INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE KICHWA INDIGENOUS PEOPLE OF SARAYAKU *v.* ECUADOR

JUDGMENT OF JUNE 27, 2012
(Merits and Reparations)

In the *Case of Kichwa Indigenous People of Sarayaku*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") composed of the following judges:

Diego García-Sayán, President;
Manuel E. Ventura Robles, Vice-President;
Leonardo A. Franco, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu Blondet, Judge;
Alberto Pérez Pérez, Judge;
Eduardo Vio Grossi, Judge; and

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court[1] (hereinafter "the Rules of Procedure"), delivers this Judgment, which is structured in the following manner:

[1] The Rules of Procedure approved by the Court at its Eighty-fifth Regular Period of Sessions held on November 16-28, 2009, apply in this case in accordance with the provisions of Article 79 of said Rules of Procedure. Article 79.2 of the Rules of Procedure stipulates that"[i]n cases in which the Commission has adopted a report under Article 50 of the Convention before these Rules of Procedure have come into force, the presentation of the case before the Court will be governed by Articles 33 and 34 of the Rules of Procedure previously in force. Statements shall be received with the aid of the Victim's Legal Assistance Fund, and the dispositions of these Rules of Procedure shall apply". Therefore, as to the presentation of the case, Articles 33 and 34 of the Rules of Procedure approved by the Court at its Forty-ninth Regular Session, shall apply.

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I
INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. On April 26, 2010, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") filed before the Court, pursuant to the provisions of Articles 51 and 61 of the Convention, a petition against the Republic of Ecuador (hereinafter "the State" or "Ecuador") in relation to case No. 12.465. The initial petition was submitted to the Commission on December 19, 2003 by the Association of the Kichwa People of Sarayaku (*Tayjasaruta*), the Center for Economic and Social Rights (*Centro de Derechos Económicos y Sociales*) (hereinafter "CDES") and the Center for Justice and International Rights (hereinafter "CEJIL"). On October 13, 2004, the Commission approved Admissibility Report No. 62/04[2], in which it declared the case admissible. On December 18, 2009 the Commission approved the Report on Merits No. 138/09[3], under the terms of Article 50 of the Convention. The Commission appointed Luz Patricia Mejía, Commissioner, and Mr. Santiago A. Canton, Executive Secretary, as Delegates, and Mrs. Elizabeth Abi-Mershed, Deputy Executive Secretary, and the attorneys Mrs. Isabel Madariaga and Mrs. Karla I Quintana Osuna as legal advisors.

2. According to the Commission, this case concerns, among other issues, the granting of a permit by the State to a private oil company to carry out oil exploration and exploitation activities in the ancestral territory of the Kichwa Indigenous People of Sarayaku (hereinafter "the Sarayaku People" or "the Sarayaku Community" or "the Community") during the decade of the 1990s, without previously consulting them and without obtaining their consent. Thus, the company began the exploration phase, and even introduced high-powered explosives into several points of the Sarayaku territory, thereby creating an alleged situation of risk for the population, given that for a time they were prevented from practicing their traditional subsistence activities and their freedom of movement and cultural expression were curtailed. This case also concerns the alleged lack of judicial protection and enforcement of judicial guarantees.

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[2] In this report, the Commission rejected the objection filed by the State arguing that domestic legal remedies had not been exhausted, and concluded that it was within its jurisdiction to examine the claims submitted by the petitioners regarding the alleged violations of Articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 22, 23, 24, 25 and 26, pursuant to Articles 1(1) and 2 of the American Convention, and that the application was admissible in accordance with the requirements established in Articles 46 and 47 of the American Convention. *Cf.* Admissibility Report 62/04, Evidence file, volume 1, pages 71 to 90.

[3] In the Report on the Merits, the Commission concluded that the State was responsible for the violation of the rights recognized in the following provisions: Article 21, in relation to Articles 13, 23 and 1(1) of the American Convention, to the detriment of members of the Kichwa Indigenous People of Sarayaku; of Articles 4, 22, 8 and 25, in relation to Article 1(1) of the American Convention, to the detriment of the Kichwa People of Sarayaku; of Article 5 in relation to Article 1(1) of the American Convention, to the detriment of Hilda Santi Gualinga, Silvio David Malver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luis Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejandro Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga and Cesar Santi, all members of the Sarayaku Community. Likewise, the Commission considered that the State is responsible for the failure to comply with the provisions of Article 2 of the American Convention. Finally, the Commission stated that it does not have sufficient evidentiary elements to make a determination regarding the alleged violation of Articles 7, 12, 16, 19, 24 and 26 of the American Convention, or of Article 13 of the Protocol of San Salvador. In its report, the Commission made the following recommendations to the State: 1) Adopt the necessary measures to guarantee and protect the right to property of the Kichwa Indigenous People of Sarayaku and their members, with regard to their ancestral territory, respecting their special relationship with their territory; 2) Guarantee the members of the Kichwa People of Sarayaku the right to carry out their traditional subsistence activities, removing the explosive material placed on their territory; 3) Guarantee the meaningful and effective participation of indigenous representatives in decision-making processes related to development and other issues that affect these communities and their cultural survival; 4) Adopt, with the participation of Indigenous Communities, legislative or other types of measures required to make effective the right to prior, free, informed consultation in good faith, in accordance with international human rights standards; 5) Make reparations both to individuals and the community for the consequences of the stated violations of rights; 6) Adopt the necessary measures to prevent similar events from occurring in the future, in accordance with the obligation to protect and guarantee fundamental rights as recognized in the American Convention. *Cf.* Report on Merits 138/09, Evidence file, volume 1, pages 3 to 69.

3. Based on the foregoing, the Commission requested the Court to declare the State's international responsibility for the violation of:

a) the right to private property, recognized in Article 21, in relation to Articles 13, 23, and 1(1) of the American Convention, to the detriment of the Indigenous Community of Sarayaku and its members;

b) the right to life, fair trial [judicial guarantees] and judicial protection, established in Articles 4, 8, and 25, in relation to Article 1(1) of the American Convention, to the detriment of the Indigenous Community of Sarayaku and its members;

c) the right to freedom of movement and residence recognized in Article 22, in relation to Article 1(1) of the American Convention, to the detriment of the Sarayaku Community and its members;

d) the right to humane treatment [personal integrity], stated in Article 5 of the American Convention, in relation to Article 1(1) therein, to the detriment of 20 members of the Kichwa People of Sarayaku[4]; and

e) the duty to adopt domestic legal measures as established in Article 2 of the American Convention, and

Finally, the Commission asked the Court to order the State to adopt specific measures of reparation

4. The petition was notified to the State and to the representatives[5] on July 9, 2010.

II
PROCEEDINGS BEFORE THE COURT

A. Provisional Measures

5. On June 15, 2004, the Commission submitted a petition to the Court requesting provisional measures in favor of the Sarayaku community and its members, in accordance with Article 63(2) of the American Convention and Article 25 of the Rules of Procedure. The Court ordered provisional measures[6] on July 6, 2004, which still remain in effect.[7]

B. Proceedings

6. On September 10, 2010, Mr. Mario Melo Cevallos and CEJIL, representatives of the Sarayaku Community in this case (hereinafter "the representatives"), submitted to the Court their brief containing pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Article 40 of the Rules of Procedure. The representatives were in substantial agreement regarding the allegations of the Commission and asked the Court to declare the State's international responsibility for the alleged violation of the same articles of the American Convention indicated by the Inter-American Commission, but with a broader scope, arguing that the State had also violated:

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[4] Namely: Hilda Santi Gualinga, Silvio David Malver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luis Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejandro Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga and Cesar Santi.

[5] The aforementioned petition was first submitted to the Secretariat of the Inter-American Court (hereinafter "the Secretariat" via facsimile on April 26, 2010, without its attachments. The original petition, its attachments and annexes, together with their respective copies, were received at the Secretariat on May 17, 2010.

[6] *Cf. Matter of the Indigenous People of Sarayaku, Provisional Measures regarding Ecuador*. Order of the Inter-American Court of July 6, 2004. Available at: http://www.Cortetidh.or.cr/docs/medidas/sarayaku_se_01.pdf

[7] In its Orders of July 17, 2005 and February 4, 2010, the Court ratified the provisional measures in force regarding Ecuador. Orders available at http://www.Corteidh.or.cr/docs/medidas/sarayaku_se_02.pdf http://www.Courtidh.or.cr/docs/medidas/sarayaku_se_04.pdf

a) the right to culture, recognized in Article 26 of the Convention in relation to Article 1(1) thereof, to the detriment of the members of the Sarayaku Indigenous Community, and

b) the right to humane treatment [personal integrity] and the right to personal liberty, contemplated in Articles 5 and 7 of the Convention, together with Article 1(1) of the same instrument, as well as Article 6 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "ICPPT"), to the detriment of the four Sarayaku community leaders illegally detained on January 25, 2003 by military forces.

Consequently, the representatives requested the Court to order the State to adopt various measures of reparation, including the payment of costs and expenses.

7. Also, on that occasion, the representatives indicated that the alleged victims wished to access the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights (hereinafter "Legal Assistance Fund") "to cover some specific costs associated with the production of evidence during the proceedings before the Court," which they specified, and subsequently presented evidence showing that the alleged victims lacked the economic resources to cover those costs."

8. In the Order of March 3, 2011, the President of the Court (hereinafter "the President") declared admissible the request submitted by the alleged victims, through their representatives, to access the Victim's Legal Assistance Fund (*supra* par. 7), and approved the financial assistance necessary for the presentation of up to four statements.

9. On March 12, 2011, the State submitted to the Court its application for preliminary objections, the brief answering the application and observations to the pleadings and motions brief (hereinafter "answer to the application"). In said application, the State filed a preliminary objection for failure to exhaust domestic remedies. The State appointed Mr. Erick Roberts Garcés, Mr. Rodrigo Durango Cordero and Mr. Alfonso Fonseca Garcés as its Agents.

10. On May 18 and 19, 2011, the Inter-American Commission and the representatives submitted, respectively, their observations to the preliminary objection filed by the State and asked the Court to dismiss it.

11. On June 17, 2011, the President of the Court issued an Order[8], in which he ordered that sworn statements be rendered before a notary public (affidavits) by twelve alleged victims proposed by the representatives, one witness proposed by the State and six expert witnesses proposed by the representatives. In this Order the President also summoned the parties to a public hearing and issued rulings regarding the Legal Assistance Fund.

12. The public hearing on the preliminary objection and possible merits and reparations took place on June 6 and 7, 2011, during the 91st Regular Period of Sessions, held at the seat of the Court.[9] During the public hearing, testimonies were received from four members of the Sarayaku Community, two witnesses proposed by the State, an expert witness proposed by the Commission and an expert witness offered by the representatives, as well as the final oral arguments of the representatives and the State, and the final oral observations of the Commission.

13. Furthermore, the Court received *amicus curiae* briefs from: 1) the International Human Rights Clinic of Seattle University Law School[10]; 2) the Legal Clinic at the University of San Francisco

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[8] *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador.* Order of the President of the Inter-American Court of June 17. 2011. LINK

[9] The following people appeared at the hearing: a) for the Inter-American Commission: Luz Patricia Mejía, Commissioner, and Karla Quintana Osuna, advisor; b) for the representatives: Mr. José María Gualinga Montalvo, President of Sarayaku, Mr. Mario Melo, lawyer, and Viviana Kristicevic and Gisela of León, of CEJIL; and for the State: Erick Roberts Garcés, Agent, Alonso Fonseca Garcés, Alternate Agent and Dolores Miño Buitrón, María del Cisne Ojeda and Colonel Rodrigo Braganza, advisers. Also present at the hearing were the following members of the Sarayaku Community: Eriberto Benedicto Gualinga Montalvo, Franco Tulio Viteri Gualinga, Hernán Malaver, Jorge Malaver, Sandra Gualinga, Bolivar Luis Dahua Imunda, Sabine Bouchat, Catalina Santi Gualinga, Carlos Wilfrido Carrasco Castro, Clever Francisco Sando Mitiap, Carlos Santiago Mazabanda Calles and Cristina Corina Gualinga Cuji.

[10] Brief submitted by Thomas Antkowiak and Alejandra Gonza on April 29, 2011.

in Quito[11]; 3) the Human Rights Center at the Pontificia Catholic University of Ecuador[12]; 4) Amnesty International;[13] 5) "Regional Alliance for Freedom of Expression and Information;"[14] 6) Mrs. Luz Ángela Patiño Palacios, Mrs. Gloria Amparo Rodríguez and Mr. Julio Cesar Estrada Cordero; 7) Mr. Santiago Medina Villareal and Mrs. Sophie Simon; 8) the Allard K. Lowestein International Human Rights Clinic at Yale University[15]; and 9) the organization "Forest Peoples Programme."[16]

14. On August 5 and 8, 2011, the State and the representatives filed, respectively, their final written arguments, and on August 8, 2011, the Commission submitted its final written observations. In a note from the Secretariat dated August 19, 2011, and following instructions from the President, a deadline was set for submitting any observations deemed pertinent to the attachments submitted by the representatives and State.

15. In a note dated August 19, 2011, the Secretariat, following instructions from the President and in accordance with Article 5 of the Court's Rules for the Operation of the Victims' Legal Assistance Fund, informed the State about the expenditures covered by the Fund in the present case, granting it a non-extendable deadline of September 2, 2011 to submit any observations it deemed relevant. The State did not forward any observations in this regard.

16. On September 1, 2011, the representatives and the State submitted their observations on the attachments to the final arguments of the other party. On September 2, 2011 the Inter-American Commission noted, *inter alia*, that it had no observations regarding the attachments submitted by the representatives and, with regard to those forwarded by the State, it noted that "several of these are time-barred," for which reason it requested that these be rejected without specifying which documents it was referring to.

17. On September 6, 2011, the Secretariat notified representatives, upon the instructions of the President, that their observations and arguments that were not specifically related to the admissibility or content of the documents offered by the State with its closing written arguments were inadmissible and, therefore, would not be considered by the Court. In the same note, the State was informed, upon the instructions of the President, that its brief containing observations was inadmissible because it had presented arguments that did not specifically refer to the attachments submitted by the representatives.[17]

C. *Visit to the territory of the Sarayaku People*

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[11] Brief submitted by Marcel Jaramillo and Elizabeth Rodríguez on June 30, 2011.

[12] Brief submitted by David Cordero Heredia, Coordinator of the Center for Human Rights, Harold Burbano, Legal Counsel and Mónica Vera, Legal Counsel on July 5, 2011.

[13] Brief submitted by Susan Lee, Director for America, on July 14, 2011.

[14] Brief submitted by Karina Banfi, Executive Secretary on July 19, 2011. Also endorsed by Manfredo Marroquín, Executive Director of Acción Ciudadana of Guatemala; Nery Mabel Reyes, President of the Journalists' Association of El Salvador; Juan Javier Zeballos Gutiérrez, Executive Director of the National Press Association of Bolivia; Álvaro Herrero, Executive Director of the Civil Rights Association of Argentina; Edison Lanza Robatto, Executive Director of the Archive Center and Access to Public Information of Uruguay; Elizabeth Ungar Bleier, Executive Director of Corporation Transparencia of Colombia; Katya Salazar, Executive Director of the Due Process of Law Foundation of the United States; Andrés Morales, Executive Director of the Foundation for the Freedom of the Press of Colombia; Moises Sánchez Riquelme, Executive Director of the Pro Acceso Foundation of Chile; César Ricaurte, Executive Director of Fundamedios of Ecuador; Miguel Angel Pulido Jiménez, Executive Director of Fundar, Center for Analysis and Research of Mexico; Ezequiel Francisco Santagada, Executive Director of the Institute of Law and Environmental Economics of Paraguay; Alejandro Delgado Faith, President of the Institute of Press and Freedom of Expression of Costa Rica; Ricardo Uceda, Executive Director of the Instituto de Prensa y Sociedad of Peru, and Mercedes of Freitas, Executive Director of Transparency, Venezuela.

[15] Brief submitted by James J. Silk, Director and Law Professor, and Allyson A. McKinney, on July 21, 2011.

[16] Brief submitted by Fergus MacKay on July 22, 2011.

[17] The representatives' attachments were merely intended to support their application for costs and expenses, and they were therefore informed that the admissibility and, if applicable, evidentiary value of said attachments would be determined by the Court in its Judgment.

18. In its brief of August 5, 2011 containing final written arguments, the State reiterated its request, made during the public hearing on July 6 and 7, 2011, for the Court "[to] conduct a field visit to the Bobonaza River Communities [for the purpose of] examining in the field the legal complexities and socio-environmental issues involved in the litigation of this case." Furthermore, during the hearing, one of the alleged victims, Mrs. Ena Santi, requested that the Court hold a session in Sarayaku.[18] On September 28, 2011, the Constitutional President of Ecuador, Mr. Rafael Correa Delgado, addressed the President of the Court to "ratify and formalize the invitation issued by the State's agents at the hearing held in San Jose, Costa Rica [for] the Inter-American Court to carry out an official visit [to his country]." Subsequently, following the instructions of the President of the Court, the Commission and the representatives were given an opportunity to submit their observations on this matter.

19. Through the Order of January 20, 2012, the President of the Court, [19] pursuant to Articles 4, 15(1), 26(1), 26(2), 31(2), 53, 55, 58 and 60 of the Rules of Procedure of the Court, and in consultation with the other members of the Court, decided to appoint a delegation from the Court, led by the President, to conduct a visit to the territory of the Sarayaku People in Ecuador. [20] Furthermore, the Court rejected the State's request to include an additional expert witness.

20. The purpose of said visit would be to conduct "proceedings aimed at obtaining additional information about the situation of the alleged victims and places where some of the alleged events took place." Furthermore, "[in] accordance with the principle of contradiction, and in pursuit of procedural fairness, [it was indicated that] the representatives of the alleged victims, of the Inter-American Commission and of the State [would] participate in the visit, if they deemed it necessary." Finally, it was noted that "the *in situ* proceedings [would] take place in parts of the Sarayaku territory where the alleged events described in the factual context of the case occurred." [21]

21. For the first time in the history of the Inter-American Court's judicial practice, a delegation of Judges conducted a proceeding at the site of the events of a contentious case submitted to its jurisdiction. Thus, on April 21, 2012, the Court delegation, accompanied by the delegations of the Commission, the representatives and the State, visited the territory of the Sarayaku People.[22] Upon

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[18] "The State claims that it has given projects to benefit the Sarayaku community. The State did grant some projects […] but did not fulfill them… you are invited to Sarayaku to verify the situation of the projects that the State has given us (Minute 49.05 – 49.25 of the recording, part 3). "Honorable Judges of the Inter-American Court, I am inviting you to come to Sarayaku and verify *in situ* the Government's work, to see if there is a lovely and beautiful road built by the State, to see if there are finished bridges and all of the other works that they claim to have given to the Sarayaku people. Please, come to Sarayaku, we will be waiting for you there […] "(Minute 55.00 - 55.22 of the recording)

[19] *Cf. Case of the Kíchwa Indigenous People of Sarayaku v. Ecuador.* Order of the President of the Inter-American Court of January 20, 2012. Available at http://Corteidh.or.cr/docs/asuntos/sarayaku1.pdf

[20] *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador.* Order of the President of the Inter-American Court of January 20, 2012, para. 17.

[21] The Order considered that "although the State requested a visit to 'the Communities of Rio Bobonaza', the case filed for the Court to consider referred to events that allegedly occurred in the Sarayaku territory and surrounding areas," for which reason it decided to limit the aforesaid visit to the Sarayaku territory, which is not affected by the fact of having also visited the community that lives in the area known as Jatun Molino, in response to a proposal by the representatives and the State in that regard. (Brief of the representatives of the alleged victims of February 20, 2012 and brief of the State of March 13, 2012). Accordingly, the Court considers it necessary to make it clear that the purpose of the instant case has been to determine whether the State is responsible for the alleged violations of the American Convention to the detriment of the Sarayaku people. The Court is aware of the fact that this indigenous community lives in a territory in which other indigenous communities are present and that naturally, relationships exist between these communities which may give rise to both diverging and converging interests and rights of other communities. However, in the context of the present case, it is not up to this Court to make decisions regarding other communities, populations or persons who are not petitioners in the present case.

[22] The Court delegation that conducted the visit consisted of the President of the Court, Judge Diego Garcia-Sayán, Judge Rhadys Abreu Blondet, the Secretary Pablo Saavedra Alessandri and the attorneys of the Secretariat, Olger I. González Espinosa, coordinator, and Jorge Errandonea. Similarly, on behalf of the State of Ecuador, the following were present: the Secretary for Legal Affairs of the President of the Republic, Dr. Alexis Mera, the Minister of Justice, Dr. Johana Pesántez, the Deputy Foreign Minister, Dr. Marco Albuja and the Executive Secretary of ECORAE, anthropologist Carlos Viteri, among other State officials. On behalf of the Inter-American Commission, the lawyers Isabel Madariaga and Karla I. Quintana were present. Finally, Mr. Mario Melo and Mrs. Viviana Kristicevi were present on behalf of the representatives.

arrival, the delegations were received by numerous members of the Sarayaku Community. After crossing the Bobonaza River in canoes, they were escorted to the People's Assembly House (*Tayjasaruta*), where they were greeted by the President, Mr. José Gualinga, the *kurakas*, the *yachaks* and other authorities and members of the Community. Also present were representatives from other indigenous communities of Ecuador. There, the delegation of the Court heard numerous statements from members of the Sarayaku Community, including young people, the elderly and children[23], who shared their experiences, views and expectations about their way of life, their worldview and their experiences in relation to the facts of the case. The President of the Court also gave the representatives of the delegations an opportunity to express their views. At that point, the Legal Secretary of the Presidency of the Republic, Dr. Alexis Mera, formally acknowledged the responsibility of the State (*infra* paras. 23 and 24). Finally, the delegations went on a walking tour around the community lands, specifically to the center of Sarayaku, where the people performed various cultural activities and rituals. The delegations also went on an aerial reconnaissance of the territory, during which they saw the places where events related to the case occurred. Subsequently, the delegations visited the village of Jatun Molino, where they heard some of the local people.

III
JURISDICTION

22. The Inter-American Court has jurisdiction over this case under the terms of Article 62(3) of the Convention, given that Ecuador has been a State Party to the American Convention since December 28, 1977, and accepted the binding jurisdiction of the Court on July 24, 1984.

IV
ACKNOWLEDGEMENT OF INTERNATIONAL RESPONSIBILITY

23. After hearing the statements of several members of the Community during the Court's visit to the Sarayaku territory, the President of the Court gave the floor to the Secretary for Legal Affairs of the Presidency of the Republic of Ecuador, Dr. Alexis Mera, who stated the following:

> […]What I am going to say to you, I say not just on my own behalf but on behalf of President Correa, who asked me to come here […] I do not feel that we are in conflict. Why? Because all the things that have been denounced today, all the testimonies about all the invasive oil extraction activities which occurred in 2003, the government does not want to challenge these[…] The government considers that the State is responsible for the events that occurred in 2003. I want this to be clearly stated and fully understood. The government recognizes its responsibility. Therefore, all the actions that occurred, the invasive acts, the actions of the armed forces, the acts of destruction of the rivers, are all issues that we as a government condemn, and believe that there is a right to reparations. Therefore, I invite the other party to sit down and try to discuss reparations. The State is willing to make all necessary reparations to the Community.
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> And I say this in the most direct way possible. In fact, this hearing was convened at the request of the President of the Republic himself: it was the President himself who requested in writing that the President of the Inter-American Court of Human Rights come here to verify the situation of the Sarayaku people, and also to verify that this government was the one that expelled the CGC oil company. When we came 5 years ago and found that all these incidents had taken place, and found evidence of so much unease and the serious problem in the block, our reaction was, as you know, to expel the CGC oil company. It is no longer exploiting [the land]. And there will be no more oil exploitation without prior consultation.
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> I saw those who had come here to visit, who were saying "No to round 23". A new round will not begin without informed consultation. And what is this consultation? It has to do especially with what we said about pollution; what should not be polluted, because rivers and communities cannot be polluted by oil activities; there cannot be pollution, we cannot allow oil exploitation that pollutes. And we must also discuss the situation of the communities themselves. What is the health situation? What about education? Here, when we begin to discuss

[23] Among others, the Court heard statements from Narsiza Gualinga, Representative of Shiwakocha; Holger Cisneros, Representative of Shiwakocha; Franco Viteri, Representative of Pista; Digna Gualinga, Representative of Pista; Lenin Gualinga, Representative of Pista, Cesar Santi, Representative of Sarayakillu, Isidro Gualinga, Representative of Kali Kali; and Siria Viteri and Ronny Ávilez in representation of the young people of Sarayaku.

> the oil issue, we could have the best doctors treating the mothers in the communities, we could have the best health teams and best teachers coming from Quito to the area, if there is going to be money generated through oil exploitation.
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> Oil development should benefit the communities. However, the fact is that historically the State has acted behind the backs of indigenous peoples. That is the historical reality of this country; because the State has acted behind the backs of indigenous people, oil exploration has been carried out to the detriment of communities. However, we don't want this system, this government does not want it, and therefore we will not allow any oil exploration to continue behind the backs of communities. Instead, we will seek dialogue if we decide to resume oil exploration or think about a new oil project here. There will be no oil development without an open, frank dialogue; not a dialogue by the oil company, as has always been charged. We have changed the legislation so that the dialogue is initiated by the government and not by the extractive industry.
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> So, in short, Mr. President, I would like to thank you for allowing me to speak. I reiterate that the State acknowledges its responsibility and is willing to make any arrangement for compensation. Finally, I would like to add a thought. The petitioners accuse us of being the "villains" in this scenario … I recall that Mr. Cisneros said that we were the "villains"…. I don't see it in that way, I believe there has been suffering that must be compensated for. And finally, with respect to ancestral knowledge, I see here before me the indigenous leadership. We should work together to bring charges against the companies that steal the ancestral rights from indigenous communities. At some point we should begin a frank discussion in order to establish, and not allow others to take these rights and knowledge that belong to these communities, and make themselves rich from it. At some point we must discuss these issues. Thank you, Mr. President.

24. Following this statement, the President of the Court gave the floor to members of the Sarayaku Community, to their representatives in this case and to the Inter-American Commission, who submitted their observations in this regard. Immediately after the meeting, members of the Sarayaku Community announced that the community had decided to await the judgment of the Court.

25. On May 15, 2012, after the visit to the territory and the acknowledgement of responsibility, the State affirmed that "the public declaration [of the Secretary for Legal Affairs of the Presidency] is, in itself, and in advance, a formula for the reparation of human rights, in the context of the provisions of Article 63.(1) of the American Convention," and asked the Court to "officially convey this position, which will eventually allow the parties to move forward toward specific and technical agreements regarding reparations or merits, as the case may be." The Commission and the representatives did not submit any observations in this regard.

26. Under Articles 62 and 64 of the Court's Rules[24], and in exercise of its powers of international judicial protection of human rights, in a matter of international public order that transcends the will of the parties, it is the Court's responsibility to ensure that acts of acquiescence are acceptable for the purposes sought by the Inter-American system. This task is not limited to verifying, recording, or taking note of the acknowledgment made by the State, or confirming the formal conditions of such acts; rather, it must examine them in accordance with the nature and seriousness of the alleged violations, the requirements and interests of justice, the particular circumstances of the

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[24] These provisions of the Court's Rules of Procedure establish the following:

Article 62. Acquiescence: If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.

Article 64. Continuation of a Case. Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding Articles.

specific case and the attitude and position of the parties[25], so that it can elucidate the truth about what took place, to the extent possible, and in the exercise of its jurisdiction.[26]

27. In the present case, the Court notes that the State's acknowledgment of responsibility has been made in broad and generic terms. Thus, it is up to the Court to give full effect to this action by the State and value it positively, given its far-reaching significance in the context of the Inter-American system for the protection of human rights. Such acknowledgment represents to the Court an admission of the facts contained in the factual framework of the Commission's application[27], and of the relevant information provided by the representatives that clarifies or explains the facts.[28] Furthermore, it highlights the State's commitment to promote the necessary reparations through dialogue with the Sarayaku People. All these actions on the part of Ecuador make a positive contribution to this process, to the exercise of the principles underlying the Convention[29], and, in part, satisfy the need for reparation of the victims of human rights violations.[30]

28. Finally, although there is no longer a dispute, the Court shall proceed to a specific determination of the events that occurred, inasmuch as this contributes to reparation for the victims, to preventing a recurrence of similar situations and, in general, to the satisfaction of the purposes of inter-American jurisdiction over human rights.[31] Furthermore, the Court will open the relevant chapters to analyze and specify, where relevant, the scope of the alleged violations and, since a dispute still exists over the extent of the reparations, it will, accordingly, rule on the matter.

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25 *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 24 and *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs.* Judgment of August 31, 2011. Series C No. 232, para. 25

26 *Cf. Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 26, 2010. Series C No. 213, para. 17 and *Case of Contreras et al. v. El Salvador,* para. 25.

27 The State has also referred to open criminal cases against members of the Sarayaku Community in relation to alleged acts of violence and the alleged theft of 150 kg of pentolite explosive, for which one of the members of the community was convicted in a criminal court. The State also charged that "between November 22, 2002 and January 25, 2003, 29 workers from the CGC company were kidnapped." In addition, it claimed that members of the Sarayaku were obtaining financial benefits from the pentolite explosives in their territory. On this point, the Court emphasizes once again, what it stated in the first judgment delivered in a contentious case: that it is not a criminal court or a court of first instance that analyzes or determines the criminal, administrative or disciplinary liability of individuals (*Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 134 and *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011. Series C No. 233, para. 98). *Thus*, even if information has been provided regarding the criminal conviction of a member of the Sarayaku, such an event would be outside of the scope of the present case. Accordingly, the Court will not take into consideration allegations regarding the guilt or innocence of members of the Sarayaku People with regard to the irregular actions of which they have been accused, since it is not within the scope of this case.

28 In their brief of pleadings and motions, the representatives referred to a number of events not included in the petition submitted by the Commission. In its jurisprudence the Court has reiterated that alleged victims and their representatives may invoke the violation of other rights different to those already included in the petition, provided these are limited to events already described therein, which constitute the factual context of the proceedings before the Court. This does not preclude the possibility of setting forth those facts that may explain, clarify or reject those mentioned in the petition (*Case of "Five Pensioners" v. Peru. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, paras. 153 and 154 and *Case of Forneron and daughter v. Argentina. Merits, Reparations and Costs*. Judgment of April 27, 2012 Series C No. 242, para. 17), or the supervening facts which may be submitted to the Court at any stage of the proceedings before the Judgment is issued. Ultimately, it is up to the Court to decide on the validity of such arguments in each case, in order to protect the procedural equality of the parties. (*Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, para. 58, and *Case of Torres Millacura et al. v. Argentina. Merits, Reparations and Costs*. Judgment of August 26, 2011. Series C No. 229, para. 52). Therefore, the Court will not consider arguments by the representatives that are not part of the factual framework or that do not explain or clarify other facts, nor will it refer to legal allegations made by the representatives that are outside this factual framework.

29 *Cf. Case of Caracazo v. Venezuela. Merits.* Judgment of November 11, 1999. Series C No. 58, para. 43 and *Case of Pacheco Teruel et al. v. Honduras. Merits and Reparations*. Judgment of April 27, 2012. Series C No. 241, para. 19.

30 *Cf.. Case of Manuel Cepeda Vargas v. Colombia, para* 18, and Case *of Contreras et al. v. El Salvador*, para. 26

31 Cf. Case of Tiu Tojín v. Guatemala. *Merits, Reparations and Costs*. Judgment of November 26, 2008. Series C No. 190, para. 26 and Case of Manuel Cepeda Vargas v. Colombia, para. 153.

V
PRELIMINARY OBJECTION
(*Failure to exhaust domestic remedies*)

29. The State argued that the Sarayaku Community lodged an appeal for constitutional protection (writ of amparo) on November 27, 2002 against the CGC company and its subcontractor "Daymi Services S.A.", which had remained unresolved due to the lack of action on the part of the appellants themselves, namely, the Sarayaku Community, who had not provided the facilities or the cooperation necessary to ensure the prompt and efficient processing of the appeal. The State added that the parties were summoned to a public hearing on December 7, 2002, at which principal respondent in the process, the CGC company appeared, but no representative of the Sarayaku did so. Therefore, according to the Law of Constitutional Supervision in force at that time, the appeal was deemed to have been withdrawn. Furthermore, the State pointed out that the alleged victims had sufficient remedies at their disposal to resolve this situation, such as filing a complaint before the Human Rights Commission of the National Council of the Judiciary or a hearing to challenge the judge who heard the case ("juicio de recusación"). In this regard, the Commission indicated, *inter alia*, that during the processing of the case before it, the State indeed filed the aforementioned objection, but that, contrary to what it has claimed before the Court, on that occasion the State indicated that the application for amparo was not adequate and effective to resolve this situation, since the amparo was not conceived to contest a contract for an oil concession, which should be contested through an appeal under administrative law. For this reason, in its Report 62/04 the Commission concluded that the writ of amparo was appropriate according to the Ecuadorian legislation applicable to the case and that the objection contemplated in Article 46.2.c) of the Convention was applicable, due to the lack of effectiveness of the remedy. Consequently, the Commission requested that, based on the principle of *estoppel*, the objection be declared inadmissible. For their part, the representatives agreed with the Commission, presented other arguments and called on the Court to dismiss this objection.

30. Having regard to the provisions of Article 42.6, and under the terms of Articles 61, 62 and 64 of its Rules of Procedure, the Court considers that, having acknowledged its responsibility in the present case, the State has accepted the full jurisdiction of the Court to hear this case, and therefore the filing of a preliminary objection for the failure to exhaust domestic remedies is, in principle, incompatible with the aforesaid acknowledgement.[32] Furthermore, the content of that objection is intimately related to the merits of the present case, particularly with regard to the alleged violation of Articles 8 and 25 of the Convention. Consequently, the objection filed serves no purpose and it is not necessary to analyze it.

VI
EVIDENCE

31. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of its Rules of Procedure, and on its case law regarding evidence and assessment thereof[33], the Court will examine and assess the documentary evidence submitted by the Commission, the representatives and the State at the

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[32] *Cf. Case of the "Massacre of Mapiripán" v. Colombia. Preliminary Objections*. Judgment of March 7, 2005. Series C No. 122, para. 30, and *Case of the Massacres of Ituango v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2006. Series C No. 148, para. 104. Similarly, see *Case of Montero Aranguren et al. (Catia Detention Center) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 5, 2006. Series C No. 150, para. 50, and *Case of Vélez Loor v. Panama, Preliminary Objections, Merits, Reparations and Costs*, para. 27.

[33] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 25, 2001, Series C No. 76, para. 51 and Case of *Forneron and daughter v. Argentina*, para. 10.

different procedural stages, the statements of the alleged victims and witnesses and the expert opinions rendered by affidavit before a notary public and at the public hearing before the Court. In doing so, the Court shall adhere to the principles of sound judgment, within the applicable legal framework.[34]

A. Documentary, testimonial, and expert evidence

32. The Court received various documents offered as evidence by the Inter-American Commission, the representatives, and the State, together with their main briefs. Also, the Court received affidavits rendered before a notary public by four alleged victims[35], namely: Sabine Bouchat, Bertha Gualinga, Franco Viteri and José Gualinga, all members of the Sarayaku Community, and six expert witnesses: Rodolfo Stavenhagen, Alberto Acosta Espinosa, Víctor Julio López Acevedo, Bill Powers, Shashi Kanth and Suzana Sawyer.

33. The Court notes that, in their brief of June 23, 2011, the representatives stated that they had "decided to present the written statements" of four of the alleged victims and "desist from presenting" the statements of eight other alleged victims, all of which were required by the Order of the President issued on June 17, 2011.[36] Once the President has ordered the presentation of an affidavit, the submission of that evidence is no longer up to the parties, and therefore not submitting it requires the respective justification. Therefore, failure to furnish evidence can only affect the party that unjustifiably failed to do so.

34. With respect to the evidence furnished at the public hearing, the Court heard testimony from the following alleged victims: Mr. Sabino Gualinga, spiritual leader (*Yachak*), Patricia Gualinga, leader of the women and families, Marlon Santi, former President of the Confederation of Indigenous Peoples of Ecuador –CONAIE, - and former President of Sarayaku, and Ena Santi, all members of the Sarayaku Community. Moreover, it heard from witnesses Oscar Troya and David Gualinga (offered by the State), and two expert witnesses (offered by the Commission and the representatives): James Anaya, current United Nations Special Rapporteur on the Rights of Indigenous Peoples, and the anthropologist and lawyer, Rodrigo Villagra Carrón.[37]

B. Admission of the documentary evidence

35. In this case, as in others, the Court accepts the evidentiary value of those documents submitted by the parties at the proper procedural stage, as well as those relating to supervening facts presented by the representatives and Inter-American Commission that were not contested or opposed, and the authenticity of which was not questioned, only insofar as they are pertinent and useful to determine the facts and their possible legal consequences.[38]

36. As to the press reports offered by the parties and the Commission with their respective briefs, this Court has held that these may be considered as documentary evidence when they contain well-known public facts or statements by State officials, or when they corroborate certain

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[34] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. *Merits.* Judgment of March 8, 1998. Series C No. 37, para. 76 and Case *of Forneron and daughter v. Argentina*, para. 10.

[35] The State did not submit the affidavit of the witness Rodrigo Braganza, requested in the Order of the President of the Court of June 17, 2011 (*supra* para. 11)

[36] The representatives did not submit the affidavits of Mario Santi, Felix Santi, Isidro Gualinga, Eriberto Gualinga, Marcia Gualinga, Bolivar Dahua, Eliza Cisneros and Reynaldo Gualinga, offered by them and required by Order of the President of the Court of June 17, 2011 (*supra* para. 11).

[37] *Cf. Case of the Kíchwa Indigenous People of Sarayaku v. Ecuador.* Order of the President of the Court of June 17, 2011.

[38] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* para. 140 and *Case of Forneron and daughter v. Argentina*, para. 12.

aspects related to the case.[39] The Court decides to admit those articles that are complete, or at least those whose source and publication date can be verified, and shall assess them taking into account the entire body of evidence, the observations of the parties and the rules of sound judgment.

37. With respect to certain documents referred to by the parties by means of their electronic links, the Court has established that if a party provides at least the direct electronic link to the document cited as evidence, and it is possible to access this document, the legal certainty and the procedural balance will not be affected, because its location is immediately available to the Court and to the other parties.[40] Moreover, in this case, the other parties did not oppose or object to the content or authenticity of such documents.

38. Furthermore, the Court notes that, together with the observations to the preliminary objection filed by the State, the representatives submitted several attachments as "supervening evidence" and presented a document entitled "Study of the Traditional Peoples, Population and Mobility of the Original Kichwa People of Sarayaku."[41]

39. With regard to the procedural stage for the submission of documentary evidence, under the terms of Article 57(2) of the Rules of Procedure, this must generally be presented along with the written submission of the case (application), the brief containing pleadings and motions, or the answer to the application, as appropriate. Evidence submitted outside the proper procedural moment is inadmissible, except in the cases established in Article 57(2) of the Court Rules, namely, *force majeure*, serious impediment, or when it refers to events which occurred after the procedural moments indicated.

40. In this regard, the Court notes that the State submitted several documents along with its final written arguments. The representatives argued that all these documents would be inadmissible and that several of them were time-barred, something that the State did not justify based on any of those exceptional circumstances and, moreover, that the documents were available to the State prior to submitting its answer to the application. The Commission also asked the Court to reject some of these documents given that they were time-barred, but without specifying which documents it was referring to. In this regard, the Court considers that it is not appropriate to admit those documents presented by the State in its final written arguments that were not submitted at the proper procedural stage.[42]

41. As to the attachments submitted by the representatives together with their observations to the preliminary objection, the Court notes that in the brief containing pleadings and motions, the representatives indicated that "the [Sarayaku] Community was in the process of conducting a census [and that] this [would be] provided to the […] Court as soon as it was available." Therefore, the Court considers said study admissible, on the understanding that it was not yet available and had also been mentioned in the brief containing pleadings and motions. Regarding the other attachments submitted by the representatives with their observations to the preliminary objection, the Court will only admit those documents that relate to supervening events.

42. Furthermore, the representatives submitted, with their final written arguments, proof of litigation expenses related to the present case. The Court will only consider those documents referring to requests for costs and expenses that the representatives claim were incurred during the

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[39] *Cf.. Case of Velásquez Rodríguez v. Honduras, Merits* para. 146, *and Case of Pacheco Teruel et al. v. Honduras*, para. 12.

[40] *Cf.. Case of Escué Zapata v. Colombia. Merits, Reparations and Costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of González Medina and family v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 27, 2012. Series C No. 240, para. 68.

