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ARIZMENDI *ET AL.* V. CHUQUI[1]

BENCH MEMORANDUM

FOR USE BY JUDGES ONLY

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PART 1. GENERAL

I. INTRODUCTION

This memorandum provides the judges with tools concerning the key facts and legal issues relating to the hypothetical case. It does not contain and exhaustive analysis of all of these issues. It merely calls the judge's attention to certain legal issues and some jurisprudential or doctrinal developments on the subject matter that the teams may raise. The judges should be open to the participants asserting arguments that are different from or complementary to the ones discussed herein. This memorandum must be read in conjunction with the case and its clarification questions and answers.

As the facts of the case indicate, the State in question has ratified all of the international instruments. The purpose of this is for all of the participants to be able to make arguments using different international instruments to support their positions and thereby interpret the American Convention on Human rights (hereinafter the American Convention or the Convention), the jurisprudential developments of the Inter-American Court and the decisions of the Inter-American Commission comprehensively with other sources of international law.

II. CRITERIA FOR THE INTERNATIONAL RESPONSIBILITY OF THE STATE

What is the scope of the obligation to respect rights?
Should the interpretation and application of these treaties also take into account the particular circumstances of States, or just the specific situations and needs of the individuals under their protection?
What can be required of a State in the protection of human rights? Can a State argue that its limited national resources prevent it from meeting its human rights obligations?

Applicable Law

To conduct an analysis of the responsibility of the State for the events taking place in this case, it is recommended first to make reference to the nature of human rights treaties. Second, there should be an analysis of articles 1 and 2 of the Convention, with reference to the international obligations of States regarding the protection of human rights. Finally, it is necessary to examine the responsibility of the State for acts committed by third parties as well as the possibility of the company's responsibility for human rights violations.

It can be said generally that States are bound internationally by the obligations contained in the human rights treaties once they have expressed their voluntary consent to do so. These international obligations prescribe certain conduct, and the State's failure to adhere to such conduct gives rise to the international responsibility of the State. Therefore, in principle, the international responsibility of the State is determined by acts or omissions attributable to the State.

The special nature of human rights treaties has been established in numerous decisions issued by international bodies for the protection of human rights. Their special nature is derived from the fact that they are treaties that protect a greater good, the individual person. The Inter-American Court has stated that they are treaties inspired by common values centered on the protection of human beings.[2] Therefore,—unlike other international treaties— human rights treaties are not based on a reciprocal exchange of rights for the mutual benefit of the States; rather, they are treaties whose object and purpose are the protection of the fundamental rights of human beings, before their own States as well as before the other Contracting States, and it is based on that object and purpose that the treaty must be interpreted and applied.[3] States thus assume obligations toward the individuals under their jurisdiction[4] that may be passive in nature (do not kill, do not violate physical integrity) or that may be positive obligations.[5]

The ability of States to implement human rights standards (which is one of the issues that might be raised in the resolution of this case) arises from the latter. To this effect, what is required of the State? This issue comes up especially with regard to those countries with limited resources, and is directly related to the progressive development of human rights that will be discussed later on. Many States are not in a position to be able to ensure all of the standards established in the international human rights standards. However, it should not be forgotten that States assume only the responsibilities they have accepted voluntarily.

A. Obligation to respect and ensure human rights:

Article 1 of the Convention establishes the obligation of States to respect rights as follows:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
>
> 2. For the purposes of this Convention, "person" means every human being.

[2] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 105 (Sept. 16, 2005).
[3] *Cf. Id.* at 105; Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 101 (June. 17, 2005); Lori Berenson Mejía v. Perú, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119, 220 (Nov. 25, 2004); Serrano-Cruz Sisters v. El Salvador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 118, 69 (Nov. 23, 2004); Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, 83 (June. 21, 2002),
[4] *Cf.* The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75) Advisory Opinion OC-2/82, 1982 Inter-Am. Ct. H.R. (ser. A) No. 2, 29 (Sept. 24, 1982).
[5] *See* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 114 (Sept. 16, 2005).

Moreover, article 2 of the Convention regulates the duty of States to adopt provisions of domestic law, so that

> 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.

Although the American Convention makes express reference to the general norms of international law for its interpretation and application,[6] the obligations contained in articles 1.1 and 2 are the basis for the determination of the international responsibility of a State for Convention violations. The Convention is in effect *lex specialis* in terms of State responsibility because of the special nature of international human rights treaties *vis-à-vis* general international law. Therefore, the attribution of international responsibility to the State must be considered in light of the Convention itself.[7] The very origin of the responsibility of a State arises, therefore, from its non-compliance with the obligations enshrined in articles 1.1 and 2 of the Convention.[8] Special duties are derived from these general obligations, and are determined according to the legal person's particular needs for protection, whether due to his personal situation or his specific status,[9] such as extreme poverty or marginalization and childhood.[10]

States have the obligation to respect rights and the obligation to ensure rights. The obligation to respect involves a limit on the exercise of public power, so as to establish certain areas of the human sphere that cannot be violated or penetrated. The obligation to ensure entails the duty to organize the entire state apparatus to ensure the full and free exercise of human rights.[11] On this point, the Inter-American Court has stated that:

> [a]s a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[12]

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[6] The preamble of the American Convention refers expressly to the principles reaffirmed and developed in international instruments "worldwide as well as regional in scope" (para. 3), and article 29 requires its interpretation bearing in mind the American Declaration "and other international acts of the same nature". Other norms refer to obligations imposed by international law in relation to the suspension of guarantees (article 27), as well as the "generally recognized principles of international law" in the definition of the exhaustion of domestic remedies (article 46(1)(a)).

[7] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 107 (Sept. 16, 2005).

[8] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 11 (Jan. 31, 2006); Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 111 (Sept. 16, 2005); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, 140 (Sept. 17, 2003).

[9] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 111-112 (Jan. 31, 2006); Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 108, 110 (Sept. 16, 2005), Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 71 (July. 8, 2004).

[10] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 154 (Mar. 29, 2006).

[11] *Cf.* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 165 et seq. (July. 29, 1988).

[12] *Cf. Id.* at 165.

The Court has established in principle that any infringement of human rights shall be imputable to the State if it can be attributed, according to the rules of international law, to the act or omission of any public authority, and the State thereby incurs responsibility in the terms provided by the Convention. To this effect, any time an entity or employee of the State or of a public institution unduly infringes such rights it constitutes non-compliance with the duty to respect enshrined in article 1 of the Convention.[13] It is independent of whether the government entity or employee has acted in violation of domestic law provisions or exceeded the limits of its/his own jurisdiction, given that it is a principle of international law that the State is responsible for the acts of its agents when such acts are performed under color of law, and is responsible for their omissions even if they act outside the limits of their jurisdiction or in violation of domestic law.[14]

Furthermore, to establish that there has been a violation of the rights enshrined in the Convention it is not necessary to determine (as it is in domestic criminal law) the guilt of its perpetrators or their intent; nor is it necessary to individually identify the agents to whom the violations are attributed.[15] It is sufficient to demonstrate that the authorities have supported or tolerated the infringement of rights recognized in the Convention[16], or the omissions that have allowed these violations to be perpetrated.[17]

The obligation to prevent, as well as the obligation to investigate, is an obligation of means or conduct, and "the existence of a particular violation does not, in itself, prove the failure to take preventive measures";[18] rather, it is "because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[19] The Court has held that the duty to investigate is a means to ensure the rights protected under articles 4, 5 and 7 of the Convention, and its breach gives rise to the international responsibility of the State.[20]

With regard to the general duty set forth in article 2 of the Convention, the Court has indicated that it entails the adoption of measures along two lines. On one hand, it involves the suppression of standards and practices of any kind that amount to a

[13] *Cf.* Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 72 (July. 8, 2004); Five Pensioners v. Perú, 2003 Inter-Am. Ct. H.R. (ser. C) No. 98, 63 (Feb. 28, 2003); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, 76 (Sept. 17, 2003); Baena-Ricardo et al. v. Panamá, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72, 178 (Feb. 2, 2001).

[14] *Cf.* Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 72 (July. 8, 2004); Five Pensioners v. Perú, 2003 Inter-Am. Ct. H.R. (ser. C) No. 98, 63 (Feb. 28, 2003); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, 76 (Sept. 17, 2003); Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 108 (Sept. 16, 2005); Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 111 (Jan. 31, 2006); Baena-Ricardo et al. v. Panamá, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72, 178 (Feb. 2, 2001).

[15] *Cf.* 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 141 (July. 5, 2004); Maritza Urrutia v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, 41 (Nov. 27, 2003); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 75 (Nov. 19, 1999).

[16] *Cf.* 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 141 (July. 5, 2004); Juan Humberto Sánchez v. Honduras, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, 44 (June. 7, 2003); Cantos v. Argentina, 2002 Inter-Am. Ct. H.R. (ser. C) No. 97, 28 (Nov. 28, 2002).

[17] Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 110 (Sept. 16, 2005); Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 112 (Jan. 31, 2006).

[18] *Cf.* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 175 (July. 29, 1988).

[19] *Cf. Id.* at 172.

[20] *Cf.* Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 100-102, 106 (Jan. 28, 2008).

violation of Convention rights. On the other, it entails the issuance of standards and the development of practices conducive to the effective observance of such rights.[21]

The resolution of this case therefore raises the issue of whether the State met these two categories of obligations. On this point, the participants will have to argue as to whether the State, by act or omission, violated the rights of the victims in the case—that is, whether there was **non-compliance with the duty to respect, prevent and ensure**, and whether the State met or failed to meet its obligation to **adopt measures to ensure effectively the fundamental rights of the persons who claim to have been affected adversely by it.**

B. State Responsibility for the actions of third parties and the duty of prevention

Can a State be internationally responsible for human rights violations committed by third parties who are not public officials, entities or employees of the State? *Is the State required to consider in the adoption of its public policies every possible circumstance that might result in a violation of some human right?*

Without prejudice to the above discussion, the Court has indicated that international responsibility can also arise from acts of private individuals that are not in principle attributable to the State. Although it is the States Parties to the Convention that have obligations *erga omnes* to respect and ensure respect for the standards of protection and to ensure the effectiveness of the rights enshrined therein under all circumstances and with regard to all people,[22] the effects of these State obligations go beyond the relationship between its agents and the individuals under its jurisdiction; they are also manifested in the positive obligation of the State to adopt the measures necessary to ensure the effective protection of human rights in relationships among individuals. The attribution of responsibility to the State for private acts may occur in cases where the State fails to comply, by the act or omission of its agents when they are in the position of guarantors [of rights], with those *erga omnes* obligations contained in articles 1.1 and 2 of the Convention.[23] Likewise, in the case of *Albán Cornejo et al.*, the Court established that State responsibility can arise from acts carried out by private individuals when the State fails to prevent or stop the acts of third parties who infringe upon legally protected interests.[24] Therefore, the Convention and the obligations prescribed therein stand on the principle of prevention and the effectiveness of the protection.[25] Similarly, in

[21] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 109 (Sept. 16, 2005), Lori Berenson Mejía v. Perú, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119, 219 (Nov. 25, 2004); Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 206 (Sept. 2, 2004); Five Pensioners v. Peru (2003) Inter-Am. Ct. H.R. (ser. C) No. 98, 165 (Feb. 28, 2003).
[22] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 111 (Sept. 16, 2005); Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 113 (Jan. 31, 2006); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, 140 (Sept. 17, 2003).
[23] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 111 (Sept. 16, 2005); Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 113 (Jan. 31, 2006).
[24] *Cf.* Case of Albán Cornejo et al. v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 171, 119 (Nov. 22, 2007).
[25] Asdrúbal Aguilar, *Derechos Humanos y Responsabilidad Internacional del Estado"*, 1997, Monte Ávila Editores Latinoamericana, Universidad Católica Andrés Bello, p. 197. See also Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 175 (July. 29, 1988); Godínez-Cruz v. Honduras, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, 183 (Jan. 20, 1989).

Advisory Opinion 18 on the *Juridical Condition and Rights of the Undocumented Migrants*, the Court stated that

> [t]he obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes)*. This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.[26]

For its part, the Commission has found State responsibility in several cases where the acts of violation were committed by third parties. This occurred in the case of the mining companies operating on land belonging to the Yanomami indigenous people of Brazil,[27] in which it found the State responsible for omitting to adopt timely and effective measures to protect the human rights of the individuals affected;[28] this was also the case with regard to petroleum development activities in Ecuador[29] that contaminated, among other things, the water used by the region's inhabitants. The Commission recognized the freedom of States to exploit their natural resources, including by opening up to international investment; however, it emphasized the serious consequences of inadequate regulation at the national level resulting in human rights violations.[30]

The European Court has referred to the responsibility of the State for acts not committed by State agents within the framework established in article 1 of the European Convention, which contains the obligation of States to ensure the rights recognized therein. In the case of *A v. United Kingdom*, the Court linked article 1 to the substantive right recognized article 3 of the European Convention, and established that the State can be responsible for violating the prohibition against torture or cruel, inhuman or degrading treatment even if they were acts committed by third party nonstate actors, because of the State's failure to ensure that the law adequately protected a young man from abuse at the hands of his stepfather. The European Court held that the substantive right at issue requires the State to adopt measures designed to ensure that the individuals under its jurisdiction not be subject to torture or cruel, inhuman or degrading treatment, including abuses committed by private individuals.[31] Consequently, the State has the obligation to ensure that there are adequate prevention measures.

The Inter-American Court has established that positive obligations must be interpreted so as not to impose an impossible or disproportionate burden on the authorities.[32] As such, and taking into account the difficulties of planning and adopting public policies, a State cannot be responsible for every situation of risk. The Court has established as a requirement for the determination of State responsibility that at the time of the events the authorities knew or should have known that a real

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[26] *Cf.* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, 140 (Sept. 17, 2003).
[27] *Cf.* Yanomami v. Brazil, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L/V/II.66 Doc. 10 rev. 1 (1985).
[28] *Cf. Id.* at clauses 10 and 11, and clause one of the holding.
[29] *Cf.* Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser. L/V/II.96 Doc. 10 rev. 1 (1997), ch. VIII.
[30] *Cf.* Report on the Situation of Human Rights in Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.53, Doc. 21 rev. 2, (1981).
[31] *See also* Z and others v. UK, 2002 Eur. Ct. H.R., No. 29392/95, para. 73 (May. 10, 2001).
[32] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 124 (Jan. 31, 2006); and Kiliç v. Turkey, 2000 Eur. Ct. H.R., III, 63.

or immediate risk existed and that they failed to take the measures necessary within the sphere of their functions which, judged reasonably, could be expected to prevent or avert such risk.[33] The Court has likewise held that laws in and of themselves are not sufficient to ensure the full effectiveness of the rights protected by the Convention; rather, government conduct is necessary to ensure the real existence of an effective guarantee of the free and full enjoyment of human rights.[34] Such conduct, in turn, must be sufficient and adequate for the attainment of that objective.[35]

C. Corporate Responsibility

Do the obligations derived from human rights treaties create obligations exclusively for States or, to the contrary, can third party nonstate actors be responsible for the violation of those rights? Is it possible to talk about levels of responsibility within the sphere of human rights in order to justify the attribution of responsibility to the company?

The Court has established that in the Inter-American system for the protection of rights "the jurisdiction of the organs established [by the Convention] refer exclusively to the international responsibility of states and not to that of individuals."[36] However, the Court has also stated that human rights treaties are living instruments whose interpretation must be considered in light of evolving times and present-day conditions.[37] Further, in the interpretation and application of the Convention, attention must be paid to the particular need for protection of the individual person, the ultimate beneficiary of the standards set forth in the treaty. As such, due to the *erga omnes* nature of the Convention obligations, they concern all subjects of international law and presumptions of non-compliance must be determined in each case according to the need for protection in each particular case.[38]

Although the States are the primary guarantors of human rights, the evolutionary interpretation of international human rights standards would allow for corporations, as private entities with growing power and influence in the international sphere, to also be understood as guarantors of such rights. The Court has made reference to such effects with regard to third parties in contentious cases,[39] and has also ordered

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[33] *Cf*. Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 124 (Jan. 31, 2006); Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 155 (Mar. 29, 2006). *See also* Kiliç v. Turkey, 2000 Eur. Ct. H.R., III, 63; Öneryildiz v. Turkey (2004) Eur. Ct. H.R., Application No. 48939/99, 93 (Nov. 30, 2004); Osman v. the United Kingdom, 1998 Eur. Ct. H.R., VIII, 116.

[34] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 142 (Jan. 31, 2006); Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 167 (Mar. 29, 2006).

[35] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 170 (Mar. 29, 2006).

[36] *Cf.* Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), Advisory Opinion OC-15/97, 2003 Inter-Am. Ct. H.R. (ser. A) No. 17, 56 (Nov. 14, 1997).

[37] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 125 (June. 17, 2005).

[38] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 117 (Jan. 31, 2006).

