following:

a. The purpose of the present grant is threefold: to protect the ecosystems of the Ecuadorian Amazon basin, to improve the living standards of the indigenous communities, and to preserve the integrity of their culture.

b. This grant in no way affects the grants previously made to persons or institutions. The validity of those earlier grants is hereby confirmed. Nor does it affect the settlements and settlers' holdings made prior to this date or free transit via waterways or overland routes that now exist or that are built in the future, pursuant to domestic law.

c. This grant shall not limit the State's authority to build roads, ports, airports and other infrastructure needed for the country's economic development and security.

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[22] See in: *Empresa Petrolera de Ecuador* (PETROECUADOR), Statistical Report 1972-2006. http://news.bbc.co.uk/hi/spanish/specials/2006/energia/newsid_4702000/4702970.stm Annex 7.

[23] *Revista Panam Salud Publica/Pan Am Journal of Public Health* 15(3), 2004. Miguel San Sebastian and Anna-Karin Hurtig. Oil exploitation in the Amazon basin of Ecuador: a public health emergency. Available at: http://publications.paho.org/spanish/TEMA_San_bastian.pdf Annex 8. Latin American School of Social Sciences (FLACSO) and the *Empresa Petrolera de Ecuador* (PETROECUADOR), *Petróleo y desarrollo sostenible en Ecuador* [Petroleum and sustainable development in Ecuador]. For example, a 2003 study done by FLACSO and PETROECUADOR reports on three research studies on the effects of oil exploration and exploitation in Ecuador. According to the study, the greatest socio-environmental impact caused by petroleum activities in Ecuador was in the so-called "Texaco era" (1967-1992).

[24] Clause Two. Purpose of the Military Cooperation Agreement. Military Security Cooperation Agreement between the Ministry of Defense and the oil companies operating in Ecuador, signed in Quito on July 30, 2001. Annex 9.

[25] Property Records for Puyo, Pastaza. Land grant for the Bobonaza River communities, Puyo, May 26, 1992. Annex 10.

d. The National Government, its institutions, and the military and police shall have free access to the awarded land, so that they are to perform the functions that the Constitution and the laws prescribe.

e. Subsoil natural resources are the property of the State, which may exploit them without interference so long as the rules of environmental protection are observed.

f. To preserve the social, cultural, economic and environmental integrity of the communities receiving the land grant, the indigenous communities shall prepare plans and programs for that purpose and present them to the Government for consideration.

g. A community that is the beneficiary of the land grant shall abide by the rules for the management and care of the land and shall not sell or divest itself of the property either in whole or in part.[26]

4. Celebration and execution of the partnership contract for exploration of hydrocarbons and exploitation of crude oil within block 23 of the Amazonian Region

61. On June 26, 1995, the Special Bidding Committee [Comité Especial de Licitación] (CEL) convened the eighth international call for proposals for exploration and exploitation of hydrocarbons in Ecuadorian national territory, which included block 23 in the Amazonian region of the Province of Pastaza.[27]

62. On July 26, 1996, in the presence of the Third Notary of San Francisco de Quito, the partnership contract for exploration of hydrocarbons and crude oil exploitation in block No. 23 of the Amazonian Region (hereinafter the "contract for oil exploration and exploitation" or "the contract with the CGC") was signed between the *Empresa Estatal de Petróleos del Ecuador* (PETROECUADOR) and the consortium composed of the CGC and the Petrolera Argentina San Jorge S.A.[28]

63. The area awarded under the CGC contract covered some 200,000 hectares that were home to the following indigenous associations and communities: Sarayaku[29], Jatun Molino[30], Pacayaku[31], Canelos[32], Shaimi[33] and Uyuimi.[34] Of these indigenous communities, Sarayaku is the largest both in terms of population and land size; 65% of the block 23 oil field is within the ancestral territory that legally belongs to the Sarayaku Community.

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[26] Ibid.

[27] Partnership contract between the State of Ecuador and the firm *Compañía General de Combustibles*, dated July 26, 1996. Annex 11. Clause Two (2.1).

[28] Partnership contract between the State of Ecuador and the firm *Compañía General de Combustible*s, dated July 26, 1996 (hereinafter "the partnership contract"). Annex 11.

[29] Part of the Organization of Indigenous Peoples of Pastaza (OPIP); it has 132,000 hectares of legally recognized land.

[30] Part of the Association of Evangelical Indigenous People of the Pastaza (AIEPRA); it has 3,000 hectares of legally recognized land.

[31] Part of the Association of Indigenous Peoples of Pastaza (OPIP), it has 40,000 hectares of legally recognized land.

[32] Part of the Federation of Kichwa Nationalities of Pastaza (FENAKIPA/OPIP), it has 40,000 hectares of legally recognized land.

[33] Part of the Interprovincial Federation of the Achuar Nationality of Ecuador (FINAE), it has 24,000 hectares of legally recognized land.

[34] Part of the Federation of the Shuar Nationality of Pastaza (FENASH); the number of hectares it possesses is not indicated, nor whether they are legally recognized.

64. Under the contract concluded between the State and the oil company, the phase for seismic prospecting would last 4 years – which could be extended for another 2 years – starting as of the effective date of the contract, which was the date on which the Ministry of Energy and Mines, based on the Environmental Impact Assessment (EIA), approved the contract.[35] The contract also provided that the oil exploitation phase would last 20 years, with the possibility of extension.[36]

65. The contractor's obligations included, *inter alia,* preparation of the Environmental Impact Assessment (EIA)[37] and the performance of all efforts necessary to preserve the ecological balance within the exploration area of the block leased.[38] The Office of the Under Secretary for Environmental Protection of the Ministry of Energy and Mines, by way of the Office of the National Director of Environmental Protection, would be in charge of relations with the Community.[39] The contract also included a clause requiring that the company obtain from third parties any permits and/or rights of way and/or easements needed to get to the area specified in the contract or to move from one place to another within the area to conduct its activities.[40]

66. The contract also spelled out the parties' mutual obligations, which included, *inter alia,* that of interpreting and executing the contract in good faith,[41] applying to the respective ministry for expropriation, in the name of PETROECUADOR, of lands or other immovables or the creation of easements of any kind necessary to perform the contract, and obtaining these lands and easements once a social interest or public utility had been declared.[42]

67. Furthermore, within the first six months the contractor was to submit an Environmental Impact Assessment (EIA) for the exploration phase, as well as an Environmental Management Plan for the exploitation phase. The EIA was to contain, *inter alia,* a description of the natural resources, especially the forests and wild flora and fauna, and the social, economic and cultural aspects of the populations or communities living in the contract's area of influence.[43]

68. The consulting firm *Walsh Environmental Scientists and Engineers, Inc.*, retained by the CGC to do the EIA required under the partnership contract, conducted the assessment in 1997, which was approved on August 26 of that year for the seismic prospecting phase.[44] According to the information from the Ministry of Energy and Mines, the EIA project was not executed.[45]

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[35] Clauses 3.1.15 and 6.1 of the partnership contract. Annex 11.

[36] Clause 6.3 of the partnership contract. Annex 11.

[37] Clause 5.1.4 of the partnership contract. Annex 11.

[38] Clause 5.1.21 of the partnership contract. Annex 11.

[39] Clause 5.1.21.3 of the partnership contract. Annex 11.

[40] Clause 5.1.25 of the partnership contract. Annex 11.

[41] Clause 5.5.1 of the partnership contract. Annex 11.

[42] Clause 5.5.5 of the partnership contract. Annex 11.

[43] Clause 5.1.21.6 of the partnership contract. Annex 11.

[44] Walsh Environmental Scientists and Engineers, Inc. Environmental Impact Study for the seismic prospecting activities, Block 23, Ecuador: Final Report, Walsh Project number: 2921-010, May 1997; Annex 12. Report of the Ministry of Energy and Mines on the activities conducted in block 23. Annex 13.

[45] Report of the Ministry of Energy and Mines on the activities conducted in block 23. Annex 13; Memorandum No. 155 from the Ministry of Energy and Mines. Annex 14.

69. As required under the Substitute Regulation of the Environmental Regulations for Hydrocarbon Operations in Ecuador, on July 2, 2002 the updating of the Environmental Management Plan and of the Plan for Monitoring Seismic Prospecting Activities in Block 23 was approved.[46]

- *Facts that predated the seismic prospecting phase*

70. According to the petitioners, the oil company tried several times to negotiate for entrance into Sarayaku territory and tried to obtain the Community's consent for oil exploitation. It did this by offering money, both to individuals and to the group[47] and bringing in a medical caravan to provide medical care to a number of communities that are part of Sarayaku. In order to be treated, the individual had to sign a list, which was allegedly later converted into a letter sent to the CGC supposedly asking that the seismic prospecting activities be continued.[48]

71. Both the OPIP and the Organization of Kichwa People of Sarayaku objected to the methods that the CGC used to obtain consent. On November 22, 2002, the Vice President and Members of the Rural Parochial Board of Sarayaku filed a complaint with the Ombudsman's Office objecting to the CGC's presence within Sarayaku territory and to the searches that the military were conducting.[49] Later, Mr. Silvio David Malaver, a member of the Sarayaku Community, added his name to the complaint.[50] In response to these complaints, on November 27, 2002 the Ombudsman of Ecuador declared that all members of the Sarayaku Community were under his protection. He also stated that "no person, authority or civil servant may obstruct the freedom of movement – overland or by river- or communication between members of the Sarayaku [...]."[51]

72. On April 10, 2003, the Office of the Ombudsman for the Province of Pastaza issued a resolution on the November 2002 complaint in which it decided to give a partial endorsement to the complaint and resolved that the Minister of Energy and Mines and chairman of the board of directors of PETROECUADOR, as well as the attorney and legal representative of the CGC company were in full violation of articles 84(5) and 88 of the Constitution of Ecuador, ILO Convention No. 169, and Principle 10 of the Rio Declaration on Environment and Development.[52]

73. On November 28, 2002, the President of the OPIP filed a petition with the First Civil Court of Pastaza seeking constitutional *amparo* against the CGC and against Daymi Services.[53] The OPIP representatives stated that since 1999 the CGC had taken a number of measures to negotiate separate deals with communities and private individuals "thereby generating a number of disputes

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[46] Ibid.

[47] Decision taken by the Sarayaku Association-OPIP at the meeting held with the CGC on June 25, 2000. Annex 15; letter dated April 13, 2002, which the Sarayaku Association addressed to the Minister of Energy and Mines. Annex 16.

[48] Letter titled "COMMUNITY OF INDEPENDENTS OF SARAYAKU O.P.I.P AFFILIATED", undated Annex 17; list of signatures from the Chontayacu Community, signed December 31, 2002. Annex 18. Decision of the General Assembly of the "CAS – TAYJASARUTA", January 7, 2003. Annex 19.

[49] Office of the Ombudsman of the Province of Pastaza. Decision of April 10, 2003, Complaint No. 368-2002. Annex 20.

[50] Ibid.

[51] Office of the National Ombudsman. Statement in Defense dated November 27, 2002. Annex 21.

[52] Decision of the Office of the Ombudsman of the Province of Pastaza, April 10, 2003, Complaint No. 368-2002. Annex 20.

[53] The petition was also filed against Daymi Services, a CGC subcontractor. Petition of constitutional *amparo* that the Organization of Indigenous Peoples of Pastaza filed against the CGC and Daymi Services. Annex 5.

and impasses within [their] organizations, which had eroded [their] theretofore strong organization."[54]

74. In response to the *amparo* petition, on November 29, 2002, the judge ordered a precautionary measure, which was that "any current or imminent activity that [would] affect or threaten the rights [...] that are the subject of the petition" was to be suspended.[55] On December 12, 2002, the Pastaza District Superior Court sent a memorandum to the First Civil Judge of Pastaza, wherein it said that it had "discovered irregularities in your proceedings" [and stated that] the complete failure to act swiftly [on the] complaint is disturbing, given the social repercussions that the petition seeks to address [...]."[56]

75. On January 24, 2003, the Ministry of Energy and Mines stated that "on June 18, 19 and 22, 2002, in accordance with Article 37 of the Substitute Regulation of the Environmental Regulations for Hydrocarbon Operations in Ecuador, three public presentations were given [by the CGC] of the Environmental Management Plan, in the communities of Canelos, Pacayacu and Shauk."[57]

- *Seismic prospecting activities*

76. The seismic prospecting program proposed for block 23 covered an area of 633.425 Km.[58] At the outset the seismic testing was expected to last 6 to 8 months, depending on weather conditions. Within the prospecting area, paths were cleared to lay the seismic lines, and for camps, loading areas and heliports.[59]

77. Between October 2002 and February 2003, the oil company's activity within block 23 advanced 29% into the interior of Sarayaku territory. In that period, the CGC pumped 467 wells with a total of 1433 kilograms of explosives[60] and left the explosives planted on the lands of the Indigenous Peoples living in block 23.[61] As of December 2008 the explosives were still on Sarayaku territory.[62]

78. On February 6, 2003, the Association of the Ecuadorian Hydrocarbons Industry reported that the CGC had declared bankruptcy and suspended the seismic prospecting work once and for all.[63]

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[54] Petition of constitutional *amparo* that the Organization of Indigenous Peoples of Pastaza filed against the CGC and Daymi Services. Annex 5.

[55] Decision of the First Civil Court Judge of Pastaza, on the petition seeking constitutional *amparo,* filed by the OPIP-Sarayaku (Block 23), November 29, 2002. Annex 22.

[56] Memorandum dated December 12, 2002, which the Office of the Chief Judge of the Superior Court of the District of Pastaza sent to the First Civil Court Judge of Pastaza. Annex 23.

[57] Ibid.

[58] Final Report on operations. Prepared by the *Compañía General de Combustibles* CGC, p. 27. Annex 24.

[59] Final Report on operations. Prepared by the *Compañía General de Combustibles* CGC. Annex 24; Explanation of the seismic prospecting process in general, prepared by the Ministry of Energy and Mines, March 7, 2006. Annex 25.

[60] Ministry of Energy and Mines. Certification of explosive charges distributed in block 23, according to information on record at the Office of the National Director of Environmental Protection. Annex 26.

[61] Seismic prospecting map, Annex 1.c.) Annex 27.

[62] XVII State Report on the provisional measures ordered by the Inter-American Court of Human Rights and currently in force. Annex 28.

[63] Report of the Ministry of Energy and Mines on the activities carried out in block 23. Annex 13.

5. Consequences of the seismic prospecting in the territory of the Sarayaku People

79. When the seismic prospecting phase resumed in November 2002 and with the CGC about to enter Sarayaku territory, the Association of Sarayaku Kichwa People declared a state of emergency which brought their daily economic, administrative and school activities to a halt for several months. To defend the borders of their territory and prevent the CGC from entering, the inhabitants of Sarayaku organized six encampments called *paz y vida,* along the perimeter of their territory.[64] The petitioners allege that during that period, the members of the Community lived in the jungle; the crops and food ran out and for three months the families lived off the land in the jungle. The members of the Community ceased to receive medical attention from the State.[65]

80. Pursuant to the Military Cooperation Agreement that the State concluded with the oil companies the State ordered a military presence in the territory of Sarayaku and its neighboring communities.[66] The unit operating in Block 23 was Jungle Brigade No. 17;[67] around Sarayaku specifically, four military bases were set up, namely: Jatún Molino, Shaimi, Pacayaku and Pozo Landa Yaku.[68] Between 2002 and 2005, the Canelos and Jatún Molino military outposts[69] conducted searches of members of the Sarayaku Community.

81. Once the seismic prospecting started within Sarayaku territory, the hostilities between members of that community, the CGC workers and other indigenous communities inside block 23 intensified. The Commission's file on this case contains information about a series of incidents supposedly perpetrated by members of the Kichwa People of Sarayaku against CGC workers and that were under investigation.[70] The members of the Sarayaku People reported and filed complaints about a series of assaults committed against them. Of these, the following stand out:

- *Incidents relating to freedom of movement*

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[64] Office of the First Notary of Pastaza Province. Sworn statement made by Ena Margoth Santi on November 13, 2007; Office of the First Notary of Pastaza Province, sworn statement made by Carmenza Soledad Malaver Capucha on November 13, 2007; map drawn up by the petitioners showing the location of the *Paz y Vida* camps inside Sarayaku territory. Annex 27.

[65] Office of the First Notary of Pastaza, sworn statements of Ena Margoth Santi and Carmenza Soledad Malaver Capucha, November 13, 2007. Annex 29.

[66] Second report submitted by the Ecuadorian State, in connection with the provisional measures ordered by the Inter-American Court of Human Rights, November 24, 2004. Annex 28.

[67] Office of the Ombudsman of the Province of Pastaza. Decision of April 10, 2003, Complaint No. 368-2002. Annex 20.

[68] The Ministry of Energy and Mines reported that during a meeting held in the Sarayaku Community on February 3 and 4, 2003, a resolution was adopted to "suspend the military and police presence in the Sarayaku zone." Ministry of Energy and Mines, Report on activities conducted in block 23. Annex 27; Map "of the petro-military fence" as drawn up by the petitioners. Annex 20; Office of the Ombudsman of the Province of Pastaza. Decision of April 10, 2003, Complaint No. 368-2002; Ministry of Energy and Mines of Ecuador, Report on the activities conducted in block 23. Annex 13.

The military outpost located in the Community of Jatun Molino was set up in January 2003 and initially was manned by 30 people. Later that number dropped to 5. Hearing with witnesses, held on March 13, 2006 during the Commission's 124th regular session. Witness Rubén David Gualinga. Second report presented by the Ecuadorian State in connection with the provisional measures ordered by the Inter-American Court of Human Rights, November 24, 2004. Annex 28.

