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2016 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Case of Edmundo Camana *et al.,*
Pichicha and Orífuna Peoples v. Santa Clara

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Introduction

The hypothetical case in the 2016 Inter-American Human Rights Moot Court Competition seeks to encourage debate about human rights violations stemming from the acts of extractive companies that benefit from the decisions and policies of their home countries. The case also addresses the jurisdiction of the bodies of the Inter-American Human Rights System (IAHRS) to rule on the extraterritorial responsibility of the home countries of extractive companies; the duty of those countries to provide effective judicial remedies; the right to water; and the right of indigenous and Afro-descendant peoples to consultation and to free, prior, and informed consent.

In recent decades, the supranational human rights bodies have developed standards on the attribution of responsibility to States for the acts of private parties. Although most of those standards are related to violations committed by individuals organized under a para-State structure (*e.g.*, paramilitary groups), there have been recent developments regarding the conduct of other categories of private parties, including corporations that benefit from State acts or omissions. In the absence of an international treaty governing the violations committed by corporations, the supranational human rights bodies—especially within the United Nations—have been the ones to interpret the instruments currently in force as they apply to the obligations of corporations' home States. The 2016 hypothetical seeks to address part of the debate concerning the scope of international human rights obligations in cases of violations committed by a transnational corporation in a developing country where impunity is the norm, and when access to the justice system of the corporation's home country is limited.

The authors of the hypothetical case are aware of the challenges the competition's participants will face in debating an issue that is still nascent in international law. Nevertheless, we are confident that the academy is a privileged forum for the discussion of legal solutions to social phenomena that affect the lives of so many people – including the social conflicts and serious human rights violations that have taken place in Latin America as a result of the large-scale extraction of natural resources. There are any number of examples of extractive projects carried out to the detriment of the territory of indigenous and Afro-descendant peoples, and with disregard for the humane treatment of social leaders and defenders of the environment. Unfortunately, while the extractive companies have extensive dispute resolution mechanisms protected by free trade and investment treaties, the victims of the human rights violations caused by their activities still have limited access to justice, both domestically and internationally.

As former participants in the Inter-American Human Rights Moot Court Competition, we are honored to be able to contribute to its 21st year. We hope that the participants will deepen their knowledge of the Inter-American System and be inspired to embrace human rights as professionals and as individuals, cultivating a special awareness of this cause.

I. Issues of Jurisdiction and Admissibility

One of the most important aspects of the case has to do with the jurisdiction of the Inter-American Court of Human Rights (Inter-American Court) to hear and decide matters concerning violations that take place outside the territory of the Republic of Madruga, but the responsibility for which is attributable to Santa Clara. There are at least two events that, although they took place within the borders of Madruga, were preceded by acts and omissions of the State of Santa Clara. The first is the December 12, 1994 murder of four members of the Camana Osorio family. The second is the murder of Lucía Camana Osorio on December 10, 2002. The facts of the case are inconclusive with respect to the direct perpetrators and masterminds of the murders, but there are several pieces of evidence pointing to the participation of the unlawful armed group known as "Los Olivos." That group's criminal activities in northern Madruga have benefitted mining companies from Santa Clara. According to the facts of the case, the formation of those unlawful armed groups—known as militias—in northern Madruga can be traced back to policies and decisions of the authorities of the State of Santa Clara in the first half of the 20th century.

The representatives of the alleged victims should argue that the Inter-American Court has jurisdiction to hear and decide the allegations concerning Santa Clara's responsibility for the events that took place in Madruga, insofar as certain acts and omissions by Santa Clara contributed to the violation of the American Convention on Human Rights (ACHR). In turn, the representatives of the State should put forward arguments to disprove any connection between Santa Clara's state policies and the acts of its agents and the murder of the members of the Camana Osorio family.

As we will explain later, a State may be held internationally responsible under international human rights law when the conduct of one of its agents violates an international human rights treaty. The cases of violations committed outside the defendant State are exceptional and tend to arise under two circumstances: i) effective control of a foreign territory, and ii) when the defendant State exercises authority over the victims of the violation (for instance, so-called extraordinary renditions). The facts of the case go beyond those hypotheticals, and therefore the participants must have a thorough understanding of basic concepts of public international law, such as jurisdiction and the international attribution of responsibility. In addition, they must seek to draw analogies between the facts of the case and precedents on extraterritorial responsibility found in the IAHRS and other supranational human rights systems.

I.1 General considerations on jurisdiction

Although neither the ACHR nor the Statute or Rules of Procedure of the Inter-American Court establish competence as a requirement for the exercise of contentious jurisdiction, that analysis is derived from the general principles of international law. Unlike the admissibility requirements set forth in Articles 46 and 47 of the ACHR, whose analysis depends upon the filing of preliminary objections, the Inter-American Court tends to examine its jurisdiction on its own motion, apart from the defense arguments asserted by the defendant State. In the *Case of the Kaliña and Lokono Peoples v. Suriname*, for instance, although the State had not raised preliminary objections, the Inter-American Court underscored *sua sponte* that it lacked temporal jurisdiction over acts that took place prior to Suriname's ratification of the ACHR.[1]

1 I/A Court H.R., *Case of the Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, para. 128.

The Inter-American Court has declined to examine its temporal jurisdiction only when the defendant State expressly acknowledges responsibility for acts occurring prior to its acceptance of the contentious jurisdiction of the Court.[2] With regard to personal, territorial, and subject matter jurisdiction, which will be explained in the following paragraphs, the Inter-American Court has performed a *sua sponte* analysis separate from the defendant State's assertion of any preliminary objections.

In order for the Inter-American Court to hear and decide a petition filed under Article 44 of the ACHR[3] the alleged victims must be individual persons[4] (jurisdiction *ratione personae*) and the facts alleged must be related to obligations derived from a treaty ratified by the defendant State (jurisdiction *ratione materiae*). In addition, the events in question must have taken place subsequent to acceptance of the contentious jurisdiction of the Inter-American Court (jurisdiction *ratione temporis*). Finally, the petition must allege violations that took place within the territory of a State Party (jurisdiction *ratione loci*). This general rule on territorial jurisdiction or *ratione loci* provides for some exceptions that allow the supranational human rights bodies to hear and decide matters occurring within the territory of a country other than the defendant State, but whose commission is attributed to its acts or omissions.

According to the facts of the case, Santa Clara raised the preliminary objection of lack of territorial jurisdiction before the Inter-American Commission on Human Rights (IACHR) issued its admissibility report. It is expected that the teams representing the State will raise the preliminary objection of the Inter-American Court's lack of territorial jurisdiction, both in their written briefs and at oral argument.

Before delving into the arguments related to territorial jurisdiction, it is important to note that the analysis of the preliminary objection has certain nuances that distinguish it from the analysis of the merits regarding the attribution of responsibility to Santa Clara. Even if the Inter-American Court concludes that it has territorial jurisdiction to hear the matter, it does not automatically lead to the international responsibility of Santa Clara. In this regard, the debate on territorial jurisdiction must be complemented by a subsequent explanation of the criteria for the attribution of international responsibility to Santa Clara for the murders of December 12, 1994 and December 10, 2002.

I.2 Territorial jurisdiction or *ratione loci*

One of the IAHRS precedents that addresses territorial jurisdiction in more detail is Report on Admissibility No. 112/10, published by the IACHR in October 2010. This is an inter-State petition,

2 See, e.g., I/A Court H.R., *Case of the Massacres of El Mozote and nearby places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, para. 30.