[39] *Cf.* Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, 211 (June. 15, 2005); Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, 108 (Sept. 7, 2004); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 91 (July. 8, 2004); 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 183 (July. 5, 2004); Maritza Urrutia v. Guatemala,

provisional measures to protect members of groups or communities from acts and threats caused by agents of the State and by private third parties.[40]

For some time now an international expectation has been considered and established, according to which corporations must meet certain international standards of social responsibility in their conduct. As a result, there are now numerous attempts at the international level to regulate the responsibility of corporations for acts that violate human rights and corporate social responsibility. Nevertheless, most of them are characterized by their voluntary nature, establishing guidelines on which to evaluate the harmful acts of corporations, their effects and measures to resolve those effects. Their effectiveness depends exclusively upon the degree to which corporations want to be bound by such documents, since they are not binding international standards the way human rights treaties are.[41] Here it is worth mentioning the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.*[42] This is a document created in 2003 by the United Nations Human Rights Sub-Commission, and it has become a strong impetus for the possible binding international regulation of transnational corporations, without prejudice to the intense international debate in favor of and against voluntary systems and binding systems. This document lists a series of international standards that corporations must respect in their conduct. It states that they "have […] the obligation to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments", including the American Convention on Human Rights.[43]

2003 Inter-Am. Ct. H.R. (ser. C) No. 103, 71 (Nov. 27, 2003); Bulacio v. Argentina 2002, Inter-Am. Ct. H.R. (ser. C) No. 100, 81 (Sept. 18, 2002).

[40] *Cf. Case of the Penitentiaries of Mendoza*, Provisional Measures. Inter-Am. Ct. H.R.Order of June 18, 2005; *Case of the Sarayaku Indigenous Community*, Provisional Measures. Inter-Am. Ct. H.R. Order of July 6, 2004; *Case of the Kankuamo Community*, Provisional Measures. Inter-Am. Ct. H.R. Order of July 5, 2004; *Case of the Jiguamiandó and Curbaradó Communities*, Provisional Measures. Inter-Am. Ct. H.R. Order of March 6, 2003. Series E No. 4, p. 169; *Case of the Paz de San José Apartadó Community*, Provisional Measures. Inter-Am. Ct. H.R. Order of June 18, 2002. Series E No. 4, p. 141; *Case of the Urso Branco Prison*, Provisional Measures. Inter-Am. Ct. H.R. Order of June 18, 2002. Series E No. 4, p. 53.

[41] The participants may therefore make reference to this, and might mention programs and documents such as the United Nations' "Global Compact"; the OECD Guidelines for Multinational Enterprises; the Tripartite Declaration of Principles Concerning Multinational Enterprises; the Draft UN Code of Conduct for Transnational Corporations; and the Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights, among others.

[42] United Nations, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, August 26. 2003.

[43] […] are […] obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; the United Nations Convention against Transnational Organized Crime; the Convention on Biological Diversity; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Declaration on the Right to Development; the Rio Declaration on the Environment and Development; the Plan of Implementation of the World Summit on Sustainable Development; the United Nations Millennium Declaration; the Universal Declaration on the Human Genome and Human Rights; the International Code of Marketing of Breast milk Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the "Health for

In the General Obligations paragraph, this document also establishes that States have the main responsibility to respect, ensure respect for, and promote human rights, while corporations will have these obligations to respect, ensure and promote only within their respective spheres of activity and influence.[44]

The convergence of responsibilities is mixed into the debate, and the participants may explore this avenue. An argument on levels of responsibility follows from the above reading, with the main obligation belonging to the State, while the corporations, also potential responsible parties, will only be responsible for conduct within their sphere of activity and influence.

Sovereign States were previously considered the only actors with power in the international sphere; nowadays however, there are other relevant actors in the contemporary international system, most notable transnational corporations. The idea of an international system of government centered on States has turned into a system of multiple actors with relevant roles. Thus, the various actors in the international forum not only have a say in decision-making or in the ability to influence decisions; at the same time the social responsibilities that were previously within the exclusive purview of States, including the protection of and respect for human rights, have been extended to them.[45]

Nevertheless, there are positions against this idea. They are centered basically on the abovementioned premise that international responsibility rests exclusively with States, which are the principal actors, together with individuals, as far as human rights are concerned.[46]

All in the Twenty-First Century" policy of the World Health Organization; the Convention against Discrimination in Education of the United Nations Education, Scientific, and Cultural Organization; conventions and recommendations of the International Labor Organization; the Convention and Protocol relating to the Status of Refugees; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development; and other instruments […].

[44] *Id.* A. General Obligations. 1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

[45] "With power should come responsibility, and international human rights law needs to focus adequately on these extremely potent international nonstate actors", David Weissbrodt and Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, American Journal of International Law, October 2003, Vol. 97 No. 4, p. 901.
"Corporations […] should be subjected to human rights responsibilities, notwithstanding their status as creatures of private law, because human dignity must be protected in every circumstance," Clapham 1993: 147, in Rory Sullivan, Business and Human Rights, p. 37.

[46] "Private non-state actors do not have any positive duty to observe human rights. Their only duty is to obey the law. Thus it is for the state to regulate on matters of social importance and for such actors to observe the law. It follows also that TNCs and other business enterprises, as private actors, can only be beneficiaries of human rights protection and not human rights protectors themselves. [W]hich human rights are TNCS to observe? They may have some influence over social and economic matters […] but they can do nothing to protect civil and political rights. Only states have the power and the ability to do that", Rory Sullivan, Business and Human Rights: dilemmas and solutions, p.35-36.

Accordingly, there is no single and absolute answer in the resolution of this case. It is possible to argue in both directions, given that there really is no binding international recognition that establishes corporate responsibility for human rights violations.

Arguments of the Commission and the State

The IACHR can argue that the State has granted access to numerous foreign corporations to operate within its borders without adequately adapting its laws with the aim of protecting the rights of its citizens. The liberalization of foreign investment must be accompanied by domestic regulatory standards to govern the activities of those corporations, as well as by the development of programs for the oversight of the industrial activity in question. It follows from the facts that the State failed to act preventively through policies to monitor the industrial activities, particularly the creation of programs to monitor the environmental impact of such activities. As such, it must be concluded that the violations of the American Convention are imputable to the State as a result of the omissions of its own agents.

The attribution of responsibility to the State for the corporation's acts lies in its noncompliance with its *erga omnes* Convention obligations to ensure the effectiveness of human rights in relationships among individuals.

All States must take human rights into account in the determination of their public policies, including economic policies, as it is impossible to separate the protection of human rights from the action of any sphere of the State's public administration. It is true that there is no clear and specific regulation at the international level establishing specific content with regard to the States' obligation of protection in the face of corporate abuse. However, it is indeed clear in the international sphere that States are the principal guarantors of human rights, and that they have the obligation not only to respect those rights but also to protect them from abuse by third parties.

The State also has a direct responsibility from the time the cause of the deaths and poisonings was discovered, because in spite of the fact that it initially ordered the company to be shut down in view of the ongoing risks in the area, the

State later (following a request made by company officials) lifted this order and allowed the company to keep operating, with the risk to human life that this involved. The company specifically argued that there could be an economic impact on the country, and that the prestige of the company and of the State itself could be affected in terms of future investment by other foreign corporations. Indeed, it does follow from the various regulations that have come out in recent decades on corporate social responsibility—especially regarding the role of corporations in the protection of human rights—that the prestige of a corporation must be seen in light of its efforts and achievements with respect to human rights, and not just in light of the economic benefit obtained.

The company had the legal and administrative support of the State through its policy of liberalization toward foreign investment. The State opted to pass laws favorable to corporations while neglecting its duty and responsibility to ensure the fundamental rights of its citizens.

The State can argue that acts committed by third parties cannot be attributed to it as though they were the State's own acts, and that these acts—which are outside the realm of state activity—cannot give rise to the international responsibility of the State. Only if it is demonstrated that the corporation's conduct is imputable by act or omission to agents of the State, because they failed to comply with their convention duties in the face of acts committed by private agents (the company), could international responsibility be attributed to the State.

Compliance with the State's obligations requires the establishment of priorities that take into account the limited resources available to a State, which can become valid limitations to the enjoyment of a right when they are consistent with criteria of reasonableness and proportionality.

For the State, its action was confined to the margin that States have for the development of public policies aimed at guiding public life and the interaction of social actors and private actors. The State of Chuqui is a poor State with few resources. In spite of this, it has developed certain environmental and health laws according to which the companies that wish to establish themselves in the country must meet certain requirements in order to obtain the necessary environmental and health licenses, and the companies are required to comply fully with the standards for the protection of health and the environment. Based on the facts, it was determined that the company violated those laws, and the State immediately set in motion the mechanisms of action necessary to eliminate the risks posed by the company. Furthermore, the State complied with the recommendations of the International Monetary Fund in terms of the public policies relating to foreign corporations. With the resources that the State has, it cannot conduct technical monitoring of any great significance; rather, it is the corporations themselves that must allocate funds for environmental impact studies and take the measures necessary to prevent acts such as those that occurred in this case.

Not only was the State not the one that created a situation of risk but it was also unaware of that risk; as such, there is no State support or tolerance as required by the Inter-American jurisprudence in order for the State to be responsible internationally for what happened. Moreover, once the first cases of death and intoxication were known, the State set in motion all of its administrative machinery to determine the origin of the events and to prevent more deaths from occurring. The State therefore acted with due diligence and promptness in clearing up the facts and eliminating the risk of similar acts continuing to occur. Therefore, the State cannot admit responsibility, since its agents and employees acted within the parameters established by law, protecting the population with their prompt action.

Likewise, domestic legal resources were used to determine responsibilities, and the domestic proceedings determined that the corporation—not any State agent or employee—was responsible. This proves that the State is not responsible due to any direct action of its employees or due to State acquiescence to the actions of third parties. The responsible parties acted outside the law, and were therefore convicted—the corporation in a civil case and the company's engineer in a criminal case.

The rights enshrined in the articles of the Convention alleged to have been violated were and are duly protected by the laws of the State and ensured by the authorities. In this case the judicial authorities investigated and punished those responsible, with criteria and modes of participation consistent with the seriousness of the acts.

D. Duty to ensure with regard to the environment: principles of sustainability and precaution[47]

To what extent might ignorance of the principles of prevention and precaution, a lack of access to sufficient information and the improper performance of an Environmental Impact Study constitute a violation of substantive Convention rights?

Applicable law

The teams may opt for different strategies in litigating environmental law issues. Among many possible options, some of these topics are examined below in connection with articles 1.1 and 2 of the Convention. The analysis stresses the duty to ensure, which means ensuring the adoption of domestic law provisions that facilitate effective prevention and precaution. It should be noted that numerous substantive rights may be invoked in relation to these general duties. For this, the analysis developed in the second part of this memorandum must be taken into account.

The creativity of the teams must be analyzed according to how they fall within the framework of the American Convention. Given that the Inter-American Court lacks jurisdiction to make the right to the environment directly justiciable, different indirect enforcement options can be attempted. Many of them are related to procedural or instrumental rights and principles applicable to all regulations, such as the principle of nondiscrimination, access to information, access to justice and the right of participation.[48] Likewise, as discussed in more detail below, strategies of interdependence or connection between the rights to health and the environment and various substantive rights of the American Convention may be used.

The right to a healthy environment is recognized in article 11 of the Protocol of San Salvador. This article establishes that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services" and that "[t]he States Parties shall promote the protection, preservation and improvement of the environment." The right to a healthy environment protects not only a "salubrious" environment but also the conservation of natural resources, biological diversity and the proper functioning of ecosystems.

The environment includes all natural resources (water, air, earth, flora, fauna), the ecosystems formed through their interaction and biological diversity.[49] Likewise, the right to the environment is profoundly related to the right to sustainable development (principle of sustainability)[50], since its satisfaction, necessary to the

[47] This segment is based in part on María Aránzazu Villanueva Hermida, Agustín Enrique Martin and Oscar Parra Vera's *Protección Internacional de los Derechos Económicos, Sociales y Culturales. Sistema Universal y Sistema Interamericano*, San José, IIDH/UNFPA, 2008.
[48] IACHR, Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129 Doc. 4, September 7, 2007 and IACHR, Guidelines for preparation of progress indicators in the area of economic, social and cultural rights, OEA/Ser/L/V/II.129 Doc. 5, October 5, 2007.
[49] Declaration of the United Nations Conference on the Human Environment "Stockholm Declaration", of 1972, Principle 2. Rio Declaration on Environment and Development of 1992, Principle 7; World Charter for Nature, Principles 1, 2, 10, Convention on Biological Diversity, article 1.
[50] As the Rio Declaration on Environment and Development states, "[p]eace, development and environmental protection are interdependent and indivisible." (principle 25). See also Daniel Barstow

enjoyment of all human rights, entails the use of natural resources. The Declaration on the Right to Development,[51] in pertinent part, defines this right as follows:

> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The 1992 World Conference on Human Rights recognized that the illegal dumping of toxic waste and dangerous substances could constitute a serious threat to the rights of all people to life and to health. The "Río Declaration on Environment and Development" was issued at this conference, holding that "sustainable development" is that which tends to eliminate poverty and improve quality of life (principles 5 and 8) but "[is] fulfilled so as to equitably meet developmental and environmental needs of present and future generations" (principle 3) and considers "environmental protection [as an] integral part of the development process and not […] isolate[ed] from it" (principle 4).

In this context, the United Nations Special Rapporteur investigating the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, has cited the obligation of States, in view of the rights to life and to health, to ensure those rights by adopting policies to facilitate the safe handling of hazardous materials.[52] In addition, General Comment 14 of the ESCR Committee has considered the right to a healthy environment on of the "underlying determinants of health."[53] Among the measures that States should adopt in aiming to satisfy the right to health are "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health."[54] To ensure the enjoyment of the right to food (General Comment 12), the ESCR Committee considered essential "appropriate […] environmental […] policies."[55], including those aimed at preventing the contamination of food products.[56] With regard to the right to adequate housing, the Committee has indicated, in its General Comment No. 4, that it is not adequately met if the housing is built on polluted sites.[57]

It must be stressed that the IACHR has granted precautionary measures to protect the rights of communities affected by serious environmental pollution. One of them concerns the effects of an open-air deposit of mine tailings that contained noxious substances.[58] In another case the IACHR ordered precautionary measures to protect the health, safety and lives of 65 individuals whose health was adversely affected by

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Magraw y Lisa D. Hawke, "Sustainable Development" in Daniel Bodansky, Jutta Bruñe and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, pp. 613-638.

[51] Adopted by the General Assembly of the United Nations in its Resolution 41/128 of December 4, 1986.

[52] United Nations Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Sr. Okechukwu Ibeanu. *The adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, Report of February 20, 2006. Document E/CN.4/2006/42, paras. 36, 38.

[53] Paragraphs 4 and 11.

[54] Paragraph 15.

[55] Paragraph 4.

[56] Paragraph 10.

[57] Paragraph 8.

[58] IACHR, 2004 Annual Report, Precautionary Measures granted on behalf of Oscar González Anchurayco and members of the Community of San Mateo de Huanchor. The IACHR requested that the State provide medical attention to the adversely affected community and conduct the appropriate environmental impact study.

high levels of contaminants in the air, soil and water in the community of La Oroya (Peru) from metal particles released by the smelter plant operating there.[59]

On par with the principle of sustainability, environmental law includes the **principle of precaution or precautionary principle.** According to this criterion, "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[60] Therefore, every political decision-maker must act in advance, and before possessing scientific certainty, to protect the environment and, consequently, the interests of future generations.[61]

In accordance with the obligation to "protect", it is the States' duty to create a regulatory system that requires private parties to refrain from harming the environment. The performance of this duty includes mechanisms such as Evaluations or Environmental Impact Studies. On this point, the Río Declaration on the Environment and Development states that an "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

On the other hand, the procedural guarantees that facilitate environmental protection include (i) the duty to provide information; (ii) the duty to allow the greatest possible participation of the affected persons; and (iii) access to justice to resolve conflicts that make it difficult for these procedural guarantees to remain in effect.

As for access to information, the Inter-American Court has noted the connection between the right of access to public information and environmental issues, and has used international instruments on the subject of the environment to interpret this right.[62] This duty is particularly important if we bear in mind that environmental matters tend to be linked to issues that concern a collective group of unspecified individuals.

With regard to the right of participation, Principle 10 of the Río Declaration stresses that "[At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes."

As for the right of access to justice, the Río Declaration insists that "[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided." This obligation requires effective resources to safeguard the principles of sustainability, prevention and precaution and the "polluter pays"

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[59] IACHR, 2007 Annual Report, Precautionary Measures, para. 50. The Commission requested that the State of Peru adopt the relevant measures to conduct a specialized medical diagnosis of the beneficiaries, and provide appropriate specialized medical treatment for those individuals whose diagnosis demonstrates that they are in danger of suffering irreparable harm to their personal safety or lives.

[60] The 1992 Rio Declaration on Environment and Development, Principle 15. The doctrinal developments on this topic are quite extensive. One current example can be seen in Jonathan B. Wiener's "Precaution" in Daniel Bodansky, Jutta Bruñe and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, pp. 597-612.

[61] Goldenber, Isidoro H., Caferata, Néstor A., "Daño ambiental. Problemática de su determinación causal", Ed. Abeledo–Perrot, Bs. As., Argentina, 2001, p. 68.

[62] *Cf.* Claude-Reyes et al. v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, 81 (Sept. 19, 2006).

principle. It requires that the usual evidentiary rigor be relaxed. In turn, the collective nature of environmental issues requires the collective standing of groups in order to prevent the resource from being ineffective, and it requires collective remedies.