The Landayaku well is located north of Sarayaku territory, in block 10, leased in 1989.

[69] Second Report of the Ecuadorian State to the Inter-American Court. Annex 28.

[70] Ecuador's Ministry of Energy and Mines, report on the activities conducted in block 23. Annex 13. August 26, 2003 memorandum signed by the CGC and addressed to the Attorney General's Office. Annex 30. Final topography report 2D Block 23 2002, "salient events" prepared by the *Compañía General de Combustibles* CGC, p. 18. Annex 31.

82. On January 13, 2003, townspeople of Jatún Molino, standing on the banks of the Bobonaza River, fired on members of the Sarayaku Community who traveling on the river by canoe. These events were reported to the Political Agency of Sarayaku Parish.[71]

83. Later, on July 6, 2003, a meeting was held among the Canelos, Pacayacu and Sarayaku associations where the following decision was taken:

> [...] Although it has read the Constitution of Ecuador, the Pacayacu Community is proposing that within one month's time, the Association of Indigenous Centers of Sarayaku sit down with the Government of Ecuador for a dialogue on the issue of oil exploration and exploitation in block 23; should the government, under pressure from the Sarayaku People, refuse to resume the seismic prospecting, the OPIP pledges to find, within the space of three months, the funding to finance the project that would not be completed under the contract signed with the CGC oil company [...] The Canelos Association proposes to allow free passage provided the Sarayaku association allows the CGC to carry on.
>
> The Sarayaku Association is rejecting this proposal and states that it will neither sell its territory nor exchange it for passage along the Bobonaza River, much less open it up for oil exploitation.
>
> Therefore, the Canelos and Pacayacu hereby resolve that they will not allow free passage to the members of the Sarayaku association until the three associations have come to a second agreement.[72]

84. Because the territory of Sarayaku was "threatened by the militarization of block 23", on December 1, 2003 the Association of Sarayaku Kichwa sent a communication to the members of the Canelos community to invite them to participate in the march for *paz y la vida* [peace and life] in Puyo on December 5 and 6.[73] In answer to this communication, on December 2, 2003, the Association of Kichwa Indigenous People of Canelos "*Palati Churicuna*" issued a circular announcing that it had decided not to participate in the march and warned that "as is known throughout the province [...] freedom of movement is completely suspended in the case of those who are flatly opposed to the oil issue."[74]

85. On December 4, 2003, Police Lieutenant Wilman Aceldo met with the President of the Canelos Parish Board to ask about the circular. He was told that the document had been sent to the offices of Tayjasaruta in Sarayaku, to Radio Mía and Radio Puyo and to the Sarayaku offices. The President of the Canelos Parish Board also warned the lieutenant that if "Canelos' decisions not to allow passage through Canelos territory were not respected, clashes beyond his control [would ensue]."[75]

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[71] Republic of Ecuador, Political Agency of Sarayaku Parish, certification signed by Mr. Edgar Gualinga, Political Lieutenant of Sarayaku Parish, June 13, 2003. Annex 32; legal-anthropological report. Annex 3; Eighteenth Notary, Dr. Enrique Díaz Ballestero, Quito, Ecuador, sworn statement given by Mr. Segundo Lenin Reinaldo Gualinga Gualinga on June 17, 2003. Annex 29, and certified copy of his identification document Annex 33, and certification of Sarayaku Political Lieutenant, Mr. Edgar Gualinga, June 13, 2003. Annex 32.

[72] Report of the Meeting among the Canelos, Pacayacu and Sarayaku Associations, July 6, 2003. Annex 34; Report prepared by Pastaza Provincial Police Command No. 16. Annex 35.

[73] Report of the Canelos Parish Board on the clash that occurred between the Canelos Community and the Sarayaku Community, signed by Mr. Cleber Toquetón, president of the Canelos Parish Board, no date. Annex 36.

[74] Ibid.

[75] Report of the Canelos Parish Board on the clash that occurred between the Canelos Community and the Sarayaku Community, signed by Mr. Cleber Toquetón, president of the Canelos Parish Board, no date. Annex 36. Police report dated December 4, 2004. Annex 37; photographs of the injured. Annex 38.

86. That same day, when members of the Kichwa People of Sarayaku were on their way to the march in Puyo, they were attacked and assaulted by members of the Canelos Community, with police looking on.[76] Police Lieutenant Aceldo Argoti, who was at the scene of these events, said the following:

> [...] all the townspeople [of Canelos] were gathered to stop the people from Sarayaku from traveling to Puyo, to attend the *paz y vida* march [...]
>
> I went as far as the Cuyas sector to await the arrival of the people from Sarayaku. At around 1:00 p.m., five people arrived, but from there on the people of Canelos flatly refused to allow anyone to pass; approximately 500 meters from where we were standing, they cut down a tree to block the way and prevent us from leaving [...] our personnel immediately gave them protection, to avoid further misfortunes [...] on the other side of the bridge, near the school, about 110 people from Sarayaku had gathered [...] so we manned the bridge with a police barricade, but our efforts were not sufficient. Armed with sticks, they broke through our police barricade and started after the people from Sarayaku. We did everything possible to avoid the clash. But they chased them for ten minutes and caught up with them, whereupon a fight broke out. A number of people were injured in the fight.[77]

87. Members of the Kichwa People of Sarayaku were injured in these events, among them the following: Hilda Santi Gualinga, Silvio David Malaver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luís Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejando Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga and Cesar Santi[78].

88. In response to the events described above, on December 5, 2003 the Office of the Ombudsman of the Province of Pastaza launched its own inquiry and issued a decision that found that leaders and members of the Canelos Indigenous Community were responsible for:

> (1) a flagrant violation of the right to travel freely though the national territory, a right guaranteed and recognized in Article 23-14 of the Constitution of the Republic; (2) an offense criminalized and punished under Article 129 of the Criminal Code; and (3) a violation of Article 12(1) of the International Covenant on Civil and Political Rights.[79]

89. Based on the police reports of December 4 and 5, 2003, the Pastaza District Attorney's Office launched a preliminary inquiry on December 9, 2003, and ordered that a forensic examination be done of the injured.[80]

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[76] Initial inquiry order from the Office of the Ombudsman of Pastaza Province, Puyo, December 5, 2003. Annex 39. Preliminary Inquiry, signed by the Prosecutor from the Public Prosecutor's Office, December 9, 2003. Annex 40. There are three reports from Pastaza Provincial Police Command No. 16: one dated December 4, 2003, signed by Police Lieutenant Wilman Oliver Aceldo Argoti, and two dated December 5, 2003, signed by Police Lieutenant Patricio Campaña and Police Major Aníbal Sarmiento Bolaños. Annex 41. Report of the Canelos Parish Board on the clash that occurred between the Canelos Community and the Sarayaku Community, signed by Mr. Cleber Toquetón, president of the Canelos Parish Board, no date. Annex 42. List of persons alleged to have injured the members of the Kichwa People of Sarayaku on September 4, 2003. Annex 43. Eleven statements from 36 of the people accused in these events. Annex 29.

[77] Report submitted to the Commandant of Pastaza Provincial Police Command No. 16, dated December 4, 2003, signed by Police Lieutenant Wilman Oliver Aceldo Argoti. Annex 41.

[78] Medical certificates issued by the Public Prosecutor's Office, Forensic Medicine and Sciences System, December 9, 2003. Annex 44. Report of Pastaza Provincial Police Command No. 16, dated December 5, 2003, signed by Police Lieutenant Patricio Campaña. Annex 41.

[79] Initial inquiry order from the Office of the Ombudsman of Pastaza Province, Puyo, December 5, 2003. Annex 45.

[80] Preliminary Inquiry, signed by the Prosecutor from the Public Prosecutor's Office, December 9, 2003. Annex 46.

90. On April 10, 2005, the Canelos Assembly resolved to allow members of the Sarayaku Community to travel via the Bobonaza River through its sector "provided they comply with the resolutions adopted on June 6, 2003 in Pakayaku and that they drop the 23 legal cases brought against members of the Canelos Community."[81]

- *Episodes related to alleged arbitrary detentions*

91. On January 25, 2003, Reinaldo Alejandro Gualinga Aranda, Elvis Fernando Gualinga Malver, Marco Marcelo Gualinga Gualinga and Fabián Grefa, all members of Sarayaku, were detained by State agents within Sarayaku territory "because of the danger the subjects posed [...] as they had weapons and explosives in their possession." They were later flown by a CGC helicopter to the city of Chonta, and then driven by police in company cars to the city of Puyo, where they were handed over to the Puyo police and later released.[82]

92. On October 7, 2003, the First Criminal Court of Pastaza issued orders to take Reinaldo Alejandro Gualinga Aranda, Elvis Fernando Gualinga Malver, Marco Marcelo Gualinga Gualinga, Yacu Viteri Gualinga and Fabián Grefa into preventive custody on charges of theft and aggravated assault.[83] As of the date of this report, the Commission has been informed that the orders to incarcerate Elvis Gualinga, Reinaldo Gualinga and Fabián Grefa were nullified and the charges against them dismissed. Marcelo Gualinga Gualinga was sentenced to one year in prison for the crime of possession of explosives and was released upon completion of his sentence.

- *Violations of the personal integrity of members of the Sarayaku Community*

93. On January 29, 2003, Marisela Yuri Gualinga Santi and Tatiana Gualinga Dacha, then young girls and members of the Sarayaku Community, were stopped by an Army patrol, accompanied by CGC workers. The CGC workers threatened the two girls. According to one member of the Sarayaku Community who was the father one of the girls, the girls were not raped only because the soldiers intervened.[84]

94. On April 23, 2004, José Serrano Salgado, attorney and legal counsel for the Sarayaku Community, was allegedly attacked and assaulted by three armed men wearing hoods who warned him to stop defending Sarayaku. That same day, attorney Serrano filed a complaint with the Pichincha District Attorney's Office.[85]

95. In December 2004, Mr. Marlon Santi, a leader of the Sarayaku Community and CONFENAIE candidate for president, filed a complaint with the Attorney General of Ecuador in which he asserted the following:

> On December 21 and 22, 2004, as I in the city of Otavalo to participate in the CONAIE Congress held to elect the new president –an office for which I was a candidate- I received

[81] Order of the Inter-American Court of Human Rights, July 6, 2004, paragraph 32, letter p.

[82] First Criminal Court of Pastaza, October 7, 2003. Annex 47. Report of the National Prosecutor, September 27, 2003. Annex 48. Eighteenth Notary, Quito, Ecuador, sworn statement of Mr. Reinaldo Alejandro Gualinga Aranda, February 6, 2003. Annex 29. Request dated October 1, 2003, in which the Public Prosecutor's Office asked the judge to order preventive detention. Annex 49. Memorandum dated March 13, 2003, signed by the Commandant of Pastaza's 17th Brigade. Annex 50.

[83] First Criminal Court of Pastaza, October 7, 2003. Annex 47.

[84] Video taken in January 2003. Annex 51.

[85] Pichincha District Attorney's Office, received April 23, 2004. Annex 52.

> calls from telephone number 09507842. I was told they were going to kill me, and that I should withdraw my candidacy for the office of president; if not I would be dead within twenty-four hours [...].
>
> I have to say that this is one of many complaints that we have filed to have those responsible for these events investigated, tried and punished, yet we have not had a single encouraging response in any of the cases [...].
>
> Having said this, I am filing this complaint about this call, which is a punishable offense under the law and that poses a threat to my physical and mental integrity. But it is also an act calculated to persecute and terrorize my Community. In my capacity as an indigenous leader, I am asking you to please launch the necessary investigation to ascertain the whereabouts of those responsible for this act.[86]

96. Because of the attacks on Mr. Marlon Santi, the United Nations Special Rapporteur on the fundamental rights and freedoms of indigenous peoples, and the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the U.N. Secretary-General's Special Representative on the Situation of Human Rights Defenders jointly issued an urgent call to the State because:

> It was feared that Mr. Marlon Santi's aggression could be connected to the victim's intention to attend a meeting in Costa Rica on 3 March regarding the case presented by the indigenous community of Sarayaku to the Inter-American Commission on Human Rights against the Government of Ecuador. In this context, the Special Rapporteur [...] remind[ed] the Government of the previous urgent appeals regarding the campaign of intimidation and defamation suffered by the indigenous community of Sarayaku because of their mobilization against the activities of the Argentine oil company *Compañia General de Combustibles*.[87]

Destruction of sacred places

97. In July 2003, the CGC destroyed at least one site of particular importance in the religious and spiritual life of the members of the Sarayaku community, namely the property of the spiritual leader (Yachak or shaman) Cesar Vargas.[88] The facts were confirmed by the First Notary of Puyo, who wrote the following:

> [...] At the place known as PINGULLU, a tree approximately twenty meters tall and one meter in thickness, whose name is LISPUNGU, had been destroyed. [...] As night fell [...], we spoke with the elderly shaman Cesar Vargas [...] who said that [...] employees of the oil company had made their way into his sacred forest in PINGULLU and had destroyed all the trees there, especially the great tree of the Lispungu. He has been left powerless to get his medicine to cure the illnesses of his children and relatives. [...].[89]

6. Reactivation of the oil activities

98. On May 8, 2009, the Management Board of PETROECUADOR decided to lift the suspension of activity in blocks 23 and 24, which had been ordered on February 6, 2003 and

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[86] Complaint that Mr. Marlon Santi and his attorney José Serrano filed with the Attorney General of Ecuador. Annex 53.

[87] United Nations, Economic and Social Council (E/CN/.4/2005/88/Add.1) Human Rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, paragraph 41.

[88] First Notary of Pastaza Province, Dr. Andrés Chacha Gualoto. Notarized Record dated July 20, 2003. Annex 54.

[89] Ibid.

ordered that certain activities specified in the partnership contracts be immediately resumed.[90] The State informed the Commission that it had undertaken negotiations with the CGC to terminate the partnership contracts in question.[91] As of this writing, the Commission has no information on the outcome of that process

C. THE LAW

1. Articles 21 (the right to property), 13 (freedom of thought and expression) and 23 (right to participate in government) of the American Convention, in relation to Article 1(1) thereof

99. Article 21 of the Convention provides that:

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
> 2. 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 according to the forms established by law.
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

100. Article 13(1) of the American Convention reads as follows:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

101. Article 23(1) of the Convention states that "[e]very citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives [...]".

a. The right to property of indigenous peoples

102. The case law of the inter-American human rights system has repeatedly recognized indigenous peoples' right to property over their ancestral territories and the duty of protection that follows from Article 21 of the American Convention. The Inter-American Court has written that "[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[92] The Court has also held that "[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[93]

103. The Court has added that:

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[90] Resolution No. 080-CAD-2009-04-20 of May 8, 2009 from the Management Board of PETROECUADOR. Annex 55.

[91] Memorandum dated July 21, 2009 from the Ministry of Justice and Human Rights. Memorandum from the Ministry of Mines and Petroleum, July 11, 2009. Annex 57.

[92] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, paragraph 149.

[93] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community.* Judgment of August 31, 2001. Series C No. 79, paragraph 149. See also in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community.* Judgment of March 29, 2006. Series C No. 146, paragraph 222.

> This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.[94]

104. To give effect to this right, the Court has held that:

> [T]he close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element deriving therefrom, must be secured under Article 21 of the American Convention. On the matter, the Court, as it has done before, is of the opinion that the term "property" as used in Article 21, includes "material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value.[95]
>
> To guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values. In connection with their milieu, their integration with nature and their history, the members of the indigenous communities transmit this non-material cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities.[96]
>
> The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.[97]

105. The Court has also recognized the right of indigenous peoples to live freely on their ancestral territories.

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[98]

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[94] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community.* Judgment of March 29, 2006. Series C No. 146, paragraph 120.

[95] I/A Court H.R., *Case of the Yakye Axa Indigenous Community.* Judgment of June 17, 2005. Series C No. 125, paragraph 137, and I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, paragraph 149; and I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community.* Judgment of March 29, 2006. Series C No. 146, paragraph 120.

[96] I/A Court H.R., *Case of the Yakye Axa Indigenous Community.* Judgment of June 17, 2005. Series C No. 125, paragraph 154.

[97] I/A Court H.R., *Case of the Yakye Axa Indigenous Community.* Judgment of June 17, 2005. Series C No. 125. paragraph 135.

[98] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, paragraph 149. See also in I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community.* Judgment of March 29, 2006. Series C No 146, paragraph 222.

106. In the case *sub examine,* the Kichwa People of Sarayaku have possessed their ancestral territory from time immemorial, a situation that the State acknowledged with the May 12, 1992 land grant. Subsequently in July 1996, Ecuador signed a partnership contract with the CGC for exploration and exploitation of block 23, located in the province of Pastaza, which is the home to the Kichwa people and other peoples. It was not until November 2002 that the CGC began the phase of seismic prospecting within the territory of the Sarayaku People.

107. In articles 63 and 4, Ecuador's 1996 Constitution guaranteed the right to property and the indigenous peoples' right to nondiscrimination. In Article 44, the Constitution guaranteed "the right of the people to live in the healthy and ecologically balanced environment that is a guarantee of sustainable development."