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

4 Article 1.2 of the American Convention establishes that "For the purposes of this Convention, 'person' means every human being." The bodies of the IAHRS have sought to broaden the scope of that provision when the harm to individuals is derived from State conduct to the detriment of legal entities. Those situations are not relevant to the facts of the hypothetical case, so we mention, merely for reference purposes, IACHR Report on Admissibility No. 72/11, Petition 1164-05, *William Gómez Vargas v. Costa Rica*, March 31, 2011, paras. 31-40.

in which Ecuador alleged Colombia's responsibility for the extrajudicial execution of Guillermo Aisalla Molina during a Colombian military operation carried out on Ecuadoran soil. In ruling on the preliminary objection raised by Colombia, the IACHR examined the general obligation to protect and guarantee human rights contained in Article 1.1 of the ACHR, and underscored the following:

> The drafting history of the Convention does not indicate that the parties intended to give a special meaning to the term "jurisdiction." The *travaux préparatoires* for the American Convention reveal that the initial text of Article 1.1 provided that: "[t]he States Parties undertake to respect the rights and freedoms recognized in this Convention and to ensure to all persons within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms […].
>
> At the time of adopting of the American Convention, the Inter-American Specialized Conference on Human Rights chose to omit the reference to 'territory' and establish the obligation of the State parties to the Convention to respect and guarantee the rights recognized therein to all persons subject to their jurisdiction. In this way, the range of protection for the rights recognized in the American Convention was widened, to the extent that the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory, but also for those acts and omissions committed wherever they exercise jurisdiction.[5]

Prior to Report on Admissibility No. 112/10, the IACHR had already maintained the position that the definition of jurisdiction is not exclusively based on territoriality. In the case of *Coard et al. v. United States*, for instance, the IACHR had stated that, under certain circumstances, the supranational body's jurisdiction to hear and decide matters occurring outside the territory of the defendant State is supported by international law.[6] The case of *Coard et al.* concerned the arrest and incommunicado detention of citizens of Grenada during the U.S. military occupation in October 1983. In the case of *Armando Alejandre Jr. et al. v. Cuba*, the IACHR took a similar stance, asserting that under international human rights law each State is required to respect the rights of persons within its territory, as well as those persons subject to the control of its agents.[7]

In the universal human rights system,[8] the Human Rights Committee (also known as the Committee of the International Covenant on Civil and Political Rights– ICCPR) has established that:

> State parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. [...] the

5 IACHR. Report No. 112/10, Admissibility, Inter-State Petition PI-02, *Franklin Guillermo Aisalla Molina* (Colombia - Ecuador), October 21, 2010, paras. 89 & 90. Underscore added to original version. Internal referentes in the text have been omited.

6 IACHR. Report No. 109/99, Merits, Case 10.951, *Coard et al. v. United States*, September 29, 1999, para. 37.

7 IACHR. Report No. 86/99, Merits, Case 11.589, *Armando Alejandre Jr. et al. v. Cuba*, April 13, 1999.

8 It bears recalling that the validity of the case law of other supranational bodies is derived, *inter alia*, from Article 38 of the Statute of the International Court of Justice. That provision establishes the sources of public international law, including "judicial decisions." There are numerous Inter-American Court decisions that mention precedents from other supranational human rights systems and the International Court of Justice.

> enjoyment of Covenant rights is not limited to citizens of State parties but must also be available to all individuals, regardless of nationality or statelessness [...] This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.[9]

It is important to stress that Article 2.1 of the ICCPR[10] is worded more restrictively than its counterpart, Article 1.1 of the ACHR, in reference to the territorial scope of the obligation to respect and guarantee human rights. Nevertheless, the UN Human Rights Committee has an interpretation that is very similar to that of the IAHRS bodies. Both systems consider that territorial jurisdiction is not limited to the territory of the defendant State, and that it encompasses violations committed by means of territorial control or the exercise of authority over the victims of the violations.

The European Court of Human Rights (ECHR) has held that the term "jurisdiction" should not be confused with "territory," as it also extends to acts that have effects outside the territory of the defendant State.[11] In the case of *Loizidou v. Turkey*, the ECHR found that the defendant State exercised jurisdiction in those territories over which it exercised effective control by means of a military occupation:

> In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. […] the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory […].
>
> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[12]

9 UN Committee for Human Rights, General Comments No. 31, 80th Period of Sessions, U.N. Doc. HRI/GEN/1/Rev.7, 225 (2004), para. 10.

10 This Article establishes that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

11 ECHR. *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, para. 91. See also the decisions of the European Commission on Human Rights on the admissibility of petitions 1611/62*, X v. Federal Republic of Germany*, 25 September 1965; Petition 6231/73, *Hess v. United Kingdom*, 28 May 1975; Petitions 6780/74 & 6950/75, *Cyprus v. Turkey*, 26 May 1975; Petitions 7289/75 & 7349/76, *X and Y v. Switzerland*, 14 July 1977; Petition 9348/81, *W. v. United Kingdom*, 28 February 1983.

12 TEDH. *Loizidou v. Turkey*. Judment of 23 March 1995, para. 62.

In the case of *Bankovic and Others v. Belgium and Others*, the ECHR reiterated that, under international law, the meaning of "jurisdiction" is not exclusively territorial.[13] This precedent is significant, insofar as it limits the scope of the ECHR's jurisdiction over acts that result in the violation of international obligations, but in a geographic area in which the European Convention on Human Rights was not applicable and where there was no effective control by the States subject to international complaints. *Bankovic and Others* concerns the death of Ksenija Bankovic and other individuals during a bombing raid in the city of Belgrade, in the former Yugoslavia, by the North Atlantic Treaty Organization (NATO). The petitioners alleged the international responsibility of Belgium and 16 other European NATO member countries. The ECHR declared the case inadmissible on the grounds that this type of military operation did not constitute effective control over the territory in question.[14] Along these lines, it concluded that it lacked jurisdiction over an aerial bombing in the territory of a country that is not part of the European Human Rights System.

There are at least two paragraphs in the *Bankovic* judgment whose rationale could support the arguments of the teams. The first has to do with the general rule on the exercise of extraterritorial jurisdiction by a State Party to the European Convention:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[15]

The second paragraph is related to the conduct of a State's diplomatic representatives that contributes to the violation of human rights in the territory of a third country. That paragraph may be useful above all to the representatives of the alleged victims, upon substantiating the connection between the murder of the members of the Camana Osorio family and the meetings held by the Deputy Military Attaché to Santa Clara's Embassy in Madruga, Mr. David Nelson, with members of the Los Olivos militia, the alleged perpetrators of those murders. The paragraph from the *Bankovic* judgment that relates to this allegation is the following:

> Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.[16]

In the case of *Issa v. Turkey*, the ECHR departed from the more restrictive position taken in *Bankovic and Others*, holding that the European Convention imposes upon the States Party the obligation to abstain from committing violations in other countries' territory.[17] In that case, the ECHR considered

13 ECHR. *Bankovic and Others v. Belgium and Others*. Judgment of 12 December 2001, paras. 59-61.
14 ECHR. *Bankovic and Others v. Belgium and Others*. Judgment of 12 December 2001, paras. 74 & 80.
15 TEDH. *Bankovic and Others v. Belgium and Others*. Judgment of 12 December 2001, para. 71. Free translation.
16 TEDH, *Bankovic y otros vs. Bélgica y otros*. Sentencia de 12 de diciembre de 2001, párr. 73. Free translation.
17 ECHR, *Issa and Others v. Turkey*. Judgment of 16 November 2004, para. 71.

it to have been proven that Turkey had exercised effective control over a portion of the territory of Cyprus. Although the execution of the victims in this case had not occurred during a Turkish military operation, the ECHR concluded that the effective occupation of part of the territory of Cyprus had contributed to the violation of various provisions of the Convention. Unlike in the case of *Bankovic and Others,* both Cyprus, as the State in which – geographically – the violations occurred, and Turkey, as the defendant State, are parties to the European Convention.

Although the facts of the hypothetical case do not reflect any of the traditional scenarios of extraterritorial jurisdiction, there are different elements that can strengthen the argument of the representatives of the alleged victims with respect to the territorial jurisdiction of the Inter-American Court. First, the establishment of the unlawful militia groups that participated in the Camana Osorio family murders is directly linked to policies and decisions of agents of the State of Santa Clara during the first half of the 20th century.[18] Strictly speaking, those groups are not paramilitary forces acting under the acquiescence or tolerance of the Republic of Madruga, but rather are more like criminal gangs. Second, the facts of the case describe certain acts by agents of the State of Santa Clara that may have contributed to the commission of the murders of the members of the Camana Osorio family. Most notably, those actions include the meetings held by David Nelson, Deputy Military Attaché of Santa Clara, with members of the Los Olivos militia group, the alleged perpetrators of the murders.[19] Equally notable is the granting of government-subsidized loans to mining companies that benefitted from the unlawful acts of militia groups in northern Madruga; as well as a foreign policy designed to defend the interests of those companies and lacking the proper human rights safeguards.[20]

Finally, the representatives of the alleged victims can emphasize the point that the laws of Santa Clara limit the potential for civil suits for violations committed by foreign subsidiaries of companies headquartered in that country. They can also argue that citizens of Santa Clara involved in the unlawful actions of the militia groups operating in Madruga enjoy legal and even diplomatic protection, which solidifies the impunity surrounding the Camana Osorio family murders. Although the discussion on Santa Clara's potential obligation to change its policies and legal frameworks corresponds to the arguments on the merits, it is expected that the teams will address this issue for purposes of establishing the territorial jurisdiction de the Inter-American Court.