The Inter-American Court has held with respect to these procedural guarantees that the failure to consult with indigenous communities regarding the a protection of the environment on their land an neighboring areas, as well as the omission to conduct an appropriate environmental impact study with regard to the exploitation of natural resources located on tribal or indigenous land, are acts that can infringe upon the respective communities' right to property in violation of article 21 of the ADHR as understood in light of article 1.1 of that treaty. The environmental impact study must be performed by independent and technically capable entities under the supervision of the State.[63] To this effect, the Court has stated that

> "[the] duty [to consult with indigenous or tribal communities to enable their effective participation in development or investment plans concerning their territory] requires the State to both accept and disseminate information, and 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. Furthermore, the [indigenous or tribal community] must be consulted, in accordance with [its] own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the [indigenous or tribal community] are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the [indigenous or tribal community's] traditional methods of decision-making.[64]
>
> […]
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> Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within the [indigenous or tribal] territory, the State has a duty, not only to consult with the [indigenous or tribal community], but also to obtain their free, prior, and informed consent, according to their customs and traditions. The Court considers that the difference between "consultation" and "consent" in this context requires further analysis.[65]

Similarly, the Inter-American Commission has considered that the concession of permits to third parties for the exploitation of natural resources located on land belonging to an indigenous community, without first engaging in appropriate consultation with that community, as well as the environmental damage caused by such activities, violates the right to property.[66] It has also granted precautionary measures aimed at suspending activities that would adversely affect the natural resources or environment of territories settled by indigenous communities, based on the understanding that such activities could cause irreparable harm to those communities. It is notable that this was the case even when not all of the activities in question were liable to be a detriment to health. Accordingly, on October 20, 2000,

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[63] *Cf.* Saramaka People v. Suriname (2007) Inter-Am. Ct. H.R. (ser. C) No. 171, 129 (Nov. 28, 2007).
[64] Likewise, in *Maya Indigenous Communities of the District v. Belize*, the Inter-American Commission observed that States must engage in effective and fully informed consultations with indigenous communities regarding the acts or decisions that might affect their traditional territories. In this case, the Commission determined that a process of "fully informed consent" requires "at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or [collectively]." *Cf.* Inter-American Commission on Human Rights, Report on the Merits 40/04. Case 12.052. *Maya Indigenous Communities of the Toledo District*, para. 142. *Cf.* also the Ecuador Principles, Principle 5.
[65] *Cf.* Saramaka People v. Suriname (2007) Inter-Am. Ct. H.R. (ser. C) No. 171, 134-135 (Nov. 28, 2007).
[66] *Cf.* Case 12.053 *Maya Indigenous Communities of the Toledo District* (Belize). Report No 40/04 of October 12, 2004, paras. 144, 147, 148, 153.

the Commission requested on behalf of the Mayas Indigenous Communities and their members that the State of Belize adopt the necessary measures to suspend all permits, licenses, and concessions for the exploitation of petroleum or other natural resources on lands used or occupied by such communities. Similarly, on August 8, 2002, it issued precautionary measures to protect twelve Saramaka clans with respect to concessions for logging, mining and road construction on indigenous lands that were granted by the State without consulting with the communities in question; in addition, between 20 and 30 tons of mercury had been released into the environment, contaminating water sources and marine life.

The above are some very basic elements concerning the Law applied to international environmental law. However, the teams may use many more relevant cases. For example, in the case of *López Ostra v. Spain*, the European Court of Human Rights examined the harm sustained by a family whose house was located in the vicinity of a toxic waste treatment plant built with the authorization of the State. The Court affirmed that the State failed to achieve "a fair balance between the interest of the town's economic well-being—that of having a waste treatment plant—and the applicant's effective enjoyment of her right to respect for her home and her private and family life."[67] Further, given that the plant emitted vapors, constant noise and strong odors, and given that this made the family's living conditions unbearable and caused serious health problems to its members, the Court found that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."[68]

In the case of *Fadeyeva v. Russia*[69] the European Court found a violation of the same right due to the fact that the health and well-being of the victim had been affected by the operation of a steel plant in close proximity to her home. Likewise, in the case of *Taskin v. Turkey*[70] the Court ruled that the right to private life was violated because gold mining activities endangered the health of individuals due to the emission of dangerous dioxins.

Arguments of the Commission and the State

The Commission could argue that the serious effects of the pollution give rise to an inference that the company was issued permits without any verification. Likewise, the two month suspension of the order requiring the company to close demonstrates that the different principles ensuring the right to the environment were not taken into account. In particular, it could stress that the affected community was never informed of the potential environmental damage, that there was never any public deliberation on the matter and that the company did not conduct any promotion or prevention activities—an aspect that would have to be supervised by the State.

In effect, taking into account the magnitude of the events, the decision to revoke the order to close the company would be incompatible with the principle of precaution, given that there was no certainty of overcoming the risk. At least for the sake of discussion, an environmental impact study would have been necessary at the time the company was reopened, and one was not done.

[67] Case of López Ostra v. Spain, (1994) Eur. Ct. H.R. Judgment of December 9, 1994, para. 58.
[68] *Id.* at. 51.
[69] Case of Fadeyeva v. Russia, (2005) Eur. Ct. H.R. Judgment of June 9, 2005.
[70] Case of Taskin v. Turkey, (2004) Eur. Ct. H.R. Judgment of November 10, 2004.

The State could argue that it is difficult to measure the impact at the time of an alleged incident of environmental contamination. In addition, taking into account the reparations made by the company, the State could indicate that the "polluter pays" principle was respected, and that the company even took part in promotion activities, consistent with the principles of prevention and precaution.

PART 2: RIGHTS VIOLATED

I. THE RIGHT TO LIFE

Relevant facts

- In November of 1998, the Director of the Public Hospital in the capital of Chuqui was informed by the person in charge of the pediatric department that four children had died during the past 6 months of unknown causes, but that in all of the cases their blood was found to contain elevated levels of mercury and other contaminating agents.
- The Director immediately sent out an internal memorandum at the Hospital and asked to be informed of all cases where elevated levels of mercury or other contaminating agents were found in patients' blood.
- From December 1999 to October 2001, 21 deaths and 61 cases of illness were reported as a consequence of the toxic spill from the company. Of these individuals, X are children.
- The State determined that the cause of the deaths was poisoning, which was caused by the contamination of water by the Androwita company's dumping of chemicals in the area.

Applicable law

Article 4 of the American Convention recognizes that "[e]very person has the right to have his life respected. This right shall be protected by law […]. No one shall be arbitrarily deprived of his life."

The right to life is a fundamental human right, the full enjoyment of which is a prerequisite to the enjoyment of all other human rights.[71] If it is not respected, all other rights are meaningless.[72] Because of this characteristic, restrictive approaches

[71] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 120 (Jan. 31, 2006); 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 153 (July. 5, 2004); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, 152 (Nov. 25, 2003); Juan Humberto Sánchez v. Honduras, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, 110 (June. 7, 2003); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144 (Nov. 19, 1999).

[72] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 161 (June. 17, 2005); Huilca-Tecse v. Perú, 2005 Inter-Am. Ct. H.R. (ser. C) No. 121, 65 (Mar. 3, 2005); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 128 (July. 8, 200419 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 153 (July. 5, 2004); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, 152 (Nov. 25, 2003); Juan Humberto Sánchez v. Honduras, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, 110 (June. 7, 2003); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144 (Nov. 19, 1999); Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 156 (Sept. 2, 2004).

to this right are inadmissible.[73] In accordance with article 27.2 of the Convention, this right forms part of the non-derogable nucleus; it is enshrined as one of those rights that cannot be suspended in times of war, public danger or other threats to the independence or security of the States Parties.[74]

As discussed above, States have the obligation to ensure the creation of the requisite conditions to prevent violations of the right to life,[75] and they also have the duty to prevent its agents from violating it.[76] The case law of the Inter-American Court has consistently held that the observance of article 4, in connection with article 1.1 of the American Convention, not only presupposes that no one shall be deprived of his life arbitrarily (negative obligation) but it also requires that States adopt all appropriate measures[77] to protect and preserve the right to life (positive obligation) [78] in accordance with its duty to ensure the full and free exercise of the rights of all persons under its jurisdiction. As such, the right to life also encompasses the right not to face conditions that impede or hinder access to a decent life or existence.[79]

In developing this analysis, the Court specified the need for States to create an appropriate framework of standards to discourage any threat to the right to life; to establish an effective justice system capable of investigating, punishing and redressing all deprivation of life caused by State agents[80] or private parties;[81] and to safeguard the right not to be prevented from having access to conditions that guarantee a dignified existence,[82] which includes the adoption of positive measures to prevent the violation of this right.[83]

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[73] *Cf.* "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144 (Nov. 19, 1999); on this same point, see Nachova and others v. Bulgaria, 2005 Eur. Ct. H.R., Application Nos. 43577/98 and 43579/98, Judgment 6 July 2005, para. 94.

[74] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 150 (Mar. 29, 2006); Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 119 (Jan. 31, 2006).

[75] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 120 (Jan. 31, 2006); Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 151 (Mar. 29, 2006).

[76] *Cf.* Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, 40 (July. 4, 2007).

[77] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 120 (Jan. 31, 2006); to this effect see also *Cf.* L.C.B. v. United Kingdom (1998) Eur. Ct. H.R., III, 1403, 36.

[78] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 120 (Jan. 31, 2006); Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 232 (Sept. 16, 2005); Huilca-Tecse v. Perú, 2005 Inter-Am. Ct. H.R. (ser. C) No. 121, 66 (Mar. 3, 2005); Corte I.D.H., Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 158 (Sept. 2, 2004); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 129 (July. 8, 2004); 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 153 (July. 5, 2004); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, 153 (Nov. 25, 2003); Juan Humberto Sánchez v. Honduras, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, 100 (June. 7, 2003); Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, 172 (Nov. 25, 2000); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144-146 (Nov. 19, 1999).

[79] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 161 (June. 17, 2005); Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 156 (Sept. 2, 2004); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 128 (July. 8, 2004); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, 152 (Nov. 25, 2003); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144 (Nov. 19, 1999).

[80] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 120 (Jan. 31, 2006); Kiliç v. Turkey, 2000 Eur. Ct. H.R., III, 62-63.

[81] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 120 (Jan. 31, 2006); Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 111 (Sept. 16, 2005); *see also* Osman v. the United Kingdom, 1998 Eur. Ct. H.R., VIII, 115-116.

[82] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 161 (June. 17, 2005); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser.

The European Court has also ruled on the right to life and the obligations of the State. Thus, as we have seen, the State's positive obligations to adopt the necessary measures to safeguard the lives of individuals under its jurisdiction entails for this Court, in certain circumstances, the obligation to protect every person from third party acts that pose a risk to his or her life.[84] To this effect, the European Court has in certain cases examined national laws to determine whether they adequately protected the lives of persons from the acts of third parties.[85] The European Court stated in its judgment in the case of *Osman v. United Kingdom* that the protection of the right to life requires State authorities to do everything reasonably required to prevent a real and imminent risk to life when the authorities knew or should have known about such risk.[86]

However, it might be asked whether the State's duty to adopt all necessary measures means that the State must prevent, in all circumstances, any danger to the lives of individuals under its jurisdiction.

To this effect, as previously discussed, the Inter-American Court has established that a State cannot be responsible for every situation that poses a risk to the right to life. Therefore, and taking into account the difficulties involved in planning and adopting public policies and making operative decisions according to priorities and resources, the positive obligations of the State must be interpreted so as not to place an

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C) No. 63, 144 (Nov. 19, 1999); Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 156 (Sept. 2, 2004).

[83] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 153 (Mar. 29, 2006).

[84] 9438/81, (Dec) February 28, 1983, 32 D. R 190, in Karen Reid, Practitioner's Guide to the European Convention on Human Rights, p. 503.

[85] Case of Oman v. United Kingdom, Eur. Ct. H.R.; Case of Mastromatteo v. Italy, Eur. Ct. H.R.

[86] 116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.
In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offenses against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or willful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

impossible or disproportionate burden on the authorities.[87] Accordingly (in the opinions of both the Inter-American Court and the European Court of Human Rights), in order to impute responsibility it is necessary to establish that, at the time the acts were committed, the authorities knew or should have known that there was a real and immediate risk to the life or lives of a specific individual or group of individuals, and that they failed to take the necessary measures within the scope of their authority—measures that, judged reasonably, could have been expected to prevent or put an end to such risk.[88]

As previously indicated, in addition to the duty to respect the rights enshrined in the Convention, the State also has the duty to ensure such rights. These include the right to life, as well as the right to physical integrity, for which the State must comply with its **duty to investigate** matters adversely affecting [the right to] life. This duty is derived from article 1.1 of the Convention in conjunction with the substantive right that must be defended, protected or ensured.[89]

The European Court has established that the obligation to investigate applies not only to cases where state authorities have violated the right to life but also with regard to "any suspicious or unlawful killings".[90] In many cases it is enough that the State prosecute and convict the perpetrators, without there being a need for reparations or, in cases where an investigation is necessary, that it has met certain requirements, meaning "promptness and expedition, access to material evidence and sufficient public scrutiny and involvement of the relatives."[91]

The European Court has examined cases of environmental pollution resulting in deaths. It has examined these cases by evaluating whether the State "did all that could have been required of it to prevent […] life from being avoidably put at risk."[92] In the same judgment it also established that the right to life imposes the obligation to inform, warn and monitor the health of the individuals who are considered to be at risk or to enact laws with regard to the matter. In this manner, the right to life can still be violated even if there is no death.[93]

As such, the State is required to do everything that would be reasonably expected of it as guarantor of the individual's right to life;[94] that is, given what the authorities would be expected to know or should know about—in this case, the contamination

[87] *Cf.* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 124 (Jan. 31, 2006); Kiliç v. Turkey, 2000 Eur. Ct. H.R., III, 63. See also Keenan v. UK; Osman v. UK; Younger v. UK; Paul and Aubrey Edwards v. UK.
[88] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 155 (Mar. 29, 2006); Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 123-124 (Jan. 31, 2006) and see also Kiliç v. Turkey, 2000 Eur. Ct. H.R., III, 63; Öneryildiz v. Turkey, 2004, Eur. Ct. H.R., Application No. 48939/99, Judgment 30 November 2004, 93 and Osman v. the United Kingdom, 1998 Eur. Ct. H.R., VIII, 116.
[89] *Cf.* Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, 40 (July. 4, 2007); Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 100-102, 100 (Jan. 28, 2008).
[90] *Cf.* Paul and Aubrey Edwards v. UK, Eur. Ct. H.R.
[91] *Cf. Id.* at. 72.
[92] *Cf.* LCB v. UK, Eur. Ct. H.R., para. 36
[93] In the Judgment on the *Case of the Rochela Massacre*, the IACtHR found a violation of art. 4 with respect to the survivors of the massacre. The Court applied the legal analysis used in the European case law (*Acar and Others v. Turkey*, *Makaratzis v. Greece)*, which established that the conduct at issue, by its nature, posed a serious risk to their lives in spite of the fact that they had survived the attack. Thus, "[t]he fact that three of them were only injured and not killed [was] merely fortuitous." *Cf.* Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, 123-128 (May. 11, 2007).
[94] *Cf.* e.g., Öneryildiz v. Turkey, Eur. Ct. H.R.

that a chemical manufacturing company might cause and the repercussions on its population, meaning the risk to the health and lives of those individuals.

Arguments of the Commission and the State

The Commission can argue that the State violated article 4.1 of the American Convention in connection with article 1.1 (of the Convention) in that it failed to adopt the necessary positive measures within the scope of its powers to prevent or avoid the risk to the right to life of the inhabitants of the area in which the polluting company was operating. As guarantor of the right to life of the individuals under its jurisdiction, it is reasonable to expect that the State would monitor the emissions, and it is also reasonable to require that it have knowledge of the circumstances that were occurring. The deaths are therefore attributable to the State due to its failure to prevent, which is furthermore a violation of article 19 of the Convention. Given that the company was a chemical manufacturer, the State was required to develop periodic oversight mechanisms to monitor the company's contaminating emissions. It is not sufficient for the company to meet some initial requirements for setting up operations in the country; rather, it is necessary to ensure that, during the course of its operation, it not exceed the maximum levels of contamination permitted by law, given the evident fact that such chemical activity creates a risk to the health and lives of the people residing in the area.

The State can argue that it is a disproportionate and unpredictable burden to require it to foresee every possible threat to the lives of each and every one of its citizens, especially with regard to acts not committed by agents of the State, given that the State has no control over the private activities conducted within its borders. Domestic jurisdiction is the appropriate realm in which to resolve potential threats to the lives of a State's citizens, as occurred in the case at hand. There are laws regulating the maximum allowable emissions of contaminants by chemical companies, and it is the obligation of those companies to obey the law. Once it was determined that the company was not in compliance with such regulations and had endangered the lives of citizens—and caused the death of several—the State apparatus, within the scope of domestic law, began working effectively to investigate the events, determine responsibility and punish the guilty parties. Up to that point, the State was unaware of the risk that the company's activity was causing, and this is the only reason it did not take measures sooner.