108. On April 14, 1998, Ecuador approved Convention No. 169 of the International Labour Organisation (ILO) on Indigenous and Tribal Peoples in Independent Countries.[99] In the chapter on land, the ILO Convention provides that governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

109. Ecuadorian law contains a series of provisions that have the rank of constitutional and lesser laws on the rights of Indigenous Peoples. Chapter 5 of the 1998 Constitution of Ecuador upholds the collective rights of Indigenous and Afro-Ecuadorian Peoples[100] and provides the following with respect to the right to property:

> Article 84: In keeping with this Constitution and the law and in furtherance of respect for public order and human rights, the State shall recognize and guarantee the following collective rights of Indigenous Peoples:
>
> - To preserve, *in perpetuam,* ownership of the communal properties, which shall be inalienable, not subject to attachment, and indivisible, although the State retains its right to declare said properties public domain. These lands shall be exempt from property tax.
> - To maintain ancestral possession of the community lands and to have them awarded *gratis,* in accordance with the law;
> - To participate in the use of, profits from, and management and conservation of the renewable natural resources on their lands.
> - To preserve and promote their practices for managing the biodiversity and their natural surroundings.
> - Not to be displaced, as Peoples, from their lands.
> - To collective intellectual property of their ancestral knowledge; its enhancement, use and development in accordance with the law.
> - To maintain develop and administer their cultural and historic heritage.

110. In addition to these provisions of the Constitution, there are laws that concern the ancestral territory of the Indigenous Peoples and that are intended to protect them and promote the most suitable methods of community production.[101].

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[99] Official Record No. 304 of April 24, 1998.

[100] Constitution of Ecuador, Chapter 5, Collective Rights, Section One, Indigenous, Black and Afro-Ecuadorian Peoples, articles 83 to 85.

[101] Agrarian Development Act, Codification 2004-02, Published in a supplement of Official Record No. 315, April 16, 2004.

Article 3: Promotion, development and protection of the agrarian sector shall be through establishment of the following policies: [...] f) One of ensuring the factors that come into play in agrarian activity to enable full exercise of the right to individual and collective ownership of land, its routine and peaceful conservation and its voluntary transfer, without

111. The Commission finds that under Ecuador's domestic laws, Ecuador had an obligation to adopt special measures to ensure to the Indigenous Peoples the effective enjoyment of their human rights and fundamental freedoms, without restriction, and to include measures that promote the full effect of their social, economic and cultural rights, while respecting their social and cultural identity, their customs, traditions and institutions.

112. Furthermore, the Inter-American 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, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.[102]

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undermining the legal security of community property or imposing any limitations other than those than the present law specifically prescribes. Special attention shall be given to facilitate the right to obtain property title. The present law seeks to ensure the security of individual and collective tenure of the land and to strengthen community property from the standpoint of enterprise and ancestral production.

Article 49: The State shall protect the lands of the INDA [Instituto Nacional de Desarrollo Agrario] (National Agrarian Development Institute) which shall be for the development of the *montubio,* indigenous and Afro-Ecuadorian peoples and shall give legal title to those lands by awarding, *gratis,* lands that have been in the ancestral possession of the communities or ethnic groups on condition that their own traditions, cultural life and social organization be respected. Under INDA's responsibility, these communities or ethnic groups shall introduce the elements that help to improve production systems, empower ancestral technologies, acquire new technologies, restore seed quality and diversify seed stock, and develop other factors that afford them higher standards of living. The procedures, methods and instruments used must preserve the ecological system.

2) The *Comunas* Organization and Regime Act. Codification 2004-04. Published in a supplement of Official Record No. 315 of April 2004.

Article 1. Establishing and naming *comunas*. "Every population center not classified as a parish, and that currently exists or will exist in the future, and whether it is called a village, annex, neighborhood, county, community, group or any other designation, shall be called a *comuna,* in addition to the name it has always had or the name it is given when founded."

Article 3. Legal personality of *comunas*. "The *comunas* shall be governed by this law and shall have juridical personality by the mere fact that they adhere to this law.

In applying the present law, exercise of the collective rights of the indigenous peoples who identify themselves as nationalities having ancestral roots shall be guaranteed, as shall the exercise of the collective rights of black or Afro-Ecuadorian Peoples, and the communities that are part of these groups in accordance with Article 84 of the Constitution of the Republic."

3) Environmental Management Act. Codification 004-019, published in Official Record 418 of September 10, 2004.

Article 16. Application of the National Territorial Zoning Plan is mandatory. The Plan shall contain the economic, social and ecological zoning of the country, based on the land-use capacity of the ecosystems, the need to protect the environment, respect for the ancestral ownership of communal lands, conservation of natural resources and the natural heritage. It must be tailored to balanced development of the regions and the physical organization of the space. Zoning shall not imply any alteration of the political-administrative division of the State.

4) The Unoccupied Lands and Colonization Act. Codification 2004-03. Published in a Supplement of Official Record 315, April 16, 2004.

Article 1. The lands listed below are unoccupied and are thereby among the holdings of the National Agrarian Reform Institute: [...]

The ancestral community lands of the indigenous peoples who identify themselves as nationalities having ancestral roots shall be guaranteed, as shall the exercise of the collective rights of black or Afro-Ecuadorian peoples and the communities that are part of these groups in accordance with Article 84 of the Constitution of the Republic, shall not be considered unoccupied lands.

[102] I/A Court H.R., *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, paragraph 96; I/A Court H.R., *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, paragraph 127; I/A Court H.R., *Case of Ivcher Bronstein*. Judgment of September 24, 1999. Series C No. 54, paragraph 154; I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 144; I/A Court H.R., *Case of the*

113. In addition to the guidelines cited in the preceding paragraph, in the specific case of Indigenous Communities the Inter-American Court has written that States must take the following considerations into account when imposing limits on the Indigenous Peoples' right to ownership:

> Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.[103]
>
> Furthermore, in analyzing whether restrictions on the property right of members of indigenous and tribal peoples are permissible, especially regarding the use and enjoyment of their traditionally owned lands and natural resources, another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.[104]
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> In accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan")[105] within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.[106]

114. Furthermore, the Court was unequivocal when it held that, "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions [...]."[107]

115. Thus, the case law of the inter-American system of human rights has established that States have an obligation to ensure that Indigenous Peoples effectively participate, in

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Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006. Series C No. 146, paragraph 138; I/A Court H.R., I/A Court H.R., *Case of the Saramaka People*. Preliminary, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, paragraph 128.

[103] I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 147.

[104] I/A Court H.R., *Case of the Saramaka People. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, paragraph 128. *Cf. e*.g. United Nations Human Rights Committee, *Länsman et al. v. Finland (fifty-second session, 1994),* Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1994, November 8, 1994, paragraph 9.4 (which states that a State may be allowed to conduct measures that have a certain limited impact on the way of life of persons belonging to a minority, provided this does not entirely extinguish the Indigenous People's way of life)..

[105] By "development or investment plan" the Court means any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.

[106] I/A Court H.R., *Case of the Saramaka People. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, paragraph 129.

[107] I/A Court H.R., *Case of the Saramaka People*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, paragraph 134.

accordance with their customs and traditions,[108] in the plans for development, investment, exploration and mining on indigenous lands. Implicit in this safeguard is the obligation to consult those Peoples or Communities beforehand.

116. As this chapter will show, in the instant case the State's restrictions on the right of the Indigenous Community of Sarayaku to use and enjoy their territory have not been explained or justified, thereby violating Article 21 of the American Convention to the detriment of the Indigenous Community of Sarayaku and its members.

b. Right of Indigenous Peoples and Communities to prior consultation

117. In the present case, the State has alleged that at the time the oil company entered Sarayaku territory, allegedly without consulting the Community beforehand and without its consent, the State's obligation to consult did not yet exist. The State observes that it was not until 1998 that this right was introduced into the Constitution; ILO Convention No. 169 was ratified later. According to the State, based on the Vienna Convention of the Law of Treaties, Ecuador "could hardly be expected to apply these instruments retroactively."

118. In the instant case, the Commission has taken as established fact that the Sarayaku Community has been in possession of their ancestral territory since time immemorial, a fact that the State itself acknowledged in the May 12, 1992 land grant. Then, on July 26, 1996, the State entered into a partnership contract with the CGC for crude oil exploration and exploitation in block 23; the Environmental Impact Assessment (EIA) that the company submitted to begin the seismic prospecting phase in that territory was approved on August 26, 1997. The seismic prospecting activities did not get underway until after July 2, 2002, when the State decided to update the EIA and ordered that the seismic prospecting phase of the project be resumed.

119. Moreover, the Commission has considered as a proven fact that on July 30, 2001, the Ministry of Defense signed a military cooperation agreement with the oil companies operating in the country. In it the State pledged to "guarantee the security of the oil facilities and the persons who work there." Based on that agreement, and with the beginning of the exploration phase, the Sarayaku territory was militarized.

120. The Inter-American Commission, through its country reports, its merits reports and its thematic reports has developed the content and scope of Article 21 of the Convention, in relation to the right of indigenous peoples to use and enjoy their territory. The Commission has developed the content and scope of Article 21 and has interpreted its dispositions in an evolutionary manner interpreting in a broad way the enjoyment and exercise of the rights recognized by the State in other articles, such as ILO Convention 169. Through that convention and through normative and case-law developments, international law has given a specific content to the right to prior consultation of indigenous people in situations that affect their territory.

121. In this sense, the Commission has pointed out that, in cases of activities done by or under the authorization of the State –through, for example, bidding processes or concessions- that would have a meaningful impact in the use and enjoyment of such right, it is necessary that States ensure that the affected indigenous people have information regarding the activities that would

[108] See also IACHR, 1997 Report on the situation of human rights in Ecuador, Chapter IX: "Certain individual rights guaranteed by the American Convention on Human Rights must be enjoyed in community with others, as is the case with the rights to freedom of expression, religion, association and assembly. The right to freedom of expression, for example, cannot be fully realized by an individual in isolation; rather, he or she must be able to share ideas with others to fully enjoy this right. The ability of the individual to realize his or her right both contributes to and is contingent upon the ability of individuals to act as a group. For indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture."

affect them. It is also important that indigenous people have the possibility of participating in the different processes to take decisions, and further, to the judicial protection and guarantees in case they consider that their rights are not being respected.

122. The Commission has applied the former principles in different contexts, including in relation to the bidding or concession of activities of exploitation of natural resources that affect areas where indigenous communities live and related to the possibility of indigenous peoples to use and enjoy their territories, as well as in relation to other consequences. In its report following the visit to Ecuador in 1995, the IACHR considered that it was imperative that "individuals have access to: information, participation in relevant decision-making processes, and judicial recourse."[109] Specifically, in relation to indigenous people, the Commission was informed of the fact that some of them were under "the imminent threat of profound human rights violations due to planned oil exploitation activities within their traditional lands." Consequently, it recommended that the State

> ... take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival. "Meaningful" in this sense necessarily implies that indigenous representatives have full access to the information which will facilitate their participation[110].

123. Following this line, in the Third Report on the Human Rights Situation in Colombia in 1999, the Commission referred to the oil-related activity within indigenous traditional territories, taking into account the guaranties of the right to property of the Uwa indigenous people. The Commission recommended that:

> The State should ensure that the exploitation of natural resources found at indigenous lands should be preceded by appropriate consultations with and, to the extent legally required, consent from the affected indigenous communities.[111]

124. In the same sense, in the Mary and Carrie Dann case presented to the Commission on April 2, 1993, the Commission analyzed the gold prospecting that was taking place pursuant to the authorization of the State in the Western Shoshone ancestral territory, without having adequately consulted them. In that regard, the Commission considered 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 as collectives. [...][112]

125. In the same sense, in the Maya Indigenous Communities case against Belize, the Commission referred, *inter alia*, to the concession granted by the State in 1993, to companies interested in timber harvesting. The Commission concluded that:

> the State, by granting [...] concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled [...], without effective consultations with and the informed consent of the Maya people and with resulting environmental

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109 IACHR, Report on the Situation of Human Rights in Ecuador 1997, Conclusions of Chapter VIII.

110 IACHR, Report on the Situation of Human Rights in Ecuador 1997, Conclusions in Chapter IX. HUMAN RIGHTS ISSUES OF SPECIAL RELEVANCE TO THE INDIGENOUS INHABITANTS OF THE COUNTRY.

111 IACHR, Report on the Situation of Human Rights in Colombia, Chapter X, 1999. Recommendation No. 4.

112 See in IACHR, Merits Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States), Annual Report of the IACHR 2002, para. 140.

> damage further violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people. [To that regard the Commission pointed out] that one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories. [...][113]

126. In that case, the Commission concluded that:

> The State violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people, by failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists.

127. Moreover, in 2007 the Commission referred to the right of prior consultation in its report on Access to Justice and Social Inclusion in Bolivia. The IACHR emphasized that:

> [...] the consultation procedure, in the sense of guaranteeing indigenous peoples' right to participate in matters that may affect them, is of much broader scope: it must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages. On the contrary, it must guarantee participation by indigenous peoples, through the consultation process, in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation. [...].[114]

128. In the Saramaka case against Suriname, the Inter-American Court addressed an indigenous people's right of consultation. It established that in a case where the State wants to limit the an indigenous people's right to property, it must ensure, *inter alia,* "the effective participation of the [indigenous] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan [...] within Saramaka territory [...].[115] For the Court, effective participation consists precisely in an indigenous people's right to prior consultation according to its own traditions and its right to give its free, prior, and informed consent according to its customs and traditions.116

129. In its judgment, the Court addressed the nature of the right to consultation. In the Saramaka case, the State of Suriname had ratified the American Convention, but had not recognized the tribal people's right to either property or consultation; nor had it recognized ILO Convention No. 169. The Court analyzed Article 21 of the American Convention based on Article 29(b) thereof, taking into consideration that the State had already ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Therefore, the Court held that pursuant to Article 29(b) of the American Convention, it could not interpret the provisions of Article 21 of the American Convention in a manner that restricted its enjoyment and exercise to a lesser degree than what was recognized in said covenants.

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113 IACHR. Merits Report No. 40/04, Case 12,053. Mayan Indigenous Communities of the Toledo District (Belize), October 12, 2004, paragraphs 142 and 153.

114 IACHR. *Report on Access to Justice and Social Inclusion. The Road Toward Strengthening Democracy in Bolivia*. Chapter IV, Rights of Indigenous Peoples and Peasant Communities, para. 248. Bolivia ratified ILO Convention No. 169 in 1991.

115 I/A Court H.R., *Case of the Saramaka People*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, paragraphs 127 and 128. The Court held that the Saramaka people were one of the six distinct Maroon groups in Suriname whose ancestors were African slaves and, although not indigenous to Suriname, they nonetheless had a relationship to their land and the distinctive cultural and political structures that indigenous peoples have.

116 I/A Court H.R., *Case of the Saramaka People.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, Series C. No. 172, para. 134.

130. Based on the *corpus iuris* developed by the organs of the system, the Commission considers that, under Article 21 of the Convention, at the time the State signed the contract with the CGC for exploration and exploitation of natural resources in the ancestral Sarayaku territory, the State of Ecuador was obliged to duly consult and inform the Sarayaku members in order for them to be able to participate in the process and, if they deemed it necessary, to seek judicial remedies.

131. The Commission observes that Ecuador has been a party to the American Convention since August 12, 1977, and to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights since March 6, 1969. ILO Convention No. 169 entered into force for Ecuador as of May 15, 1999. Article 84(5) of Ecuador's 1998 Constitution, which was in force until 2008, recognized the obligation of prior consultation.[117] The 1998 National Human Rights Plan[118] and the 2000 Law for Promoting Investment and Citizen Participation[119] also recognized the indigenous peoples' right to prior consultation.

132. In the instant case, the Commission has considered as proven fact that the oil exploration and exploitation activities started in 2002, after the State approved the updating of the environmental impact assessment. The militarization of the territory started that same year, pursuant to a military agreement signed in 2001 between the State and the oil companies.

133. Consequently, based on an evolutionary interpretation of Article 21 of the American Convention as it pertains to indigenous peoples' rights, and inasmuch as Ecuador ratified ILO Convention No. 169, Ecuador had an obligation to consult the Sarayaku people in advance and in a free and informed manner before approving the updating of the environmental impact assessment.

134. Given the foregoing, the Commission will now address the content and scope of prior consultation. Indigenous peoples' right to property is closely related to the exercise of other human rights, among them the right to receive information affecting their territory and the right to be consulted beforehand by the State regarding activities involving their territories.

135. It is obvious from the State's line of argument that it believes that the Sarayaku Community's right of access to information depends on whether an obligation of prior consultation exists. In the State's view, the Indigenous Peoples' right of access to information and the obligation of prior consultation were not exigible when the partnership contract for oil exploration and exploitation was signed in 1996, or when the Environmental Impact Assessment was approved to begin the phase of seismic prospecting, since at the time neither the 1998 Constitution nor ILO

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[117] That article made provision for the collective right of Indigenous Peoples "to be consulted on plans and programs to explore for and exploit non-renewable natural resources on their lands and that could adversely affect them either environmentally or culturally; to share in the benefits of those projects insofar as possible, and to receive compensation for any socio-environmental harm that those projects cause."

[118] Ecuador's National Human Rights Plan of June 18, 1998. Article 8(4). To establish as general objectives: To endeavor to consult the Indigenous Peoples before authorizing projects to explore for or mine renewables and nonrenewables on their lands and ancestral territories and examine the possibility of the Indigenous Peoples' receiving their fair share of any benefits the exploitation activities produce and their right to be compensated for any damages done.