I.3 Exhaustion of domestic remedies

According to the case law of the Inter-American Court, a State may expressly or tacitly waive invocation of the exhaustion of domestic remedies requirement provided in Article 46.1.a) of the ACHR.[21] In order for it to be timely, the objection must be raised at the admissibility phase of the

18 See paras. 12-14 of the hypothetical case.
19 See para. 25 of the hypothetical case.
20 For an analysis of this topic, see: *The impact of international investment and free trade on the human rights of indigenous peoples.* Report to the General Assembly, 2015. http://unsr.vtaulicorpuz.org/site/index.php/en/documents/annual-reports/93-report-ga-2015
21 That provision establishes that:
This Article reads as follow:
1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

proceedings before the IACHR. If it is not done at that time, the State is presumed to have waived its defense argument, and is precluded from raising it at the later stages of the proceedings before the Inter-American Court.[22]

According to Section V of the facts of the case, Santa Clara did not raise the preliminary objection of failure to exhaust domestic remedies before the IACHR. Nevertheless, there is at least one fact that could lead to a debate on the improper exhaustion of domestic remedies. According to paragraph 40 of the hypothetical, the petition for a constitutional remedy [*amparo*] filed by Mr. Ricardo Manuín to protect fundamental rights of the Pichicha People was ruled inadmissible. In stating the grounds for its decision, the Supreme Court of Santa Clara found that the *amparo* action was not the suitable mechanism for asserting compensatory claims. The answer to clarification question No. 5 explains that administrative litigation and regular civil actions are the suitable proceedings for these types of claims under the laws of Santa Clara.

The representatives of the State will be able to argue that the alleged victims failed to properly exhaust domestic remedies. If they do, however, they should justify the reasons why the Inter-American Court should change its case law with respect to the proper time during the proceedings to evaluate the admissibility requirement provided for in Article 46.1.a) of the Convention. In turn, the representatives of the alleged victims are expected to be able to refute the State's arguments, emphasizing that Santa Clara tacitly waived its right to raise the objection of failure to exhaust domestic remedies because it did not invoke that defense before the IACHR.

22 I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 135.

II. Merits

II.1 Attribution of extraterritorial responsibility to Santa Clara for the murder of members of the Camana Osorio family

Given that the facts of the case do not reflect a situation of effective control over territory located in the Republic of Madruga, or the exercise of authority over the deceased victims, the debate surrounding the extraterritorial responsibility of Santa Clara requires a command of certain factual elements and the ability to outline their legal consequences. It is important for the representatives of the alleged victims to argue that the State of Santa Clara had knowledge of the context in which social leaders were being executed in northern Madruga, and that it could have created safeguards when granting subsidized loans to corporations involved or in any case favored by this context of violence in Madruga. In addition, they should argue that certain acts of agents of Santa Clara and the country's policies toward mining companies operating abroad contributed to the commission of human rights violations in Madruga. As explained below, this position leads to a breach of the obligation to protect and respect the rights of the members of the Camana Osorio family.

The representatives of the State should argue that the facts of the case do not prove any type of connection between the acts of agents of Santa Clara or its policies to encourage foreign investment and the Camana Osorio murders. Although it is undisputed that the direct perpetrators of those murders were members of unlawful militia groups, no final court decision has been handed down—in Santa Clara or in Madruga—to establish the criminal responsibility of agents of Santa Clara. The fact that diplomatic agent David Nelson held meetings with members of Los Olivos could be treated as an *ultra vires* act, without his direct participation in human rights violations in Madruga having been established in a court of law.

It is expected that the representatives of the State will maintain that, under the current international standards, the acts of private corporations are not attributable to the countries in which they are headquartered. They can also assert that the use of the courts of Santa Clara as a parallel instance to the courts of other countries violates the principle of *ne bis in idem* with respect to acts already prosecuted in Madruga. In addition, they can argue that it is an improper interference in the administration of justice by the competent authorities of Madruga, which jeopardizes diplomatic relations with that country. Finally, the representatives of the State can maintain that the complaints of the relatives of the individuals murdered in Madruga can be brought before the bodies of the IAHRS, but against the Republic of Madruga, in light of its international obligations.

Below we will discuss the main standards of supranational human rights bodies and soft law instruments that, together with the position of the IAHRS bodies, facilitate the examination of Santa Clara's responsibility for the violations derived from the activities of its agents and corporations operating in Madruga.

II.1.1 International standards on extraterritorial responsibility for violations derived from the acts of private corporations[23]

To date, the most tangible outcome of the discussions in inter-governmental forums on corporations and human rights is the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011. In June 2014, a open-ended working group was created within the Council, the outcome of which is yet to be seen. Its mandate is to draft a binding treaty on "human rights and transnational corporations and other business enterprises."24 In spite of these recent developments in UN political bodies, it is its thematic rapporteurships and human rights treaty bodies that have contributed more to the debate on corporations and human rights. One of the most important aspects of that debate is the extraterritorial liability of the home States of corporations that commit violations, whether directly or through corporate policies that acquiesce in the violations committed by their subsidiaries in third countries.

As a general rule, the provisions of the inter-American instruments regulating the obligations to respect and guarantee[25] human rights are worded similarly to those of other regional systems and the universal system. Like the UN's Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man does not contain a general clause on the obligation to respect and guarantee rights. Such general clauses emerged as a trend in human rights instruments especially in the 1960s. So, while the International Covenant on Civil and Political Rights (1966) and the American Convention (1969) contain introductory provisions with specific language about those obligations, the first article of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is much more limited, alluding only to the duty of respect and omitting the word "guarantee."

Despite the language in the international instruments, the approach of international human rights bodies to State obligations has been based on three main elements: respect, protect, and guarantee. The obligation to respect rights goes back to the liberal constitutionalism of the first half of the 19th century, whereby governments were required to abstain from violating the fundamental freedoms of citizens. Gradually, that abstention-based paradigm was supplemented by the obligation to protect and guarantee civil and political rights, as well as economic, social, and cultural rights. The paradigm later expanded to include the State obligation to take positive legislative, judicial, or other measures to give effect to human rights.[26]

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23 Part of this section has been extracted from: Daniel Cerqueira, *The Attribution of Extraterritorial Liability for the Acts of Private Parties in the Inter-American System: Contributions to the Debate on Corporations and Human Rights*. In: AportesDPLF No. 20, Year 8, August 2015, pp. 14-17. Available at: http://www.dplf.org/sites/default/files/aportes_20_english_web_nov_10b_1.pdf

24 Para un análisis más detallado sobre las discusiones relacionadas con el tema empresas y derechos humanos en los órganos políticos de la ONU y de la Organización de Estados Americanos véanse Carlos López, *Empresas y derechos humanos: hacia el desarrollo de un marco jurídico internacional* & Katya Salazar, *Empresas y Derechos Humanos: ¿un nuevo desafío para la OEA?* In: AportesDPLF No. 20, año 8, agosto de 2015. Disponible en: http://www.dplf.org/sites/default/files/aportes2020_web_final_0.pdf

25 For the purposes of this essay, it is not necessary to provide an exhaustive definition of the obligation to guarantee rights. Suffice it to say that it involves the State duty to prevent, investigate, and punish human rights violations, as well as to provide the appropriate reparation mechanisms.

26 An indication of this trend in positive international law can be found in the African Charter on Human and Peoples' Rights (1980), Article 1 of which specifies that the Member States "shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."

In the constitutional sphere, the doctrine of the *Drittwirkung der Grundrechte* came to support the duty to protect and guarantee fundamental rights, not only in relationships between States and individuals, but also among private parties. Developed in the late 1950s by the German Federal Constitutional Court, the doctrine would influence the judicial branches of various States founded on the constitutional rule of law. In the international sphere, while the European Court of Human Rights (ECHR) tacitly began to assimilate the doctrine of the *Drittwirkung* in the 1980s,[27] other supranational bodies would use a very similar rationale decades later.[28]

In the IAHRS, the Inter-American Commission on Human Rights (IACHR) has recognized that the duty to investigate human rights violations by private parties arises from both the American Convention[29] and the American Declaration.[30] The *erga omnes* nature of the obligations to protect and guarantee human rights has been reflected in the case law of the Inter-American Court since its earliest decisions,[31] and has been expanded in the judgement in *Blake v. Guatemala*.[32] In Advisory Opinion No. 18/03, on the legal status and rights of migrants,[33] the Inter-American Court referred expressly to the so-called "horizontal effect of human rights" in evaluating the obligation of States to guarantee the right to equality and non-discrimination in the relationship between employers and migrant workers. It follows that States parties to the IAHRS are obliged to take positive measures to guarantee human rights, including in relation to their actual or potential violation by private parties.[34]

Through its essential function of monitoring human rights, the IACHR has made reference since the 1980s to violations by a particular State in the territory of others. In its 1985 *Report on the Situation of Human Rights in Chile*, for example, the IACHR addressed the murder of two high-ranking officials of Salvador Allende's government by National Intelligence Bureau (*Dirección de Inteligencia Nacional*, DINA) agents in the United States and Argentina.[35] Similarly, the IACHR noted the creation by

27 See, e.g., ECHR. *Young, James and Webster v. The United Kingdom*, 13 August 1981; *X and Y v. Netherlands*, 26 March 1985. For a detailed explanation of the doctrine of the *Drittwirkung* and its incorporation into the case law of the ECHR, see Eric Engle, "Third Party Effect of Fundamental Rights (Drittwirkung)," *Hanse Law Review* 5, (2009): 165–73. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481552

28 See, e.g., UN. Human Rights Committee. (1999). *William Eduardo Delgado Páez v. Colombia*, CCPR/C/39/D/195/1985, July 12, para. 5.5 (for failing to meet its obligation to prevent murders in cases where there is sufficient evidence of risk to life); CEDAW. (2005). *Ms. A.T. v. Hungary*, January 26, para. 9.3 (for failing to meet its obligation to guarantee the appropriate structures and legal protection to prevent cases of domestic violence against women).