II. VIOLATIONS OF THE RIGHT TO LIFE AND THE RIGHT TO PERSONAL INTEGRITY ARISING FROM HARM TO HEALTH[95]

Relevant facts

- In December of 1999 it was reported that over 30 people had been hospitalized for severe intoxication from mercury or chemicals, which in some cases had severely and irreversibly affected organs including the kidneys, lungs and stomachs of different patients.

[95] This segment and the following segment are based, in part, on Oscar Parra Vera, "La justiciabilidad del derecho a la salud: casos difíciles y metodologías", in *Justiciabilidad de los Derechos Económicos, Sociales y Culturales*, Santiago, CEPAL/OACNUDH, 2008 (at press).

- Between December of 1999 and March 30, 2001 another 14 people had been hospitalized for contamination by mercury and other chemicals, one of whom will have to undergo dialysis treatments for the rest of his life.
- On August 20, 2001 it was reported that an additional 17 individuals had been hospitalized as a result of chemical contamination.

To what extent can a violation the right to health and the environment be asserted as a violation of articles 4 and 5 of the Convention, according to the focus of interdependence developed in the case law of the Inter-American Court?

Applicable law

It has already been explained in the previous segment that "the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence."[96] Article 5 of the Convention recognizes the right of every person to "have his physical, mental and moral integrity respected" and prohibits torture and cruel, inhuman or degrading punishment or treatment.

Most of the cases decided by the Inter-American Court in connection with article 5 mention violations of the right to personal integrity having to do with torture or the deprivation of liberty under degrading conditions. Likewise, the Court has found that article to be violated based on the suffering of the relatives of victims of grave human rights violations.

The Inter-American Court has not conducted an autonomous analysis or examination of the right to health. Rather, it has implicitly allowed for its enforceability by means of its interdependence with other rights such as the right to life or the right to personal integrity. In this context, the Inter-American Court has used the criterion of interdependence in view of the restrictions it faces to ensure the direct enforceability of ESCR in contentious cases.[97]

In the case of the *"Juvenile Reeducation Institute" v. Paraguay*, the Court examined the situation of children deprived of their liberty. Some of them had died under various circumstances. The Court considered that "to protect a child's life, the State must be particularly attentive to that child's living conditions while deprived of his or her liberty"[98] and that, consequently, "[with regard to] children deprived of their liberty and thus in the custody of the State, the latter's obligations include that of providing them with health care and education."[99] Likewise, the jurisprudence of the Inter-American Court and the Inter-American Commission, particularly in cases on provisional measures and pre-trial detention as they relate to some jails in the

[96] This criterion was asserted for the first time in the "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144 (Nov. 19, 1999) and has been subsequently reiterated.
[97] On this point it should be recalled that paragraph 5 of the Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights on 25 June 1993, states that: "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."
[98] *Cf.* Juvenile Reeducation Institute v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, 160 (Sept. 2, 2004).
[99] *Cf. Id.* at 161.

hemisphere, has dealt at great length with this interdependence between health conditions and the guarantee of basic social goods in detention centers and the immediate protection of the right to a decent life and the right to personal integrity.[100]

This line of interpretation has also been put forward by other bodies for the protection of human rights in the universal system. In effect, the Human Rights Committee of the United Nations (hereinafter "HRC") has indicated that "persons deprived of their liberty [...] may not be subjected to [...] any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[101] This line of reasoning includes the basic social rights that guarantee a deprivation of liberty compatible with human dignity.

The following two cases deal with indigenous communities that brought claims before the State of Paraguay for the return of their ancestral lands, stating that they were living outside those lands in very precarious conditions. These conditions included factors such as unemployment, malnutrition, substandard housing and difficulties in accessing potable water and health services.

66. In its judgment in the case of the *Yakye Axa Indigenous Community*, the Court found that the right to life included access to conditions that enable a decent existence. Accordingly, it considered it proper to evaluate whether the State had met its positive obligations in regard to the right to life "in view of the provisions set forth in Article 4 of the [ADHR], in combination with the general duty to respect rights, embodied in Article 1(1) and with the duty of progressive development set forth in Article 26 of that same Convention, and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights, and the pertinent provisions ILO Convention No. 169."[102] Examining the facts of the case, the Court stated that the community's miserable living conditions, and the effect of those

[100] The following cases are notable among the decisions of the Inter-American Court on this issue: Miguel Castro-Castro Prison 2006, Inter-Am. Ct. H.R. (ser. C) No. 160, 285, 293-295, 300, 301 (Nov. 25, 2006); Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, 102-103 (July. 5, 2006); De la Cruz-Flores v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 115, 132 (Nov. 18, 2004); Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, 157 (Sept. 7, 2004); Loayza-Tamayo. Provisional Measures (Whereas clauses 4, 5 and 6; clause one); as well as the Provisional Measures on the Penitentiaries of Mendoza (Argentina), Febem (Brazil), Urso Branco (Brazil), Yare I and II (Venezuela) and La Pica (Venezuela). The following are notable decisions of the Inter-American Commission: Precautionary measures granted in favor of the detainees being held at the National Civilian Police substation in the municipality of Sololá on December 23, 2005 (Guatemala); Precautionary measures granted in favor of 62 children held in the Juvenile Center of Provisional Confinement on November 24, 2004 (Guatemala); Precautionary measures granted in favor of Luis Ernesto Acevedo and another 372 individuals deprived of their liberty in the National Civil Police Station in the city of Escuintla on October 24, 2003 (Guatemala); Precautionary measures granted in favor of the patients of the Neuropsychiatric Hospital on December 17, 2003 (Paraguay) and Precautionary measures granted in favor of Diego Esquina Mendoza and other persons on April 8, 1998 (Guatemala).

[101] *Cf.* Human Rights Committee, General Comment No 21. *The humane treatment of persons deprived of liberty* (para. 3). See also, Committee on Economic, Social and Cultural Rights, General Comment No. 14 *The right to the highest attainable standard of health* (para. 34); General Comment No. 15 *The right to water* (para. 16); IACHR, *Case of Oscar Elías Biscet et al.* (paras. 155-158, 264 and 265).

[102] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 163 (June. 17, 2005).

conditions on the health and nutrition of its members, adversely affected the dignity of their lives. Given the circumstances of the case, it considered that this was attributable to State, in part because it failed to adopt the positive measures necessary to ensure living conditions for these people compatible with their dignity, in spite of its awareness of their situation (paras. 162-171 and 176).

The decision in the *Sawhoyamaxa Indigenous Community* case followed the same line of reasoning. In the case of the *Yakye Axa Indigenous Community*, the Court did not consider it proven that the deaths of sixteen members of the community were attributable to the State, since it did not find sufficient evidence of a causal relationship between the lack of adequate nutrition and medical attention and their deaths. In the case of the *Sawhoyamaxa Indigenous Community*, the Inter-American Court, first of all, considered proven the fact that a group of people was facing a serious absence of a broad set of ESCR, caused by factors such as "unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes",[103] which had created a risk to the lives of these persons and resulted, effectively, in the deaths of some of the members of the group. Second, the Court considered that the fact that the State had knowledge of this situation and still failed to provide the proper assistance, or did so inadequately, rendered it responsible for ignoring its obligation to "ensure" the right to life, in its modality of "preventing" its violation; this duty arises from the linkage of article 1.1 of the treaty to article 4 of the treaty.[104]

According to this logic of interdependence, the Inter-American Court has established that the right to health ("health care"), together with the right to education, is a "key pillar […] to ensure enjoyment of a decent life."[105]

In another case, the case of *Cesti Hurtado*, the victim was in prison without access to the medication he needed to treat his cardiac ischemia, which could endanger his life. The Court ordered as a provisional measure that he receive adequate medical treatment for purposes of preserving his physical, mental and emotional integrity.[106]

As for the contentious cases evaluated by the IACHR,[107] first, it has declared the right to health of some indigenous communities to have been violated in light of article XI de the American Declaration. The case of the *Aché Tribe* considered the lack of medical care and medicines during epidemics to be a violation of the right to the preservation of health and wellbeing (Art. XI). Additionally, in several cases against Cuba, the same right was declared violated due to the deficiencies of that country's penitentiary systems and the living conditions to which the inmates were

[103] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 168 (Mar. 29, 2006).
[104] *Cf. Id.* at 159-178.
[105] This case examined the right of children to a decent life, as a vulnerable group that not always has access to the means necessary for the effective defense of their rights. Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, 2002 Inter-Am. Ct. H.R. (ser. A) No. 17, 86 (Aug. 18, 2002).
[106] *Cf.* Case of Cesti Hurtado, Provisional Measures. Order of the Inter-American Court of Human Rights of January 21, 1998, clause 2 of the holding. Order of September 11, 1997, whereas clause 6. Order de July 29, 1997, whereas clause 7.
[107] For an analysis of the practice of the Commission on this matter, see Melish, Tara J., "The Inter-American Commission on Human Rights" in Langfor, Malcolm (ed.), *Social Rights Jurisprudence: Trends in Comparative and International Law*, Cambridge University Press, 2007.

subjected, such as deficient medical care, and insufficient and poor quality food, among others.[108] The Commission advanced an approach of interdependence in its examination of the violation of the right to life and to personal integrity due to the deaths of people in the State's custody who did not receive proper medical care[109] and the violation of the right to personal integrity due to terrible conditions of detention that prevented detainees from having access to health care. Finally, other reports on admissibility deal with the failure to provide antiretroviral medications to individuals living with HIV/AIDS who cannot obtain them on their own.[110]

Arguments of the Commission and the State

The Commission could argue that the cases of poisoning, and the environmental harm in general, infringe the affected parties' right to a decent life and therefore violate article 4 of the Convention in connection with the right to health and the environment. It could also highlight the harm to physical integrity caused by the poisoning, which amounts to a violation of article 5.

The State could stress that the events that took place, although of a certain seriousness, are not significant enough to threaten a decent life. In effect, the various judgments of the Court and the jurisprudence of the Commission have mentioned situations that are clearly irreversible. For the sake of argument, the State could admit the violation of the right to integrity in the most serious cases but not in the others.

The Commission can make reference to the special vulnerability of the people living in the areas surrounding the company, in that they are low-income individuals who are helplessly facing the consequences of the chemical spills. To this effect, the living conditions they must endure affect their physical integrity and human dignity. While it is true that the company's operations were supposed to provide a benefit to the community, they created an even more negative impact on the situation it was already experiencing, since 60 individuals suffered and continue to suffer harm to their health. As such, all of the people who were poisoned are confronted with physical and emotional harm, in some cases for life.

III. VIOLATIONS OF THE RIGHT TO LIFE AND THE RIGHT TO PERSONAL INTEGRITY DUE TO A LACK OF INSPECTION, MONITORING AND OVERSIGHT REGARDING HEALTH AND THE ENVIRONMENT

Relevant facts

- In December of 1999 the Ministry of Health was notified of the first deaths.
- On July 20, 2002 the Prosecutor decided not to issue indictments against any authorities or officials from the Ministry of Health, the Ministry of the Environment or the Office of the Mayor of Kinkili, as they did not have adequate equipment for effectively monitoring the pollution.

[108] *Cf.* IACHR, Order Nº 3/82, Case 6091, Cuba, March 8, 1982; Order Nº 45/81, Case 4402, Cuba, June 25, 1981; Order Nº 46/81, Case 4429, Cuba, June 25, 1981; Order Nº 47/81, Case 4677, Cuba, June 25, 1981; Order Nº 2/82, Case 2300, Cuba, March 8, 1982; Order Nº 3/82, Case 6093, Cuba, March 8, 1982.
[109] *Cf.* IACHR, *Víctor Rosario Congo* (Ecuador), Report No. 63/99 and IACHR, *Juan Hernández* (Guatemala), Report No. 28/96.
[110] *Cf.* IACHR, *Jorge Odir Miranda Cortez et al.*(El Salvador), Admissibility Report No. 29/01 y IACHR, *Luis Rolando Cuscul Piraval et al.* (Guatemala), Admissibility Report No.

What is the level of absence of inspection, monitoring and oversight that creates international responsibility for the violation of the rights to health and to the environment?

Applicable law

General Comment 14 of the ESCR Committee (para. 51), which addresses the right to health, states that the failure to take all necessary measures to protect persons against the violations of that right by third parties constitutes a violation of the obligation to protect. The Committee includes in this category omissions such as "the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others."

In the case of *Ximenes Lopes v. Brazil*,[111] which deals with the death of a mentally disabled person while under the care of a rest home, the Inter-American Court examined, *inter alia*, the obligation to ensure inspection, monitoring and oversight in the provision of health services. After specifying that it is possible to attribute international responsibility to a State for the actions of third parties who provide public services, the Inter-American Court emphasized that "the duty of the States to regulate and supervise the institutions which provide health care services, as a necessary measure aimed at the due protection of the life and integrity of the individuals under their jurisdiction." This duty encompasses "both public and private institutions which provide public health care services, as well as those institutions which provide only private health care."[112] (para. 141).

These considerations were reiterated in the case of *Albán Cornejo et al. v. Ecuador*,[113] a case dealing with medical malpractice. In this decision the Court held that "when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the attribution of responsibility can stem from "the omission of the duty to supervise the rendering of the public service to protect the mentioned right."[114]

Arguments of the Commission and the State

The Commission could submit that had there been proper inspection, monitoring and oversight, the State would have known about the serious situation much sooner than when the first deaths occurred. The duty of prevention should have been operating since November of 1998, when the deaths of the children under such irregular circumstances first came to light. Further, the Technical Commission's report from February of 2000 demonstrates that the prevention and precaution were minimal, given that there was no clear statement regarding the source of the harm. Likewise, there was no verification of the medical monitoring of the individuals and properties that potentially could have been affected by the contamination. Finally, the Commission could note that the criminal indictment excluded the authorities because they did not have the adequate equipment to effectively monitor the pollution, which

[111] *Cf.* Ximenes-Lopes v. Brazil, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149 (July. 4, 2006).
[112] *Cf.* Ximenes-Lopes v. Brazil, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, 141 (July. 4, 2006).
[113] *Cf.* Albán Cornejo et al. v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 171 (Nov. 22, 2007).
[114] *Cf.* Albán Cornejo et al. v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 171, 119 (Nov. 22, 2007).

demonstrates clearly the absence of a suitable monitoring mechanism for purposes of prevention.

The State could assert that its obligation to supervise third parties is an obligation of means and not an obligation of results. To this effect, when they learned of the serious events, the respective authorities acted and punished the appropriate parties. The State would therefore argue that the control was effective.

IV. PROGRESSIVE DEVELOPMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLE 26)[115]

Are the rights to health and to the environment justiciable based on article 26 of the American Convention?

Applicable law

In addressing ESCR, the Convention refers to the Charter of the Organization of American States (hereinafter "OAS Charter"), adopted in 1948 and amended in 1967. Article 26 states the following:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The determination of the scope of article 26 has created a number of doctrinal debates. The first of these concerns whether the American Convention establishes enforceable social rights.