[119] Law for Promoting Investment and Citizen Participation. Decree Law 2000-1. Published in Official Record 144 of August 18, 2000. Article 40. After the General Provisions, add the following unnumbered: Consultation. Before carrying out plans and programs to explore for and exploit hydrocarbons found on lands that the Ecuadorian State has assigned to indigenous Communities or to black or Afro-descendent peoples and that could adversely affect the environment, PETROECUADOR, its affiliates or franchises are to consult with the ethnic groups or communities. For that purpose, they shall endeavor to hold assemblies or public hearings to explain the plans and purposes of their activities, the conditions under which they will be carried out, how long they will last and the possible direct or indirect environmental impacts that the activities could cause on the Community or its inhabitants. A written public document or instrument shall be drawn up to record any acts, agreements or pacts that result from the consultations regarding the exploration and exploitation plans and programs.

Convention No. 169, ratified by Ecuador in 1998, was in effect for Ecuador. Both instruments establish the duty of prior consultation.

136. The Inter-American Commission has written that the right of access to information "comprises the positive obligation of the State to provide its citizens with access to the information in its possession, and the corresponding right of individuals to access the information held by the State."[120] The right of access to information is not simply the duty to provide information requested by a private individual. This right also involves the obligation to make government transparent[121] and to provide, at its own initiative, any information that the public (the citizenry in general or a particular group) requires, when possession of that information is essential for the exercise of other rights. In effect, when the exercise of the basic rights of the individual depends on whether that individual is able to know relevant public information, the State must provide that information promptly, fully and by accessible means.[122] The Commission has established that the right of access to information is vital to the exercise of other human rights, "particularly by the most vulnerable individuals."[123]

137. The Commission has observed that keeping indigenous communities accurately and fully informed of any outside interventions that might affect their territory is a condition *sine qua non* to properly guarantee the exercise of their right to communal ownership of their territory. Furthermore, given the close relationship that indigenous peoples have with their land, the right of access to information on potential outside intervention in indigenous territory, when that outside intervention could adversely affect the community habitat, may become an essential means of ensuring other rights, such as the group members' right to health and even their very right to exist as a community. Finally, the right of access to information concerning exogenous intrusions into indigenous territory is a condition *sine qua non* to ensure control over political decisions that could

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[120] IACHR. Annual Report 2008. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III: Inter-American Legal Framework of the Right to Freedom of Expression, paragraphs 140 and 142. Also, Article 4 of the IACHR's Declaration of Principles on Freedom of Expression (2000) provides that "Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right." See also: IACHR: Special Study of the Office of the Special Rapporteur for Freedom of Expression on the Right of Access to Information (2007); IACHR. Annual Report 2005. Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: Report on Access to Information in the Hemisphere; IACHR. Annual Report 2003. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: Report on Access to Information in the Hemisphere; IACHR. Report on Terrorism and Human Rights (2002), paragraphs 281-288; IACHR. Annual Report 2001. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Volume II. Chapter III: Report on Action with respect to *Habeas Data* and the Right of Access to Information in the Hemisphere.

[121] I/A Court H.R., *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, paragraph 77. In their 2004 joint declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression wrote that "Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest."(Joint Declaration on access to information and secrecy legislation, December 6, 2004, see at: http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=319&IID=2), which is particularly pertinent inasmuch as it states that information is a necessary precondition to the exercise of other basic rights. The importance of this obligation is also made clear in the resolution of the Inter-American Juridical Committee on "Principles on the Right of Access to Information (73º CJI/RES. 147 (LXXIII-O/08), Rio de Janeiro, Brazil, August 7, 2008, see at: http://www.oas.org/cji/CJI-RES_147_LXXIII-O-08.pdf), which states that: "Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable" (Principle 4).

[123] IACHR. Annual Report 2008. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III: Inter-American Legal Framework of the Right to Freedom of Expression. Article 9 of the Inter-American Democratic Charter provides that "the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation."

compromise that community's collective rights and the basic rights that would be affected by association.[124]

138. Specifically, the Commission has written the following:

> [o]ne of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories. As the Commission has previously noted, Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed 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 as collectives.[125]

139. The Inter-American Court, for its part, has held that Indigenous Peoples' exercise of their right of communal ownership requires, *inter alia, "*the State to both accept and disseminate information, and entails constant communication between the parties. [...] [that it be done] in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.*"*[126] As the Court has written, "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction [...] can question, investigate and consider whether public functions are being performed adequately"; the State thereby "encourages greater participation by the individual in the interests of society.*"*[127]

140. In cases such as the present one, access to information is vital for proper exercise of democratic control of the State's affairs in the exploration and exploitation of natural resources within the territory of indigenous communities, which is a matter of obvious public interest.[128.]

141. The right of access to information has special meaning and consequences[129] where Indigenous Peoples are concerned if the State is bound by the obligation to conduct prior consultations before any exogenous intervention could occur that might affect the indigenous territory in significant ways. Here the Commission recalls that there is a close relationship between Indigenous Peoples' right to prior consultation and the right to property recognized in Article 21 of the American Convention. That right implies that its *titulaire,* in this case the Indigenous People or Community and its members, may use, dispose of, derive profit from, and enjoy its territory.

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[124]IACHR. Case No. 12,503, *Mayan Indigenous Communities of the Toledo District* (Belize). October 12, 2004, paragraph 142.

[125]Ibid.

[126] I/A Court H.R., *Case of the Saramaka People*. *Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, paragraphs 133-134. Emphasis added.

[127] I/A Court H.R., *Case of Claude Reyes et al.,* paragraphs 86-87.

1. [128] I/A Court H.R., *Case of Herrera Ulloa*. Judgment of July 2, 2004, Series C No. 107, paragraph 127; I/A Court H.R., *Case of Ivcher Bronstein*. Judgment of February 6, 2001, Series C No. 74, paragraph 155; and IACHR. Annual Report 2008. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter 3: Inter-American Legal Framework of the Right to Freedom of Expression, paragraphs 33-37.

[129] Prior consultation is broader in scope than the right of access to information and endows the latter with specific juridical content that would not be exigible if the only obligation was the one specified in Article 13 of the Convention.

142. Inter-American case law has established that the obligation to consult exists whenever there are plans to build major or large-scale projects that could seriously compromise the ancestral territory of indigenous and tribunal peoples. The Court has written that:

> [...]Article 21 of the Convention does not *per se* preclude the issuance of concessions for the exploration and exploitation of natural resources in indigenous or tribal territories. Nonetheless, if the State wants to restrict, legitimately, the [...] right to communal property, it must consult with the communities affected by the development or investment project planned within territories which they have traditionally occupied, reasonably share the benefits with them, and complete prior assessments of the environmental and social impact of the project [...][130].

143. The right to prior consultation is not simply the indigenous people's right to be adequately informed of a possible project conducted within its territory; it also implies the right to play a real role in the decision-making process. In effect, while the right to prior consultation is not simply a matter of supplying information, that information is nonetheless a condition *sine qua non* for the consultation to be an effective consultation. It is a moment of truly intercultural dialogue in which the State is obliged to give serious consideration to the arguments made by the indigenous people and the values, principles and rights that could be infringed by the potential project, all of which must be done from a respectful and genuinely multicultural perspective.

144. A systematic reading of the case law and instruments governing the inter-American system for the protection of human rights reveals that the right of access to information as a precondition for exercise of the rights that flow from indigenous peoples' or communities' communal ownership and as a precondition for proper prior consultation in those cases in which consultation is required, creates a connection between an indigenous people's right to information and the State's obligation to provide accessible, sufficient and timely information on two aspects: (i) the nature and impact that an outside project would have on the property or resources the indigenous community owns, and (ii) the process of consultation that will be conducted and the reasons for it. This is the only way to ensure that the information supplied by the State will enable the communities to arrive at a truly free and informed decision with regard to the exploration and exploitation of the natural resources within their territories.[131]

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[130] 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.

[131] I/A Court H.R., *Case of the Saramaka People*, paragraphs 133-137; I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, paragraph 225; IACHR, Case 11,140, *Mary and Carrie Dann* (United States), paragraph 140; IACHR. *Case No. 12,503*, *Mayan Indigenous Communities of the Toledo District (Belize)*, paragraph 142; IACHR. *Access to Justice and Social Inclusion: the Road Toward Strengthening Democracy in Bolivia* (2007), paragraphs 246 and 248; IACHR, Draft American Declaration on the Rights of Indigenous Peoples, Article XVIII, paragraphs 5 and 6. See also, the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, where the Special Rapporteur wrote that "[a]ny development projects or long-term strategy affecting indigenous areas must involve the indigenous communities as stakeholders, beneficiaries and full participants, whenever possible, in the design, execution and evaluation stages. The free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary precondition for such strategies and projects. Governments should be prepared to work closely with indigenous peoples and organizations to seek consensus on development strategies and projects, and set up adequate institutional mechanisms to handle these issues." United Nations Economic and Social Council. *Indigenous Issues. Human Rights and Indigenous Issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, E/CN.4/2003/90, paragraphs 66 and 73. See also: International Labour Organisation. *Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989)*, articles 6, 7 and 15; United Nations Committee for the Elimination of Racial Discrimination. *Consideration of Reports Submitted by States Parties under Article 9 of the Convention. Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador,* CERD/C/62/CO/2 (2003), paragraph 16; International Labour Organisation. *Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries,1989 (No. 169), A Manual (2003),* pp. 15-20; United Nations Economic and Social Council, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* E/C.19/2005/3, pp. 13-14; United Nations General Assembly, *Resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples,* A/RES/61/295, December 10, 2007, Article 27; International Labour Organisation, *Guidelines on Indigenous Peoples' Issues.* United Nations Development Group, February 2008, p. 18; Constitutional Court of Colombia.

145. The information supplied by the State during prior consultations must be clear and accessible. This means that the information supplied is truly understandable, which also means, *inter alia,* that it must be disseminated in clear language and, where necessary, be given with the aid of an interpreter or in a language or dialogue that will enable the members of the indigenous communities concerned to understand it fully.[132] The information supplied must also be sufficient, i.e., suitable and complete enough so that if consent is given to the proposed project or activity, that consent is free of manipulation.[133]

146. The consultations must be "prior" because the information must be provided sufficiently in advance of any authorization or the start of negotiations, and must factor in the time that the consultation process itself will take and the time that the Indigenous Community will need to adopt its decision.[134] Having made these observations, the Commission must also point out that where the right of access to information is concerned, the right of indigenous peoples or communities to prior consultation also means, at a minimum, that the information provided will cover two different issues: the exploration or exploitation project that is planned and the consultation procedure the State wants to use.[135]

Judgment SU 039/97 (February 3, 1997), Judgment C-169/01 (February 14, 2001), Judgment C-891/02 (October 22, 2002), Judgment SU-383/03 (May 13, 2005), Judgment C-030/08 (January 23, 2008); and Judgment C-175 of 2009 (March 18, 2009). E/CN.4/2003/90., *op. cit*. Paragraphs 66, 68, 69, 74, 75, 76, and 77.

[132] Here the ILO has written that "[t]process of consultation must be specific to the circumstances and the special characteristics of the given group or community. Thus, a meeting with village elders conducted in a language they are not familiar with, e.g., the national language, English, Spanish, etc., and with no interpretation, would not be a true consultation." See International Labour Organisation. *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual (2003)*, p. 16. The United Nations Economic and Social Council has written that "[i]nformation should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand" and that "[c]onsent to any agreement should be interpreted as indigenous peoples have reasonably understood it. " United Nations Economic and Social Council. *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* E/C.19/2005/3, pp. 13 and 12. See also: I/A Court H.R., *Case of the Saramaka People,* paragraphs 133-137, and IACHR. *Access to Justice and Social Inclusion: the Road Toward Strengthening Democracy in Bolivia* (2007), paragraphs 246 and 248.

[133] The *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* convened by the United Nations, states that in the information delivery there should be "no coercion, intimidation or manipulation." United Nations Economic and Social Council. *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* E/C.19/2005/3, p. 12. Article 6.2 of ILO Convention No. 169 states that "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." The Constitutional Court of Colombia has written that the right to prior consultation means that. "the People or Community has full knowledge of projects intended to explore for or exploit the natural resources on the territories they occupy or that belong to them, the mechanisms, procedures and activities required to put those projects into action." Constitutional Court of Colombia, *Judgment SU 039/97 (February 3, 1997).* See also: I/A Court H.R., *Case of the Saramaka People*, paragraphs 133-137, and IACHR. *Access to Justice and Social Inclusion: the Road Toward Strengthening Democracy in Bolivia* (2007), paragraphs 246 and 248.

[134] The UNESCO Report stated that "'prior' should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes." United Nations Economic and Social Council. *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* E/C.19/2005/3, p. 12; International Labour Organisation. *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual (2003)*, p. 14. See also I/A Court H.R., *Case of the Saramaka People,* paragraphs 133-137; IACHR, *Access to Justice and Social Inclusion: the Road Toward Strengthening Democracy in Bolivia* (2007), paragraphs 246 and 248. In Judgment C-175 of 2009 (March 18, 2009) Colombia's Constitutional Court held that the timing issue has to do with the fact that "the Afro-descendent communities' participation should have the potential to materially influence the content of the measure."

[135] UNESCO's *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* E/C19/2005/3, states that informed consent "should imply that information is provided that covers (at least) the following aspects: a. The nature, size, pace, reversibility and scope of any proposed Project or activity; b. The reason(s) for or purpose(s) of the Project and/or activity; c. The duration of the above; d. The locality of areas that will be affected; e. A preliminary assessment of the likely economic, social, cultural and environmental impact , including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; f. Personnel likely to be involved in the execution of the proposed Project (including indigenous peoples, private sector staff, research institutions, government employees and others); g. Procedures that the project may entail.

147. The Commission recognizes the fact that no single model can be applied to all prior consultations, irrespective of the circumstances. On the other hand, however, the process cannot be left to the discretion of State authorities. The Commission is reminded that, as Article 6(2) of ILO Convention No. 169 states, "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." The Inter-American Court has emphatically stated that consultation "entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement."[136]

148. Furthermore, the terms for the consultation should also include a point at which the communities can know the reasons why their arguments were overridden, if that is the case. The terms should also establish the State's duty to provide clear, sufficient and timely information on the compensation being proposed should it be necessary to redress harm done. On this point, the Commission has stated clearly that the State "must also ensure that such procedures will establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development."[137] Finally, it is the duty of the State –not of the indigenous peoples or communities- to show that in the instant case, both dimensions of the right to prior consultation were effectively guaranteed.

149. As the Commission has established in this chapter, before authorizing or going forward with the seismic prospecting activities, the State should have consulted the Sarayaku Indigenous Community, since these activities could have a serious adverse effect on its ancestral territory. In a framework of consultations, the State should have take care to provide clear, sufficient and prior information on the nature and impact of the planned activities and on the process of prior consultations.

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[136] I/A Court H.R., *Case of the Saramaka People*, paragraphs 133-134. See also, International Labour Organisation, *Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989).* In this connection, the ILO has written that good faith means "respect for each others' interests, values and needs" and that "representativity" has to do with whether or not the process is being "developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected." International Labour Organisation. *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual (2003)*, p. 16. See also, Constitutional Court of Colombia, *Judgment C-030/08 (January 23, 2008).*

[137] In that same report, titled *Access to Justice and Social Inclusion: the Road Toward Strengthening Democracy in Bolivia* (2007), the IACHR clearly states that: "[t]he consultation procedure, in the sense of guaranteeing indigenous peoples' right to participate in matters that may affect them, is of much broader scope: it must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages. On the contrary, it must guarantee participation by indigenous peoples, through the consultation process, in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation." IACHR, *Access to Justice and Social Inclusion: the Road Toward Strengthening Democracy in Bolivia* (2007), paragraph 248. Also, in its *Judgment SU 039/97 (February 3, 1997),* Colombia's Constitutional Court wrote that "when an agreement or a negotiated settlement is not possible, the decision taken by the authority must be devoid of any arbitrariness or authoritarianism; therefore, it must be objective, reasonable and suited to the constitutional purpose that requires that the State protect the social, cultural and economic identity of the indigenous people. Mechanisms must be worked out to mitigate, correct or restore the effects that the measures of the authority cause or can cause that are detrimental to the People or its members." Constitutional Court of Colombia. Judgment *SU 039/97 (February 3, 1997).* This ruling was reaffirmed by the Colombian Court in Judgment *C-175 of 2009 (March 18, 2009)* where the Court held that if the People's consent is not secured, the State retains its authority to adopt a final decision in the matter, but that its exercise of that authority (i) must be "devoid of any arbitrariness and authoritarianism; (ii) be based on criteria of objectivity, rationality and proportionality as to the degree to which the traditional communities' interests are affected; (iii) make provision for suitable means by which to mitigate the impact of the measure on those interests, both at the individual level and the collective level, all with a view to preserving the practices that shape the ethnic and cultural diversity."

150. According to the petitioners, on a number of occasions the CGC attempted to negotiate its way into Sarayaku territory and attempted to obtain its consent for the oil drilling. They also allege that on one occasion, the CGC brought a medical caravan in to treat the members of the Sarayaku Community who, in order to be treated, had to put their names on a sign-in sheet. That list was then affixed to a letter to the CGC in support of its continuing the seismic prospecting work. The Sarayaku authorities filed complaints with the Office of the Ombudsman of the Province of Pastaza and with the First Civil Court of Pastaza. There is also the fact that the Ministry of Energy and Mines stated that on "June 18, 19 and 22, 2002 [the CGC gave] three public presentations of the Environmental Management Plan in the communities of Canelos, Pacayacu and Shauk," but there was no mention of Sarayaku.