[41] *Cf.* "Estudio de Poblamiento Tradicional, Poblacional y de Movilidad del People Originario Kichwa de Sarayaku" ("Study of the Traditional Peoples, Population and Mobility of the Native Kichwa People of Sarayaku") of 2011 (Evidence file, Vol. 18, pages 9932-9988)

[42] The attachments to the brief of final arguments of the State that will not be considered because they are time-barred are: 1-5, 13-17, 28, 32 and 39-45.

proceedings before this Court, subsequent to the date of filing the brief containing pleadings and motions.

C. *Admission of statements of the alleged victims and the testimonial and expert evidence*

43. The Court deems its appropriate to admit the testimonies and reports rendered by the alleged victims and the expert witnesses at the public hearing and by means of affidavits, insofar as these are consistent with the purpose defined by the President in the Order requiring them (*supra* para. 11) and with the purpose of the present case. These shall be assessed in the relevant chapter along with the body of evidence. [43] Pursuant to this Court's case law, the statements offered by the alleged victims cannot be assessed in isolation, but rather must be examined along with all the evidence in the proceedings, since they are useful insofar as they can provide further information on the alleged violations and their consequences. [44] These will be assessed in the relevant chapter, together with other elements of the body of evidence, taking into account the observations made by the parties. [45]

44. Together with its final list of deponents, the State submitted a document entitled "Official Anthropological Report," signed by Mr. Boris Aguirre Palma who was originally offered as an expert witness by the State in its answer to the application. At the time, the State explained that his testimony was "on the subject matter approved by the Court." As is evident in the Order of the President of June 17, 2011, said expert opinion had not been required by the Court or its President. Thus, the abovementioned document, signed by Mr. Aguirre Palma, who was offered by the State as an expert witness, was not submitted as documentary evidence at the appropriate procedural time, nor can it be regarded as expert testimony because neither the Court nor its President requested it. Moreover, it was not in accordance with the provisions contained in Articles 41(1) (b), 46, and 50 of the Rules of Procedure regarding the offering, convocation and appearance of deponents. Consequently, this document is inadmissible.

45. Likewise, this Court notes that the statement by Mr. Rodrigo Braganza, offered by the State as a witness and requested in the first operative paragraph of the Court's Order of June 17, 2011 was not submitted. The State accredited Mr. Braganza as part of its delegation that would represent it at the hearing,[46] to which the representatives objected during a pre-hearing meeting, in consideration that he had been summoned as a witness. Mr. Braganza participated as part of the delegation accredited by the State and in the presentation of the State's closing arguments at the public hearing, referring to the matter of the pentolite buried in the territory of the Sarayaku Community. In their closing arguments, the representatives stated that this evidence should not have been considered by the Court. Therefore, the Court considers that having participated in the State delegation, Mr. Braganza's statements do not constitute evidentiary elements as such, but are the arguments of a party.

46. With regard to the testimony offered at the hearing by Mr. Oscar Troya, a witness proposed by the State, the Court notes that when answering a question posed by the representatives during his testimony in open court, Mr. Troya himself accepted that he had been present in the courtroom during the testimony of the alleged victims, witnesses and experts. It is the parties' duty to inform their respective witnesses about the rules for appearing before the Court. The Court considers that in addition to affecting the principle of fairness between the parties in the proceedings, such conduct is contrary to the provisions of Article 51(6) of the Rules of Procedure. Therefore, the Court will not admit the testimony of Mr. Oscar Troya.

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[43] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43 and Case of Pacheco Teruel v. Honduras, para. 13.

[44] *Cf. Case of Loayza Tamayo v. Peru*. *Merits*, para. 43 and Case of Forneron and daughter v. Argentina, para. 13.

[45] *Cf. Case of Loayza Tamayo v. Peru. Merits,* para. 43 and Case of Forneron and daughter v. Argentina, para. 13.

[46] The State requested his accreditation in writing on July 5, 2011.

D. Assessment of the case file on provisional measures

47. In the "Evidence" section of the "Merits" chapter of its application, the Inter-American Commission took into account the proceedings for precautionary measures before it and the pending provisional measures ordered by the Court. Then, it considered that the State, "as a party to both proceedings, has had the opportunity to contest and object to the evidence offered by the petitioners and, as such, there exists due procedural fairness between the parties." Therefore, the Commission incorporated "the evidence adduced by the parties during the proceedings for precautionary and provisional measures" into the body of evidence. For their part, the representatives have made numerous references in their pleadings and motions to the provisional measures or to documents provided in that context. The State, on the other hand, has alleged in its answer that the reports it has produced regarding provisional measures "must be considered as evidence in favor of the State by the Inter-American Court."

48. The Court recalls that the purpose of the provisional measures proceedings, which are of an incidental, precautionary and protective nature, is different to the object of a contentious case, both in the procedural aspects as well as in the assessment of the evidence and the scope of the decisions.[47] However, unlike other cases[48], the alleged victims in the case at hand have also been beneficiaries of such protective measures. That is, the specific or potential group of beneficiaries is identical to the group of persons comprising the alleged victims. Furthermore, the purpose of the provisional measures coincides with many substantive aspects of the case. Therefore, the briefs and documents submitted during the provisional measures proceedings will be considered as part of the body of evidence in this case, provided that these have been specifically and properly referenced or identified, in a timely manner, by the parties in relation to their allegations.

E. Assessment of the visit to the Sarayaku territory

49. With respect to the *in situ* proceedings (*supra* paras. 18 to 21) aimed at obtaining further information about the situation of the alleged victims and the places where some of the facts alleged in the present case took place, the information and audiovisual material received will be evaluated in consideration of the particular circumstances in which they were produced. Thus, in accordance with the case law of this Court, the statements of witnesses who were heard cannot be evaluated in isolation, but rather in the context of the evidence as a whole, as they are useful insofar as they can provide additional information about the alleged violations and their consequences.[49]

50. As regards the information received at Jatun Molino, the Court has taken it as contextual information, but will not make any determination with respect to that community (*supra* para. 20).

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[47] *Cf. Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195, para. 69 and *Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 70.

[48] *Cf. Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 29, 2009. Series C No. 194, para. 58 and *Case of Perozo et al.*, para. 69. See also *Case of Torres Millacura v. Argentina,* para. 55 and *Case of Barrios Family v. Venezuela, para*. 6.

[49] *Cf. Case of Loayza Tamayo v. Peru. Merits,* para. 43 and *Case of Atala Riffo and Daughters v. Chile* para. 25.

VII
FACTS

A. The Kichwa Sarayaku Indigenous Peoples[50]

51. The Kichwa nation[51] of the Ecuadorian Amazon encompasses two Peoples who share the same linguistic and cultural tradition: the Napo-Kichwa People and the Kichwa of Pastaza People. The Kichwa of the province of Pastaza define themselves as *Runas* (persons or human beings), affirming their attachment and belonging to the same intra-ethnic identity, vis à vis other non-Kichwa Indigenous Peoples.[52] According to the *Consejo de Desarrollo de Nacionalidades y Pueblos del Ecuador* [Council for the Development of Nations and Peoples of Ecuador] (hereinafter "CODENPE"),[53] the Kichwa of the Amazon have organized themselves into several federations. The Kichwa Peoples of Sarayaku and other Kichwa-speaking groups of Pastaza province belong to the Canelos-Kichwa cultural group, who form part of an emerging culture arising from a mixture of the original inhabitants of the northern Bobonaza area.[54]

52. The Kichwa Nation of Sarayaku lives in the Amazon region of Ecuador, in an area of tropical forest, in the province of Pastaza, at different points along the banks of the Bobonaza River. Their territory is located 400 masl, at a distance of 65 kilometers from the city of Puyo. It is one of the Kichwa settlements in the Amazon with the largest concentrations of people and land area and, according to the census of the Peoples, consists of around 1200 inhabitants. The local environment of the Sarayaku peoples is one of the most biologically diverse in the world. The Sarayaku Nation consists of five towns: Sarayaku Center, Cali Cali, Sarayakillo, Shiwacocha, and Chontayacu. These towns are not independent communities, but belong to the Sarayaku People and in each town there are groups of extended families or *ayllus*, which in turn are divided into *huasi* households consisting of a couple and their offspring. This was partially observed by the Court delegation during its visit.

53. The territory of the Sarayaku People is located in an inaccessible area. Travel between Puyo- the nearest town - and Sarayaku, depending on weather conditions, takes about 2 or 3 days by boat along the Bobonaza River and eight days over land. To enter Sarayaku territory, whether by river or land, it is necessary to travel through the Canelos Parish. Although Sarayaku also has a landing strip for small planes, the use of this mode of transport is expensive.

54. The Sarayaku People subsist on family-based collective farming, hunting, fishing and gathering within their territory, in accordance with their traditions and ancestral customs. Around 90% of their nutritional needs come from products obtained from their own land and the remaining 10% come from outside the community.

55. With respect to their political organization, in 1979 Sarayaku was granted a Statute registered with the Ministry of Social Welfare, which includes authorities such as President, Vice-President, Secretary and Members. As of 2004, Sarayaku was formally recognized as the Kichwa

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[50] Most of the facts in this section have not been challenged and are drawn mainly from an anthropological-legal Report by FLACSO of May, 2005, on the social and cultural impacts of the presence of the CGC company in Sarayaku. FLACSO "Sarayaku: el Pueblo del Cénit", 1st Edition, CDES-FLACSO, Quito, 2005 (Evidence file, volume 8, p. 4224 and following pages). Other evidence is cited as necessary.

[51] Article 83 of the Political Constitution of the Republic of Ecuador establishes that Indigenous Peoples define themselves as Nations of ancestral roots. *Cf.* Political Constitution of the Republic of Ecuador (Evidence file, volume 8, p.4190 and following pages)

[52] *Cf.* The Council for the Development of Nations and Peoples of Ecuador (Evidence file, volume 8, p. 4169 and following pages) and Ministry of Education and Culture of Ecuador, "The Kichwa Nation of the Amazon", (Evidence file, volume 8, p. 4190 and following pages).

[53] The Council for the Development of the Nations and Peoples of Ecuador (CODENPE) was created by Executive Decree No. 386, published in Official Record No. 86 of December 11, 1998.

[54] *Cf.* Council for the Development of the Nations and Peoples of Ecuador, p. 4190 and following pages.

Native People of Sarayaku. Currently, decisions on important issues or on matters of special significance for the people are made by the traditional Community Assembly, [55] called *Tayjasaruta*,[56] which is also the highest decision-making body. It is organized under a Governing Council composed of traditional leaders from each community (*kurakas* or *varavuks*), community authorities, former leaders, elders, traditional scholars (*yachaks*) and groups of technicians and advisors of the community. This Council has the authority to make decisions on certain kinds of internal and external conflicts, but its main task is to serve as an interlocutor with actors external to the Sarayaku, based on decisions taken at an Assembly.

56. The organization of the Kichwa People of Sarayaku forms part of the Kichwa Association of Pastaza. It also forms part of the *Confederación de las Nacionalidades Indígenas de la Amazonía Ecuatoriana* [Confederation of Indigenous Nations of the Ecuadorian Amazon](CONFENIAE for its Spanish acronym) and of the *Confederación de Nacionalidades Indígenas de Ecuador* [Confederation of Indigenous Nations of Ecuador] (CONAIE).

57. According to the Sarayaku People's worldview, the territory is associated with a set of meanings: the jungle is alive and the natural elements have spirits (*Supay*)[57], which are connected to each other and whose presence sanctifies places.[58] Only the *Yachaks* can enter certain sacred places and interact with their inhabitants.[59]

B. Oil exploration in Ecuador

58. According to the State, from 1960 Ecuador intensified oil exploration activities, focusing its interest in the country's Amazon region. In this regard, the State mentioned that in 1969 the first reserves of crude oil were discovered in the northeastern region, and three years later, exports began and the region "became very important in a geopolitical and economic sense, being transformed from a 'myth' into a strategic national area." According to statements by the parties, during the 1970s decade, Ecuador experienced rapid economic growth, a surge in exports[60] and a strong process of modernization in its main cities.

59. As indicated by the State, at that particular historical moment, steps were taken with a view to securing complete control over the country's oil resources from a nationalist perspective and under a philosophy of "national security," based on an economic-political concept that defined the oil sector as a strategic area. At that time, "environmental, ethnic, and cultural variables were not sufficient reason for political debate." According to the representatives, oil exploitation resulted in large-scale environmental costs which included, among other things, large spills of crude oil, contamination of water sources due to waste from oil production and open-air burning of significant

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[55] The political organization of the Kichwa People of Sarayaku has been recognized by the Executive Secretary of the Council for Development of Nations and Peoples of Ecuador (CODENPE for its Spanish acronym), through Agreement 24 of June 10, 2004. See FLACSO Anthropological-Legal Report, pages 4226 and 4227.

[56] Assemblies are convened for the election of authorities, the announcement of the results of negotiations, decision making processes that concern the entire community and the settlement of certain kinds of internal disputes. It is important to note that internal conflicts are dealt with at various preliminary stages before reaching the Assembly. Only disputes of a serious nature reach this body. These conflicts are of two kinds: the death of a member of the association and the failure to comply with the orders of the Assembly. See FLACSO Anthropological-Legal Report (Evidence file, page 4273)

[57] *Cf.* Affidavit of José María Gualinga Montalvo of June 27, 2011 (Evidence file, Volume 19, p. 10014 and following pages).

[58] *Cf.* Testimony of Sabino Gualinga and expert opinion of Rodrigo Villalba before the Court during the public hearing held on July 6 and 7, 2011.

[59] *Cf.* Testimony of Sabino Gualinga and Rodrigo Villalba before the Court during the public hearing held on July 6 and 7, 2011.

[60] *Cf.* Alberto Acosta, "Preparémonos para lo que se avecina. En el Oriente es un Mito", 1st Edition, Abda Yala/CEP, Quito, 2003 (Evidence file, volume 1, page 392)

amounts of natural gas. Moreover, this environmental pollution generated health risks for the populations in the oil producing areas of eastern Ecuador.[61]

60. Ecuador is currently the fifth largest oil producer and the fourth exporter among Latin American countries. According to figures from the Ministry of Energy and Mines of Ecuador, in 2005 sales of crude oil generated about a quarter of the country's gross domestic product (GDP) and oil revenues covered about 40% of the national budget. [62]

C. Adjudication of territories to the Kichwa Peoples of Sarayaku and the Communities of the Bobonaza River in May 1992

61. On May 12, 1992, the State, through the *Instituto de Reforma Agraria y Colonización* [Institute for Agrarian Reform and Colonization] (IERAC for its Spanish acronym), adjudicated an undivided area of land in the province of Pastaza, identified in the title as Block 9, and covering a surface area of 222,094 Hectares [63] or 264,625 Hectares[64], in favor of the communities of the Bobonaza River,[65] which includes the Kichwa People of Sarayaku.[66] Within Block 9, the Sarayaku territory consists of 135,000 Hectares. In fact, on June 10, 2004, the Executive Secretariat of CEDENPE (a State institution attached to the Presidency of the Republic with jurisdiction over indigenous matters) registered the Statute of the Native Kichwa Peoples of Sarayaku (Agreement No. 24), wherein Article 47(b) establishes "the territory of the Kichwa People of Sarayaku and its natural resources found on [the] surface of Block 9, cohabited by the Kichwa peoples of Boberas, of which approximately and traditionally 135,000 Hectares correspond to the Sarayaku, as well as the assets referred to in Articles 45 and 46 of this Statute, noting that these territorial dimensions may be increased in the future."[67]

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61 *Cf.* Miguel San Sebastian and Anna-Karin Hurtig, "*Oil exploitation in the Amazon basin of Ecuador: a public health emergency*" (2004) 15: 3 Rev Panam Salud Publica/Pan Am J Public Health (Evidence file, volume 8, p. 4326 and following pages). For example, a 2003 study, prepared by FLACSO and PETROECUADOR mentions three investigations on the effects of oil exploration and exploitation in Ecuador. According to the study, the worst socio-environmental impacts of oil activities in Ecuador occurred during the so-called "Texaco era" (1967-1992). Aída Arteaga, "Management Indicators and Impacts of oil exploration in the Ecuadorian Amazon Region" in *Petróleo y desarrollo sostenible en Ecuador*, 1ª Edition, FLACSO – PETROECUADOR, Quito, 2003 (Evidence file, volume 11, page 6904).

62 *Cf.*. Empresa Petrolera de Ecuador (PETROECUADOR), Statistical Report 1972- 2006 (Evidence file, volume 8, page 4354).

63 *Cf.* Notary's certificate dated May 26, 1992 of the registration of the adjudication of May 12, 1992 (Evidence file, volume 14, pages 8621-8623).

64 *Cf.* Evidence file, volume 14, page 8631. According to the State, on May 11, 2005, "a public document was drawn up as a record of the Open Mortgage on the property granted to the Communities of Rio Bobonaza through the adjudication made by the IERAC on May 12, 1992 and registered on May 26 of that year, covering an area of two hundred and seventy-four thousand, six hundred and twenty-five hectares. This deed was drawn up between the Tayac Apu Organization of the Ade Territory of the Nation of the Native Kichwa People of Sarayaku (Tayjasaruta)'' and the Institute for the Eco-Development of the Amazon Region (ECORAE) in order to guarantee the execution of the Project for the Extension of the Landing Strip of the Community of Sarayaku."

65 *Cf.* According to the State, the communities of the Rio Bobonaza include: Sarayacu, Sarayaquillo, Cali Cali, Shigua Cucha, Chontayacu, Niwa Cucha, Palanda, Teresa Mama, Ramizuna, Tahuay Nambi, Palizada, Mimo, Tishin, Mangaurco, Hoberas, Santo Tomas, Puca Urcu, Llz Pungo, Yanda Playa, Chiyun, Playa, Shawindia, Upa, Lulun, Huagra, Cucha, Tuntun Lan, Llanchamacocha, Alto Corrientes, Papaya, Cabahuari and Masaranu.

66 *Cf.* Property Register of Puyo, Pastaza. Adjudication of lands to the communities of Río Bobonaza, Puyo, May 26 1992, (Evidence file, volume 14, p. 8616 and following pages; evidence file, volume 8, p. 4374 and folliwng pages, and volume 10, p. 6005 and following pages).

67 *Cf.* Article 3 of this Agreement states that "the Governing Council of the Native Kichwa Peoples of Sarayaku and those named in this record shall enjoy all rights, guarantees and attributes established in the Political Constitution of the Republic of Ecuador, for indigenous peoples self-defined as nations of ancestral lineage. In addition, "Art. 48. Regarding Territory: a) the boundaries of the Kichwa People of Sarayaku are those stated in the adjudication issued by the Institute for Agrarian Reform and Colonization (IERAC for its Spanish acronym) on May 12, 1992, and registered on the 26th of the same month and year, and in the decision of rectification of July 23, 1992, which was recorded on August 21 of the same year; granted by the Institute for Agrarian Reform and Colonization, without detriment to the territory contained within the traditionally existing historical limits, or any other territory that may be included as an extension in the future". This

62. Likewise, in accordance with the land title, the adjudication was carried out according to the following provisions:

> "a) The present adjudication is inspired by the threefold objective of protecting the ecosystems of the Ecuadorian Amazon, improving the living standards of members of the indigenous communities and protecting the integrity of their culture [;]
>
> b) This adjudication does not affect in any way whatsoever the adjudications made previously to individuals or institutions whose validity is ratified in this act, nor does it affect the settlements or possessions of the settlers established prior to this date, nor the free movement through existing waterways or overland passes or those to be built in the future in accordance with national legislation [;]
>
> c) This adjudication does not limit the ability of the State to build roads, bridges, airports and other works of infrastructure necessary for the economic development and security of the nation[;]
>
> d) The National Government, its institutions and its police forces shall have free access to the adjudicated areas in order to carry out the actions contemplated in the Constitution and laws of the Republic[;]
>
> e) Natural underground resources belong to the State, which may exploit these without interference in accordance with environmental protection standards;
>
> f) With the aim of protecting the social, cultural, economic and environmental integrity of the adjudicated communities, the National Government will implement plans and programs prepared by the respective indigenous communities and submitted to the consideration of the Government [, and]
>
> g) The beneficiary community shall be subject to regulations regarding the care and management of the adjudicated area. The partial or total sale or transfer of the adjudicated area is expressly forbidden[68]

D. Participation contract with the CGC company for exploration of hydrocarbons and exploitation of crude oil in Block 23 of the Amazon Region

63. On June 26, 1995, the *Comité Especial de Licitación* [Special Tender Committee] ("CEL" for its Spanish acronym) convened the eighth round of international public bidding for exploration and exploitation of hydrocarbons on Ecuadorian territory, which included "Block 23" of the Amazon region of the province of Pastaza. [69] According to the State, Block 23 was located in the province of Pastaza, approximately 40 km from the town of Puyo to the east, and the base of operations of the CGC Company was established in Chonta, using the sectors of Pacayacu, Shimi, Jatun Molino and Kunkuk as support points.

64. On July 26, 1996, a participation contract was signed before the Third Notary of San Francisco de Quito, to carry out hydrocarbon exploration and exploitation of crude oil in Block No. 23 in the Amazon Region (hereinafter the "contract for oil exploration and exploitation" or "the contract with CGC"), between the State Petroleum Company of Ecuador (PETROECUADOR) and the consortium formed by Compañía General de Combustibles S.A. (CGC) (hereinafter "CGC" or "CGC company") and Petrolera Argentina San Jorge S.A.[70]

65. The territory allotted for that purpose in the contract with CGC consisted of an area of 200,000 hectares, inhabited by several indigenous groups, communities and villages: Sarayaku, Jatun Molino, Pacayaku, Canelos, Shaimi and Uyuimi. Of the aforementioned indigenous

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document is included in the file before the Court, since it was incorporated along with the Community Self-evaluation of the Impacts Suffered by the Kichwa People of Sarayaku due to the Actions of the CGC Oil Company in its Territory (Appendix 3 of January 21, 2008, presented by the representatives of the beneficiaries of the provisional measures, provisional measures file in the matter of the *Indigenous People of Sarayaku* (Ecuador), volume 6, page 1464).; See also FLACSO. Sarayaku: el Pueblo del Cénit. 1st edition CDES-FLACSO. Quito, 2005, page 16, (Evidence file, volume 11, page 6626).

[68] *Cf.* Property Registry of Puyo, Pastaza. Adjudication of lands to the communities of Río Bobonaza, Puyo May 26, 1992, (Evidence file, volume 8, p.4374 and following pages; volume 10, page 6005 and following pages, and volume 14, page 8616 and following pages).

[69] *Cf.* Participation contract for the exploration of hydrocarbons and exploitation of crude oil in Block No. 23 of the Amazon region, between the State Petroleum Company of Ecuador, PETROECUADOR, and the Compañía General de Combustibles S.A., (CGC) of July 26 1996, Clause (2.1) (Evidence file, volume 8, page 4381 and following pages; Evidence file, volume 10, page 5928 and following pages).

[70] *Cf.* Participation contract between PETROECUADOR and CGC.

settlements, Sarayaku is the largest in terms of population and land area, since its ancestral and legal territory accounted for around 65% of the land included in "Block 23."

66. According to the terms of the contract between the State oil company PETROECUADOR and the CGC company, the seismic exploration phase would last four years - with the possibility of a two year extension- from the effective date of the contract, i.e., once the Ministry of Energy and Mines approved the Environmental Impact Assessment. Furthermore, it was stipulated that the operational phase would last 20 years with possibility of an extension

67. Among the contractor's obligations, the following were established: to conduct an Environmental Impact Assessment (EIA) and make all efforts to preserve the ecological balance of the exploration area of the awarded block. It was anticipated that relations with the Sarayaku People would be managed by the Secretariat for Environmental Protection of the Ministry of Energy and Mines, through the National Environmental Protection Office. Also included in the agreement was the contractor's obligation to obtain from third parties any permit, right of way or easement that might be necessary to reach the contract area or move within it, in order to carry out its activities.

68. Within the first six months, the contractor was required to submit an Environmental Impact Assessment (EIA) for the exploration phase, together with an Environmental Management Plan for the exploitation period. The EIA was to contain, among other details, a description of the natural resources, especially of the forests, flora and fauna, as well as of the social, economic and cultural aspects of the populations or communities living in the areas affected by the contract.[71]

69. The CGC company, in partnership with the Petrolera Argentina San Jorge (later "Chevron-Burlington"), signed a contract with the consulting firm *Walsh Environmental Scientists and Engineers, Inc*. to carry out an environmental impact assessment for seismic prospecting, as required in the participation contract. The plan was completed in May 1997[72] and was approved by the Ministry of Energy and Mines (MEM) on August 26. [73] The EIA states, among other things, that "[i]t is necessary to point out that except for an area where we were denied access, the majority of physiographic regions and types of forests identified by satellite imagery were visited during the field trip."[74] According to the Ministry of Energy and Mines, the environmental impact assessment was never executed, that is, it was not implemented in practice.[75]

70. On May 15, 1998, Ecuador ratified Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, of the International Labour Organization (ILO), (hereinafter "ILO Convention No. 169." The Convention entered into force for Ecuador on May 15, 1999.

71. Furthermore, on June 5, 1998 Ecuador adopted the Political Constitution of 1998, which recognized the collective rights of Indigenous and Afro-Ecuadorian peoples.[76]

72. According to the State, by means of Ministerial Agreement No. 197, published in Official Record No. 176 of April 23, 1999, prospecting activities were suspended in Block 23 on the grounds that "the activities carried out by CGC [were] being affected by the actions of indigenous

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71 *Cf.* Clause 5.1.21.6 of the participation contract between PETROECUADOR and CGC.

72 *Cf.* Environmental Impact Assessment for Seismic Prospecting Activities, Block 23. Final Report, May 1997 (Evidence file, volume 8, page 4463 and subsq. pages; Evidence file volume 10, page 6021 and subsq. pages).

73 *Cf.* Official letter No. 155 of the Ministry of Energy and Mines (Evidence file, volume 8, page 4797 and subsq. pages); Report of the Ministry of Energy and Mines on the activities carried out in Block 23 (Evidence file, volume 8, page 4778).

74 *Cf.* Environmental Impact Assessment for Seismic Prospection Activities, Block 23.

75 *Cf.* Official letter No. 155 of the Ministry of Energy and Mines on the activities carried out in Block 23.

76 *Cf*. Constitution of Ecuador, Chapter 5, On Collective Rights, First Section, Of the rights of Indigenous, Black or Afro-Ecuadorian persons, Articles 83 to 85, (Evidence file, volume 8, page 4079). The 1998 Constitution contained provisions that protected the rights of indigenous populations, who were to be consulted regarding plans or programs for prospection and development of non-renewable resources on their lands which could have an environmental or cultural impact on them, and were to receive a share of the profits earned from these projects and, where possible, receive compensation for social, cultural and environmental damages caused to them (Article 84.5).

organizations against the workers and the destruction of the camp." The suspension was ordered in an effort to continue developing community relations programs, in order to resolve the problems that had arisen. [77] The suspension was extended several times until September 2002.[78]

E. Facts prior to the seismic prospecting and incursions into the Sarayaku People's territory

73. It was argued, without being contested by the State, that on numerous occasions the CGC oil company tried to gain access to the Sarayaku People's territory and obtain the community's consent for oil exploration, through actions such as: a) direct contacts with members of the community, circumventing the organizational levels within the indigenous community; b) offering to send a medical team to provide care in various communities of the Sarayaku People; however, in order receive care, the people were required to sign a list that was subsequently used as a letter of support addressed to the CGC to continue its work; [79] c) payment of salaries to individuals within communities to recruit others in order to endorse the seismic prospecting; d) offering gifts and personal benefits; e) forming support groups for the oil industry,[80] and f) offering money, either individually or collectively.[81]

74. The representatives also alleged that in May 2000, the attorney for the CGC visited Sarayaku and offered U.S. $60,000.00 for development projects and 500 jobs for the men of the Community. The State did not dispute this. On June 25, 2000, the Sarayaku held a General Assembly at which, in the presence of the CGC representative, they rejected the company's offer. [82] For their part, the neighboring communities of Pakayaku, Shaimi, Jatún Molino and Canelos signed agreements with the CGC. [83]

75. In relation to the foregoing, the representatives argued, that given Sarayaku's refusal to accept the CGC's oil prospecting activities, in 2001 the company hired Daymi Service S.A., a team of sociologists and anthropologists to build community relations. According to members of Sarayaku, its strategy was to divide the communities, manipulate the leaders and instigate slander campaigns

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77 *Cf.* Ministerial Agreement No. 197, Published in Official Record Nº 176 (evidence file, volume 14, pages 8653 and 8654).

78 *Cf.* Resolution No. 028-CAD-2001-01-19 ordered the suspension of April 2000 to be extended until April 9, 2001 (Evidence file, volume 14, page 8656) and Resolution No. 431-CAD-2001-08-03 of August 2001 accepted a request for a further extension until September 26, 2002 (Evidence file, volume 14, page 8658).

79 *Cf.* Letter entitled "Community of Independents of Sarayacu Branch O.P.I.P.", undated, (Evidence file, volume 8, page 4818 and subsq. pages); List of signatories of the Chontayacu People, signed on December 31, 2002, (Evidence file, volume 8, page 4825 and subsq. pages) 18. Minutes of the General Assembly of the "CAS – TAYJASARUTA", of January 7, 2003, (Evidence file, volume 8, page 4828 and subsq. pages).

80 *Cf.* Brief of pleadings and motions, volume 1, pages 281 and 282; See also affidavit rendered before a notary public by José María Gualinga Montalvo on June 27, 2011 (Evidence file, volume 19, pages 4815-4816).

81 *Cf.* Decision taken by the Association Sarayaku-PIP at a meeting held with the CGC company on June 25, 2000 (Evidence file, volume 8, pages 4812-4813); Letter of April 13, 2002 addressed to the Minister of Energy and Mines by the Sarayaku Association (Evidence file, volume 8, pages 4815-4816).

82 *Cf.* Decision taken by the Sarayacu-OPIP Association at the Meeting held with the CGC Company on June 25, 2000 (Evidence file, volume 10, pages 6109-6110) The Sarayaku Association and the Organization of Indigenous Peoples of Pastaza, OPIP for its Spanish acronym, have taken the following decisions: "Sarayaku ratifies its decision not to accept any oil company, be it CGC and/or other companies, mining or lumber organizations; based on this decision, there will be no further dialogue or negotiation with CGC; it decides not to accept the USD $ 60,000 from the agreement of the provincial council and CGC, because this money would create inter-community conflicts with serious consequences; Sarayaku will not accept further meetings instigated by CGC with other communities of the Block; in accordance with these decisions, we request the definitive cancellation of the contract between the Ecuadorian State and CGC in Block 23. These decisions are supported by the collective rights recognized by the Ecuadorian Constitution; by ILO Convention No. 169 and by other laws and international bodies that protect the rights of indigenous peoples."

83 *Cf.* As of February 2003 CGC had invested 350,000 USD in social projects in these four communities. *El Comercio* newspaper of February 7, 2001, "Mediation for the Sarayacu conflict" (Evidence file, volume 11, page 6541). See also the affidavit of José María Gualinga Montalvo of June 27, 2011 (evidence file, volume 19, page 10018).

to discredit the leaders and organizations. The representatives argued that, as part of that strategy, the company created the so-called "Community of Independents of Sarayaku" in order to reach an agreement and justify its entry into the territory.[84] The State did not dispute these facts.

76. As to Ecuadorian domestic legislation, the Law for the Promotion of Investment and Citizen Participation was enacted on August 18, 2000. [85] This law states, *inter alia*, that:

> "[p]rior to the execution of plans and programs for exploration or development of hydrocarbons found on lands allocated by the Ecuadorian State to Indigenous Communities or Black or Afro-Ecuadorian people, and which could affect the environment, PETROECUADOR and its subsidiaries, contractors, and associates must consult with the communities and ethnic groups. To that end, they will promote meetings and public hearings in order to present and explain their plans and the purpose of their activities, the terms under which these will be carried out, the timeframe and potential direct or indirect environmental impacts that could be caused to the community or its inhabitants. All acts, agreements or settlements reached as a result of consultations regarding the plans and programs for exploration and development shall be recorded in writing by means of minutes or a public instrument."

77. Furthermore, on February 13, 2001, the Substitute Environmental Regulations for Hydrocarbon Operations in Ecuador (Executive Decree 1215)[86] were promulgated. Article 9 of said Regulations establishes that:

> [P]rior to initiating any tendering for a State oil contract, the agency responsible for carrying out the oil bidding processes shall apply the consultation procedures established in the Regulations issued for that purpose, in coordination with the Ministry of Energy and Mines and the Ministry of the Environment.
>
> Prior to the implementation of plans and programs for exploration and exploitation of hydrocarbons, those subject to control must inform the communities within the areas directly affected by the projects, and must hear their suggestions and opinions. All acts and agreements reached as a consequence of these information meetings shall be documented, by means of a public instrument, and shall be sent to the Deputy Secretary for Environmental Protection.
>
> Agreements shall be drafted according to the principles of compensation and reparation for potential environmental effects and damages to property that the execution of energy production projects might cause to the population. Compensation shall be calculated on the basis of existing official tables.
>
> When such zones or areas are located within the National Patrimony of Natural Areas, the regulations and management plan of that zone shall be observed, in accordance with the Law of Forests and Conservation of Natural Areas and Wildlife and the Regulations, approved by the Department of the Environment."

78. Furthermore, on July 30, 2001, the Ministry of Defense of Ecuador signed a Cooperation Agreement on Military Security with the oil companies operating in the country, in which the State undertook to "ensure the safety of oil facilities, and of the persons who work in them." [87]

79. On March 26, 2002, the CGC company submitted to the Ministry documents referring to the updated Environmental Management Plan and Monitoring Plan for the 2D seismic prospecting activities in Block 23. [88] On April 17, 2002, the Ministry requested information to ensure that the project to be implemented corresponded to the same area and characteristics as the seismic project approved on August 26, 1997, creating an Operational Plan so that, as the seismic exploration plan advanced, progress would also be made on aspects such as education, health, productive projects, infrastructure and community support.

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[84] *Cf.* Pleadings and motions brief, volume 1, pages 283. See also affidavit of José María Gualinga Montalvo of June 27, 2011 (Evidence file, volume 19, page 10021) and testimony rendered by Marlon Santi before the Court during the public hearing held on July 6, 2011.

[85] *Cf.* Law for the Promotion of Investment and Citizen Participation, Decree Law 2000-1, Record 144 of August 18, 2000. (Evidence file, volume 11, page 6541).

[86] *Cf.* Executive Decree 1215, Official Record 265 of February 13, 2001

[87] *Cf.* Clause Two. Purpose of the Military Cooperation Agreement. Cooperation Agreement on Military Security between the Ministry of National Defense and the oil companies operating in Ecuador, signed in Quito on July 30, 2001 (Evidence file, volume 8, page 4365)

[88] *Cf.* Report of the Ministry of Energy and Mines on activities carried out in Block 23 (Evidence file, volume 8, page 4779); Official letter No. 155 of the Ministry of Energy and Mines, (Evidence file, volume 8, page 4798 and subsq.).

80. On April 13, 2002, the Sarayaku Association sent a communication to the Ministry of Energy and Mines, expressing its opposition to the entry of oil companies to its ancestral territory.[89]

81. In an official letter dated July 2, 2002, and considering that the project approved in 1997 had not been implemented due to *force majeure* "related to the actions of the indigenous communities," and that the area concerned is the same one as that established that year, the Ministry approved the updated Environmental Management Plan and Monitoring Plan for 2D seismic prospecting in Block 23.

82. On August 26, 2002, the CGC submitted to the Ministry of Energy and Mines the following five investment agreements made with indigenous communities or associations and signed on August 6, 2002, before the Second Notary of the Canton of Pastaza: FENAQUIPA Organization, $194,000.00; AIEPRA Organization, Jatun Molino community and "Independent Communities of Sarayaku," $194,900.00; FENASH-P Federation, $150,000.00; Association of Indigenous Centers of PACAYAKU, $222,600.00; and Achuar Community of SHAIMI, $50,600.00. These agreements involved contributions for productive projects, infrastructure, job training, health and education,[90] and were based on an operational plan, implemented in the measure that the seismic activities were carried out in their territories.

83. According to the State, on September 2002, the CGC asked the Ministry of Energy and Mines to lift the *force majeure* status, which would allow for the reactivation of exploration or exploitation activities.

84. On November 13, 2002, the CGC company submitted its first progress report on the 2D seismic project, emphasizing that to date 25% progress had been achieved in reaching community agreements and that, as part of the dissemination of the Specific Environmental Management Plan, it had held a meeting with journalists in the city of Puyo and authorities of the Province.

85. On November 22, 2002, the Vice-President and Members of the Rural Parish Association of Sarayaku filed a complaint with the Ombudsman. They argued that the contract for 2D seismic prospecting in Block 23 constituted a violation of Articles 84(5) and 88 of the Political Constitution of Ecuador, in relation to Article 28(2) of the Environmental Management Law, and they requested: 1. that the CGC company respect the territory under the jurisdiction of the Sarayaku Parish 2. the immediate withdrawal of the Armed Forces that were providing protection to CGC workers, and 3. compliance with these Articles by the State authorities. Subsequently, Mr. Silvio David Malaver, a member of the Sarayaku Community, joined in the complaint. [91]

86. On November 27, 2002, the Ombudsman's Office of Ecuador issued a "defensorial statement," affirming that the members of the Sarayaku People were under the protection of its authority. Moreover, it stated that "[n]o person, authority or official shall impede the free movement, circulation, navigation and intercommunication of members of the Sarayaku across all lands [and] rivers that they require and need to exercise their legitimate right. Whoever obstructs, opposes, impedes or limits the right to free movement and circulation [of] the members of this community shall be subject to the penalties and sanctions established by the laws of Ecuador."[92]

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89 *Cf.* Communication of the Sarayaku Association to the Ministry of Energy and Mines of April 13, 2002 (Evidence file, volume 10, pages 6111-6112).

90 *Cf.* Report on Activities in Block 23 CGC. Official letter sent by CGC to Mr. Ab. Gustavo Gutiérrez on December 24, 2002. Official letter No. 155 DM-DINAPA-CSA-870 0212389 (Appendix 14, volume 8, page 4797).

91 *Cf.* Ombudsman of the Province of Pastaza. Resolution of April 10, 2005. Complaint No. 368-2002 (Evidence file, volume 8, page 4831 and subsq.).

92 *Cf.* National Office of the Ombudsman, "Defensorial declaration" of November 28, 2002 (Evidence file, volume 8, page 4870 and volume 10, page 6032).

F. Writ of amparo

87. On November 28, 2002, the President of the OPIP, representing the 11 associations of the Kichwa People of Pastaza, presented a constitutional writ of amparo before the First Civil Court of Pastaza against the CGC company and its subcontractor, *Daymi Services*. In the amparo, it was alleged that since 1999, CGC had carried out several efforts intended to negotiate, separately and in isolation, with the communities and individuals "generating a series of conflicts and internal *impasses* within [their] organizations, which led to the deterioration of [their] hitherto strong organization." [93]

88. On November 29, 2002, the First Civil Court of Pastaza agreed to hear the amparo and, as a precautionary measure, ordered the suspension of "any current or impending action that affects or threatens the rights that are the subject of the complaint," as well as the holding a public hearing on December 7, 2002. [94]

89. According to the State, in a decision issued on December 2, 2002, the initial resolution was extended, "correcting the error made regarding the date, designating Friday, December 6, to hold the hearing."

90. The hearing that was convened did not take place. The State alleged that no representative of the Sarayaku had appeared at the hearing, whereas the respondent party, the CGC company, did appear. The representatives, in their brief answering the preliminary objection, pointed out that the hearing never took place and that proof of this is the fact that no "minutes of the meeting" exist.

91. On December 12, 2002, the Superior Court of Justice of the District of Pastaza sent an official letter to the First Civil Judge of Pastaza, in which it "noted irregularities in the procedure [and expressed] concern over the total lack of speed [... of the] action, taking into account the social repercussions that its purpose implies." [95]

G. Facts related to the seismic prospecting or oil exploration activities of the CGC company as of December 2002

92. The seismic prospecting program proposed in Block 23 included an area of 633,425 km, distributed in 17 lines, mainly oriented north-south and east-west[96]. Initially it was estimated that the seismic campaign would last 6 to 8 months depending on weather conditions. In the prospecting area, paths were cleared for laying down the seismic lines, as well as for the placement of camps, drop zones and heliports. [97]

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[93] Writ of constitutional amparo filed by the Organization of Indigenous Peoples of Pastaza against the CGC company and Daymi Services on November 28, 2002 (Evidence file, volume 8, page 4333 and subsq. pages, and Evidence file, volume 10, page 6025 and subsq. pages).