Some approaches consider that the emphasis on the progressive development of these rights deprives them of justiciability, so that they would have to be understood solely as programmatic objectives. Contributing to this is an interpretation that considers that "the rights" enshrined in the OAS Charter would not be "rights in a strict sense." In effect, and as noted by Héctor Gros Espiell in his criticism of the express non-inclusion of each one of the ESCR in the American Convention, "[t]he mistake was in failing to understand that the economic, social and cultural standards of the Protocol of Buenos Aires—although they listed economic, social and cultural rights—did not have the purpose of ensuring human rights, but rather of establishing guidelines for the conduct of States on economic, social and cultural matters."[116] Judge Manuel Ventura Robles, having studied the background and preparatory work on the American Convention, considers that the ESCR "were not included" in it. For this reason, Judge Ventura indicates that the jurisprudence of the Inter-American Court has made mention of these rights as they arise from the violation of civil and

[115] This segment is based, in part, on María Aránzazu Villanueva Hermida, Agustín Enrique Martin and Oscar Parra Vera, *Protección Internacional de los Derechos Económicos, Sociales y Culturales. Sistema Universal y Sistema Interamericano*, San José, IIDH/UNFPA, 2008.
[116] *Cf.* Gros Espiell, Héctor, *Los derechos económicos, sociales y culturales en el Sistema Interamericano*, San José, Asociación Libro Libre, 1986, p. 114.

political rights.[117] The positions maintaining that article 26 does not include social rights place emphasis on the draft presented by the Inter-American Commission before the Special Inter-American Conference of 1969 –which did not include these rights–[118] and on the understanding of the progressivity clause as a "non-justiciability standard."[119]

Other positions with respect to article 26 of the American Convention defend the thesis of the establishment of enforceable rights in said instrument. As to the debate on the historical background of the standard, we stress that three distinct positions were recorded in the minutes of the Special Inter-American Conference:[120] (a) no mention of ESCR; (b) a thorough and express listing of them; and (c) very general reference to ESCR, with reference to commitments of progressivity. It is worth noting that the Colombian delegation made an express proposal for the detailed inclusion of ESCR. This initiative was rejected and an intermediate formula of reference to the Protocol of Buenos Aires was proposed, to include the social rights that extend the OAS Charter.[121] Taking into account these acts and the preamble of the Convention, according to which the jurisdictions of the system's bodies with regard to ESCR are to be determined by that instrument,[122] it is possible to infer that upon accepting the reference enshrined in article 26, the States expressed their consent to the recognition of ESCR in the ADHR.[123]

Víctor Abramovich and Julieta Rossi stress that article 26 refers clearly to the "adop[tion] of measures" to achieve the "full realization" of "rights". To this effect, its literal interpretation leads to the conclusion that it does not announce mere programmatic objectives.[124] These rights, in accordance with the wording of the standard, must be inferred from the economic, social and cultural standards contained in the OAS Charter. Likewise, Judge Sergio García Ramírez has indicated that article 26 provides rights, and that "[a]ll rights [...] contained in the Pact of San

[117] *Cf.* Ventura Robles, Manuel, "Jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de derechos económicos, sociales y culturales, in *Revista IIDH*, No. 40, San José, IIDH, 2004, pp. 91; 130.
[118] *Cf.* Craven, Matthew, "Economic, Social and Cultural Rights" in Harris, David and Livingstone, Stephen, *The Inter-American System of Human Rights*, Oxford University Press, 1998, pp. 297-306.
[119] *Cf.* Cavallaro, James and Schaffer, Emily, "Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas" in *Hastings Law Journal*, No. 217, 2005, pp. 225-227; 267-269.
[120] *Cf.* Urquilla Bonilla, Carlos Rafael, "Los derechos económicos, sociales y culturales en el contexto de la reforma al Sistema Interamericano de protección de los Derechos Humanos", in *Revista IIDH*, No. 30-31, San José, IIDH, 2000.
[121] *Cf.* OEA, General Secretariat, Special Inter-American Conference on Human Rights. Minutes and Documents, Doc. OEA/Ser.K/XVI/1.2, Washington, 1969.
[122] It is affirmed in the preamble of the Convention that the States Parties to the American Convention adopt it "[c]onsidering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters[.]"
[123] An exhaustive analysis of the preparatory work and the trajectory of the ESCR at the Special Inter-American Conference in defense of the thesis of State consent with respect to the protection of social rights through the ADHR can be seen in Melish, Tara, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, Center for Human Rights and Global Justice, New York, 2006, pp. 49-56.
[124] Abramovich, Víctor and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos", in Martin, Claudia, Rodríguez-Pinzón, Diego and Guevara, José A. (comps.), *Derecho Internacional de los Derechos Humanos*, México, Fontamara, 2004.

José and accepted by the States [...] are subject to the general system of supervision and decision; in other words, to the "means of protection."[125]

If we accept this starting point (that the American Convention establishes social rights), the subsequent work lies in the interpretation of article 26 to determine (i) what rights is it possible to infer in light of such reference to the OAS Charter; (ii) what is the scope of the progressive development clause; and (iii) how State obligations operate in relation to these rights.[126]

A resolution of these legal issues must take into account the interpretive criteria discussed in the first segment of this memorandum (*supra*): the "most favorable to the individual" and the consideration of human rights treaties as "living instruments" that must be interpreted in light of current conditions and the evolution of contemporary international law. Likewise, as emphasized by Héctor Faúndez, article 29(d) of the ADHR stipulates that none of its provisions may be interpreted to exclude or limit the effects of the American Declaration of the Rights and Duties of Man and other acts of the same nature.[127] It must be stressed that this declaration, as previously indicated, expressly encompasses different social rights.

Among the positions on social rights derived from article 26 are (i) interpretations that understand rights included in the standard to be only those that can be derived from the OAS Charter, without being able to use the American Declaration or the "pro individual" principle for their determination. According to this position, the "most favorable" principle of interpretation should only be used to define the scope of the respective standard.[128] On the other hand, there are (ii) positions that, through the application of the "most favorable" principle of interpretation, determine rights harmonizing the OAS Charter, the American Declaration[129] and the Protocol of San Salvador[130] as well as other international instruments on the subject (ICESCR, ILO Conventions, etc.).[131]

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[125] García Ramírez, Sergio, "Protección jurisdiccional internacional de los derechos económicos, sociales y culturales", i *Cuestiones Constitucionales*, No 9, July-December 203, p. 139; 141.

[126] The doctrinal literature has evaluated these issues exhaustively. See in particular, Melish, Tara, *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, Quito, CDES, Yale Law School, 2003, pp. 379-392; Abramovich and Rossi, "La tutela de los derechos económicos, sociales y culturales en el artículo 26…", pp. 457-478; Faúndez Ledesma, Héctor, "Los derechos económicos, sociales y culturales en el sistema interamericano", in AA.VV, *El Sistema Interamericano de Protección de los Derechos Humanos: su jurisprudencia sobre el debido proceso, DESC, libertad personal y libertad de expresión*, San José, IIDH, 2004, pp. 98-102; 113-120; Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos", in Courtis, Christian, Hauser, Denise and Rodríguez Huerta, Gabriela (comps.), *Protección internacional de los derechos humanos. Nuevos desafíos*, Porrúa-ITAM, México, 2005, pp. 1-66.

[127] Faúndez Ledesma, Héctor, "Los derechos económicos, sociales y culturales en el sistema interamericano", p. 100.

[128] Abramovich, Víctor and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26…", pp. 470-478.

[129] Among the litigation options defended by the Center for Justice and International Law (CEJIL) is the use of the standard defined by the IACtHR in its Advisory Opinion on the American Declaration, according to which, "the American Declaration defines the rights referred to in the OAS Charter." CEJIL considers that "the rights protected by the Charter, referred to in article 26, would be those contained in the American Declaration." CEJIL, *La protección de los derechos económicos, sociales y culturales y el Sistema Interamericano*, San José, CEJIL, 2005, p. 75.

[130] Melish, Tara, "Enfoque según el artículo 26: Invocando los DESC que se derivan de la Carta de la OEA", in Idem, *La protección de los derechos económicos, sociales y culturales en el Sistema Interamericano…*, pp. 383-388.

[131] Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26…", pp. 8-29; CEJIL, *La protección de los derechos económicos, sociales y culturales…*", pp. 76-78 and

Reference is made below to some interpretive elements that might be useful in tackling these issues.

With respect to the rights enshrined in article 26, it is important to bear in mind that the reference made in this article involves several norms contained in the OAS Charter. The set of rights it is possible to infer may be relatively broad, but everything depends upon the argument technique employed.[132] Moreover, if we take
into account the difficulty of deriving rights from standards that set public policy measures and objectives. To this effect, Christian Courtis has maintained that "[t]he validity of the inference is a matter of degree: the more clear and abundant the base standard—the "indices"—upon which the inference is made, the more certain its validity. On the other hand, if the normative references upon which the inference is made are obscure, vague or isolated, the validity of the inference will be weakened."[133]

The Inter-American Commission has defended the enforceability of some social rights through article 26 in some country reports[134] and reports on individual cases. In the case of *Milton García Fajardo et al. v. Nicaragua*, related, *inter alia*, to an arbitrary firing following a labor strike, the IACHR maintained that "the economic rights of the customs workers fall within the framework of protection of the [ESCR] shielded by the American Convention in Article 26" and that in such case, "the Nicaraguan State, instead of adopting measures with the purpose of achieving the progressive development of the customs workers, sought to curtail their rights, thereby causing grave injury to their economic and social rights." Likewise, the IACHR has recognized expressly that article 26 encompasses the right to health.[135]

The Inter-American Court has issued judgment on article 26 of the Convention in some cases. In the *Five Pensioners* case, the IACHR alleged that the unjustified deterioration in the degree of development of the right to social security was a violation of article 26. The Court held that there was a violation of the right to property (article 21 of the Convention) but not of the right to social security, reasoning that "the progressive development" of social rights must be measured "in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily

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Krsticevic, Viviana, "La protección de los derechos económicos, sociales y culturales en el Sistema Interamericano", in CEJIL, *Construyendo una agenda para la justiciabilidad de los derechos sociales*, CEJIL, San José, 2004, pp. 167-173.

[132] Bajo la prevención de que siempre es necesaria una construcción argumentativa que justifique la inferencia concreta de derechos, es posible aludir, *inter alia*, a estos derechos sociales en el article 26 de la ADHR: derecho al bienestar material o a un nivel de vida adecuado (article 26 ADHR and articles 34, 45(a) and 45(f) of the OAS Charter), right to health (article 26 and articles 34 i, 34.l of the OAS Charter) and right to a healthy environment (article 26 ADHR y articles 34 l, 45(a) and 45(f) of the OAS Charter).

[133] Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26…", pp. 8-9.

[134] The IACHR has said that "the Charter [of the OAS] as amended by the Protocol of Buenos Aires, enshrines several economic, social, and cultural rights at Articles 33, 44, and 48, among others" (*Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999. Chapter III, para. 4).

[135] Cf. IACHR. Case of Jorge Odir Miranda Cortez, para. 47; IACHR. Case of Luis Rolando Cuscul Pivaral et al., para. 42) and the right to social security (Report on the Merits in the IACHR. Case of the "Five Pensioners"; IACHR. Case of Jesús Manuel Naranjo Cárdenas, paras. 61-64).

represent the prevailing situation,"[136] for which reason it rejected "the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case."[137] In the case of the *"Juvenile Reeducation Institute"*, the Court examined the allegation that article 26 was violated by a failure to guarantee minimum levels of compliance with regard to social rights. In order to define the scope of the right to life, the Court took into account social rights enshrined in the Convention on the Rights of the Child and the Protocol of San Salvador, for which reason it found that it was unnecessary to issue a ruling in that specific case with respect to article 26.

In the case of the *Yakye Axa Indigenous Community*, the Court used article 26 in its analysis of the violation of the right to life. The Court held that the obligation to "generat[e] minimum living conditions that are compatible with the dignity of the human person and [to] not creat[e] conditions that hinder or impede it" is a duty, the verification of which—in the specific case at hand—must consider, *inter alia*, the duty of progressive development contained in article 26 of the Convention and some social rights set forth in the Protocol of San Salvador (paras. 162 and 163).

Hence the importance of the debate on the obligations that are derived from article 26. There is debate as to whether the obligations set forth in articles 1 and 2 of the Pact of San José are applicable to the ESCR recognized in the treaty. Judge Sergio García Ramírez maintains that "[t]he general obligations contained in articles 1 and 2 encompass all of the rights covered by the treaty."[138] Christian Courtis lends support to the same position, asserting that if these articles do not specify what right they refer to, the interpreter should not do so either.[139] However, Judge Cecilia Medina has expressed her criticism of this position, maintaining that, given that articles 2 and 26 overlap (in the sense that both establish the duty to take measures) it would seem that they were intended to establish different obligations.[140] Christian Courtis responds to this argument by stating that "what article 26 adds –and this is why it is a case of *lex specialis* in relation to article 2– is that the State may define the guarantee of these rights –that is, in the terms common to articles 2 and 26, the attainment of their effectiveness– progressively, and to the extent possible given the available resources," with the exception of the obligations of respect, protection and essential minimum levels of compliance with these rights, which are not subordinate to progressivity and have immediate effect.[141] It should be noted that the obligation of progressive development does not deny the justiciability of these rights, and even opens some spheres of judicial control to the duty of non-regressivity.[142]

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[136] *Cf.* Five Pensioners v. Peru 2003 Inter-Am. Ct. H.R. (ser. C) No. 98, 147 (Feb. 28, 2003).
[137] *Cf. Id*. at 148.
[138] García Ramírez, Sergio, "Protección jurisdiccional internacional de los derechos económicos, sociales y culturales", in *Cuestiones Constitucionales* No. 9, July-December 203, p. 139.
[139] Courtis, Christian, "La Protección de los Derechos Económicos, Sociales y Culturales a través del Artículo 26 de la Convención Americana sobre Derechos Humanos," pp. 2-29.
[140] Medina Quiroga, Cecilia, "Las obligaciones de los Estados bajo la Convención Americana de Derechos Humanos", in *The The Inter-American Court of Human Rights. Un cuarto de siglo 1979-2004*, San José, IACtHR, 2005, pp. 227-228.
[141] Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos", paper presented at the Interdisciplinary Human Rights Course, San José, IIDH, 2007, p. 23.
[142] See the previously cited articles by Christian Courtis and Tara Melish, as well as Melish, Tara, "The Inter-American Court of Human Rights: Beyond Progressivity", in Langford, Malcolm (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2007. It is notable that the latter author considers that the success of international litigation before the ISHR that directly invokes ESCR will be associated with an analysis of cases based on the duties to respect and ensure, and not based on the obligation of progressive development. For Melish, progressivity is a

Arguments of the Commission and the State

The Commission could argue in this case that it is possible to derive the right to health and the right to the environment from an interpretation of article 26 in connection with the pertinent standards of the Protocol of San Salvador and article 29 of the American Convention. Further, it could maintain that the obligations to respect and ensure are predicated upon these rights enshrined in article 26.

The State could argue that the attribution of contentious jurisdiction to the Court must be express, and therefore cannot be derived from an interpretive exercise. To this effect, the "most favorable" principle of interpretation must be used when there are two or more interpretations, with a view to giving preference to the [guarantor], not to deriving rights without considering the principle of State consent. On the other hand, the State can stress that in the model of justiciability of the Protocol of San Salvador (which only considers the possibility of petitions regarding the right to education and some trade union rights) it is clear that the States did not give their consent for the litigation of cases relating to the right to health and the right to the environment. The numerous apprehensions that exist in this field must be distinguished from the self-monitoring of the reporting system established by the Protocol. The State could highlight the recent proposal of the IACHR regarding indicators of compliance with the Protocol. The State could also mention that the progressive development of these rights was not infringed upon; to the contrary, the operations of these companies create wealth, which will increase the opportunities for a greater number of citizens to enjoy various social rights, such as the right to work and the right to development, among others. To this effect, there is no evidence that the rights to health and to the environment are being affected with respect to the overall population, and the small number of adversely affected individuals is not necessarily representative of the general situation in the country.

V. RIGHTS OF THE CHILD

Relevant facts

- Several children died from poisoning as a result of the water contamination.

What is the scope of the duty of special protection of children?

monitoring standard, not usable in litigation. The author explains that the duty to respect is a negative and immediate obligation, and that the duty to ensure involves positive obligations that in some way depend upon the resources of the States. To the contrary, the obligation of progressive development is evaluated in light of the results attained in satisfaction of the rights of the community. Finally, this author considers that "the differentiation among "types" of obligations applied to the rights in Chapter II and Chapter III [of the ADHR], respectively—one focused on appropriate State conduct, the other on overall levels of enjoyment of rights beyond the conduct of States– is the greatest weakness of the [IACtHR] in terms of the adequate protection of socioeconomic rights." See Melish, Tara, "El litigio supranacional de los Derechos Económicos, Sociales y Culturales: avances y retrocesos en el Sistema Interamericano", p. 213 et seq.

Applicable law

The Court has held that the American Convention as well as the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) form part of a very comprehensive international *corpus juris* on the protection of children.[143]

Article 19 of the American Convention establishes that every child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State. In the opinion of the Inter-American Court "this provision must be understood as an additional, complementary right that the treaty establishes for those who, because of their physical and emotional development, require special protection.[144] The State should therefore assume a special position as guarantor and must take special measures based on the principle of the best interests of the child.[145] The Court has established that numerous international instruments widely accepted by the international community "[…] devolve to the State the obligation to adopt special measures of protection and assistance for the children within its jurisdiction."[146]

Article 6 of the United Nations Convention on the Rights of the Child, "Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance", states that

> 1. States Parties recognize that every child has the inherent right to life.
>
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

In the case at issue, several children were among the individuals who died as a consequence of being poisoned by the chemical waste from the company; this reflects the need for the special protection of children. The participants may probe the issue of the vulnerability that children face, in the following manner, for example:

> In spite of the international recognition contained in General Comment No. 18 of the Committee on Civil and Political Rights (para. 5) for the right that they [girls and boys]

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[143] *Cf.* Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 166 (July. 8, 2004); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 194 (Nov. 19, 1999); Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, 2002 Inter-Am. Ct. H.R. (ser. A) No. 17, 24 (Aug. 18, 2002).

[144] *Cf.* Corte Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, 2002 Inter-Am. Ct. H.R. (ser. A) No. 17, 54 (Aug. 18, 2002); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 164 (July. 8, 2004); Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 147 (Sept. 2, 2004).

[145] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 152 (Sept. 16, 2005); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 172 (June. 17, 2005); Corte I.D.H., Juvenile Reeducation Institute v. Paraguay, 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, 160 (Sept. 2, 2004); Corte I.D.H., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, 2002 Inter-Am. Ct. H.R. (ser. A) No. 17, 56, 60 (Aug. 18, 2002); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 124, 163-164, 171 (July. 8, 2004); Bulacio v. Argentina 2002, Inter-Am. Ct. H.R. (ser. C) No. 100, 126, 134 (Sept. 18, 2002); "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 196 (Nov. 19, 1999).

[146] *Cf.* "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 146 (Nov. 19, 1999).