29 IACHR. *Simone André Diniz v. Brazil*. Case No. 12.001. Merits. Report No. 66/06, October 21, 2006, para. 101.

30 IACHR. *Jessica Lenahan (Gonzáles) et al. v. United States*. Case No. 12.626. Merits. Report No. 80/11, July 21, 2011, para. 130 (establishing that the States can be held responsible for violations of their duty to investigate and punish cases of domestic violence under the American Declaration).

31 I/A Court H.R. *Case of Velásquez Rodríguez v. Honduras*, July 26, 1988, para. 176.

32 I/A Court H.R. *Case of Blake v. Guatemala*, July 2, 1996.

33 I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003, paras. 140, 147 and 150.

34 For an analysis of the evolution of the case law of the Inter-American Court with respect to the State obligation to guarantee human rights in relationships among private parties, see Javier Mijangos y González, Indret Revista para el Análisis del Derecho, *The doctrine of the Drittwirkung der Grundrechte in the case law of the Inter-American Court of Human Rights*. Barcelona, January 2008. Available at: http://www.indret.com/pdf/496_en.pdf

35 IACHR. *Report on the Situation of Human Rights in Chile*. Chapter III, The Right to Life, subsection C. Executions Ordered by War-Time Military Courts. OEA/Ser.L/V/II.77, rev.1, May 8, 1985.

Surinamese State agents of a climate of threats and harassment against Surinamese citizens in the Netherlands.[36]

Within the framework of the petition and case system, there are two scenarios in which the IACHR has addressed State responsibility for acts committed abroad: (1) when the acts or omissions have an impact outside the territory of the respondent State;[37] or (2) when the person or alleged violator of an international obligation is under the authority or effective control of the respondent State.[38] Accordingly, the IACHR has established that both the American Declaration[39] and the American Convention[40] have extraterritorial application with respect to acts of military occupation, military action, or detention.

Although the OAS Charter establishes that transnational corporations are subject to the laws and jurisdiction of the courts of the countries in which they operate,41 no decisions have been issued within the petition and case system in which IAHRS bodies have established criteria for attributing State responsibility for the conduct of corporations within the borders of third countries. Under current inter-American standards, the acts of corporations abroad are not considered directly attributable to their State of origin, unless those companies perform government functions with the support and cooperation of the State.42 In spite of that gap, the standards already developed on the obligation to respect, protect, and guarantee rights in relation to the acts of private parties, in addition to more specific decisions on extraterritorial liability issued by other international legal bodies, make it possible to rule out a merely territorial definition of jurisdiction.

Some international courts have allowed for exceptions to the rule that private entities are distinct from the State in cases where a government establishes a policy of absolute control over an industry,43 or when the corporation exercises official powers in conducting the activity for which it has been awarded a concession.44 In addition, there seems to be some leeway in international law

36 IACHR. *Second Report on the Situation of Human Rights in Suriname.* Chapter V, Freedom of Movement and Residence, subsection E. Special Considerations: Terrorist Attacks on the Surinamese Exile Community, OEA/Ser.L/V/II.66.Doc. 21, rev.1, October 2, 1985.

37 See IACHR. (1998). *Saldaño v. Argentina.* Report No. 38/99, paras. 15-20 (supporting the assertions made in decisions of the European Court and Commission); IACHR. *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia.* Inter-State Petition PI-02. Report on Admissibility No. 112/10, October 21, 2010 ("the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory … human rights are inherent in all human beings and are not based on their citizenship or location … each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.")

38 See IACHR. (1998). *Saldaño v. Argentina. 1998 Annual Report.* Report No. 38/99, paras. 17-20.

39 IACHR. *Armando Alejandre Jr., et al. v. Cuba.* Case No. 11.589. Report No. 86/99, September 29, 1999; IACHR. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), March 12, 2002.

40 IACHR. *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia.* Inter-State Petition PI-02. Report on Admissibility No. 112/10, October 21, 2010.

41 Article 36 of the OAS Charter establishes that "Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries."

42 James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002), p. 112.

43 *Philips Petroleum Co. Iran v. Iran, et al.* Iran-U.S. C.T.R. 1989, paras. 91-100 (explaining that the government of Iran assumed complete control of the petroleum industry, including a policy whereby the National Iranian Oil Company would sign petroleum contracts on the government's behalf).

44 I/A Court H.R. *Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149.

for the attribution of responsibility that requires more in-depth analysis of the concepts of: (i) support, acquiescence, or tolerance of the acts of private parties; and (ii) the link between the international violation and the authority of the respondent State.45 With respect to the first element, there are several precedents in the IAHRS that, although they refer to support for or acquiescence to violations committed within the jurisdiction of the respondent State,46 could be applied to violations perpetrated in the territory of other countries when the support or acquiescence comes from the respondent State. As for the nexus between the acts of private parties and the home State, the IAHRS could find support in the progress made in the European system, where the ECHR has held that the tolerance by a State's authorities for private conduct that violates the rights of third parties in another country's territory could give rise to responsibility of the home State.47

In its document Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy,48 the organization ESCR-Net examines the application of extraterritorial obligations (ETOs) by thematic committees and special rapporteurships of the UN, in particular with respect to economic, social, and cultural rights. In explaining the content of the ETOs, ESCR-Net stated that:

> The obligation to protect human rights has been used most often in the context of corporate accountability, although the obligations to respect and to fulfill are also relevant. […] Regarding the obligation to fulfill, as business enterprises are legal entities subject toa n incorporation and regulation framework manager by the state, states should take constructive steps to apply or amend, as relevant, this overarching framework to ensure that business enterprise activities are in harmony with the state's human rights obligations, including its positive obligations to further human rights. This might entail positive measures regarding public expenditure priorities, the corporate capture of politics and law-making, taxation developments, education initiatives, and so on, to address existing systemic flaws conducive to corporate human rights violations.49

There is a tendency in the thematic committees of the Universal System to issue general comments recommending that the States change laws or policies that are conducive to the commission of human rights violations in the territories of third countries. In the case of the IAHRS, although there has not been a similar trend, the IACHR will publish a Report on Extractive Industries and the Rights of Indigenous and Afro-descendant Peoples in the Americas in the coming months. That

45 IACHR. Report No. 39/00, Case 10.586, *et al.* Extrajudicial Executions, Guatemala, April 13, 2000, para. 586. ("The judiciary proved unwilling and unable to discharge its role in identifying, prosecuting and punishing those responsible. Where such a practice, attributable to the State or with respect to which it acquiesced, can be established, and the particular case can be linked to that practice, that linkage further defines the nature and scope of the claims raised, and aids in establishing the veracity of the facts alleged"); I/A Court H.R. *Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 126.
46 I/A Court H.R. *Case of Ríos, et al. v. Venezuela*, January 28, 2009.
47 ECHR. *Cyprus v. Turkey*, 10 May, 2001, para. 81.
48 ESCR-Net. (2014). *Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy,* available at: https://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf
49 See ESCR-Net, *Global Economy, Global Rights: UN Treaty Monitoring Bodies Increasingly Interpret Extraterritorial Obligations in Response to Global Business Activities*. In: AportesDPLF No. 20, Year 8, August 2015, pp. 14-17. Available at: http://www.dplf.org/sites/default/files/aportes_20_english_web_nov_10b_1.pdf

document is expected to include the standards of the Universal System and progress in the accountability of the home States of corporations that violate human rights in third countries.