151. It is evident from the Commission's file on this case that the State did not provide the Sarayaku Community with clear, sufficient and timely information, and did not engage in the prior consultations on the activities to explore for and exploit natural resources on its territory, either before the partnership contract with the CGC was signed in 1996 or when the start of the seismic prospecting activities was ordered in 2002.[138]

152. By failing to inform or consult with the Kichwa People of Sarayaku about a project that would have a direct impact on their territory, the State failed to comply with its obligations under international law and under its own domestic laws, which were to ensure that the indigenous communities were able to participate, through their own institutions and according to their own values, uses, customs and forms of organization, in the decision-making on issues and policies that affect or can affect the cultural and social life of the indigenous communities.

153. The petitioners have alleged that the State did not allow members of the Sarayaku community to have a voice in the decisions that led to the seismic prospecting within their territory, even though the State itself had pledged to establish the means to enable the interested communities to participate freely, to the same degree allowed to other sectors of the population and at all levels, in the adoption of decisions of concern to them.

154. In the case of the political rights of the indigenous peoples or communities, Article 23 of the American Convention must be interpreted as a function of the provisions of other instruments for the protection of human rights,[139] which recognize their own form of organization and participation. The Inter-American Court and the Inter-American Commission have been particularly attentive to the rights of indigenous peoples or communities, which includes, *inter alia,* their political and organizational rights. Specifically, the Commission has written that:

> [F]or an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the rights set forth by the American Convention on Human Rights, since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity. Particularly relevant are the rights to protection of

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[138] To the contrary, it has been established that the CGC tried to obtain consent for its oil exploitation by offering money, both to individuals and to the community as a whole, and by bringing in a medical caravan to various communities that are part of Sarayaku. During these overtures, signatures were obtained that were then attached to a letter claiming that the Community was giving its consent to the seismic prospecting activities undertaken. The Commission believes that this conduct is not evidence of compliance with the right of access to information and does not fulfill the obligation of prior consultation. Indeed, this was the understanding of the Office of the Ombudsman of Pastaza, who found that it had been "fully" established that the constitutional right set forth in Article 84(5) of the Constitution of Ecuador, ILO Convention No. 169 and Principle 10 of the Rio Declaration on Environment and Development had been violated. It also held the Minister of Energy and Mines, the Chairman of the Board of Directors of PETROECUADOR, and the attorney and legal counsel of the CGC to be responsible for the violations.

[139] See *mutatis mutandi*. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community.* Judgment on the Merits, August 31, 2001, paragraph 148.

> honor and dignity; freedom of thought and expression; the right of assembly and of association; the right to residence and movement and the right to elect their authorities.[140]

155. The Commission particularly notes that consultation is the mechanism that the indigenous peoples and communities use to make decisions and associate politically with other indigenous peoples and communities and with the State, and is thus a political forum for election and decision-making where the Community participates according to its ancestral uses and customs. The mechanism or means by which the consultation process is carried out will depend on each community's uses and customs.

156. The Inter-American Commission has also written that:

> [In international law, in general, and in inter-American law, in particular, special protection is needed for the indigenous people to be able to exercise their rights fully and on an equal footing with the rest of the population. Also, it may be necessary to establish special measures of protection for the indigenous people, in order to ensure their physical and cultural survival," and to ensure their effective participation in the decision-making processes that affect them.[141]
>
> Such protection further requires that the State take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival. "Meaningful" in this sense necessarily implies that indigenous representatives have full access to the information which will facilitate their participation.[142]

157. In the *Yatama* case, the Inter-American Court recognized the right of indigenous peoples and communities to participate directly and proportionately to their population in the conduct of public affairs, from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention.[143] In the instant case, the Commission has taken as established fact that for the Sarayaku Community, the form of political participation on issues of special importance to the Community is the Community Assembly.

158. Furthermore, as it has been pointed out in the present report, in the Saramaka case, the Court established that the State must give effective participation to the members of the community. To that regard, the Commission deems it necessary to consider the right of political participation of indigenous peoples, in the light of Article 29(b) of the Convention. The Commission points out that in the United Nations system, the political rights of indigenous peoples are embodied in ILO Convention No. 169, which recognizes "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[144] The United Nations Declaration on the Rights of Indigenous Peoples[145] recognizes these peoples' right to self-determination, their right to retain and strengthen their unique political, legal, economic, social and cultural institutions, to participate in decision-making in matters which would affect their

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[140] IACHR. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, November 29, 1983. IACHR, Report 24/03, Case 12,388, Yatama (Nicaragua), paragraph 143.

[141] IACHR, Report on the Situation of Human Rights in Ecuador, Chapter IX, 1997. IACHR, Report 24/03 Case 12,388, Yatama (Nicaragua), paragraphs 141 and 142.

[142] IACHR, Report on the Situation of Human Rights in Ecuador, Chapter IX, 1997.

[143] I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, paragraph 225

[144] ILO Convention No. 169. Preamble.

[145] Declaration on the Rights of Indigenous Peoples. Approved by the United Nations General Assembly on September 13, 2007.

rights, and right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[146]

159. Given these provisions of the international law of human rights with respect to indigenous peoples, States not only have an obligation to consult indigenous peoples or communities before approving any project that might affect them, but also to respect the particular system of consultation that each indigenous people or community practices, as that is their method of exercising their political rights. The law requiring prior consultation is one dimension of the exercise of indigenous peoples' political rights as a means of ensuring that they have a meaningful and significant role in the process whereby decisions about development and other issues that affect them are taken.[147]

160. In Ecuador, indigenous peoples' political rights are recognized in the Constitution and other domestic laws. Specifically, Article 84 of the Constitution provides that indigenous peoples or communities shall have the right to participate in using, profiting from, administering and conserving the renewable natural resources on their lands, to maintain and strengthen their traditional forms of coexistence and social organization and traditional ways in which authority is created and exercised, and to participate, through their representatives, in the government agencies that the law establishes.

161. In the instant case, Ecuador did not respect the Sarayaku Community's right to be consulted on issues that directly affected its territory, through the mechanisms that its practices and customs establish, such as the Community Assembly. To the contrary, it allowed the oil company to engage in oil exploration on Sarayaku's territory. In so doing, it violated the Community's right to associate politically with the State, through forms of political participation that take its practices and customs into account.

162. The petitioners alleged that the State breached the right of the Sarayaku people to preserve, practice, profess and spread their beliefs because it allowed the deforestation and destruction of holy areas of their territory. An example of this, is the destruction of the area of Yachak Vargas, where the Sarayaku people preserve their knowledge on medicines, uses, sources and powers, as well as the holy beings. The Commission observes that the affectation of the Sarayaku people due to the lack of protection of their right of property by the State has also meant the destruction of their holy areas.

163. The Commission therefore considers that the State violated Article 21 of the American Convention, in relation to articles 1(1), 13 and 23 thereof, to the detriment of the Sarayaku Indigenous Community and its members.

3. Article 4. Right to life

164. The pertinent part of Article 4 of the American Convention provides that:

> 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.

165. The Inter-American Court has set down the following principles with respect to the right to life:

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[146] Declaration on the Rights of Indigenous Peoples. Approved by the United Nations General Assembly on September 13, 2007. See articles 3, 4, 5,18, 19, 20, 23, 32, 33 and 34.

[147] IACHR, Report on the Situation of Human Rights in Ecuador, Chapter IX, 1997.

> The right to life is a fundamental human right, which full enjoyment is a pre-requisite for the enjoyment of the other human rights. If this right is not respected, all other rights do not have sense. Having such nature, no restrictive approach of the same is admissible. [...]
>
> By virtue of this fundamental role that the Convention assigns to this right, the States have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right.[148]

166. It is the *jurisprudence constante* of the Court that compliance with the obligations imposed by Article 4 of the American Convention, as regards Article 1(1) thereof, not only presupposes that no person shall be deprived of his life arbitrarily (negative obligation), but also that, given the obligation to ensure the full and free exercise of human rights, States shall adopt all necessary measures to protect and preserve the right to life of those persons subject to its jurisdiction (positive obligation).[149]

167. The Court adds that States must adopt any measures that may be necessary (i) to create an adequate statutory framework to discourage any threat to the right to life; (ii) to establish an effective system of administration of justice able to investigate, punish and redress any loss of life caused by state agents or by individuals; and (iii) to protect the right to be allowed access to conditions that guarantee a decent life, which includes the adoption of positive measures to prevent a violation of this right.[150] The Court has held that:

> [U]nder the American Convention, the international responsibility of States is engaged when the general obligations *erga omnes,* set forth in articles 1(1) and 2 thereof, are violated. Special obligations derive from these obligations *erga omnes*, which are determined as a function of the subject's particular requirements as regards protection or by the subject's specific circumstances, such extreme poverty or marginalization, or being a child.[151]

168. Article 1(1) establishes general obligations for the States with respect to human rights. The first of these is to respect the rights recognized in the Convention; the second is to ensure the free and full exercise of those rights. With regard to the right to life, the State's obligation to "respect" that right implies, *inter alia,* that the State must refrain from depriving anyone of his life by the actions of its agents. On the other hand, the State's obligation to "ensure" the right to life implies that the State is obligated to prevent violations of that right, investigate violations of the right to life, punish those responsible, and redress the victim's next of kin when the responsible parties are agents of the State or private persons acting with its acquiescence.

169. The Commission understands that States cannot be held accountable for any risk to the right to life. The Court, too, has addressed this matter and has held that:

> It is clear for the Court that a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities. In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing

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[148] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community.* Judgment of March 29, 2006. Series C No. 146, paragraphs 150 and 151.

[149] Idem, paragraph 152.

[150] Ibidem, paragraph 153.

[151] Ibidem, paragraph 154.

> an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.[152]

170. In the instant case, it has been established that once the State granted the concession to the oil company, the latter –with the State's protection and acquiescence- started to clear trails and planted close to a ton and a half of explosives in block 23, which includes Sarayaku territory. Those activities were done under the umbrella of a military protection and security agreement in which the State pledged "to guarantee the security of the oil company facilities and the people who work there." It has also been shown that the Sarayaku Community's means of subsistence is based on communal agriculture, hunting, fishing and gathering, all of which its members do within Sarayaku's territory.

171. The Commission would like to point out that the Court's June 17, 2005 Order for provisional measures focused on the planting of explosives within the territory of the Sarayaku indigenous Community. It stated that the explosives that the company planted on the territory of the Sarayaku Indigenous Community for oil exploration activities, pose a serious threat to the life and safety of the members of that Community.[153] The Court therefore ordered the State to remove the explosive material. As of the date of preparation of this report, that has not happened.

172. The evidence in the case file establishes that the members of the Sarayaku Community live under conditions that pose a grave and imminent threat to their lives because of the danger that the presence of explosives within its territory poses. Even more, the Commission would like to point out that the detonation of explosives has destroyed forests, sources of water, caves, underground rivers and holy places, and it has also caused the migration of animals. The placing/setting of explosives in traditional hunting areas has prevented the Sarayaku people to search for their food, diminishing their capacity of survival and it has also altered their cycle of life. Furthermore, the presence of those explosives, combined with the deforestation of its territory, has had an impact on the Community's way of life, as its members have been unable to search for food and thus is less able to find their means of subsistence. Thus, the conditions under which the members of the Sarayaku Indigenous Community live are unsuited to the decent life to which they are entitled and constitute a violation of the individual and collective right to life of all its members.

173. Moreover, the Commission has considered as proved that in November of 2002, as a result of the reactivation of the seismic exploration phase, and with the entry of the CGC to the Sarayaku territory, the *Asociación del Pueblo Kichwa Sarayaku* declared a state of emergency in which it paralyzed its economic, administrative and educational daily activities by several months. In order to protect the limits of their territory to prevent the entrance of the CGC, the Sarayaku people organized six "peace and life" camps on the edges of their territory.[154] The petitioners allege that during that period, Sarayaku members lived in the forest; the crops and food were not enough, and during three months the families lived of the resources of the forest. Likewise, the members of the Sarayaku people stopped receiving medical attention by part of the State.

174. As previously observed, the basic right to life also encompasses the right of persons not to be denied access to conditions that can guarantee them a decent way of life. On the subject of the rights of Indigenous Peoples, the Court wrote the following in the *Case of the Mayagna*

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[152] Idem, paragraph 155.

[153] I/A Court H.R., Order on Provisional Measures, June 17, 2005, *Considerandа* 12.

[154] Office of the First Notary of Pastaza Province, Sworn statement that Ena Margoth Santi gave on November 13, 2007; Office of the First Notary of Pastaza Province, Sworn statement that Carmenza Soledad Malaver Capucha gave on November 13, 2007, Annex 29; map prepared by the petitioners showing the distribution of the "peace and life camps" within Sarayaku territory, Annex 27.

(Sumo) Awas Tingni Community: "for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[155]

175. In cases such as the case *sub examine,* Ecuador's failure to comply with its obligation to ensure respect for the right to property of the Sarayaku Indigenous Community and its members by allowing explosives to be planted on Community territory, has created an ever-present danger that threatens the lives and the survival of its members. It has jeopardized the Community's right to preserve and pass along its cultural legacy.

176. The Commission therefore concludes that the State has failed to take adequate measures to correct the conditions that have curtailed the opportunities that the members of the Sarayaku Community have to live a decent life, and has failed to adopt the pro-active measures that could be reasonably expected of it, to prevent or avoid the risk posed to the right to life of the members of that Community. The State of Ecuador thus violated Article 4 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Sarayaku Indigenous Community and its members.

4. Article 22. Right to freedom of movement and residence

177. Article 22 of the American Convention provides that:

> 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 [...].
> 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
> 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.[...]

178. The Inter-American Court has held that the right to freedom of movement and residence is a condition *sine qua non* for the individual's fulfillment.[156] It is the right of every individual who is within the territory of a State lawfully to move about freely within that State and to choose his or her place of residence.[157]

179. Ecuador's Constitution provides the following with respect to freedom of movement:

> Art. 23.14. With prejudice to the rights established in this Constitution and in the international instruments currently in force, the State shall recognize and ensure to individuals [...] their right to move freely within national territory and to choose their residence. [...]

180. In the case *sub judice*, the Commission has taken as established fact that access to the territory of the Sarayaku Community is difficult. The most common route taken by members when traveling to and from the Sarayaku Community is the Bobonaza River. Furthermore, the members of the Sarayaku Community have been unable to use the Community's landing strip

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[155] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community* Judgment of August 31, 2001. Series C No. 79, paragraph 149.

[156] I/A Court H.R., *Case of the "Mapiripán Massacre".* Judgment of September 15, 2005. Series C No. 134, paragraph 168; I/A Court H.R., *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, paragraph 110; and *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, paragraph 115.

[157] I/A Court H.R., *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, paragraph 168.

because for many years the conditions of the strip have been such that planes are unable to take off or land.

181. The Commission has taken as established fact that on July 6, 2003, the communities of Canelos and Pacayacu resolved that they would "not allow free passage to the members of the Sarayaku association until the three associations ha[d] come to a second agreement" on the issue of oil exploration and exploitation in block 23. Thereafter, early in December 2003, the Canelos Community issued a communiqué in which it announced that it would deny passage to members of the Sarayaku Community.

182. The Commission has also taken as established fact that on December 4, 2003, at least 20 members of the Sarayaku Community were attacked and wounded by members of the Canelos Community. At the time, the State had sent ten police officers to prevent the clash from happening; given the medical reports on the injured, that number was insufficient.

183. During the processing of this case, the Commission learned of other incidents that occurred on November 22, 2002 and January 13, 2003, where members of neighboring communities did not allow members of the Sarayaku Community to travel freely on the Bobonaza River. The Commission therefore concludes that the State failed to provide adequate protection to the 20 members of the Sarayaku Community[158] to enable them to exercise their right to freedom of movement and to protect the right to personal integrity.

184. The Commission recalls that in its orders for provisional measures dated July 6, 2004 and June 17, 2005, the Inter-American Court addressed the allegation of a violation of the right to freedom of movement and wrote that "members of the neighboring community of Canelos and soldiers from the military outpost at Jatún Molino have denied members of the Sarayaku Indigenous Community access to the territory where they live by way of the Bobonaza River."[159] The Court therefore ordered that the State protect the right to freedom of movement of all members of the Sarayaku Indigenous Community.

185. The Commission notes that the State asserted that on April 10, 2005, the Canelos Assembly resolved to allow the leaders of the Sarayaku Community and their families to travel freely via the Bobonaza River through its sector provided that they comply with the resolutions adopted on June 6, 2003 in Pakayaku and that they drop the 23 legal cases brought against members of the Canelos Community." Since then, both in the proceedings with the Commission and the proceedings on the provisional measures with the Court, the State has kept the Commission and the Court informed of its presence in the vicinity of the Bobonaza River to ensure that the members of the Sarayaku Community are able to come and go freely.

186. Concerning these events, the Commission is persuaded that the State was fully aware that the Sarayaku Community had its freedom of movement impaired for at least two years. Despite that, the Commission finds that the State did not offer the protection or take the protective measures that would have been necessary and sufficient to correct this situation and thus allow the members of the Sarayaku Community to move about freely. The State is thus internationally responsible for failing to protect the members of the Sarayaku Community to enable them to travel freely via the Bobonaza River, knowing that the Canelos Community had made public its intention

158 Hilda Santi Gualinga, Silvio David Malaver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luís Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejando Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga and Cesar Santi.

159 I/A Court H.R., Order for Provisional Measures dated June 17, 2005, *Consideranda* 12.

not to allow them to pass. The Commission further finds that the State is responsible for the actions of the personnel manning the military outposts who denied the members of the Sarayaku Community their right to travel by way of the Bobonaza River.