[94] Decision of the First Civil Judge of Pastaza regarding the Constitutional Amparo of the OPIP-Sarayaku (Block 23), November 29, 2002, (Evidence file, volume 8, page 4872; Evidence file, volume 10, page 6029).

[95] Official letter of December 12, 2002 sent by the President of the Superior Court of Justice of the District of Pastaza to the First Civil Judge of Pastaza (Evidence file, volume 8, page 4874 and subsq; Evidence file, volume 10, page 6030 and subsq.).

[96] *Cf.* Final Operations Report prepared by the CGC Company in February 2003 (Evidence file, volume 8, pages 4881, 4884, 4889 or pages 5, 8 and 13).

[97] *Cf.* Final Operations Report prepared by the CGC Company (pages 4884 and 4903); and general description of a process of seismic exploration prepared by the Ministry of Energy and Mines, March 7, 2006 (Evidence file, volume 8, pages s 4953 and 4954).

93. On December 2, 2002, the Regulations for Consultation on Hydrocarbon Activities were adopted.[98] The Regulations provided "a uniform procedure for the hydrocarbon sector for the application of the constitutional right of indigenous peoples to be consulted."

94. On December 4, 2002, a meeting was held in Quito with the participation of Sarayaku, the Governor of Pastaza, PETROECUADOR, the Secretariat for Environmental Protection, the Ministry of Energy and Mines, CGC, OPIP, Canelos and the CGC Coordination Committee of the Government of Pastaza, calling for the activities at Block 23 to be suspended. No agreement was reached. [99]

95. On December 5, 2002, the environmental monitoring points submitted by the company were approved, according to the State, under the provisions of Article 12 of the Substitute Environmental Regulations for Hydrocarbon Operations in Ecuador (DE 1215). [100]

96. On December 12, 2002, an Agreement of Intent was signed between the Undersecretary of the Ministry of the Interior and representatives of the indigenous organizations. The agreement established the following:

> a) Seek a peaceful solution to the problem, without the intervention of the security forces;
>
> b) The communities will allow the immediate departure of the workers detained in the communities of Shaimi and Sarayaku, as a gesture of good will and to open a dialogue,
>
> c) Given the critical situation that has arisen in Block 23, the Government undertakes to URGE the CGC company to temporarily suspend seismic prospecting in Block 23, so that the new government may address this issue;
>
> d) As a sign of good will, the Ministry of the Interior will appoint a high-level commission with the authorities directly responsible for oil operations, and will seek to hold meetings in Puyo city, where the search for a solution to the problem of Block 23 will begin;
>
> e) The Government will oversee CGC's compliance with the contract, monitoring the company's adherence to the standards established, whilst taking the regulatory steps for Prior Consultation, so that the rules are clearly established for all parties.[101]

97. On January 7, 2003, the residents of Chontayaku and the Council of Kurakas held an Assembly at which they presented a document reaffirming the unity of the Kichwa People of Sarayaku and their opposition to the entry of the oil company. [102]

98. On January 25, 2003, Reinaldo Alejandro Gualinga Aranda, Elvis Fernando Gualinga Malver, Marco Marcelo Gualinga Gualinga and Fabián Grefa, all members of the Sarayaku community, were detained by staff of the CGC company and members of the Armed Forces in the Sarayaku territory "because of the danger these individuals posed [...] given that they were in possession of weapons and explosives." [103] They were subsequently flown in a CGC helicopter to the city of Chonta, and later transported by police officers in vehicles belonging to CGC to the city of Puyo, where they were left in the custody of local police and released that same afternoon. [104]

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98 Executive Decree No. 3401 of December 2, 2002, Official Record No.728 of December 9, 2002 "Regulations on Consultations concerning Hydrocarbon Activities." (Evidence file, volume 8, pages 4130 and subsq.).

99 *Cf.* Memorandum No DINAPA-CSA-003-200. Undersecretary for Environmental Protection (Evidence file, volume 10, page 6131).

100 *Cf.* Official letter No. 155 of December 24, 2002, Ministry of Energy and Mines, referring to Official letter DINAPA-CSA-808 of December 5, 2002 (Evidence file, volume 8, page 4799).

101 *Cf.* Agreement of Intent with the Undersecretary of Government, December 12, 2002 (Evidence file, volume 10, pages 6141-6142).

102 *Cf.* Minutes of the General Assembly of the "CAS – TAYJASARUTA", of January 7, 2003 (Evidence file, volume 8, pages 4828 and 4829).

103 *Cf.* Official letter of March 13, 2003 signed by the Commander of the 17th Brigade of Pastaza (Evidence file , volume 9, page 5215).

104 *Cf.* Official letter of March 13, 2003 signed by the Commander of the 17th Brigade of Pastaza and Preliminary Inquiry No. 069-2003, complaint filed by Mr. José Walter Hurtado Pozo, for the alleged crimes of theft and kidnapping (Evidence file , volume 16, pages 9091 and subsq.).

99. In relation to these arrests, on January 28, 2003, a preliminary inquiry was opened by the District Prosecutor of Pastaza and on October 7, 2003 the First Criminal Court of Pastaza issued arrest warrants for Reinaldo Alejandro Gualinga Aranda, Elvis Fernando Gualinga Malver, Marco Marcelo Gualinga Gualinga, Yacu Viteri Gualinga and Fabián Grefa for the crimes of kidnapping and aggravated robbery. [105] Subsequently, the abovementioned arrest warrants for Elvis Gualinga, Reinaldo Gualinga, and Fabián Grefa were revoked and dismissed. [106] The Commission indicated that Marcelo Gualinga Gualinga was sentenced to one year in prison for the crime of possession of explosives and was released after serving his sentence.

100. Following the reactivation of the seismic exploration phase in November 2002 and given the CGC's entry into the Sarayaku territory, the Association of the Kichwa People of Sarayaku declared an "emergency," during which the community stopped its everyday economic, administrative and education activities for a period of 4 to 6 months. In order to protect the boundaries of its territory and prevent the entry of the CGC, the Sarayaku community organized six so-called "Peace and Life Camps" on the edges of the territory, each comprising 60 to 100 people, including men, women and young people. [107] It was also claimed, and not refuted by the State, that members of the Sarayaku headed into the jungle to reach the camps set up on the borders of the territory, including children old enough to walk and pregnant women or those with babies.[108] The only people who did not participate in this surveillance were the elderly, the sick and very young children (toddlers), who stayed in Sarayaku Center. [109] During this period, the Community members lived in the jungle; the crops and food ran out and, during several months, the families survived exclusively on resources from the forest. [110]

101. Between October 2002 and February 2003, the oil company's work within the Sarayaku territory advanced by 29%. [111] During this period the CGC loaded 467 wells with a total of 1433 kilograms of "pentolite" explosives, [112] both at the superficial and deeper levels, and left them buried in the territories that comprised Block 23. [113] According to the information submitted, at the time of this Judgment, the buried explosives remained in Sarayaku territory.

102. On February 6, 2003, the Association for the Hydrocarbon Industry of Ecuador reported that the CGC had declared a state of "*force majeure"* and suspended the seismic exploration work.[114] On February 10, 2003 the CGC expressed its willingness to "continue with the seismic registration campaign and with the rest of the work agreed in the contract." The State affirmed, without being

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105 *Cf.* First Criminal Court of Pastaza of October 7, 2003 (Evidence file, volume 14, pages 9222 and 9223).

106 *Cf.* First Criminal Court of Pastaza of October 7, of 2003. Report of the National Attorney, September 27, 2003 (Evidence file , volume 9, pages 5210 and 5211), petition of October 1, 2003 in which the Public Prosecutor's Office requested the judge to order pre-trial custody (Evidence file , volume 9, pages 5210 and 5211).

107 First Notary of the Canton of Pastaza, sworn statement of Ena Margoth Santi of November 13, 2007; First Notary of the Canton of Pastaza, affidavit of Carmenza Soledad Malaver Capucha, of November 13, 2007, (Evidence file, volume 9, page 5000 and subsq.).; map prepared by the petitioners, showing the distribution of peace and life camps in the Sarayaku territory (Evidence file, volume 9, page 4969).

108 Testimony rendered by Ena Margot Santi before the Court during the public hearing held on July 6, 2011. See also Testimony rendered before a notary public Gloria Berta Gualinga Vargas, of June 27, 2011 (Evidence file , volume 19, page 10039)

109 Brief of pleadings and motions(volume 1, page 284). See also testimony rendered by Ena Margot Santi before the Court during the public hearing held on July 6, 2011.

110 Testimony of Abdón Alonso Ciualinga question 2 (Evidence file , volume 11, page 6526); First Notary of the Canton of Pastaza, affidavits of Ena Margoth Santi and Carmenza Soledad Malaver Capucha, of November 13, 2007.

111 *Cf.* Ministry of Energy and Mines. Certification of explosive charges distributed in Block 23, according to information from the National Environmental Protection Office (Evidence file, volume 9, pages 4956 and 4957).

112 *Cf.* Ministry of Energy and Mines. Certification of explosive charges distributed in Block 23, according to information from the National Evrinmental Protection Office (Evidence file, volume 9, pages 4956 and 4957).

113 *Cf.* Seismic map (Evidence file, volume 9, page 4969 and subsq.)

114 *Cf.* Report of the Ministry of Energy and Mines on the activities carried out in Block 23 (Evidence file, volume 8, page 4788).

challenged, that according to official letter No. 019-CGC-GG-03 of February 26, 2003 the CGC continued the suspension of activities. The State also mentioned that according to official letter No. 023-CGC-GG-05 of June 15, 2005 the suspension was maintained.[115]

103. On April 10, 2003, the Ombudsman of the Province of Pastaza issued a ruling regarding the complaint filed on November 2002 (*supra* paras. 85 and 86), in which, based on the allegations made by the parties, the act of recognition of the scene of the events and international law, it decided to admit the complaint and ruled that the Minister of Energy and Mines and Chairman of the Board of PETROECUADOR and the attorney and legal representative of the CGC, were in full violation, *inter alia*, of Articles 84(5) and 88 of the Political Constitution of Ecuador, ILO Convention No. 169, and Principle 10 of the Rio Declaration on Environment and Development. Likewise, it declared the Minister of Energy and Mines and Chairman of PETROECUADOR and the attorney and legal representative of the CGC responsible for these violations. [116]

104. Regarding the damages to the Sarayaku territory, it was argued, without this being challenged by the State, that in July 2003, the CGC destroyed at least one site of particular importance in the spiritual life of members of the Sarayaku People, on the land of *Yachak* Cesar Vargas. [117] The events were recorded by the First Notary of Puyo in the following terms:

> […] At the point known as PINGULLU, a tree whose name is LISPUNGU, measuring approximately twenty meters in height and one meter in width was destroyed. […] In the evening […], we interviewed the elderly Shaman Cesar Vargas […] who stated […]: That employees from the oil company had entered his sacred forest in PINGULLU and destroyed all the trees that existed there, particularly, the great tree of Lispungu, which has left him without the power to obtain medicine to cure the ailments of his children and relatives […].

105. Similarly, the State has not disputed the fact the company opened seismic trails, [118] set up seven heliports,[119] destroyed caves, water sources and underground rivers needed to provide drinking water for the community; [120] it also cut down trees and plants of great environmental and cultural value, used for subsistence purposes by the Sarayaku People. [121] Nor has the State disputed the fact that the arrival of helicopters destroyed part of the so-called *Wichu kachi Mountain*, or "place of the parrots," a site of great value in the worldview of the Sarayaku People.[122] The oil

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115 *Cf.* Answer to the petition (Merits file, volume 2, page 494).

116 *Cf.* Resolution of the Ombudsman's Office of Pastaza Province, dated April 10, 2003 (Evidence file, volume 8, pages 4831 and subsq.)

117 *Cf.* First Notary of the Canton of Pastaza, Dr. Andrés Chacha Gualoto, Notarial Certification of July 20, 2003 (Evidence file, volume 9, page 5225).

118 *Cf.* Maps provided as attachments to brief of pleadings and motions (Evidence file, volume 12, page 7297, and Appendix 124, document in electronic format).

119 *Cf.* Testimony rendered before a notary public by Gloria Berta Gualinga Vargas, on June 27, 2011 (Evidence file, volume 19, page 10037) See also *Report on the Visit to the Community of Sarayaku, to investigate Complaint by the OPIP against the Compañía General de Combustibles*. Commission on Human Rights. National Congress of the Republic of Ecuador, May 8 2003 (Evidence file, volume 10, page 6155); Press Release of the Kichwa Association of Sarayaku of January 17, 2003, (Evidence file, volume 10, page 6396); Report of the Ministry of Energy and Mines of Ecuador of March 7, 2006, Appendix 48, volume 10, page 6398; Community Self-evaluation of the impacts suffered by the Kichwa People of Sarayaku due to the actions of the CGC oil company in their territory" (Evidence file, volume 11, page 6588).

120 *Cf.* Roberto Narváez. Social Study *"Afectaciones a la Calidad of Vida, Seguridad y Soberanía Alimentaria en Sarayaku"*, Quito 2010, (Evidence file, volume 11, page 6757).

121 *Cf.* Roberto Narváez. Social Study *"Afectaciones a la Calidad of Vida, Seguridad y Soberanía Alimentaria en Sarayaku"* page 6759. See also expert report rendered by Anthropologist Rodrigo Villagra before the Inter-American Court of Human Rights during the public hearing held on July 7, 2011; testimony rendered by Sabino Gualinga before the Inter-American Court of Human Rights during the public hearing held on July 6 2011; testimony rendered by Marlon René Santi Gualinga before the Inter-American Court of Human Rights during the public hearing held on July 6, 2011.

122 Specifically, César Santi stated that ''[t]wo months ago the company passed through here with a seismic line and now there are no birds, the owner left, the *Amazanga*, because when the owner leaves all the animals leave …As the helicopters have been stopped from coming here, if we leave things quiet for a good while, perhaps the animals will return.'' FLACSO Study, "Sarayacu: el Pueblo del Cénit", page 6721.

company's work led to the suspension, during some periods, of the Sarayaku People's ancestral cultural rites and ceremonies, such as *Uyantsa*, the most important festival held each year in February, [123] and the seismic line passed near sacred sites used for initiation ceremonies for young people reaching adulthood.

106. For its part, after visiting the Sarayaku Community on May 8, 2003, the Human Rights Commission of Ecuador's National Congress issued a report which concluded that "[t]he State, through the Ministries of Environment and Energy and Mines, violated paragraph 5) of Article 84 of the Political Constitution of the Republic, by failing to consult the community on plans and programs for the exploration and exploitation of non-renewable resources found on their lands and which could affect them environmentally and culturally." This Congressional Commission also concluded that by negotiating separately with the communities, the CGC did not recognize the leadership of the OPIP, which created conflicts between the groups. It also confirmed the damage caused to the territory's flora and fauna. As regards the population, the report concluded that "[t]here was a violation of human rights, given that serious psychological harm was caused to the children of the community who witnessed the confrontation with the army, the police and the CGC's security staff, and that the leaders of the OPIP were arrested and accused of terrorism, and were then subjected to physical abuse, which affected their personal integrity, something prohibited by the Political Constitution of the Republic." [124]

H. Alleged threats and attacks against members of the Sarayaku Community

107. Between February 2003 and December 2004 a number of incidents of alleged threats and harassment were reported against leaders, community members and a Sarayaku lawyer. [125]

108. On December 4, 2003, about 120 members of the Sarayaku People were attacked with machetes, sticks, stones and firearms by members of the People of Canelos, in the presence of police officers, when they were going to a "march for peace and life" which was to take place on December 5 and 6 in Puyo, due to the danger of "militarization in Block 23." [126]

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[123] The festival activities serve to renew the links with the territory and social bonds. People return to the recreational areas (*purinas*) and hunting areas, reinforcing the connection of these areas to the territory. Also, according to members of the Community, the Sarayaku festival involves the participation of all the Kurakas, as well as authorities and leaders, and the *yachaks* who visit the houses of the festival to order and transmit peace and respect, so that conflicts do not occur (FLACSO, "Sarayacu: el Pueblo del Cénit" (Evidence file , pages 6672-6676). See also statements of Simón Gualinga and Jorge Malaver in Community Self-evaluation of the impacts suffered by the Kichwa People of Sarayaku due to the actions of the CGC oil company in their territory" (Evidence file, volume 11, page 6588).

[124] Report on the Visit to the Sarayaku Community to investigate the Complaint by the OPIP against the CGC Company. Commission on Human Rights. National Congress of the Republic of Ecuador, May 8, 2003. (Evidence file , volume 10, page 6155).

[125] *Cf.* Complaint filed on April 19, 2004 for threats received via email on April 3, 2004, and telephone threats; Complaint filed by José Gualinga on February 27, 2003 before the District Attorney's Office of Pastaza, for an alleged false report regarding his death in a road accident. (Evidence file , volume 10, pages 6164 and 6165), and Complaint of March 1, 2004 filed by Marlon Santi before the 2nd National Police Station of the Canton of Quito (Evidence file , volume 10, page 6287) over the alleged events of February 29, 2004 in which he was assaulted. Also, on April 23, 2004 José Serrano Salgado, then the attorney and legal representative of the Sarayaku People, reported that he was attacked and assaulted by three armed and hooded men, who warned him to discontinue the defense of Sarayaku (Evidence file , volume 10, pages 6336 and 6337). In December 2004, Mr. Marlon Santi, then a candidate to the presidency of CONFENAIE, reported to the Attorney General's Office of Ecuador that on December 21 and 22, 2004, whilst participating in the CONAIE conference in the city of Otavalo to elect a new president, an election in which he was involved as a candidate, he received "telephone calls […], in which I was told that I would be killed, and that I should withdraw my candidacy to president or else I would not be breathing in twenty-four hours." He stated that he was reporting this matter as it "constitutes a threat to my physical and mental integrity and an act of persecution and harassment against my People and as such of my status as an indigenous leader." Complaint filed by Marlon Santi and his lawyer José Serrano, before the Attorney General of Ecuador, (Evidence file, volume 10, page 6338).

[126] *Cf.* Preliminary decision of the investigation by the Ombudsman's Office of Pastaza Province, Puyo, December 5, 2003 (Evidence file, volume 9, pages 5127 and 5128) and Preliminary Inquiry signed by the Prosecutor's Office on December 9, 2003 (Evidence file, volume 9, pages 5130 and 5131). See also, reports of the Provincial Police Authority of Pastaza No. 16: December 4, 2003, signed by Police Lieutenant Wilman Oliver Aceldo Argoti and two reports of December 5, 2003, signed by Police Lieutenant Patricio Campaña and Police Major Aníbal Sarmiento Bolaños (Evidence file, volume 9, pages 5135 to 5140)

109. In this regard, on December 1, 2003, the Kichwa Association of Sarayaku had sent a communication to members of Canelos inviting them to join the march.[127] In response to this communication, the next day the Indigenous Kichwa Association of Canelos "Palati Churicuna" issued a press release stating that it had decided not to participate in the march and warning that "as is known at the provincial level […] movement is totally suspended for those who have strongly opposed the oil matter."[128] On December 4, 2003, Police Lieutenant Wilman Aceldo met with the President of the Parish Board of Canelos, who warned the lieutenant that "if the decision by Canelos not to allow passage through Canelos territory is not respected, [there will be] greater confrontations." [129]

110. The State sent a security contingent to the area consisting of 10 officers. Police Lieutenant Aceldo Argoti, who was there, stated:

> […] all the settlers [of Canelos] were gathering in order to prevent the Sarayaku people from traveling to the city of Puyo, to march for peace and for life […] I went to the Cuyas area to await the arrival of the people from Sarayaku. [At] about 1.00 p.m., five people arrived, but from that moment the inhabitants of Canelos indicated their clear refusal to allow any movement through and, approximately 500 meters from where we were they cut down a tree in the pathway to stop us from leaving […] and immediately our security personnel provided protection, to avoid mishaps again […] on the other side of the bridge near the school they had found around 110 Sarayaku, and so we redoubled our forces on the bridge with a police barricade but our efforts were not enough as the police barricade broke down, at which point they began to chase the Sarayaku people, armed with sticks …we tried to avoid conflict, exhausting our efforts, and they chased them for 10 minutes, and when they caught up with them, a fight broke out in which some people were injured. [130]

111. In this incident, incident, members of the Kichwa People of Sarayaku were injured, among them, Hilda Santi Gualinga, Silvio David Malaver Santi, Laureano Gualinga, Edgar Gualinga Machoa, José Luís Gualinga Vargas, Victoria Santi Malaver, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Gualinga Machoa, Heriberto Gualinga Santi, Jorge Santi Guerra, Aura Cuji Gualinga, María Angélica Santi Gualinga, Clotilde Gualinga, Emerson Alejando Shiguango Manya, Romel F. Cisneros Dahua, Jimy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga, and Cesar Santi. [131]

112. In light of these events, on December 5, 2003, the Ombudsman's Office of the Province of Pastaza filed a complaint *ex oficio* and issued a resolution in which it concluded that the leaders and members of the Indigenous People of Canelos were responsible for: a) flagrant violation of the right to move freely through national territory, a right guaranteed and recognized in Article 23-14 of the Political Constitution of the Republic; b) criminal infraction, as established and sanctioned in Article 129 of the Criminal Code; and c) violation of Article 12 paragraph 1 of the International Covenant on Civil and Political Rights. [132]

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and Report of the Parish Council of Canelos on the confrontation between the People of Canelos and the People of Sarayaku, undated (Evidence file, volume 9, pages 5141 to 5144). See also list of persons who allegedly attacked members of the Kichwa People of Sarayaku on September 4, 2003 (Evidence file, volume 9, pages 5146 and 5147) and eleven statements by 36 of the people accused of these incidents (Evidence file, volume 9, pages 5001 and subsq.).

127 *Cf.* Report of Parish Board of Canelos on the confrontation between People of Canelos and the People of Sarayaku, page 5111.

128 *Cf.* Report of the Parish Council of Canelos on the confrontation between the People of Canelos and the People of Sarayaku, page 5112.

129 *Cf.* Report of the Parish Council of Canelos on the confrontation between the People of Canelos and the People of Sarayaku, page 5112. Also see police report of December 4, 2003 (Evidence file , volume 9, pages 5116 and 5117).

130 Report submitted to the Provincial Commander of Pastaza No. 16 of December 4, 2003, signed by Police Lieutenant Wilman Oliver Aceldo Argoti, (Evidence file, volume 9, pages 5135 a 5137). Also see Preliminary Inquiry 845-2003 confirming the confrontation (Evidence file, volume 16, page 9230 and subsq.).

131 *Cf.* Medical certificates of the Public Prosecutor's Office, Department of Legal Medicine and Forensic Science, December 9, 2003 (Evidence file , volume 9, page 5149 and subsq.), Pastaza Police report No. 16 of December 5, 2003, signed by Police Lieutenant Patricio Campaña, Photos taken at the hospital (Evidence file, volume 11, page 6578 and subsq.); Preliminary Inquiry 845-2003 confirming the confrontation, pages 9230 and subsq.

132 *Cf.* Preliminary ruling of investigation, officially opened by the Ombudsman's Office of Pastaza Province on December 5, 2003, Appendix 45 to the petition.

113. In response to the complaint filed by the Ombudsman's Office, the District Attorney of Pastaza initiated a preliminary inquiry into these events on December 9. [133] The Attorney's Office carried out some investigation procedures. [134]

I. Facts subsequent to the suspension of the activities of the CGC company

114. On August 3, 2007 an Inter-institutional Cooperation Agreement was signed between the Ministry of Mines and Oil and the National Police, in order to proceed to remove the pentolite from Sarayaku territory, pursuant to the provisional measures ordered by the Court. [135]

115. On April 22, 2008 the Regulations for the Application of Social Participation Mechanisms, established in the Law on Environmental Management[136] were promulgated, regulating, among other aspects, the mechanisms and scope of social participation in environmental management. [137]

116. Article 57 of Ecuador's Constitution of 2008, which entered into force on October 20 of that year, establishes that "the [...] collective rights of indigenous communes, communities, peoples and nations are recognized and shall be protected, in accordance with the Constitution and with human rights agreements, conventions, declarations and other international instruments."

117. On April 20 2009, Management Council of PETROECUADOR decided to lift the suspension of activities in Blocks 23 and 24, decreed on February 6, 2003 (*supra* para. 102) and ordered the immediate resumption of certain activities mentioned in the participation contracts. [138]

118. Based on an official letter issued by the Ministry of Mines and Oil on May 8, 2009, the oil company had been permitted to resume its activities.[139]

119. In July 2009, the State reported that it had initiated a negotiation process with CGC to terminate the aforementioned participation contracts. [140]

120. On October 2, 2009, an Inter-institutional Cooperation Agreement was signed between the Ministry of Natural and Non-renewable Resources and the National Police to remove the pentolite from Sarayaku territory, both from the surface and the material buried deep in block 23, which involved three phases that would be regulated by the Undersecretary for Hydrocarbon Policy and the National Police of Ecuador through the Intervention and Rescue Group (GIR for its Spanish acronym). [141]

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133 *Cf.* Preliminary Inquiry 845-2003 confirming the confrontation, page 9230 and subsq.

134 *Cf.* Preliminary Inquiry of December 9, 2003 (Evidence file, volume 16, pages 9253 and 9254); Certification of appointment of expert witnesses of December 9, 2003 (Evidence file, volume 16, page 9255); Legal-medical certificates of December 9, 2003 (Evidence file , volume 16, pages 9256-9295); statements of suspects, taken on May 4, 5, 14 and 20, and June 4 and 8, 2004 (Evidence file, volume 16, pages 9313-9370); witness statement June 10, 2004 (Evidence file , volume 16, pages 9371-9372), and report on inquiry at the scene of the events involving Sarayaku and Canelos, of April 23, 2004 (Evidence file, volume 16, pages 9359 to 9360).

135 *Cf.* Inter-institutional Cooperation Agreement between the Ministry of Mines and Oil and the National Police to proceed with removal of pentolite (Evidence file, volume 14, pages 8679-8680).

136 *Cf.* Executive Decree 1040 of April 22, 2008, "Regulations for the Application of Social Participation Mechanisms established in the Law on Environmental Management," Official Record No. 332, May 8, 2008.

137 This regulation also annulled Executive Decree No. 3401, Official Record No. 728 of December 19, 2002.

138 *Cf.* Official letter dated May 8, 2009 of the Ministry of Mines and Oil (Evidence file, volume 9, page 5228, and volume 14 page 8661) referring to Resolution No. 080-CAD-2009-04-20 of April 20, 2009 of the Management Council of PETROECUADOR.

139 *Cf.* Official letter of May 8, 2009 of the Ministry of Mines and Oil.

140 *Cf. Evidence file* , volume 9, page 5232.

141 *Cf.* Response of the State (Merits file, volume 2, pages 496-497).

121. On December 17, 2009, a "modification agreement" was approved, with the aim of increasing the budget allocated to the plan for "Reparation and Remediation of Environmental Damage," to $8,640.00 USD. [142] The State was to remove 14 kg. of the pentolite buried near the surface.[143]

122. As confirmed in an official letter dated September 16, 2010, containing the Deed of approval by the Undersecretary for Environmental Quality of the "Comprehensive Environmental Assessment of Block 23, the representative of the CGC was required to: "a) Submit a schedule and specific deadlines for the implementation of activities contemplated in the Action Plan, including those referring to information on the management of pentolite, the current status of this explosive; environmental impact of the search and evaluation of the buried material, [etc.]." [144]

123. On November 19, 2010, in a document drawn up before a notary public, PETROECUADOR signed a Deed of Termination, by mutual agreement with the CGC, of the participation agreement for exploration and exploitation of crude oil in Block 23. [145] The representatives noted that despite having expressly requested it, the Sarayaku People were not informed of the terms of the negotiation between the State and the CGC, or of the conditions under which the Act was signed.[146] According to the terms of the Act of Termination of the contract of Block 23, in clause 8(4), the parties (PETROECUADOR and CGC) agree and ratify that there is no environmental liability in the concession area that is attributable to the contractor. [147]

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[142] Office of the Attorney General of Ecuador, "Modification Agreement" to increase the budget allocation, of December 17, 2009 (Evidence file, volume 14, page 8707).

[143] In the context of the provisional measures, at the end of 2009 the State reported that the pentolite was being removed in two phases: the first phase involved removing the material found on the surface, a task that had already been completed and, a second, involving the material buried underground. As to the first phase, the State had previously reported that in December 2007 an Inter-institutional Cooperation Agreement was signed between the Ministry of Mines and Oil and the Sarayaku People, which concluded in April 2008 with approximately 40% of the preliminary works completed. To complete the rest of the preliminary work, a second Agreement was signed between the Sarayaku People and the Ministry in April 2008. In October and December 2009, a new cooperation Agreement was signed. In the first phase, the State reported that the explosives on the surface were removed in three sub-phases– a visual search by explosives technicians of the Intervention and Rescue Group of Ecuador's National Police (GIR), a search with technological equipment and a search with the help of dogs trained to detect explosives. Thus, in July 2009 the GIR staff entered the territory of the Sarayaku and proceeded to conduct a visual search and manual removal of 14 kilograms of pentolite. This explosive material was burned and detonated in a controlled manner on August 24, 2009 at the Provincial Police Station of Pastaza, in the presence of a representative of the District Attorney's Office of Pastaza, leaders of the Sarayaku Community, representatives of the Ministry of Justice and Human Rights and the press. The State added that the search area for the explosives was delimited according to the information provided by the community and that the second phase, namely, the removal of the material buried underground, was still pending, due to disagreements with community members over the method to be used. However, the State insisted that the material lodged underground did not pose a danger to the community, given the depth at which the explosives are buried. Finally, the State admitted that it did not have definite information regarding the amount of explosives that might be in the area in question. *Cf. Matter of the Indigenous People of Sarayaku regarding Ecuador*. *Provisional measures.* Order of the Inter-American Court of February 4, 2010, Considering paragraph 8. See http://www.Corteidh.or.cr/docs/medidas/sarayaku_se_04.doc

[144] Act of Termination by mutual agreement of the participation contract for the exploration of hydrocarbons and exploitation of crude oil in Block 23, Annex XV, No. MAE-SCA-2010-3855 of September 16, 2010 (Evidence file, volume 17, page 9595).

[145] Act of Termination by mutual agreement of the participation contract for the exploration of hydrocarbons and exploitation of crude oil in Block 23, of November 19, 2010 (Evidence file, volume 17, pages 9389 and subsq.).

[146] *Cf.* On July 30, 2010, the Secretary for Hydrocarbons of the Ministry of Non-Renewable Natural Resources, sent the Sarayaku Official letter No. 24-SH-2010 109964 (Evidence file, volume 10, page 6451) requesting a "certified copy of the technical and legal file of the Sarayaku case, in relation to the operations in Block 23 and in the territory, before the Inter-American Court of Human Rights and the relevant printed and electronic documents. With reference to said official letter, on August 4, 2010, the Sarayaku requested from the Secretary for Hydrocarbons a certified copy of the Memorandum of Understanding without receiving any reply. (Evidence file, volume 10, page 6451)

[147] Act of Termination by mutual agreement of the participation contract for the exploration of hydrocarbons and exploitation of crude oil in Block 23, of November 19, 2010, page 9412.

VIII
MERITS

VIII.1
RIGHTS TO CONSULTATION AND TO INDIGENOUS COMMUNAL PROPERTY

124. In this case, it must be determined whether the State adequately respected and guaranteed the rights of the Sarayaku People that were allegedly violated, in granting a contract for oil exploration and exploitation on their territory to a private company; in implementing said contract and causing a series of related events. Even though the State acknowledged that it did not carry out prior consultations in this case, it questioned its obligation to do so during the litigation and argued that certain actions carried out by the company satisfied the requirement to consult the indigenous communities of the area granted in concession. Unlike other cases heard by this Court, [148] in this case there is no doubt regarding the right of the Sarayaku People to their territory, one fully acknowledged by the State in domestic proceedings (*supra* paras. 55, 61 and 62) and an undisputed fact before this Court. The Court shall proceed to analyze a) the arguments of the parties; and b) the obligation to guarantee the right to prior consultation, in relation to the rights to communal property and cultural identity of the Sarayaku People.

A. Arguments of the parties

A.1 Right to Property,[149] in relation to the Obligation to respect the Right to[150]Freedom of Thought and Expression[151] and Political Rights[152]

125. The *C*ommission argued that the State violated the rights enshrined in Article 21 of the American Convention, in relation to Articles 1(1), 13, and 23 thereof, to the detriment of the Sarayaku Community and its members. In particular, it noted that Ecuadorian law contains a

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[148] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of February 1, 2000. Series C No. 66; *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of June 17, 2005. Series C No. 125; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146; *Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010 Series C No. 214.

[149] Article 21 of the American Convention establishes: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law […]".

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

[151] Article 13(1) of the American Convention states: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

[152] Article 23 of the American Convention states: "1. Every citizen shall enjoy the following rights and opportunities: a) to take part in the conduct of public affairs, directly or through freely chosen representatives […]".

number of constitutional and legal provisions on the rights of Indigenous Peoples that require the State to adopt special measures to guarantee the effective enjoyment of human rights, without restriction, and to include measures to promote the full realization of their social, economic and cultural rights, respecting their social and cultural identity, their customs, traditions and institutions. It added that, based on Article 21 of the Convention and the case law of the bodies of the Inter-American System, at the time when the contract with the CGC was signed, the State was under an obligation to consult Community members in advance, in a free and informed manner, in order to give them an opportunity to participate in this process and, if deemed appropriate, file judicial actions. In that sense, it also noted that under the evolutionary interpretation of Article 21 of the Convention concerning the rights of indigenous peoples and the ratification of ILO Convention 169, Ecuador was under the obligation, prior to approving the EIA, to consult the Sarayaku People in a free, prior and informed manner with specific procedural safeguards.

126. In relation to Article 13 of the Convention, the Commission argued that, as part of the consultation process, the State should have provided clear, sufficient and timely information on the nature and impact of the activities to be carried out and on the prior consultation process. It added that in a case such as this, access to information is vital for the proper exercise of democratic oversight of the State's administration with respect to the exploration and exploitation of natural resources in the territory of indigenous communities, a matter of obvious public interest. At the same time, in relation to Article 23 of the Convention, the Commission pointed out that, by failing to inform or consult the Sarayaku People about a project that would directly impact their territory, the State was in breach of its obligations, under the principles of international law as well as under domestic law, to adopt all necessary measures to guarantee the participation of indigenous peoples, through their own institutions and in accordance with their values, traditions, customs and forms of organization, in the decisions made regarding matters and policies that affect or may affect the social and cultural life of indigenous peoples.

127. The representatives argued that the State was internationally responsible for violating Articles 21, 13 and 23 of the Convention, in relation to Article 1(1), to the detriment of members of the Sarayaku People, for allowing and supporting the incursion of third parties into the Sarayaku territory and for not protecting their use and enjoyment of the natural resources found therein, which are the basis of their livelihood. They alleged the same violations as the Commission, having regard to the following facts and circumstances: i) the State not only signed the contract with the company without consulting the Community and obtaining its consent, but it also allowed and supported (through the "militarization of the territory") the illegal incursion of the CGC company into the territory, despite the Community's repeated opposition, ii) the unauthorized use and destruction of the territory by the oil company during its incursion between November 2002 and February 2003, when nearly 200 kilometers of primary forest were clear-cut. This action affected the area's resources, which is particularly serious given the Community's dependence on these resources for its livelihood, iii) the leaving of explosives in the territory, and iv) the destruction of sacred areas. The representatives added that while the entire territory was sacred, the company destroyed specific sites of special cultural and spiritual value. Thus, the granting and subsequent implementation of the oil concession took place without the State having guaranteed the Community's effective participation in consultations and its free, prior and informed consent, according to its traditions and customs, in such a way that it would reasonably benefit from the plan and without having conducted a preliminary study of the social and environmental impact by an independent entity under the supervision of the State. The representatives also claimed that the violation of Article 21 is aggravated by the State's failure to comply with the precautionary measures of the Commission and the provisional measures ordered by the Court, particularly the failure to remove the pentolite from the territory.

128. The State argued that, having signed the contract for oil exploration with the CGC in 1996, it was under no obligation to initiate a consultation process, or obtain the free, prior and informed consent of the Sarayaku People, since it had not yet ratified ILO Convention 169 and because the Constitution at that time made no provision to that effect. Thus, based on Article 28 of the Vienna Convention on the Law of Treaties, this was a legally non-existent obligation for Ecuador. The State

emphasized that this in no way implied any disregard or disrespect for the land rights of indigenous peoples, and therefore the State adjudicated the territory to the Sarayaku People. This is not an unlimited property title, because according to the provisions of the adjudication contract the State's power to build roads or other infrastructure is not restricted and its institutions and Security Forces have free access to the territory to fulfill their constitutional obligations. Furthermore, it argued that underground natural resources belong to the State, which may exploit these without interference provided that it does so in accordance with environmental protection standards.

129. The State also pointed out that, even if there were no obligation to engage in prior consultation, the State considered that the participation of indigenous peoples in matters that affect them and the right to be consulted are essential for their social and cultural development. However, it argued that there is no regulation authorizing indigenous communities to exercise a "right of veto" over a decision made by the State concerning the exploitation of natural resources, particularly those underground.

130. The State added that despite the lack of any obligation in this regard, in August 2002 the CGC company, the alleged victims and other communities signed an agreement to "develop the seismic 2D" in which it was acknowledged that the company had informed the parties in an appropriate, timely and repeated manner about the seismic project prior to its execution. The State also alleged that the company sought an understanding with the communities in order to carry out its contractual activities; that an environmental impact assessment was carried out in 1997 which had also been duly and properly "discussed" with the affected communities, although "in practice it was never implemented." Furthermore, when the Constitution of 1998 entered into force, the Environmental Management Plan was updated.

131. The State argued that the constant and repeated lack of cooperation and reactive attitude of members of the Sarayaku Community had prevented the full implementation of compensatory measures agreed by the CGC. For his reason, the declaration of *force majeure* remained in effect and the contract was terminated without a single barrel of oil having been extracted.

132. With regard to the alleged violation of freedom of expression of the Sarayaku People, the State considered that, based on the facts of this case, there has been no act or omission to their detriment that is attributable to it.

133. The State noted that access to political participation by indigenous peoples, in general, had been guaranteed, more fully as of the nineties, and that the Sarayaku leaders hold innumerable positions of political power in public institutions and have participated in many elections. Furthermore, the State reiterated that, with regard to political participation in consultations on mining activities, at the time of the concession, Ecuador had not accepted any domestic or international legal framework that recognized the right to culture as a central focus of public policies related to natural resource extraction. Consequently, the institutions and mechanisms enabling indigenous people to exercise political participation prior to undertaking natural resource extraction projects had not been incorporated in such a way as to constitute a justiciable right. Finally, the State recalled that the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169 and a wide range of collective and comprehensive constitutional rights were implemented as of 1998.

A. 2 Right to Freedom of Movement and Residence[153]

[153] Article 22 of the American Convention states: "1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right lo leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest […]".

134. The Commission argued that the inability of the Sarayaku People to move freely within their own territory, and their inability to leave it, all with the acquiescence and participation of State agents, leads it to conclude that the State is responsible for the violation of the right to free movement, protected under Article 22 of the American Convention, to the detriment of the Sarayaku People. Specifically, the Commission considered that the State was fully aware of the problem of freedom of movement affecting the Sarayaku People, but did not offer or implement the necessary or sufficient measures of protection to remedy this situation. In this regard, the Commission recalled that travel by boat across the Bobonaza River is the most usual form of transport for members of the Community, who cannot use the air strip given that for many years it was not suitable for takeoff and landing of airplanes. Similarly, the Commission argued that the State is responsible for having impeded the freedom of movement and travel of the Sarayaku People by setting up military posts. Finally, it also mentioned that the placement of explosives on the community's territory affected the free movement of its members, reducing the areas in which they could look gather food and ensure their subsistence.

135. Based on the foregoing, the representatives argued that a violation occurred, in the first place, because of the State's failure to provide protection to guarantee the Sarayaku People's freedom of movement along the Bobonaza River and within their own territory, despite having knowledge of the attacks and restrictions on this right by third parties. Moreover, the freedom of the Sarayaku to navigate the river was directly restricted by soldiers stationed in Jatun Molino in January 2003. They argued that the police admitted that blockades were used by the Community of Canelos as a repressive measure against Sarayaku for their opposition to the oil activities. The representatives stated that these restrictions were disproportionate, given that the Sarayaku exercised their right of movement through the only access route to their territory without affecting others. They also recalled that these facts are even more serious, given that the Sarayaku People's settlement in the Amazon jungle is extremely inaccessible. Finally, they alleged that the State failed to investigate or punish the attacks by third parties against the freedom of movement.