Extraterritorial human rights obligations in soft law instruments–Maastricht Principles

The *Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights*[50] were adopted by international experts, and offer a reformulation of the customary and treaty-based rules regarding ETOs. Published in 2011, the principles underscore that "All States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially,"[51] and that the

> States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsability of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potencial impacts does not constitute justification for such conduct.[52]

Principle 8 also recognizes that the ETOs encompass "the acts and omissions of a State, within or beyond its territory."[53] Similarly, Principle 24 establishes that the extraterritorial obligation to protect includes the requirement that

> [a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set forth in Principle 25, such as private individuals and organisations, and transnacional corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights.[54]

Although the Maastricht Principles are not a "hard law" instrument validated by States, their content systematizes the international standards in force at the time they were drafted. In this regard, they can guide the interpretation of the IAHRS bodies, insofar as they reflect the norms established in treaties and in the case law of supranational bodies. This makes their content a possible source of international law, in light of Article 38 of the Statute of the International Court of Justice.

II.1.2 Obligation to provide effective judicial remedies to prevent and redress violations committed in other countries

International human rights treaties tend to contain general clauses on how States should implement the obligation to respect, protect, and guarantee rights, which includes providing civil and criminal remedies. While there is a tendency in the criminal sphere toward a flexible definition of jurisdiction for purposes of prosecuting certain crimes that are especially serious (genocide, crimes against peace, war crimes, or crimes against humanity), there is a nascent trend in the civil sphere toward access to justice in territories other than those where the violation took place. The establishment of universal

50 Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights, adopted September 28, 2011. Available at: http://www.etoconsortium.org/
51 Id., Principle 3.
52 *Ibíd*, Principio 13.
53 *Ibíd,* Principle 8.
54 *Ibíd*, Principio 24.

or quasi-universal jurisdiction has been advanced nationally and internationally in the criminal context,[55] in relation to a limited number of international crimes.[56] Indeed, there are several treaties in the criminal sphere that suggest, and in some cases require, the exercise of extraterritorial jurisdiction to prosecute certain transnational crimes. Such is the case of the Inter-American and United Nations Conventions against Terrorism,[57] and the Inter-American Convention against Corruption.[58]

In the civil context, there is no uniform practice or multilateral treaties that broaden the exercise of extraterritorial jurisdiction over human rights violations like the ones described in the facts of the hypothetical case. Given the silence of positive international law on the subject and the still novel decisions of the supranational human rights bodies, the exercise of extraterritorial jurisdiction in civil matters has been relegated to the discretion of the States. There are very few treaties that, in addition to regulating the criminal prosecution of international crimes, require the establishment of civil remedies at the domestic level. One exception is the UN Convention against Torture, Article 14 of which expressly requires States Party to provide an enforceable right to compensation under their domestic laws.[59]

While the requirement to legislate in favor of extraterritorial jurisdiction in civil matters is not yet an unequivocal international obligation, it is not prohibited by any treaties or international court decisions, either. However, there are decisions from supranational bodies, including the International Court of Justice, that limit the extraterritorial exercise of criminal jurisdiction when it conflicts with institutions of international law such as diplomatic immunity and sovereign immunity.[60]

In view of the above, it is anticipated that the representatives of the alleged victims will argue that Santa Clara failed to meet its obligation to adapt its domestic laws, in light of Article 2 of the ACHR, in order to provide effective judicial remedies to redress violations committed by its public servants

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55 While universal jurisdiction in the criminal context entails the obligation to prosecute the crime regardless of the State's relationship to the victim, perpetrators, and place the offense was committed, quasi-universal jurisdiction defines the obligation in terms beyond prosecution as such, encompassing alternative obligations. Such is the case, for instance, of the obligation to prosecute or extradite (*aut dedere, aut judicare*) in the case of a crime that is particularly grave in the eyes of the world.

56 One document that systematizes the international standards on this subject is Resolution 60/147 of the UN General Assembly, of December 2005, establishing 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*. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

57 See, e.g., Articles 5.2 & 6.1 of the Inter-American Convention against Terrorism, related to the seizure and forfeiture of assets derived from financing or facilitating the practice of terrorism, regardless of where the unlawful act was carried out. Available at: http://www.oas.org/xxxiiga/english/docs_en/docs_items/agres1840_02.htm

58 See Article V, clauses (3) & (4) of the Inter-American Convention against Corruption, which authorize the exercise of extraterritorial jurisdiction in criminal matters by the States Party. Available at: https://www.oas.org/juridico/english/treaties/b-58.html

59 For an authorized interpretation of Article 14 of the Convention against Torture, see Committee Against Torture, Conclusions and recommendations, 34th Session, 2-20 of May 2005, UN Doc. CAT/C/CR/34/CAN, July 7 2005, paras. 4.g) and 5.f).

60 For a detailed study on this issue, see Julia Kapelanska-Pregowska, *Extraterritorial Jurisdiction of National Courts and Human Rights Enforcement: Quo vadis justitia?* In: **International Community Law Review** 17 (2015), pp. 413-444. As to the ICJ position regarding international arrest warrants issued against heads of States, see ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Judgment of 14 February 2002. Available at: http://www.icj-cij.org/docket/files/121/8126.pdf

and corporations in Madruga. In turn, the representatives of the State should first argue that effective judicial remedies do exist in Santa Clara, and were invoked by the alleged victims and adjudicated by the competent courts with all of the requisite due process guarantees. In addition, they can argue that the current international standards do not require the extraterritorial exercise of criminal jurisdiction over the crimes committed against the Camana Osorio family. The murders committed by unlawful militias in northern Madruga cannot be considered crimes against humanity, because they are not systematic; nor do they meet the requirements to be classified as genocide, crimes against peace, or war crimes.

Finally, with respect to the judicial remedies sought under the laws of Santa Clara, the representatives of the State can assert that the relatives of the Camana Osorio family themselves were party to a transaction with the defendant mining company, having accepted the payment of US $150,000.[61] Therefore, there would be no basis for the argument that Santa Clara does not provide effective judicial remedies for seeking reparation from private corporations that commit violations in in Madruga. In fact, there are very few States in the region that recognize the right to file a civil action against private parties for acts carried out abroad. The United States, for example, has the Alien Tort Statute (ATS), which has been used to seek compensation from private parties that commit grave human rights violations abroad. In its 2013 decision in the case of *Kiobel v. Royal Dutch Petroleum Co. Inc.*, the United States Supreme Court held that, in order for a civil action brought under the ATS to be heard in a US court, at least part of the pertinent conduct has to have taken place in the United States, as the fact that the company is legally incorporated in the US is insufficient.

II.2 Rights established in Articles 16 and 17 of the American Convention

In Merits Report No. 17/15, the IACHR concluded that Santa Clara was responsible for the violation of several provisions of the American Convention on Human Rights (ACHR), including Articles 16 (freedom of association) and 17 (protection of the family), to the detriment of members of the Camana Osorio family who were killed on December 12, 1994 and December 10, 2002.

The Inter-American Court has ruled on situations in which the murder of human rights defenders results in (encompasses?) the violation of freedom of association protected by Article 16 of the ACHR[62]. However, the jurisprudence of the Court has been ambiguous regarding the impact on the right provided for in Article 17 of the ACHR, when members of a given family are killed. While the Inter-American Court found violations of this provision in the cases of *Chitay Nech et al.* and "*Las Dos Erres Massacre*," both against Guatemala, there are a number of precedents in which, despite the execution of members of the same family, the Inter-American Court declined to rule on or found no violation of Article 17.

Although Edmundo Camana and his daughter Lucía Camana were human rights defenders, the facts of the case do not clearly establish a link between their murders and their advocacy activities. Similarly, the execution of five members of the Camana Osorio family may entail a violation of the

61 See para. 31 of the hypothetical case.
62 See, I/A Court H.R. *Case of Huilca Tecse v. Peru*. Judgment of March 3, 2005. Series C No. 121; and *Case Kawas Fernández v. Honduras*. Judgment of April 3, 2009, Series C No. 196.

right to family protection, although in several similar cases, the Court has not declared a violation of this guarantee.

In view of the above, the representatives of the alleged victims and the State should possess a minimum knowledge of the jurisprudence of the Inter-American Court regarding Articles 16 and 17 of the ACHR. It is important to stress that the controversy surrounding these provisions is subsidiary to the other elements of fact and law of the hypothetical case. Therefore, the management of one or two precedents of the Inter-American Court would satisfy the knowledge required to argue for or against the violation of those provisions.