187. Nevertheless, the Commission appreciates the measures that the Ecuadorian State has recently taken to ensure that members of the Sarayaku Community are able to travel freely by way of the Bobonaza River. Even so, however, the petitioners reported that "insecurity and fear persist about the possibility of new attacks on Sarayaku travelers who risk the Bobonaza River trip only when strictly necessary."[160]

188. Furthermore, the planting of explosives on the territory of the Sarayaku Community has severely impacted its members' freedom of movement by narrowing the areas where they can go in search of the food they need to survive. Six years have passed since the explosives were planted and four years have passed since the Court gave express orders to remove them, and yet they are still in place. This takes its toll not just on the Community's ability to secure its means of subsistence and survival but on its freedom of movement as well.

189. In the case *sub examine,* the Community's inability to move about freely within its territory and its inability to leave its territory, all with the acquiescence and involvement of State agents, lead the Commission to conclude that the State is responsible for violation of the right to freedom of movement, protected under Article 22 of the American Convention, in relation to Article 1(1) thereof and to the detriment of the Kichwa People of Sarayaku.

5. Article 5. Right to Humane Treatment

190. El artículo 5.1 de la Convención Americana establece que "[t]oda persona tiene derecho a que se respete su integridad física, psíquica y moral". El artículo 5.2 establece protecciones complementarias: la prohibición absoluta de la tortura y la garantía de que a las personas en condición vulnerable, por haber sido privadas de su libertad, se les debe tratar con el respeto debido a la dignidad inherente al ser humano. Estas garantías son inderogables y deben ser aplicadas en toda circunstancia[161].

191. During the proceedings before the Commission, the petitioners have alleged violations to the right of the personal integrity in detriment of individual Sarayaku members. To that regard, the Commission considers the following:

192. The Commission has considered as a proven fact that on December 4, 2003, when members of the Sarayaku people tried to transit the Bobonaza River, passing through the community of Canelos, they were attacked by members of that community. The following members of the Sarayaku people were injured in such events: Hilda Santi Gualinga, Silvio David Malaver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luís Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejando Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga y Cesar Santi.

193. To that regard, as it has been developed in the chapter regarding article 22 of the American Convention, the Commission observes that March of 2003 the Community of Canelos decided to forbid Sarayaku members to transit through their community. On December 4, 2003, the

[160] Observations on the State's second report on provisional measures, January 21, 2008.

[161] I/A Court H.R., *Case of the "Juvenile Reeducation Institute."* Judgment of September 2, 2004, paragraph 157.

members of the Sarayaku were beaten with sticks, stones, and machetes; their belongings were hacked to pieces; and the people indicated in the previous paragraph were injured. In connection with the incident, the State sent a contingent of ten police officers to the site: a clearly inadequate deployment that took no action to prevent the attack, but instead merely watched. Therefore, the Commission considers that the State did not provide adequate protection to the 20 members of the Sarayaku people named in the previous paragraph to protect their right to personal integrity.

194. On the other hand, the Commission has considered as a proven fact that on January 25, 2003, Elvis Fernando Gualinga, Marcelo Gualinga, Reinaldo Gualinga y Fabián Grefa were detained by militaries in Sarayaku territory and were taken to Puyo, where they were released. The petitioners allege that after having been detained by the militaries and before being taken to the Puyo Police station, security employees of the CGC tortured them and infringed them cruel, inhuman and degrading treatments. To that regard, even thought the Commission has considered as a proven fact that between the moment of the detention in the Sarayaku territory and the transfer of the arrested persons to Puyo, the soldiers took the detained persons to the installations of the CGC, the Commission does not have sufficient evidentiary elements to analyze what happened in that installation.

195. Finally, regarding the matter of the children Marisela Yuri Gualinga Santi y Tatiana Gualinga Dacha, occurred on January 29, 2003, the Commission considers that from the allegations of the petitioners it can be concluded that the CGC employees were responsible of the alleged dishonest abuses against the girls. Moreover, the father of one of the minors, whose declaration was sent by to the IACHR the petitioners, manifested that the military prevented the girls from being raped. Consequently, the Commission considers that there are no elements to impute the responsibility to state agents, neither by action nor by omission.

196. Therefore, the Commission considers that the State of Ecuador is responsible for the violation of the right to humane treatment established in article 5 of the Convention, in relation to article 1.1 of the same treaty, in detriment of Hilda Santi Gualinga, Silvio David Malaver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luís Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejando Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga y Cesar Santi.

6. Articles 8 and 25: Right to due process and right to judicial protection.

197. Article 25 of the Convention reads as follows:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
> 2. The States Parties undertake:
> a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
> b. to develop the possibilities of judicial remedy; and
> c. to ensure that the competent authorities shall enforce such remedies when granted.

198. The Inter-American Court has written that:

> [P]rotection of the individual against arbitrary exercise of public authority is a fundamental objective of international human rights protection.[162]. In this regard, non-existence of effective domestic remedies places the individual in a state of defenselessness. Article 25(1) of the Convention sets forth, in broad terms, the obligation of the States to offer all persons under their jurisdiction an effective judicial remedy against acts that violate their basic rights.[163."]
>
> [F]or the State to comply with the provisions of the aforementioned Article 25(1) of the Convention, it is not enough for the resources to exist formally, but rather they must be effective[164]; in other words, they must provide the individual with the real possibility of filing a remedy in the terms of this Article. The existence of this guarantee "is one of the basic pillars, not only of the American Convention, but also of the rule of law itself in a democratic society, in the terms of the Convention."[165]

199. Article 8(1) of the Convention provides that:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

200. The Inter-American Court has observed that Article 8 of the Convention applies to the set of requirements that must be observed by courts in legal proceedings, whatever their nature, to ensure that individuals are able to properly defend themselves against any act by the State that can affect their rights.[166]

201. The Court has observed the following with regard to articles 8 and 25 of the American Convention:

> The effective remedies that the States must offer pursuant to Article 25 of the American Convention, must be substantiated according to the rules of due legal process (Article 8 of the Convention), all this set within the general obligation of the States themselves to guarantee free and full exercise of the rights recognized by the Convention for all persons under their jurisdiction. In this regard, the Court has deemed that due legal process must be respected in administrative proceedings and in any other proceedings where the decision may affect individuals' rights.[167]

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[162] I/A Court H.R., *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114. paragraph 130; *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98, paragraph 126.

[163] I/A Court H.R., *Case of Tibi.* Judgment of September 7, 2004. Series C No. 114. paragraph 130; *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, paragraph 111; and I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, paragraph 23. I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, paragraphs 167 and 164

[164] I/A Court H.R., *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, paragraph 131.

[165] I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, paragraph 169.

[166] I/A Court H.R., *Case of Ivcher Bronstein*. Judgment of February 6, 2001. Series C No. 74, paragraph 102; *Case of Baena Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, paragraph 124; *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No. 71, paragraph 69; and I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, paragraph 27. I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, paragraph 147.

[167] I/A Court H.R., *Case of the Yakye Axa Indigenous Community.* Judgment of June 17, 2005. Series C No. 125, paragraph 62.

202. In the case of indigenous peoples, the Inter-American Court has written that "it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs."[168]

203. Article 95 of the Constitution of Ecuador provides that once a petition of *amparo* is filed, a public hearing must be immediately convened to give the respective parties a hearing. The judge will summon them immediately to hear their arguments in a public hearing held within the next 24 hours. In that same hearing, if cause be established, the judge shall order that any act that could violate a right be halted.[169]

204. In the instant case, the Commission has taken as established fact that the petition of constitutional *amparo* was filed by officials of the Sarayaku Community on November 28, 2002, to request that the competent court authority order that measures be taken immediately to suspend the CGC's activities within the Community's ancestral territory and order that it cease and desist the activity undertaken starting in November 2002, causing serious harm to the Indigenous Community of Sarayaku and its members. On November 29, 2002, the judge ordered, as a precautionary measure, suspension of any activity that might affect or threaten the rights for which protection was sought. Despite this, the court order was not obeyed, and the case did not proceed as it should have.

205. As previously noted, the petition of *amparo* is intended to bring a halt to or avoid the commission of an unlawful act or omission on the part of a public authority, whether committed directly or by delegation to third parties and that violates or can violate any right recognized in the Constitution or in an international convention in force, and that poses an immediate threat of serious harm. It is also used to immediately remedy the consequences of such acts or omissions.

206. Ecuadorian law provides that a petition of *amparo* must be heard in a summary proceeding and decided within the space of seventy-two hours. Within the next forty-eight hours, the judge must issue his or her decision, which shall be executed immediately, although an appeal can be filed with the Constitutional Court to have the decision confirmed or reversed. In the instant case, however, the judge hearing the petition convened a hearing for December 7, 2002, which was one week after the order suspending activities was issued. However, the hearing did not take place on the date set by the court.

207. The Pastaza District Superior Court underscored the irregularities and inexplicable delays in the case, especially when one considers its social repercussions. The President of the Superior Court of Pastaza wrote that:

> the complete failure to act swiftly [on the] complaint is disturbing, given the social repercussions that the petition seeks to address [...] As these irregularities are harmful to the reputation of the courts in this District, we would energetically urge you to follow the letter of the Constitutional Control Law and to proceed with the swiftness and efficiency that the case demands, or face the legal consequences.[170]

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[168] In referencing the application of this article, the Court echoed what it said in the Judgment on the Yakye Axa Indigenous Community, which reads as follows: "it is necessary to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity." I/A Court H.R., *Case of the Yakye Axa Indigenous Community.* Judgment of June 17, 2005. Series C No. 125. paragraphs 51, 63.

[169] Article 95 of the Constitution of Ecuador.

[170] Memorandum of December 12, 2003.

208. Nevertheless, it has been seven years since the petition of *amparo* was filed and the Commission still has no proof that the hearing in question was ever held or that the petition of *amparo was* decided. To the contrary, despite the court order, employees of the CGC, occasionally with the acquiescence of State agents, have taken action harmful to that Community, as the present report shows. Therefore, the Commission finds that the petition established in the Constitution of Ecuador was ineffective.

209. It has also been established that the Pastaza District Attorney's Office launched a preliminary inquiry on December 9, 2003, into the acts of aggression committed against members of the Sarayaku Indigenous Community when they were attempting to navigate the Bobonaza River. Furthermore, on April 23, 2004, José Serrano Salgado, attorney and legal counsel for the Sarayaku Community, filed a complaint with the Pichincha District Attorney's Office alleging that he had been assaulted by three armed men wearing hoods, who warned him to drop his defense of Sarayaku. The Commission has taken as established fact that Community leader Marlon Santi received anonymous threats, which were reported to the Attorney General of Ecuador in December 2004.

210. These facts were brought to the attention of the Inter-American Court in the request seeking provisional measures. The Court ordered the State to "investigate the events that caused the Court to order and then keep in place these provisional measures, and the threats and intimidation of members of the Indigenous Community of Sarayaku, especially Mr. Marlon Santi, with a view to identifying those responsible and imposing the penalties that the law prescribes, in keeping with the parameters established in the American Convention."[171]

211. In response to the order of provisional measures, the State reported that there are two complaints on record in connection with the alleged threats and intimidation committed against certain members of the Sarayaku Indigenous Community. The complaints were filed because the accused could not be identified.

212. The Commission observes that there has been no significant progress made in the investigation of the facts. To the contrary, rather than pursue the investigations, two of them have been filed and there is no information regarding other investigations into the events that necessitated the provisional measures.

213. Five years after one complaint was filed and six years after the other was filed, both in connection with various incidents of violence and threats against members of the Sarayaku Community, the State has still not conducted an effective investigation into the facts reported. In effect, the State has not supplied the Commission with any information that would enable the Commission to conclude that an effective investigation has been conducted into the complaints that members of the Sarayaku Community filed with the Pastaza District Attorney on December 9, 2003, the Office of the Attorney General of Ecuador in December 2004, and the Office of the Pichincha District Attorney on April 23, 2004.

214. The Commission finds that the Ecuadorian State has violated the right to judicial guarantees and judicial protection in the case of the members of the Sarayaku Community because: a) the hearing and decision on the petition of *amparo* are still pending, more than six years after the petition was filed; and b) six years after court complaints were filed by members of the Sarayaku Community, no action has as yet been taken. Therefore, the Commission concludes that the Ecuadorian State is responsible for violation of articles 8 and 25 of the American Convention, in

[171] Order of the Inter-American Court, dated June 17, 2005.

relation to Article 1(1) thereof and to the detriment of the Kichwa People of Sarayaku and its members.

7. Obligation to adopt domestic legislative measures

215. Article 2 of the American Convention reads as follows:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

216. Pursuant to the obligation established in Article 2 of the Convention, the State must adopt the necessary measures to guarantee the rights protected by the Convention, which entails "the elimination of norms and practices that result in the violation of such rights, as well as the enactment of laws and the development of practices leading to the effective respect for these guarantees." As the Inter-American Court wrote in its judgment in *Claude Reyes et al., "*this means that laws and regulations governing restrictions to access to State-held information must comply with the Convention's parameters and restrictions may only be applied for the reasons allowed by the Convention; this also relates to the decisions on this issue adopted by domestic bodies."[172]

217. Furthermore, the Inter-American Court has stated:

> [T]he general duty set forth in Article 2 of the American Convention implies the adoption of measures on two fronts: on the one hand, the suppression of rules and practices of any kind that entail violation of the guarantees set forth in the Convention; on the other, the issuance of rules and the development of practices leading to the effective observance of said guarantees.[173] This general obligation of a State party means that the provisions of domestic law must be effective (principle of *effet utile*). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires[174].

218. The Commission observes that by July 2, 2002 –when the State authorized the effective launch of the seismic prospecting activities in Block 23- the Ecuadorian legal system already had specific provisions establishing the State's obligation to consult the Kichwa People of Sarayaku before starting those activities. Those provisions appear in Article 84 of the 1998 Constitution, Article 8(4) of the National Human Rights Plan and articles 6 and 15 of ILO Convention No. 169.[175]

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[172] I/A Court H.R., *Case of Claude Reyes et al.*, paragraph 101.

[173] I/A Court H.R., *Case of the "Juvenile Reeducation Institute."*. Judgment of September 2, 2004, paragraph 206; and *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 200**3.** Series A No. 18, paragraph 78.

[174] I/A Court H.R., *Case of the "Juvenile Reeducation Institute".* Judgment of September 2, 2004, paragraph 205; and I/A Court H.R. *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, paragraph 170.

[175] Moreover, the General Provisions of the 1978 Hydrocarbons Law stipulated that "[B]efore undertaking plans and programs to explore for and exploit hydrocarbons found on lands that the Ecuadorian State has assigned to indigenous Communities or to black or Afro-descendent peoples and that could adversely affect the environment, PETROECUADOR, its affiliates or franchises are to consult with the ethnic groups or communities. For that purpose, they shall endeavor to hold assemblies or public hearings to explain the plans and purposes of their activities, the conditions under which they will be carried out, how long they will last and the possible direct or indirect environmental impacts that the activities could cause on the Community or its inhabitants. A written public document or instrument shall be drawn up to record any acts, agreements or pacts that result from the consultations regarding the exploration and exploitation plans and programs." That text was added to the 1978 Hydrocarbons Law by Article 40 of the Law for Promoting Investment and Citizen Participation, dated August 18, 2000, but was later declared unconstitutional by the Constitutional Court in Ruling No. 193-2000-TP of December 12, 2000.

219. As previously noted, Article 84(5) of the 1998 Constitution of Ecuador established the collective right of indigenous peoples "to be consulted on plans and programs to explore for and exploit non-renewable natural resources on their lands and that could adversely affect them either environmentally or culturally; to share in the benefits of those projects insofar as possible, and to receive compensation for any socio-environmental harm that those projects cause." The 2008 Constitution also contains a clause establishing the right to prior consultation.[176]

220. Article 8(4) of Ecuador's National Human Rights Plan, adopted in 1998 and still in force, provides the following as a general objective:

> To endeavor to consult the Indigenous Peoples before authorizing projects to explore for or mine renewables and nonrenewables on their lands and ancestral territories and examine the possibility of the Indigenous Peoples' receiving their fair share of the benefits that the exploitation activities produce and their right to be compensated for any damages done.

221. Articles 6 and 15 of ILO Convention No. 169 expressly establish the obligation of prior consultation. Indeed, the ILO Convention provides that the Peoples concerned are to be consulted, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly, and that States are to establish the means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them (Art. 6). Article 15 of the ILO Convention also expressly requires prior consultation.[177]

222. As is apparent from the facts in this case, by July 2, 2002, clause 84(5) of the Constitution, Article 8(4) of the National Human Rights Plan, and ILO Convention No. 169 were not embodied into specific legislation or procedures, which in practice was an obstacle preventing the Kichwa People of Sarayaku from exercising their right of consultation.

223. Subsequent to these events, on December 19, 2002 the State approved the Regulations for Consultations in connection with Hydrocarbon Activity, Executive Decree No. 3401, which established:

> [A] uniform procedure for the hydrocarbon sector, for application of the constitutional law requiring that indigenous peoples who identify themselves as nationalities and Afro-Ecuadorians be consulted on the subject of preventing, mitigating, controlling, and rehabilitating the negative socio-environmental effects and the promotion of the positive socio-environmental effects caused by the hydrocarbon-related activities conducted on their lands; and the participation of those peoples and communities in the procedures related to

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[176] Article 58(7) of the 2008 Constitution now in force provides that indigenous Peoples have a right to: " prior, free and informed consultation, within a reasonable period, concerning plans and programs for exploration, exploitation and marketing of nonrenewable resources located on their lands and that can adversely affect either environmentally or culturally; to share in the benefits that those projects produce and to receive compensation for any social, cultural and environmental damage they cause. The consultation that the competent authorities must conduct is mandatory and timely. If the consulted Community does not give its consent, the Constitution and the law will be followed."