136. The State argued that the Commission and the representatives did not provide conclusive evidence to reliably establish that there had been any violation; on the contrary, it was demonstrated that the State had guaranteed this and other rights of the Community. Moreover, it pointed out that the adjudication made by the IERAC in 1992 clearly shows that this did not affect their freedom of movement. Also, it argued that during the seven years that the provisional measures have been in force, "no unfortunate events have been reported."

A.3 Economic, Social and Cultural Rights[154]

137. The representatives argued that Ecuador violated the right to culture of the members of the Sarayaku People, contained in Article 26 of the Convention, in relation to Article 1(1) thereof. They argued that the State, by granting the concession in the territory of the Sarayaku People without consulting them, violated their right to culture, given their special relationship with their territory. They added that this violation occurred due to the State's lack of action, when the company entered the area, to protect and preserve sacred areas of cultural importance as well as traditional customs, the celebration of rites and other daily activities that form part of their cultural identity, which caused serious damage to fundamental aspects of the Sarayaku worldview and culture. The representatives mentioned that the Sarayaku People's suspension of their daily activities and the adults' dedication to the defense of the territory had a profound impact on the teaching of cultural traditions and rituals to the children and young people, as well as on the transmission and perpetuation of the elders' spiritual knowledge.

[154] Article 26 of the American Convention states: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires, by legislative or other appropriate means."

138. The Commission did not allege a violation of Article 26 of the Convention and did not refer to the arguments of the representatives

139. The State argued that there was no violation of Article 26 of the Convention. It stated that the right to culture is a central concern of the State and that some of the most important indicators of this concern are reflected in the institutions that Ecuador has developed in accordance with the constitutional provisions. The State also argued that the representatives define culture from "a fixed ethnic notion" and therefore "do not grasp the integration and polysemy of the cultural dimension of indigenous peoples, or in general of any components of human socialization, be it urban or rural."

A.4 Duty to Adopt the Provisions of Domestic Law[155]

140. The Commission argued that the State did not adopt the provisions of domestic law to guarantee the right of access to information and the right to prior consultation, and therefore considered it responsible for violating Article 2 of the Convention. Specifically, the Commission noted that Decree No. 1040 of April 2008 makes no reference to the right of access to information or to the right to prior consultation with indigenous peoples, in line with applicable international standards, and does not stipulate that the delivery of information through so-called "mechanisms of social participation" must be accessible, adequate and timely, under the terms described in this petition. Furthermore, although the right to prior consultation is enshrined in both the 1998 and the 2008 Constitutions, to date Ecuador has no mechanism or specific procedures to effectively implement the framework established in the new Political Constitution, the National Plan on Human Rights and in ILO Convention No. 169.

141. The representatives essentially agreed with the Commission's comments regarding the violation of Article 2 of the Convention.

142. The State, for its part, considered that it had not violated Article 2 of the Convention and stressed that the Constitution is in the process of being harmonized with the laws, regulations and other regulatory bodies, and that international human rights instruments are being incorporated into all substantive and adjective reforms.

A.5 Obligation to Respect Rights

143. The representatives and the Commission argued that the State is responsible for the alleged violations, cited previously, in relation to Article 1(1) of the Convention.

144. The State argued that it did not violate Article 1(1) of the Convention. In particular, it argued that, in terms of preventing human rights violations, the Ministry of Justice and Human Rights was created specifically to bring the citizens and the State closer to a system that respects rights and guarantees. It also stated, "[i]n regard to the investigation of crimes and violence that can affect the rights of individuals, the Attorney General's Office has developed a system called *"Indigenous Prosecutors,"* who by knowing Kichwa and Spanish, and other constitutionally recognized languages, greatly facilitate the gathering of evidence and the investigation of alleged criminal offenses." The State also noted that in neighboring communities of Sarayaku, and within the community itself, the Indigenous prosecutors have played an important role "when they have not been hindered by the residents." Finally, it stated that the representatives have not exhaustively demonstrated that the State violated general obligations of an *erga omnes* nature.

[155] Article 2 of the American Convention establishes: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

F. The obligation to guarantee the right to consultation in relation to the rights to communal property and cultural identity of the Sarayaku People

B.1 The right to communal indigenous property

145. Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements stemming from these. [156] Among indigenous peoples there exists a communitarian tradition related to a form of collective land tenure, inasmuch as land is not owned by individuals but by the group and the community. [157] This notion of land ownership and possession does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific forms of use and enjoyment of property, based on the culture, uses, customs and beliefs of each community, 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 people. [158]

146. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected with the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the Convention so that they can continue living their traditional lifestyle, and so that their cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States. [159]

147. Moreover, lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities;[160] or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language.[161]

B.2 The special relationship between the Sarayaku People and their territory

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156 *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Para. 148, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 85. Also, Inter-American Commission, *Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia* Doc. OAS/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 156.

157 *Cf. Case* of *the Mayagna (Sumo) Awas Tingni Community v.Nicaragua*, para. 140 and *Case of the Xákmok Kásek Indigenous Community v. Paraguay* paras. 85-87.

158 *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 120 and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 87.

159 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs*, paras. 124, 135 and 137, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, paras. 118 and 121.

160 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs,* para 164.

161 *Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay*, paras. 73.61 to 73.74 and *Case of Xákmok Kasek v. Paraguay*, paras. 205, 207 and 208.

148. To determine the existence of a relationship between indigenous peoples and communities and their traditional lands, the Court has established that: i) this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and ii) the relationship with the land must be possible. Some ways in which this relationship is expressed may include traditional uses or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or harvesting; use of natural resources associated with their customs or other elements inherent to their culture. [162] The second element implies that Community members are not prevented, for reasons outside their control, from carrying out activities that reveal the enduring nature of their relationship with their traditional lands.[163]

149. In this case, the Court finds that there is no doubt regarding the Sarayaku People's communal ownership of their territory, which is exercised in a time-honored and ancestral manner. This was expressly recognized by the State through the adjudication made on May 12, 1992 (*supra* para. 61). Notwithstanding the foregoing, in addition to the points noted in the section on the facts of the case (*supra* paras. 51 to 57), the Court considers it pertinent to emphasize the deep cultural, non-pecuniary and spiritual ties that the community has with its territory, so as to more fully understand the damages caused in this case.

150. Mr. Sabino Gualinga, *Yachak* of Sarayaku, stated during the public hearing that "Sarayaku is a living land, a living jungle; there are trees, medicinal plants and other types of beings there." [164] Previously, he had stated:

> Beneath the ground, *ucupacha,* there are people living as they do here. There are beautiful towns down there, and there are trees, lakes and mountains. Sometimes you hear doors shutting in the mountains; this is the presence of the men that live there…We live in the *caipacha*. In the *jahuapacha* lives the powerful and ancient sage. There everything is flat, it is beautiful… I don't know how many *pachas* there are above, where there are clouds there is a pacha, where the moon and stars are there is another, beyond this there is another pacha, where there are pathways made of gold, beyond this there is another *pacha* where I have been, it is a planet of flowers where I saw a beautiful hummingbird which was drinking honey from the flowers. I arrived at this point, but I couldn't go beyond. All the ancient sages have studied in order to arrive at the *jahuapacha*. We know that god is there, but we have not reached it.[165]

151. In a previous statement, Mr. Gualinga had explained that "the extermination of life is intolerable; with the destruction of the jungle, the soul is erased, we stop being people of the jungle." [166]

152. The current Sarayaku President, José Gualinga, stated that in this "living jungle" there are "noises and special phenomena" and it is "the inspiration where, when we are in these places, we feel a breath, an emotion and then when we return to the people, to our family, we are strengthened." [167] These spaces "give us the power, potential and energy that is vital to our survival and life. And everything is interconnected with the lagoons, the mountains, the trees, the beings and also us as an exterior living being." [168] He further stated: "[W]e were born, we have grown, our

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[162] *Cf. Case of Yakye Axa Indigenous Community v. Paraguay*, *Merits, Reparations and Costs,* para. 154, and *Case of Xákmok Kásek v. Paraguay,* para. 113.

[163] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* para. 132 and *Case of Xákmok Kásek v. Paraguay,* para. 113.

[164] Testimony rendered by Sabino Gualinga before the Court during the public hearing held on July 6, 2011.

[165] FLACSO. *Sarayaku: el Pueblo del Cénit*. Page 96 (Evidence file, volume 11, page 6678).

[166] FLACSO. Sarayaku: el Pueblo del Cénit, page 6729.

[167] Testimony rendered before a notary public José María Gualinga Montalvo, on June 27, 2011 (Evidence file, volume 19, page 10016)

[168] Testimony rendered before a notary public José María Gualinga Montalvo, page 10016.

ancestors have lived on these lands, and also our parents, in other words, we are natives of this land and we live from this ecosystem, from this environment."[169]

153. For the Sarayaku, an intimate relationship exists between the *Kawsak Sacha* or "living jungle" and its members. According to Mrs. Patricia Gualinga:

> It is an intimate relationship, a relationship of harmonious coexistence. The *Kawsak Sacha* for us is the living forest, with everything that it implies; the living forest with all its beings, with all of its worldview, with all of its culture with which we are intertwined. […] These beings are extremely important. They provide us with vital energy, they maintain the balance and abundance, they maintain the entire cosmos and are connected with each other. These beings are essential not just for the Sarayaku, but for the equilibrium of the Amazon, they are all connected and for this reason the Sarayaku Community so ardently defends its living space.[170]

154. During the public hearing, the expert witness Rodrigo Villagra Carrón stated that "the territory, knowledge, possibilities, production potential, but also human reproduction are intimately linked." [171] Similarly, he considered that "the cultural identity of each cultural group is dependent on the special relationship it has with Nature, expressed in a wide range of practices regarding management, protection, use, or primary extraction of natural resources, goods and services from the ecosystems." For his part, the expert witness Victor López Acevedo explained that "for the Sarayaku it is not acceptable to depend on the State or other groups that demand goods, because they understand that the land is their greatest asset, in the sense that it contains all the material elements that determine appropriate social interaction, and where the beings which represent their spiritual beliefs are found. These beliefs are based on a different value system from that of the society around them, and constitutes their *raison d'être* and their reason for living." [172]

155. The proven and undisputed facts in this case show that the Kichwa People of Sarayaku have a deep and special relationship with their ancestral territory, which is not limited to ensuring their livelihood, but rather encompasses their own worldview and cultural and spiritual identity.

B.3 Protective measures to guarantee the right to communal property

156. The Inter-American Court has pointed out that when States impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories and natural resources, certain guidelines must be followed. Thus, "when indigenous communal property and individual private property enter into real or apparent contradiction, the American Convention and the Court's jurisprudence provide guidelines to define the admissible restrictions," [173] which must be previously established by law, be necessary, proportional and aimed at achieving a legitimate objective in a democratic society without denying a people their livelihood. [174] The Court has stated that, in cases concerning natural resources in the territory of an indigenous community, in addition to the above standards, the State is required to verify that these restrictions do not imply the denial of the survival of the indigenous people themselves.[175]

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[169] Testimony rendered before a notary public José María Gualinga Montalvo, pages 10028-10029. See also: Testimony rendered before a notary public by Franco Tulio Viteri Gualinga, on June 27, 2011 (Evidence file, volume 19, pages 9994-9995)

[170] Testimony rendered by Patricia Gualinga before the Inter-American Court during the public hearing of July 6, 2011.

[171] Expert opinion rendered by anthropologist Rodrigo Villagra before the Inter-American Court during the public hearing held on July 7, 2011.

[172] Expert opinion rendered by anthropologist Prof. Víctor López Acevedo before a notary public, on June 29, 2011 (Evidence file, volume 19, pages 10145-10146).

[173] *Cf. Case of Indigenous Community Yakye Axa v. Paraguay, Merits, Reparations and Costs,* para. 144. See also *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs* para. 128.

[174] *Cf. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, para. 128. Similarly, *Case of the Yakye Axa Indigenous Community v Paraguay,* paras.144 and 145.

[175] *Cf. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs,* para. 129.

157. For this reason, in the case of *Saramaka v. Suriname*, the Court held that in order to ensure that the exploration or extraction of natural resources in ancestral territories does not imply a negation of the survival of indigenous people themselves, the State must comply with the following safeguards: i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development plans or large-scale investment; ii) conduct an environmental impact assessment, and iii) where applicable, reasonably share the benefits arising from the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of such compensation should be, according to its customs and traditions.[176]

158. In this case, no specific arguments have been presented in relation to those standards to determine the admissibility or validity of the communal ownership restrictions to the Sarayaku territory, or in regard to one of the protection measures regarding the requirement to share the benefits. Accordingly, the Court will not examine these issues and will proceed to refer to the right to consultation.

B.4 The State's obligation to guarantee the right to consultation of the Sarayaku People

159. The Court notes, then, that the close relationship between indigenous communities and their land is generally an essential component of their cultural identity based on their own worldview, which, as distinct social and political actors in multicultural societies, should be specifically recognized and respected in a democratic society. The recognition of the right to consultation of indigenous and tribal communities and peoples is founded, *inter alia*, on respect for their rights to their own culture or cultural identity (*infra* paras. 212 to 217), which should be assured in a pluralistic, multicultural and democratic society. [177]

160. It is for all the aforementioned reasons that one of the fundamental guarantees for ensuring the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is recognized in ILO Convention No. 169, among other complementary international instruments. [178]

161. In other cases,[179] this Court has pointed out that human rights treaties are living instruments, whose interpretation must evolve over time and reflect present day living conditions.

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[176] *Cf. Case of the Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs,* para. 129. and *Case of the Saramaka People V. Suriname. "Interpretation of the Judgment"* on *Preliminary Objections, Merits, Reparations and Costs.* paras. 26 and 27.

[177] Regarding this point, by way of example, in Judgment C-169/01, the Constitutional Court of Colombia declared: "The Court has now recognized that "pluralism establishes conditions so that the axiological content of constitutional democracy has root and democratic foundation. In synthesis, the free and popular choice of best values is formally justified by the possibility of choosing other values without restriction, and materially for the reality of a higher ethic". (Judgment C-089/94, ibid). The same judgment emphasized the democratization of the State and society prescribed by the Constitution, which can be linked to a progressive effort of historical construction, in which it is essential that the public domain and the political system are open to constant recognition of new social actors. Consequently, it is only possible to speak of a true, representative and participative democracy when the formal and material composition of the system maintains an adequate correspondence with the diverse forces of which society is composed, and allows all of them to participate in making decisions that concern them. This is particularly important in for the Social Rule of Law, which presupposes the existence of a deep interconnection between the traditionally separate spaces of the "State" and "Civil Society," and which seeks to overcome the traditional notion of democracy, seen simply as formal government of the majority, in order to better adapt to reality and include within the public debate, as active subjects, different social groups, minorities or those in the process of consolidation, thereby fostering their participation in decision-making processes at all levels.

[178] *Cf. Case of the Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs,* para. 134. Also see ILO Convention No. 169, Articles 6 and 17, and United Nations Declaration on the Rights of Indigenous Peoples, Articles 19, 30(2), 32(2) and 38.

[179] *Cf*. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/97 of November 14, 1997. Series A No. 15, para. 114. Case of the "Street Children" (Villagrán Morales et al.), Merits, para. 193 and Case of the Gómez Paquiyauri Brothers. Merits, Reparations and Costs, Judgment of July 8, 2004. Series C No 110, para. 165.

This evolutionary interpretation is consistent with the general rules of interpretations established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties. In this sense, the Court has declared that in interpreting a treaty it is necessary to take into account not only the agreements and instruments formally related thereto (Article 31(2) of the Vienna Convention), but also the system of which it forms part (Article 31(3) of the same instrument). [180] Similarly, this Court has considered that it could "address the interpretation of a treaty provided it is directly related to the protection of human rights in a Member State of the Inter-American System,"[181] even if that instrument does not belong to the same regional system of protection. [182] Accordingly, the Court has interpreted Article 21 of the Convention in the light of domestic legislation concerning the rights of members of indigenous and tribal peoples in cases involving Nicaragua[183], Paraguay[184] and Suriname,[185] for example, also taking into account ILO Convention No 169. [186]

162. In this regard, the reiterated case law of this Court since the *Case of Yakye Axa v. Paraguay*, is applicable to this case:

> Given that the instant case concerns the rights of members of an indigenous community, the Court deems it appropriate to recall that, pursuant to Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals who are not subject to their jurisdiction. However, it is necessary to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as it indeed it will in the instant case, to assess the scope and content of the Articles of the American Convention, which the Commission and the representatives claim were breached by the State.[187]

163. Convention No. 169 of the ILO concerning Indigenous and Tribal Peoples of 1989 applies, *inter alia,* to "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations,"[188] and for

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[180] Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, para. 113; Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, Merits paras 192 and 193; and Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 78.

[181] "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 21; Interpretation of the American Declaration on Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 44, and The Legal Status and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 22.

[182] Cf. Legal Status and Human Rights of the Child, para. 22. See also The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, para. 109, and "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), paras. 14, 32 and 38. Furthermore, "no good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system." "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), para. 48, and Legal Status and Human Rights of the Child, para. 22.

[183] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras.* 148-153.

[184] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs*, paras. 138-139, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* paras. 122-123 and *Case of the Xákmok Kásek Indigenous Community v. Paraguay,* para. 143.

[185] *Cf. Case of Saramaka People v. Suriname*, *Preliminary Objections, Merits, Reparations and Costs*, paras. 106-117, and *Case of the Moiwana Community, Preliminary Objections, Merits, Reparations and Costs*, paras. 86.39 to 86.41.

[186] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs*, paras. 125-130; *Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs*, paras. 93 and 94, and *Case of Sawhoyamaxa Indigenous Community v. Paraguay*, paras. 117.

[187] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *Merits, Reparations and Costs*, para. 51 and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, paras. 59-60.

[188] ILO. *Convention No. 169.* Article 1.1.a

whom States "shall have the responsibility of developing, with the participation of the peoples concerned, coordinated and systematic actions to protect the rights of these peoples and to guarantee respect for their integrity."[189] Articles 13 to 19 of this Convention refer to the rights of those populations to their land and territories" and Articles 6, 15, 17, 22, 27 and 28 regulate the different situations in which prior, free and informed consultations should be applied in cases where measures are contemplated that affect them.

164. Various Member States of the Organization of American States have incorporated these standards into their domestic legislation, and through their highest courts. Thus, the domestic regulations of several States in the region, including Argentina[190], Bolivia[191], Chile[192], Colombia[193], United States[194], Mexico[195], Nicaragua[196], Paraguay[197], Peru[198] and Venezuela[199], refer to the

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189 ILO. Convention No. 169. Article 2

190 The National Constitution of Argentina of 1994, in Article 75.17, recognizes the ethnic and cultural preexistence of the indigenous peoples of Argentina, the legal status of their communities and their communal possession and ownership of the lands they traditionally occupy, declaring that none of these shall be sold, transferred or be subject to liens or embargoes. Moreover, the same provision guarantees the participation of indigenous peoples "in the management of their natural resources and other interests affecting them."

191 The Political Constitution of Bolivia recognizes the right of indigenous peoples to be consulted "through appropriate procedures, and in particular through their representative institutions, whenever legislative or administrative measures are considered which may affect them. In this context, the right to compulsory prior consultation conducted by the State, in good faith and with consensus, with respect to the exploitation of non-renewable natural resources in the territory they inhabit shall be respected and guaranteed." (Art. 30. II.15). In addition to constitutional provisions, Bolivian domestic legislation makes numerous references to the right to prior consultation such as Law 3058 of May 19, 2005, Article 78 of Environmental Law 1333 of April 27, 1992, and Executive Decree No. 29033 of February 16, 2007 which regulates the process of Prior Consultation, particularly Article 4, which includes the principles of integrity and participation.

192 In Chile, Article 34 of the Indigenous Law No. 19.253 of 1993 stipulates that "when addressing matters that affect or are related to indigenous issues, the services of the State administration and local organizations shall hear and consider the views of indigenous organizations recognized by this Law."

193 In Colombia, Article 330 of the Political Constitution states that "[t]he exploitation of natural resources in indigenous territories shall be undertaken without detriment to the cultural, social and economic integrity of the indigenous communities. In decisions taken with respect to such exploitation, the Government shall encourage the participation of representatives of the respective communities." Furthermore, several provisions in Colombian law refer to prior consultation: Colombia's *General Law on the Environment*, Law 99 of 1993, in Article 76, regulates the methods and procedures for the participation of indigenous and black communities in the environmental framework; Decree No. 1397 of 1996; Law No. 70 of 1993, Article 44; Presidential Directive Number 01, 2010; Decree 1320, of 1998; Decree Law No. 200 of February 3, 2003; Decree No. 1220 of 21 April 2005; Decree No. 4633 of 2011; and Decree No. 4633 of December 9, 2011.

194 In the United States, the right to prior consultation was codified in the Northwest Decree passed by Congress in 1787. In this regulation, it was established that the territories of indigenous peoples "cannot be invaded or disturbed, unless it is under a declaration of war ordered by Congress." Moreover, the obligation to carry out a consultation is established in the National Historic Preservation Act of 1966, 16 USC §§ 470(a)(d)(6)(B) & 470(h) (1992); the National Environmental Policy Act (NEPA); the Native American Graves Protection and Repatriation Act of 1990 § 3 (c), and the American Indian Religious Freedom Act. See also Executive Order 12875 (1993) which stipulated that the Federal Government must consult Tribal Communities on issues that may significantly affect them; Executive Order 13007 (1996) which stipulated that federal agencies must allow access to sacred sites and avoid actions that harm the integrity of these places; and Executive Order 13175 (2000), which established a Government policy requiring that regular consultations be carried out with communities before implementing federal policies that affect them.

195 The Constitution of the United Mexican States provides that "[t]he Federal Government, the states, and the municipalities, in order to promote equal opportunities for indigenous people and eliminate any discriminatory practices, must establish institutions and determine the necessary policies to ensure the effectiveness of indigenous rights and development of their peoples and communities, which must be designed and operated in conjunction with them: [...] Consult indigenous peoples in drafting the National Development Plan and those of states and municipalities and, where appropriate, incorporate their recommendations and proposals." Constitution of the United Mexican States, Title I, Chapter 1, Article 2.B. See also, *Law of the National Commission for the Development of Indigenous Peoples* of May 21, 2003, the *Planning Law* of June 13, 2003; *General Law on the Linguistic Rights of Indigenous Peoples* of March 13, 2003. Likewise, several Mexican states have promulgated legislation referring to prior consultation: *Law on Indigenous Consultation for the State and Municipalities of San Luis Potosí* of July 8, 2010; *Law on the Rights, Culture and Organization of Indigenous Peoples and Communities of the State of Campeche* of June 15, 2000; *General Law on Indigenous Peoples and Communities of the State of Durango* of July 22, 2007; *Law on the Rights and Culture of Indigenous Peoples and Communities of the State of Querétaro* of July 24, 2009; Law *on Indigenous Rights and Culture of the State of Chiapas* of July 29, 1999; *Regulations of the Law on Rights, Culture and Development of Indigenous Peoples and Communities of the State of Puebla* of July 22, 2011; *Law for the Promotion and Development of the Rights and Culture of the Indigenous Peoples and Communities of the State of Morelos* of January 18,

importance of consultation or of communal property. Furthermore, a number of domestic courts of the countries in the region that have ratified ILO Convention No. 169,[200] have made reference to the right to prior consultation pursuant to the provisions of that agreement. In this regard, the high courts of Argentina[201], Belize[202], Bolivia[203], Brazil[204], Chile[205], Colombia[206], Costa Rica[207], Ecuador[208],

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2012; *Law on Indigenous Rights and Culture of the State of Nayarit* of December 18, 2004; *Article 9 of the Political Constitution of the State on Indigenous Rights and Culture* of September 13, 2003, Political Constitution of the Free and Sovereign State of San Luis Potosí of July 11, 2003; *Law on Indigenous Rights and Cultures of the State of Veracruz, Ignacio de la Llave* of November 3, 2010; *Law on the Rights and Development of Indigenous Peoples and Communities of the State of Jalisco* of January 11, 2007; *General Law on Indigenous Peoples and Communities of the State of Durango* of July 22, 2007; Law *No. 701 Recognition of the Rights and Culture of Indigenous Peoples and Communities of the State of* Guerrero of April 8, 2011; *Law on Indigenous Rights and Culture of the State of Baja California* of October 26, 2007; Political Constitution of the Free and Sovereign State of Chihuahua, Article 64; Political Constitution of the State of Durango, February 22, 2004; Political Constitution of the Free and Sovereign State of Jalisco of April 29, 2004; Law on Indigenous Rights and Culture of the State of Mexico of September 10, 2002; Political Constitution of the Free and Sovereign State of Puebla of December 10, 2004; and the *Law of Indigenous Rights, Culture and Organization of the State of Quintana Roo* of November 20, 1996.

196 The Political Constitution of the Republic of Nicaragua states that "[t]he Communities of the Atlantic Coast [...] have the right to preserve and develop their cultural identity within national union; establish their own forms of social organization and manage their affairs according to local traditions." Moreover, it adds that the State "recognizes communal forms of land ownership of the Communities of the Atlantic Coast. It also recognizes the enjoyment and use of the waters and forests of their communal lands" (Title IV: Rights, Duties and Guarantees of the Nicaraguan People, Chapter VI: Rights of the Communities of the Atlantic Coast, Article 89). Likewise, "the State shall guarantee these communities the enjoyment of their natural resources, the effectiveness of their forms of communal property, and the free election of their authorities and representatives." (Title IX: Political Administrative Division, Chapter II: Communities of the Atlantic Coast, Article 180). In addition, the *Law on communal ownership of the indigenous peoples and ethnic communities of the autonomous regions of the Atlantic coast of Nicaragua and of the rivers Bocay, Coco, Indio and Maiz*, states in Article 3 that Consultation is the "delivery of technical information regarding the operation or the project followed by a process of discussion and a decision thereon, during which communities should have translators who translate what has been said during this process into their languages and be assisted by experts in the field."

197 The Political Constitution of Paraguay of 1992 states in Article 64 that indigenous peoples "have the right to communal ownership of land in the extent and quality sufficient for the conservation and development of their distinctive ways of life."

198 The Law on the right to prior consultation with indigenous or native peoples, recognized in the ILO Convention No. 169, of September 6, 2011 which states, *inter alia*, that the right to prior consultation "[i]s the right of native or indigenous peoples to be consulted in advance on legislative or administrative measures which directly affect their collective rights, their physical existence, cultural identity, quality of life and development" and that [i]t is also appropriate to carry out consultation on national and regional development plans, programs and projects that directly affect these rights." See also the General Environmental Law No. 28611, Article 72.2 and Executive Decree 012-2008-EM, "Regulations on Citizen Participation for the Implementation of Hydrocarbon Activities" Article II: Purpose and Nation of the Participation.

199 Article 120 of the Constitution of the Bolivarian Republic of Venezuela of 1999 states that "[t]he exploitation of natural resources in indigenous habitats by the State shall be undertaken without harming the cultural, social and economic integrity thereof and likewise is subject to the prior information and consultation with indigenous communities concerned. The benefits of this use on the part of indigenous peoples are subject to the Constitution and the law." For its part, Article 11 of the *Organic Law on Indigenous Peoples and Communities* of December 8, 2005, provides that "[a]ny activity that could directly or indirectly affect indigenous peoples and communities must be consulted with the indigenous peoples and communities involved. The consultation shall be conducted in good faith, taking into account their language and spiritual views, respecting the particular organization, legitimate authorities and systems of communication and information of the members of the indigenous peoples and communities involved, in accordance with the procedure established in this Law. All activities to benefit from the use of natural resources and any development projects carried out in the habitat and lands shall be subject to the procedures of information and prior consultation, set forth in this Law."

200 The following countries of the region have ratified ILO Convention No. 169: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela.

201 The Supreme Court of Justice of Argentina has ruled that the guarantee of the right to communal property of indigenous people, "should take into account that the land is closely related to their traditions and oral expressions, their customs and languages, their arts and rituals, their knowledge and its uses related to Nature, their culinary arts, their customary law, their dress, philosophy and values", and "[t]he importance and fragility of the aforesaid assets should guide judges not only in the investigation of and decisions on substantive points of law, but also [...] of those related to "judicial protection" established in the American Convention on Human Rights (Art. 25), which have constitutional precedence" (CSJN, "Eben Ezer Indigenous Community c/Province of Salta – Ministry of Labor and Production s/ amparo" of September 30, 2008, C. 2124. XLI, a la p. 4). Likewise, the Superior Court of Justice of Neuquén, referring to the right to prior consultation of indigenous peoples, noted that it is "essentially a fundamental right of a collective nature, and therefore the State must establish procedures of good faith aimed at obtaining the free and informed opinion of these communities, when involving governmental actions, legislative or administrative measures which may affect them directly, in order to establish the agreements or arrangements that are of merit" The same court held that "recognition of [the right to prior consultation] arises as the result of an awareness of the need for a special advocate to safeguard the interests of human populations,

which due to factors linked to their cultural identity, have been neglected in the decision making processes of government and the functioning of state structures in general. Similarly, it stands as a guarantee of equality or mechanisms of equalization, in terms of the real ability of these populations to rule and influence provisions that affect their lives, to place them on the same footing as those corresponding to any group of citizens." TSJN, 25/10/10, Agreement No. 6 in the case " Mapuche Catalán Community and Indigenous Confederación Neuquina c/ Province of Neuquen s/ action of unconstitutionality" of October 25, 2010 File. No. 1090-1004. Also see First Chamber of the Supreme Court of Justice of Mendoza, Argentina, File No. 102.631, Judgment of May 18, 2012.

[202] The Supreme Court of Belize stated that "although Belize has not yet ratified [... ILO Convention No. 169 ...], there is no doubt that Article 14 of that instrument contains provisions on land rights of indigenous peoples that reflect the principles of international law concerning indigenous peoples." The Supreme Court of Belize, *Case of Aurelio Cal on his own behalf and on behalf of the Community of Santa Cruz Maya et al. v. Attorney General of Belize et al*.", cases 171 and 172, 2007, Judgment of October 18, 2007.

[203] The Constitutional Court of Bolivia has ruled on several occasions regarding the right to prior consultation. In particular, it noted that "the State's respect for the social, economic and cultural rights of indigenous peoples, especially those relating to their land of origin, guaranteeing the sustainable use and exploitation of the natural resources therein; making effective the guarantee to protect indigenous peoples for their special characteristics, including social, economic, conditions that distinguish them from the rest of the national community, and their own customs or traditions, and they are conscious of belonging to this community and deserve to be formally recognized as such by the State organs." Constitutional Court of Bolivia, Judgment 0045/2006, June 2, 2006. II.5.3. See also File No. 2008-17547-36-RAC, Judgment of October 25, 2010, III.5: "Consultation, according to Article 15.2 of ILO Convention Nº 169 includes resources existing on the lands of indigenous peoples, and indicates that when "the State retains ownership of mineral or sub-surface resources, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of the resources pertaining to their lands."

[204] The Fifth Federal Court of First Instance, Judicial District of Maranhão provided that "[t]he State cannot ignore the constitutional protection that forms part of one of the fundamental objectives of the Federative Republic of Brazil," that is, "to promote the good of all, without preconceptions of origin, race, sex, age or any other form of discrimination" (Federal Constitution 1988, Art. 3, IV), thus including the traditional Afro descendant communities (remnants of the quilombo communities), especially when, as highlighted by the representative of the Public Prosecutor's Office, the Brazilian government has confirmed its intention to establish public policies to combat discrimination against the traditional lifestyles of indigenous and tribal peoples, upon publishing the Legislative Decree No. 43/2000, ratifying ILO Convention No. 169. Fifth Federal Court of First Instance, Judicial District of Maranhão (Justiça Federal 1st Instance, Seção Judiciária do Maranhão, 5th Vara), Alves et al. Joisael v. Diretor Geral do lançamento Center of Alcântara ", Judgment No. 027/2007/JCM/JF/MA, Process 2006.37.00.005222-7 No, Judgment of February 13, 2007.

[205] Chile's case law has referred to the right to prior consultation, noting that in a case where a municipality proceeded to exploit lumber on a hillside, without consulting the indigenous communities concerned, it "had violated the right to psychological integrity of the petitioners, because there is no doubt that the intervention and destruction of their cultural heritage leads to a feeling of lack of respect for their social identity, their customs and their traditions and the conservation of the characteristics of their ethnicity, naturally causing distress and great concern." Court of Appeals of Conception, Chile, August 10, 2010.

[206] Regarding the right to free and informed consultation, the Constitutional Court of Colombia has stated "it is necessary that the State guarantee and encourage, in a coordinated manner, the real and effective implementation of the fundamental right to prior consultation of ethnic communities, primarily because the underlying tools that the consultation provides, allows parties to reconcile positions and reach a middle ground for intercultural dialogue in which the peoples exercise their right to autonomy with their own life plans regarding economic models based on market economy or the like." Constitutional Court of Colombia Judgment C-169/01, paragraph 3.1. Also, Colombia's Constitutional Court, Judgment T-129/11, paragraph 5.1. Furthermore, the Court noted that the obligation to consult by the State is a direct result of the right of native communities to decide priorities in their process of development and preservation of their culture (Judgment C 169/01, para. 2.3).

[207] The Constitutional Chamber of the Supreme Court of Justice of Costa Rica noted that the "Political Constitution should be interpreted and applied so as to allow and facilitate the independent living and development of ethnic minorities in Costa Rica, without any other limitations than those imposed by human rights on the conduct of all other persons." (Considering para. III). Regarding consultation with indigenous peoples, it established that "any legislative or administrative measure that is likely to directly affect the peoples concerned must be the subject of consultation with them." (Considering IV) In that regard, it recalled that because of the normative status granted by Article 7 of the Constitution, the ILO Convention No. 169 supersedes the laws and therefore, its protection falls within the scope of constitutional jurisdiction (Considering III). Constitutional Chamber of the Supreme Court of Justice of Costa Rica, 2011-1768 of February 11, 2011, Amparo Proceedings. *See also*, Constitutional Chamber of the Supreme Court of Justice of Costa Rica, Judgment 2000-08019, September 8, 2000.

[208] The Constitutional Court of Ecuador has discussed prior consultation in its jurisprudence, noting that "public consultation is another one of the major issues related to the management of the environment, and the participation of the people must be expressed at different stages of this process, that is, during the planning, policy development, environmental impact studies, monitoring and procedural legitimacy; the ability to file different petitions before the administrative or judicial

Guatemala[209], Mexico[210], Peru[211] and Venezuela[212] have noted the need to respect the norms of prior consultation and of this Convention. Other courts of countries that have not ratified ILO Convention No. 169 have also referred to the need to carry out prior consultations with indigenous, native or tribal communities regarding any administrative or legislative measure that directly affects them, as well as on the exploitation of natural resources in their territory. Thus, similar developments in case law are evident in the high courts of countries within the region, such as Canada[213] or the United States of America[214], or of those outside the region such as New Zealand.[215]In other words, the

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bodies must exist." Constitutional Court of Ecuador. Case of the Dry Swamps of Pastaza (222-2004-RA), Judgment of June 9, 2004, Considering Paragraph 12. On the other hand, it indicated that "any State decision that may affect the environment, on which the community should be duly informed, refers to the law to guarantee the participation of the community" and that "the participation of the public in environmental issues […] is considered essential as it is precisely the community who will face the consequences of various activities undertaken in their environment." Constitutional Court of Ecuador. Case of the IMAX Theater in the Parish of Cumbayá (679-2003-RA and 034-2003-TC), Considering Paragraph 6.

209 The Constitutional Court of Guatemala referred to the right to prior consultation of the indigenous peoples emphasizing that it essentially consists of "a fundamental right of a collective nature, according to which the State has the duty to establish procedures in good faith designed to obtain the free and informed opinion of these communities when governmental actions are proposed, either legislative or administrative, which may affect them directly, in order to establish meritorious agreements or measures." The Court further stated that "[t]his recognition is a result of the awareness of the need to advocate in a special manner to safeguard the interests of the human populations that, because of factors linked to their cultural identity, have been excluded from decision-making processes in the public arena and from state structures in general. Further, it stands as a guarantee of equality or mechanism of equalization, for these populations to have a real ability to decide and influence the provisions that affect their living conditions, in order to place them in the corresponding level as any other group of citizens." Constitutional Court, Guatemala, December 21, 2009, Appeal to Amparo Judgment, Exp. 3878-2007, Section V.

210 The Supreme Court of Justice, Amparo under review 781/2011. María Monarca Lázaro et al. March 14, 2012. Also, the Electoral Tribunal of Judicial Power of the Mexican Federation invoked Convention No. 169 to determine that failure to consult an indigenous community regarding elections is taken as an indication of lack of diligence by the authorities, which in the specific case, resulted in the Court's decision to consider the postponement of elections to be improperly motivated pursuant to indigenous customary law. Electoral Tribunal of Judicial Power of the Federation, *Joel Cruz Chavez et al. v. the Fifty-Ninth Legislature of the State of Oaxaca and others*, SUP-JDC-11/2007, judgment of 6 June 2007.

211 In its case law, the Constitutional Court of Peru has referred to the right to prior consultation in several decisions. In particular, the Court noted that in cases of exploitation of natural resources "it is necessary to consult indigenous communities that might be harmed by such activities" and that "not only shall those indigenous peoples in whose territory activities are carried out be consulted, but […] also indigenous peoples immediately adjacent to that area who are likely to be affected." In addition, the judgment stated that "any process shall begin with the determination of legislative or administrative measures that may directly affect indigenous people. Judgment of the Constitutional Court, Exp. No. 0022-2009-PI/TC, paragraphs 23 and 41. The Court also held that the right to ethnic identity comprises: [...] c. The right to be heard and consulted prior to any action or measure taken and that can affect them." Judgment of the Constitutional Court, Exp. No. Case No. 03343-2007-PA/TC, paragraph 30.

212 *Cf.* Judgment delivered by the Supreme Court of Justice, case file number 2005-5648, Judgment of December 6, 2005.

213 With respect to the land rights of indigenous peoples, the Supreme Court of Canada stated that "[t]he honor of the Crown requires that these rights be determined, recognized and respected. The latter requires that the Crown act honorably and participate in negotiation processes. During this process, the honor of the Crown may require a consultation and, where indicated, consider the interests of the indigenous population (*Haida v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, para. 25). As regards the obligation to consult, the Court established that the nature and scope of the duty to consult will vary depending on the circumstances and in all cases the obligation to consult must be exercised in good faith and with the intention of considering the interests of the indigenous population whose lands are at stake. It also found that the same consultation arises whenever the State seeks to establish restrictions on indigenous ownership (*Haida Vs. British Columbia,* para. 35). Moreover, the obligation to perform a consultation involves a process of listening with an open mind to what the indigenous group has to say and be prepared to change the original proposal. Similarly, the Supreme Court of Canada ruled that the obligation to consult was a duty of the State which increased in proportion to the severity of involvement of the right that was in question (*Haida v. British Columbia,* paras. 39 and 68). Finally, the Court also determined that the proposed intervention in indigenous territory by the State does not require an immediate impact on the territories or resources of the indigenous communities in order for the duty to consult to arise; it is sufficient that the activity of the State have a potentially negative impact on the territorial rights of the indigenous community. (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R 650 paras 31 and subsq.)

214 In the case of the Court of Appeals of the Ninth Circuit of the United States, Hoopa Valley v. Christie, 1986, the Court held that the concept of consultation requires prior discussion with an executive or community leader or one who has clear authority to represent the tribe to the agency. (*Hoopa Valley Tribe v. Christie,* 812 F.2d 1097 (1986)). In another the case in 1979, the Court established that the lack of prior consultation cannot be remedied by a meeting after the decision is taken of (*Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (1979)) Also, see *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395

obligation to consult, in addition to being a conventional standard, is also a general principle of International Law.

165. In other words, nowadays the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are to be affected is an obligation that has been clearly recognized. Such processes must respect the specific consultation system of each people or community, so that the consultation may be understood as an appropriate and effective interaction with other State authorities, political and social actors and other third parties concerned.

166. The obligation to consult Indigenous and Tribal Communities and Peoples on any administrative or legal measure that may affect their rights, as recognized under domestic and international law, as well as the obligation to guarantee the rights of indigenous peoples to participate in decisions on matters that concern their interests, is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1(1)). This implies the duty to adequately organize the entire governmental apparatus and, in general, all the organizations through which public power is exercised, so that these are capable of legally guaranteeing the free and full exercise of those rights.[216] The foregoing means that States have the obligation to structure their standards and institutions in such a way that indigenous, native or tribal communities can be consulted effectively, in accordance with international standards in this matter.[217] Thus, States must incorporate those standards within the prior consultation processes, so as to generate sustained, effective and reliable channels for dialogue with indigenous communities in processes of consultation and participation through their representative institutions.