II.3 Consultation and prior, free, and informed consent of the Pichicha and Orífuna Peoples

The hypothetical case contains certain facts related to the obligation of the State of Santa Clara to engage in prior consultation with the indigenous Pichicha People, who reside in Santa Clara, and the Afro-descendant Orífuna People, who live in the Republic of Madruga. A consultation process was conducted with the Pichicha People, in which the representative authorities decided to accept the mining exploration project, provided that certain safeguards were observed. The main controversy surrounding the consultation process has to do with an environmental accident that took place on May 15, 2011, consisting of the rupture of a small mud-and-rock containment dam by the Silverfield mining company.[63] After the accident, the authorities of Santa Clara had to take exceptional measures that involved restricting the territorial rights of the Pichicha People. In order to ensure the continual supply of potable water to the indigenous and non-indigenous population affected by the dam's rupture, a decision was made to enter the sacred lands of the Pichicha People and distribute water to the affected population from the Mandí Stream, which the Pichicha considered inviolable. It bears recalling that these events took place exclusively within the territory of Santa Clara, so the issue of extraterritoriality is irrelevant here.

The representatives of the alleged victims can allege noncompliance with the agreements made with the Pichicha People, which were signed after a process of prior, free, and informed consultation. In doing so, they should emphasize that one of the main conditions imposed by the Pichicha People was the inviolability of their sacred lands, in particular the Mandí Stream. Along these lines, they could assert that the cultural integrity and social fabric of the Pichicha People have suffered irreparable harm as a result of the unauthorized incursion into their sacred sites. The victims' representatives should argue that the Pichicha People, through their attorney, Mr. Ricardo Manuín, were denied an effective judicial remedy to protect the fundamental right to consultation and to the collective ownership of their land.

For their part, the representatives of the State can assert that the restriction of the Pichicha People's right to the collective ownership of their territory was based on international norms. It was a legal measure that pursued a legitimate aim (providing potable water to thousands of people affected by the environmental accident), and it was necessary and proportional; therefore, the restriction of fundamental rights was justified. As explained in more detail below, the right to consultation does not create an absolute prohibition against well-founded restrictions. Along this line of argument, the representatives of the State could maintain that the temporary use of the Mandí Stream was the only suitable measure for reestablishing the water supply—not only to the indigenous population in the vicinity of the Pampulla Lagoon but also the members of the Pichicha People themselves. As

63 See para. 37 of the hypothetical case.

discussed below, this argument is related to an explanation of the content of the fundamental right to water.

As for the alleged violation of the right to prior consultation of the Afro-descendant Orífuna People, an initial point of discussion is the definition of that group as a tribal people under the terms of ILO Convention 169 and the jurisprudence of the IAHRS. The second issue for debate is whether decisions made by Santa Clara that can potentially affect a tribal people located in Madruga should be preceded by a process of prior, free, and informed consultation. This point concerns both the decisions related to the Wirikuya mining project and the bilateral agreements between Santa Clara and the Republic of Madruga.

The principal international standards on the right to consultation and the right to water, relevant to the facts of the case that pertain to the Pichicha and Orífuna Peoples, are summarized below.

II.3.1 International standards

Standards of the universal human rights system

Convention 169 of the International Labor Organization (ILO) of 1989 and the 2007 UN Declaration on the Rights of Indigenous Peoples are the most important instruments with respect to the right to consultation and to free, prior, and informed consent. Article 1.b of ILO Convention 169 provides that it applies to:

> b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

In addition, Article 1.2 of the same Convention establishes that "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."

Self-identification as a fundamental aspect in determining the subjects of consultation is reinforced by Article 33.1 of the UN Declaration on the Rights of Indigenous Peoples, which establishes that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions."[64]

The UN has identified the following principles to ensure that a consultation process is consistent with international standards: (i) universality, inalienability, and indivisibility; (ii) interdependence and interrelatedness; (iii) non-discrimination and equality; (iv) participation and inclusion; and (v) accountability and the rule of law.[65]

64 The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on September 13, 2007 with 144 member States in favor.
65 See, United Nations Development Group, "Guidelines on Indigenous Peoples' Issues," pp. 27-28.

One of the key elements in the debate on the right to consultation is the determination of whether obtaining consent from indigenous peoples is an obligatory step, or if it suffices to carry out a process designed to obtain consent. Under the international standards currently in force, the right to consultation does not mean that indigenous peoples have a right of veto.[66] However, both the Office of the UN Special Rapporteur on the Rights of Indigenous Peoples and the Inter-American Court[67] have identified situations in which an economic project is conditioned upon the consent of indigenous peoples. In the case of the UN, former Rapporteur James Anaya has established that:

> The Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands.[68]

The UN Declaration on the Rights of Indigenous Peoples establishes that measures involving the forced displacement of indigenous people from their ancestral land,[69] the storage or disposal of toxic waste on their lands,[70] and the conduct of military activities on their land[71] require that consent be obtained (and not just sought).

Finally, in order for a consultation process to be considered informed, the State must provide all necessary information about the activity or administrative or legislative measure that it the subject of the consultation. The information must be provided in such a way that the indigenous people can understand the measure and have the opportunity to ask questions during the consultation process.[72]

Standards of the Inter-American Human Rights System

The IACHR has established that there is no precise definition of "indigenous peoples" under international law. Given the diversity of the indigenous peoples in the Americas and in the rest of the world, a strict definition would affect the main element for identifying diversity, which is self-identification.[73] It is important to stress that, regardless of the name or definition they are given, the determining factor is the set of elements that allow a human group to be considered indigenous.[74]

The IACHR has agreed that the self-identification of a people or community as indigenous is a fundamental aspect in determining such status, as stated in both ILO Convention 169 and the UN

66 See Hanna, Philippe & Frank Vanclay. "Human rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent" (2013) 31:2 Impact Assessment Project Appraisal 146, para. 150.
67 I/A Court H.R., *Case of the Saramaka People. v. Suriname.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172.
68 James Anaya, "Report of the Special Rapporteur on Indigenous Peoples Rights 2009," para. 47.
69 *United Nations Declaration on the Rights of Indigenous Peoples*, art. 10.
70 Id., art. 29(2).
71 Id., art. 30(1).
72 Anaya, "Report of the Special Rapporteur 2009," Id., p. 18.
73 In Latin America, indigenous peoples are given a variety of different names, such as "peasant communities," "native communities," "first peoples," "aboriginal peoples," "Andean peoples," "Amazonian peoples," "minorities," and others. See IACHR. *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, paras. 24-38.
74 International Labor Organization. CEACR. Report 2008/79th session. Individual Observation concerning Indigenous and Tribal Peoples Convention No. 169, 2009, Peru.

Declaration. The Commission has asserted that the "the criterion of self-identification is the principal one for determining the condition of indigenous people, both individually and collectively."[75] Similarly, the Inter-American Court has established collective self-identification as a determining factor. In its judgment in the *Case of the Xákmok Kásek Indigenous Community. v. Paraguay,* it held that:

> The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy. (…) Therefore, the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.[76]

It should be emphasized that, under international human rights law, indigenous peoples or communities need not be registered or recognized by the State in order to be entitled to and exercise their rights.[77]

Collective property rights of indigenous peoples over their lands, territories, and natural resources

Article 21 of the Convention and Article XXIII of the American Declaration, interpreted in light of ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples, form a *corpus iuris* that defines the obligations of the OAS Member States with respect to the protection of the collective property rights of indigenous and tribal peoples.[78]

As the IAHRS bodies have maintained, the particular connection between indigenous communities, their lands, and natural resources, is tied to their very existence as a people, and therefore "warrants special measures of protection."[79] The property rights of indigenous and tribal peoples protect their connection to their lands and to the natural resources associated with their culture that are found there.[80]

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75 IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, para. 216; *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. op. cit.*, paras. 24-31.

76 I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community. v. Paraguay.* Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, para. 37. Similarly, in its judgment in the *Case of the Saramaka People v. Suriname,* the Inter-American Court found that: "the question of whether certain self-identified members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case." I/A Court H.R., *Case of the Saramaka People v. Suriname*, note 67 *supra*, para. 164.

77 I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 82.

78 See *inter alia* IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann v. United States*, December 27, 2002, para. 127; IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize,* October 12, 2004, para. 87; IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. op. cit.*, para. 6. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, note 77 *supra*, paras. 127-129.

79 IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann v. United States*, December 27, 2002, para. 128. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79, para. 149.