> have to measures of protection on the part of family, society and State as required by their status as minors, the United Nations has indicated that "11 million children continue to die each year in the developing world from preventable or easily treated disease, and poverty, lack of education, discrimination and the traumas arising from war, exploitation and abuse continue to hinder the healthy development of many millions more."[147]

To the Inter-American Court, when a State violates the rights of at-risk children, it makes them the victims of a dual aggression. First, it deprives them of the minimum conditions for a decent life and impedes the "full and harmonious development of [their] personality,"[148] in spite of the fact that every child has the right to harbor a life plan that must be cared for and encouraged by the public authorities so it will develop for the child's benefit and for the benefit of the society to which he or she belongs. Second, it violates their physical, mental and moral integrity and even their lives.[149]

In the case of *Z and others v. United Kingdom*, which deals with the right to personal integrity, the European Court established that the protection of children does not require only that the criminal laws address such protection from treatment prohibited by article 3 of the European Convention; rather, the authorities must also take the necessary preventive measures to protect children who face at-risk situations *vis-à-vis* other individuals.

VI. PROTECTION OF THE FAMILY

Relevant facts

- The contamination from the company's dumping of waste caused the deaths of a number of people, including several children.
- In addition to the deaths, several people who were poisoned now suffer from irreversible disease.
- Several of these individuals were family breadwinners; others among the affected persons depend upon their relatives for financial support.

Applicable law

Article 17. Protection of the Family

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 11.2 of the American Convention recognizes the right to have a private and family life free from interference.

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[147] María Aránzazu Villanueva Hermida, Agustín Enrique Martin and Oscar Parra Vera, *Protección Internacional de los Derechos Económicos, Sociales y Culturales. Sistema Universal y Sistema Interamericano*, San José, IIDH/UNFPA, 2008.
[148] *Convention on the Rights of the Child*, Preamble, para. 6.
[149] *Cf.* "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 191 (Nov. 19, 1999).

The Inter-American Court has examined the right enshrined in article 17 of the Convention in the cases of *Fermín Ramírez* and *Castillo Paéz*, in which the parties had alleged violations of that right. The Court did not find this right to have been violated; rather, it concluded that the disintegration of the family was, in one case, a secondary consequence of the forced disappearance of the victim, and in the other, an effect of the victim's incommunicado status, because of which the disintegration of his family "was not produced as the result of a specific action or omission of the State with that purpose."[150]

The Court has addressed the right to family and private life mainly in relation to the violation of the right to property, so as to understand the destruction of the victims' amounts to a serious, unjustified and abusive interference in their private lives and home (*Ituango*, paras. 196 et seq.).[151] Thus, it could also be argued that the adverse health effects suffered by the victims influence the development of their family lives as understood by the European Court.

The European Court found a violation of the right to respect for family life respect in several cases of environmental pollution. It held that environmental pollution can negatively affect private and family life, even if there is, in principle, no serious danger to the health of individuals. It also determined that the State can be responsible not only for the pollution created by the actions of its authorities or agents but also in cases where the State has failed to regulate the industrial activities causing the pollution.[152]

Another issue raised in the resolution of this case is the conflict between, on one hand, the economic benefit to the area from the creation of jobs and the economic growth it generates directly or indirectly, and, on the other hand, the effects on the life and health of individuals and on private and family life. The rights recognized in articles 4 and 5 of the Convention, which are non-derogable rights, in principle are not subject to an examination of proportionality and balance between the aim pursued and the right affected. On the contrary, with respect to other rights such as the right to family life, there is room for a certain margin of appreciation that we will proceed to evaluate. It is therefore necessary for States to justify adequately the **necessity of interference** with the rights of citizens, in relation to the margin of appreciation that the States have in planning and implementing public policies;[153] this must be examined in each specific case taking, into account the peculiarities of each case.[154] On this point, in the case of *López Ostra v. Spain*, the European Court declared a violation of the right to family life because the State failed to strike a fair balance between the economic welfare of the area and the individual's right to have his private and family life respected.[155] In *Hatton v. United Kingdom*, the Court affirmed that the reference to economic welfare to justify noise pollution in an area was insufficient to justify an interference in the rights of private individuals, and further stated that

[150] *Cf.* Fermín Ramírez v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126, 121 (June. 20, 2005); Castillo-Páez v. Perú, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, 85-86 (Nov. 3, 1997).
[151] *See also* Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165 (July. 4, 2007).
[152] On this point, see Hatton and others v. UK Eur. Ct. H.R.; Fadeyeva v. Russia Eur. Ct. H.R.; Tatar v. Romania Eur. Ct. H.R.
[153] See, e.g., Buckley v. the United Kingdom Eur. Ct. H.R.
[154] Hatton and others v. UK Eur. Ct. H.R.
[155] On this point see also Hatton and others v. UK Eur. Ct. H.R.; Fadeyeva v. Russia Eur. Ct. H.R.; Moreno Gómez v. Spain Eur. Ct. H.R.; Ashoworth and others v. UK Eur. Ct. H.R.

> [a] governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the authorities have consistently monitored the situation.[156]

In the case of *Gronus v. Poland*, the European Court considered inspections and studies on contamination levels as effective measures for preventing or minimizing environmental pollution, and therefore reducing interference in the lives of citizens. In the case of *López Ostra*, these measures would also be the provision of public access to information, so as to allow individuals to make decisions regarding the risks involved and to plan their private and family lives accordingly.

In the case of *Guerra et al. v. Italy*, *th*e European Court established that the failure to provide public information on pollution can be a violation of the right to the private and family lives of individuals. With this the idea is for people to exercise their right to have appropriate and relevant information, and thus make decisions regarding the impact it might have on their private and family lives.

Arguments of the Commission and the State

The Commission can argue that the adverse effects on the health of individuals—especially those who suffer irreversible consequences as a result of the intoxication—simultaneously affect their right to family life. Not only must the personal life of each individual be adapted to the new circumstances the events have created with regard to that person's life plan, but the existing family life (or the plans they had for that life) are also impacted. The same is true for the families that have been disorganized by the death of one of its members, especially those in which the deceased was the breadwinner.

The State can argue that there is no direct violation of that right, that it is instead an indirect consequence of the events that took place. Further, the State is not responsible for those events and, in any case, this would be a matter to be approached from the perspective of reparations, not as a violation of any substantive right.

VII. THE RIGHT TO PROPERTY

Relevant facts:

- The dumping of chemicals by the company Androwita S.A. on land adjoining its main plant resulted in mercury contamination that permeated the surface of the ground, seeped through the water table, reached other publicly and privately used properties and came into contact with people.
- In addition, it continued to affect the property of those people and their families.

What is the scope of the right to private property protected in article 21 of the Convention?
Can environmental protection also be framed within the scope of private property?

[156] Hatton and others v. UK Eur. Ct. H.R.

Can private property extend to the use and enjoyment of the subsoil? Can arguments regarding the right to collective property be used in this particular case?

Applicable law

Article 21.1 and 21.2 (Right to Private Property) of the Convention stipulate that:

> […]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.
>
> […]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.

The Inter-American Court has established that the first paragraph of article 21 of the American Convention establishes the right to private property, and specifies use and enjoyment as an attribute of property. It includes a limitation on those attributes of property for reasons of social interest. The Court has developed in its case law a broad concept of property that encompasses, *inter alia*, the use and enjoyment of property, defined as "those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."[157] Also through Convention article 21, the Court has protected acquired rights, understood as "right[s] that ha[ve] been incorporated into the patrimony of the persons."[158]

Nevertheless, the right to property is not an absolute right; article 21(2) of the Convention states that for the deprivation of a person's property to be consistent with the right to property, it must be based on reasons of public utility or social interest, subject to payment of just compensation, and restricted to the cases and the forms established by law[159] and carried out in accordance with the Convention.[160]

The Inter-American Court has also recognized the right to communal property. In the *Mayagna* case, the Court held that "article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property."[161] Likewise, in the *Sawhoyamaxa* case the Court considered "indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land 'is not centered on an individual but rather on the group

[157] *Cf.* Palamara-Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, 102 (Nov. 22, 2005); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 137 (June. 17, 2005); Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, 129 (June. 15, 2005); Mayagna (Sumo) Awas Tingni Community, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66, 144 (Feb. 1, 2000).
[158] *Cf.* Five Pensioners v. Peru 2003 Inter-Am. Ct. H.R. (ser. C) No. 98, 102 (Feb. 28, 2003).
[159] *Cf.* Palamara-Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, 108 (Nov. 22, 2005); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 145, 148 (June. 17, 2005); Ivcher-Bronstein v. Perú, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, 128 (Feb. 6, 2001).
[160] *Cf.* Chaparro Álvarez y Lapo Íñiguez v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, 174 (Nov. 21, 2007).
[161] *Cf.* Mayagna (Sumo) Awas Tingni Community, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66, 148 (Feb. 1, 2000).

and its community.'"[162] Further, the Court held in the case of *Yakye Axa* that "both the private property of individuals and communal property of the members of the indigenous communities are protected by Article 21 of the American Convention."[163]

In the case of the *Saramaka Indigenous Community*, the Court stated that

> Article 21 of the Convention protects the members of the Saramaka people's right over those natural resources necessary for their physical survival (*supra* paras. 120-122). Nevertheless, while it is true that all exploration and extraction activity in the Saramaka territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory. Clean natural water, for example, is a natural resource essential for the Saramakas to be able to carry out some of their subsistence economic activities, like fishing. The Court observes that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka people and, consequently, its members (*infra* para. 152). Similarly, the forests within Saramaka territory provide a home for the various animals they hunt for subsistence, and it is where they gather fruits and other resources essential for their survival (*supra* paras. 82-83 and *infra* paras. 144-146). In this sense, wood-logging activities in the forest would also likely affect such subsistence resources. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the Saramakas.

Additionally, the Inter-American Court has understood that the failure to consult with indigenous communities with regard to the protection the environment on their lands and adjoining areas, as well as the failure to perform an appropriate environmental impact study on the exploitation of natural resources located on indigenous or tribal land, are acts that may violate the respective communities' right to property, in violation of article 21 of the ADHR as understood in light of article 1.1 of the treaty.[164] (See *supra* section I.C, duty to ensure with regard to the environment: principles of sustainability and precaution).

Arguments of the Commission and the State

The Commission could argue that the mercury contamination in the water table has seeped into the adjoining land, which has affected their use and enjoyment. In accordance with the criteria established in the case of *The Saramaka Indigenous Community v. Surinam*, the Court recognized that the exploration for natural resources on Saramaka lands could affect natural resources that are essential to the community, and would therefore affect the use and enjoyment of resources necessary to the survival of the Saramaka. In the case at hand, the mercury contamination in the subsoil has directly affected resources necessary to the survival of the community, such as water and land, specifically those on the contaminated properties (which is detrimental to the extent that activities such as farming, the raising of animals and other types of economic or daily activities depend necessarily on the use of potable water); as such, the use and enjoyment of the property has

[162] *Cf.* Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 120 (Mar. 29, 2006) (citing Mayagna (Sumo) Awas Tingni Community, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66, 149 (Feb. 1, 2000)).
[163] *Cf.* Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 143 (June. 17, 2005).
[164] *Cf.* Saramaka People v. Suriname (2007) Inter-Am. Ct. H.R. (ser. C) No. 171, 133-134 (Nov. 28, 2007).

necessarily been affected due to the fact that it is unusable in that it poses a danger to life and health. This is a violation of article 21.1 of the American Convention.

The State could assert that it does not follow from the content of article 21 of the Convention that the right to private property includes ownership of the subsoil (water table). The Court established in the case of *Chaparro v. Ecuador*[165] that the concept of property includes all movables and immovables, and all tangible and intangible assets, as well as any other property susceptible of having value.[166] It is clear in the instant case that the contaminated subsoil has no value attributable to individual persons.

The State can also argue that the cases in which the Court has recognized the violation of collective property rights has been in the cases of indigenous communities, where there are clearly an ancestral ties to the concept of territory. As such, in cases that do not involve indigenous communities, we can speak only of public interest and not of collective property. Therefore, the State cannot be found guilty of the violation of a type of property right that is not applicable to the specific case, and one that, furthermore, has already been redressed.

Moreover, it has not been proven that the mercury contamination is in fact affecting the use and enjoyment of the public and private property in question, and it is the Commission that would have to prove exactly what a specific infringement of use and enjoyment entails in terms of the right to private property. Pollution is a public health issue that can affect the entire population, but not property—much less only property. Environmental protection cannot be understood as a private factor; rather, it is a public interest and a public good. In this regard, the State has taken specific actions to control and clean up the contamination. The State will continue to watch over the health of individuals and protect the environment for all of its inhabitants.

VIII. ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION

A. Due Process

Relevant Facts

- On October 30, 2001, the organization For a Clean World filed a criminal complaint with the Office of the Prosecutor.
- On July 20, 2002, an indictment was issued against the General Manager and the Waste Management Engineer for involuntary manslaughter, requesting a prison sentence of 5 years.
- On December 5, 2003, in accordance with due process of law, the Criminal Court handed down judgment and sentenced the Waste Engineer of Androwita S.A. to 24 months in prison for involuntary manslaughter.
- The court acquitted the General Manager of the company because it found that he was the person who had handled the environmental and health permits

[165] *Cf.* Chaparro Álvarez y Lapo Íñiguez v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, 174 (Nov. 21, 2007).
[166] *Cf.* Palamara-Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, 102 (Nov. 22, 2005); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, 137 (June. 17, 2005); Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, 129 (June. 15, 2005); Mayagna (Sumo) Awas Tingni Community, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66, 144 (Feb. 1, 2000).

necessary to its proper operation, which demonstrated his care and intent not to pollute and cause harm to third parties.

- No indictments were issued against any authorities or officials from the Ministry of Health, the Ministry of the Environment or the Office of the Mayor of Kinkili, as they did not have adequate resources for effectively monitoring the pollution that the company was generating, and therefore there was no way for them to know what was happening.

Due process – Lines of investigation

Can the Court analyze lines of investigation? *Can the Court sanction a State for not convicting a specific individual?* *What are the requirements of due process?*

Applicable Law

The obligation to investigate human rights violations is within the positive measures that States must take to ensure the rights recognized in the Convention.[167] Among the obligations that arise from the relationship between articles 1.1 and 8 of the Convention is the obligation to investigate seriously, and not just as a simple formality,[168] the events that may have violated a right enshrined in the Convention. Accordingly, when State authorities have knowledge of the act, they must initiate a serious, impartial and effective investigation *ex officio* and without delay.[169] This investigation must be conducted through all available legal means and be oriented toward the determination of the truth.[170] However, the Inter-American Court has considered that the obligation to investigate is an obligation of means and not of results.

It is notable that the obligation to investigate derives not only from the conventional standards of international law that are imperative for States Parties; rather, they are also derived from domestic laws that make reference to the duty to investigate *sua sponte* certain unlawful conduct and to the standards that enable the victims or their relatives to report or file criminal complaints for purposes of participating procedurally in the criminal investigation to establish the truth of the events.[171]

In this case, the legal problem turns on the jurisdiction that the Inter-American Court may or may not have to examine a particular criminal case—specifically, the way in which an act that is illegal or possibly a violation of human rights is investigated. If

[167] *Cf.* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 166, 176 (July. 29, 1988); La Cantuta, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, 110 (Nov. 29, 2006); Zambrano-Vélez et al v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, 88 (July. 4, 2007).
[168] *Cf.* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 177 (July. 29, 1988); Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 131 (Jan. 28, 2008); Zambrano-Vélez et al v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, 120 (July. 4, 2007).
[169] *Cf.* Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, 146 (July. 8, 2004); Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 130 (Jan. 28, 2008); Zambrano-Vélez et al v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, 119 (July. 4, 2007).
[170] *Cf.* García-Prieto et al. v. El Salvador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 168, 101 (Nov. 20, 2007).
[171] *Cf. Id.* at 104.

we start from the premise that the investigation must be initiated utilizing all means possible or available to the judge or prosecutor who investigates in order to identify the perpetrators, convict them and eventually punish them, we can ask whether the Court can determine whether certain acts within the investigation were pertinent to that objective. On this point, there have been positions expressed in the case law of the Court that might support the arguments of both the State and the Commission, as outlined below.

Arguments of the Commission and the State

The Commission can use case law to support the argument that the Court not only has jurisdiction but also that it should examine the lines of investigation to analyze whether there was any violation of articles 8 and 25 of the Convention. Specifically, in the judgment of la Rochela v. Colombia,[172] the Court looked at the State's obligation to investigate adequately, and especially to act with due diligence when pursuing lines of investigation. Accordingly, it examined the serious omissions in the follow-up on logical lines of investigation.

The argument to this effect begins by establishing the obligation to investigate with due diligence. On this point, the Court has stated:

> The focal point of analysis of whether the proceedings in this case were effective is whether they complied with the obligation to investigate with due diligence. This obligation requires that the body investigating a violation of human rights use all available means to carry out all such steps and inquiries as are necessary to achieve the goal pursued within a reasonable time. The obligation to employ due diligence is particularly stringent and important in the face of the seriousness of the crimes committed and the nature of the rights violated. In this sense, all necessary measures must be adopted in order to prevent the systematic patterns that led to the commission of serious human rights violations.[173] (footnotes omitted)

Based on this obligation, the Court has established that one of the criteria that must be met is to conduct an investigation that considers the context of the violation and all of the possible perpetrators, and to conduct follow-up or analysis that encompasses all possible hypotheses in order to investigate, [convict] and punish the parties guilty of the human rights violation. The Court thus maintained:

> In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation.[174] (footnotes omitted)

If the Commission asserts this type of argument, it can allege that the State failed to meet its obligation to investigate. No investigation was conducted with respect to any state employee, although logically it was their duty to supervise and prevent the company from committing any act that could adversely affect the environment. With regard to the investigation that was opened against the General Manager, the Commission could argue that his acquittal was the result of an inefficient investigation, which also constitutes a violation.