167. Given that the State must guarantee the rights to consultation and participation in all phases of planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival, these processes of dialogue and consensus-building should take place from the first stages of planning or preparation of the proposed measures, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. To that effect, the State must ensure that the rights of indigenous peoples are not disregarded in any other activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests. Therefore, where applicable, the State must also carry out the tasks of inspection and supervision of their application and, when appropriate, deploy effective means to safeguard those rights through the corresponding judicial organs.[218]

(D.S.D. 1995); *Klamath Tribes v. U.S.*, 1996 WL 924509; *Confederated Tribes and Bands of the Yakama Nation v. U.S. Department of Agriculture*, 2010 WL 3434091, and *Quechan Tribe v. Department of Interior*, 755 F. Supp.2d 1104.

215 New Zealand Maori Council v Attorney General (1987) 1 NZLR 641; Gill v. Rotorua District Council [1993] 2 NZRMA 604, Haddon v. Auckland Regional Council [1993] A77/93, and Aqua King Limited v. Marlborough District Council [1995] WI9/95.

216 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 166, and *Case of Barrios Family v. Venezuela. Merits, Reparations and Costs.* Judgment of November 24, 2011. Series C No. 237, para. 47.

217 In that regard, Article 6.1 of ILO Convention Nº 169 states that "In applying the provisions of this Convention, governments shall: a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly [and] b) establish means by which the peoples concerned can freely participate, […] at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them." Likewise, Article 36.2 of the *United Nations Declaration on the Rights of Indigenous Peoples* establishes that "States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right." Article 38 of the same instrument provides that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration".

218 *Cf*. Articles 6, 15, 17.2, 22.3, 27.3, and 28 of ILO Convention No. 169 and Articles 15.2, 17.2, 19, 30.2, 32.2, 36.2 and 38 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

168. In the case of Ecuador, the current Political Constitution (2008) comprehensively protects the rights of indigenous communities.[219] Indeed, the expert witness Anaya noted at the public hearing held at the Court's headquarters that this Constitution is "one of the most advanced" and one of the "most exemplary in the world."[220] Furthermore, several provisions of Ecuador's legislation, issued between 2000 and 2010, reaffirm the right to property, among other rights, of indigenous Peoples who define themselves as nations with ancestral roots, as well as black or Afro-Ecuadorian Peoples, and establish requirements for consultations in a number of scenarios on the part of public institutions.[221] Nowadays, therefore, the right to consultation is fully recognized in Ecuador.

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219 The 2008 Constitution of Ecuador came into force on October 20, 2008. Article 57 of the Constitution establishes that "Indigenous communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: 1. To freely maintain, develop and strengthen their identity, feeling of belonging, ancestral traditions and forms of social organization. […]6. To participate in the use, enjoyment, administration and conservation of natural renewable resources located on their lands; 7. To free, prior and informed consultation, within a reasonable term, on the plans and programs for prospecting, exploiting and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them; to share in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation to be conducted by competent authorities shall be mandatory and timely. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken. 8. To preserve and promote their practices of managing biodiversity and their natural environment. The State shall establish and implement programs with the participation of the community to ensure the conservation and sustainable use of biodiversity. 9. To preserve and develop their own forms of peaceful coexistence and social organization and creating and exercising authority, in their legally recognized territories and ancestrally owned community lands; […] 16. To participate, through their representatives in the official organizations established by law, in formulating public policies that concern them, and in defining and deciding on their priorities in the plans and projects of the State.; 17. To be consulted before the adoption of a legislative measure that might affect any of their collective rights. […] 20. To restrict military activities in their territories, according to the law. […]"

220 Expert report of James Anaya during the public hearing held at the seat of the Court on July 7, 2011.

221 The Agrarian Development Act of April 16, 2004, Articles 3 and 49, provides, *inter alia*, that "This law seeks to guarantee the security of individual and collective ownership of land and seeks to strengthen community ownership based on the criteria of traditional production and enterprise […]The State shall protect the lands of INDA - Instituto Nacional de Desarrollo Agrario, [National Institute of Agrarian Development]] allocated for the development of the Montubio, indigenous and Afro-Ecuadorian populations and legalized by adjudication and at no cost to communities or ethnic groups that have been in their ancestral possession, under the condition that they respect their own traditions, cultural life and social organizations."(cf. Law of Agrarian Development, Code 2004-02, published in the Supplement to Official Gazette No 315 of April 16, 2004, Evidence file, volume 8, pages 4082 and subsq.) That same month, the *Law on Organization and Management of the Commune System* (code 2004-04, published in Supplement to Official Gazette No. 315, April 2004) was established, which stated that " the exercise of collective rights is guaranteed for Indigenous people who define themselves as nations with ancestral roots and black or Afro Peoples of the communities that form part of these collectives in accordance with the provisions of […] the Constitution." On April 16, 2004, the *Law on Vacant Lands and Colonization* (code 2004-03, published in Supplement to Official Gazette 315 of April 16, 2004) was established, which states that "communal lands in the possession of indigenous communities who define themselves as nations with ancestral roots and of black or Afro Peoples and of the communities that form part of these collectives, shall not be considered as vacant lands […] pursuant to the provisions of Article 84 of the Constitution of the Republic." On September 10, 2004, the Environmental Management Act (Official Supplement Record of 10 September 2004), was established, wherein Articles 28 and 29 provide that "Every natural or legal person is entitled to participate in environmental management through mechanisms established by the Regulations, among which consultations, public hearings, initiatives, proposals or any association between the public and private sectors are included. Action is granted to denounce those who violate this guarantee, subject to civil and criminal responsibility for complaints or accusations of reckless or malicious behavior. […] The failure to comply with the consultation process referred to […] by the Constitution of the Republic will deem the activity in question unenforceable and shall be grounds for revocation of the respective contracts. […] Any natural or legal person is entitled to timely and adequately inform on any activity of State institutions under the Rules of this Act, which may cause environmental impacts. For this, one may make requests and deduce actions either individually or collectively with the relevant authorities." On January 29, 2009, the Mining Act (official record supplement 517. January 29, 2009), was adopted, which provided in Articles 87, 89 Y90 that "[t]he State is responsible for executing the processes of participation and social consultation through the applicable public institutions according to constitutional principles and regulations. This responsibility is non-delegable to any private entity. These processes will aim to promote sustainable development of mining activities, as precautions to the rational utilization of mineral resources, respect for the environment, social participation in environmental and development matters in the areas of influence of a mining project. […] This process should be conducted in all phases of mining activity in the framework of procedures and mechanisms established in the Constitution and the law. […]. The processes of public participation or consultation should be considered a special procedure required by communities, peoples, and nations, on the principle of legitimacy and representation, through its institutions to those cases in which the mining exploration is conducted in their ancestral lands and territories where such work may affect their interests. " On April 20, 2010, the Law on Citizen Participation (Official Register No 175 (supplement), April 20, 2010) was established, which states that "[t]he collective right

169. In the instant case, the State signed a participation contract with the CGC company, on July 26, for exploration and exploitation of crude oil in block 23, which encompasses the Sarayaku territory.

170. According to expert witness Acosta Espinoza, prior to the entry into force of the 1998 Political Constitution and ILO Convention 169 in Ecuador, conflicts between indigenous territoriality and oil interests were resolved by the simple imposition of the State's will, without the State formalizing expropriation procedures; therefore, in practice, territories were occupied, populations were displaced and this even led to the disappearance of indigenous communities.[222]

171. The effective protection of indigenous communal property under the terms of Article 21 of the Convention in relation to Articles 1(1) and 2 thereof, imposes an obligation on States to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the land that they have traditionally used and occupied. Thus, under Article 29(b) of the Convention, the provisions of Article 21 of this instrument cannot be interpreted in a manner that restricts the enjoyment and exercise of rights recognized by the State in its domestic laws or in other relevant international regulations. [223] Under international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of a lifestyle that is strongly associated with their territory and the use of its natural resources.[224]

172. Even though, prior to the ratification of this Convention, the State had an obligation to guarantee the Sarayaku People their right to effectively enjoy their land, in accordance with their communitarian tradition, bearing in mind the specificities of their indigenous identity in their connection with the land, the State assumed the international commitment to guarantee the right to consultation, upon ratifying ILO Convention 169 in April 1998, and the collective rights of Indigenous and Afro-Ecuadorian people were enshrined the Political Constitution that entered into force in 1998,[225] yet the CGC company initiated seismic prospecting activities as of July 2002. It was on this date that the State approved, by way of the Ministry of Energy and Mines, the updating of the

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to free, prior, and informed consent within a reasonable time is guaranteed and recognized to all indigenous communes, communities, towns and nations, peoples, and Afro-Ecuadorian and Montubio people…In the case of prior consultation on plans and programs of exploration, exploitation, and marketing of non-renewable resources that are in indigenous territories and lands, commons, communities, peoples and nationalities, and Afro-Ecuadorian and Montubio people, by way of their legitimate authorities, they shall participate in the benefits that these projects will produce; likewise, they receive compensation for any negative social, cultural, and environmental factors caused. The consultation that will be conducted by competent authorities is mandatory and timely. If consent was not obtained of the collective subject, the procedure under the Constitution and the Law will be applied."

222 *Cf.* Brief of pleadings and motions, volume 1, pages 268-272. See also expert report rendered before a notary public by Economist Alberto José Acosta Espinoza, of June 30, 2011 (Evidence file, volume 19, pages 10072-10077)

223 For example, Ecuador had ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Thus, under Article 1 common to both agreements, indigenous peoples may "pursue their economic, social and cultural development" and "freely dispose of their natural wealth and resources" so that they are not "deprived of their own means of subsistence." Similarly, see *Case of the Saramaka People v. Suriname*, *Preliminary Objections, Merits, Reparations and Costs*, paras. 93-95. See also *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, para. 37, and *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. paras. 113-115 (supporting an interpretation of international human rights instruments that consider the progressive development of the *corpus juris* of international human rights over time and its current status).

224 *Cf. Case of Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs,* paras. 91, 92, 94 and 95. See also *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 149.

225 Article 84 of the Constitution of Ecuador (Chapter 5: Of collective rights, Section One: Of Indigenous, Black or Afro-Ecuadorian peoples) provides that: The State shall recognize and guarantee to Indigenous Persons, in accordance with the Constitution and the Law, and with respect to public order and human rights, the following collective rights: 2. To conserve the inalienable property of the communal lands, which will be inalienable, non-seizable and indivisible, unless declared publicly useful by the State. There lands shall be exempt from payment of property tax. 3. To preserve ancestral possession of community lands and obtain their free allocation, in accordance with the law. 4. To participate in the use, enjoyment, administration and conservation of the natural renewable resources located on their lands. 6. To conserve and promote their practices of managing biodiversity and their natural environment. 8. To not be displaced, as persons, from their lands. 9. To the collective intellectual property of their ancestral knowledge, to its valuation, use and development in accordance with the law. 10. To preserve, develop and administer their cultural and historical heritage.

Environmental Impact Plan, submitted by CGC and implemented by a subcontractor, which had been initially approved in August 1997. According to the State, this plan was approved on the basis of the Substitute Environmental Regulations for Hydrocarbon Operations. It has not been disputed that the company opened seismic trails, established heliports, destroyed caves, water sources and subterranean rivers, which provided the community's drinking water; cut trees and plants of environmental, cultural and nutritional value to the Sarayaku; and placed powerful explosives on the surface and subsurface of the territory. (*supra* para. 105).

173. Nor has it been disputed that another national regulation was in force since 1998, which established consultation mechanisms under the responsibility of the State (National Human Rights Plan of 1998[226] and the Law for the Promotion of Investment and Citizen Participation[227] of 2000). It was not until after the company's environmental impact Plan was approved, and the prospecting activities reactivated, that the *Regulations for Consultation on Hydrocarbon Activities* were approved in December 2002. Article one of this document states: [228]

> [A] standard procedure for the oil industry is the application of the constitutional right of consultation of indigenous communities, who define themselves as nations and Afro-Ecuadorians regarding prevention, mitigation, control and rehabilitation related to the negative socio-environmental impacts and to the promotion of positive socio-environmental impacts caused by hydrocarbon operations on their lands, and the participation of said Peoples and Communities in processes related to the consultations, the design of environmental impact studies, environmental management plans, including plans to promote community relations. [229]

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[226] *Cf.* National Human Rights Plan of Ecuador of June 18, 1998, Appendix 60. Article 8 (4) Establish as general objectives: Ensure that indigenous peoples are consulted before permitting projects for the exploration and exploitation of renewable and non-renewable resources located on their ancestral lands and territories and consider the possibility of indigenous peoples sharing equitably in the benefits arising from activities for the exploitation of those resources, as well as their right to be compensated for the damage caused.

[227] Published in Official Record No. 144, Supplement, of August 18, 2000.

[228] *Cf.* Executive Decree No. 3401 of December 2, 2002, Official Record No.728 of December 9, 2002 "Regulation on Consultation on Hydrocarbon Activities." This refers to the stages of the Consultation to be carried out; the Purpose of the preliminary (pre-tender) consultation with peoples, who identify themselves as indigenous nations and Afro-Ecuadorians; the Purpose of the preliminary consultation who identify themselves as indigenous nations and Afro-Ecuadorians; the subject matter of the consultation; decisions and agreements in the consultation with peoples, who identify themselves as indigenous nations and Afro-Ecuadorians; compensation due to social and environmental damage caused by hydrocarbon activities; the formalization of resolutions and agreements regarding the consultation with peoples, who identify themselves as indigenous nations and Afro-Ecuadorians; and the phases of development of hydrocarbon activities in which consultation is required prior to implementation. (Evidence file, volume 8, pages 4130 and subsq.)

[229] Similarly, Article 7 of Executive Decree No. 3401 requires that: "both consultation with the peoples who identify themselves as indigenous nations and Afro-Ecuadorians, and consultation with the citizens shall be carried out: a) Prior to the call for bids issued by the bodies in charge of bidding processes for hydrocarbons, which shall be termed pre-tender consultation; and, b) Prior to the approval of the environmental impact assessment for the implementation of hydrocarbon activities, in accordance with Article 42 of this Regulation, which shall be termed consultation prior to implementation." Article 8 establishes that: "[t]he purpose of the pre-tender consultation of Indigenous Peoples, who define themselves as nations and Afro-Ecuadorians is: a) to obtain, in advance, the views, comments, opinions, and proposals of the Indigenous People, who define themselves as nations and Afro-Ecuadorians living in the area directly affected of the block subject to tender, regarding the positive and/or negative socio-environmental impacts that might occur on their territories as a result of the plans and programs of the oil tender and the signing of the respective contracts for oil exploration and exploitation; b) Receive opinions on the general socio-environmental strategies and measures for prevention, mitigation, control, compensation, rehabilitation to the negative socio-environmental impacts, as well as on efforts to promote positive socio-environmental impacts, which should be taken into account by the body responsible for the oil tender process, the adjudication and signing of the contracts and the activities for monitoring their execution; and, c) Obtain opinions on the mechanisms of participation by Indigenous Peoples, who define themselves as nations and Afro-Ecuadorians, who live in the area directly affected by the block subject to tender, through their representative organizations, regarding the implementation of social and environmental measures of prevention, mitigation, compensation, control and rehabilitation related to the negative social and environmental impacts and to promote positive social and environmental impacts in their territories, due to the hydrocarbon activities carried out as a result of the bidding processes and the adjudication and signing of contracts for exploration and exploitation". Finally, Article 10 states that: "The purpose of prior consultation of Indigenous peoples, who define themselves as nations and Afro-Ecuadorians to obtain, in advance, the views, comments, opinions, and proposals of those living in the area of direct influence of the project, regarding the positive and/or negative socio-environmental impacts that might occur on their territories as a result of activities for the exploration and exploitation of hydrocarbons, and to determine the social and environmental measures of prevention, mitigation, compensation, control and rehabilitation related to the negative social and environmental impacts and to promote positive social and environmental impacts, which, if technically and economically viable and legally appropriate, shall be incorporated into the Environmental

174. In this case, based on the exploitation plan for Block 23, the oil concession involved seismic work in an important area of the Sarayaku territory, which would substantially affect the land, given the inherent and probable impacts of an oil project in the jungle.[230]The total area affected by the project in Sarayaku territory included primary forest, sacred sites, areas for hunting, fishing and food gathering, medicinal plants and trees and places used for cultural rites. Therefore, considering the impact that previous oil exploitation projects in Ecuador have had on the lives of indigenous peoples[231] and other inhabitants of the region, [232] it is understandable that the Sarayaku People should reasonably feel that a project of this magnitude would seriously affect their territory and way of life.

175. Indeed, it should be noted that the Sarayaku Community always opposed the company's entry into its territory through various activities within and outside the community, by decision of their own authorities (*supra* paras. 74, 80, 85, 87, 94 and 97). In this regard, during the public hearing Mrs. Patricia Gualinga stated that people in Sarayaku opposed the plan because "they had seen all the misery that oil exploitation had caused in other areas; they had seen everything that happened in Block 10 and all the division it was causing [...] and aside from that, they knew that part of their livelihood depended on defending their living space and territory."[233] Thus, during the first incursions of the CGC in November 2002, the Sarayaku People decided in an Assembly to declare a "state of emergency," and set up the so-called "Peace and Life Camps" (*supra* para. 100).

176. Given that ILO Convention 169 applies to the subsequent impacts and decisions stemming from oil projects, even though these had been contracted prior to its entry into force, [234] it is clear that at least since May 1999[235] the State was under the obligation to guarantee the Sarayaku

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Impact Assessment and Environmental Management Plan, including the Community Relations Plan (Evidence file, volume 8, page 4130 and subsq.).

230 In his expert report, William Powers describes the impacts inherent to an oil project in the jungle, which include the arrival of workers in the zone, the opening up of many trails involving the clearing of vegetation, impact on water courses, soil erosion and indirect effects of opening up an area to an exeternal population; explosives in order to create seismic waves; construction of heliports and temporary campsites; drilling of hundreds of production wells, flow lines between wells and production stations and a gas and/or oil pipeline to transfer production. Expert testimony rendered before a notary public by the engineer William Powers, June 29, 2010 (Evidence file, volume 19, pages 10090-100103).

231 *Cf.* Expert report rendered before a notary public by Economist Alberto José Acosta Espinoza, of June 30, 2011 (Evidence file, volume 19, pages. 10073-10077)

232 In this regard, the Inter-American Commission had established in 1997 that oil exploitation in eastern Ecuador would directly infringe upon the right to life of many of the inhabitants of the region, pointing out that these activities had exposed them to toxic by-products in the water which they use to drink and wash, in the air which they breathe, and the soil in which they grow their food. The Commission determined that this would pose a considerable risk to life and human health, since they would be exposed to increased risk of contracting serious illnesses (IACHR. *Report on the Situation of Human Rights in Ecuador.* OAS/Ser.L/V/II.96 Doc. 10 rev. 1(1997), Ch. VIII. The expert witness Alberto Acosta referred to the effects that the oil boom has had on the Ecuadorian Amazon, indicating that "[t]lhe indisputable fact is that since the second half of the sixties decade, oil activities have significantly harmed the biodiversity and well-being of the Amazon populations. The indigenous communities and settlers have suffered innumerable violations of their most basic rights, in the name of the mythical well-being of the entire population" (Evidence file, volume 19, pages 10073-10074).

233 Testimony rendered by Patricia Gualinga before the Court during the public hearing on July 6,2011. Also testimony rendered before a notary public by Gloria Berta Gualinga Vargas, June 27, 2011 (Evidence file, volume 19, page 10037).

234 In the context of Ecuadorian oil operations, the ILO Expert Committee affirmed that although the convention cannot be applied retrospectively, "the Agreement is applicable in the current circumstances [in Ecuador] with regard to the activities which occurred on May 15, 1999". According to the Committee, "the duty to consult the persons concerned is not only applicable to contracts but arises in the general context of the implementation of the Convention". Accordingly, the Committee established that from the aforementioned date onwards, the State would "fully apply" the Agreement, recommending that it "establish prior consultation in cases involving exploration and development of hydrocarbons which could affect indigenous and tribal communities, and to ensure the participation of interested persons in the various stages of the process, and similarly in the studies of environmental impact and the plans for environmental management" (ILO, representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), (ILO,) and 30).

235 Notwithstanding the fact that, pursuant to Article 18 of the Vienna Convention on the Law of Treaties, Ecuador was obligated to act in good faith in accordance with the purpose and object of the Convention (Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the

People's right to prior consultation, in relation to their right to communal property and cultural identity, in order to ensure that the implementation of the oil concession would not compromise their ancestral lands, livelihood or survival as an indigenous people.

B.5 Application of the right to consultation of the Sarayaku People in this case

177. The Court has established that in order to ensure effective participation by members of an indigenous community or people in development or investment plans within their territory, the State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties. Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. [236] Failure to comply with this obligation, or engaging in consultations without having regard to their essential characteristics, compromises the State's international responsibility.

178. It is appropriate, then, to determine the manner and sense in which the State had an obligation to guarantee the Sarayaku People's right to consultation and whether the actions of the concessionaire company, which the State described as forms of "socialization" or attempts at reaching an "understanding," satisfy the minimum standards and essential requirements of a valid consultation process with indigenous communities and peoples in relation to their rights to communal property and cultural identity. Therefore, it is necessary to analyze the facts by recapitulating some of the essential elements of the right to consultation, taking into account Inter-American standards and case law, State practices and the evolution of International Law. The analysis will be carried out in the following order: a) the prior nature of the consultation; b) good faith and attempts at reaching an agreement; c) appropriate and accessible consultation; d) environmental impact assessment , and e) informed consultation.

179. It is necessary to clarify that it is the State's obligation -and not that of the Indigenous Peoples- to effectively demonstrate, in this specific case, that all aspects of the right to prior consultation were effectively guaranteed.

a) Consultation must take place in advance

180. With regard to the moment at which the consultation should be carried out, Article 15(2) of ILO Convention No. 169 states that "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands." On this point, the Court has noted that consultation should take place, in accordance with the traditions of the indigenous people themselves, during the first stages of the development or investment plan and not only when it is necessary to obtain the community's approval, if this were the case, since prior warning would allow

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treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed).

[236] *Cf. Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs,* para 134.

sufficient time for internal discussions within the community and for it to provide an appropriate answer to the State.[237]

181. In this regard, the ILO's Expert Committee, upon examining a complaint that alleged non-compliance with ILO Convention No. 169 by Colombia, has established that the requirement of prior consultation implies that this process should take place before undertaking an action or implementing a project that is likely to affect the communities, including legislative measures, and that the affected communities must be involved as early as possible in the process. [238] When the prior consultation concerns the adoption of legislative measures, indigenous peoples must be consulted in advance during all stages of the process of drafting legislation, and these consultations should not be restricted to proposals.[239]

182. The domestic legislation[240] and case law of several countries of the region has also stated that consultation should take place in advance.[241]

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[237] *Cf. Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs* para.134. Likewise, the Declaration on the Rights of Indigenous Peoples stipulates that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions representative in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, use or exploitation of mineral, water or other resources". United Nations Declaration on the Rights of Indigenous Peoples, Article 32(2). See also expert report rendered by Rodolfo Stavenhagen, of June 24, 2011 (File of affidavits of the Representatives of the Alleged Victims, volume 19, page 10130).

[238] *Cf.* Report of the Committee established to examine the claim alleging non-compliance by Colombia of the Convention on indigenous and tribal peoples, 1989 (Nº 169), filed under Article 24 of the ILO Constitution by the *Central Unitaria de Trabajadores* (CUT), GB.276/17/1; GB.282/14/3 (1999), para. 90. Similarly, ILO, Expert Committee in Application of Conventions and Recommendations (CEACR), Individual Opinion on Convention No. 169, Argentina, 2005, para. 8. Also, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, of October 5, 2009, A/HRC/12/34/Add.6, Appendix A, paras. 18 and 19.

[239] *Cf.* Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 20.

[240] *Cf.* Law on Prior Consultation of September 6, 2011 of Peru, Article 4: "The consultation process shall take place prior to the adoption of any legislative or administrative measures by a State institution"; Law 3058, of May 17, 2005, Law of Hydrocarbons of Bolivia, Article 115: "the consultation shall take place at two stages: [p]rior to the bidding, authorization, contracting and approval of the hydrocarbon measures, works or projects, this being a requirement for it; and, prior to the approval of the Environmental Impact Assessments." Ecuador: Political Constitution of 2008, Article 57.17, Substitute Environmental Regulations on Hydrocarbon Operations, Executive Decree 1215, Official Record 265 of February, 13 2001, Article 9: "Prior to the start of any bidding process for state oil contracts, the body in charge of conducting the oil tender shall apply, in coordination with the Ministry of Energy and Mines and the Ministry of the Environment, the consultation procedures established in the Regulations issued for that purpose. Prior to the execution of plans and programs on exploration and exploitation of hydrocarbons, those subject to its control shall inform the communities included in the direct area of influence of the projects and to hear their suggestions and opinions […]" and Mining Law, Official Record 517.29 of January 2009, Article 89. United States: Executive Order 13175 (2000), *Section 5(b)(2)(A), 36 C.F.R. §800.2(c)(2)(ii)(A), and EPA Policy on Consultation and Coordination with Indian Tribes (Policy);* Mexico: Law of the National Commission for the Development of Indigenous Peoples, of May 21 2003, Venezuela: Organic Law on Indigenous Peoples and Communities of December 8, 2005, Articles 11-15. See also, Colombia: Presidential Order No. 01 of 2010, 2. Actions requiring the guarantee of the right to prior consultation.

[241] In that regard, the Constitutional Court of Peru stated that "[t]transferring this consultation to a moment after the publication of the measure removes the expectation of an underlying intervention in the consultation" which "would also imply that the consultation takes place on consummated actions, which could be construed as a lack of good faith. (Judgment of the Constitutional Court of Peru, Exp. No. 0022 - 2009 - PI/TC, para. 36). For its part, the Constitutional Court of Guatemala declared that this "should take place before the relevant actions have been defined." (Constitutional Court, Guatemala, December 21, 2009, Appeal of the Judgment of Amparo, Exp 3878-2007, V.). Likewise, the Constitutional Court of Colombia stated that "the process shall be undertaken starting with the stage of feasibility studies or planning and not at the end." Moreover, this it is mandatory to define the procedure to be followed in each process, specifically "through a 'pre-consultation' process to be carried out by mutual agreement with the community affected and other participating groups" (Constitutional Court of Colombia, Judgment of T-129/11, 7.1, page 93, and 8.1.vi) or "consultation on the consultation" (in order to "define the terms and conditions under which the prior consultation will take place, when deciding to initiate public works, as a specific stage of prior consultation, once the viability of the work is determined" (T-235/11)." See also Constitutional Court of Bolivia, Judgment 2003/2010-R (October 25, 2010), Exp 2008-17547-36-RAC. III.5. establishing that "consultations shall be carried out a) [p] rior to adopting or applying laws or measures that may directly affect indigenous peoples […]; b) [p]rior to approving any Project affecting their lands or territories and other resources […]; c) [p]rior to authorizing or initiating any program for the exploration or exploitation of natural resources found on the lands inhabited by indigenous peoples […] and, d) [p]rior to using indigenous lands or territories for military activities."

183. Having established that the State was obliged to carry out a prior consultation process in relation to the impacts and decisions arising from the oil exploration contract, at least since 1998 (*supra* para. 172), the State should have guaranteed the participation of the Sarayaku People and, consequently, ensured that no actions linked to the concession were carried out within their territory without consulting them previously.

184. In this regard, it is not disputed that the State did not carry out any form of consultation with the Sarayaku, at any stage of implementation of the oil exploration and through their institutions and representative bodies. In particular, the People were not consulted prior to the heliports being built, or trails being dug out, or explosives being buried, or prior to the destruction of areas of great value to their culture and worldview.

b) Good faith and attempts to reach agreement

185. According to the provisions of ILO Convention No. 169, consultations must be "carried out [...] in good faith and in a manner appropriate to the circumstances, with the aim of reaching an agreement or obtaining consent regarding the proposed measures." [242]

186. Moreover, the consultation must not only serve as a mere formality, but rather it must be considered as "a true instrument for participation," [243] "which should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties."[244] In this sense, it is an inherent part of every consultation with indigenous communities that "a climate of mutual trust be established,"[245] and good faith requires the absence of any form of coercion by the State or by agents or third parties that act with its authority or acquiescence. Furthermore, consultation in good faith is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, either through the corruption of community leaders or by establishing parallel leaders, or through negotiations with individual members of the community that are contrary to

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[242] ILO Convention No. 169, Art. 6(2). Similarly, see *Case of the Saramaka People v. Suriname*, *Preliminary Objections, Merits, reparations and Costs* para. 134. For its part, the Universal Declaration states that "[States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them [...]". United Nations Declaration on the Rights of Indigenous Peoples (Articles 19. and 32.2)

[243] "Report of the Committee in charge of examining the claim alleging non-compliance by Brazil with ILO Convention No. 169, filed under Article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF)", 2006, GB.295/17; GB.304/14/7, para. 42.

[244] ILO, CEACR, Individual Observation on the Convention No. 169, Bolivia, 2005. See United Nations, Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3, February 17, 2005; Moreover, the Permanent Forum on Indigenous Issues, established in the Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples that informed consent : "should imply that information is provided that covers (at least) the following aspects: a. The nature, size, pace, reversibility and scope of any proposed project or activity; b. The reason(s) for or purpose(s) of the project and/or activity; c. The duration of the above; d. The locality of areas that will be affected; e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);g. Procedures that the project may entail." Individual Observation on the Convention No. 169, Bolivia, 2005. See United Nations, Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3, February 17, 2005. See also, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, paras. 21, and 23.

[245] Report of the Committee responsible for examining the claim alleging non-compliance by Guatemala with the Convention on Indigenous and Tribal Peoples, 1989 (No. 169), filed under Article 24 of the ILO Constitution by the Federation of Rural and Urban Workers (FTCC), GB.294/17/1; GB.299/6/1 (2005), para. 53. See also, Report of the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 25.

international standards. Similarly, the legislation[246] and case law of the States of the region[247] have made reference to the requirement of good faith.

187. It should be emphasized that the obligation to consult is the responsibility of the State, [248] and therefore the planning and carrying out of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the same company that is interested in exploiting the resources in the territory of the community that is the subject of the consultation.[249]

188. During the process, the State argued that after the contract was signed, the CGC oil company sought an "agreement" or way of "socializing" with the communities in order to carry out its contractual activities and that in 1997 an environmental impact assessment was carried out by the Walsh Environmental Consulting company, a subcontractor of CGC. This assessment was updated and approved in 2002, following several legal reforms and the entry into force of the 1998 Constitution, and in line with Articles 34 and 41 of the Substitute Environmental Regulations on Hydrocarbon Operations. The State argued that this study had been "adequately and appropriately adapted to the social standards of the affected community, even though in practice it was never implemented."[250]It also argued that, pursuant to Article 37 of said Regulations, "on June 18, 19 and 22, 2002 [CGC organized] three public presentations on the Environmental Management Plan in the communities of Canelos, Pacayacu and Shauk." Thus, from the position taken by the State before this Court, it is clear that State authorities sought to endorse the oil company's actions as forms of consultation. Such "presentations" did not include Sarayaku. This "socialization and contact" was conducted by the very same company that intended to carry out the oil exploration and, therefore, it was attempting to negotiate its entry into the territory.

189. During the visit by the Court delegation to the Sarayaku territory, the State, in accepting its responsibility in this case, acknowledged that it had not carried out a proper prior consultation process (*supra* para. 23). In other words, the State not only recognized that it had not carried out the consultation, but also that - even if it were accepted that such a consultation process could be delegated to third parties - the State did not indicate what steps it had taken to observe, supervise,

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246 *Cf.* Political Constitution of Bolivia, Article 30: "Within the framework of the unity of the State and according to this Constitution the native indigenous nations and peoples enjoy the following rights: […] 15. To be consulted through appropriate procedures, and in particular through their own institutions, whenever legislative or administrative measures are considered that may affect them. Accordingly, the right to mandatory prior consultation shall be guaranteed and respected, by the State, in good faith and in agreement, regarding the exploitation of non-renewable natural resources in their territory." Law on Prior Consultation of indigenous or native peoples, as recognized in ILO Convention No. 169, September 6, 2011, Article 4. "State entities shall analyze and assess the position of indigenous or native peoples during the consultation process, in a climate of trust, cooperation and mutual respect." Likewise, in Venezuela: the Organic Law on Indigenous Peoples and Communities of December 8, 2005, states in Article 11 that "consultation shall take place in good faith, taking into account [their] languages and spirituality, respecting their own organization, legitimate authorities and systems of communication and information of the members of the indigenous peoples and communities involved, as established in this Law […]".

247 The Constitutional Court of Colombia stipulated that it is "necessary to establish effective communications based on the principle of good faith, in which the specific circumstances of each group are considered and the importance of its territory and its resources" (Constitutional Court of Colombia, Judgment T-129/11, 8.1.iv. Also, the Constitutional Court of Guatemala, of December 21, 2009, Appeal on Judgment of Amparo, Exp 3878-2007, V). Further, the Court stated that consultation in good faith "implies that this must not be regarded as a mere formality to be complied with, or as a procedure, but as a process rooted in the Constitution, with its own substantive content aimed at preserving the fundamental rights of the peoples affected" (Judgment C-461/08, 6.3.4.). Likewise, the Constitutional Court of Peru states that "the principle of good faith is at the core of the right to consultation [… and] through it, it is possible to exclude a series of subtle, implicit or express practices that may seek to deprive the right to consultation of its content" (Exp. No. 0022 - 2009 - PI/TC, para. 27).

248 ILO Convention No. 169, Article 6; United Nations Declaration on the rights of indigenous peoples, Article 19; Inter-American Court of Human Rights *Case of the Indigenous People of Saramaka*, para. 133; Declaration rendered before a notary public by the Prof. Rodolfo Stavenhagen, of 24 of June 2011, page 7;

249 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, A/HRC/12/34, of July 15, 2009, paras. 54 and 55.

250 Similarly, when the State agent was questioned by the Court during the public hearing in reference to the position of the State with regard to the right to consultation, he declared that "mechanisms existed at that time which could not be considered to strictly fit in with the parameters of prior consultation which we now have, but there did exist socialization and contact with the communities."

monitor or participate in the process and ensure that the rights of the Sarayaku People were protected.

190. In addition to the foregoing, members of the Sarayaku community reported a military presence on their territory during the incursions by the CGC company[251] and said that the purpose of this presence was to ensure that the company could carry out its work, given their opposition. During the hearing, the State questioned whether the Army had entered with the intention of militarizing the Sarayaku territory.

191. It has not been disputed that the Army's Seventeenth Jungle Brigade[252] operated in the area of Block 23, and specifically, that four military bases were set up around Sarayaku, that is, in Jatún Molino, Shaimi, Pacayaku and Pozo Landa Yaku.[253] During the public hearing, the witness Ena Santi explained that the reason that the "peace and life camps" were created was because they had "found out that soldiers from Montalvo were coming here [and we] were very afraid that they would harm our husbands, or kill them, and that's why we were there."[254] The witness Marlon Santi, who was in the "peace and life camps," stated at the public hearing that "the oil company had two types of security: so-called private security, provided by a private security company, Jaraseg, and public security, which was a combined effort between the Ecuadorian Army and the National Police."[255] These statements are supported by photos and videos taken by Sarayaku members, which are included in the case file,[256] as well as by press reports[257] and by a video produced by Sarayaku in 2003.[258]

192. It is also significant that on July 30, 2001, the Ministry of Defense signed a military cooperation agreement with the oil companies operating in the country, whereby the State promised to "guarantee the security of the oil facilities, as well as of the persons working there" (*supra* para. 78). In this regard, the State presented, as an attachment to its response, a letter from the CGC company to PETROECUADOR, dated December 2002, in which its representative requests that the State anticipate "the security necessary for the oil operations, by urgently calling for the intervention of the National Police and the Armed Forces." [259] In another similar letter, dated November 25, 2002, the same representative of CGC requested that the State, given the opposition of Sarayaku,

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[251] *Cf.* Testimony rendered before a notary public José María Gualinga Montalvo, of June 27, 2011, page 13. See also testimony rendered before a notary public Gloria Berta Gualinga Vargas, of June 27, 2011 (Evidence file, volume 19, page 10038) and Testimony rendered by Ena Santi before the Court during the public hearing held on July 6, 2011.

[252] *Cf.*Ombudsman of the Province of Pastaza. Resolution of April 10, 2003 (Evidence file, volume 8, page 4868)

[253] During a meeting held on February 3 and 4, 2003 in the Sarayaku Community, the Minister for Energy and Mines announced that he had decided to "suspend the presence of soldiers and police in the Sarayaku area". Report of the Ecuadorian Minister of Energy and Mines regarding the activities carried out in Block 23 (Evidence file, volume 8, page 4786) Map "of military presence" prepared by the Socio-Environmental Information Center of Pastaza (Evidence file, volume 9, page 4970); Ombudsman's Office of Pastaza Province, Resolution of April 10, 2003, (Evidence file, volume 8, page).

[254] When asked by the State official whether she had directly seen these events or had been told about them, Ena Santi answered "I haven't come here to tell lies […] I saw them with my own eyes. This isn't what my husband told me. I was looking after my baby […] I was there. That is why I came to bear witness." Testimony rendered by Ena Santi before the Inter-American Court of Human Rights during the public hearing held on July 6, 2011.

[255] Testimony rendered by Marlon René Santi Gualinga before the Inter-American Court of Human Rights during the public hearing held on July 6, 2011.

[256] *Cf.* Photographs (Evidence file, volume 11, pages 6575 and 6576) and Video produced by the Sarayaku for the exclusive use of the Commission and the Court.

[257] Evidence file, volume 11, pages 6550 and subsq.

[258] The video shows a collection of statements made to the press by the Minister of Mines and Energy, Colonel Carlos Arboleda, in which he declared in October 2003 that "the work of CGC will be protected because this is the State's policy" and, in response to journalists' questions regarding the military presence in the area, he asserted that "the State must use all the State's security forces to protect the companies that wish to work in Ecuador". The video shows members of the Army making use of the helicopters hired by the COG company. This was not specifically contested by the State. (Video produced by the Sarayaku for the exclusive use of the Commission and the Court. Attachment sent by the petitioners with the communication of March 15, 2004, included in the file before the Court).

[259] Evidence file, volume 14, page 8647.

"take all necessary steps that it deems appropriate to facilitate, together with the armed forces, the implementation of the Seismic project." [260]

193. Therefore, it is possible to consider that the State supported the oil exploration activities by the CGC company, given that it provided security with members of its armed forces at certain times, which did not contribute to a climate of trust and mutual respect to reach a consensus between the parties.

194. On the other hand, the company's actions, in attempting to legitimate its oil exploration activities and justify its intervention in Sarayaku territory, failed to respect the internal and external structures of authority and representation within and outside the communities.[261] The CGC company limited itself to offering money and various economic benefits to the Sarayaku People (as it did with other communities in the area, *supra* paras. 73 to 75, 82 and 84) in order to obtain their consent to carry out exploration and exploitation of natural resources in their territory, without implementing a systematic and flexible process of participation and dialogue with them. Furthermore, it was alleged, and was not disputed by the State, that the CGC company had used fraudulent means to obtain signatures of support from members of the Sarayaku Community. (*supra* para. 73).

195. In fact, on April 10, 2003, the Ombudsman's Office of the Province of Pastaza declared that in this case it had been "fully" proven that the constitutional right established in Article 84(5) of the Political Constitution of Ecuador had been violated, along with ILO Convention No. 169 and Principle 10 of the Rio Declaration on Environment and Development. Moreover, it blamed the Ministry of Energy and Mines and the president of the board of PETROECUADOR for these violations, as well as the legal representative of CGC (*supra* para. 110).

196. For its part, the Human Rights Commission of Ecuador's National Congress issued a report on May 8, 2003, after visiting the People of Sarayaku, in which it concluded that "[t]he State, through the Ministries of the Environment and Energy and Mines, violated clause 5) of Article 84 of the Political Constitution of the Republic, by not consulting the community on plans and programs for the exploration and exploitation of non-renewable resources on their lands, which could affect them environmentally and culturally." This Congressional Commission also concluded that the CGC disregarded the leadership of the OPIP by negotiating separately with the communities, generating conflicts between them. Similarly, it confirmed the damage caused to flora and fauna within the territory. With regard to the population, it noted in its conclusions that "[t]here exists a violation of human rights, since severe psychological harm was caused to the children of the community, upon seeing the confrontations with the soldiers, the police and CGC security staff, and also [with the] arrest of the leaders of the OPIP, accusing them of being terrorists and subjecting them to physical abuse, which affected their personal integrity, prohibited by the Political Constitution of the Republic." (*supra* para. 106).