80 IACHR. *Follow-up Report – Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, *op. cit.*, para. 156. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* note 79 *supra*, para. 148. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, note 77 *supra*, para. 137. I/A Court H.R., *Case of the*

The IACHR and the Inter-American Court have adopted an interpretation of Article 21 of the ACHR that goes beyond the traditional interpretation of the right to property. In the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* the Court found that:

> Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention—which precludes a restrictive interpretation of rights—it is the opinion of this Court 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, which is also recognized by the Constitution of Nicaragua.[81]

In this judgment, the Court notes the importance of the recognition of collective land ownership rights to the physical and cultural survival of indigenous peoples, stating that, "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[82] The direct consequence of this interpretation is the inclusion in Article 21 of the ACHR of a collective dimension to indigenous peoples' property. In the *Sawhoyamaxa* case, the Court found that:

> 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 and its community." This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.[83]

The bodies of the IAHRS have established that the ownership of land by indigenous peoples is a form of ownership based not on the official recognition of the State, but rather on the traditional use and possession of lands and resources; indigenous and tribal peoples' territories "are theirs by right of their ancestral use or occupancy."[84] The origin of indigenous and tribal peoples' property rights lies in the customary system of landholding that has traditionally existed among communities.[85] Accordingly, the Inter-American Court considers that "traditional possession of their

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Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118 & 121.

81 I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, note 79 *supra*, para. 148.

82 Id., para. 149.

83 I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, note 80 *supra*, para. 120.

84 IACHR. *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. op. cit*., para. 231.

85 See *inter alia*, I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 96. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, note 79 *supra*, para. 140(a); IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize,* October 12, 2004, para. 115.

lands by indigenous people has equivalent effects to those of a state-granted full property title,"[86] and that "indigenous groups, by the fact of their very existence, have the right to live freely in their own territory."[87]

Similarly, the Inter-American Court has held that Article 21 of the ACHR protects the close ties of indigenous peoples with their traditional territories and the natural resources therein.[88] As it held in the *Saramaka* case*,* "[…] the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land."[89]

Thus, the right to territory includes the use and enjoyment of its natural resources, and is directly connected—as a prerequisite—to the rights to a decent life, food, water, health, and life.[90]

Specific guarantees in view of decisions affecting indigenous peoples or their ancestral lands

The IACHR and the Inter-American Court have developed jurisprudential standards on the property rights of indigenous peoples vis-à-vis measures that affect their lands, territories, and natural resources, based on Article 21 of the Convention, interpreted to permit the enjoyment and exercise of the rights recognized by the State in other treaties such as ILO Convention No. 169.[91]

Through Convention No. 169 and regulatory and case law developments, international law has given specific content to the duty to engage in prior consultations with indigenous peoples in situations that affect their territory. Therefore, the State now has a positive duty to provide suitable and effective mechanisms to obtain free, prior, and informed consent in accordance with the customs and traditions of indigenous peoples prior to undertaking activities that affect their interests or may affect their rights to lands, territory, or natural resources.[92]

In particular, in the cases of *Saramaka People v. Suriname* and *Kichwa Indigenous People of Sarayaku*, the Inter-American Court established that in the event or restrictions or limitations to the exercise of indigenous peoples' rights to their lands, territories, and natural resources, the States have the duty to comply with certain guarantees. An initial requirement is to ensure that the granting of a concession does not affect the survival of the respective indigenous or tribal people in accordance with their ancestral ways of life. Under the standards of the IAHRS, the States must ensure that any

86 I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, note 79 *supra*, para. 151; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, note 80 *supra*, para. 128; *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, note 77 *supra*, para. 109.
87 I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* note 79 *supra*, para. 149.
88 I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, note 77 *supra*, para. 137.
89 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 122.
90 IACHR. *Democracy and Human Rights in Venezuela.* 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1076-1080.
91 The right to be consulted is stipulated in ILO Convention No. 169 (Arts. 6 & 7), the United Nations Declaration on the Rights of Indigenous Peoples (Arts. 27 & 32), and the Draft American Declaration on the Rights of Indigenous Peoples (Art. XXIV).
92 See *inter alia* IACHR, *Report on Ecuador 1997*. Conclusions of Chapter IX & Conclusions of Chapter VIII; *Report on the Situation of Human Rights in Colombia*, Chapter X, 1999. Recommendation No. 4.; Report on the Merits No. 75/02, Case 11.140, *Mary and Carrie Dann v. United States*, 2002 Annual Report of the IACHR, para. 140; IACHR, Report on the Merits No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize,* October 12, 2004, para. 142.

restrictions to the use and enjoyment of the lands and natural resources of indigenous peoples do not jeopardize their physical and cultural survival as a people.[93]

It bears noting that, as the Court specified in its interpretation of the judgment in the *Saramaka* case, "survival" is not defined by mere physical subsistence, but rather "must be understood as the ability of [indigenous peoples] to 'preserve, protect and guarantee the special relationship that they have with their territory,' so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected (…).' That is, the term 'survival' in this context signifies much more than physical survival."[94] Similarly, in the opinion of the IACHR, "the term 'survival' […] does not refer only to the obligation of the State to ensure the right to life of the victims, but rather to take all the appropriate measures to ensure the continuance of the relationship of [indigenous peoples] with their land or their culture."[95]

The Inter-American Court has established three conditions designed to ensure the survival of indigenous and tribal peoples as such, in view of decisions that affect their ancestral territories. Those specific guarantees consist of:[96]

a) ensuring the effective participation of the indigenous group and its members, in conformity with their customs, traditions, and customary rights, and obtain their consent regarding any large-scale development, investment, exploration or extraction plan that has a major effect on their indigenous territory;
b) guaranteeing that the indigenous group and its members will receive a reasonable benefit from the plan or project carried out within their territory; and
c) ensuring that no concession will be issued within the ancestral territory unless and until independent and technically capable entities, under the State's supervision, perform a prior environmental and social impact assessment.

These safeguards are designed to preserve the special relationship of indigenous peoples to their ancestral lands, so as to guarantee their survival as a people.

General requirements for the consultation process

In the opinion of the Inter-American Court, the prior consultation of indigenous peoples must be carried out "in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan […] carried out within their territory […]."[97] The Court has additionally ruled that, "regarding large-scale development or investment projects that would have a major impact within [indigenous] territory, the State has a duty, not only to consult with the

93 In the words of the Inter-American Court, "another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members." I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 128; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador.* Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 156.
94 I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 37.
95 Id., para. 29.
96 I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, para. 157.
97 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, paras. 127, 128; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, paras. 159-167.

[indigenous people] but also to obtain their free, prior, and informed consent, according to their customs and traditions."[98]

The bodies of the IAHRS have been emphatic in stating that consultation processes must meet certain requirements, such as being conducted **in advance**, that is, "from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process."[99] The consultation process must also be **culturally appropriate** and take account of the traditional decision-making methods of the respective people, as well as its own forms of representation.[100] Additionally, it must be **informed**, meaning that full and accurate information must be provided to the consulted communities about the nature and consequences of the process.[101] Finally, it must be done **in good faith** and with the **objective of reaching an agreement.**[102] The "good faith" requirement has been applied by the Court with respect to practices such as the corruption of indigenous leaders or authorities, the establishment of parallel leaders, or attempts to undermine the social cohesion of the affected community by making individual offers to purchase indigenous territory.[103]

The Court has emphasized that "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law."[104] It has specified that "it is the obligation of the State—and not of the indigenous peoples—to prove that all aspects of the right to prior consultation were effectively guaranteed in this specific case."[105]

a) Reasonable benefit-sharing

In addition to the requirement of participation, the Court has required the establishment of participatory mechanisms for the affected communities or peoples affected by the extraction of natural resources or the investment or development plans or projects to share in the benefits of the project.[106] In the opinion of the Court, "[…] the concept of benefit-sharing […] can be said to be inherent to the right of compensation recognized under Article 21(2) of the Convention" and "extends not only to the total deprivation of property title by way of expropriation by the State, for example, but also to the deprivation of the regular use and enjoyment of such property." [107]

98 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 134.
99 I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, paras. 167 & 180-182; *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 133.
100 Corte IDH, *Case of the Saramaka People. v. Suriname*, note 67 *supra*, paras. 27, 131, 133, 154; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, paras. 201-202.
101 IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize,* October 12, 2004, para. 142. I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 133.
102 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 133; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, paras. 185-187.
103 I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, para. 186.
104 Id., paras. 164-165.
105 Id., para. 179.
106 IACHR, *Democracy and Human Rights in Venezuela*, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1137, Recommendations 5 & 6; IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. op. cit*., paras. 248 & 297, Recommendations 5 & 6.
107 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, paras. 138-139. As the Court notes in this judgment, different international human rights bodies have issued similar decisions. See *inter alia* United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding. Observations on Ecuador*, para. 16. UN, *Report of the Special Rapporteur on the situation of the human rights*

b) Prior social and environmental impact studies

The third guarantee is the performance of a prior social and environmental impact study, by "independent and technically capable entities, under the State's supervision."[108] The ultimate aim of social and environmental impact studies is to "preserve, protect, and guarantee the special relationship" of indigenous peoples with their territories and to guarantee their survival as peoples.[109] In the opinion of the Inter-American Court, Article 21 of the ACHR is violated when the State fails to conduct or supervise social and environmental studies prior to granting the concessions.[110]

In addition, it has held that social and environmental studies must be carried out prior to the approval of the respective plans,[111] and requires States to allow indigenous peoples to participate in conducting the prior social and environmental impact studies.[112] In general terms, social and environmental studies "must respect the [respective indigenous or tribal] people's traditions and culture,"[113] and their results must be shared with the communities in order for them to be able to make an informed decision.