[177] That article reads as follows: "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

consultations, preparation of environmental impact assessments, environmental management plans, including the community relations plans.[178]

224. However, the regulations were struck down on April 28, 2008, with approval of the Regulations governing the use of social participation mechanisms established in the Environmental Management Law, Decree No. 1040.[179]

225. The Commission observes that Decree No. 1040 makes no mention at all of the right of access to information or the right to prior consultation that indigenous peoples enjoy under the applicable international provisions, nor does it require that information provided on the so-called " social participation mechanisms" be accessible, sufficient and timely in the sense described in this report. Although the 1998 Constitution and the 2008 Constitution both recognize the right to prior consultation, as of the date of this report Ecuador does not yet have specific mechanisms and procedures in place that properly build upon the framework established in the new Constitution, the National Human Rights Plan and ILO Convention No. 169.

226. The Commission concludes that in the present case, the State failed to adopt the domestic legislative measures to ensure the right of access to information or the right to prior consultation. The State has thus failed to comply with its obligation under Article 2 of the American Convention.

VIII. REPARATIONS AND COSTS

227. Given the facts alleged in the present application and the *jurisprudence constante* of the Inter-American Court, which holds that "it is a principle of international law that any violation of an international obligation that has caused damage creates a new obligation, which is to adequately

[178] Article 7 of Executive Decree No. 3401 provides that "[b]oth the consultations with indigenous Peoples who identify themselves as nationalities and Afro-Ecuadorians, and the citizen consultations shall be carried out: a) Before the agency charged with conducting the bidding for hydrocarbon projects calls for the respective proposals, in which case the consultation shall be labeled pre-tendering; and b) before approval of the environmental impact assessments for execution of hydrocarbon projects, pursuant to Article 42 of these Regulations, in which case the consultations shall be labeled pre-execution." Article 8 provides that: "the purpose of pre-tendering consultations with indigenous Peoples who identify themselves as nationalities and with Afro-Ecuadorian Communities is to: a) to get, in advance, the opinions, comments and proposals of the indigenous Peoples who identify themselves as nationalities and Afro-Ecuadorians who live in the immediate impact area of the block for which bids will be taken, apropos the positive and/or negative effects that the project can have on their territories, the plans and programs that will follow from the tendering on the oil projects and the signing of the corresponding contracts for exploration and exploitation; b) to receive opinions on the general socio-environmental strategies and measures to prevent, mitigate, control, offset and rehabilitate the negative socio-environmental impacts, and promote the positive socio-environmental effects, which the agency in charge of the bidding process will have to take into account in the bidding on the oil contracts, the awarding and signing of contracts and the oversight activities, and c) to have views on the mechanisms by which indigenous peoples who identify themselves as nationalities and Afro-Ecuadorians living in the direct impact area of the block for which bids will be taken, will be able to participate, through their representative organizations, in the execution of socio-environmental measures to prevent, mitigate, offset, control and rehabilitate the negative socio-environmental effects, and promote the positive socio-environmental effects caused in their territories thanks to the hydrocarbon projects that follow from the oil franchising and the signing of the corresponding contracts for exploration and exploitation." Finally, Article 10 provides that: "The purpose of the pre-execution consultations held with indigenous Peoples who identify themselves as nationalities and with Afro-Ecuadorian communities is to get the opinions, comments, and proposals of the indigenous and Afro-Ecuadorian communities living in the project's direct impact area concerning the positive and/or negative socio-environmental effects that the projects to explore for and exploit hydrocarbons might have and to determine socio-environmental measures to prevent, mitigate, control, offset and rehabilitate the negative socio-environmental effects and promote positive socio-environmental effects that, if technically and economically viable and legal, will be incorporated into the Environmental Impact Assessment and the Environmental Management Plan, including the Community Relations Plan."

[179] Regulations on Application of the Social Participation Mechanisms established in the Environmental Management Act, Decree No. 1040, in the petitioners' communication of June 10, 2008.

redress the wrong done,"[180] the IACHR is submitting to the Court its claims as to the reparations and costs that the Ecuadorian State must pay as a consequence of its responsibility for the violations committed against the victims.

228. Pursuant to the Rules of Court, which give the individual autonomous standing in its proceedings, in these submissions the Commission will confine itself to elaborating upon the general standards that the Court should apply in the matter of reparations and costs in the instant case. The Inter-American Commission understands that it is up to the victims and their representatives to spell out precisely what their claims are, pursuant to Article 63 of the American Convention and article 25 and related provisions of the Rules of Court. However, in the event the injured party does not exercise this right, the Court is asked to grant the Inter-American Commission a procedural opportunity to quantify the pertinent claims.

A. Obligation to make reparations

229. Article 63(1) of the American 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.

230. As this Court has previously held,

> Article 63(1) of the American Convention reflects a customary rule that is one of the fundamental principles of contemporary international law regarding the responsibility of States. When a wrongful act occurs that is imputable to a State, the latter incurs international responsibility for violation of an international rule, and thus incurs a duty to make reparation and putting an end to the consequences of the violation.[181]

231. Reparations are crucial to ensuring that justice is done in an individual case and are the means by which the Court's judgments are carried beyond the realm of moral condemnation. Reparations are the measures that will cause the effect of the violations committed to disappear. Reparation of the damage caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which is to restore the situation as it was prior to the violation.

232. Where full restitution is not possible, as is true in the instant case, it is up to the Inter-American Court to order a series of measures that will not only ensure that the violated rights are respected but also redress the consequences that the violations caused and ensure payment of indemnification as compensation for the damage caused in that case.[182] In such cases, the purpose of the indemnification is to redress the real damages, both pecuniary and non-pecuniary, that the

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180 /A Court H.R., *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 230; I/A Court H.R., *Case of Carpio Nicolle et al*. Judgment of November 22, 2004. Series C No. 117, para. 85; I/A Court H.R., *Case of De la Cruz-Flores*. Judgment of November 18, 2004. Series C No. 115, para. 138.

181 I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 86; I/A Court H.R., *Case of the Plan de Sánchez Massacre*. Judgment of November 19, 2004. Series C No. 116, para. 52; I/A Court H.R., *Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 139.

182 I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 87; I/A Court H.R., *Case of the Plan de Sánchez Massacre*. Judgment of November 19, 2004. Series C No. 116, para. 53; I/A Court H.R., *Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 140.

injured parties sustained.[183]. The assessment of the damages and harm done must be proportionate to the "gravity of the violations and the resulting damage."[184] The reparations serve another no less important purpose, which is to prevent and avoid future violations.

233. The obligation to make reparations is regulated in all its aspects (scope, nature, modes and determination of beneficiaries) by international law and cannot be modified by the respondent State by invoking the provisions of its own domestic laws; nor can the latter decline to discharge that obligation by invoking provisions of its own domestic laws.185 "Whenever a violation goes unpunished or a wrong unredressed, the law is in crisis, not just as a means for settling a certain litigation, but as a method for settling any litigation; in other words, as a tool to ensure peace with justice."186

B. Measures of reparations

234. The Court has held that reparations consist of measures tending to eliminate the effects of the violations that have been committed.[187] Reparations is a generic term that covers the different ways in which a State can redress the international responsibility it has incurred, which under international law include restitution, compensation, rehabilitation, satisfaction, and guarantees that the violations will not be repeated.[188]

235. The United Nations Special Rapporteur on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law has divided the forms of reparation into

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183 I/A Court H.R., *Bulacio Case.* Judgment of September 30, 2003, Series C No. 100, para. 70; I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, para. 204; I/A Court H.R., *Case of the "White Van" (Paniagua Morales et al.). Reparations (*Art. 63(1) American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 80; and I/A Court H.R., *Case of Castillo Páez*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 52.

184 United Nations, Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, E/CN.4/Sub.2/1996/17, para. 7, Annex 62. See also, I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 89; I/A Court H.R., *Case of De la Cruz-Flores.* Judgment of November 18, 2004. Series C No. 115, para. 141; *Case of Cantoral Benavides. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of December 3, 2001, Series C No. 88, para. 42, and *Case of Cesti Hurtado, Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 31, 2001, Series C No. 78, para. 36.

185 I/A Court H.R., *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 231; I/A Court H.R., *Case of Carpio Nicolle et al*. Judgment of November 22, 2004. Series C No. 117, para. 87; I/A Court H.R., *Case of the Plan de Sánchez Massacre*. Judgment of November 19, 2004. Series C No. 116, para. 53.

186 SERGIO GARCÍA RAMÍREZ, *LAS REPARACIONES EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS*, paper presented at the seminar titled "The inter-American system for the protection of human rights on the threshold of the XXI century," San José, Costa Rica, November 1999.

187 I/A Court H.R., *Case of La Cantuta. Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162, para. 202; I/A Court H.R., *Case of the Miguel Castro-Castro Prison.* Judgment of November 25, 2006. Series C No. 160, para. 416; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.). Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2006. Series C No. 158, para. 144.

188 See United Nations*, Final report submitted by Theo Van Boven, Special Rapporteur for Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights*, E/CN.4/Sub2/1990/10, July 26, 1990, July 26, 1990. See also: I/A Court H.R., *Blake Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48, para. 31; *Case of Suárez Rosero*, *Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of January 20, 1999. Series C No. 44, para. 41.

four general categories: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. [189]

236. Accordingly, the United Nations Commission on Human Rights has determined that:

> In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[190]

237. In the instant case, the Inter-American Commission has shown that the State has incurred international responsibility for violation of a number of rights protected under the American Convention, to the detriment of the Kichwa Indigenous People of Sarayaku and its members. By denying the Kichwa Indigenous People of Sarayaku their right to use, enjoy and dispose of their territory, it has caused a series of other egregious violations of internationally protected rights.

238. In the instant case, reparations cannot be considered from the purely individual perspective; they have a special dimension because of the collective nature of the rights that Ecuador violated to the detriment of the Community and its members. In the instant case, the aggrieved parties belong to a group with its own cultural identity;[191] they are members of an indigenous community where State violations of international law affect not just the individual victim, but the very existence of the community. Hence, the reparation must also take into account the collective dimension and be based on an understanding of the socio-cultural elements characteristic of the Kichwa People of Sarayaku, including their cosmovision, spirituality and communitarian social structure. This factor was considered in the cases of the Sawhoyamaxa and Yakye-Axa Indigenous Communities, where the Court reaffirmed its case law[192] to the effect that cases involving indigenous people have a collective component.

239. Although witnesses and experts may, at the stage in the proceedings that the Court determines, testify on the measures of reparations for the Kichwa Indigenous People of Sarayaku and its members based on their own uses, customs and values, the Commission is asking that when arriving at its judgment the Court also consider the fact that the victims in the instant case

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189 *The Administration of Justice and the Human Rights of Detainees, Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law,* prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117. E/CN.4/Sub.2/1996/17.

190 United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17, *The Administration of Justice and the Human Rights of Detainees, Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117,* May 24, 1996, para. 7.

191 The relationship among the members of the Community is what gives meaning to their indigenous existence. It gives meaning not just to a common ethnic origin, but also to the possibility of having and passing down a culture of their own, including such elements as language, spirituality, way of life, customary law, and traditions. As already indicated, being and belonging to an indigenous people embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory.

See *Study on the protection of the cultural and intellectual property of indigenous peoples,* Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chair of the Working Group on Indigenous Populations. E/CN.4/Sub.2/1993/28. July 28, 1993. United Nations, para. 1.

192 I/A Court H.R., *Case of the Plan de Sánchez Massacre, Reparations,* Judgment of November 19, 2004, paragraphs 85 and 86. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community, Merits,* Judgment of August 31, 2001. Explanation of vote by judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli.

are members of the Kichwa indigenous people of Sarayaku and that a violation of their fundamental rights by the Ecuadorian State has caused very egregious harm.

240. The Commission is also asking that any measures of reparations that the Court should order in the present case be implemented by the State of Ecuador by mutual agreement with the Kichwa Indigenous People of Sarayaku and its members.

241. Based on the evidence presented in this application and given the criteria established by the Court in its case law, the Inter-American Commission is submitting its conclusions and claims with respect to the measures of reparations for the pecuniary and non-pecuniary damages and other forms of reparations and satisfaction owed in the present case.

1. Measures of cessation, satisfaction and guarantees of non-repetition

242. Satisfaction has been defined as "any measure which the author of a breach of duty is bound to take under customary law or under an agreement by the parties to a dispute, apart from restitution or compensation … seeking a token of regret and acknowledgment of wrongdoing."[193] Satisfaction involves measures of three kinds, generally taken cumulatively: apologies or any other gesture acknowledging authorship; prosecution and punishment of the individuals involved, and measures taken to prevent a repetition of the wrong done.[194]

243. On November 29, 1985, the United Nations General Assembly approved by consensus the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power195 which holds that victims "are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered." Accordingly, the needs of the victims must be addressed by allowing "the views and concerns of victims to be presented and considered at appropriate states of the proceedings where they personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."

244. The IACHR will explain below its position regarding the measures of cessation, satisfaction and guarantees of non-repetition required in the instant case, although it may later elaborate upon its arguments on this issue:

245. The State has an obligation to take the measures necessary to guarantee the right to property of the Kichwa Indigenous People of Sarayaku and its members with respect to their ancestral territory, thereby guaranteeing the special relationship that they have with their land. The

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193 Brownlie*, State Responsibility Part 1. Clarendon Press*, Oxford, 1983, p. 208.

194 *Idem*.

195 A/RES/40/34, Access to justice and fair treatment. "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. 5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. 6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

State must also ensure to the members of the Kichwa people that they are able to practice their traditional subsistence activities by removing the explosive material planted on their territory.

246. The State must also take measures to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues that affect them and their cultural survival.

247. It is also essential that the State adopt, with the indigenous peoples' participation, the legislative or other measures necessary to give effect to the right to prior, free, informed and good faith consultation, in keeping with the standards of international human rights.

248. Finally, the Commission considers that the State must take the measures necessary to prevent a recurrence of similar events in the future, in keeping with its duty to prevent and its duty to guarantee the fundamental rights recognized in the American Convention.

2. **Measures of compensation**

249. The Court has established the basic criteria to be followed in setting the amount that will constitute adequate and effective economic compensation to redress the damages sustained as a result of violations of human rights. The Court has also held that the indemnity is purely compensatory in nature, and will be granted to the extent and in the amount sufficient to compensate for the pecuniary and non-pecuniary damages caused.[196]

250. The Commission contends that in the instant case, the State must make individual and communal reparations to redress the consequences of the human rights violations described herein. In that respect, the Commission believes that for a determination of the pecuniary damages, and without prejudice to any claims that the victims' representatives may submit at the appropriate point in the proceedings, when arriving at its decision the Court should consider the cosmovision of the Kichwa Indigenous People of Sarayaku and how the Kichwa people of Sarayaku and its members have been affected by being denied their right to use, enjoy and dispose of their territory, the effect of which has been, *inter alia,* to prevent them from engaging in their traditional subsistence activities.

251. On the other hand, to determine the non-pecuniary damages in the present case, factors such as the severity of the violations and the emotional suffering –which is a direct consequence of those violations- caused to the members of the Kichwa Indigenous People of Sarayaku must be taken into consideration.

252. The Commission considers that the conditions to which the members of the Kichwa Indigenous People of Sarayaku have been subjected have caused moral suffering. This is an especially important consideration in the instant case because that situation was caused by the actions and omissions of the Ecuadorian State in connection with an encroachment into the territory of the People of Sarayaku.

253. Accordingly the Commission is petitioning the Court to order the State to pay compensation for the moral damages that the Kichwa People of Sarayaku and its members have sustained as a direct consequence of the violations of articles 21, 13, 23, 8, 25, 4, 22 and 5 of the

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196 I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, para. 204; I/A Court H.R., *Case of Garrido and Baigorria. Reparations* (Art. 63(1) American Convention on Human Rights).Judgment of August 27, 1998, Series C No. 39, para. 41.

American Convention. In making the determination, the Kichwa People's customary law should be considered.

254. The Commission is also requesting that the Court order payment of compensation in equitable relief for the non-pecuniary damages caused to the Kichwa People of Sarayaku and its members by the suffering, pain, anguish and indignities they have endured for the years that their right to use, enjoy and dispose of their territory has been abridged.

C. The *titulaires* of the right to receive reparations

255. Article 63(1) of the American Convention requires reparation of the consequences of a breach of a right or freedom and that fair compensation be paid to the injured party. The persons entitled to that compensation are, as a rule, those directly harmed by the facts of the violation in question.[197]

256. In the present case, the *titulaires* of the right to receive compensation are both the Kichwa Indigenous People of Sarayaku and its members, because the violations of Convention-protected rights that the Ecuadorian State committed have been detrimental to an indigenous people which, given its own cultural identity, must be regarded from a collective and individual perspective.

D. Costs and expenses

257. The *jurisprudence constante* of the Court is that costs and expenses should be understood to be included within the concept of reparation established in Article 63(1) of the American Convention because the measures taken by the victim or victims, their heirs or their representatives to have access to international justice imply disbursements and commitments of a financial nature that must be compensated.[198] The Court has also held that the costs also include the various necessary and reasonable expenses that the victim or victims incur to have access to the oversight bodies established by the American Convention. The fees of those who provide legal assistance are included among the expenses.