197. Also, after the suspension of the prospecting activities, high-ranking authorities of Pastaza Province and of the Government in office at that time, issued statements supporting the oil company's actions, which did not help to create a climate of trust with the State authorities.[262]

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[260] *Cf.* Official letter DM-DINAPA-CSA-870 of December 24, 2002 of the Ministry of Energy and Mines, referring to the letter of the CGC of November 25, 2002 (Evidence file, volume 9, page 4958 and subsq.).

[261] "As will be seen below, the corporation cultivated relations with select communities that supported oil activity through patronage and promises. This selective corporate-indigenous engagement led to strident disagreement among indigenous communities as to who had authority to dictate what would happen within indigenous territory. Because broad consultation never occurred the intimate relations that Kichwa maintain with their sentient rain forest were place under threat […] And fully informed consultation and consent among equals would necessarily diminish the chances of manipulation and encourage the chances of indigenous cohesion". Expert report rendered before a notary public by Professor Suzana Sawyer, of 24 of June 2011 (Evidence file, volume 19, pages 10109 and 10119).

[262] On June 1, 2003, the Governor of the Province of Pastaza publicly announced the Government's decision to complete all the works in Block 23 over 200,000 hectares, with or without the agreement of the indigenous communities that live there (Marcelo Gálvez, "Tension over oil exploration in Block 23", EL UNIVERSO, June 2, 2003, Evidence file, volume 11, page 6547). The President of the Republic of Ecuador, Lucio Gutiérrez, also announced that full security would be provided to the oil companies ("CGC to continue exploration in Block 23", EL COMERCIO, September 18, 2003, Evidence file, volume 11, page 6550) On September 16, 2003, the authorities announced that seismic exploration work would be resumed in Blocks 23

198. It is possible to consider, then, that State's failure to conduct a serious and responsible consultation process, at a time of high tension in relations between the communities and with State authorities, encouraged, by omission, a climate of conflict, division and confrontation between the indigenous communities of the area, in particular with the Sarayaku People. Although numerous meetings took place with different local and State authorities, public and private companies, the Police, the Army and other communities, there is an evident disconnect between these efforts and a clear determination to seek consensus, something that created situations of conflict.

199. In other words, the State not only partially delegated – inappropriately - its obligation to consult to a private company, thereby failing to comply with the principle of good faith and its obligation to guarantee the Sarayaku People's right to participation, but it also discouraged a climate of respect among the indigenous communities of the area by promoting the execution of an oil exploration contract.

200. The Court reiterates that the search for an "understanding" with the Sarayaku People, undertaken by the CGC company itself, cannot be considered a consultation carried out in good faith inasmuch as it did not involve a genuine dialogue as part of the participation process aimed at reaching an agreement.

c) Adequate and accessible consultation

201. This Court has established in other cases that consultations with indigenous peoples should be undertaken using culturally appropriate procedures, that is, those consistent with their own traditions.[263] For its part, ILO Convention No. 169 provides that "governments shall […] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions,"[264] and take "measures […] to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means," taking into account their linguistic diversity, particularly in those areas where the official language is not spoken by a majority of the indigenous population.[265]

202. Similarly, the ILO Committee of Experts on the Application of Conventions and Recommendations noted that the expression "appropriate procedures" should be understood with reference to the purpose of the consultation, and that therefore there is no single model for an appropriate procedure, which should "take into account the national circumstances and those of the

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and 24 from December 2003. (See Press reports, Evidence file, volume 11, pages 6547 and 6550). On October 3, 2003 the Minister of Energy and Mines announced to the press that "the work of CGC will be protected because this is the policy of the State". In this declaration, he also mentioned that "the government is prepared to provide all security guarantees to CGC, so that it can continue with its operations in Block 23 and fulfill the established contract. And if, in order to provide security, according to law, the presence of the police or the Armed Forces is necessary, the government will take the necessary steps in line with its commitment to honor the contract". ("Colonel Arboleda heads military operation to invade Sarayaku", Press Release, Evidence file, volume 11, page 6553). In October 2003, the Minister of Energy and Mines declared that the exploration and exploitation of oil in Sarayaku's territory would be carried out with or without the agreement of the Sarayaku people, and as such the indigenous territory would be militarized as from various dates (Provisional Measures file, request of the Inter-American Commission 000010) On December 31, 2003, the Minister of Energy and Mines announced that a new intervention would begin to guarantee the entry of the oil companies, and therefore a new military incursion was imminent. ("Ecologists protest at destruction of the Ecuadorian Amazon," News report (Mexico), United Nations Environment Program, January 4, 2004). The same report states that " an armed incursion is expected the day after tomorrow but, even so, the river Bobonaza has been blockaded for the past year, and recently access by land has also been affected" (Provisional Measures file, request of the Inter-American Commission, page 11).

263 *Cf. mutatis mutandi, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs*, para. 130

264 *Cf.* ILO Convention No. 169, Article 6(1)(a). Similarly, Article 30(2) of the *United Nations Declaration of the Rights of Indigenous Peoples* stipulates that "States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities."

265 *Cf.* ILO Convention No. 169, Article 12. For its part, the *United Nations Declaration of the Rights of Indigenous Peoples* estblishes in Article 36(2) that "States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right."

indigenous peoples, as well as the [contextual] nature of the measures under consultation.[266] Thus, such procedures must include, according to systematic and pre-established criteria, the various forms of indigenous organization, provided these respond to the internal processes of these peoples.[267] Appropriateness also implies that the consultation has a temporal dimension, which again depends on the specific circumstances of the proposed action, taking into account respect for indigenous forms of decision-making.[268] In this regard, the case law[269] and domestic legislation of various States refer to the need to carry out appropriate consultations.[270]

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[266] ILO, Report of the Committee set up to examine a claim alleging non-compliance by Brazil with the Indigenous and Tribal Peoples Convention, 1989 (No. 169), presented on the grounds of Article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), GB.295/17; GB.304/14/7 (2006), para. 42. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples added that "international standards do not impose pre-established criteria for creating bodies and mechanisms to implement the requirement of consultation, which must respond to the particular characteristics and constitutional systems of each country. However, it is understood that the gradual establishment of said bodies and mechanisms is one of the duties derived from the ratification of Agreement Nº 169 and other international agreements, taking into consideration the basic duties of good faith, adaptation and representation mentioned previously. Where such mechanisms do not formally exist, transitory or ad hoc mechanisms must be adopted with a view to the effective exercise of indigenous consultations". Para. 37. Furthermore, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples declared that the "appropriate nature of the consultation with indigenous communities using representative institutions, does not respond to univocal formula but depends to a great extent on the atmosphere or scope of the specific measure which is the objective and ultimate goal of the consultation. Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 28

[267] Report of the Committee established to examine claims alleging that Mexico did not observe the Indigenous and Tribal Peoples Convention, 1989 (No. 169), filed under Article 24 of the ILO Constitution for the United Workers Front FAT) GB.283/17/1 (2001), para. 109. Similarly, the Report of UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, states that "in the light of these essential criteria of representation, it can be state that these: i) are contextually dependent on the scope of the measures to be consulted; ii) must adhere to systematic and pre-established criteria; iii) must include different forms of indigenous organization, provided that these are consistent with the internal processes of these communities; and iv) based on principles of proportionality and non-discrimination, they must respond to a range of identity, geographic and gender perspectives". Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 31

[268] Report by the Committee established to examine the claim alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), GB.276/17/1; GB.282/14/3 (1999), para 79. Similarly, see the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 33. Similarly, "the time required by indigenous communities to carry out their decision making processes and to participate effectively in the decisions taken in a manner which adapts to their cultural and social models must be anticipated… if this is not taken into consideration, it will be impossible to fulfill the fundamental requirements of prior consultation and participation."

[269] The Constitutional Court of Guatemala noted that prior consultation implies that this must be "consistent with the characteristics of each nation, a process of information, participation and dialogue with members of their communities with genuine representativity, aimed at reaching agreements on the measures to be carried" (December 21, 2009, Appeal on the Judgment of Amparo, File 3878-2007, V.). The Constitutional Court of Colombia ruled that "the participation of indigenous communities in decisions that may affect them in relation to the exploitation of natural resources […] becomes an instrument that is basic to preserve the ethnic, social, economic and cultural integrity of indigenous communities and therefore to ensure their survival as a social group" and in this way "participation is not merely reduced to an intervention in administrative actions aimed at ensuring the right to defense of those who may be affected", […] but has a greater significance given the important interests that it seeks to protect, such as those that may affect the destiny and security and survival of the aforementioned communities" (Judgment SU-039/97). See also, Constitutional Court of Ecuador, Case of the Organization of Huaorani Nations, CONAIE v. AGIP OIL ECUADOR B.V. (0054-2003-RA), Judgment of July 3, 2003 and Judgment No 001-10-SIN-CC, Cases No 0008-09-IN and 0011-09-IN, Judgment of March 18, 2010, page 53: "The specific parameters defined by the ILO that must be taken into account are: a. The flexible of the consultation process, according to the domestic laws of each State and the traditions and customs of the peoples consulted […] d. The recognition that consultation does not end with the mere provision of information or public dissemination of the measure; according to ILO recommendations, consultation should be a systematic process of negotiation that implies a genuine dialogue with the legitimate representatives of the parties, […] i. Respect for the social structure and the systems of Authority and Representation of the peoples consulted. The consultation procedure must always respect internal processes as well as traditions and customs used for taking decisions by the different peoples consulted […]."

[270] *Cf.* Law on Prior Consultation of September 6, 2011 of Peru Article 4.2: "Interculturality. The consultation process shall be undertaken recognizing, respecting and adapting to the differences existing between the cultures and contributing to the recognition of the value of each one"; Article 4.4: "Flexibility. The consultation process shall be undertaken using procedures that are appropriate to the type of legislative or administrative measure to be adopted, taking into account the special

203. In this case, the Court considers proven that the oil company tried to negotiate directly with some members of the Sarayaku People, without respecting their forms of political organization. Moreover, the State acknowledges the fact that it was not the one who "sought an understanding," but rather the oil company itself. Therefore, from the position expressed by the State before this Court, it is clear that it sought to delegate *de facto* its obligation to carry out a prior consultation to the private company that was interested in exploiting the oil in the subsurface of the Sarayaku People's territory. (*supra* para. 199). Accordingly, the Court considers that the actions carried out by the company in order to obtain the consent of the Sarayaku People cannot be construed as an appropriate and accessible consultation.

d) Environmental Impact Assessment

204. In relation to the obligation to conduct an environmental impact assessment, Article 7(3) of ILO Convention No. 169 states that "[g]overnments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities."

205. Conducting such studies constitutes a safeguard to guarantee that the restrictions imposed on indigenous or tribal communities, with respect to their right to property when concessions are granted within their territory, do not imply a denial of their subsistence as a people. (*supra* para. 157). In this regard, the Court has established that the State must guarantee that no concession shall be granted within the territory of an indigenous community unless and until independent and technically competent bodies, under the supervision of the State, carry out a prior environmental and social impact study.[271] Moreover, the Court determined that Environmental Impact Studies "serve to assess the possible damage or impact that a proposed development or investment project may have on the property and community in question. The purpose of these studies is not [only] to have some objective measure of the potential impact on the land and the people, but also [….] to ensure that members of the community […] are aware of the potential risks, including environmental and health risks," so that they can decide whether to accept the proposed development or investment plan "knowingly and voluntarily."[272]

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circumstances and characteristics of the indigenous or native peoples involved", Article 4.5: "The consultation process shall be undertaken contemplating reasonable periods of time that allow the representative institutions or organizations of indigenous or native peoples to learn of, discuss, and make specific proposals regarding the legislative or administrative measure subject to consultation"; the Constitution of Bolivia of 2009, Article 304: "native indigenous autonomous peoples shall be able to exercise the following exclusive responsibilities […] 21: Participate, develop and implement mechanisms of prior, free and informed consultation, related to the application of legislative, executive and administrative measures that affect them." See also Ecuador: Law on citizen participation, Official Record No 175 (supplement) , April 20, 2010, Article 81, and Mining Law, Official Record 517.29 of January 2009, Article 90: "The processes of citizen participation or consultation shall provide a special mandatory procedure for [indigenous] communities, peoples and nations, based on the principle of legitimacy and representativity, through their institutions for those cases in which mining exploration or exploitation is carried out on their ancestral lands and territories and when these activities may affect their interests." Likewise, in Colombia: Political Constitution, "Paragraph: […] In the decisions taken regarding said exploitation, the Government shall promote the participation of representatives of the respective communities". Similarly, in Venezuela, the Organic Law on Indigenous Peoples and Communities of December 8, 2005, states in Article 13 that "[a]ny activity or project to be planned or executed within the territories and lands of indigenous peoples and communities shall be presented in a proposal to the Indigenous peoples or communities involved, so that they may decide in a meeting to what extent their interests may be prejudiced and the necessary mechanisms to be adopted to guarantee their protection. The decision shall be taken according to their traditions and customs […]". In Nicaragua, Article 3 of Law 445 of January 23, 2003 establishes that "[…] Consultation [is] the expression and provision of technical information on the operation or project, followed by a process of discussion and decision making, during which the communities shall have translators who shall translate everything said during this process into their languages and they shall also be assisted by technicians in the field […]".

[271] *Cf. Mutatis mutandi, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs*, para. 130.

[272] *Cf. Case of the Saramaka People v. Suriname.* "Interpretation of Judgment, para. 40.

206. On the other hand, the Court has established that Environmental Impact Studies must be carried out in conformity with international standards and best practices,[273] must respect the indigenous peoples´ traditions and culture and must be completed prior to the granting of the concession, given that one of the purposes for requiring such studies is to guarantee the right of indigenous people to be informed about all proposed projects in their territory. [274] Therefore, the State's obligation to supervise the Environmental Impact Assessment is consistent with its duty to guarantee the effective participation of indigenous people in the process of granting concessions. Furthermore, the Court considers that one of the points that should be addressed by the environmental and social impact assessment is the cumulative impact of existing and proposed projects.[275]

207. In this case, the Court notes that the environmental impact study a) was carried out without the participation of the Sarayaku People; b) was carried out by a private agency subcontracted by the oil company, without being subject to strict control by State monitoring bodies, and c) did not take into account the social, spiritual and cultural impact that these development activities might have on the Sarayaku People. Therefore, the Court concludes that the environmental impact assessment was not carried out in accordance with its case law or with international standards on the matter.

e) The consultation must be informed

208. As noted previously, the consultation must be informed, in the sense that indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks. In this regard, prior consultation requires the State to accept and provide information and implies constant communication between the parties. The case law of the national courts[276] and domestic legislation[277] have referred to this aspect of the consultation.

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273 *Cf. Case of the Saramaka People v. Suriname.* "Interpretation of Judgment, footnote no. 23.

274 *Cf. Case of the Saramaka People v. Suriname.* "Interpretation of Judgment, para. 41.

275 *Cf. Case of the Saramaka People v. Suriname.* "Interpretation of Judgment, para 41.

276 The Constitutional Court of Colombia stated that prior consultation must be aimed at ensuring that "the community has full knowledge of projects for the exploration and exploitation of natural resources in the territories it occupies or that belong to it, and the mechanisms, procedures and activities required for their implementation," and is duly "informed and instructed regarding the manner in which the execution of said projects may affect or harm the elements that constitute the foundation of the community's social, cultural, economic and political cohesion and, therefore, the basis for its survival as a human group with unique characteristics" and that "it has the opportunity, through its members or representatives, to freely and knowingly assess, without external interference, the advantages and disadvantages of the project for the community and its members, to be heard in relation to its concerns and aspirations with regard to the defense of its interests and to express its views on the viability [of the project]." (Judgment SU-039/97). See also, Judgment C-030/08. See also, comments by the Constitutional Court of Ecuador in this regard, Case of Intag (459-2003-RA), Case of Nangaritza (0334-2003-RA) and Case of Yuma (0544-06-RA).

277 Peru: Law on the right to prior consultation of indigenous or native peoples recognized in ILO Convention No. 169, Article 4.f: "Absence of coercion or conditions. The participation of indigenous or native peoples in the consultation process shall be undertaken without coercion or conditions"; Article 4.7: "Timely information. Indigenous or native peoples have the right to receive from State institutions all the information necessary to be able to express their point of view, and be duly informed, on the legislative or administrative measure subject to consultation. The State has the obligation to provide this information from the start of the consultation process and with due anticipation". Bolivia: Executive Decree No. 29033, February 16, 2007: "The process of consultation and participation shall be based on this principle of truthfulness, in accordance with current legal provisions, especially the provisions of ILO Convention Nº 169, which establish that consultation should take place in good faith and therefore, all the information that is part of and the result of the process of consultation and participation must be truthful." Ecuador: Law on Environmental Management, Official Record supplement 418, September 10, 2004, Article 29: "Any physical or juridical person has the right to be informed in a timely and appropriate manner regarding any activity by the State institutions which, according to the Regulations of this Law, may produce environmental impacts." Likewise, in Venezuela, the Organic Law on Indigenous Peoples and Communities of December 8, 2005 states in Article 14 that "projects shall be presented no less than ninety days prior to their consideration by the respective indigenous peoples and communities, gathered in Assembly. These shall contain all the necessary information regarding their nature, objectives, and scope, as well as the benefits to be obtained by the indigenous peoples and communities involved and the possible environmental, social, cultural or any other damage and terms of reparation, so

209. In this case, the Court finds that there is no indication from the evidence submitted that the alleged "understanding" reached by the CGC company included the presentation of information contained in the environmental impact assessment, or that it allowed the Sarayaku People to actively participate in an appropriate discussion process. Nor was it demonstrated that the alleged "socialization" of the study was somehow related to a consultation process with the Sarayaku People, or that it served to inform them of the advantages and disadvantages of the project in relation to their culture and way of life, in the context of a communication process aimed at reaching an agreement. Therefore, the Court considers that the company's actions were not part of an informed consultation.

210. In this regard, there is evidence to conclude that the omissions in the consultation process on the part of the State, together with the numerous actions carried out by the company to fragment the communities, led to conflicts between the communities of Bobonaza and affected inter-community relations. It is for this reason that, upon extending the provisional measures in June 2005, the Court considered it "particularly important that the measures adopt[ed] include actions to promote a climate of respect for the human rights of the beneficiaries […] in order to ensure the effectiveness of the Convention in regard to relations between individuals." For that same reason, the Court ordered the State, when implementing those measures, to inform "the neighboring indigenous communities about the meaning and scope of the provisional measures, both for the State itself and for third private parties, in order to foster a climate of peaceful coexistence between them."

211. In conclusion, the Court finds that the State did not carry out an appropriate and effective process that guarantees the right to consultation of the Sarayaku People prior to beginning or authorizing the processes of prospecting or exploitation of natural resources within their territory. As noted by the Court, the oil company's actions do not comply with the minimum requirements of a prior consultation. In short, the Sarayaku People were not consulted by the State prior to the company carrying out oil exploration activities, planting explosives or affecting sites of special cultural value. All this was acknowledged by the State and, in any case, has been verified by the Court in the evidence submitted.

B.6 The rights to consultation and communal property in relation to the right to cultural identity

212. In relation to the foregoing, the Court has recognized that "[b]y disregarding the ancestral right of indigenous communities over their territories, this could affect other basic rights, such as the right to cultural identity and the very survival of indigenous communities and their members."[278] Given that the effective enjoyment and exercise of the right to communal ownership of the land "guarantees that indigenous communities conserve their heritage,[279] States must respect that special relationship in order to guarantee their social, cultural and economic survival.[280] Moreover, the close relationship that exists between indigenous peoples and their land and their traditions, customs, languages, arts, rituals, knowledge and other aspects of their identity has been recognized, noting that "based on their milieu, their integration with nature and their history, the members of indigenous communities transmit this non-material cultural heritage from one

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that they can be previously assessed and analyzed by the respective people or community […]". Also, see Article 3 of Law 445 of January 23, 2003 of Nicaragua and Decree 1397 of 1996, Articles 8 and 16 of Colombia.

278 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. para. 147. See also General Assembly, Council of Human Rights, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mr. Rodolfo Stavenhagen. A/HRC/6/15, of 15 of November 2007, para. 43.

279 *Cf. Case of Yakye Axa Indigenous Community*. *Merits, Reparations and Costs.* para. 146.

280 *Cf. Case of the Saramaka People V. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*, para. 91.

generation to the next, and it is constantly recreated by the members of the indigenous groups and communities."[281]

213. Under the principle of non-discrimination established in Article 1(1) of the Convention, recognition of the right to cultural identity is an ingredient and a means of broad interpretation to understand, respect and guarantee the right to enjoy and exercise the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic legal systems.

214. In this regard, Principle 22 of the Rio Declaration on the Environment and Development has recognized that:

> "Indigenous people and their communities, as well as other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

215. Two international instruments are particularly relevant to the recognition of the right to cultural identity of indigenous peoples: the ILO Convention No. 169 on indigenous and tribal rights[282] and the United Nations Declaration on the Rights of Indigenous Peoples.[283] Various international instruments of UNESCO also address the right to culture and cultural identity.[284]

216. For their part, the African Commission on Human and Peoples' Rights, in cases alleging the violation of Articles 17(2) and 17(3) of the African Charter,[285] and the PIDESC Committee,[286] and to

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[281] *Cf. Case of the Yakye Axa Indigenous Community. Merits, Reparations and Costs*, para. 154.

[282] Article 2(2)(b): "governments, with the participation of the peoples, must develop a coordinated and systematic action, that includes measures that] Promot[e] the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions Article 4(1): Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. Article 5: In applying the provisions of this Convention:(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;(b) the integrity of the values, practices and institutions of these peoples shall be respected.

[283] A/Res/61/295, December 10, 2007, Order of the General Assembly UN 61/295. Article 8(1) - Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. Article 8(2): States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; Article 13): Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons Article 12.1: Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites […]

[284] *Cf.* Universal Declaration of UNESCO on Cultural Diversity 2001; UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it; Declaration of Mexico on cultural policies, World Conference on Cultural Policies; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. Other UNESCO conventions refer to culture or cultural identity, also with reference to indigenous peoples: UNESCO- Recommendation on the Safeguarding of Traditional Culture and Folklore, November 15, 1989. UNESCO- Convention on the Protection and Promotion of the Diversity of Cultural Expressions, October 20, 2005.

[285] In Communication No. 276/2003, the African Commission on Human and Peoples' Rights declared: "protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity… It notes that Article 17 of the African Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus takes culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics. (para 241). It also notes: "By forcing the community to live on semi-arid lands without access to medicinal SALT licks and other vital resources for the health of their livestock, the Respondent state have created a major threat to the Endorois pastoralist way of life." The African Commission also stated that the State "has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions". Considering that "the Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access

some extent, the European Court on Human Rights in cases regarding minorities,[287] have referred to the right to cultural identity and the collective dimension of the cultural life of native, indigenous, tribal and minority peoples and communities.

217. The Court considers that the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society.[288] This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization. Similarly, ILO Convention No. 169 recognizes the aspirations of Indigenous Peoples to "exercise control over their own institutions, ways of life and economic development and to maintain and strengthen their identities, languages and religions, within the framework of the States in which they live."[289]

218. In this case, it has not been disputed that the company damaged areas of great environmental, cultural and subsistence value for the Sarayaku. Thus, in July 2003, the CGC destroyed at least one site of special importance in the spiritual life of the members of the Sarayaku Community, on the land of the *Yachak* Cesar Vargas, namely the area known as "Pingullu" (*supra* para. 104). For the Sarayaku, the destruction of sacred trees, such as the Lispungu tree, by the company implied a violation of their worldview and cultural beliefs. [290] Furthermore, it was not disputed that that the arrival of helicopters destroyed part of the so-called *Wichu kachi Mountain*, or "place of the parrots" (supra para. 105) causing, according to the beliefs of the People, the spirit owners of that sacred place to leave the site, thereby bringing sterility to the place, which, in turn, is

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to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake", the African Commission concluded that the State had violated Articles 17(2) and 17(3) of the Charter, considering that "the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory". (paras. 250 and 251).

286 "The strong collective dimension of the cultural life of the indigenous communities is indispensable for their existence, well being and integral development, and encompasses the right to lands, territories and resources that they have traditionally possessed, occupied, or otherwise used or acquired. The cultural values and the rights of the indigenous communities associated with their ancestral territories and their relationship with nature must be respected and protected, in order to avoid the degradation of their particular way of life, including their means of subsistence, the loss of natural resources and, in the final instance, their cultural identity" (para 36). "As such, States Parties must take measures to recognize and protect the rights of indigenous peoples to posses, exploit, control and utilize their lands, territories and communal resources, and in the case of other kinds of occupation or utilization of their lands or territories without their free and informed consent, adopt measures to ensure that they are returned."

287 In the *Case of Chapman v. the United Kingdom* (no. 27238/95 ECHR 2001-I), the Court acknowledged that Article 8 protects the right of a minority ("Gypsy") to maintain its identity (para. 93). In the Case of *Gorzelik and others v. Poland* (no. 44158/98, para. 92, February 17, 2004), the European Court noted that the need to protect cultural identity is also important for the proper functioning of a democracy. Reference to all the case mentioned in this paragraph is found in "Cultural Rights in the Case-law of the European Court of Human Rights", Research division ECHR, January 2011, p. 9-12.

288 The right to self-determination of all indigenous communities is recognized in the 2007 United Nations Declaration on the Rights of Indigenous Peoples, now widely accepted with the adhesion of 143 States (including Ecuador), which includes the rights of these Peoples to freely determine their political situation, to freely pursue economic, social and cultural development, to participate in the adoption of decisions which affect them, to fully participate, if they so wish, in the political, economic, social, and cultural life of the State (Articles 3, 4, 5,18, 19, 20, 23,32, 33, and 34). In the particular case of Ecuador, the recognition of this right is so clear that the current Ecuadorian Constitution of 2008 recognizes the right to self-determination in different ways, even declaring that all Indigenous communes, communities, peoples and nations have the right to "maintain, develop and strengthen their identity, sense of belonging, ancestral traditions and forms of social organization, for which the Constitution will guarantee the respect and promotion of the customs and identities of indigenous peoples in all aspects of life", and in the case of "peoples living in voluntary isolation", the State "shall adopt measures to guarantee their lives, ensure respect for their self-determination and their wish to remain in isolation and ensure the observance of their rights."

289 ILO Convention No. 169. Considering paragraph 5.

290 The *Yachak* Sabino Gualinga stated: "In a place called Pingullo, were the lands of Mr. César Vargas, and he lived there with his trees, which were woven like threads which he could use to cure. When they cut down that Lispungo tree they caused him much sadness (…) When they cut down the great Lispungo tree […] he became very sad indeed, and his wife died, then he died, and a son also died, and after that the other son [died] and now only two daughters are left. (Testimony rendered by Sabino Gualinga before the Inter-American Court of Human Rights during the public hearing held on July 6, 2011).

associated by the Sarayaku with material sterility and the permanent disappearance of animals from that area until the spirituality of the place is restored. [291] The oil company's activities caused the suspension, during some periods, of cultural ancestral events and ceremonies of the Sarayaku such as *Uyantsa*, the most important festival held every year in February, affecting the harmony and spirituality of the community. [292] It was also argued that the seismic line passed near sacred sites used during initiation ceremonies to initiate young people into adulthood (supra para. 105). Thus, the cessation of the people's daily activities and the adults' dedication to the defense of their territory, has had an impact on teaching children and young people about their traditions and cultural rituals, and in perpetuating the spiritual knowledge of the sages. The detonation of explosives has destroyed forests, water sources, caves, underground rivers and sacred sites and has caused the migration of animals. As for the area where explosives remain, the *Yachak* Sabino Gualinga said at the hearing that:

> In this sector, half of the beings that preserved the ecosystem have now gone […]. They are the ones that maintain the jungle, the woods. If there is too much destruction […] the mountains will also collapse. We live in the Bobonaza river basin and this has been totally affected. All those who wish to cause damage don't know what they are doing. We do understand, because we see it.

219. Given the importance that these sites of symbolic value have for the cultural identity of the Sarayaku People, as a collective entity, and their worldview, several of the statements and expert testimonies produced during the proceedings indicate the strong bond that exists between the elements of nature and culture, on the one hand, and each member of the Community's sense of being, on the other. This also highlights the profound impact on the social and spiritual relationships that Community members may have with the different elements of nature that surround them, when these are destroyed or weakened.

220. The Court considers that the failure to consult the Sarayaku People affected their cultural identity, since there is no doubt that the intervention and destruction of their cultural heritage implied a grave lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great anguish, sadness and suffering among them.

B.7 Duty to adopt provisions of domestic law

221. The Court recalls that Article 2 of the Convention requires the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms protected by the Convention. [293] In other words, the States not only have the positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights established in the Convention, but must also avoid enacting laws that prevent the free exercise of those rights, and ensure that laws that protect these rights are not annulled or amended. [294] In short, the State has the obligation

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[291] César Santi stated that ''Two months ago the company came through here with the seismic line and now there are no birds, the owner, the *Amazanga* (spirit being) left and because he left all the animals left … As the helicopters have been stopped from coming here, if we leave things quiet for a good time, perhaps the animals will return." FLACSO, Sarayaku: el Pueblo del Cénit, pages 6627 and subsq.

[292] The festival activities serve to renew the links with the territory and social bonds. People return to the recreational areas (*purinas*) and hunting areas, reinforcing the connection of these areas to the territory. Also, according to members of the Community, the Sarayaku festival involves the participation of all the Kurakas, as well as authorities and leaders, and the *yachaks* who visit the houses of the festival to order and transmit peace and respect, so that conflicts do not occur. FLACSO. Sarayaku: el Pueblo del Cénit, pages 6672-6676. See also statements of Simón Gualinga and Jorge Malaver, Self-evaluation, page 6588 and subsq.

[293] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, Reparations and Costs***.** Judgment of January 29, 1997. Series C No. 12, para. 50 and *Case of Chocrón Chocrón v. Venezuela*, *Preliminary Objection, Merits, Reparations and Costs***.** Judgment of July 1, 2011. Series C No. 227, para 140.

to adopt the necessary measures to render effective the exercise of the rights and freedoms recognized by the Convention. [295]

222. Despite the fact that, under the terms mentioned, the State was obliged to consult the Sarayaku People, the Court cannot verify that it was not until December 9, 2002, that the State had detailed rules on prior consultation that established, *inter alia*, the moment at which the consultation should take place, its purpose, those subject to the consultation, the phases or actions to be undertaken as part of the consultation process prior to implementation, the formalization of decisions taken during the consultation or regarding compensation for any socio-environmental damage caused by activities for the exploitation of natural resources, particularly hydrocarbons. In any case, the Regulations on Consultations of Hydrocarbon Activities of 2002, which also had no impact in this case, was subsequently revoked in April 2008 by the Regulations on the Application of Mechanisms for Social Participation, established in the Law on Environmental Procedures, Decree No. 1040,[296] which does not specifically contemplate mechanisms of consultation, as was alleged and was not contested by the State.

223. Furthermore, the Court takes note of the State's argument that it was "in the process of adopting legislative measures for constitutional harmonization" and that in "the transition period established in the Constitution of [...] 2008 itself, the legislative packets to be approved were previously marked." In other words, the State acknowledges that up until its response to this case, it did not have any regulatory provisions for constitutional harmonization to ensure the effective application of domestic rules on prior consultation. [297]

224. Therefore, the Court concludes that even though the Commission or the representatives did not clarify the reason why the lack of regulation prior to December 2002 constituted a real obstacle to the effectiveness of the right to prior consultation of the Sarayaku People, the State recognized that it was currently in a period of transition to adapt its regulatory and legislative provisions to make the right to prior consultation effective for the indigenous peoples of Ecuador.

225. Likewise, the Court notes the State's argument that "Article 2 of the American Convention [...] refers, not only to regulatory provisions, but also to measures of another nature [...], in which those of an institutional, economic or other similar nature can be grouped together and, it is worth noting what the Inter-American Court has stated on various occasions, [...] in a comprehensive manner" and that the "jurisprudence of [...] the Inter-American Court [...] upon determining these *other measures*, has established that the latter refer not only to purely administrative or judicial matters, which only fall under the obligations to respect and guarantee, referred to in Article 1(1) of the IACHR, and not in the context of Article 2 [of the Convention]. This particular point can also be found in States that adhere to a *common law* system, because in this system what creates general law is not a judicial act, but rather the regulatory power of the courts."

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294 *Cf. Case of Chocrón Chocrón v. Venezuela*, para. 140, and C*ase of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*. Judgment of May 30, 1999. Series C No. 52, para. 207

295 Cf. Case of the Massacre of Dos Erres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 240.

296 *Cf.* Regulations for the Application of the Social Participation Mechanisms established in the Law on Environmental Management, Decree No. 1040, in the petitioners' Communication of June 10, 2008 (Evidence file, volume 8, page 4154 and subsq.).

297 Similarly, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in his comments issued in November 2010 on the progress and challenges in the implementation of the guarantees of the Ecuadorian Constitution on the rights of indigenous peoples, which the should "take into account the proposals made by CONAIE during the discussions held, as well as any new proposals for reform, including in relation to the Mining Law, the Law on Water Resources, the Law on Intercultural Bilingual Education, the Organic Code of Territorial Organization, Autonomy and Decentralization, and the Environmental Code, with a view to reaching agreements with indigenous peoples on these and other laws, and to reform and implement the laws in accordance with the rights of indigenous peoples guaranteed in the Constitution of 2008 and in international human rights instruments." United Nations, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya – Observations on the progress and challenges in the implementation of the guarantees of the Political Constitution of Ecuador on the rights of indigenous peoples, A/HRC/15/37/Add.7, September 13, 2010, para. 56.

226. With regard to this argument, although the points made by the State could be accepted in general terms, the Court notes that it did not refer to any other mechanism or "other measure" in particular that would suggest that the lack of regulation of the right to prior consultation contained in the domestic and international legislation applicable to Ecuador does not constitute an obstacle to its effectiveness in this case.

227. For all the above reasons, this Court considers that the State is responsible for not discharging its obligation to adopt domestic legal measures, pursuant to Article 2 of the American Convention, in relation to the violations declared regarding the rights to consultation, cultural identity and property.

B.8 Right to Movement and Residence

228. A number of situations are alleged to have taken place in which third parties or even State officials obstructed or impeded the movement of community members along the river Bobonaza. [298] It is clear that the State was aware of the situations that affected the free movement of members of the Sarayaku Community along the river. However, insufficient evidence was provided to examine these facts under Article 22 of the Convention.

229. On the other hand, the fact that pentolite explosives were buried in the Sarayaku People's territory has certainly implied an unlawful restriction on their movement and on their hunting and traditional activities in certain sectors of their territory, given the obvious risks to their life and personal safety. However the effects of this situation have been, and will be, examined under their right to communal property and prior consultation, as well as under the rights to life and personal integrity (*infra* paras. 244 to 249).

B.9 Freedom of Thought and Expression, Political Rights, and Economic Social and Cultural Rights

230. As to the points raised by the Inter-American Commission and the representatives regarding the alleged violation of Articles 13, 23 and 26 of the Convention, the Court agrees with the Commission that, in such matters, access to information is vital for effective democratic monitoring of the State's management of exploration and exploitation activities of natural resources in the territory of indigenous communities, a matter of obvious public interest.[299] Nevertheless, the Court considers that in this case the facts have been sufficiently analyzed, and the violations conceptualized under the rights to communal property, consultation and cultural identity of the Sarayaku People, under the terms of Article 21 of the Convention, in relation to Articles 1(1) and 2, and 23, and therefore it shall not rule on the alleged violations of those provisions.

B.10 Conclusion

231. On previous occasions, in cases concerning indigenous and tribal communities or peoples, the Court has declared violations to the detriment of members of indigenous or tribal communities and peoples[300]. However, international legislation concerning indigenous or tribal communities and

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[298] In fact, in response to certain facts alleged by the Sarayaku People, on November 27, 2002 the Ombusdman ordered, as a precautionary measure, that "no person or authority or official shall prevent the free movement, circulation, navigation or inter-communication of members belonging to Saraya[k]u" (*supra* para. 86).

[299] Article 9 of the Inter-American Democractic Charter, approved at the first plenary session, held on September 11, 2001, states that "the promotion and protection of human rights of indigenous peoples […], contribute to strengthening democracy and citizen participation."

[300] *Cf. Case of the Mayagna Community (Sumo) Awas Tingni v. Nicaragua*; *Case of the Community Moiwana v. Suriname, Preliminary Objections, Merits, Reparations and Costs*; *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits,*

peoples recognizes their rights as collective subjects of International Law and not only as individuals[301]. Given that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective.

232. The State, by failing to consult the Sarayaku People on the execution of a project that would directly affect their territory, was in breach of its obligations, under the principles of international law and of its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, traditions, customs and forms of organization, in the decisions made regarding matters and policies that affected or could affect their territory, their cultural and social life, their rights to communal property and to cultural identity. Consequently, the Court considers that the State is responsible for the violation of the right to communal property of the Sarayaku People, recognized in Article 21 of the Convention, in relation to the right to cultural identity, under the terms of Articles 1.(1) and (2) thereof.

VIII.2
RIGHTS TO LIFE, PERSONAL INTEGRITY AND PERSONAL LIBERTY

A. Arguments of the parties

A.1 Right to Life[302]

233. The Commission argued that the State of Ecuador is responsible for having violated Article 4 of the Convention, in relation to Article 1(1) thereof, to the detriment of the Sarayaku Indigenous Community and its members, since its failure to comply with its obligation to guarantee them the right to property by allowing the burial of explosives in their territory, has created a situation of permanent danger that threatens the life and survival of its members and, furthermore, has jeopardized the Community's right to preserve and transmit its cultural heritage. The Commission added that the detonation of explosives had destroyed forests, water sources, caves, subterranean rivers and sacred sites, forcing the migration of animals, and that the placement of explosives in areas traditionally used for hunting had prevented the people from gathering food, diminishing their ability to ensure their subsistence and disrupting their life cycle. The Commission also argued that when the Sarayaku Peoples' Association declared the state of emergency, the community members

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Reparations and Costs; Indigenous Community Sawhoyamaxa v. Paraguay; Case of the People Saramaka v. Surinam, Preliminary Objections, Merits, Reparations and Costs, and Case of Xákmok Kásek v. Paraguay.

[301] Thus, for example, Article 1 of the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007 establishes that: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." Article 3.1 of ILO Convention No. 169 states that: "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms, without hindrance or discrimination. The provisions of this Convention shall apply without discrimination to male and female members of these peoples." Similarly, the Committee on Economic, Social and Cultural Rights, in General Comment No. 17 of November 2005, expressly stated that the right to benefit from the protection of the moral and material interests resulting from scientific, literary or artistic production also applies to indigenous peoples as collective subjects and not only to their members as individuals (paras. 7, 8 and 32). Subsequently, in General Comment No. 21 of 2009, the Committee interpreted that the expression "everyone" in Article 15.1.a) of the Convention "may denote both the individual and the collective subject. In other words, cultural rights may be exercised by a person: a) as an individual; b) in association with others; or c) within a community or a group" (para. 8). Moreover, other regional instruments such as the African Charter on Human and Peoples' Rights of 1986 have established special protection for certain rights of tribal peoples based on the exercise of collective rights. See, *inter alia*, the African Charter on Human and Peoples' Rights: Article 20 which protects the right to life and self-determination of peoples; Article 21 which protects the right to freely dispose of their land and natural resources; and Article 22 which guarantees the right to development.

[302] Article 4.1 of the American Convention states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

paralyzed their daily economic, administrative and academic activities for three months, during which time they survived on resources from the jungle, because their crops and food ran out. All this also affected the possibility of leading a life with dignity for members of the Sarayaku People. In this context, the State did not adopt the necessary positive measures within the scope of its powers, which would reasonably have been expected to prevent or avoid risk to the right to life of members of that Community.

234. The representatives considered that the State incurred in liability by placing members of the Sarayaku People at serious risk as a result of the oil company's "unconsulted" incursion into their territory. They also alleged that the State did not take the necessary and sufficient measures to ensure dignified living conditions for all members of the Sarayaku People, "affecting their different way of life, their individual and collective life projects and their development model," which amounts to a violation of Article 4(1) of the Convention. They further argued that the State did not take any steps to fulfill its obligation to protect the community, considering the special condition of vulnerability of the indigenous peoples due to the incursion by the oil company. They claimed that during the period of food shortages and state of emergency, various illnesses affected the people, mainly children and the elderly, situations described as "fatal to the health of community members who were prevented from having access to health care centers," which affected their right to life. The representatives also claimed that the State had not provided information regarding the amount of pentolite that had been left on the surface. They added that relations between the Sarayaku and neighboring communities and within the community had been affected, which seriously disrupted the security, tranquility and lifestyle of members of the Community.