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[172] Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (May. 11, 2007).
[173] *Cf. Id.* at 156.
[174] *Cf. Id.* at 158.

The State, on the other hand, can argue that in the case of Nogueira de Carvalho v. Brazil,[175] the Court ruled that did not have jurisdiction to examine the relevance or favorability of the modes of investigation used by the members of the judicial branch, since its jurisdiction is limited to verifying whether the proceedings were conducted in compliance with the judicial guarantees or the judicial protection established in articles 8 and 25 of the Convention. Specifically, the Court stated that:

> *The Court emphasizes that courts of the State are expected to examine the facts and evidence submitted in particular cases. It is not the responsibility of this Court to replace the domestic jurisdiction by ordering concrete methods or forms for investigating and judging a specific case in order to obtain a better or more effective outcome; instead, its role is to find whether or not, in the steps actually taken domestically, the State's international obligations embodied in Articles 8 and 25 of the American Convention have been violated.*[176]

In the case at hand, the State can use this judgment of the Court to argue that the Court lacks jurisdiction to specify the lines of investigation that the State should have followed in order to determine who was responsible for the contamination. According to this reasoning, the Court would not be able to make any specific reference to the fact that the public servants from the Ministry of Health, the Ministry of the Environment and the Mayor's Office of Kinkili—who were in charge of monitoring and ensuring the protection of the environment and the health of the citizens—were not convicted.

However, the Commission could respond to this argument by asserting that the precedent developed in the *Nogueira de Carvalho* judgment does not apply in this case, because the main fact in that judgment, the murder of Francisco Gilson Nogueira de Carvalho, took place before the State recognized the contentious jurisdiction of the Court. In this case, all of the events took place after the State of Chuqui had already ratified the Convention and recognized the jurisdiction of the Court.

For its part, the State could argue that although the General Manager of the company was initially named in the court case, the fact that he was acquitted cannot be examined by the Court, due to the fact that it is the result of the investigation opened by the State. If such investigation did not reveal sufficient evidence to convict the Manager, then the State acted in a manner consistent with the Convention by not convicting him; had it done so, it would have violated the Manager's [rights to] judicial protection, judicial guarantees and personal liberty.

The State can additionally argue in its favor the fact that the process of investigation into the causes of death of the victims, the determination of the party responsible for the contamination and the civil and criminal proceedings were processed expeditiously, in observance of the rules of due process, and within a reasonable period of time.

PART 3: REPARATIONS: INTERNATIONAL RESPONSIBILITY OF THE STATE AND THE DUTY TO MAKE REPARATIONS[177]

[175] *Cf.* Nogueira de Carvalho et al. v. Brazil, 2006 Inter-Am. Ct. H.R. (ser. C) No. 161 (Nov. 28, 2006).
[176] *Cf. Id.* at 80.
[177] Purpose of the chapter: *For the participants to discuss the main theoretical and practical elements of the reparation of harm applied to the specific case, including: a) Extent of the international responsibility of the State; b) victims; c) specific damages; d) reparation measures.*

Relevant facts

- The dumping of chemicals by the company Androwita S.A. on land adjoining its main plant resulted in mercury contamination that permeated the surface of the ground seeped through the water table, reached other publicly and privately used properties and came into contact with people.
- To date, this contamination has resulted in the death of 21 people and adversely affected the health of another 61 people.
- Additionally, it continues to affect the property of the aforementioned persons and their families.

In light of the above, the State has granted reparations under its domestic law consisting of the following: (i) it ordered the company to clean up the contaminated area within a period of 6 years; (ii) it sentenced the company to pay a fine in the amount of US$25,000. Further, as compensation to the affected persons, (iii) it sentenced the company in a civil suit to pay US$ 5000 to each relative of the deceased victims, and US$ 2000 to the individuals who were hospitalized. With regard to individual responsibility, the State (iv) convicted the company's Waste Engineer of the offense of voluntary manslaughter and sentenced him to 24 months in prison.

It should be noted that the Court acquitted the General Manager of the company. Likewise, the State did not issue any indictment against any authority or employee of the Ministry of Health, the Ministry of the Environment or the Mayor's Office of Kinkili.

A. General considerations on reparations

It is a principle of International law that every violation of an international obligation that results in harm creates the duty to make adequate reparation.[178] The Inter-American court has held that "reparations is a generic term that covers the various ways a state may make amends for the international responsibility it has incurred."[179] This means that the Court must set the appropriate reparations based on the American Convention and the principles of international law applicable to the subject matter.[180] The aforementioned article 63.1[181] of the Convention confers upon the Inter-American Court the authority to determine the measures that redress the consequences of the violation and regulate all of its aspects.

It has accordingly developed its own criteria for what is referred to as "integral reparation for damages."[182] Thus, the Court not only recognizes the pecuniary harm

[178] *Cf.* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 25 (July. 29, 1988); Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 156 (Jan. 28, 2008); Zambrano-Vélez et al v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, 131 uly. 4, 2007).
[179] *Cf.* Case of Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42 (Nov. 27, 1998).
[180] Velásquez-Rodríguez v. Honduras, 1990 Inter-Am. Ct. H.R. (ser. C) No. 9, 27 (Aug. 17, 1990).
[181] El article 63.1 of the Convention provides that:
If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
[182] See "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999); Separate Opinion of Judge A.A. Can*çado Trindade, para. 35.*
Cases of: *El Amparo, Loayza Tamayo, Suárez Rosero, Blake, Paniagua Morales et al., Villagrán Morales., Cantoral Benavides, Bámaca Velásquez, Trujillo Oroza, Caracazo, Bulacio, Myrna Mack Chang, Herrera Ulloa, Molina Theissen, 19 Tradesmen,, Gómez-Paquiyauri Brothers, "Juvenile Reeducation Institute", Tibi,*

derived from the violation but also evaluates comprehensively all of the multiple characteristics of the damages; therefore, reparations must be made through different measures specific to the characteristics and magnitude of the harm,[183] including through structural reparations.

Pursuant to the criteria established and reiterated in the jurisprudence of the Inter-American Court with respect to the nature and scope of the obligation to make reparations,[184] the Court should proceed to analyze the arguments of the parties regarding reparations. As such, the parties must demonstrate a causal connection among the facts, the violations alleged, the damages caused and the measures requested.

B. Injured party (Victim)

Relevant facts

- In the complaint submitted to the Commission, the representatives established that the victims were 21 deceased individuals and 61 individuals whose health had been adversely affected.
- The Commission added 4 more deceased individuals and 10 more adversely affected persons to the complaint.
- The representatives argued that these violations also extend to all those people who, subsequent to the submission of the complaint, may demonstrate in the proceedings before the Inter-American system of human rights that they have been affected in some way by the noxious effects of the contamination.
- The intoxicated victims were identified individually based on the medical reports. The deceased victims were identified individually from the death certificates and corresponding medical reports. Based on this information, it could be established that they lived in the vicinity of the company Androwita S.A.

Can there be a finding of guilt on behalf of an unspecified but determinable number of victims?

Applicable law

In the exercise of its jurisdictional authority, and pursuant to article 62 of the American Convention, the Court has jurisdiction "on all matters relating to the interpretation or application of [the] Convention", for purposes of determining the international responsibility of a State Party to the American Convention for alleged human rights violations committed against persons subject to its jurisdiction. As such, it considers it necessary to duly identify the alleged victim whose right or

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Plan de Sánchez Massacre, Carpio Nicolle et al., Serrano Cruz Sisters, Huilca Tecse, Caesar, Moiwana Community, Fermín Ramírez, Acosta Calderón, The Girls Yean and Bosico, Gutiérrez Soler, Raxcacó Reyes, Mapiripán Massacre, Gómez Palomino, García Astos and Ramírez Rojas, Blanco Romero, Pueblo Bello Massacre, López Álvarez, Acevedo Jaramillo, Baldeón García, Ituango Massacres, Jiménez López, Montero Aranguren et al. (Detention Center of Catia).

[183] *Cf.* Case of Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42 (Nov. 27, 1998) (Cancado, concurring vote).

[184] *Cf.* Velásquez-Rodríguez v. Honduras, 1990 Inter-Am. Ct. H.R. (ser. C) No. 9, 25-26 (Aug. 17, 1990); Garrido-Baigorria v. Argentina, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, 43 (Aug. 27, 1998); "White Van" (Paniagua Morales et al.) v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, 76-79 (Mar. 8, 1998) *Cf.* also La Cantuta, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, 200-203 (Nov. 29, 2006); Miguel Castro-Castro Prison 2006, Inter-Am. Ct. H.R. (ser. C) No. 160, 285, 414-416 (Nov. 25, 2006).

liberty was infringed upon.

This criterion is different from the preventive character of provisional measures, by which the Court can order the adoption of special protection measures in cases of extreme gravity and urgency, when necessary to avoid irreparable damage to persons facing the threat or possible violation of some right contained in the American Convention, with the understanding that the merits of the case are not being judged. In this case, it is enough that the beneficiaries are "determinable" for purposes of granting them such protection measures.[185]

In light of the foregoing, and for purposes of ensuring the appropriate effects (*effet utile*) of article 23 of the Regulations and the effective protection of the rights of the alleged victims, it is necessary that they be identified individually in the case that the Inter-American Commission brings before the Court.

Arguments of the Commission and the State

The State could base its argument on the judgments in *Montero Aranguren v. Venezuela*, *García Prieto v. El Salvador*, and other cases where the Court held that persons who had not been included in the article 50 report cannot be considered as victims in the case before the Court. Indeed, in these two cases, the Court determined that:

> *The case law of this Court regarding the determination of the alleged victims has been broadened and adapted to the circumstances of each particular case. The alleged victims must be included in the application and in the Report of the Commission drawn under the provisions of Article 50 of the Convention. Thus, pursuant to Article 33(1) of the Rules of Procedure, it is the duty of the Commission, and not of this Court, to accurately identify the alleged victims in a case tried by the Court.*[186]

So, based on the precedent established in the case law, the State could assert that the four deceased individuals and the 10 other individuals who were added to the case cannot be taken into account by the Court to declare the responsibility of the State or to order any type of reparations because they would be considered as a new fact.

The argument of the representatives according to which the status of victim must be extended to all those individuals who—subsequent to the filing of the complaint—can demonstrate before the Court that they have been affected in some way by the noxious effects of the contamination is unacceptable, in the State's opinion, because the Court has established in its case law that the alleged victims must be identified individually.

The Commission can argue that, although the Court has established that the alleged victims must be identified, it has also accepted—especially in cases with a large number of people involved, such as in the case of *Mapiripán*—the inclusion of "those

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[185] *Cf.* article 63.2 of the American Convention; *Case of Carlos Nieto et al.* Provisional Measures, whereas clause two; *Case of the Urso Branco Prison.* Provisional Measures, whereas clause two; and *Case of the "El Nacional" and "Así es la Noticia" Newspapers.* Provisional Measures, whereas clause two.

[186] *Cf.* Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. No. 105, 48 (Apr. 29, 2004); See also: *Case* La Cantuta, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, 72, 79 (Nov. 29, 2006); Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, 33 (July. 5, 2006)

who were identified later."[187] Clearly, the Court did not establish a specific type of

[187] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 252 (Sept. 16, 2005); Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. No. 116, 48 (Nov. 19, 2004).

material compensation for those who have not been proven to be victims, but it reserved the possibility of determining other forms of reparation for all of the members of the communities adversely affected by the facts of the case.[188]

With regard to the procedural stage at which the victims must be determined, the Court has affirmed in several judgments that the representatives may include new victims, in addition to those named in the Commission's complaint, provided that the State is given the opportunity to dispute the allegation and no ruling is issued to this effect.[189]

C. *Pecuniary and non-pecuniary damages caused*

Specific damages that can be identified within the categories of pecuniary and non-pecuniary damages

Applicable law

In its case law, the Inter-American Court has identified that human rights violations can generate different types of damages, which must be redressed in order to remedy "the consequences of the measure or situation that constituted the breach of such [rights]."[190]

As such, the jurisprudence distinguishes among different types of damages, splitting them into two broad categories: pecuniary and non-pecuniary damages.[191]

In its jurisprudence the Court has developed the concept of pecuniary damage and the situations in which it is appropriate to award compensation for it.[192] Pecuniary damages are for the monetary consequences that have a direct causal connection to the illegal act.[193] Among the pecuniary damages recognized by the Inter-American Court are consequential damages, lost wages or lost income and damages to family property considered independently, as well as compensation for other expenses arising from the search for a relative, funeral costs, displacement, exile and loss of livestock, among others.[194]

Non-pecuniary damage can include "can include the suffering and hardship caused to the direct victim and his next of kin, the harm of objects of value that are very significant to the individual, and also changes, of a non pecuniary nature, in the

[188] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 247 (Sept. 16, 2005); Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. No. 116 (Nov. 19, 2004).
[189] *Cf.* Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. No. 105, 48 (Apr. 29, 2004); See also: La Cantuta, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, 72, 79 (Nov. 29, 2006); Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, 33 (July. 5, 2006).
[190] Art. 63.1 of the American Convention.
[191] *Cf.* See Report on Reparations given by the President of the IACtHR before the OAS, April 4, 2008.
[192] *Cf.* Aloeboetoe v. Suriname, 1991 Inter-Am. Ct. H.R. (ser. C) No. 11, 50, 71, 87 (Dic. 4, 1991); Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 166 (Jan. 28, 2008); Zambrano-Vélez et al v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, 138 (July. 4, 2007); Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, 132 (July. 4, 2007).
[193] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, 43 (Nov. 25, 2000); *Case* La Cantuta, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, 213 (Nov. 29, 2006); Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 166 (Jan. 28, 2008).
[194] These last ones can be considered sub-categories of consequential damages, but with specific features.

living conditions of the victim[s]."[195] Within the category of non-pecuniary damages, the Court has recognized—although not always explicitly—pain and suffering, harm to a person's life plan, and psychological, physical and collective damages.[196]

Arguments of the Commission and the State

Based on the above considerations, the Commission could argue that the chemical spills (mercury) have caused the following types of damages: a) pecuniary, as a result of the contaminants that reached different publicly and privately used properties, which could based on consequential damages, lost wages and damage to family property; b) physical, based on the adverse health effects and the deaths of some people; c) collective damages, based on the risk posed to society, specifically the approximately 150,000 individuals in the contaminated area; d) environmental damages, based on the contamination of the ground surface (groundwater tables), in connection with the right to life and the right to a healthy environment.

The Commission must further prove that such damages have a causal connection or nexus to the violations alleged. It could argue that although the State did not cause those damages, it was negligent in its failure to exercise effectively its duty of prevention, which gave rise to its international responsibility as alleged in previous chapters.

The State could argue that it is not responsible for the alleged damages caused. In contrast to human rights violations under the Convention, the State did not act any time, with any intention, malice or premeditation to cause the damages. To the contrary, within the framework of its jurisdiction, the State acted preventively to mitigate the damages by shutting down the company and ordering the clean-up of the contaminants. In addition, the damages alleged by the Commission do not follow clearly from the theory of damages, and therefore fall outside the scope of the Court's jurisdiction. Finally, the existence of damages to the environment or to health cannot be declared without [the Court] having declared a violation of these precepts. The Court lacks jurisdiction to find that such violations are derived from the Protocol of San Salvador.

D. Scope of the measures adopted under domestic law (subsidiarity)

Which is the scope of the reparations adopted by the State under domestic law?
Does the Court have jurisdiction to hear a case in which the State has already punished the perpetrators and made reparations?
Are the company's compensation measures and the punishments imposed by the court sufficient?

i. Reparations under domestic law

Applicable law

[195] Cantoral-Huamaní and García- Santa Cruz v. Peru, 2008 Inter-Am. Ct. H.R. (ser. C) No. 176, 175 (Jan. 28, 2008)
[196] The Court has ordered reparations for damages to indigenous or tribal communities or other collectives.

On this point, the issue turns on whether the Court should hear the case or has jurisdiction to declare the responsibility of the State, when the State has already met its obligation to make reparations in the domestic sphere.

The Court has examined this issue on several occasions, particularly in the massacre cases against Colombia, in which compensation had generally already been made at the domestic level, and in the cases of *La Cantuta v. Peru* and *Almonacid v. Chile*. As such, the arguments of the parties can be based on the interpretation of the jurisprudence of the Court and the reports of the Commission.