258. In the *cas d'espèce,* the Inter-American Commission is requesting that once the Court has heard the representatives of the injured party, it order the Ecuadorian State to pay the costs and expenses that they have duly proven, taking into consideration the special characteristics of the present case.

IX. CONCLUSIONS

259. Based on the considerations in the present application, the Commission concludes that the Ecuadorian state is responsible for violation of the following articles of the American Convention:

- Article 21 of the American Convention, in relation to articles 13, 23 and 1(1) thereof, to the detriment of the Kichwa People of Sarayaku and its members.

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197 I/A Court H.R., *Case of Villagrán Morales (Case of the "Street Children")*, Reparations. Judgment of May 26, 2001, paragraphs 107 and 108.

198 I/A Court H.R., *Case of Carpio Nicolle et al. Case,* Judgment of November 22, 2004. Series C No. 117, para. 143; I/A Court H.R., *Plan de Sánchez Massacre Case*. Judgment of November 19, 2004. Series C No. 116, para. 115; I/A Court H.R., *De la Cruz Flores Case*. Judgment of November 18, 2004. Series C No. 115, para. 177.

- Articles 4, 8 and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kichwa People of Sarayaku and its members.

- Article 22 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the members of the Kichwa People of Sarayaku.

- Article 5 of the American Convention, in relation to article 1(1), to the detriment of Hilda Santi Gualinga, Silvio David Malaver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luís Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejando Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga and Cesar Santi.

260. The Commission also finds that the State is responsible for a failure to comply with the provisions of Article 2 of the American Convention.

261. The Commission is therefore asking the Court to order the State to:

1. Adopt the measures necessary to ensure and protect the right to property of the Kichwa Indigenous People of Sarayaku and its members with respect to their ancestral territory, taking particular care to ensure the relationship that they have to their land.

2. Guarantee to the members of the Kichwa Indigenous People of Sarayaku their right to practice their traditional subsistence activities by removing the explosives planted on their territory.

3. Ensure that indigenous representatives have a meaningful and effective role in the decision-making on the project and other issues that affect them and their cultural survival.

4. Adopt, pursuant to its domestic procedures and with the indigenous peoples' participation, the legislative or other measures necessary to give effect to the right to prior consultation, in good faith and with the representative institutions of those peoples, in accordance with the standards of international human rights law.

5. Take the measures necessary to prevent a recurrence of similar events in the future, in keeping with the State's duty to prevent violations of human rights and its duty to respect and ensure the fundamental rights recognized in the American Convention.

6. Order full individual and communal reparations for the Kichwa People of Sarayaku and its members, which shall include not only compensation for the pecuniary and non-pecuniary damages and costs and expenses of litigation at the domestic and international levels, but also certain acts of symbolic importance that serve to ensure that the crimes committed in the instant case will not be repeated.

X. EVIDENTIARY SUPPORTS

A. Documentary evidence

262. The following is a list of the documentary evidence available at this time:

APPENDIX 1 Merits Report No. 138/09, of December 18, 2009, Kichwa Indigenous People of Sarayaku and its members.

APPENDIX 2 Admissibility Report No. 62/04, of October 13, 2004, Petition 167-2003, Kichwa Indigenous People of Sarayaku and its members.

APPENDIX 3 Record of the case with the IACHR.

ANNEX 1. Legislation

- Constitution of Ecuador, Chapter 5, Collective Rights, Section One, Indigenous, Black and Afro-Ecuadorian Peoples.
- Agrarian Development Act, Codification 2004-02, Published in a supplement of Official Report No. 315, April 16, 2004.
- The *Comunas* Organization and Regime Act. Codification 2004-04. Published in a supplement of Official Record No. 315 of April 2004.
- Environmental Management Act. Codification 004-019, published in Official Record 418 of September 10, 2004.
- The Unoccupied Lands and Colonization Act. Codification 2004-03. Published in a Supplement of Official Record 315, April 16, 2004.
- Law for Promoting Investment and Citizen Participation. Decree Law 2000-1. Published in Official Record 144 of August 18, 2000.
- Regulations for Consultations in connection with Hydrocarbon Activity, Executive Decree No. 3401.
- Regulations on Application of the Social Participation Mechanisms established in the Environmental Management Act, Decree No. 1040.

ANNEX 2. Ecuador's Nationalities and Peoples Development Council (CODENPE) http://www.codenpe.gov.ec/kichwaama.htm (Statute of the Kichwa Native People of Sarayaku)

ANNEX 3. Ecuador's Ministry of Education and Culture, www.mec.gov.ec

ANNEX 4. Anthropological-legal report on the social and cultural impact of the presence of the CGC company in Sarayaku, prepared by Gina Chávez, Rommel Lara and María Moreno, researchers with the Latin American School of Social Sciences – FLACSO, Ecuador office, May 2005, Quito.

ANNEX 5. Petition of constitutional *amparo* that the Organization of Indigenous Peoples of Pastaza filed against the CGC and Daymi Services.

ANNEX 6. Report prepared by Pastaza Provincial Police Command No. 16, No. 2004-029-P-2-CP-16.

ANNEX 7. *Empresa Petrolera de Ecuador* (PETROECUADOR), Statistical Report 1972-2006. http://news.bbc.co.uk/hi/spanish/specials/2006/energia/newsid_4702000/4702970.stm

ANNEX 8. *Revista Panam Salud Publica/Pan Am Journal of Public Health* 15(3), 2004. Miguel San Sebastian and Anna-Karin Hurtig. Oil exploitation in the Amazon basin of Ecuador: a public health emergency. Available at: http://publications.paho.org/spanish/TEMA_San_bastian.pdf

ANNEX 9. Military Security Cooperation Agreement between the Ministry of Defense and the oil companies operating in Ecuador, signed in Quito on July 30, 2001.

ANNEX 10. Property Records for Puyo, Pastaza. Land grant for the Bobonaza River communities, Puyo, May 26, 1992.

ANNEX 11. Partnership contract between the State of Ecuador and the firm *Compañía General de Combustibles*, dated July 26, 1996.

ANNEX 12. Walsh Environmental Scientists and Engineers, Inc. Environmental Impact Study for the seismic prospecting activities, Block 23, Ecuador: Final Report, Walsh Project number: 2921-010, May 1997.

ANNEX 13. Report of the Ministry of Energy and Mines on the activities conducted in block 23.

ANNEX 14. Memorandum No. 155 from the Ministry of Energy and Mines.

ANNEX 15. Decision taken by the Sarayaku Association-OPIP at the meeting held with the CGC on June 25, 2000.

ANNEX 16. Letter dated April 13, 2002, which the Sarayaku Association addressed to the Minister of Energy and Mines.

ANNEX 17. Letter titled "COMMUNITY OF INDEPENDENTS OF SARAYAKU O.P.I.P AFFILIATED", undated.

ANNEX 18. List of signatures from the Chontayacu Community, signed December 31, 2002.

ANNEX 19. Decision of the General Assembly of the "CAS – TAYJASARUTA", January 7, 2003.

ANNEX 20. Office of the Ombudsman of the Province of Pastaza. Decision of April 10, 2003, Complaint No. 368-2002.

ANNEX 21. Office of the National Ombudsman. Statement in Defense dated November 27, 2002.

ANNEX 22. Decision of the First Civil Court Judge of Pastaza, on the petition seeking constitutional *amparo,* that the OPIP-Sarayaku filed (Block 23), November 29, 2002.

ANNEX 23. Memorandum dated December 12, 2002, which the Office of the Chief Judge of the Superior Court of the District of Pastaza sent to the First Civil Court Judge of Pastaza.

ANNEX 24. Final Report on operations. Prepared by the *Compañía General de Combustibles* CGC.

ANNEX 25. Explanation of the seismic prospecting process in general, prepared by the Ministry of Energy and Mines, March 7, 2006.

ANNEX 26. Certification of explosive charges distributed in block 23, according to information on record at the Office of the National Director of Environmental Protection.

ANNEX 27. Maps

- Seismic prospecting map.
- Map drawn up by the petitioners showing the location of the *Paz y Vida* camps inside Sarayaku territory.
- Map "of the petro-military fence" as drawn up by the petitioners; Office of the Ombudsman of the Province of Pastaza.

ANNEX 28. REPORTS ON PROVISIONAL MEASURES

- Order of the Inter-American Court dated February 18, 2010.
- The State's second report to the Inter-American Court of Human Rights.
- Observations on the State's second report on provisional measures, January 21, 2008.

ANNEX 29. STATEMENTS

- Office of the First Notary of Pastaza Province, sworn statement that Ena Margoth Santi gave on November 13, 2007.
- Office of the First Notary of Pastaza Province, sworn statement that Carmenza Soledad Malaver Capucha gave on November 13, 2007.
- Office of the Eighteenth Notary, Dr. Enrique Díaz Ballestero, Quito, Ecuador, sworn statement that Segundo Lenin Reinaldo Gualinga Gualinga gave on June 17, 2003.
- Eleven statements from 36 of the people accused in these events.

- Office of the Eighteenth Notary, Quito, Ecuador, sworn statement that Mr. Reinaldo Alejandro Gualinga Aranda gave on February 6, 2003.

ANNEX 30. August 26, 2003 memorandum signed by the CGC and addressed to the Attorney General's Office.

ANNEX 31. Final topography report 2D Block 23 2002, prepared by the *Compañía General de Combustibles* CGC.

ANNEX 32. Republic of Ecuador, Political Agency of Sarayaku Parish, certification signed by Mr. Edgar Gualinga, Political Lieutenant of Sarayaku Parish, June 13, 2003.

ANNEX 33. Certified copy of the identification document of Segundo Lenin Reinaldo Gualinga Gualinga,

ANNEX 34. Report of the Meeting among the Canelos, Pacayacu and Sarayaku Associations, July 6, 2003..

ANNEX 35. Report prepared by Pastaza Provincial Police Command No. 16.

ANNEX 36. Report of the Canelos Parish Board on the clash that occurred between the Canelos Community and the Sarayaku Community, signed by Mr. Cleber Toquetón, president of the Canelos Parish Board, no date.

ANNEX 37. Police report of December 4, 2003.

ANNEX 38. Photographs of the injured.

ANNEX 39. Initial inquiry order from the Office of the Ombudsman of Pastaza Province, Puyo, December 5, 2003.

ANNEX 40. Preliminary Inquiry, signed by the Prosecutor from the Public Prosecutor's Office, December 9, 2003.

ANNEX 41. Reports from Pastaza Provincial Police Command No. 16:

- One dated December 4, 2003, signed by Police Lieutenant Wilman Oliver Aceldo Argoti
- Two dated December 5, 2003, signed by Police Lieutenant Patricio Campaña and Police Major Aníbal Sarmiento Bolaños.

ANNEX 42. Report of the Canelos Parish Board on the clash that occurred between the Canelos Community and the Sarayaku Community, signed by Mr. Cleber Toquetón, president of the Canelos Parish Board, no date.

ANNEX 43. List of persons alleged to have injured the members of the Kichwa People of Sarayaku on September 4, 2003.

ANNEX 44. Medical certificates issued by the Public Prosecutor's Office, Forensic Medicine and Sciences System, December 9, 2003.

ANNEX 45. Initial inquiry order from the Office of the Ombudsman of Pastaza Province, Puyo, December 5, 2003.

ANNEX 46. Preliminary Inquiry, signed by the Prosecutor from the Public Prosecutor's Office, December 9, 2003.

ANNEX 47. First Criminal Court of Pastaza, October 7, 2003.

ANNEX 48. Report of the National Prosecutor, September 27, 2003.

ANNEX 49. Request dated October 1, 2003, in which the Public Prosecutor's Office asked the judge to order preventive detention.

ANNEX 50. Memorandum dated March 13, 2003, signed by the Commandant of Pastaza's 17th Brigade.

ANNEX 51. Video taken in January 2003.

ANNEX 52. Pichincha District Attorney's Office, received April 23, 2004.

ANNEX 53. Complaint that Mr. Marlon Santi and his attorney José Serrano filed with the Attorney General of Ecuador.

ANNEX 54. Office of the First Notary of Pastaza Province, Dr. Andrés Chacha Gualoto. Notarized Record dated July 20, 2003.

ANNEX 55. Resolution No. 080-CAD-2009-04-20 of May 8, 2009 from the Management Board of PETROECUADOR.

ANNEX 56. Memorandum dated July 21, 2009 from the Ministry of Justice and Human Rights.

ANNEX 57. Memorandum from the Ministry of Mines and Petroleum, July 11, 2009.

ANNEX 58. Official Record No. 304 of April 24, 1998.

ANNEX 59. Constitutional Court in Ruling No. 193-2000-TP of December 12, 2000.

ANNEX 60. Ecuador's National Human Rights Plan of June 18, 1998 Plan.

ANNEX 61. Reports of the IACHR

- IACHR, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, November 29, 1983.
- IACHR, Report on the situation of human rights in Ecuador, Chapter IX, 1997.
- IACHR, Report on the situation of human rights in Colombia, Chapter X, 1999.
- IACHR, Report on Access to Justice and Social Inclusion. The Road Toward Strengthening Democracy in Bolivia. Chapter IV, Rights of Indigenous Peoples and Peasant Communities
- IACHR Declaration of Principles on Freedom of Expression (2000).
- IACHR. Annual Report 2008. Volume II: Annual Report of the Special Rapporteur on Freedom of Expression. Chapter III: Inter-American Legal Framework of the Right to Freedom of Expression.
- IACHR. Study of the Office of the Special Rapporteur for Freedom of Expression on the Right of Access to Information (2007).
- IACHR. Annual Report 2005. Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: Report on access to information in the hemisphere.
- IACHR. Annual Report 2003. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: Report on access to information in the hemisphere.
- IACHR. Annual Report 2001. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Volume II. Chapter III: Report on Action with respect to *Habeas Data* and the Right of Access to Information in the Hemisphere.
- IACHR. Report on Terrorism and Human Rights (2002).
- IACHR. Draft American Declaration on the Rights of Indigenous Peoples.
- IACHR, Merits Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States).
- IACHR, Merits report No.40/04, Case 12,053. Mayan Indigenous Communities of Toledo District (Belize), October 12, 2004.
- IACHR Report 24/03, Case 12,388, Yatama (Nicaragua).

ANNEX 62 Documents issued by international institutions

- Declaration on the Rights of Indigenous Peoples. Approved by the United Nations General Assembly on September 13, 2007.
- Joint Declaration on access to information and secrecy legislation, December 6, 2004, see at: http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=319&IID=2).
- Resolution of the Inter-American Juridical Committee on "Principles on the Right of Access to Information (73th CJI/RES. 147 (LXXIII-O/08), Rio de Janeiro, Brazil, August 7, 2008, see at: http://www.oas.org/cji/CJI-RES_147_LXXIII-O-08.pdf).
- United Nations Economic and Social Council. *Indigenous Issues. Human Rights and Indigenous Issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, E/CN.4/2003/90.
- United Nations Economic and Social Council, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* E/C.19/2005/3.
- International Labour Organisation. *Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989)*.
- International Labour Organisation. *Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries,1989 (No. 169), A Manual (003).*
- United Nations Committee for the Elimination of Racial Discrimination. *Consideration of Reports Submitted by States Parties under Article 9 of the Convention. Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador,* CERD/C/62/CO/2 (2003).
- International Labour Organisation, *Guidelines on Indigenous Peoples' Issues.* United Nations Development Group, February 2008.
- United Nations General Assembly, *Resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples,* A/RES/61/295, December 10, 2007.

ANNEX 63. Rulings of the Constitutional Court of Colombia

- Constitutional Court of Colombia. Judgment SU 039/97 (February 3, 1997).
- Constitutional Court of Colombia. Judgment C-169/01 (February 14, 2001).
- Constitutional Court of Colombia. Judgment C-891/02 (October 22, 2002).
- Constitutional Court of Colombia. Judgment SU-383/03 (May 13, 2005).
- Constitutional Court of Colombia. Judgment C-030/08 (January 23, 2008).
- Constitutional Court of Colombia. Judgment C-175 de 2009 (March 18, 2009).

ANNEX 64. Letter granting power of attorney.
ANNEX 65. Experts' curriculum vitae.

B. Expert opinions

263. The Commission is asking the Court to receive the opinions of the following experts:

James Anaya, United Nations Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, who will address the indigenous peoples' right to prior consultation, the international instruments on the subject, how the right and the provisions of the international instruments figure in the domestic laws, and other matters related to the object and purpose of this application. The Commission believes that this case presents the Inter-American System with an opportunity to elaborate on the question of indigenous peoples' right to prior and informed consultation.

Rodrigo Villagra Carron, anthropologist and attorney, who will describe how the Indigenous People of Sarayaku has been affected by the State's failure to protect it from third-party encroachment onto its territory and from the explosives planted on its land, its consequences, the right of consultation under Ecuadorian law, and other matters related to the object and purpose of this application. The Commission believes that this case is an opportunity to elaborate upon the rights of indigenous peoples to use, enjoy and dispose of their ancestral territories.

XI. INFORMATION ON THE REPRESENTATIVES

264. In compliance with Article 34 of the Court's Rules of Procedure, the Inter-American Commission submits the following information:

265. The Kichwa Indigenous People of Sarayaku, through its president and legal representative, Holger Cisneros, granted Mario Melo Cevallos and CEJIL the power of attorney to represent it before the organs of the Inter-American System.

266. The representatives of the victims have given their address as: [redacted]