235. The State considered that the right to life has priority within the system of guarantees enshrined in the Convention and, therefore, there are only a few exceptional cases in which the State can be declared responsible for the violation of this right for having failed to respond with due diligence. In this case, it reiterated that it cannot be argued that the impact of the oil company's actions has caused serious damage to conditions required for a dignified life of the Sarayaku. With regard to the buried explosives, in the provisional measures the State informed the Court of the progress made in removing these explosives. As for the alleged illnesses and other alleged damages, the State emphasized that no impartial medical certificates or other scientific evidence were provided, but rather only affidavits from community members and "studies of questionable reliability." The State argued that it is illogical to claim violations of the right to life because the right to health, nutrition, access to clean water or access to means of subsistence were affected as a result of a private action that was interrupted and did not even reach the seismic prospecting phase; therefore it is not appropriate to discuss pollution or substantial disruption of the lifestyle of the indigenous peoples of the area. Finally, it claimed that it had not breached its positive or negative obligation to protect the right to life, inasmuch as it had ensured compliance with the regulations applicable at the time of the facts, regarding natural resource extraction activities.

A.2 Rights to personal integrity[303] *and personal liberty*[304]

[303] Article 5 of the American Convention states: "1. Every person has the right to have his physical, mental and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person […]".

[304] Article 7 of the American Convention states: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty, except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial […]".

236. In relation to the events of December 4, 2003, the date on which around 120 members of the Sarayaku People were assaulted by members of the Community of Canelos in the presence of police officers, the Commission argued that the State did not provide adequate protection to the 20 members of the Sarayaku People who were attacked, since the contingent of police officers present was "in every sense insufficient" to prevent acts of violence, particularly given that the Canelos community had announced days before that it would deny right of way to the Sarayaku.

237. Regarding these events, the representatives considered that the State is responsible for the violation of the right to physical integrity to the detriment of the members of Sarayaku who were assaulted and attacked in the community of Canelos. They argued that although the State knew about the indigenous protest, and about the constant blockades that hindered the Sarayaku's freedom of movement along the Bobonaza River and the attacks from neighboring communities, it dispatched a contingent of only 10 officers. They added that, after the attack had taken place, the officers ordered the Sarayaku members to return to their community, which is a day's travel by canoe from Canelos, despite their physical condition, without food or medical care, thereby demonstrating that the State did not take the necessary measures to protect the integrity of the Sarayaku who were on their way to a peaceful march. The representatives added that the State has not investigated or punished the perpetrators of those attacks. Therefore, the representatives argued that the State violated the right to integrity of the 120 community members who were attacked in Canelos on December 4, 2003.

238. With respect to the events of December 4, 2003, the State dismissed the allegations made by the representatives and the Commission, arguing that the criminal investigation system had acted through individual investigations to ascertain the facts and determine responsibility. It pointed out that the investigations found that people who were injured did not suffer severe physical incapacity, that they did not even need rest, that they received outpatient treatment and that some were only incapacitated for hours. Furthermore, the State alleged that the Governor of Pastaza publicly stated that he had ordered the presence of the armed forces and police to protect people's rights and prevent possible inter-communal clashes from taking place, and that the work of the security forces would have been based on parameters of proportionality and respect for rights. The State also argued that the members of the Sarayaku Community were fully aware of the potential risks of their actions.

239. As to the events of January 25, 2003, the representatives alleged that Messrs. Elvis Gualinga, Marcelo Gualinga, Reinaldo Gualinga and Fabian Grefa were detained by Ecuadorian soldiers, without a warrant and without having been found committing a crime. They claimed they were not informed at any time about the reasons for their arrest or the charges against them, and therefore the arrest was in violation of Article 7 of the Convention. The representatives also alleged that during the period of detention, they were subjected to inhumane treatment by employees of the CGC. Based on this, the representatives argued that the treatment to which they were subjected by the army and the subsequent tolerance of the alleged abuse inflicted on them by members of the CGC, were forms of torture and cruel, inhumane and degrading treatment attributable to the State, in violation of Article 5 of the Convention and 6 of the CIPST.

240. As to the events of January 25, 2003, although the Commission referred to these, it pointed out that it did not have sufficient evidence to rule on this matter. Moreover, the Commission made no particular reference to the alleged violations of Article 7 of the American Convention and Article 6 of the CIPST.

241. The representatives also considered that the State is responsible for several threatening acts and harassment against the Sarayaku leaders, since it failed to provide protection, even though measures of protection to their benefit were in force, granted by the Inter-American Commission on May 5, 2003. In addition, they argued that despite the complaints from those affected, the State has not conducted an investigation process nor has a punishment been handed down.

242. The representatives, in turn, emphasized that the aforementioned violations led to the stigmatization of the Sarayaku as a violent people, which has severely affected its members' relations with the rest of Ecuadorian society, particularly with neighboring communities. They also

asserted that the situation had created distress, anxiety and fear among members of the Sarayaku and affected their physical and psychological well-being. The representatives therefore asked the Court to declare that the Ecuadorian State violated the right to humane treatment [personal integrity] of all members of the Sarayaku People.

243. As to the events of January 25, 2003, the State argued that without reasonable evidence to prove a particular pattern, or direct evidence demonstrating the period during which the alleged mistreatment took place, or evidence of the responsibility of State agents, the Court cannot declare the State's responsibility. Likewise, it pointed out that in this case there is no consistent evidence or presumptions that could lead the Court to solidly conclude that the alleged victims were subjected to torture or other cruel, inhumane or degrading treatment and, furthermore, carried out with the support or tolerance of government authorities. Therefore, it would be inappropriate to blame the State for acts that have not been convincingly proven.

B. Considerations of the Court

B.1 In relation to the explosives buried in the Sarayaku territory

244. In its case law, the Court has established that the obligations imposed by Article 4 of the American Convention, relating to Article 1(1) thereof, not only presuppose that no one is to be arbitrarily deprived of life (negative obligation) but also, in light of their obligation to guarantee the full and free exercise of human rights, States are required to take all appropriate measures to protect and preserve the right to life (positive obligation) of all those who are under its jurisdiction. From the general obligations under Articles 1(1) and 2 of the Convention, special obligations are derived, determinable according to the particular needs of protection of the holder of the right, be it due to their personal status or the specific situation of each person. [305] In certain cases, exceptional circumstances have arisen that allow the Court to examine the violation of Article 4 of the Convention with respect to persons who did not die as a consequence of the violatory actions.[306]

245. It is clear that a State cannot be held responsible for all situations in which the right to life is at risk. Bearing in mind the difficulties involved in the planning and execution of public policies and the operational choices that must be made according to priorities and the resources available, the State's positive obligations must be interpreted in such a manner that an impossible or disproportionate burden is not imposed upon the authorities. For this positive obligation to arise, it must be determined that at the moment when the events occurred, the authorities knew or should have known about the existence of a situation that posed an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk. [307]

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[305] *Cf. Case of the "Massacre of Mapiripán" v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, paras. 111 and 113, and *Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 22, 2009. Series C No. 202, para. 37. Also see *Case of Gelman v. Uruguay. Merits and Reparations.* Judgment of February 24, 2011. Series C No. 221, para. 76.

[306] For example, in the *Case of the Yakye Axa Indigenous Community v. Paraguay,* the Court ruled that the State was responsible for the violation of the right to life, considering that, having failed to ensure the right to communal property, the State had deprived them of the possibility of having access to their traditional means of subsistence, as well as the use and enjoyment of the natural resources necessary to obtain clean water and for the practice of traditional medicine for the prevention and treatment of diseases, and for failing to adopt the affirmative measures required to ensure living conditions with dignity (*Case of Indigenous Community Yakye Axa v. Paraguay, Merits, Reparations and Costs*, para. 158.d) and e)). See also, *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 2, 2004. Series C No. 112, para. 176; *Case of the Massacre of La Rochela v. Colombia. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No. 163, paras. 124, 125, 127 y 128, and *Case of Gelman v. Uruguay*, para. 130.

[307] *Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay*, paras. 155 and 166. See also *Case of the Massacre de Pueblo Bello v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, para. 123 and *Case of Barrios Family v. Venezuela*, para. 123.

246. Since the provisional measures were ordered in this case in June 2005 (*supra* para. 5), the Court has noted with particular concern the placement of over 1400 kg. of high-powered explosives (pentolite) in the Sarayaku territory, considering that this "constitutes a serious risk factor to the life and integrity of its members." [308] As a result, the Court ordered the State to remove the explosive material, a provision that is still in force to date and which the State has partially complied with (supra para. 120 and 121). Given the presence of this material in the territory, the Assembly of Sarayaku decided to declare the area a restricted zone for safety reasons, prohibiting access to it, a measure that would remain in force, despite considering the area sacred and an important hunting ground for the Sarayaku.

247. The task of removing the pentolite began in December 2007, after a First Cooperation Agreement was signed between the Ministry of Mines and Petroleum and the Sarayaku People to carry out preliminary work. The operations began in July 2009 and consisted solely of actions aimed at removing the pentolite found on the surface of the Sarayaku's territory. To date, the State has removed between 14 and 17 kgs. of the 150 kilograms found on the surface.,[309] out of a total of over 1400 kilograms left in the territory. It is noteworthy that, upon completion of the contract with the CGC, it was placed on the record that there were no environmental liabilities (*supra* para. 120 to 123). [310] The presence of explosives has been an obvious concern to the Sarayaku People for their physical safety, and the activation or detonation of these explosives is, according to the expert witnesses[311] a real and potential danger.

248. In this case, the oil company, with the acquiescence and protection of the State, cleared trails and planted nearly 1400 kg of pentolite explosives in Block 23, which includes the Sarayaku territory. Therefore, this has constituted a clear and proven risk, and it was the State's responsibility to deactivate it, as ordered in the provisional measures. In other words, the State's non-compliance with its obligation to guarantee the Sarayaku Community's right to communal property by allowing explosives to be placed on its territory, has created a permanent situation of risk and threat to the life and physical integrity of its members.

249. For the foregoing reasons, the State is responsible for having gravely put at risk the rights to life and physical integrity of the Sarayaku People, recognized in Articles 4(1) and 5(1) of the Convention, in relation to the obligation to guarantee the right to communal property, under the terms of Articles 1(1) and 21 thereof.

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[308] *Matter of the Sarayaku Indigenous people regarding Ecuador*. *Provisional Measures.* Order of the Inter-American Court of June 17, 2005, Considering para. 12.

[309] *Cf.* Appendix 1 of the State's Report of September 19, 2009, submitted to the Court on October 13, 2009. (Evidence file, volume 8, page 2523).

[310] In its last order on provisional measures, the Court valued "that the state authorities and the representatives of the Sarayaku People had entered into agreements for the removal of the explosive material and that the State has completed the first phase of removal of explosives that were over the surface of the territory, of which the Sarayaku community was informed and coordinated efforts were made to that end. However, even though the State has given explanations about the delay in the adoption of this procedure, it does not clearly justify the reasons why the implementation of said procedure began more than four years after the Court expressly ordered it. Under the particular circumstances in which these provisional measures were ordered, the protection of the right to life and human treatment of the members of the Sarayaku Indigenous Community required and requires the guarantee that the explosives will be removed from the territory where the community is settled, given that this situation has hindered their freedom of circulation and the use of the natural resources existing in the area. In these circumstances, it is clear that the main concern, at this moment, is focused on the current and potential risk that the existence of high explosives buried in their territory implies for the Sarayaku community." *Cf. Matter of the Kichwa Indigenous People of Sarayaku regarding Ecuador. Provisional Measures.* Order of the Inter-American Court of February 4, 2010, Considering para 13.

[311] In that regard, one of the expert witnesses explained that the leaving behind of explosives, with visible detonation cables, poses a very serious situation because they can be triggered deliberately or accidentally (due to electrostatic causes) (affidavit of Prof. Shashi Kanth, Dossier on Pentolite Boosters used in Oil Exploitation. May 25th, 2011. South Dakota School of Mines, Evidence file, volume 19, page 10164). Similarly, the expert witness Bill Powers considered that the explosives abandoned in the territory by the CGC are a "latent danger" to the Sarayaku (affidavit of William E. Powers. *Etapas de Desarrollo de un Campo Petrolero en la Selva*, June 29, 2011, Evidence file, volume 19, page 10103).

B.2 Alleged threats to members of the Sarayaku People

250. The representatives alleged that leaders and members of the Sarayaku Community had suffered harassment and received a number of threats, most of which are not part of the factual context of this case. Some of these alleged incidents were reported to the competent authorities (*supra* para. 107) The Court considers that that while this is a plausible hypothesis in the context of the facts, no documentary evidence was provided to support the alleged attacks, harassment and threats imputable to the State. The representatives did not demonstrate that the State had any knowledge that the members of the Sarayaku Community who were allegedly assaulted faced any specific, imminent and real danger at the time the alleged events took place against them. In other words, the Court considers that the evidence produced was not sufficient, appropriate or of the type to conclude that the State is responsible for the acts or omissions in the alleged facts.

B.3 Alleged attacks, unlawful arrest and restrictions on movement along the Bobonaza River

251. A number of situations were alleged in which third parties or even state agents hindered or prevented the movement of members of the Sarayaku along the Bobonaza River. Thus, as stated in the briefs submitted in the proceedings regarding provisional measures, it is clear that the State was aware of the situations affecting the free movement of members of the Sarayaku People. As to the events that took place on December 4, 2003 (*supra* paras. 108 to 113), despite the fact that the measures adopted, in the abstract, could have been different, the Court was not provided with documents or specific arguments indicating that State authorities were in a position to determine the magnitude of the events that actually took place and that the police contingent sent would be insufficient for such purposes. The Court does not have sufficient elements to be able to conclude that the State is responsible for omissions regarding the obligation to guarantee the physical integrity of the persons injured in the events of December 4, 2003. However, as indicated in the next chapter, these facts were not diligently investigated despite having been reported, and thus the State did not ensure the right to personal integrity through diligent investigations (*infra* paras. 265-271).

252. With respect to the events of January 25, 2003 (*supra* para. 98), the Court notes that the representatives did not submit any documentation, nor did they make specific reference in their briefs to the evidence provided that would allow the Court to confirm whether a complaint was filed regarding these facts, stating that they had suffered acts that would qualify as torture or cruel treatment by the company's security personnel, with the tolerance, acquiescence or negligence of military officials. It is noteworthy that the report presented by the "Chief of Physical Security of the CIA. CGG" to the "Brigade Chief of the CIA. CGG," concludes that "upon reaching the Chonta base, the detainees were not physically or morally abused," and yet it also records the fact that "once the detainees reached the base, they were immediately taken to a secure area where [they were] investigated by CGC security" before being taken to Puyo to be delivered to the National Police. [312] However, in their arguments, the representatives did not question the nature of the entities involved in the arrest, which also carried out the medical examination, nor did they specifically refer to these documents. Moreover, they did not provide information about the normal control procedure regarding the detainees' physical or health status at the time of arrest.

253. As to the alleged violation of personal liberty of the four Sarayaku members, the Court confirms that, contrary to what was indicated by the representatives, the District Attorney of Pastaza opened a preliminary investigation proceeding against them on January 28, 2003. [313] The record of the preliminary investigation shows that although no court order was issued, the arrest

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[312] *Cf.* Preliminary inquiry No. 069-2003, based on complaint filed by José Walter Hurtado Pozo, for the alleged crimes of theft and kidnapping (Evidence file, volume 16, pages 9105 and 9106).

[313] *Cf.* Prosecutor's Investigation 069-2003 (Evidence file, volume 16, pages 9096 and 9097)

was the result of alleged criminal acts committed by these individuals, who were detained at the scene of the incidents. [314] The Court notes, on that one hand, that during the time-span between the arrest of the four Sarayaku members at one of the heliports opened in their territory (line E 16), and their handover to the National Police at Puyo, these individuals had been "investigated" by private security staff (*supra* para. 252). However, the representatives did not provide information on the applicable legal regime, nor did they specifically allege a violation of their right to personal liberty, for having been questioned by people who, apparently, were not competent authorities. On the other hand, those four people were subjected to a precautionary measure of imprisonment by decision of the First Court of Pastaza (*supra* para. 99), without the court record indicating whether the prosecution and judicial authorities duly justified the need for this measure based on procedural requirements in that situation, namely, the danger of failure to appear in court. Nevertheless, the representatives did not argue that the foregoing implied a specific violation of Article 7(3) of the Convention, nor did they report or provide evidence to enable the Court to analyze whether they were detained arbitrarily or for unlawful reasons.

254. Consequently, the Court does not have sufficient evidence to conclude that the State is responsible for the alleged violations of the rights recognized in Articles 5 and 7 of the Convention and in Article 6 of the Convention to Prevent and Punish Torture.

VIII.3
RIGHTS TO A FAIR TRIAL [JUDICIAL GUARANTEES][315] AND TO JUDICIAL PROTECTION[316]

A. Arguments of the parties

255. The Commission argued that the State had violated the right to judicial guarantees and judicial protection for several reasons: i) the writ of amparo was not processed in the usual manner and there were unexplained delays in the procedure, which was neither resolved nor was a hearing held; ii) the remedy was ineffective because the injunction ordered was not fulfilled; and iii) the State has not provided any information to conclude that it performed an effective investigation of the complaints related to the various incidents of violence and threats against members of the Sarayaku Community.

256. The representatives agreed with the Commission's comments and added that the judge with jurisdiction over the writ of amparo had not summoned the hearing under the legal terms established by the Constitution and the Law of Constitutional Control. They argued that the State had violated the guarantee of due process by failing to comply with the precautionary measure ordered, and by not ensuring the means to implement the decisions and judgments issued by the competent authorities in order to effectively protect the rights, making the right to judicial protection ineffective. Like the Commission, they alleged that the State is responsible for the total lack of investigation into the complaints filed on various occasions by members of Sarayaku.

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[314] *Cf.* Prosecutor's Investigation 069-2003, pages 9096 and 9097.

[315] Article 8.1 of the American Convention states: "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

[316] Article 25 of the American Convention states: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; b) to develop the possibilities of judicial remedy; and c) to ensure that the competent authorities shall enforce such remedies when granted."

257. The State argued that the writ of amparo filed by the OPIP had been withdrawn given the procedural inactivity of the interested party, on the understanding that the plaintiff "did not show interest in pursuing the amparo" and therefore, it had been "inconclusive." In particular, it noted that in this case, "the lack of celerity was not due to irregularities in the process" but rather to the fact that the interested party did not provide the "necessary collaboration to proceed with summoning one of the defendants" prior to the date of the hearing. The State added that OPIP could not benefit from its own willful misconduct regarding the failure to summon Daymi Services "as it was their mistake for failing to verify the correct address of the defendant, in order to effectively protect the rights allegedly violated." Moreover, the State argued that OPIP did not appear at the hearing, nor did it justify its absence, which, pursuant to the Law of Constitutional Control, amounts to a withdrawal of the writ.

258. With respect to the foregoing, the representatives noted that the First Civil Judge of Pastaza changed the date of the hearing to December 2, and notified OPIP of the change that same day. They added that the address for Daymi Services listed in the OPIP brief was wrong, but that the error was corrected by a letter from OPIP dated December 16, 2002, and that it was not on the record "that the court conducted further proceedings from that date to once again summon a hearing." Thus, the representatives noted that if not all the parties were summoned, "the Judge could not possibly have held the hearing, as was the case, and therefore, the plaintiffs could not be accused of failing to appear and even less considered to have withdrawn the amparo.

259. With regard to the investigations, the State noted that "it cannot be considered guilty over the lack of investigation into the complaints filed by members of the Sarayaku Community because the investigative processes by the Prosecutor's Office of Pastaza were undertaken only after the authorities had access to the communities and the collaboration of the plaintiffs to continue with the investigation of the cases presented." Moreover, it mentioned that the "Sarayaku Community did not provide facilities for the Prosecutor to conduct an investigation given that it restricted access to its territory, exposing law enforcement authorities to a major confrontation if they attempted to enter by force." The State further indicated that the lack of progress in the inquiries "is due to a total refusal to cooperate on the part of the possible victims," and that under the reforms made to the Criminal Procedure Code in 2009, "inquiry processes cannot be kept open for more than one year for misdemeanors and two years for felonies."

B. Considerations of the Court

260. The Court has held that the State has a duty to provide effective judicial remedies to persons who claim to be victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process (Article 8(1)), all within the general obligation of States to guarantee the full and free exercise of the rights recognized by the Convention to every person under its jurisdiction (Article 1(1)).[317]

261. On the other hand, the Court has pointed out that Article 25(1) of the Convention establishes, in general terms, the duty of the States to guarantee effective judicial remedies against acts that violate fundamental rights. In interpreting the text of Article 25 of the Convention, the Court has held, on other occasions that the duty of the State to provide a judicial remedy is not satisfied by the mere existence of courts or formal procedures or even the possibility of having recourse to the courts. Rather, the State has the duty to adopt affirmative measures to guarantee that the judicial remedies it provides are "truly effective in establishing whether or not a human

[317] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Fleury et al. v. Haití. Merits and Reparations.* Judgment of November 23, 2011. Series C No. 236, para. 105.

rights violation has occurred and providing redress." [318] The Court has further held that "the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which such remedy is lacking." [319]

262. Similarly, the Court has reiterated that the right of all persons to simple and prompt recourse or any other effective remedy before a competent judge or tribunal for protection against acts that violate their fundamental rights "constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law itself in a democratic society, within the meaning of the Convention." [320]

263. This Court has also held that for a State to comply with the provisions of the aforesaid article, it is not sufficient to ensure that the remedies formally exist, but that they are effective.[321] In this sense, under the terms of Article 25 of the Convention, it is possible to identify two specific responsibilities of the State. First, it must embody in its legislation and ensure due application of effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations. Second, guarantee effective mechanisms to execute the decisions or judgments issued by said authorities, so that the declared or recognized rights are effectively protected. Because a judgment is binding in character, the latter provides certainty on the right or controversy at issue in the case and, therefore, has as one of its effects the requirement or need for compliance. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of that ruling. [322] Therefore, the effectiveness of the sentences or judicial orders depends on their execution. [323] Anything to the contrary would imply the denial of the right concerned. [324]

264. Furthermore, with respect to indigenous people, it is crucial that the States grant effective protection that allows for the distinct characteristics of indigenous peoples, their economic and social situation, as well as their special vulnerability, customary law, values, traditions and customs. [325]

B.1 Regarding the obligation to investigate

265. The Court has previously held that the obligation to investigate, judge and, if applicable, punish those responsible for human rights violations falls within the affirmative measures that States

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318 *Cf. Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs*, para. 177. See also *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 of American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

319 *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights), para. 24; *Case of Castillo Petruzzi et al. v. Peru,* para. 185. See also, *Case of Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs*, para. 179.

320 *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 82, and *Case of Xákmok Kásek Indigenous Community v. Paraguay*, para. 139.

321 *Cf. Velásquez Rodríguez v. Honduras, Merits,* paras. 63, 68 and 81 and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 26, 2010. Series C No. 220, para. 142. Also, *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

322 *Cf. Case of Mejía Idrovo v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 5, 2011. Series C No. 228, para. 104 and *Case of Baena Ricardo et al. v. Panama. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, paras. 73 and 82.

323 *Cf. mutatis mutandi, Case of Baena Ricardo et al., Jurisdiction v. Panama*, para. 82 and *Case of Mejía Idrovo v. Ecuador*, para. 104.

324 *Cf. Case of Baena Ricardo et al., Jurisdiction v. Panama*, para. 82 and *Case of Mejía Idrovo v. Ecuador*, para. 104.

325 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs*, para. 63, and *Case of Rosendo Cantú and another v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2010. Series C No. 216, para. 184.

must adopt in order to guarantee the rights recognized in the Convention[326], in accordance with Article 1(1) thereof. This duty must be assumed by the State as a legal obligation and not simply as a formality that is preordained to be ineffective, or as a mere response to private interests, which relies upon the procedural initiative of the victims or their next of kin, or on the production of evidence by private parties. [327]

266. Likewise, the Court has stated that the obligation to investigate, and the corresponding right of the alleged victim or their next of kin, do not only derive from the conventional norms of international law, which are imperative for the States Parties, but also derive from domestic legislation which refers to the duty to investigate *ex oficio* certain unlawful actions and the rules that allow victims or their families to file a complaint or lawsuit, present evidence, petitions or any other matter, in order to participate procedurally in the criminal investigation in the hope of establishing the truth of the facts. [328]

267. In this matter, the Court notes that several complaints were filed in relation to the alleged assaults and threats against members of the Sarayaku Community (*supra* para. 107).

268. There is no indication of proceedings or results related to the complaint filed before the District Attorney of Pichincha in April 2004 by Mr. José Serrano.

269. In addition to the official investigation begun by the Ombudsman of Pastaza in connection with the events that took place on December 4, 2003 (*supra* para. 112), the Court notes that the District Attorney carried out some inquiries[329] in response to the complaint filed (*supra* para. 113). Despite this, no evidentiary documents were submitted to determine whether or not any action was taken or if a final or provisional decision was made by the authorities in relation to the allegations. With respect to the other complaints, the Court finds that the parties did not furnish any evidentiary documents or specific allegations to determine whether or not an investigation or some sort of verification process was carried out as a result of the complaints filed. Nor was any documentation provided regarding any definitive or temporary action by the authorities in relation to the allegations.

270. In short, the Court finds that no investigation was conducted in five of the six complaints filed and, as to the one investigation begun, it is clear there was procedural inactivity after certain steps were carried out. Although the State argues that this inactivity was due to lack of access to the Sarayaku territory, it did not furnish any evidentiary documentation regarding any final action or decision by the authorities in connection with the investigation of the complaints filed, which contains that or any other explanation for not continuing with the investigations. Thus, the Court finds that in this case, the investigations were not an effective measure to guarantee the rights to personal integrity of the alleged victims of these acts.

271. Based on the foregoing considerations, the Court finds that in this case, the flaws in the investigation of the alleged facts demonstrate that the State authorities did not act with due diligence or in accordance with their obligations to guarantee the right to humane treatment derived from Article 5(1) of the Convention, in relation to the State's obligation to guarantee the rights

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326 *Cf. Case of Velásquez Rodríguez v. Honduras, Merits,* paras. 166 and 167, and *Case of Torres Millacura et al. v. Argentina,* para. 112.

327 *Cf. Case of Velásquez Rodríguez v. Honduras, Merits,* para. 177, and *Case of Torres Millacura et al. v. Argentina*, para. 112.

328 *Cf. Case of Barrios Family v. Venezuela,* para. 80, and *Case of García Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2007. Serie C No. 168, para. 104.

329 *Cf.* Preliminary inquiry of December 9, 2003 (Evidence file, volume 16, pages 9253 and 9254); Appointment of expert witnesses, December 9, 2003 (Evidence file, volume 16, page 9255); Legal-medical certificates of December 9, 2003 (Evidence file, volume 16, pages 9256-9295); statements from suspects taken on May 4, 5, 14 and 20, June 4 and 8, 2004 (Evidence file, volume 16, pages 9313 a 9370);witness statement of June 10, 2004 (Evidence file, volume 16, pages 9371 to 9372), and report on the investigation at the scene of the incidents involving Sarayaku and Canelos, of April 23, 2004 (Evidence file, volume 16, pages 9359 to 9360).

contained in Article 1(1) thereof, to the detriment of the Sarayaku People. (*supra* paras. 107 and 111).

B.2 Regarding the writ of amparo

272. In the context of the simple, prompt and effective remedies established in the provision under analysis, this Court has maintained that the procedural remedy of amparo has the necessary characteristics for the effective protection of the fundamental rights; [330]in other words, it is simple and brief. In this regard, in the proceedings before this Court concerning the facts of the present case, the State argued that the writ of amparo was effective to "resolve the juridical situation of the petitioner."

273. As to the writ of amparo filed by the OPIP on November 28, 2002 in the instant case, the Court notes that the remedy was reviewed by the Superior Court of Justice of the District of Pastaza on December 12, 2002, and that it found "irregularities in [the] processing" of the writ. In that order, the Superior Court of the District of Pastaza further indicated that the initial ruling in which the parties are summoned to a public hearing violated the provisions of the Law on Constitutional Control and expressed "concern over the total absence of promptness in dealing with the matter, considering the repercussions to the social order that its objective implies." In the same ruling, the First Civil Judge of Pastaza was "strongly urged" "to comply with the strict provisions of the Law on Constitutional Control, with the promptness and efficiency that the case requires.[331] Similarly, although the OPIP filed a brief on December 16, 2002 before the First Civil Judge of Pastaza clarifying the address at which the defendants should be notified[332], no information or documentation was furnished to enable this Court to determine whether there were further procedural actions or a final decision by the abovementioned court in relation to the amparo petition.

274. Considering the foregoing, the Court holds that the reviewing court found irregularities in the processing of the writ of amparo and ordered these to be remedied. However, this Court cannot ascertain whether the First Civil Court of Pastaza complied with the orders of the reviewing tribunal, thereby rendering the order effective. On the contrary, as the State itself indicated, the action was inconclusive. Therefore, the Court considers that, in the present case, the amparo procedure was ineffective inasmuch as the First Civil Judge of Pastaza did not comply with the orders of the Superior Court of the District of Pastaza and prevented the competent authority from deciding on the rights of the plaintiffs.

275. Similarly, the Court notes that on November 29, 2002, the First Civil Judge of Pastaza ordered, as a precautionary measures, to suspend any action that could affect or threaten the rights that were the subject matter of the amparo (*supra* para. 88). There is no indication in the body of evidence that said order was fulfilled by the authorities. Therefore, the Court considers that the ruling by the First Civil Judge of Pastaza on November 29, 2003, which provided a precautionary measure, was ineffective in preventing the situation described, as it was not capable of producing the result for which it was conceived.[333] In that regard, it is appropriate to reiterate that to ensure

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330 *Cf. Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987, para. 32; *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, para. 91, and *Case of the Massacre of Dos Erres v. Guatemala,* para. 121.

331 *Cf.* Order of the Superior Court of Justice of Pastaza, page 8725.

332 *Cf.* Brief filed by the President of the OPIP before the First Civil Judge of Pastaza, on December 16, 2002, (Evidence file, volume 14, page 8730.

333 *Cf. Case of Mejía Idrovo v. Ecuador* para. 98, and *Case of the Massacre of Dos Erres v. Guatemala*, para. 121.

that the remedies applied in the instant case would be truly effective, the State should have adopted the necessary measures to ensure compliance.[334]

276. Finally, while it is reasonable to consider that the precautionary measure ordered by the First Civil Judge was temporary, until the competent Judge had entered a final decision regarding the writ of amparo, it is not possible to conclude that the requirements imposed by this measure had been extinguished due to the remedy having been inconclusive. Particularly, if the ineffectiveness of the amparo is due, as was demonstrated, to the negligence of the judicial authorities themselves. Thus, the duty to comply with the precautionary measures ordered by the State's judicial authorities lasted throughout the period during which the alleged risk to the rights of the plaintiffs remained.

277. Furthermore, although judicial authorities did not issue an order or definite decision on the merits of the writ of amparo, they ordered a precautionary measure for the purpose of safeguarding the effectiveness of a subsequent final decision. Therefore, the State had the obligation to ensure compliance with said ruling under the provisions of Article 25(2)(c).

278. Based on the foregoing considerations, the Court finds that the State did not guarantee an effective remedy to address the juridical situation infringed, nor did it ensure that the competent authority ruled on the rights of the persons who filed the writ, or that the measures were executed through effective judicial protections, in violation of Articles 8(1), 25(1), 25(2)(a), and 25(2)(c) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Sarayaku People.

IX
REPARATIONS
(Application of Article 63(1) of the American Convention)[335]

279. Based on the provisions of Article 63(1) of the Convention, the Court has indicated that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation[336], and that this provision "reflects a customary norm that constitutes one of the fundamental principles of contemporary International Law on State responsibility."[337]

280. The reparation of the damage caused by a breach of an international obligation requires, wherever possible, full restitution (*restitutio in integrum),* which consists of reinstating the situation that existed prior to the violation. Where this is not possible, as happens in the majority of cases involving human rights violations, the Court will order measures to guarantee respect for the infringed rights and ensure that the damage caused by the violations is repaired.[338] Accordingly, the Court has considered the need to order several measures of reparation in order to fully redress the

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334 *Cf.*, *mutatis mutandi*, *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1,2009. Series C No. 198, para. 75.

335 Article 63(1) of the American Convention states: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

336 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25; and *Case of Forneron and daughter v. Argentina. Merits, Reparations and Costs.* Judgment of April 27, 2012. Series C No. 242, para. 145.

337 *Cf. Case of Castillo Páez v. Peru. Reparations and Costs*. Judgment of November 27, 1998. Series C No. 43, para. 50 and *Case of Forneron and daughter v. Argentina*, para. 145.

338 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs,* para. 26 and *Case of Forneron and daughter v. Argentina*, para. 157.

damage caused, and therefore, in addition to pecuniary compensation, the measures of restitution, satisfaction and guarantees of non-repetition are especially relevant.[339]

281. This Court has established that the reparations must have a causal connection with the facts of the case, the violations declared, the harm proven, as well as with the measures requested to repair the damage. Consequently, the Court must adhere to this concurrence in order to rule properly and according to law. [340]

282. At the end of the litigation before the Court, the State reiterated its willingness, expressed during the visit to the Sarayaku territory, to reach an agreement with the Community regarding reparations in this case (*supra* paras. 23 and 25). During the aforementioned proceeding, the *Tayak Apu*, or President of the Sarayaku, José Gualinga, indicated that it was the will of the Community that the Court order reparations. At the time of issuing the judgment, the Court has not been informed of any specific agreements on reparations, which, of course, does not preclude these from being reached at the domestic level at any time after the Judgment has been delivered.

283. Consequently, and without detriment to any form of reparation subsequently agreed between the State and the Sarayaku Community, in consideration of the violations of the American Convention indicated in this Judgment, the Court shall proceed to order measures aimed at repairing the damage caused to the Sarayaku People. To this end, the Court will take into account the requests for reparations made by the Commission and the representatives, as well as the State's arguments, in light of the criteria established in the Court's case law regarding the nature and scope of the obligation to make reparations. [341]

A. Injured Party

284. Under the terms of Article 63(1) of the American Convention, the Court considers the injured party to be the Kichwa Indigenous People of Sarayaku, who suffered the violation of the rights established in the Merits chapter of this Judgment (*supra* paras. 231, 232, 249, 271 and 278), and are therefore considered as the beneficiaries of the reparations ordered by the Court.

B. Measures of restitution, satisfaction and guarantees of non-repetition

285. The Court shall determine the measures aimed at repairing the non-pecuniary damages that are not of a pecuniary nature, as well as measures of public scope and impact.[342] International jurisprudence and, in particular, the jurisprudence of the Court, has repeatedly held that the judgment *per se* is a form of reparation.[343] However, considering the circumstances of the case *sub judice*, and having regard to the damage caused to members of the Sarayaku Community and the pecuniary or non-pecuniary consequences stemming from the violations of the American

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339 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs,* Judgment of July 21, 1989. Series C No. 7, Para. 26 and *Case of Pacheco Teruel et al. v. Honduras*, para. 91.

340 *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 191, para. 110 and *Case of Forneron and daughter v. Argentina*, para. 146.

341 *Cf. Case of Velásquez Rodríguez v. Honduras, Reparations and Costs,* paras. 25 a 27 and *Case of Forneron and daughter v. Argentina*, para. 147.

342 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*, Judgment of may 26, 2011. Series C No. 77, para. 84 and *Case of Atala Riffo and daughters v. Chile*, para 251.

343 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and Costs.* Judgment of September 19, 1996. Series C No. 29, para. 56 and *Case of Forneron and daughter v. Argentina*, para. 149.

Convention declared to their detriment, the Court deems it appropriate to establish the following measures of restitution, satisfaction and guarantees of non-repetition.

286. The Commission requested that the Court order the State to:

i. "adopt the necessary measures to guarantee and protect the right to property of the members of the Kichwa indigenous community of Sarayaku with respect to their ancestral territory, guaranteeing the special relationship between the Sarayaku community and its ancestral territory";

ii. "guarantee members of the Community the exercise of their traditional subsistence activities by removing the explosive materials planted on their territory;

iii. "guarantee the meaningful and effective participation of the representatives of the indigenous peoples in decision-making processes related to development and other issues that affect them and their cultural survival";

iv. "adopt, with the participation of the indigenous peoples, the legislative or other measures necessary to make effective the right to prior, free, informed consultation in good faith, in line with international human rights standards"; and

v. "adopt the measures necessary to prevent a recurrence of similar events, in accordance with the duty to protect and ensure the fundamental rights enshrined in the American Convention."

287. In addition to the measures indicated by the Commission, the representatives called on the Court to order the State to:

i. "immediately conduct effective and prompt investigations and prosecutions of all the facts alleged by members of the Kichwa People of Sarayaku, leading to the clarification of the facts, the punishment of those responsible and adequate compensation for the victims."

ii. sign a "document of brotherhood with the neighboring communities of the Kichwa People of Sarayaku[344]";

iii. the "immediate cessation of any type of oil exploration or exploitation in the territory of the Kichwa People of Sarayaku carried out without respecting the rights of the Community[345]";

iv. the "removal of all types of explosives, machinery, structures and non-biodegradable waste and the reforestation of the areas deforested by the oil company when clearing trails and establishing camp sites required for seismic prospecting";

v. "respect for the decision of the Sarayaku People to declare their entire territory as 'Sacred Territory and Heritage Site of Biodiversity and of the Ancestral Culture of the Kichwa Nation[346]";

vi. "adopt, within a reasonable period, training modules on the rights of indigenous peoples for all police and judicial operators and other State officials whose duties involve relations with members of indigenous communities";

vii. "full compliance with the provisional measures in force in favor of members of the Sarayaku Indigenous Community", and

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344 Specifically, in their brief containing pleadings and motions, the representatives asked the Court to order the State "to sign a document which could be entitled –Protocol Act of Brotherhood- between the Sarayaku and the two communities with whom there is still bitterness," and in which the State "promises not to take any measures that create divisions between the [13] communities of the Bobonaza river basin." They added that, in accordance with the aforementioned documents, "the three communities make a commitment to live together in peace and harmony, in an atmosphere of respect and tolerance." Furthermore, to this end, the State must initate a consultation process with the consent of the three communities involved.

345 They asked that the Court require the State "to take the necessary measures to revoke the contract with the CGC company, as regards the territory of the Kichwa People of Sarayaku. As part of these measures, the State should provide detailed and clear information to the Sarayaku Community regarding the current status of the contract, and ensure that the community participates in the steps to be followed for its cancellation." They added that the State should "inform and guarantee the Community's participation, and obtain its consent for any State development project that could affect its interests."

346 They added that this concept "does not correspond to an existing legal category in Ecuador, given that the Kichwa People of Sarayaku consider it important that the declaration be based on a concept originating from their own worldview," and that "the legal basis for this declaration is the right to self-determination, recognized in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples: the Right to Private Property as guaranteed in Article 21 of the American Convention, in clause 12 of Article 57 of the Constitution and in Article 66, clause 12, of the Constitution. "

viii. ensure that the right to prior consultation "includes respect for the right to prior, free and informed consent in accordance with current international standards".

288. The State did not present specific arguments regarding the requests of the Commission and the representatives.

B.1 Restitution

Removal of explosives and reforestation of the affected areas

289. With regard to the explosives buried in the territory of the Sarayaku People, the Court appreciates that, since 2009, the State has taken several steps to deactivate or remove the explosive material, on occasion in consultation with members of the Sarayaku Community. Furthermore, the State proposed several options to neutralize the explosives buried in the territory.

290. In particular, the State provided a certificate of approval by the Secretary of Environmental Quality of a "Comprehensive Environmental Evaluation" of Block 23, stating that the CGC representative should, *inter alia*, "submit a schedule and specific deadlines for executing the activities contemplated in the Plan of Action, including those related to information processes on the way the pentolite was managed, the current condition of this explosive; the environmental impacts of the attempts to search for and examine the buried material." [347] At the same time, according to the terms of the agreement for the termination of the contract, in clause 8.4 the parties (PETROECUADOR and CGC) "accept and ratify that there is no environmental liability in the concession area attributable to the contractor" (*supra* para. 123).

291. With respect to the removal of the pentolite from the Sarayaku People's territory, the Court notes that according to the parties, two different situations exist: first, the pentolite near the surface - approximately 150 kilograms - is buried at a depth of up to 5 meters and would be possible to remove completely. Second, the pentolite buried at a greater depth – about 15 to 20 meters – would be difficult to remove without causing serious environmental damage or even potential security risks to those performing the extraction.