In cases involving measures that affect an indigenous people or community without providing the aforementioned guarantees, the Inter-American Court has attributed international responsibility to the State for the violation of Article 21 of the ACHR, and has ruled that, "with regard to the concessions already granted within traditional [indigenous] territory, the State must review them, in light of the present Judgment [referring to the *Case of the Saramaka People v. Suriname*] and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the [indigenous] people."[114]

II.3.2 Article 26 of the American Convention

According to the facts of the case, the IACHR' Merits Report No. 17/15 concluded that Santa Clara is responsible for the violation of the rights enshrined in Articles 5, 8, 21, 25 and 26 of the American Convention, regarding the Pichicha Indigenous Peoples. The case-law related to Articles 5, 8, 21 and 25 of the Convention have been covered in the previous paragraphs. As to Article 26, the organs of

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and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (59th session), UN Doc. E/CN.4/2003/90, 21 January 2003, para. 66.

108 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 129; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, para. 205.

109 I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 40. IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. op. cit*., para. 254.

110 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 154.

111 I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 41. I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador,* note 93 *supra*, paras. 205-206.

112 I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 133; I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 16.

113 I/A Court H.R., *Case of the Saramaka People v. Suriname.* Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 41.

114 Id., para. 194.a).

the IAHRS have no rulings declaring the violation of the non-regression of ESCR in light of the absence of a process of free, prior and informed consultation. Therefore, the representatives of State are in a better position to arguing that the IACHR' conclusions in its Merits Report are groundless.

Although the debate on Article 26 is less relevant than other aspects of the case, the participant teams should be able to address a basic knowledge on the content of said conventional provision. In this vein, it is important to emphasize that the obligation of progressive realization established in Article 26 uses a similar language of Article 2 of the International Convenant on Economic Social and Cultural Rights, whose Committee has interpreted it as a mandatory obligation. Finally, the "non-regressive" obligations set forth in Article 26 have been interpreted as justiciable by the IACHR[115] and the IACt-HR,[116] under their individual complaint mechanism. Even though the Inter-American Court has not passed a judgment declaring the non-compliance with this obligation so far, its current position is that any state decision that diminish the enjoyment of ESCR gives rise to a violation of Article 26 of the American Convention.[117]

II.3.3 The right to water

Although the scope and content of the right to water is not a central issue in this case, the parties are expected to have a good command of some basic concepts pertaining to the issue. One of the most important points has to do with the dimension this right acquires when water resources located in indigenous peoples' natural environment are affected. While the authorities of Santa Clara have argued that taking water from the Mandí Stream was necessary in order to guarantee access to water for thousands of people, the Pichicha People have maintained a definition of the right to water based on their own worldview, which is connected to their cultural relationship to their natural environment.

The right to water is not expressly enshrined in any of the instruments of the IAHRS, but both the Inter-American Court and the IACHR have held that it is derived from the content of other human rights. Although the IAHRS has made reference to some Economic, Social, and Cultural Rights (ESCR) protected under the Protocol of San Salvador, they have been developed mainly in relation to the violation of three rights enshrined in the ACHR, to wit: i) life, ii) humane treatment, iii) property. It bears recalling that this approach is most consistent with the definition of the right to water as a civil and political right, and enables the representatives of the State to argue in support of the restriction imposed on the Pichicha People's rights to the Mandí Stream.

In the IAHRS, water has been classified as an essential element for the enjoyment of the right to a decent life.[118] Therefore, criteria very similar to those set forth in General Comment No 15 of the ESCR Committee have been developed.[119]

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115 See National Association of Ex Employees of the Peruvian Social Security Institute et al. vs. Peru, Case 12.670, Inter-Am. C.H.R. Report No. 38/09 (Mar. 27, 2009) www.cidh.oas.org/annualrep/2009eng/Peru12670eng.htm

116 See Case of Acevedo Buendía et al. (Discharged and Retired Employees of the Comptroller) vs. Peru (Preliminary Objections, Merits, Reparations and Costs), Inter-Amer. Ct. H.R. (ser. C) No 198 (July 1, 2009) www.corteidh.or.cr/docs/casos/articulos/seriec_198_ing.pdf

117 Un análisis resumido de la exigibilidad de los DESC en el Derecho Internacional puede ser encontrado en: Daniel Cerqueira, *Enforceability of Economic, Social and Cultural Rights: historical background, legal basis and misleading assumptions*. February 2016. Available at: http://dplfblog.com/2016/02/04/exigibilidad-de-los-derechos-economicos-sociales-y-culturales-antecedentes-historicos-fundamento-legal-y-suposiciones-equivocadas/

118 I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, note 80 *supra*, para. 168.

In its judgment in the *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, the Inter-American Court determined that a person should have at least 7.5 liters of water per day to meet his or her basic needs.[120] That includes the supply of potable water as a service provided by the State, as well as the non-interruption of natural water sources, which in many cases are the only ones available. The Inter-American Court has also addressed the issue of water quality, stating that pollution can cause illness and suffering antithetical to decent living conditions.[121]

The IACHR, for its part, has developed standards on the protection of water as part of the environment and the lives of individuals. In its 2007 Report on the Situation of Human Rights in Bolivia, it maintained that the States have an obligation to mitigate the harm caused by corporations to water sources, in order to guarantee minimum living standards within the framework of concessions for economic activities.[122] The IACHR has further indicated that the States must halt extractive activities that pollute rivers and streams, negatively affecting people's daily living conditions.[123]

The Inter-American Court has recognized the importance of clean water to indigenous and tribal peoples' ability to conduct essential activities such as fishing.[124] It has also stated that extractive activities can have serious adverse effects on water sources used for human consumption, such as rivers and streams, and therefore, the States have the obligation to keep those activities from jeopardizing potable water sources.[125] The Inter-American Court, for its part, has also followed this line of reasoning and has noted the significance of indigenous peoples' territory as part of their culture and worldview, as the place where they perform their rituals, and as part of their religion.[126] In this regard, it has held that depriving indigenous peoples of natural resources, such as water, is a serious impediment to their continued practice of ancestral cultural activities.[127]

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119 Committee on Economic, Social, and Cultural Rights. General Comment No 15. The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights). E/C.12/2002/11. 20 January 2003, para. 2.

120 Id.

121 I/A Court H.R., *Case of the Saramaka People. v. Suriname.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, paras. 150-154.

122 IACHR. *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. op. cit*., paras. 252- 253.

123 IACHR. *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. op. cit*, para. 253.

124 I/A Court H.R., *Case of the Saramaka People. v. Suriname.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 126.

125 IACHR. Report on the Merits No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize,* October 12, 2004, para. 145.

126 I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, note 77 *supra*, para. 135.

127 I/A Court H.R., *Case of the Saramaka People. v. Suriname*, note 67 *supra*, para. 82.

III. Measures of Reparation

According to the case law of the Inter-American Court, measures of reparation can be broken down into the following categories: restitution of the violated right, monetary compensation or reparation (pecuniary and non-pecuniary damages), rehabilitation, measures of satisfaction, and non-repetition. In addition to these sub-categories of reparations, the Inter-American Court will order payment of the victims' attorneys' fees to the respective petitioner organizations when the defendant State is found internationally responsible.

The facts of the case do not present a particular challenge with respect to measures of reparation. The most controversial point is that the representatives of the alleged victims may request compensation for the deaths of the Camana Osorio family members. As stated in paragraph 31 of the hypothetical case, the representatives of the Camana Osorio family decided to enter into a civil settlement with the corporation Miningcorp, thereby waiving the right to continue pursuing their compensation claim in the Santa Clara courts. The representatives of the State could potentially use this as an argument to contest the claims for pecuniary damages before the Inter-American Court.

Finally, it is very important for the teams to present their requests for relief, in both their written briefs and at oral argument. In view of the facts of the case, the request for relief should cover the issues of jurisdiction and admissibility as well as the merits.

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