On this point, the IACHR document "Principal Guidelines for a Comprehensive Reparations Policy" stated that the jurisprudence of the Inter-American system has established on several occasions that the victims of serious violations are entitled to adequate compensation for the harm caused, compensation that should materialize in the form of individual measures calculated to constitute restitution, compensation and rehabilitation for the victim, as well as general measures of satisfaction and guarantees of non repetition.[197]

To this effect, the Court has established that "in cases of human rights violations the duty to provide reparations lies with the State, and consequently while victims and their relatives must also have ample opportunities to seek fair compensation under domestic law, this duty cannot rest solely on their initiative and their private ability to provide evidence."[198] The IACHR affirmed in the previously cited document that, "[r]eparations should consist of measures that tend to make the effects of the violations committed disappear. Their nature and amount will depend on the damage caused both at the pecuniary and non-pecuniary levels. Reparations cannot involve enrichment or impoverishment of the victim or his or her heirs." The State must assume a principal—not secondary—role in ensuring that victims have effective access to reparations in accordance with international law standards.

Arguments of the Commission and the State

a) Direct responsibility of the State

The Commission could argue as a key reason for the Court to hear the case that although some compensation has already been made to the victims, most of it did not result from any voluntary act if the State; rather, it was the company that awarded such compensation as part of its responsibility. Therefore, given that the State has a direct responsibility for the events that occurred (because it failed to meet its obligation to prevent the contamination that adversely affected the health of so many people), the State must make direct reparations for its breach. The Court

[197] *Cf.* Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, 237-237 (Nov. 25, 2003); Caracazo v. Venezuela, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, 77-78 (Aug. 29, 2002); Blake v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, 31-32 (Jan. 29, 1999) Suárez-Rosero v. Ecuador, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44, 41 (Jan. 20, 1999); Castillo-Páez v. Perú, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, 53 (Nov. 27, 1998). See also IACHR, *Statement of the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia,* OEA/Ser. L/V/II 125 Doc. 15, August 1, 2006, para. 48.

[198] *Cf.* IACHR, *Report on the Implementation of the Justice and Peace Law: initial stages in the demobilization of the AUC and the first judicial proceedings.* OEA/Ser. L/V/II 129 Doc. 6, October 2, 2007, para. 97. See also Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, 220 (May. 11, 2007).

should therefore hear the case and ensure that compensation is awarded for the pecuniary and non-pecuniary damages, and that the measures of satisfaction and non-repetition it considers necessary are granted.

The State can maintain the position that the act is not directly imputable to it, and that there was no negligence, malice or generalized practice on its part. As stated in the arguments relating to the responsibility of the State in this case, if it is concluded that the act is not imputable to the State, it should not be responsible for acts committed by third parties. Moreover, it is impossible to prove that the State acted without diligence or that there was some type of intent that would involve it directly in the facts of the case.

b) Sufficiency of the reparations and subsidiarity of the human rights system to the national system

The Commission can further argue that the State was not the party that compensated the victims directly, and that the reparations made were insufficient because they failed to meet the standards established by the Court. Likewise, it would not be the first time the Court heard a case in which the victims had already been partially compensated, and there is no standard in the Convention or its Regulations that would clearly prevent the Court from exercising its duties in such a case.

The Commission can use the following case law to support its hypothesis. Indeed, in the judgments in the cases of the Massacres of *Mapiripan*, *Pueblo Bello* and *la Rochela* against Colombia, the Court has reiterated that the payment of compensation to the victims is not comparable to the concept of comprehensive reparation as understood by this Court. On this point, the Court established that:

> Adequate [and comprehensive] reparation, within the framework of the Convention, requires measures of rehabilitation, satisfaction and guarantees of non-repetition. Recourses such as the action for direct reparation or the action for annulment and re-establishment of the right […], have a very limited scope and conditions of access that are not appropriate for the purposes of reparation established in the American Convention. [The Court held that] the judgment of a judicial authority in the administrative jurisdiction rules on the fact that an unlawful damage has been produced and not on the State's responsibility for failing to comply with human rights standards and obligations.[199]

In this same vein, in the case of *Kaya v. Turkey*, the European Court of Human Rights decided that the violation of a right protected by the Convention could not be redressed exclusively by a finding of civil liability and the payment of compensation to the victim's relatives.[200]

As a result of the cases of the *Mapiripán Massacre*, *the Pueblo Bello Massacre* and *the Ituango Massacres*, all three against Colombia, the Court found that comprehensive reparation of the violation of a right protected by the Convention cannot be reduced to the payment of compensation to the victim's relatives.[201] The Court

[199] *Cf.* Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, 341, 342 (July, 1, 2006); Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (May. 11, 2007).
[200] *Cf.* Kaya v. Turkey, 1998 Eur. Ct. H.R., Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, § 105. Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006).
[201] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 214 (Sept. 16, 2005);

stated that it will consider the results obtained in administrative proceedings when it establishes the respective reparations, "insofar as the outcome of those proceedings has generated *res judicata* and is reasonable under the circumstances of the case."[202]

While Androwita S.A. was ordered in a civil case to pay US$ 5000 (five thousand dollars) to each family member of the deceased victims and US$ 2000 (two thousand dollars) to the individuals who were hospitalized as a result of the contamination, this payment clearly lacks the characteristics of comprehensive reparations pursuant to the terms of the Court.

The Commission may recognized that other forms of reparation were established in this case, such as the order against the company to pay a certain amount for the damages and the order to clean up the contaminated area within a period of six years. However, this type of reparation is also insufficient, and ineffective to redress entirely all of the harm caused. First of all, the $25,000 fine imposed is laughable in terms of remedying the environmental damage caused. Moreover, this fine fails to meet the objective of ensuring non-repetition. If the fines imposed against corporations for pollution are not exemplary and do not reach considerable amounts, corporations might—according to the cost-benefit logic—prefer to pay the fines rather than take the steps to prevent pollution.

Likewise, the order to clean up the site within a period of six years is also inconsistent with the concept of comprehensive reparation since, due to the seriousness of the events and the noxious effects that might continue to be felt by the public, this should be an urgent measure. That is, the company should have been ordered to clean up and redress the harm caused within the shortest possible time period.

The conviction that was obtained against the company's engineer and the obligation of the State to investigate and punish will be reviewed more exhaustively in the next subsection.

As a counter-argument to the Commission's point, the State can assert that one of the governing principles of international law in general, and the human rights systems specifically, is that they are complementary or subsidiary to national legal systems, and should only operate when there has been no specific response under domestic law or the alleged victims have not been adequately compensated.[203]

In the same sense Cf. Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, 339 (July, 1, 2006)*;* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 206 (Jan. 31, 2006).

[202] *Cf.* Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, 214 (Sept. 16, 2005); *In the same sense Cf.* Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, 339 (July, 1, 2006)*;* Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, 206 (Jan. 31, 2006).

[203] In the Lori Berenson Mejía v. Perú, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004) the Court dismissed one of the allegations of the representatives with respect to the possible violation of article 8 of the Convention, basing its interpretation on the case of *T.K. v. France*, (220/1987) of November 8, 1989 in which the Human Rights Committee stated that: "[t]he purpose of Article 5, paragraph 2(b) of the Optional Protocol is, *inter alia*, to direct possible victims of violations of the Covenant provisions to seek, first, satisfaction from the competent State Party and, also, based on individual complaints, to allow States Parties to examine the implementation of the provisions of the Covenant, in their territory and by their organs and, if necessary, to remedy the violations that occur before the Committee hears the matter."

This is related to the idea of enforcing the principle of legal security in the international system and also to provide an opportunity for the State to find an internal solution, given that the State should be able to "resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction."[204]

In this case, the State can argue that, according to the above, this case should not be heard by the Court because the State acted diligently within its own jurisdiction to the extent that the acts giving rise to the violation have already been investigated, the perpetrators have been punished and the victims have already obtained legal reparations. Therefore, a conviction at the international level is unnecessary.

The State can argue that the reparations that were granted meet the standards of the Court for the following reasons:

- The sanctions imposed against the company were in accordance with the laws of Chuqui.
- The amounts awarded to the individuals affected by the contamination are comparatively reasonable and proportional to the amounts of money that the Court has awarded to the victims in cases of serious human rights violations.
- The State met its obligation to provide reparations to the affected individuals, because the company was ordered not only to provide pecuniary reparations but also to take measures to prevent it from happening again; this was the purpose of the fine imposed against the company and the clean-up order, as well as the idea of promoting a national awareness campaign on the importance of living in a pollution-free world.

ii. Obligation to investigate and punish

Did the State fail to meet its obligation to investigate by virtue of the fact that no public employees were indicted?
Is the sentence imposed against the company's engineer proportional?

Applicable law

On this point, the participants may center the discussion on the issue of whether States have the obligation to investigate every act that may have given rise to a violation of human rights or whether, to the contrary, there are some cases in which, although there may have been a violation, the case is not "serious" enough for the State to be required to conduct an investigation.

It is also possible to discuss the proportionality of the sentence imposed against the company's engineer. The arguments of the parties could be the following:

[204] *Cf.* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 618 (July. 29, 1988).

Arguments of the Commission and the State

The Commission could point out that the Court has established from its inception that "[t]he State is […] obligated to investigate every situation involving a violation of the rights protected by the Convention"[205] (emphasis added). Thus, regardless of the right violated or the situation giving rise to the possible violation, the State must investigate following due diligence and the other parameters of the Convention. In any case, the notion that only "serious" violations of human rights can be investigated would be a serious mistake that could lead to the idea that there are some rights or types of violations that deserve to be investigated, whereas others could be omitted. This notion is contrary to the Convention, as it establishes no division or categories among the rights; therefore, any act that may violate a right enshrined in the Convention must be investigated in order to comply with the obligation to ensure held by all States Parties.

With regard to the proportionality of the punishment, the Commission could point out that the Court has determined that the State's response to the unlawful conduct of the perpetrator of the transgression must be proportional to the legally protected interest affected and to the degree of culpability with which the perpetrator acted; it must be established according to the nature and seriousness of the acts committed.[206] The punishment must be the result of a judgment issued by a judicial authority. In identifying the appropriate punishment, the reasons for the punishment should be determined. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention.[207]

In this case, the Commission could consider that the sentence imposed against the engineer was not proportional, because the legally protected interests are the right to life and to personal integrity of approximately 81 individuals, and the sentence imposed was two years for involuntary manslaughter. A person who caused harm of such magnitude as a result of serious negligence cannot be punished with such a short sentence.

The State, on its behalf, could demonstrate that in this case it promptly conducted a diligent investigation (as explained in the segment on due process), and convicted the responsible individual from the company that caused the pollution that affected numerous people.

E. Reparations measures under domestic law

Responsibility of the State to make reparations for damages arising from violations of the Convention
Could the Court grant measures for environmental damages, and on what basis?
Could the company Androwita S.A. have a part in the reparations?
Could punitive damages be considered for these types of acts?
What is the causal connection among the acts, the violation, the damages and the

[205] *Cf.* Velásquez-Rodríguez v. Honduras, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, 176 (June. 26, 1987).
[206] *Cf.* Vargas-Areco v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, 108 (Sept. 26, 2006); Raxcacó-Reyes v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133, 70, 133 (Sept. 15, 2005); Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, 102 (June. 21, 2002).
[207] *Cf.* Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (May. 11, 2007).

measures?

Applicable law

At this point, the participants are expected to identify the possible reparations that the Commission might request in case the State is found guilty, taking into account the type of damages, the causal connection and the type of measure that would truly redress the harm caused. The State can put forth arguments against the reparations measures requested by the Commission, following the previously described logic, and at the same time reiterating the reasons for which no type of reparations should be awarded.

Thus, as previously mentioned, it is a principle of international law that every violation of an international obligation which results in harm creates a duty to make adequate reparation.[208] To this end, the Court should order different specific measures to redress the harm caused. The Inter-American Court has reiterated that the reparation established must bear relation to the violation found.[209]

The Court has held that "[r]eparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others.)"[210]

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law establish (Principle 19) that adequate reparation may include measures such as: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[211] Likewise, the Inter-American Court

[208] *Cf.* Velásquez-Rodríguez v. Honduras, 1990 Inter-Am. Ct. H.R. (ser. C) No. 9, 25 (Aug. 17, 1990).
[209] *Cf.* Garrido-Baigorria v. Argentina, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, 43 (Aug. 27, 1998).
[210] *Cf.* Case of Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, 85 y 151 (Nov. 27, 1998); Separate Joint Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, para. 5 and 13; El Amparo v. Venezuela, 1996, Inter-Am. Ct. H.R. (ser. C) No. 28 (Sept. 14, 1996); Dissenting vote of Judge A.A. Cançado Trindade, para. 6. IACtHR "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 77, 75 (May. 26, 2001); Separate Opinion of Judge A.A. Cançado Trindade, para. *28.*
[211] Resolution G.A. Res. 60/147, Preamble, UN.Doc. A/RES/60/147 (Dec. 16, 2006) (emphasizing the right of victims of human rights violations to obtain recourse and reparations).
Principle 19 includes the following: (i) *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. (ii) *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services. (iii) *Rehabilitation* should include medical and psychological care as well as legal and social services. (iv) *Satisfaction* should include, where applicable, any or all of the following: Effective measures aimed at the cessation of continuing violations; Verification of the facts and full and public disclosure of the truth; The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed; An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim; Public apology; Judicial and administrative sanctions; Commemorations and tributes to the victims. (v) *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention: Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

has ordered additional measures to act under domestic law,[212] as well as obligations regarding the duty to investigate and punish,[213] and the payment of costs and expenses.

Finally, with regard to responsibility of international corporations, Norm 18 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[214] *(hereinafter Norms on the responsibilities of corporations with regard to human rights),* establishes that:

> "Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, *inter alia,* reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law."

Arguments of the Commission and the State

Based on these considerations, the Commission could allege that because of the violations of the Convention and the serious harm caused, the Court should order comprehensive reparation measures. To this effect, the Commission could creatively request that the State adopt, *inter alia,* the following reparation measures:

a) *Compensation:* Additional amounts awarded by the State based on its international responsibility. It should be noted that the compensation awarded to the victims are payments from the company Androwita S.A. Therefore, the State has not awarded any compensation of its own.

b) *Rehabilitation Measures:* i) for the individuals who have suffered harm to their health as a result of the contamination; ii) rehabilitation of the environment in order to clean up the contaminated area.

c) *Satisfaction Measures:* i) public apologies by the government officials and also by representatives of the Company (Norm 18); ii) building of public spaces that promote respect for the environment.

d) *Duty to act under domestic law:* i) legislative reforms to establish greater environmental regulation, as well as to increase the fines and other sanctions for

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Strengthening the independence of the judiciary; Protecting persons in the legal, medical and health-care professions; Promoting mechanisms for preventing and monitoring social conflicts and their resolution; Reviewing and reforming laws.

[212] Examples: (a) Amendment, abolition or repeal of norms incompatible with the Convention. *Cf.* "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, 2001, Inter-Am. Ct. H.R. (ser. C) No. 74, clause 4 of the holding (Feb. 5, 2001); Castillo-Petruzzi et al. v. Perú, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, clause 14 of the holding (May. 30, 1999); (b) abstention from the application of norms and the amendment of norms within a reasonable period of time. *Cf.* Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, clause 8 of the holding (June. 21, 2002).

[213] The Court has established that this is an obligation of means, not necessarily of results–as is the pursuit of justice at the domestic level-, but it must be conducted or "complied with seriously, and not as a mere formality." (19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 258 (July. 5, 2004); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, 273 (Nov. 25, 2003); IACtHR, Trujillo-Oroza v. Bolivia, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, 100 (Feb. 27, 2002))

[214] ONU. Res. E/CN.4/Sub.2/2003/12Rev.2. Norma 18.

pollution; ii) that the State amend its laws so that corporations that invest in its country meet the standards of the Convention in relation to the Norms on the responsibilities of corporations with regard to human rights.

e) *Guarantee of non-repetition:* i) training of government employees; ii) environmental campaigns. In this respect, the Company expressed its willingness to initiate a national awareness campaign together with the government on the importance of living in a pollution-free world.

f) *Duty to investigate and punish:* conduct an effective investigation into the government officials who acted negligently and failed to comply with the State's duty of prevention.

Here the Commission would have to demonstrate the causal nexus or link between the proposed measure and the damages and violations alleged.

The Commission could further maintain, in accordance with the interpretation of the UN Norms on the responsibilities of corporations with respect to human rights, (Article 29.b of the Convention), that the Court should order the State to require the company to meet its obligations with regard to human rights, and thus have the company participate in the reparation measures it orders (*supra* clauses c, d, and e).

The State could argue that it has acted diligently under domestic law in seeking reparation measures that could be considered to fall within the categories of compensation, investigation and punishment, guarantees of non-repetition and rehabilitation.[215] As previously mentioned, the State already made reparations; thus, additional reparations to the victims could cause unjust enrichment, as well as the duplication of proceedings, and for purposes of the company, the violation of the principle of *non bis in idem* or the imposition of punitive damages, which the Inter-American Court has rejected.[216]

The State may also argue that the principles and directives, as well as the norms on the responsibilities of corporations with regard to human rights invoked by the Commission, are not binding international norms for the State. They are simply provisions of *soft law* that are improper for the Court to interpret. Finally, the Court only has jurisdiction to try the State and to declare the responsibility of the State, not a corporation or private individuals.

[215] *Cf. Supra*, see Part III reparations, section D, subheading b, last paragraph.
[216] *Cf.* Velásquez-Rodríguez v. Honduras, 1990 Inter-Am. Ct. H.R. (ser. C) No. 9, 25 (Aug. 17, 1990).