292. Regarding the pentolite located near the surface, the State indicated that its removal by physical means posed serious security risks to the people responsible for carrying out the operation. In addition, it would imply damage to the integrity of the territory inasmuch as it should be done by heavy machinery. For their part, representatives and Commission requested the removal of all surface explosives, which would entail a search of at least 500 meters on each side of the E16 seismic line running through the Sarayaku territory.

293. The Court orders the State to neutralize, deactivate and, if applicable, completely remove the surface pentolite, carrying out a search of at least 500 meters on each side of the E16 seismic line running through the Sarayaku territory, as proposed by the representatives. The means and methods used for these purposes shall be chosen after a process of prior, free and informed consultation with the Sarayaku Community so that it may authorize the entry and presence on their territory of the equipment and people required to carry out the process. Finally, given that the State alleged a risk to the physical integrity of the people responsible for removing the explosives, it is up to the State, in consultation with the Community, to select the methods for removing the explosives which pose the least risk to the ecosystems in the area, consistent with the Sarayaku worldview and the safety of the team performing the operation.

294. As to the pentolite buried at a greater depth, the Court finds that, based on the technical reports by experts, the representatives themselves have proposed a solution to neutralize the

[347] Evidence file, volume 17, page 9595.

danger involved.[348] The State did not present any observations in this regard. The case file contains no specific argument, technical expert testimony, or evidence of a different nature that indicates that the measure proposed by the Sarayaku Peoples is not the most appropriate and safe option, and the most consistent with their worldview, for neutralizing the buried explosives. Therefore, the Court orders that, in accordance with the technical expert testimony presented in this process, and until a better solution is agreed upon by the parties at the domestic level, the State shall: i) determine the number of points where the pentolite is buried; ii) bury the detonator cables so that they are inaccessible and the explosive can degrade naturally; and iii) properly mark the burial locations, including planting local tree species that do not grow roots deep enough to cause an accidental explosion of pentolite. In addition, the State shall adopt the measures necessary to remove any machinery, structures and non-biodegradable waste remaining as a result of the oil company's activities, and shall reforest those areas that may still be affected by the construction of trails and camps required for seismic research. These tasks shall be carried out after a process of prior, free and informed consultation with the Sarayaku Community, which shall authorize the entry and presence on its territory of the materials and persons required for this purpose.

295. Compliance with this measure of reparation is an obligation of the State, which shall complete it within a period no longer than three years. For the purposes of compliance, the Court orders that, within six months, the State and the Sarayaku People establish by common agreement a schedule and a work plan that includes, among other aspects, details of the location of the superficial pentolite and of the material buried at a greater depth, as well as specific and effective steps to deactivate, neutralize and, where applicable, remove the pentolite. Within the same period, the parties shall report to the Court on this matter. Once this information has been submitted, the State and the Sarayaku Community shall report every six months on the measures implemented in compliance with the work plan.

B.2 Guarantees of non-repetition

a) Due prior consultation

296. The Court has been informed by the State and the representatives that, in November 2010, PETROECUADOR and the CGC company signed an Act of Termination by Mutual Agreement of the contract of participation for the exploration and exploitation of crude oil in Block 23 (*supra* para. 123). In addition, the representatives referred to several announcements by State authorities of the hydrocarbons sector regarding a call for new bids for oil exploration in the south-central Amazon region of Ecuador, in the provinces of Pastaza and Morona Santiago. Specifically, it was alleged that at least eight blocks were to be exploited in the southeast Amazon, including Pastaza Province, and that the new bidding round would include the Sarayaku territory.

297. Furthermore, it was reported that in November 2010, the State had signed an "Agreement Modifying the Contract for Provision of Services for the Exploration and Exploitation of Hydrocarbons (crude oil) in Block 10 of the Ecuadorian Amazon region[349]" with the concessionaire company of the new "Block 10," and that the redefined area would include a portion of approximately 80,000

[348] The representatives requested the Court to "call on the State to remove all explosives found on the surface of the territory, as the Sarayaku requested in the process of provisional measures." In order for this to occur, "the State must conduct a search of at least 500 meters on both sides of the E16 seismic line which passes through Sarayaku." Similarly, they asked the Court to "order the Ecuadorian State to treat the pentolite located underground in accordance with the plan proposed by Professor Kanth, based on determining the number of points where the pentolite is buried, bury the detonating cables, mark the points where these are buried and declare the area as a recovery zone." Finally, they proposed that "the process described be executed by the State as soon as possible, [and that] every phase of this management plan be submitted for consultation and agreement to the Kichwa People of Sarayaku, who should continue to receive external advice regarding the process."

[349] Final Negotiation Report. Contract for the Provision Services for Exploration and Exploitation of Crude Oil in Block 10. AGIP ECUADOR OIL B.V, of November 21, 2010 (Evidence file, volume 18, pages 9711, 9736).

hectares of Block 23. This would affect the territory of Kichwa communities in the upper basin of the Bobonaza river and the Achuar Association of Shaime, as well as a portion of the Sarayaku territory.

298. In this regard, it is appropriate to recall that the Secretariat for Legal Affairs of the Presidency of the Republic of Ecuador, in acknowledging the State's responsibility in this case, stated that:

> […] there will be no oil exploitation here without prior consultation […] No new round will begin without informed consultation. […] we will not do any oil exploitation behind the back of the communities but rather through the dialogue that will take place at some point, if we decide to begin oil exploitation […] here. There will be no oil development without open and frank dialogue; not a dialogue made by the oil company, as has always been charged. We have changed the legislation so that the dialogue is initiated by the government and not by the extractive industry […]

299. While it is not appropriate to rule on new bidding rounds that the State may have initiated, in the present case, the Court has determined that the State is responsible for the violation of the right to communal property of the Sarayaku People, for having failed to adequately guarantee their right to consultation. Therefore, as a guarantee of non-repetition, the Court orders that, in the event that the State should seek to carry out activities or projects for the exploration or exploitation of natural resources, or any type of investment or development plans that imply potential repercussions for the Sarayaku territory or affect essential aspects of their worldview or life, integrity or cultural identity, the Sarayaku Community shall be previously, adequately and effectively consulted, in full compliance with the international standards applicable to this subject matter.

300. The Court further recalls that processes of participation and prior consultation must be carried out in good faith throughout all the stages of preparation and planning of any project of this nature. Moreover, according to the international standards applicable in such cases, the State must effectively ensure that any plan or project that affects, or could potentially affect the ancestral territory, includes prior comprehensive studies on the environmental or social impact, carried out by technically qualified and independent entities, and with the active participation of the indigenous communities involved.

b) Regulation of the right to prior consultation in domestic law

301. With respect to the domestic legal system which recognizes the right to prior, free and informed consultation, the Court has already noted that, in the evolution of the international *corpus juris*, the Ecuadorian Constitution of 2008 is one of the most advanced in the world on this matter. However, the Court has also confirmed that the right to prior consultation has not been sufficiently and adequately regulated through appropriate regulations for its practical implementation. Thus, under Article 2 of the American Convention, the State must adopt, within a reasonable period, any legislative, administrative or other type of measures that may be necessary to effectively implement the right to prior consultation of indigenous peoples, communities and nations and modify those measures that inhibit its full and free exercise, for which purpose the State must ensure the participation of the communities themselves.

c) Training of state officials on the rights of indigenous peoples

302. In this case, the Court has determined that the violations of the rights to prior consultation, cultural identity and cultural integrity of the Sarayaku Community resulted from the actions and omissions of various officials and institutions that failed to guarantee those rights. The State shall implement, within a reasonable period and with the corresponding budgetary provisions, mandatory programs or courses that include modules on domestic and international human rights standards concerning indigenous peoples and communities, aimed at law enforcement officials and others whose functions involve relations with indigenous peoples, as part of the general and continuing training of civil servants in the respective institutions, at all hierarchical levels.

B.3 Measures of satisfaction

a) Public act of acknowledgment of State responsibility

303. The representatives requested that the Court order the State to "[c]onduct a public act of acknowledgment of responsibility, previously agreed to by the Sarayaku Community and its representatives, in relation to the violations established in the eventual judgment of the Court." They added that "this act should be carried out in the Community's territory, in a public ceremony, with the presence of the President of the Republic and other senior State authorities, and to which members of the neighboring communities of the Bobonaza River basin are invited." Moreover, in the course of said act, "the State should recognize that the Sarayaku are a peaceful people who have fought for over 14 years to defend the integrity of their territory and preserve their culture and means of subsistence." They also requested that […] the "State should dignify the image of the Sarayaku leaders who have suffered threats, harassment and insults because of their work in defense of the territory and its People and, for this reason, have been beneficiaries of the provisional measures." Finally, they requested that the Court order the State to "[c]onduct the public act of recognition in Spanish as well as in the Kichwa language, and […] disseminate it through the national media."

304. The Commission did not formulate similar requests and the State made no reference to the request of the representatives.

305. Although in this case the State has already acknowledged its responsibility on the territory of the Sarayaku, the Court considers, as it has in other cases[350], that in order to repair the damage caused to the Sarayaku People, particularly through the violation of their rights to self-determination, cultural identity and prior consultation, that the State should carry out a public act acknowledging its international responsibility for the violations set forth in this Judgment. The place, terms and conditions of this act shall be determined through prior consultation and in agreement with the Community. The act shall take place during a public ceremony; in the presence of senior State officials and members of the Sarayaku Community; in the Kichwa and Spanish languages and shall be widely publicized in the media. The State has one year as from notification of the Judgment to comply with this measure.

b) Publication and broadcasting of the Judgment

306. The representatives requested that "the relevant parts of the judgment be published at least once in the Official Gazette and in another newspaper of national circulation, both in Spanish as well as Kichwa." The Commission and the State made no comment on this matter.

307. In this regard, the Court considers, as it has in other cases[351], that the State must publish, within six-months from the date of legal notice of the present Judgment:

- the official summary of this Judgment issued by the Court, once only, in the Official Gazette;
- the official summary of this Judgment issued by the Court, once only, in a newspaper with wide national circulation; and
- this Judgment, in its entirety, to be posted on an official website for a period of one year.

308. Furthermore, the Court considers it appropriate for the State to publicize, through a radio station with wide coverage in the southeastern Amazon, the official summary of the Judgment, in

[350] *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs.* Judgment of December 3, 2001. Series C No. 88, para. 81 and Case of *Atala Riffo and Daughters*, para. 263. See also *Case of the Moiwana Community, Preliminary Objections, Merits, Reparations and Costs*, paras. 216 and 217 and *Case of Xákmok Kásek v. Paraguay*, para. 297.

[351] *Cf. Case of* Cantoral Benavides *v. Peru. Reparations and Costs,* para. 79 and *Case of Forneron and daughter v. Argentina*, para. 183.

Spanish, Kichwa and other indigenous languages of the sub-region, with the relevant interpretation. The radio broadcast shall take place every first Sunday of the month, on at least four occasions. The State has one year from notification of this Judgment to comply with this measure.

C. Compensation for pecuniary and non-pecuniary damages

C.1 Pecuniary damages

309. The Court has developed case law on the concept of pecuniary damages and the circumstances in which compensation must be paid. This Court has established that pecuniary damage contemplates "the loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the *sub judice* case."[352]

a) Arguments of the parties

310. The Commission requested that the Court order the State to make reparation "at the individual and the community level, for the consequences of the violations" and that, in determining the pecuniary damages and other claims made by the representatives, it consider the worldview of the Sarayaku People and the effect on the Community itself and its members as a result of being prevented from using, enjoying and disposing of their territory and, among other consequences, being prevented from carrying out their traditional subsistence activities."

311. The representatives asked the Court to determine, in equity, compensation for pecuniary damages, to be paid directly the Sarayaku People, for the damage caused to their territory and natural resources[353]; the effects of the cessation of production activities by the Sarayaku during the six months that the "state of emergency" lasted[354]; the effects of the actions undertaken to defend

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[352] *Cf. Case of Bámaca Velásquez V. Guatemala. Reparations and Costs.* Judgment of February 22, 2002. Series C No. 91, para. 43; and *Case of González Medina and family v. Dominican Republic*, para. 310.

[353] This item includes: a) "The opening of seismic trails and of seven heliports in the territory destroying large tracts of forest"; b) "The destruction of caves, water sources and underground rivers required for drinking water for the community"; c) "The cutting of trees and plants of great cultural, environmental and subsistence value for the Sarayaku"; d) "environmental pollution, waste and garbage left behind by workers in the territory"; e) "Highly dangerous explosives abandoned on the surface and subsurface of the Sarayaku territory, which still remain today."

[354] This item includes: a) lost income due to the inability to plant and sell their farm products, which resulted in their having to purchase products in the markets. According to the representatives, the losses incurred by not being able to plant the cassava crop that year alone amounted to $ 64,000 (sixty-four thousand dollars of the United States of America). In addition to supplementing their diet because of food shortages caused by the scarcity of game and fish due to the seismic activities, each of the 160 families in the community had to spend $ 34 (thirty-four dollars of the United States of America) per month for six months during the state of emergency and 8.5 US. dollars (eight dollars and fifty cents of the United States of America) during the eight months that followed, b) interruption of the community's other production activities, such as building canoes, houses and crafts; c) serious impact on community tourism in Sarayaku, reducing the direct income received by project managers from tourists, associated with spending on food, accommodation and jungle tours offered by community guides. They also claimed that each tourist paid $ 15 (fifteen dollars of the United States of America) for admission to the territory. They claimed that on average, about 200 tourists a year entered the Sarayaku territory, a source of income that was interrupted for two years. In other words, after the conflict they failed to receive a total of $ 6,000 (six thousand dollars of United States of America) assigned to a community fund, and d) the loss of some Sarayaku development projects such as fish farming and the program on community economics. In the brief of final arguments, the representatives stated that "[a]ccording to the new census mentioned above, it is estimated that the Sarayaku Community has 206 nuclear families and not 160 as indicated in [the] ESAP", and that "the Sarayaku have reviewed the calculations made of the losses incurred on their farms (*chacras*), given the inclusion of some incorrect facts in the ESAP." For this reason they presented a new request that includes income not earned due to their inability to grow and sell their farm products, which resulted in their having to buy products in the market. Thus, the amount that the representatives are requesting that the Court set in equity for this item is USD$ 618,000 (206 families x two farms each x 150 quintales of yucca x USD$ 10 per quintal).

their territory[355], and the economic impact of the restrictions on their freedom of movement along the Bobonaza River.[356]

312. The State argued that the damage caused to the Sarayaku People's territory and its natural resources, as well as expenses incurred by its members to move around, had not been proven and that no reports or inspections had been submitted to support the request It claimed that the alleged lack of tourists was due "to the position taken by the leaders against the work of the foreign company" and that the "conflicts created by them and their refusal to establish negotiation mechanisms were the major causes of these situations." Regarding the lack of yucca production and the need to purchase other basic staples, the State alleged that the Sarayaku had not presented documents or evidence to justify these assertions. As to the losses suffered by the community tourism agency, "Papango Tours," the State noted that in order to demonstrate bankruptcy, it is necessary to present a series of documents, such as annual balances, income and loss statements, and the documents submitted to the Internal Revenue Service. Finally, the State asserted that the Sarayaku People's freedom of movement along the Bobonaza River was not restricted and "that the activities which, according to the Sarayaku Community, were not possible due to the restriction on their right to free passage, must be properly demonstrated, that is, duly supported."

b) Considerations of the Court

313. Regarding the damage to the Sarayaku territory and its natural resources, the Court notes that a report by the Human Rights Commission of the National Congress of the Republic of Ecuador[357] was submitted, which indicates that "the State, through the Environmental Ministry and the Ministry of Energy and Mines violated [...] the political Constitution of the Republic by not consulting with the community regarding the plans and programs for exploration and exploitation of non-renewable resources found on their land and which could have environmental and cultural effects." Said report specifically refers to the "significant negative impact on the flora and fauna in the region due to the destruction of forests and the construction of heliports." Moreover, in relation to this matter, a report of the Ministry of Energy and Mines Ministry[358] was submitted, which gives details of the "land clearance" to be carried out in the seismic exploration process.[359] At the same time, the Court confirms that the rest of the supporting documentation furnished by the representatives consists of documents produced by the Sarayaku themselves (press releases[360] or testimonies from the Self-Assessment document[361]) and an excerpt from a social study on the impacts on the quality of life and food security and sovereignty in Sarayaku.[362]

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355 According to the allegations, the defense of the territory implied many expenses for the Sarayaku leaders, who had to travel to different parts within and outside the country. They added that the community tourism business went bankrupt.

356 The representatives claimed that this restriction implied additional transport costs because Sarayaku members had no choice other than to travel by air for urgent matters, which increased the community's expenses as each plane trip costs an average of $250 (two hundred fifty dollars of the United States of America). They added that the restrictions on freedom of movement had also hampered the following activities: a) entry of tourists; b) sales of Sarayaku products to the cities; c) the entry of basic commodities from the city, which had to be transported by plane, multiplying the costs; d) entry of goods for stores in Sarayaku; and e) because it was impossible for Sarayaku members to travel by river, they had to travel by plane to leave Sarayaku, which increased transportation costs**.**

357 *Cf.* Evidence file, volume 10, page 6158.

358 *Cf.* Evidence file, volume 10, page 6398.

359 Specifically, the report describes land clearance activities along the trails for laying seismic lines, for the camps, for trails in the drop zones, and trails for the heliport.

360 *Cf.* Evidence file, volume 10, page 6396.

361 *Cf.* Evidence file, volume 10, page 6588 and following pages.

362 *Cf.* Evidence file, volume 11, page 6753 and following pages.

314. The principle of equity has been used in the jurisprudence of this Court to quantify non-pecuniary damages[363]and pecuniary damages.[364] However, the use of this criterion does not mean that the Court may act discretionally in setting the amounts of compensation.[365] It is up to the parties to clearly specify the proof of damage suffered, as well as the specific connection between the pecuniary claim with the facts of the case and the violations alleged.

315. The Court notes that the evidentiary elements submitted are not sufficient or specific enough to determine the income lost by members of the Sarayaku Community due to the suspension of their daily activities during some periods, and the growing and sale of farm products, and for the alleged costs incurred to supplement their diet because of the food shortages during some periods, or for the impact on community tourism. Furthermore, the Court notes that the amounts requested for pecuniary damages vary significantly between the brief of pleadings and motions and the final written arguments submitted by the representatives. Although this is understandable because of the difference in the number of families initially indicated, which emerged after the census was carried out in Sarayaku, the differences in the criteria used by the representatives to calculate the pecuniary damages are not clear. However, given the circumstances of this case, it is reasonable to conclude or presume that as a result of these events, the members of the Sarayaku Community incurred a number of expenses and lost earnings which, in turn, affected their ability to use and enjoy the resources on their territory, particularly due to their restricted access to areas used for hunting, fishing and general subsistence. Moreover, given the location and way of life of the Sarayaku People, the difficulty in proving those and losses and pecuniary damages is understandable.

316. Similarly, although no supporting documents were presented for the expenses incurred, it is reasonable to assume that the actions and efforts undertaken by members of the Community generated costs that should be considered as emerging damages, particularly with regard to the actions or procedures to arrange meetings with the various public authorities and other communities, for which their leaders or members have needed to travel. Accordingly, the Court establishes, in equity, compensation for the pecuniary damages, bearing in mind that: i) members of the Sarayaku People incurred expenses in carrying out actions and negotiations at the domestic level to demand the protection of their rights; ii) their territory and natural resources were damaged, and iii) the Community's economic situation was affected by the suspension of production activities during certain periods.

317. Consequently, the Court establishes the amount of US $90,000.00 (ninety thousand dollars of the United States of America) as compensation for pecuniary damages. This sum shall be paid to the Association of the Sarayaku People (*Tayjasaruta*) within one year of notification of this Judgment, so that the Community may decide, in accordance with its own decision-making mechanisms and institutions, how to invest the money, among other things, for the implementation of educational, cultural, food security, health and eco-tourism development projects or other works or projects of collective interest that the Community considers as priorities.

C.2 Non-pecuniary damages

318. In its case law, the Court has developed the concept of non-pecuniary damage and has established that it may "include both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other afflictions of a non-pecuniary nature, which affect the living conditions of the victims or their families."[366]

a) Arguments of the parties

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363 *Cf. Case of Velásquez Rodríguez, Reparations and Costs,* para. 27 and *Case of Atala Riffo and Daughters*, para. 291.

364 *Cf. Case of Neira Alegría et al.*, *Reparations and Costs,* para. 50 and *Case of Atala Riffo and Daughters*, para. 291.

365 *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and Costs*. Judgment of September 10,1993. Series C No. 15, para. 87, and *Case of Atala Riffo and Daughters*, para. 291.

366 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*, para. 84 and *Case of Forneron and Daughter v. Argentina*, para. 194.

319. The Commission requested that the Court establish in equity the amount of compensation for moral damages caused to the Sarayaku Community and its members, "for the suffering, anguish, and indignities to which they have been subjected during the years in which their right to use, enjoy and dispose of their territory has been limited" and for the other alleged violations.

320. The representatives asked the Court to set an amount in equity as compensation to repair the non-pecuniary damages suffered by the Sarayaku Peoples which resulted in the following encumbrances: the threat to the livelihood and cultural identity of the Community due to the damage to the territory[367]; the impact on the education of the children and young people[368]; the effects on health and safety[369]; on family and community relationships[370] and on individual life projects and collective development projects.[371]

321. The State pointed out that the representatives' arguments regarding non-pecuniary damages are, in several respects, "absolutely dysfunctional in the cultural context of a Quichua indigenous community in the Amazon because they appear as isolated aspects, which contradicts the ethos of the Sarayaku indigenous worldview." Regarding the alleged threats to the Community's livelihood and cultural identity due to the damage to the territory and other alleged facts, the Stated added that in the "Amazonian Quichua mind-set, social, community and environmental order with nature is revitalized through a process of hierarchical symbolic re-adjudication that does not involve state intervention and, on the contrary, is a matter for the cultural agents of each community." As to the allegation that the community was deprived of education, health, communal relations and collective development projects, the State argued "that the ecological and social conditions in Sarayaku are not seriously at risk as there is a significant flow of tourists each month and community-based tourism has become an alternative form of development, that is, eco-development." Finally, the

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[367] In this regard, they noted that the arrival of the oil company and the damage it caused to the territory meant that "the spirits that inhabited these places fled to other places taking with them the elements of the jungle like animals and spiritual strength." In addition, they mentioned other damage to their worldview, namely: a) The destruction of the sacred site of Shaman Cesar Vargas, including the *Lispungu* tree, and the *Wichu Kachi* mountain, or place of the parrots, b) the destruction of trees and plants of great value for traditional medicine; c) harm to sacred sites, and d) inability to celebrate the Uyantsa festival for two years.

[368] In this regard, they added that "the traditional education, and that of children and young people was also affected due to the suspension of classes in schools for three months, during which time young children were left in the houses and young people joined the Peace and Life camps to protect their territory." They also mentioned that "many of the Sarayaku leaders had to abandon their studies at the University of Sarayaku, created by a cooperation project between Ecuadorian universities and a Spanish university, since they had to defend the territory and therefore could not obtain their college degree."

[369] On this point the representatives indicated that a) as a result of food shortages during and after the "state of emergency" to defend the territory of Sarayaku, "its members suffered various illnesses such as malnutrition, fever, diarrhea, vomiting, headaches, increased gastritis and anemia, hepatitis B and other illnesses," b) the conflict seriously disrupted the security, tranquility and lifestyle of members of the People, who feel that [anytime] anything can happen and [that] all threats could be real," c) the children have lived in fear of the militarization of the territory and the fate of their parents and, as a result of the suspension of classes, did not return to their studies; d) the effects of the threats, harassment and physical abuse to which they were subjected still continue to this day as "Sarayaku members continue to fear for the future of their territory," e) "as a result of the actions of the State, the Sarayaku People have been stigmatized as a 'guerilla' people and as 'a true state within a State', with ties to subversive activities, which has affected their relations with much of Ecuadorian society."

[370] The representatives argued that regarding this point a) "tension has been constant with neighboring communities, especially with the Canelos community, with which it is still working to improve relations" b) "the conflict raised tensions between the Sarayaku families themselves, both because of disputes over allowing the oil company to enter and the lack of time to devote to family life," and c) the divisions caused by the company led to the expulsion and punishment of members of Sarayaku, [and] situations of strife and distrust." In this regard, it indicated that the consequences "of these conflicts have had an impact to date, as evidenced by the situation created by the attempted secession of the territory and creation of the Kutukachi community."

[371] Specifically, they argued that a) it affected the life project of many members of the community, who were forced to leave their previous occupations to devote themselves entirely to the defense of their territory, and b) development projects in the community such as the fish farming project, the communitarian economy, the conservation of the territory, the community tourism, and the university of Sarayaku were "delayed, hindered or thwarted."

State asserted that it had invested more than half a million dollars in Sarayaku since 2004, including in a project entitled "Development of the Life Plan of the Sarayaku Community." It added that "all this investment is the result of the oil revenues, from which Sarayaku is one of the indigenous communities that has benefited the most," and, therefore "considers that no real changes exist to the life project of its inhabitants" and that their claim "exceeds the scope of the potential and collateral damage caused by the lack of protection from the state apparatus."

b) Considerations of the Court

322. In declaring the violations of the rights to communal property and consultation, the Court took into account the serious impacts suffered by the Community and its members, having regard to of their deep social and spiritual relationship with their territory, and in particular, the destruction of parts of the forest and certain places of great symbolic value.

323. Bearing in mind the compensation ordered by the Court in other cases, and in consideration of the circumstances of this case, the suffering caused to the Sarayaku People, to their cultural identity, the impact on their territory, particularly due to the presence of explosives, as well as the changes caused in their living conditions and way of life and other non-pecuniary damages that they suffered, the Court deems it appropriate to set, in equity, the amount of US $1,250,000.00 (one million, two hundred and fifty thousand dollars of the United States of America) for the Sarayaku People as compensation for non-pecuniary damages. This amount shall be paid to the Association of Sarayaku People (*Tayjasaruta*), within one year as from notification of this Judgment, so that the money may be invested as the Community sees fit, in accordance with its own decision-making mechanisms and institutions, among other things, for the implementation of educational, cultural, food security, health and eco-tourism development projects or other communal works or projects of collective interest that the Community considers a priority.

D. Costs and Expenses

324. As the Court has indicated on previous occasions, costs and expenses are included under the heading of reparations as established in Article 63(1) of the American Convention.[372]

D.1 Arguments by the parties

325. The Commission requested that the Court "after hearing the representatives of the injured party, order the State to pay the costs and expenses […], taking into account the special characteristics of the […] case."

326. The representatives asked the Court to order the State to pay costs and expenses in benefit of the Sarayaku Community, and its representatives, Mario Melo and CEJIL, for the following: expenses incurred by the Sarayaku People[373]; expenses incurred by the attorney Mario Melo before

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[372] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C. No. 39, para. 79 and *Case of Forneron and daughter v. Argentina*, para. 198.

[373] With regard to this item, they stated that "over the past seven years, the actions related to the case have forced leaders and members of Sarayaku to regularly travel to the cities of Puyo and Quito (Ecuador), Washington OC (USA). Asuncion (Paraguay) and San José (Costa Rica). " They added that while some of the expenses incurred are covered by NGOs, there have been other expenses that have had to be covered by the Sarayaku and that "these expenses amount […] to a sum of five thousand dollars a year […] Since the Sarayaku people have not saved receipts for most of the costs incurred, they are asking the Court to order in equity a payment for the sum of 35,000 USD." In their final written arguments, the representatives pointed out that the Sarayaku People received support from the Victims' Legal Assistance Fund of the Court, for which reason they did not request the reimbursement of any expenses additional to those included in the brief.

the Inter-American System[374]; and expenses incurred by CEJIL.[375] In total, they requested that the Court set in equity the sum of USD $ 152,417.26 for costs and expenses.

327. For its part, the State presented no comments regarding the representatives' claims for costs and expenses.

D.2 Considerations of the Court

328. As the Court has indicated, costs and expenses are part of the reparations, provided that the actions carried out by the victims to obtain justice involve expenditures that must be compensated for when the State's international responsibility is declared in a sentence. In terms of reimbursement, it is up to the Court to make a prudent estimate of the extent of the costs incurred in proceedings before the authorities of the domestic courts and in the proceedings before this Court, taking into account the specific circumstances of the case and the nature of the international jurisdiction for the protection of human rights. The Court shall make this assessment based on the principle of equity and the expenses identified by the parties, provided the *quantum* is reasonable.[376]

329. Accordingly, the Court reiterates that the claims of the victims or their representatives in relation to costs and expenses, and any supporting evidence, must be submitted at the first procedural opportunity granted to them, namely, in the brief containing pleadings and motions, even though such claims may be subsequently updated, according to new costs and expenses incurred in connection with these proceedings.[377] Likewise, it is not sufficient to submit only probative documents; the parties must also develop arguments that relate the evidence to the facts under consideration, and, in the case of alleged financial disbursements, the items and their justification must be clearly described.[378]

330. With respect to the expenses claimed by the attorney Mario Melo, the Court finds that some of the vouchers do not identify the payments that are to be assessed. The items referred to have been equitably deducted from the calculations established by the Court. Similarly, as in other cases, it is evident that the representatives incurred costs in the processing of the case before the Inter-American Human Rights System. As to the expenses claimed by CEJIL, the Court notes that some of

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[374] The representatives requested reimbursement for costs and expenses incurred by the defense, undertaken by the attorney Mario Melo, as a member of the Center for Economic and Social Rights - CDES-between 2003 and 2007, and as a member of the Pachamama Foundation team from 2007 to date. In particular, they listed "the costs incurred for their professional services and the travel costs to places such as Puyo and Sarayaku in Ecuador, Washington DC (United States) and San José (Costa Rica) to attend proceedings in this case; the collection of evidence and the notarization of documents have been covered by the CDES and Pachamama Foundation for the sum of $ 13,569.97 per year." Therefore, they requested that the Court order payments to cover the costs incurred by the CDES and the Pachamama Foundation, in equity. In their final written arguments, they also requested, in addition to the aforementioned costs and expenses, reimbursement of costs and expenses incurred by representatives of the Kichwa People of Sarayaku since the presentation of the brief of pleadings and motions in September 2010 to the holding of the public hearing in this case at the seat of the Court in Costa Rica. Accordingly, the requested that the Court order payment, in equity, to the aforementioned CDES and Pachamama organizations, for the sum of USD$ 13,569.97. In total, they requested the Court to set in equity the amount of USD$ 73,569.97.

[375] The representatives requested the Court to order the State to reimburse the Center for Justice and International Law (CEJIL), for costs and expenses incurred in representing the victims and their families in the international process beginning in 2003 and to set in equity the amount of $ 28,056.29 for expenses, and that such payment be made directly by the State to the representatives. Finally, they requested that the Court set in equity the sum of USD$ 15,791.00 to cover the costs incurred by CEJIL since the presentation of the brief of pleadings and motions up to the present. Finally, they requested that they be awarded the future costs generated, which include, *inter alia,* "travel and additional expenses of witnesses and experts to the possible hearing before the Court; travel by the representatives to the Court; and the costs involved in obtaining future evidence." In total they requested that the Court establish in equity the sum of USD$ 43,847.29.

[376] *Cf. Case of Garrido and Baigorria v. Argentina, Reparations and Costs,* para. 82 and *Case of González Medina and family,* para. 325.

[377] *Cf. Case of Chaparro Álvarez and Lapo Iñiquez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C. No. 170, para. 275 and *Case of González Medina and family,* para. 326.

[378] *Cf. Case of Chaparro Álvarez and Lapo Iñiquez V. Ecuador, Preliminary Objections, Merits, Reparations and Costs* para. 277 and *Case of González Medina and family,* para. 326.

the receipts submitted do not clearly show a connection with outlays linked to this case. However, the Court also notes that the representatives incurred various expenses related to, among other things, the collection of evidence, transportation and communications services in domestic and international proceedings in this case.

331. In this case, the expenses incurred by the Sarayaku People have already been taken into account in determining the compensation for pecuniary damages (*supra* paras. 316 and 317). Furthermore, the Court determines, in equity and in consideration of certain supporting documentation on expenses, that the State shall pay the total sum of USD$ 58,000.00 (fifty-eight thousand dollars of the United States of America) for costs and expenses. Of that amount, the State shall directly pay the sum of USD $ 18,000.00 to CEJIL. The rest of the amount set shall be paid to the Association of the Sarayaku People (*Tayjasaruta*), so that it may distribute it as appropriate among the other persons and, where applicable, organizations that have represented the Sarayaku People before the Inter-American System. During the monitoring of compliance with this Judgment, the Court may order the State to reimburse the victims or their representatives for subsequent reasonable and adequately proven expenses.

E. Reimbursement of expenses to the Victims' Legal Assistance Fund

332. In 2008, the General Assembly of the Organization of American States (hereinafter "OAS") created the Legal Assistance Fund of the Inter-American Human Rights System to "facilitate access to the Inter-American human rights system by persons who currently lack access to the resources needed to bring their case before the system."[379] In the present case, the victims were granted the necessary financial assistance from the Legal Assistance Fund for Mr. Sabino Gualinga, Mr. Marlon Santo and Mrs. Patricia Gulinga and Mrs. Ena Santi to appear at the public hearing (*supra* paras. 8 and 11).

333. The State had the opportunity to present its observations on the expenditures made in the present case, which amounted to the sum of US $6,344.63 (six thousand three hundred forty-four dollars and sixty-two cents of the United States of America). However, it did not submit any observations in this regard. Consequently, it is up to the Court, pursuant to Article 5 of the Rules of the Fund, to assess the appropriateness of ordering the respondent State to reimburse the Legal Assistance Fund for the expenditures incurred.

334. In consideration of the violations declared in this Judgment, the Court orders the State to reimburse the Fund in the amount of US $6,344.62 (six thousand three hundred forty-four dollars and sixty-two cents in United States dollars) for the aforementioned expenses related to the public hearing. This amount shall be repaid within 90 days of notification of the present Judgment.

F. Method of compliance with the payments ordered

335. The State shall pay the compensation established in respect of pecuniary and non-pecuniary damages, as well as reimbursement for legal costs and expenses (*supra* para. 331), directly to the Sarayaku Community, through its own authorities, and shall pay the corresponding amount for costs and expenses directly to the representatives, within one year from notification of this Judgment, under the terms of the following paragraphs.

336. The State shall discharge its obligations by making the payment in dollars of the United States of America.

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[379] AG/RES. 2426 (XXXVIII-O/08) Resolution adopted by the OAS General Assembly during its Thirty-Eighth Regular Session, during the fourth plenary session, held on June 3, 2008, *"Creation of the Legal Assistance Fund of the Inter-American Court of Human Rights*", Operative paragraph 2.a, and Resolution CP/RES. 963 (1728/09), Article 1(1).

337. If, for reasons attributable to the beneficiaries, it is not possible for them to receive the amounts ordered within the indicated period, the State shall deposit those amounts in an account held in the beneficiaries' name or in a certificate of deposit from a financial institution in Ecuador under the most favorable financial terms allowed by law and customary banking practice. If, after 10 years, the compensation has not been claimed, these amounts shall be returned to the Ecuadorian State with the accrued interest.

338. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the beneficiaries in their entirety in accordance with the provisions of this Judgment, without deductions derived from future taxes.

339. If the State should fall into arrears with its payments, it shall pay interest on the total amount owed at the current bank rate in Ecuador.

G. Provisional measures

340. Provisional measures were ordered from the time this case was under consideration by the Inter-American Commission (*supra* para. 5), for the purpose of protecting the lives and integrity of the members of the Sarayaku Community through a series of actions to be implemented by the State. The protection ordered was intended to prevent, *inter alia*, the thwarting of potential reparations that the Court might order in its favor. For the purpose of assessing the information contained in the provisional measures file (*supra* para. 48) and, unlike most other cases, the particular group of beneficiaries of such measures of protection are identical to the beneficiaries of the measures of reparations ordered in this Judgment on merits and reparations. In other words, the duty to protect the rights to life and personal integrity of the members of the Sarayaku People, initially set out in the orders for provisional measures, are, hereafter, covered by the reparations ordered in this Judgment, which must be complied with from the moment the State receives legal notice thereof. Thus, given the special nature of the present case, the State's obligations within the provisional measures framework, are replaced by the measures ordered in this Judgment and, therefore, their implementation and enforcement shall be subject to the monitoring of compliance with the Judgment instead of the provisional measures. Consequently, the provisional measures [380]no longer have any effect.

X
OPERATIVE PARAGRAPHS

341. Therefore,

THE COURT

DECLARES:

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[380] Similarly, *Cf. Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs.* Judgment of June 20, 2005. Series C N. 126, Operative paragraph 14. See also relevant decisions in the Case of *Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 133, Operative paragraph 15. Likewise, see *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Provisional measures.* Order of the Inter-American Court of November 26, 2007, para. Considering paragraphs 10 and 11; and *Case of Indigenous Community Sawhoyamaxa v. Paraguay. Monitoring compliance with Judgment*. Order of the Inter-American Court of February 2, 2007, Considering paragraphs 8 to 21.

By unanimity, that:

1. Given the broad acknowledgment of responsibility made by the State, which the Court has assessed positively, the preliminary objection filed is rendered purposeless and it is not appropriate to analyze it, under the terms of paragraph 30 of this Judgment.

2. The State is responsible for the violation of the rights to consultation, to indigenous communal property and to cultural identity, under the terms of Article 21 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the Kichwa Indigenous People of Sarayaku, as established in paragraphs 145 to 227, 231 and 232 of this Judgment.

3. The State is responsible for having gravely placed at risk the right to life and personal integrity, under the terms of Articles 4(1) and 5(1) of the American Convention, in relation to the obligation to guarantee the right to communal property, under the terms of Articles 1(1) and 21 thereof, to the detriment of the members of the Kichwa Indigenous People of Sarayaku, in accordance with paragraphs 244 to 249 and 265 to 271 of this Judgment.

4. The State is responsible for the violation of the right to a fair trial [judicial guarantees] and to judicial protection, recognized in Articles 8(1) and 25 of the American Convention, respectively, in relation to Article 1(1) thereof, to the detriment of the Kichwa Indigenous People of Sarayaku, pursuant to paragraphs 272 to 278 of this Judgment.

5. It is not appropriate to analyze the facts of this case in light of Articles 7, 13, 22, 23 and 26 of the American Convention, or of Article 6 of the Inter-American Convention to Prevent and Punish Torture, for the reasons stated in paragraphs 228 to 230 and 252 to 254 of this Judgment.

AND ORDERS:

By unanimity, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State shall neutralize, deactivate and, if applicable, remove all pentolite left on the surface and buried in the territory of the Sarayaku People, based on a consultation process with the Community, in accordance with the means and methods described in paragraphs 293 to 295 of this Judgment.

3. The State shall consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with international standards applicable to this matter, in the event that any activities or projects for the exploration or extraction of natural resources, or investment, development or other type of plans, were to be carried out that would imply potential damage to their territory, under the terms of paragraphs 299 and 300 of this Judgment.

4. The State shall adopt the legislative, administrative or any other type of measures necessary to give full effect, within a reasonable period, to the right to prior consultation of indigenous peoples, communities and nations and to modify those that prevent their free and full exercise, for which purpose it shall ensure the participation of the communities themselves, under the terms of paragraph 301 of this Judgment.

5. The State shall implement, within a reasonable period and with the respective budgetary provisions, mandatory training programs or courses consisting of modules on national and international standards on the human rights of indigenous peoples and communities, aimed at

military, police and judicial officials, as well as others whose roles involve relations with indigenous peoples, under the terms of paragraph 302 of this Judgment.

6. The State shall carry out a public act of acknowledgment of international responsibility for the facts of this case, under the terms indicated in paragraph 305 of this Judgment.

7. The State shall issue the publications indicated in paragraphs 307 and 308 of this Judgment, within a period of six months as from notification of this Judgment.

8. The State shall pay the amounts established in paragraphs 317, 323 and 331 of this Judgment, as compensation for pecuniary and non-pecuniary damages, and as reimbursement for costs and expenses, under the terms established in the aforesaid paragraphs, and in paragraphs 335 to 339 of this Judgment, and shall reimburse the Victim's Legal Aid Fund with the amount established in paragraph 334.

9. The State shall, within a period of one year as of notification of this Judgment, provide the Court with a report on the measures adopted to comply with the Judgment, without detriment to the provisions of Operative paragraph two, in relation to paragraphs 293 to 295, of this Judgment.

10. The provisional measures ordered in this case have been annulled, under the terms of paragraph 340 of this Judgment.

11. The Court shall monitor full compliance with this Judgment, by virtue of its authority and in compliance with its obligations under the American Convention, and shall close this case once the State has fully complied with the provisions established in this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on June 27, 2012.

Diego García-Sayán
President

Manuel E. Ventura Robles

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary