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 the 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:

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[1] The Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009, which apply to this case in accordance with the provisions of Article 79 of these Rules of Procedure. According to Article 79(2) of the Rules of Procedure: "[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, Articles 33 and 34 of the previous Rules of Procedure approved by the Court at its forty-ninth regular session will apply to the presentation of this case.

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I
INTRODUCTION OF 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") submitted to the Court, under the provisions of Articles 51 and 61 of the Convention, an application against the Republic of Ecuador (hereinafter "the State" or "Ecuador") in relation to case No. 12,465. The initial petition was lodged before the Commission on December 19, 2003, by the Association of the Kichwa People of Sarayaku (*Tayjasaruta*), the *Centro de Derechos Económicos y Sociales* (hereinafter "CDES") and the Center for Justice and International Law (hereinafter "CEJIL"). On October 13, 2004, the Commission approved Admissibility Report No. 62/04,[2] declaring the case admissible. On December 18, 2009, the Commission approved Report on Merits No. 138/09,[3] under Article 50 of the Convention. The Commission appointed Luz Patricia Mejía, Commissioner, and Santiago A. Canton, Executive Secretary, as Delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Isabel Madariaga and Karla I. Quintana Osuna, lawyers, as legal advisers.

2. According to the Commission, this case concerns, among other matters, the granting by the State of a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku (hereinafter "the Sarayaku People" or "the People" or "Sarayaku") in the 1990s, without previously consulting them and without obtaining their consent. Thus, the company began the exploration phase, and even introduced high-powered explosives in several places on indigenous territory, thereby creating an alleged situation of risk for the population because, for a time, this prevented them from seeking means of subsistence and limited their rights to freedom of movement and to cultural expression. In addition, this case relates to the alleged lack of judicial protection and the failure to observe judicial guarantees.

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

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[2] In this report, the Commission rejected the objection of failure to exhaust domestic remedies filed by the State, and concluded that it was competent to examine the claims submitted by the petitioners regarding the alleged violation of Articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 22, 23, 24, 25 and 26, in relation to Articles 1(1) and 2 of the American Convention, and that the petition was admissible in accordance with the requirements established in Articles 46 and 47 of the American Convention. *Cf.* Admissibility Report 62/04, evidence file, tome 1, folios 71 to 90.

[3] In the Report on 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; 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 People. In addition, the Commission considered that the State was responsible for the failure to comply with the provisions of Article 2 of the American Convention. Finally, the Commission stated that it did not have sufficient probative elements to rule on 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 its 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) ensure the meaningful and effective participation of indigenous representatives in decision-making processes related to development and other issues that affect them and their cultural survival; (4) adopt, with the participation of the indigenous peoples, the necessary legislative or other measures to implement effectively the right to prior, free, informed consultation in good faith, in accordance with international human rights standards; (5) make reparation to both individuals and the community for the consequences of the violation of the rights indicated; (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 recognized in the American Convention. *Cf.* Report on Merits 138/09, evidence file, tome 1, folios 3 to 69.

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 Kichwa People of Sarayaku and its members;

b) The right to life, 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 People 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 members of the People;

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

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

Lastly, 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 to the consideration of the Court a request for provisional measures in favor of the Sarayaku People and its members under Articles 63(2) of the American Convention and 25 of the Court's Rules of Procedure. The Court ordered provisional measures on July 6, 2004,[6] and they remain in effect.[7]

B. Proceedings

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

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 People, and

b) The right to personal integrity and the right to personal liberty recognized in Articles 5 and 7 of the Convention, in relation to Article 1(1) of this 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 leaders illegally detained on January 25, 2003, by members of the Army.

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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 said petition was first submitted to the Secretariat of the Inter-American Court (hereinafter "the Secretariat") by facsimile on April 26, 2010, without its attachments. The original petition, its attachments and annexes, together with the respective copies, were received by the Secretariat on May 17, 2010.

[6] *Cf. Matter of the Sarayaku Indigenous People, Provisional measures with regard to 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 Orders of July 17, 2005, and February 4, 2010, the Court ratified the provisional measures in force with regard to 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

Consequently, they asked 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 requested access to the Victims' Legal Assistance Fund (hereinafter "Legal Assistance Fund") "to cover some specific costs related to the production of evidence during the processing of this case before the Court," which they specified, and subsequently presented evidence to prove the presumed victims lack of financial resources to cover those costs.

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

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

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

11. On June 17, 2011, the President of the Court issued an Order,[8] in which he ordered that the testimony of 12 presumed victims proposed by the representatives, one witness proposed by the State, and six expert witnesses proposed by the representatives be received by affidavit. In this Order, the President also convened the parties to a public hearing and made a ruling on the Legal Assistance Fund.

12. The public hearing on the preliminary objection and eventual merits and reparations was held at the seat of the Court on June 6 and 7, 2011, during it ninety-first regular session.[9] During the hearing, testimonies were received from four members of the Sarayaku People, two witnesses proposed by the State, one expert witness proposed by the Commission and one expert witness proposed 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. In addition, 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 *Universidad de San Francisco*, Quito;[11] (3) the Human Rights Center at the *Pontificia Universidad Católica de Ecuador;*[12] (4) Amnesty International;[13] (5) the "Regional Alliance for Freedom of Expression and Information";[14]

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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. Available at: http://www.corteidh.or.cr/docs/asuntos/Sarayaku_17_6_11.pdf

9 The following were present at the hearing: (a) for the Inter-American Commission: Luz Patricia Mejía, Commissioner, and Karla Quintana Osuna, adviser; (b) for the representatives: José María Gualinga Montalvo, Sarayaku President, 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 People: 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.

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 Adviser, and Mónica Vera, Legal Adviser, on July 5, 2011.

13 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

(6) Luz Ángela Patiño Palacios, Gloria Amparo Rodríguez and Julio Cesar Estrada Cordero; (7) Santiago Medina Villareal and Sophie Simon; (8) the Allard K. Lowestein International Human Rights Clinic of Yale University,[15] and (9) the Forest Peoples Programme.[16]

14. On August 5 and 8, 2011, the State and the representatives, respectively, filed their final written arguments, and on August 8, 2011, the Commission submitted its final written observations. In a note of the Secretariat of August 19, 2011, and on the instructions of the President, a time frame was established for the presentation of any observations deemed pertinent on the attachments submitted by the representatives and the State.

15. In a note of the Secretariat of August 19, 2011, on the instructions of the President and in accordance with article 5 of the Court's Rules for the Operation of the Victims' Legal Assistance Fund, the State was advised of the disbursements made from the Fund in this case, and granted until September 2, 2011, at the latest, to submit any observations it deemed relevant. The State did not forward any observations.

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 indicated, *inter alia*, that it had no observations on the attachments submitted by the representatives and, on those forwarded by the State, it observed that "several of these are time-barred," and therefore requested that they be rejected without specifying the documents to which it was referring.

17. In a note of the Secretariat of September 6, 2011, the representatives were informed, on the instructions of the President, that their observations and arguments that were not specifically related to the admissibility or content of the documents provided by the State with its final written arguments were inadmissible and would not be considered by the Court. In the same note, the State was informed, on the instructions of the President, that its brief with 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 Sarayaku People*

18. In its final arguments brief of August 5, 2011, the State reiterated a request, made during the public hearing, for the Court "[to] make a field visit to the Bobonaza River Communities [so that] it could observe on site the complex legal and socio-environmental issues of the instant case." Furthermore, during the hearing, one of the presumed victims, Ena Santi, asked the Court to session in Sarayaku.[18] On September 28, 2011, the Constitutional President of Ecuador, Rafael

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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 *Centro de Archivo y Acceso a la Información Pública* of Uruguay; Elizabeth Ungar Bleier, Executive Director of Transparency Colombia; Katya Salazar, Executive Director of the United States Due Process of Law Foundation; Andrés Morales, Executive Director of the Freedom of the Press Foundation 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, Centro de Análisis e Investigación* of Mexico; Ezequiel Francisco Santagada, Executive Director of the *Instituto de Derecho y Economía Ambiental* of Paraguay; Alejandro Delgado Faith, President of the *Instituto de Prensa y Libertad de Expresión* 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 requests for costs and expenses; they were therefore informed that the admissibility and, if applicable, probative value of these attachments would be determined by the Court in the judgment.

18 "The State says that it has provided projects to benefit the Sarayaku. The State did give some projects […] but did not complete them […]. You are invited to Sarayaku to verify the situation of the projects that the State has given" (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 work done by the Government; to see if there is a lovely, beautiful road built by the State; if

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 make an official visit [to his country]." Subsequently, on the instructions of the President of the Court, the Commission and the representatives were given an opportunity to submit their observations in this regard.

19. By an Order of January 20, 2012, of 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 Court's Rules of Procedure, and in consultation with the other members of the Court, it was decided to appoint a delegation from the Court, headed by the President, to visit the territory of the Sarayaku People in Ecuador.[20] In addition, the Court rejected the State's request for an additional expert appraisal

20. The purpose of the said visit would be to take "measures aimed at obtaining additional information about the situation of the presumed victims and the places where some of the alleged events took place." In addition, "[i]n accordance with the adversarial principle, and in order to maintain procedural equality, [it was indicated that] the representatives of the presumed victims, the Inter-American Commission and the State [would] participate in the visit, if they considered it necessary." Lastly, it was indicated that "the on-site procedure [would] take place in parts of the Sarayaku territory where the alleged events included in the factual framework of the case had 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, a delegation from the Court, accompanied by delegations from the Commission, the representatives, and the State, visited the territory of the Sarayaku People.[22] Upon arrival, the delegations were received by numerous members of the Sarayaku People. After crossing the Bobonaza River in canoes, they went to the People's assembly house (*Tayjasaruta*), where they were received by the President, José Gualinga, the *kurakas*, the *yachaks* and other authorities and members of the People. Also present were representatives from other indigenous communities of Ecuador. There, the Court's delegation heard numerous statements from members of the Sarayaku, including young people, women, men, the elderly and children from the community,[23] who shared their experiences, views and expectations about their way of life, their

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there are completed bridges, and all of the other infrastructure they claim to have given the Sarayaku People. Please come to Sarayaku, we will be waiting for you […]." (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 Rio Bobonaza Communities,' the case submitted to the consideration of the Court referred to events that allegedly occurred on Sarayaku territory and surrounding areas"; therefore, it was decided to limit the said visit to its territory, which is not affected by the fact that a visit was also made to the community that lives in the area known as Jatun Molino, in response to the corresponding proposal by the representatives and the State (Brief of the representatives of the presumed victims of February 20, 2012 and brief of the State of March 13, 2012). In this regard, the Court considers it necessary to clarify that the purpose of this 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 that this indigenous community lives in a territory where there are other indigenous communities and that, naturally, links exist between them and there may be both divergent and converging interests and rights of other communities. However, in the context of the present case, it is not for this Court to make determinations regarding other communities, populations or persons who are not petitioners in this case.

22 The Court's delegation that made the visit consisted of the President of the Court, Judge Diego Garcia-Sayán, Judge Rhadys Abreu Blondet, the Secretary Pablo Saavedra Alessandri and the Secretariat lawyers, Olger I. González Espinosa, coordinator, and Jorge Errandonea. Also, the following were present for the State of Ecuador: the Secretary for Legal Affairs of the Presidency of the Republic, Alexis Mera, the Minister of Justice, Johana Pesántez, the Vice Minister for Foreign Affairs, Marco Albuja, and the Executive Secretary of ECORAE, anthropologist Carlos Viteri, among other State officials. And the Inter-American Commission was represented by the lawyers Isabel Madariaga and Karla I. Quintana. Lastly, Mario Melo and Viviana Kristicevic represented the representatives.

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,

worldview and their experience in relation to the facts of the case. The President of the Court also gave the members of the delegations an opportunity to express their views. At that point, the Secretary for Legal Affairs of the Presidency of the Republic, Alexis Mera, formally acknowledged the State's responsibility (*infra* paras. 23 and 24). Lastly, the delegations went on a walking tour around the community, specifically the center of Sarayaku, where the People performed various cultural activities and rituals. The delegations also overflew the territory, observing the places where the events of the case occurred. Subsequently, the delegations visited the village of Jatun Molino, where they listened to some of the local people.

III
COMPETENCE

22. The Inter-American Court is competent to hear this case, under Article 62(3) of the Convention, because 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. During the Court's visit to the Sarayaku territory, after hearing the statements of several members of the People, the President of the Court gave the floor to the Secretary for Legal Affairs of the Presidency of the Republic of Ecuador, Alexis Mera, who made the following statement:

> […] 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, all the invasive oil extraction activities that occurred in 2003, the Government does not want to challenge them. The Government considers that the State is responsible for the events that occurred in 2003. I want this to be clearly stated and understood. The Government recognizes its responsibility. Therefore, all the actions that occurred, the invasive measures, the actions of the armed forces, the acts against the destruction of the rivers, are all issues that we as a Government condemn, and believe that there is a right to reparation. Therefore, I invite the other party to sit down with us 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 it was this Government that expelled the CGC oil company. When we took office five years ago we discovered all these incidents and all this unease and the serious problem in the block and, as you know, our reaction was, to expel the CGC oil company. It is no longer carrying out exploitation activities. And there will be no more oil exploitation without prior consultation.
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> I saw those who came here to visit, who said "No to round 23." A new round will not begin without informed consultation. And what is this consultation? In particular, it deals with what was 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? When we begin to discuss 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 by oil exploitation.
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> Oil exploitation should benefit the communities. However, the fact is that historically the State has acted behind the backs of the indigenous peoples. That is the historical reality of this country; because the State has acted behind the backs of the 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 the 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 denounced. We have changed the law so that the dialogue is initiated by the Government and not by the extractive industry.

Representative of Pista; Cesar Santi, representative of Sarayakillu; Isidro Gualinga, representative of Kali Kali, and Sira Viteri and Ronny Ávilez in representation of the young people of Sarayaku.

> So, in short, your Excellency, 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 reparation arrangement. Lastly, I would like to add a thought. The petitioners accuse us of being the "villains" … I recall that Mr. Cisneros said that we are the "villains"…. I don't see it in that way; I believe there has been suffering that must be redressed. And finally, with regard to ancestral knowledge, I see here before me the indigenous leadership. We should work together to bring charges against the companies that steal ancestral rights from indigenous communities. At some point we should begin a frank discussion, and not allow others to take this knowledge that belong to these communities and make themselves rich from it. At some point we must discuss these issues. Thank you, your Excellency.

24. Following this statement, the President of the Court gave the floor to members of the Sarayaku People, to their representatives in this case, and to the Inter-American Commission, who presented their observations in this regard. Immediately after the meeting, members of the Sarayaku People 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 indicated that "the public declaration [of the Secretary for Legal Affairs of the Presidency] is, in itself, and in advance, a form of reparation of human rights under the provisions of Article 63(1) of the American Convention," and asked the Court to "convey this position officially, which will eventually allow the parties to move forward toward specific technical agreements on reparations or aspects of the merits, as appropriate." The Commission and the representatives did not present any observations in this regard.

26. Under Articles 62 and 64 of the Court's Rules of Procedure,[24] and in exercise of its powers of international judicial protection of human rights, 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 to verifying the formal conditions of such acts; rather, it must examine them in relation to the nature and seriousness of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,[25] so that it can elucidate the truth of 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 made its acknowledgment of responsibility in broad and general terms. Thus, it is for the Court to give full effect to this declaration made by the State and assess it positively, given its far-reaching significance in the context of the inter-American system for the protection of human rights, in particular because it was made on Sarayaku territory during the procedure carried out in this case. Thus, for the Court, this acknowledgment represents an admission of the facts included within the factual framework of the Commission's application,[27] and of the relevant information provided by the representatives to

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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 presumed 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."

[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 criminal cases opened against members of the Sarayaku, in relation to alleged acts of violence and the alleged theft of 150 kg of pentolite explosive, for which one of the members of this community was convicted in a criminal court. The State also indicated that "between November 22, 2002, and January 25, 2003, 29 CGC workers were kidnapped." In addition, it claimed that members of the Sarayaku were obtaining financial benefits from the existence of pentolite explosives on their territory. In this regard, 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 responsibility of individuals (*Cf. Case of Velásquez Rodríguez v.*

clarify or explain those facts.[28] Furthermore, the Court underscores the undertaking made by the State to expedite the necessary reparations through dialogue with the Sarayaku People. All these actions on the part of Ecuador make a positive contribution to these proceedings, to the exercise of the principles underlying the Convention[29] and, in part, to satisfying the need to make reparation to the victims of human rights violations.[30]

28. Finally, although there is no longer a dispute, the Court will proceed to make a specific determination of the events that occurred, because this contributes to making reparation to the victims, to preventing a recurrence of similar acts and, in general, to the satisfaction of the purposes of the inter-American jurisdiction over human rights.[31] In addition, the Court will include the relevant chapters to analyze and specify, where relevant, the scope of the alleged violations and, since the determination of the reparations remains pending, will make the necessary ruling.

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

29. The State argued that the Sarayaku People filed an application for constitutional *amparo* on November 27, 2002 against CGC and its subcontractor "Daymi Services S.A.," and that it had not been concluded owing to the lack of action by the appellants themselves; namely, the Sarayaku People, who had not provided the necessary facilities or cooperation for the prompt and efficient processing of the appeal. The State added that the parties were summoned to a public hearing on December 7, 2002, and the CGC, the main respondent in the proceedings, appeared before the court, but no representative of the Sarayaku appeared. Therefore, according to the Law of Constitutional Control in force at the time, the appeal was deemed to have been withdrawn. The State also indicated that the presumed victims had sufficient remedies at their disposal to resolve this situation, such as filing a complaint before the Human Rights Committee of the National Council of the Judicature or a "hearing to challenge the judge who heard the case". In this regard, the Commission indicated, *inter alia*, that while the case was being processed before it, the State had indeed filed the said objection, but that, contrary to what it was claiming before the Court, on that occasion the State indicated that the application for *amparo* was not the adequate and effective remedy to resolve the situation, because the *amparo* was not designed to contest an oil concession

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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, these facts would be outside of the purpose 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 in keeping with the purpose of this case.

[28] In their pleadings and motions brief, the representatives referred to a series of events not included in the application submitted by the Commission. In its case law the Court has reiterated that presumed victims and their representatives may invoke the violation of rights other than those included in the petition, provided these are limited to the facts described therein, which constitute the factual framework of the proceedings before the Court. This does not preclude the possibility of setting forth any facts that may explain, clarify or reject those mentioned in the application (*Case of the "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 delivered. Ultimately, it is for the Court to decide on the admissibility 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 the facts alleged by the representatives that do not fall within the factual framework or that do not explain or clarify this; nor will it refer to legal arguments made by the representatives regarding facts that are outside that factual framework.

[29] *Cf. Case of El 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.

contract, which should be contested by a judicial complaint under administrative law. Hence, in its Report 62/04, the Commission concluded that the application for *amparo* was appropriate according to the Ecuadorian law applicable to the case and that the exception 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 *estoppel* principle, the objection be declared inadmissible. For their part, the representatives agreed with the Commission, presented other arguments, and asked the Court to reject this objection.

30. Based on the provisions of Article 42(6) in relation to the provisions of Articles 61, 62 and 64 of its Rules of Procedure, the Court finds that, having acknowledged its responsibility in the instant case, the State has accepted the full competence of the Court to hear this case, so that, in principle, the filing of a preliminary objection of failure to exhaust domestic remedies is incompatible with this acknowledgement.[32] Furthermore, the content of the said objection is closely related to the merits of this matter, particularly as regards the alleged violation of Articles 8 and 25 of the Convention. Consequently, the objection filed has 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 its assessment,[33] the Court will examine and assess the documentary evidence submitted by the Commission, the representatives and the State at the different procedural stages, the statements of the presumed victims and witnesses and the expert opinions provided by affidavit and at the public hearing before the Court. In doing so, the Court will abide by the principles of sound judicial discretion, within the applicable legal framework.[34]

A. Documentary, testimonial, and expert evidence

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

33. The Court records that, in their brief of June 23, 2011, the representatives stated that they had "decided to present the written statements" of four of the presumed victims and "to desist from presenting" the statements of eight other presumed victims, all of which were required by the Order of the President of June 17, 2011.[36] Once the President has ordered the presentation of a statement, the submission of this evidence no longer depends on the decision of the parties; accordingly, not

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[32] *Cf. Case of the Mapiripán Massacre v. Colombia. Preliminary objections.* Judgment of March 7, 2005. Series C No. 122, para. 30, and *Case of the Ituango Massacres 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. (Reten de Catia) 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.

[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, offered by the State and required 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).

submitting it requires the respective justification. Thus, failure to provide evidence can only affect the party that unjustifiably did not do so.

34. Regarding the evidence provided at the public hearing, the Court heard testimony from the following presumed victims all members of the Sarayaku: Sabino Gualinga, spiritual leader (*Yachak*), Patricia Gualinga, women and family leader, Marlon Santi, former President of the Confederation of Indigenous Nationalities of Ecuador (CONAIE), and former President of the Sarayaku, and Ena Santi. In addition, it heard 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 probative value of those documents submitted by the parties at the appropriate procedural stage, as well as those relating to supervening facts presented by the representatives and the 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 eventual legal consequences.[38]

36. Regarding the newspaper articles submitted by the parties and the Commission with their different briefs, this Court has considered that they may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case. The Court decides to admit those documents that are complete or that, at least, allow the source and date of publication to be verified, and will assess them taking into account the entire body of evidence, the observations of the parties, and the rules of sound judicial discretion.[39]

37. With regard to some documents indicated by the parties by 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, legal certainty and procedural balance will not be affected, because it can be located immediately by the Court and 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 their observations on the preliminary objection filed by the State, the representatives forwarded several attachments as "supervening evidence" and presented a document entitled "*Estudio de Poblamiento Tradicional, Poblacional y de Movilidad del Pueblo Originario Kichwa de Sarayaku*" [Study on the traditional, population-related and mobility settlement of the original Kichwa People of Sarayaku].[41]

39. With regard to the procedural occasion for the submission of documentary evidence, under Article 57(2) of the Rules of Procedure, this must generally be presented together with the briefs submitting the case (application), with pleadings and motions, or answering the application, as appropriate. Evidence submitted outside the proper procedural moment is inadmissible, except in the exceptional circumstances established in Article 57(2) of the Court Rules; namely, *force*

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[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.

[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 members 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 Pueblo Originario Kichwa de Sarayaku,*" 2011 (evidence file, volume 18, folios 9932 to 9988).

majeure, serious impediment, or when it refers to events which occurred after the procedural moments indicated.

40. Thus, the Court notes that the State submitted several documents together with its final written arguments. The representatives argued that all these documents were inadmissible and that several of them were time-barred, which the State failed to justify based on any of those exceptional circumstances and, moreover, that the documents had been available to the State prior to submitting its answer to the application. The Commission also asked the Court to reject some of these documents because 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 with its final written arguments that were not submitted at the proper procedural stage.[42]

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

42. The representatives also submitted vouchers for litigation expenses related to the present case with their final written arguments. The Court will only consider those documents that refer to requests for costs and expenses that the representatives claim were incurred during the proceedings before this Court, after the date on which the pleadings and motions brief was presented.

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

43. The Court finds if pertinent to admit the testimony and opinions provided by the presumed victims and expert witnesses at the public hearing and by affidavit, to the extent that they are in keeping with the purpose defined by the President in the Order requiring them (*supra* para. 11) and the purpose of this case. They will be assessed in the corresponding chapter, together with the other elements of the body of evidence.[43] In accordance with this Court's case law, the statements offered by the presumed victims cannot be assessed in isolation, but must be examined together with all the evidence in the proceedings, because they are useful insofar as they can provide further information on the alleged violations and their consequences.[44] They will be assessed in the corresponding chapter, together with the other elements of the body of evidence and taking into account the observations made by the parties.[45]

44. Together with its final list of deponents, the State forwarded a document entitled "Notarized Anthropological Report," signed by Boris Aguirre Palma who was originally offered as an expert witness by the State in its answer to the application. When sending it, the State indicated that it was doing so "on the purpose approved by the Court." As can be seen from the Order of the President of June 17, 2011, this expert opinion had not been required by the Court or by its President. The said document, signed by Mr. Aguirre Palma, forwarded by the State as an expert opinion, was not presented as documentary evidence at the appropriate procedural moment, and it was not produced

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

[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.

in accordance with the provisions of Articles 41(1)(b), 46 and 50 of the Rules of Procedure on the offering, convening and appearance of deponents. Consequently, this document is inadmissible.

45. The Court also places on record that the statement of Rodrigo Braganza, offered by the State as a witness and required in the first operative paragraph of the Order of the President of June 17, 2011, was not submitted. The State had accredited Mr. Braganza as a member of the delegation that would represent it at the hearing,[46] and the representatives objected to this during the pre-hearing meeting, considering that he had been summoned as a witness. Mr. Braganza participated, as a member of the delegation accredited by the State, in the presentation of the State's final oral arguments at the public hearing, referring to the issue of the pentolite buried on the territory of the Sarayaku People. In their final arguments, the representatives stated that the Court should not take this into consideration. Therefore, the Court finds that, since he was presented as a member of the State's delegation, Mr. Braganza's declarations do not constitute real probative elements, but rather arguments of one of the parties.

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

D. Assessment of the file on provisional measures

47. In the section on "Assessment of the evidence" of the chapter on "Analysis of the merits" of its application, the Inter-American Commission took into account that the file on precautionary measures had been processed before it and that the provisional measures ordered by the Court were also being processed. Then, it considered that, "having been a party to both proceedings, the State has had ample opportunity to challenge and object to the evidence supplied by the petitioners; thus, a procedural balance exists between the parties." Therefore, the Commission added "the evidence supplied by the parties during the proceedings on the precautionary and provisional measures to the whole 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. Meanwhile, in its answer to the application, the State alleged that the reports it has sent on the provisional measures "must be assessed as evidence in favor of the State by the Inter-American Court."

48. The Court recalls that the purpose of the procedure on provisional measures, which are of an incidental, precautionary and protective nature, differs from that of a contentious case, both in the procedural aspects and in the assessment of the evidence and the implications of the decisions.[47] However, unlike other cases,[48] the presumed victims in this case have also been beneficiaries of those protective measures; in other words, the specific or potential group of beneficiaries is identical to the group of persons that comprises the presumed victims. In addition, 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 part of the

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[46] The State presented a written request to accredit him on July 5, 2011.

[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 the Barrios Family v. Venezuela, para*. 6.

body of evidence in this case, provided they have been opportunely, specifically and duly referred to or identified by the parties in relation to their arguments.

E. Assessment of the visit to the Sarayaku territory

49. With regard to the *in situ* procedure (*supra* paras. 18 to 21) aimed at obtaining further information about the situation of the presumed victims and the places where some of the facts alleged in this case took place, the information received will be evaluated based on the particular circumstances in which it was produced. Thus, in accordance with this Court's case law, the statements made by those who were heard cannot be assessed in isolation, but rather within the context of the evidence as a whole, because they are useful insofar as they can provide additional information about the alleged violations and their consequences.[49]

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

VII
FACTS

A. The Kichwa Indigenous People of Sarayaku[50]

51. The Kichwa nationality[51] of the Ecuadorian Amazon Basin consists of two Peoples who share the same linguistic and cultural tradition: the Napo-Kichwa People and the Kichwa People of Pastaza. The fact that the Kichwa of the province of Pastaza identify themselves as *runas* (persons or human beings) means that they see themselves as belonging to the same intra-ethnic identity, vis-à-vis other non-Kichwa Indigenous Peoples.[52] According to the Ecuador's Council for the Development of Nationalities and Peoples (CODENPE),[53] the Kichwa of the Amazon Basin have organized themselves into different federations. The Kichwa People of Sarayaku and other Kichwa-speaking groups of the province of Pastaza belong to the cultural group of the Canelos-Kichwa, who are part of a nascent culture arising from a combination of the original inhabitants of the northern region of the Bobonaza.[54]

52. The Kichwa People of Sarayaku are to be found in the tropical forest area of the Amazonian region of Ecuador, in different parts of the province of Pastaza and along the banks of the Bobonaza River. Their territory is located 400 meters above sea level, 65 kilometers from El Puyo. It is one of the Kichwa settlements in the Amazonian region with the largest population concentration and land area and, according to the census of the People, consists of around 1,200 inhabitants. The territory of the Sarayaku People is one of the most biologically diverse in the world. The Sarayaku community consists of five population centers: Sarayaku Center, Cali Cali, Sarayakillo, Shiwacocha and

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

50 Most of the facts in this section have not been challenged and are drawn mainly from a May 2005 anthropological-legal Report by FLACSO, on the social and cultural impacts of the presence of CGC in Sarayaku. FLACSO, *Sarayaku: el Pueblo del Céni*t, 1st Edition, CDES-FLACSO, Quito, 2005 (evidence file, tome 8, folios 4224 and *ff.).* Other relevant evidence is cited as necessary.

51 Article 83 of the Constitution establishes that Indigenous Peoples define themselves as Nationalities with ancestral roots. *Cf.* Constitution of the Republic of Ecuador (evidence file, tome 8, folios 4190 and *ff.)*

52 *Cf.* The Council for the Development of Nationalities and Peoples of Ecuador (evidence file, tome 8, folio 4169 and *ff.*) and Ministry of Education and Culture of Ecuador, "*Nacionalidad Kichwa de la Amazonía,*" (evidence file, tome 8, folios 4190 and *ff.*).

53 The Council for the Development of Nationalities 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 Nationalities and Peoples of Ecuador, folios 4190 and *ff.*.

Chontayacu. These centers are not independent communities, but belong to the Sarayaku People and, in each one, there are groups of extended families or *ayllus* that are, in turn, divided into *huasi,* which are households consisting of a couple and their offspring. This was observed partially by the Court delegation during its visit.

53. It is difficult to access the territory where the Sarayaku People are located. Depending on the weather conditions, travel between Puyo – the nearest town – and Sarayaku, takes about two or three days by boat along the Bobonaza River and around eight days by land. The entry into Sarayaku territory, whether by river or land, must be made through Canelos Parish. Sarayaku also has a landing strip for small planes; however the use of this means of transport is expensive.

54. The Sarayaku subsist on collective family-based farming, hunting, fishing and gathering within their territory following their ancestral customs and traditions. Around 90% of their nutritional needs are met by products from their own land and the remaining 10% with goods from outside the community.

55. Regarding 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. In 2004, Sarayaku was recognized as the Kichwa Original People of Sarayaku. Currently, decisions on important issues or matters of special significance for the People are made by the traditional community Assembly,[55] called the *Tayja Saruta-Sarayacu*,[56] which is also the highest decision-making body. It is also organized under a Governing Council composed of traditional leaders from each community (*kurakas* or *varavuks*), community authorities, former leaders, elders, traditional shamans (*yachaks*) and groups of experts and advisers from the community. This Council has decision-making authority with regard to a certain kind of internal and external dispute, but its main purpose is to serve as an interlocutor with actors outside of Sarayaku, based on decisions taken in the assemblies.

56. The *Organización del Pueblo Kichwa de Sarayaku* is part of the *Confederación de las Nacionalidades Indígenas de la Amazonía Ecuatoriana* (CONFENIAE) and of the *Confederación de Nacionalidades Indígenas de Ecuador* (CONAIE).

57. According to the worldview of the Sarayaku People, their land is associated with a set of meanings: the jungle is alive and nature's elements have spirits (*Supay*),[57] which are interconnected and whose presence makes places sacred.[58] Only the *Yachaks* may enter these sacred places and interact with their inhabitants.[59]

B. Oil exploration in Ecuador

58. According to the State, starting in the 1960s, Ecuador increased oil exploration activities, focusing its interest in the country's Amazonian region. In this regard, the State indicated 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 from a geopolitical and economical

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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 Nationalities and Peoples of Ecuador (CODENPE for its Spanish acronym), through Agreement 24 of June 10, 2004. See FLACSO Anthropological-Legal Report, folios 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, folio 4273)

[57] *Cf.* Affidavit of José María Gualinga Montalvo of June 27, 2011 (evidence file, tome 19, folio 10014 and *ff.*).

[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.

perspective, changing from a 'myth' into a national strategic area." According to the parties, during the 1970s, Ecuador experienced rapid economic growth, a significant surge in exports,[60] and a strong process of modernization of the infrastructure of its main cities.

59. As indicated by the State, at that particular time, steps were taken to secure complete control over the country's oil resources from a nationalist perspective and under a philosophy of "national security," an economic-political concept that defined the oil sector as a strategic area. At that time, "the environmental, ethnic, and cultural variables were not an issue for political debate." According to the representatives, oil exploitation had resulted in large-scale environmental costs which included, among other matters, spills of large amounts of crude oil, contamination of water sources due to waste from hydrocarbon production, and the burning of significant amounts of natural gas in the open air. Moreover, this environmental pollution had generated health risks for the inhabitants of the oil producing areas of eastern Ecuador.[61]

60. Currently, among the Latin American countries, Ecuador ranks fifth in terms of oil production and fourth in oil exports. According to figures from Ecuador's Ministry of Energy and Mines, in 2005 sales of crude oil accounted for around a quarter of the country's gross domestic product (GDP) and oil revenues represented nearly 40% of the national budget.[62]

C. Award 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 Institute for Agrarian Reform and Settlement (IERAC), awarded a single undivided parcel 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] to the communities of the Bobonaza River,[65] which includes the Kichwa People of Sarayaku.[66] Within this Block 9, the Sarayaku territory consists of 135,000 hectares. And, on June 10, 2004, the Executive Secretariat of CEDENPE (a State institution attached to the Presidency of the Republic with competence for indigenous matters) registered the Statute of the Kichwa Original People of Sarayaku (Agreement No. 24), Article 47(b) of which establishes "[t]he territory of the Kichwa People of Sarayaku and its natural resources on [the] surface of Block 9, cohabited with the Kichwa

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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, tome 1, folio 392)

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 Journal of Public Health (evidence file, tome 8, folios 4326 and *ff.*). 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, "*Indicadores de gestión e Impactos de la actividad petrolera en la Región Amazónica Ecuatoriana* Management," in *Petróleo y desarrollo sostenible en Ecuador*, 1ª Edition, FLACSO – PETROECUADOR, Quito, 2003 (evidence file, tome 11, folio 6904).

62 *Cf.* Empresa Petrolera de Ecuador (PETROECUADOR), *Informe estadístico* 1972-2006 (evidence file, tome 8, folio 4354).

63 *Cf.* Notary's certificate dated May 26, 1992 of the registration of the award of May 12, 1992 (evidence file, tome 14, folios 8621-8623).

64 *Cf.* evidence file, tome 14, folio 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 award made by IERAC on May 12, 1992, registered on May 26 that year, corresponding to 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 Original Nation of the Kichwa People of Sarayaku (Tayjasaruta) and the Institute for the Eco-Development of the Amazonian 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. Award of lands to the communities of Río Bobonaza, Puyo, May 26, 1992 (evidence file, tome 14, folios 8616 and *ff.*; evidence file, tome 8, folio 4374 and *ff.,* and tome 10, folio 6005 and *ff.*).

People 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]

62. Similarly, according to the land title, the award was made in the following terms:

> "a) The purpose of the present award is threefold: to protect the ecosystems of the Ecuadorian Amazon basin, to improve the living standards of the indigenous communities, and to preserve the integrity of their culture;
>
> b) This award in no way affects the awards made previously to persons or institutions. The validity of those earlier awards is here by confirmed. Furthermore, it does not affect the settlements or settlers' holdings established prior to this date, or free transit by waterways or overland routes that exist or that are built in the future in accordance with national law;
>
> c) This award shall not limit the State's authority to build roads, ports, airports and other infrastructure needed for the country's economic development and security;
>
> d) The National Government, its institutions and its military and police forces shall have free access to the areas granted to perform the functions prescribed by the Constitution and the laws of the Republic;
>
> e) Subsoil natural resources are the property of the State, which may exploit them without interference provided that environmental protection standards are observed;
>
> f) To preserve the social, cultural, economic and environmental integrity of the communities receiving the land grant, the Government will take into account the plans and programs that, to this end, are prepared by the respective indigenous communities and submitted to the Government's consideration[, and]
>
> g) The beneficiary community shall abide by the rules for the management and care of the area awarded and is expressly prohibited to sell or divest itself of the property either in whole or in part.[68]

D. Partnership contract with the CGC for exploration of hydrocarbons and exploitation of crude oil in Block 23 of the Amazonian Region

63. On June 26, 1995, the Special Bidding Committee] (CEL) convened the eighth international call for proposals for exploration and exploitation of hydrocarbons in Ecuadorian territory, which included "Block 23" in the Amazonian region of the province of Pastaza.[69] According to the State, Block 23 was located in the province of Pastaza, approximately 40 km east of El Puyo, and the CGC base of operations was established in Chonta, using the sectors of Pacayacu, Shimi, Jatun Molino and Kunkuk as support centers.

64. On July 26, 1996, a partnership contract was signed before the Third Notary of San Francisco de Quito, for hydrocarbon exploration and exploitation of crude oil in Block No. 23 in the Amazonian Region (hereinafter the "oil exploration and exploitation contract" or "the contract with CGC"), between the State Oil Company of Ecuador (PETROECUADOR) and the consortium formed by the

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[67] *Cf.* Article 3 of this Agreement states that "the Governing Council of the Native Kichwa People of Sarayaku named in this record shall enjoy all rights, guarantees and attributes established in the Constitution of the Republic of Ecuador, for the indigenous peoples self-defined as nationalities of ancestral lineage." In addition, "Art. 48. Territory: (a) the boundaries of the Kichwa People of Sarayaku are those stated in the land grant issued by the Institute for Agrarian Reform and Settlement (IERAC) on May 12, 1992, registered on the May 26 that year, and in the rectification decision of July 23, 1992, registered on August 21 that year; granted by the Institute for Agrarian Reform and Settlement, without detriment to the territory included within the existing traditional historical limits, or any other extension that may be included in the future." This document is included in the file before the Court, because it was incorporated together with the Community Self-evaluation of the impacts suffered by the Kichwa People of Sarayaku owing to the entry of the CGC Oil Company onto its territory (attachment 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), tome 6, folio 1464). See also FLACSO. *Sarayaku: el Pueblo del Cénit.* 1st edition CDES-FLACSO. Quito, 2005, p. 16, (evidence file, tome 11, folio 6626).

[68] *Cf.* Property Registry of Puyo, Pastaza. Award of lands to the communities of Río Bobonaza, Puyo, May 26, 1992, (evidence file, tome 8, folio 4374 and *ff.*; tome 10, folio 6005 and *ff.*, and tome 14, folio 8616 and *ff.*).

[69] *Cf.* Partnership contract for the exploration of hydrocarbons and exploitation of crude oil in Block No. 23 of the Amazonian region, between the State Oil Company of Ecuador (PETROECUADOR), and the Compañía General de Combustibles S.A. (CGC) of July 26 1996, Clause (2.1) (evidence file, tome 8, folio 4381 and *ff.*; evidence file, tome 10, folio 5928 and *ff.*).

Compañía General de Combustibles S.A. (CGC) (hereinafter "the CGC") and *Petrolera Argentina San Jorge S.A.*[70]

65. The territory granted for that purpose in the contract with the CGC covered an area of 200,000 hectares, inhabited by several indigenous associations, communities and peoples: Sarayaku, Jatun Molino, Pacayaku, Canelos, Shaimi and Uyuimi. Sarayaku is the largest of these indigenous settlements in terms of population and land area, since its ancestral and legal territory accounted for around 65% of the territory included in "Block 23."

66. According to the terms of the contract between the State oil company PETROECUADOR and the CGC, the seismic survey phase would last four years - with the possibility of a two-year extension – from the date the contract came into force; in other words, once the Ministry of Energy and Mines had approved the Environmental Impact Assessment. Furthermore, it was stipulated that the exploitation phase would last for 20 years with the possibility of an extension.

67. The contractor's obligations included: preparing an Environmental Impact Assessment (hereinafter also "EIA") and making every effort to preserve the existing ecological balance in the exploration area of the block awarded. It was established that the Under-Secretariat for Environmental Protection of the Ministry of Energy and Mines, through the National Environmental Protection Directorate, would be responsible for relations with the Sarayaku People. Also included in the contract was the obligation to obtain from third parties any permit, right of way or easement that might be necessary to reach the area of the contract or to move within it in order to carry out activities.

68. The contractor was required to submit an Environmental Impact Assessment for the exploration phase, and also an Environmental Management Plan for the exploitation period within the first six months. The EIA was to contain, among other elements, a description of the natural resources, especially the forests, wild flora and fauna, as well as of the social, economic and cultural aspects of the populations or communities settled in the area affected by the contract.[71]

69. The CGC, 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 make an environmental impact assessment for the seismic survey, as required in the partnership contract. The assessment was completed in May 1997[72] and approved by the Ministry of Energy and Mines (MEM) on August 26 that year.[73] Among other matters, the EIA states that "[i]t is necessary to point out that, except for an area where we were denied access, most 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; in other words it was not put 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 also "ILO Convention No. 169." The Convention entered into force for Ecuador on May 15, 1999.

71. Also, on June 5, 1998, Ecuador adopted the 1998 Constitution, which recognized the collective rights of the indigenous and Afro-Ecuadorian Peoples.[76]

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70 *Cf.* Partnership contract between PETROECUADOR and CGC.

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

72 *Cf.* Environmental Impact Assessment for seismic surveying activities, Block 23, Ecuador. Final Report, May 1997 (evidence file, tome 8, folio 4463 and *ff.*; evidence file tome 10, folio 6021 and *ff.*).

73 *Cf.* Note No. 155 of the Ministry of Energy and Mines (evidence file, tome 8, folio 4797 and *ff.*); Report of the Ministry of Energy and Mines on the activities carried out in Block 23 (evidence file, tome 8, folio 4778).

74 *Cf.* Environmental Impact Assessment for seismic surveying activities, Block 23.

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

76 *Cf*. Constitution of Ecuador, Chapter 5, Collective Rights, First Section, Rights of indigenous and black or Afro-Ecuadorian Peoples, Articles 83 to 85, (evidence file, tome 8, folio 4079). The 1998 Constitution contained provisions that protected the rights of indigenous populations, who were to be consulted regarding plans or programs for the exploration and

72. According to the State, by Ministerial Decision No. 197, published in Official Record No. 176 of April 23, 1999, prospecting activities were suspended in Block 23 because CGC "activities [were] being affected by actions against the workers by indigenous organizations and destruction of the camp." The suspension was ordered in order to continue the implementation of programs to develop community relations, so as to resolve the problems that had arisen.[77] The suspension was extended several times up until September 2002.[78]

E. Facts prior to the seismic survey and incursions into the territory of the Sarayaku People

73. It was argued, without being contested by the State, that on numerous occasions the CGC oil company tried to negotiate access to the Sarayaku People's territory and to obtain their consent for oil exploration, by actions such as: (a) direct contacts with members of the community, circumventing the indigenous organizational levels; (b) offering to send a medical team to provide care in several Sarayaku communities; however, to receive care, the people would have been required to sign a list, which would have been used subsequently as a letter addressed to the CGC supporting the continuation of its work;[79] (c) payment of wages to specific individuals within the communities to recruit others in order to support the seismic survey; (d) offering personal gifts and incentives; (e) forming support groups for the oil exploration activities,[80] and (f) offering money, either individually or collectively.[81]

74. The representatives also alleged that in May 2000, the CGC lawyer visited Sarayaku and offered US$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, it was decided to reject the company's offer.[82] Meanwhile, the neighboring communities of Pakayaku, Shaimi, Jatún Molino and Canelos signed agreements with the CGC.[83]

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exploitation of non-renewable resources on their lands that might have an environmental or cultural impact on them, and were to receive a share of the profits from these projects, to the extent possible, and to receive compensation for the social and environmental damage caused to them (Article 84.5).

77 *Cf.* Ministerial Decision No. 197, Published in Official Record No 176 (evidence file, tome 14, folios 8653 and 8654).

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

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

80 *Cf.* Pleadings and motions brief, tome 1, folios 281 and 282; See also affidavit provided by José María Gualinga Montalvo on June 27, 2011 (evidence file, tome 19, folios 4815-4816).

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

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

83 *Cf.* As of February 2003 CGC had invested US$350,000 in social projects in these four communities. *El Comercio* newspaper of February 7, 2003, "*Mediación para el conflicto de Sarayacu*" (evidence file, tome 11, folio 6541). See also the affidavit of José María Gualinga Montalvo of June 27, 2011 (evidence file, tome 19, folio 10018).

75. Regarding the above, the representatives argued that, in view of the Sarayaku's refusal to accept the CGC's oil exploration activities, in 2001, the CGC hired Daymi Service S.A., a team of sociologists and anthropologists dedicated to planning community relations. According to Sarayaku members, its strategy consisted of dividing the communities, manipulating the leaders, and carrying out defamation campaigns to discredit the leaders and organizations. The representatives argued that, as part of that strategy, the company established a 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 this.

76. As for Ecuadorian domestic legislation, the Promotion of Investment and Citizen Participation Act was adopted on August 18, 2000.[85] The law establishes, *inter alia*, that:

> Prior to the execution of plans and programs for exploration or exploitation of hydrocarbons on lands allocated by the Ecuadorian State to indigenous communities or black or Afro-Ecuadorian people, which could affect the environment, PETROECUADOR, its subsidiaries or the contractors or associates must consult with the ethnic groups or communities. To that end, they shall hold meetings or 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 records, agreements or arrangements resulting from the consultations on the plans and programs for exploration and exploitation shall be recorded in writing by means of a public instrument or record."

77. In addition, on February 13, 2001, the Regulations to substitute the Environmental Regulations for Hydrocarbon Operations in Ecuador (Executive Decree 1215) were promulgated.[86] Article 9 of these Regulations establishes that:

> Before initiating any call for bids for a State oil contract, the agency responsible for carrying out the oil tendering process 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 records, agreements and arrangements reached as a result of these information meetings shall be documented, by means of a public instrument to be sent to the Under-Secretary for Environmental Protection.
>
> The agreements shall be drafted according to the principles of compensation and reparation for possible environmental impacts and damage to property that the execution of fuel production projects might cause to the population. Compensation shall be calculated on the basis of the official tables in force.
>
> When such zones or areas are located within the National Natural Resource Endowment, the provisions of the management plan for that area shall be observed, in accordance with the Conservation of Natural Areas, Wildlife and Forestry Law and its Regulations, approved by the Ministry of the Environment."

78. Apart from this, on July 30, 2001, the Ecuadorian Ministry of Defense 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 submitted documentation to the Ministry updating the Environmental Management Plan and the Monitoring Plan for the 2D seismic survey in Block 23.[88] On April 17, 2002, the Ministry requested information in order to verify that the survey to be implemented corresponded to the same areas and characteristics as the seismic survey approved on

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

85 *Cf.* Promotion of Investment and Citizen Participation Act, Decree Law 2000-1, Registration number 144 of August 18, 2000 (evidence file, tome 11, folio 6541).

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

87 *Cf.* Clause Two of the 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, tome 8, folio 4365)

88 *Cf.* Report of the Ministry of Energy and Mines on activities carried out in Block 23 (evidence file, tome 8, folio 4779); Note No. 155 of the Ministry of Energy and Mines (evidence file, tome 8, folio 4798 and *ff.).*

August 26, 1997, creating a plan of operations so that, as the seismic exploration plan advanced, progress would also be made on aspects such as education, health, production projects, infrastructure and community support.

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 the oil companies into its ancestral territory.[89]

81. In a note dated July 2, 2002, considering that the survey 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 one that was established in 1997, the Ministry approved the updated Environmental Management Plan and Monitoring Plan for 2D seismic survey activities in Block 23.

82. On August 26, 2002, the CGC submitted to the Ministry of Energy and Mines the following five investment agreements signed with indigenous communities or associations on August 6, 2002, before the Second Notary of the canton of Pastaza: FENAQUIPA Organization, US$194,000.00; AIEPRA Organization, Jatun Molino community and Independent Communities of Sarayaku, US$194,900.00; FENASH-P Federation, US$150,000.00; Association of Indigenous Centers of Pacayaku, US$222,600.00, and Achuar Community of Shaimi, US$50,600.00. These agreements, with the respective plan of action, were based on contributions to production projects, infrastructure, job training, health and education[90] to be made as the seismic survey 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 submitted its first progress report on the 2D seismic survey emphasizing that, at that date, 25% of the community agreements had been fulfilled and that, as part of the dissemination of the specific Environmental Management Plan, a meeting had been held with Puyo journalists and provincial authorities.

85. On November 22, 2002, the Vice President and Members of the Sarayaku Rural Parish Committee filed a complaint with the Ombudsman. They alleged that the 2D seismic survey contract to be implemented in Block 23 constituted a violation of articles 84(5) and 88 of the Ecuadorian Constitution, in relation to article 28(2) of the Environmental Management Act, and they requested: (a) that the CGC respect the territory under the jurisdiction of the Sarayaku Parish; (b) the immediate withdrawal of the Armed Forces that provided protection to CGC workers, and (c) compliance with the said articles by the State authorities. Subsequently, Silvio David Malaver, a member of the Sarayaku People, joined the complaint.[91]

86. On November 27, 2002, the Ecuadorian Ombudsman issued a "human rights statement," affirming that the members of the Sarayaku People were under the protection of the Ombudsman's Office. He also stated that "[n]o person, authority or official may prevent the free passage, movement, navigation and intercommunication of the members of the Sarayaku on all the lands [and] rivers that they have a legitimate right to require and need. Whosoever obstructs, opposes, impedes or limits the right to free passage and movement [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, tome 10, folios 6111 and 6112).

90 *Cf.* Report on activities in Block 23, CGC. Note sent by CGC to Gustavo Gutiérrez, lawyer, on December 24, 2002. Note No. 155 DM-DINAPA-CSA-870 0212389 (annex 14, tome 8, folio 4797).

91 *Cf.* Ombudsman of the Province of Pastaza. Decision of April 10, 2003. Complaint No. 368-2002 (evidence file, tome 8, folio 4831 and *ff*.)

92 *Cf.* National Ombudsman's Office, "Human rights declaration" of November 28, 2002 (evidence file, tome 8, folio 4870 and tome 10, folio 6032).

F. Application for amparo

87. On November 28, 2002, the President of the OPIP, which represents the 11 associations of the Kichwa People of Pastaza, presented an application for constitutional protection (*amparo)* before the First Civil Judge of Pastaza against the CGC and its subcontractor, Daymi Services. The application alleged that, since 1999, CGC had taken several measures aimed at negotiating, separately and independently, with the communities and with individuals "creating a series of disruptive situations and impasses within [its] organizations, which resulted in the deterioration of [its] hitherto strong organization."[93]

88. On November 29, 2002, the First Civil Judge of Pastaza agreed to hear the application 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," and also that a public hearing be held on December 7, 2002.[94]

89. According to the State, in a decision issued on December 2, 2002, the initial order was extended, "correcting the error made regarding the date, and 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, while the respondent party, the CGC oil company, did appear. The representatives, in their brief answering the preliminary objection, indicated that the hearing never took place and that proof of this is that no "record of the meeting" exists.

91. On December 12, 2002, the Superior Court of Justice of the district of Pastaza sent a note to the First Civil Judge of Pastaza, in which it "noted irregularities in the processing [… of the] application [and expressed] concern over the total lack of promptness, taking into account the social repercussions of its purpose."[95]

G. Facts related to the seismic survey and oil exploration activities of the CGC as of December 2002

92. The seismic survey program proposed in Block 23 included an area of 633.425 kilometers, distributed in 17 lines, mainly oriented north-south and east-west.[96] Initially it was estimated that the seismic survey would last six to eight months depending on weather conditions. Paths were cleared in the survey area in order to lay down the seismic lines, and for the camps, unloading areas, and heliports.[97]

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

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[93] Application for constitutional protection filed by the Organization of Indigenous Peoples of Pastaza against the CGC and Daymi Services on November 28, 2002 (evidence file, tome 8, folio 4333 and *ff.*, and evidence file, tome 10, folio 6025 and *ff.*).

[94] Decision of the First Civil Judge of Pastaza regarding the application for constitutional protection of the OPIP-Sarayaku (Block 23), of November 29, 2002 (evidence file, tome 8, folio 4872; evidence file, tome 10, folio 6029).

[95] Note 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, tome 8, folio 4874 and *ff.*; evidence file, tome 10, folio 6030 and *ff.*).

[96] *Cf.* Final Operations Report prepared by the *Compañía General de Combustible* (CGC) in February 2003 (evidence file, tome 8, folios 4881, 4884, 4889 or pp. 5, 8 and 13).

[97] *Cf.* Final Operations Report prepared by the *Compañía General de Combustible* (CGC) (folios 4884 and 4903); and General explanation of a seismic survey prepared by the Ministry of Energy and Mines, March 7, 2006 (evidence file, tome 8, folios 4953 and 4954).

[98] Executive Decree No. 3401 of December 2, 2002, Official Record No.728 of December 9, 2002, "*Reglamento de Consulta de Actividades Hidrocarburíferas*" [Regulations on Consultations concerning Hydrocarbon Activities] (evidence file, tome 8, folios 4130 and *ff.).*

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

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

96. On December 12, 2002, an Agreement of Intent was signed between the Under-Secretary of the Ministry of the Interior and the 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 willingness to dialogue;
>
> c) Given the critical situation that has arisen in Block 23, the Government undertakes to URGE the CGC to temporarily suspend the seismic survey in Block 23, so that new Government may take up the issue;
>
> d) As a sign of good will, the Ministry of the Interior will establish a high-level commission with the authorities directly responsible for oil operations, and will endeavor to hold a meeting in Puyo, in which the search for a solution to the problem of Block 23 will begin, and
>
> e) The Government will monitor CGC's compliance with the contract […], ensuring that the company abides by the standards it has established, while respecting the regulations on prior consultation, so that the rules are clearly established for all parties.[101]

97. On January 7, 2003, 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, were detained by CGC personnel and members of the Armed Forces in the Sarayaku territory "owing to the danger posed by these individuals […] because they had weapons and explosives."[103] They were subsequently flown to Chonta in a CGC helicopter, and later taken by police agents in CGC vehicles to Puyo, where they were placed in the custody of local police and released that same afternoon.[104]

99. Regarding these arrests, on January 28, 2003, a preliminary inquiry was opened by the Pastaza District Prosecutor and, on October 7, 2003, the First Criminal Court of Pastaza issued committal orders for Reinaldo Alejandro Gualinga Aranda, Elvis Fernando Gualinga Malver, Marco Marcelo Gualinga Gualinga, Yacu Viteri Gualinga and Fabián Grefa based on accusations of the offenses of kidnapping and aggravated robbery.[105] Subsequently, the committal orders for Elvis Gualinga, Reinaldo Gualinga and Fabián Grefa were annulled and the case against them was

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99 *Cf.* Memorandum No DINAPA-CSA-003-200. Under-Secretary for Environmental Protection (evidence file, tome 10, folio 6131).

100 *Cf.* Note No. 155 of December 24, 2002, Ministry of Energy and Mines, referring to Note DINAPA-CSA-808 of December 5, 2002 (evidence file, tome 8, folio 4799).

101 *Cf.* Agreement of Intent with the Under-Secretary of Government, December 12, 2002 (evidence file, tome 10, folios 6141-6142).

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

103 *Cf.* Note of March 13, 2003, signed by the Commander of the 17th Brigade of Pastaza (evidence file, tome 9, folio 5215).

104 *Cf.* Note of March 13, 2003, signed by the Commander of the 17th Brigade of Pastaza, and Preliminary Inquiry No. 069-2003, based on complaint filed by José Walter Hurtado Pozo for the alleged crimes of theft and kidnapping (evidence file, tome 16, folios 9091 and *ff.*).

105 *Cf.* First Criminal Court of Pastaza of October 7, 2003 (evidence file, tome 14, folios 9222 and 9223).

dismissed.[106] The Commission indicated that Marcelo Gualinga Gualinga had been sentenced to one years' imprisonment for the offense of possession of explosives and had been released after serving his sentence.

100. As a result of the reactivation of the seismic exploration phase in November 2002, and in view of the entry of the CGC into the Sarayaku territory, the Association of the Kichwa People of Sarayaku declared an "emergency," during which the community ceased its daily economic, administrative and education activities for four to six months. In order to safeguard the boundaries of its territory and to prevent the entry of the CGC, members of the People organized six so-called "Peace and Life Camps" on the borders of the territory, each comprising 60 to 100 people, including men, women and young people.[107] In particular, it was claimed, and not refuted by the State, that the members of the Sarayaku went into the jungle to get to the camps set up on the borders of the territory, with children old enough to walk and pregnant women or those with young infants.[108] The only people who did not take part in this surveillance were the elderly, the sick and some children who were not old enough to walk, and they remained in Sarayaku Center.[109] During this time, the members of the People lived in the jungle; the crops and food ran out and, for several months, the families survived exclusively on resources from the forest.[110]

101. From October 2002 to February 2003, there was a 29% advance in the work of the oil company within the Sarayaku territory.[111] Over this period the CGC loaded 467 wells with approximately 1,433 kilograms of "pentolite" explosives,[112] both on the surface and at deeper levels, and left them scattered across the territory that comprised Block 23.[113] According to the information provided, at the time of this Judgment, the explosives remain on Sarayaku territory.

102. On February 6, 2003, the Ecuadorian Hydrocarbon Industry Association reported that the CGC had declared a situation of "*force majeure"* and suspended the seismic exploration work.[114] On February 10, 2003, the CGC expressed its willingness to "continue the seismic survey and the other activities agreed in the contract." The State indicated, without this being contested, that according to note No. 019-CGC-GG-03 of February 26, 2003, the CGC maintained the suspension of activities. The State also mentioned that, according to note No. 023-CGC-GG-05 of June 15, 2005, the suspension had been maintained.[115]

103. On April 10, 2003, the Ombudsman of the province of Pastaza issued a decision on the complaint filed in November 2002 (*supra* paras. 85 and 86), in which, based on the arguments submitted by the parties, the record of the inspection of the scene of the events, and international

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106 *Cf.* First Criminal Court of Pastaza of October 7, of 2003. Report of the National Attorney of September 27, 2003 (evidence file, tome 9, folios 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, tome 9, folios 5210 and 5211).

107 First Notary of the canton of Pastaza, sworn statements of Ena Margoth Santi of November 13, 2007, and Carmenza Soledad Malaver Calapucha of November 13, 2007 (evidence file, tome 9, folio 5000 and *ff.);* map prepared by the petitioners, showing the distribution of the peace and life camps on the Sarayaku territory (evidence file, tome 9, folio 4969).

108 Testimony provided by Ena Margot Santi before the Court during the public hearing held on July 6, 2011. See also Testimony provided before notary public by Gloria Berta Gualinga Vargas on June 27, 2011 (evidence file, tome 19, folio 10039)

109 Pleadings and motions brief (tome 1, folio 284). See also testimony provided by Ena Margot Santi before the Court during the public hearing held on July 6, 2011.

110 Testimony of Abdón Alonso Gualinga Machoa, question 2 (evidence file, tome 11, folio 6526); First Notary of the canton of Pastaza, affidavits of Ena Margoth Santi and Carmenza Soledad Malaver Calapucha 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 Directorate (evidence file, tome 9, folios 4956 and 4957).

112 *Cf.* Ministry of Energy and Mines. Certification of explosive charges distributed in Block 23, according to information from the National Environmental Protection Directorate (evidence file, tome 9, folios 4956 and 4957).

113 *Cf.* Seismic map (evidence file, tome 9, folio 4969 and *ff.*)

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

115 *Cf.* Answer to the application (merits file, tome 2, folio 494).

law, he decided to admit the complaint partially, and decided that the Minister of Energy and Mines and Chairman of the Board of PETROECUADOR and also the CGC legal representative had violated *inter alia*, Articles 84(5) and 88 of the Ecuadorian Constitution, ILO Convention No. 169, and Principle 10 of the Rio Declaration on Environment and Development. He also declared the Minister of Energy and Mines and Chairman of PETROECUADOR and the CGC legal representative responsible for these violations.[116]

104. Regarding the impact on the Sarayaku territory, it was alleged, and the State did not contest, that in July 2003 the CGC had destroyed at least one site of special significance for the spiritual life of members of the Sarayaku People on the land of *Yachak* Cesar Vargas.[117] The facts were recorded by the First Notary of Puyo as follows:

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

105. Similarly, the State has not contested the fact the company laid down seismic lines,[118] set up seven heliports,[119] destroyed caves, water sources and underground rivers needed to provide drinking water for the community;[120] and cut down trees and plants of great environmental and cultural value, and used for subsistence food by the Sarayaku.[121] In addition, the State has not contested the fact that landings by helicopters destroyed part of the so-called *Wichu kachi Mountain*, or "place of parrots," a site of great significance in the worldview of the Sarayaku People.[122] The oil company's activities led to the sporadic suspension of the Sarayaku People's ancestral cultural rites and ceremonies, such as the *Uyantsa*, the most important festival held every February,[123] and the seismic line passed near sacred sites used for ceremonies initiating young people into adulthood.

106. For its part, after visiting the Sarayaku People on May 8, 2003, the Human Rights Committee of the Congress of the Republic issued a report in which it concluded that "[t]he State, through the

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116 *Cf.* Decision of the Ombudsman's Office of the province of Pastaza dated April 10, 2003 (evidence file, tome 8, folios 4831 and *ff.*)

117 *Cf.* First Notary's Office of the canton of Pastaza, Andrés Chacha Gualoto, Notarial Certification of July 20, 2003 (evidence file, tome 9, folio 5225).

118 *Cf.* Maps provided as attachments to the pleadings and motions brief (evidence file, tome 12, folio 7297, and annex 124, document in electronic format).

119 *Cf.* Affidavit prepared by Gloria Berta Gualinga Vargas on June 27, 2011 (evidence file, tome 19, folio 10037). See also *Report on the Visit to the Community of Sarayaku, to investigate Complaint by the OPIP […] against the Compañía General de Combustibles*. Human Rights Committee, Congress of the Republic of Ecuador, of May 8 2003 (evidence file, tome 10, folio 6155); Press release of the Kichwa Association of Sarayaku of January 17, 2003 (evidence file, tome 10, folio 6396); Report of the Ecuadorian Ministry of Energy and Mines of March 7, 2006, annex 48, tome 10, folio 6398; Community self-evaluation of the impacts suffered by the Kichwa People of Sarayaku due to the entry of the CGC oil company on their territory" (evidence file, tome 11, folio 6588).

120 *Cf.* Roberto Narváez. Social study *"Afectaciones a la Calidad of Vida, Seguridad y Soberanía Alimentaria en Sarayaku"*, Quito 2010 (evidence file, tome 11, folio 6757).

121 *Cf.* Roberto Narváez. Social study *"Afectaciones a la Calidad of Vida, Seguridad y Soberanía Alimentaria en Sarayaku"* folio 6759. See also expert opinion provided by Anthropologist Rodrigo Villagra to the Court during the public hearing held on July 7, 2011; testimony rendered by Sabino Gualinga before the Court during the public hearing held on July 6, 2011; testimony rendered by Marlon René Santi Gualinga before the Court during the public hearing held on July 6, 2011.

122 In particular, 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 goes all the animals leave. […] As the helicopters have been stopped from coming, if we leave things quiet for a good while, perhaps the animals will return." FLACSO, "*Sarayacu: el Pueblo del Cénit,*" folio 6721.

123 The festival activities serve to renew the ties with the land and social bonds. People return to the recreational areas (*purinas*) and hunting areas, reinforcing the fact that these areas belong to the territory. Also, according to the members of the Community, the Sarayaku festival is characterized by the intervention of all the *Kurakas*, as well as the 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, folios 6672 to 6676). See also statements of Simón Gualinga and Jorge Malaver in the Community Self-evaluation of the impacts suffered by the Kichwa People of Sarayaku due to the entry of the CGC oil company on their territory" (evidence file, tome 11, folio 6588).

Ministries of the Environment and of Energy and Mines, had violated Article 84(5) of the Constitution of the Republic by failing to consult the community on plans and programs for the exploration and exploitation of non-renewable resources on their lands that could have an impact on their environment and culture." The Congressional Committee also concluded that, by negotiating with the communities individually, the CGC disregarded the OPIP leadership role, and this created conflicts between the communities. It also confirmed the damage caused to the territory's flora and fauna. As regards the population, the Committee concluded that "[h]uman rights have been violated because serious psychological harm was caused to the children of the community who witnessed the confrontations with the soldiers, the police and CGC security personnel, and because the OPIP leaders were arrested and accused of terrorism, and were then subjected to physical abuse, which affected their personal integrity, and this is prohibited by the Constitution of the Republic."[124]

H. Alleged threats and attacks against Sarayaku members

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

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

109. In this regard, on December 1, 2003, the Kichwa Association of Sarayaku had sent a communication to the members of Canelos inviting them to join the march.[127] In response to this communication, the next day the "Palati Churicuna" Association of Kichwa Indigenous People of Canelos issued a communique stating that it had decided not to take part in the march and warned that "as is known throughout the province, […] the transit of those who have strongly opposed the issue of oil activities is totally suspended."[128] On December 4, 2003, Police Lieutenant Wilman

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124 Report on the Visit to the Sarayaku Community to investigate the complaint filed by the OPIP against the *Compañía General de Combustibles*. Human Rights Committee, Congress of the Republic of Ecuador, of May 8, 2003 (evidence file, tome 10, folio 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 Pastaza Public Prosecution Office, for a supposed false report regarding his death in a road accident (evidence file, tome 10, folios 6164 and 6165), and Complaint of March 1, 2004, filed by Marlon Santi before the Second National Police Station of the canton of Quito (evidence file, tome 10, folio 6287) for the presumed events of February 29, 2004, in which he was supposedly attacked. Also, on April 23, 2004, José Serrano Salgado, then the lawyer and legal representative of the Sarayaku People, reported that he had been attacked and assaulted by three armed and hooded men, who warned him to cease defending the Sarayaku (evidence file, tome 10, folios 6336 and 6337). In December 2004, Marlon Santi, then a candidate for the presidency of CONFENAIE, reported to the Prosecutor General's Office that, on December 21 and 22, 2004, while in Otavalo participating in a CONAIE conference to elect a new president, an election in which he was a candidate, he received "telephone calls […], in which [he] was told that [he] would be killed, and that I should withdraw my candidacy for the presidency or else, in 24 hours' time, I would not be breathing." He indicated that he was reporting this matter because it constituted a threat to his physical and mental integrity and an act of persecution and harassment against his People and, as such, against his situation as an indigenous leader. Complaint filed by Marlon Santi and his lawyer José Serrano, before the Prosecutor General of Ecuador (evidence file, tome 10, folio 6338).

126 *Cf.* Preliminary investigation measures of the Ombudsman of the province of Pastaza, Puyo, of December 5, 2003 (evidence file, tome 9, folios 5127 and 5128) and Preliminary inquiry signed by the Prosecutor of the Public Prosecution Office on December 9, 2003 (evidence file, tome 9, folios 5130 and 5131). See also, reports of the 16th Provincial Police Command of Pastaza: of 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, tome 9, folios 5135 to 5140) and Report of the Canelos Parish Committee on the confrontation between the People of Canelos and the People of Sarayaku, undated (evidence file, tome 9, folios 5141 to 5144). See also list of persons who supposedly attacked members of the Kichwa People of Sarayaku on September 4, 2003 (evidence file, tome 9, folios 5146 and 5147) and 11 statements by 36 of the people accused of these incidents (evidence file, tome 9, folios 5001 and *ff.*).

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

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

Aceldo met with the President of the Canelos Parish Committee, who warned the lieutenant that "if the decisions taken by Canelos not to allow passage through Canelos territory are not respected, confrontation [will] increase."[129]

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

> […] all the inhabitants [of Canelos] were gathering in order to prevent people from Sarayaku from going to Puyo, to the march for peace and for life […]. I went to the Cuyas sector to await the arrival of the people from Sarayaku. [A]t about 1.00 p.m., five people arrived, but, as of that moment, the inhabitants of Canelos indicated their clear refusal to allow any movement through and therefore, around 500 meters from where we were, they cut down a tree in the pathway to prevent us from leaving […]; immediately our personnel provided protection, to avoid further mishaps; […] on the other side of the bridge near the school they had found around 110 people from Sarayaku, […] so we strengthened passage on the bridge with a police barricade but our efforts were not sufficient because the police barricade was destroyed, at which point they began to chase the people from Sarayaku, arming themselves with sticks; we tried to avoid the confrontation making every effort. They chased them for 10 minutes, and caught up with some of them, causing a fight to break out in which some people were injured.[130]

111. During this incident, some 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. Owing to these events, on December 5, 2003, the Ombudsman of the province of Pastaza opened a complaint procedure *ex officio* and issued a decision in which he concluded that leaders and members of the Indigenous People of Canelos were responsible for: (a) flagrant violation of the right to move freely throughout national territory, a right guaranteed and recognized in article 23-14 of the Constitution of the Republic; (b) a criminal offense, established and penalized in article 129 of the Criminal Code, and (c) violation of article 12(1) of the International Covenant on Civil and Political Rights.[132]

113. In addition, based on a report by the Ombudsman's Office, on December 9, 2003, the Pastaza District Prosecutor initiated a preliminary inquiry into these events.[133] The Prosecutor carried out some investigation measures.[134]

I. Facts subsequent to the suspension of CGC activities

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129 *Cf.* Report of the Canelos Parish Committee on the confrontation between the People of Canelos and the People of Sarayaku, folio 5112. Also see police report of December 4, 2003 (evidence file, tome 9, folios 5116 and 5117).

130 Report submitted to the 16th Provincial Commander of Pastaza of December 4, 2003, signed by Police Lieutenant Wilman Oliver Aceldo Argoti, (evidence file, tome 9, folios 5135 a 5137). Also see Preliminary Inquiry 845-2003 mentioning the confrontation (evidence file, tome 16, folio 9230 and *ff.*).

131 *Cf.* Medical certificates of the Public Prosecutor's Office, Department of Legal Medicine and Forensic Science, December 9, 2003 (evidence file, tome 9, folio 5149 and *ff.*), Pastaza Police report No. 16 of December 5, 2003, signed by Police Lieutenant Patricio Campaña, photos taken at the hospital (evidence file, tome 11, folio 6578 and *ff.*); Preliminary Inquiry 845-2003 mentioning the confrontation, folios 9230 and *ff.*

132 *Cf.* Initial measure taken in investigation opened *ex officio* by the Ombudsman's Office of the province of Pastaza on December 5, 2003, annex 45 to the application.

133 *Cf.* Preliminary inquiry 845-2003 confirming the confrontation, folio 9230 and *ff.*

134 *Cf.* Preliminary inquiry of December 9, 2003 (evidence file, tome 16, folios 9253 and 9254); Record of appointment of expert witnesses of December 9, 2003 (evidence file, tome 16, folio 9255); Record of forensic medical examination of December 9, 2003 (evidence file, tome 16, folios 9256 to 9295); statements of suspects taken on May 4, 5, 14 and 20, and June 4 and 8, 2004 (evidence file, tome 16, folios 9313 to 9370); witness statement of June 10, 2004 (evidence file, tome 16, folios 9371 and 9372), and report on inspection of the scene of the events involving Sarayaku and Canelos, of April 23, 2004 (evidence file, tome 16, folios 9359 to 9360).

114. On August 3, 2007, an inter-institutional cooperation agreement was signed between the Ministry of Mines and Petroleum and the National Police in order to proceed to remove the pentolite from the Sarayaku territory in keeping with the provisional measures ordered by the Court.[135]

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

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

117. On April 20 2009, the PETROECUADOR Board of Directors 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 under the partnership contracts.[138]

118. Based on a note issued by the Ministry of Mines and Petroleum 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 said partnership contracts.[140]

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

121. On December 17, 2009, a "modifying agreement" was approved in order to increase the budget allocated to the plan for "Reparation and Remediation of Environmental Damage" by US$8,640.00.[142] The State had remove 14 kilograms of the pentolite buried near the surface.[143]

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135 *Cf.* Inter-institutional Cooperation Agreement between the Ministry of Mines and Petroleum and the National Police to proceed with removal of pentolite (evidence file, tome 14, folios 8679 and 8680).

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

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

138 *Cf.* Note dated May 8, 2009, of the Ministry of Mines and Petroleum (evidence file, tome 9, folio 5228, and tome 14 folio 8661) referring to Resolution No. 080-CAD-2009-04-20 of April 20, 2009, of the Management Council of PETROECUADOR Board of Directors.

139 *Cf.* Note of May 8, 2009, of the Ministry of Mines and Petroleum.

140 *Cf.* Evidence file, tome 9, folio 5232.

141 *Cf.* Answering brief of the State (merits file, tome 2, folios 496 and 497).

142 Office of the Attorney General of Ecuador, "Modifying Agreement to increase the budget allocation," of December 17, 2009 (evidence file, tome 14, folio 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 the material found on the surface, a phase that had already been completed and, a second, involving the material buried underground. Regarding the first phase, the State had previously reported that in December 2007 an inter-institutional cooperation agreement had been signed between the Ministry of Mines and Petroleum 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 experts 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, GIR personnel entered the territory of the Sarayaku and proceeded to conduct a visual search and the manual removal of 14 kilograms of pentolite. This explosive material was burned and detonated in a controlled manner on August 24, 2009, at the Pastaza Provincial Police Station, in the presence of a representative of the Pastaza District Prosecutor's Office, leaders of the Sarayaku People, representatives of the Ministry of Justice and Human Rights, and the press. The State added that the search area for the explosives was delimited based on the

122. As confirmed in a note of September 16, 2010, which containing the record of the approval of the "Comprehensive Environmental Assessment" of Block 23 by the Under-Secretary for Environmental Quality, the CGC representative was required: "(a) to submit a schedule and specific time frames for executing the activities contained in the Plan of Action, including those referring to information on how the pentolite was managed, the current condition of this explosive, and the environmental impact of the search for and evaluation of the buried material."[144]

123. On November 19, 2010, in a public instrument, PETROECUADOR and the CGC signed a Deed of Termination by mutual agreement of the partnership contract for the exploration and exploitation of crude oil in Block 23.[145] The representatives indicated 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 said Act, in clause 8(4), the parties (PETROECUADOR and CGC) "agree and ratify that there is no environmental liability" in the concession area that can be attributed to the contractor.[147]

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, by granting a contract for oil exploration and exploitation on their territory to a private company; by implementing this contract and by the occurrence of a series of related events. Even though the State acknowledged that it had failed to conduct prior consultations in this case, during the litigation, it questioned its obligation to do so and argued that certain actions taken 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]

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information provided by the community and that the second phase, namely, the removal of the material buried underground, remained pending, due to disagreements with community members over the method to be used. However, the State maintained that the material underground did not pose a danger to the community, given the depth at which the explosives are buried. Finally, the State indicated that it did not have definite information regarding the amount of explosives that might be on the territory in question. *Cf. Matter of the Indigenous People of Sarayaku with regard to Ecuador*. *Provisional measures.* Order of the Inter-American Court of February 4, 2010, Considering paragraph 8. Available at: http://www.Corteidh.or.cr/docs/medidas/sarayaku_se_04.doc

144 Act of Termination by mutual agreement of the partnership 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, tome 17, folio 9595).

145 Act of Termination by mutual agreement of the partnership contract for the exploration of hydrocarbons and exploitation of crude oil in Block 23, of November 19, 2010 (evidence file, tome 17, folios 9389 and *ff.*).

146 *Cf.* On July 30, 2010, the Secretary for Hydrocarbons of the Ministry of Non-Renewable Natural Resources, sent the Sarayaku Note No. 24-SH-2010 109964 (evidence file, tome 10, folio 6451) requesting "a certified copy of the technical and legal file of the Sarayaku proceedings in relation to the operations in Block 23 and on their territory before the Inter-American Court of Human Rights, both printed and electronic documents." Regarding this note, on August 4, 2010, the Sarayaku asked the Secretary for Hydrocarbons for a certified copy of the Memorandum of Understanding without receiving any reply. (evidence file, tome 10, folio 6451)

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

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.

in this case there is no doubt regarding the right of the Sarayaku People to their territory, which has been fully acknowledged by the State in domestic proceedings (*supra* paras. 55, 61 and 62) and as an undisputed fact before the Court. The Court will now analyze: (a) the arguments of the parties, and (b) the obligation to guarantee the right to 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 Rights,[150] Freedom of Thought and Expression,[151] and Political Rights[152]

125. The *C*ommission argued that the State had violated the rights recognized in Article 21 of the American Convention, in relation to Articles 1(1), 13, and 23 of this instrument to the detriment of the Sarayaku People and its members. In particular, it indicated that Ecuadorian law contains a number of constitutional and legal provisions on the rights of the indigenous Peoples that require the State to adopt special measures to guarantee the effective enjoyment of their human rights, without restriction, and to include measures to promote the full exercise of their social, economic and cultural rights, respecting their social and cultural identity, their customs, traditions and institutions. It added that, under Article 21 of the Convention and the case law of the organs of the inter-American system, at the time the contract with the CGC was signed, the State had the obligation to consult its members in advance, in a free and informed manner, so that they could participate in the process and, if they considered it pertinent, seek judicial remedies. Thus, it also indicated that under an evolutionary interpretation of Article 21 of the Convention as it pertains to indigenous peoples' rights, and based on its ratification of ILO Convention 169, Ecuador had the obligation to consult the Sarayaku People in a free and informed manner with specific procedural safeguards before approving the EIA.

126. Regarding Article 13 of the Convention, the Commission argued that, in the context 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 in relation to exploration and exploitation activities for natural resources in the territory of indigenous communities, a matter of evident public interest. At the same time, in relation to Article 23 of the Convention, the Commission mentioned 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 obligation under the principles of international law and its domestic law to adopt all necessary measures to guarantee that indigenous Peoples are able to participate through their own institutions, and in accordance with their values, practices, customs and forms of organization, in decision-making on matters and policies that have or may have an impact on the social and cultural life of the indigenous Peoples.

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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, color, 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 […]".

127. The representatives argued that the State had incurred international responsibility 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 directly, because it permitted and supported the incursion of third parties into Sarayaku territory, and because it failed to protect their use and enjoyment of the natural resources found therein, which are the basis of their subsistence. They alleged the same violations as the Commission, based on the following facts and circumstances: (i) the State not only signed the contract with the oil company without consulting the community and obtaining its consent, but also permitted and supported (through the "militarization of the territory") the illegal incursion of the CGC into the territory, despite the community's repeated opposition; (ii) the unauthorized use and destruction of the territory owing to the incursion of the oil company between November 2002 and February 2003, when nearly 200 kilometers of primary forest were cleared. This action affected the resources of the territory, which is particularly serious given the community's dependence on these resources for its subsistence; (iii) the abandoning of explosives on the territory, and (iv) the destruction of sacred places. 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 effective participation of the members of the community by means of consultations and free, prior and informed consent according to its traditions and customs, so that they would obtain reasonable benefits from the plan, and without obtaining a preliminary study of the social and environmental impact conducted 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 its failure to remove the pentolite from the territory.

128. The State argued that, when signing the oil exploration and exploitation contract with the CGC in 1996, it was under no obligation to initiate a prior consultation process, or to 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 contained no provision in this regard. Thus, based on Article 28 of the Vienna Convention on the Law of Treaties, legally, this obligation was non-existent for Ecuador. The State emphasized that this in no way implied any disregard or disrespect for the territorial rights of the indigenous peoples, which was the reason that the State granted the territory to the Sarayaku People. However, this is not an unlimited property title because, according to the provisions of this land grant, the State's authority to build roads or other infrastructure is not restricted and its institutions and Armed and Police Forces have free access to the territory in order to fulfill their constitutional obligations. Furthermore, it argued that the underground natural resources belong to the State, which may exploit them without interference provided that it does so in accordance with environmental protection standards.

129. The State also pointed out that, even if there was no obligation to engage in prior consultation, the State considered that the participation of the 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, the presumed victims, and other communities signed an agreement to "carry out the seismic 2D survey" acknowledging that the company had repeatedly provided appropriate and timely information about the seismic project prior to its execution. The State also argued that the company had 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 "socialized" with the affected communities, although "in practice it was never implemented." Furthermore, when the 1998 Constitution entered into force, the Environmental Management Plan was updated.

131. The State indicated that the constant and repeated lack of cooperation and the reactive attitude of the members of the Sarayaku People had prevented the full implementation of the

measures of compensation agreed by the CGC. Consequently, 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 the freedom of expression of the Sarayaku People, the State considered that, based on the facts of this case, no act or omission that harmed them can be inferred and that can be attributed to it.

133. The State underscored that, in general, it had guaranteed the access to political participation by the indigenous peoples; more completely as of the 1990s, and that the Sarayaku leaders had held numerous positions of political power in public institutions and had participated in many elections. In addition, with regard to political participation in consultations on mining activities, the State reiterated that, at the time of the concession, Ecuador had not accepted any domestic or international legal framework that recognized the right to culture as a crosscutting element of public policies related to natural resource extraction. Consequently, the institutions and mechanisms enabling the indigenous peoples to exercise political participation before natural resource extraction projects were undertaken had not been incorporated in such a way as to constitute a justiciable right. Lastly, the State recalled that the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169, and a wide range of diffuse and collective constitutional rights were implemented as of 1998.

A.2 Freedom of Movement and Residence[153]

134. The Commission argued that the impossibility 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 to the conclusion that the State is responsible for the violation of the freedom of movement, protected by Article 22 of the American Convention, to the detriment of the members 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 by 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 the takeoff and landing of airplanes. The Commission also argued that the State is responsible for having prevented the freedom of movement and travel of the Sarayaku People by setting up military outposts. 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 seek food and ensure their subsistence.

135. Based on the foregoing, the representatives argued that the violation was constituted, first, because of the State's failure to provide protection to guarantee the Sarayaku People's freedom of movement on the Bobonaza River and within their own territory, despite being aware of the attacks and restrictions on this right by third parties. In addition, the freedom of the Sarayaku to navigate on the river was directly restricted by soldiers stationed in Jatun Molino in January 2003. They argued that the police recognized that blockades were used by the community of Canelos as a repressive measure against the Sarayaku owing to the latter's opposition to the oil activities. The representatives stated that these restrictions were disproportionate, given that the Sarayaku exercised their right of movement through the necessary access route to their territory without affecting others. They also recalled that these facts are even more serious, given that the Sarayaku

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 to 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 […]".

People's settlement in the Amazonian jungle is extremely inaccessible. Finally, they argued that the State failed to investigate or to punish the attacks on freedom of movement by third parties.

136. The State argued that the Commission and the representatives had not provided conclusive evidence to establish reliably that there had been any violation; on the contrary, it had been proved that the State had guaranteed this and other rights of the People. Moreover, it indicated that the land grant made by the IERAC in 1992 clearly establishes that this did not affect freedom of movement. It also argued that, during the seven years that the provisional measures had been in force, "no unfortunate events have been reported."

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

137. The representatives argued that Ecuador had 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, by granting the concession in the territory of the Sarayaku People without consulting them, the State had violated their right to culture, given their special relationship with their territory. They also mentioned that this violation occurred due to the State's lack of action when the company entered the area to protect and preserve sacred places of cultural importance as well as traditional practices, 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 indicated that the suspension of the People's daily activities and the dedication of the adults 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.

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 Article 26 of the Convention had not been violated. It asserted 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 institutional framework that Ecuador has developed in accordance with the constitutional principles. The State also argued that the representatives define culture "based on a fixed ethnic notion" and therefore "do not grasp the integration and polysemy of the cultural dimension of the indigenous peoples or, in general, any components of urban or rural human socialization."

A.4 Domestic Legal Effects[155]

140. The Commission argued that the State had not adopted domestic legal provisions to guarantee the right of access to information and the right to prior consultation, and was therefore responsible for violating Article 2 of the Convention. In particular, the Commission observed that Decree No. 1040 of April 2008 makes no mention of the right of access to information or the right to prior consultation of the indigenous peoples under the applicable international standards, and does not require that information provided by so-called "social participation mechanisms" be accessible, sufficient and timely, in the terms of the application. Furthermore, although both the 1998 and the 2008 Constitutions recognize the right to prior consultation, to date Ecuador does not have a specific

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[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."

[155] Article 2 of the American Convention stipulates: "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."

mechanisms or procedures in place to implement effectively the framework established in the new Constitution, the National Human Rights Plan and in ILO Convention No. 169.

141. The representatives agreed essentially with the Commission's observations 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 laws, regulations and other regulatory mechanisms are being harmonized with the Constitution, and that international human rights instruments have been incorporated into all substantive and procedural reforms.

A.5 Obligation to Respect Rights

143. The representatives and the Commission indicated that the State is responsible for the above-mentioned alleged violations, in relation to Article 1(1) of the Convention.

144. The State argued that it had not violated Article 1(1) of the Convention. In particular, it argued that, regarding the prevention of human rights violations, the Ministry of Justice and Human Rights had been created specifically to bring the citizens and the State closer together under a system that respects rights and guarantees. It also indicated, "[r]egarding the investigation of crimes and violence that can violate human rights, the Prosecutor General's Office had developed a system called *Indigenous Prosecutors,"* who, by knowing Kichwa and Spanish and other languages recognized in the Constitution, "greatly facilitate the gathering of evidence and the investigation of alleged offenses." The State also noted that, in the neighboring communities to Sarayaku, and within the community itself, the indigenous prosecutors have played an important role "when they have not been obstructed by the residents." Lastly, it indicated that the representatives had not proved exhaustively that the State violated general obligations of an *erga omnes* nature.

B. The obligation to guarantee the right to consultation in relation to the rights to indigenous 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 on their ancestral territories and the intangible elements arising from these.[156] The indigenous peoples have a community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community.[157] These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose 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

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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, *Follow-up Report – Access to justice and Social Inclusion: The road towards strengthening democracy in 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 to 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.

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 to 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 way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.[159]

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

B.2 The special relationship of the Sarayaku People with their territory

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

149. In this case, the Court notes 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 by the award made on May 12, 1992 (*supra* para. 61). Nevertheless, in addition to the considerations in the chapter on the facts of the case (*supra* paras. 51 to 57), the Court considers it pertinent to emphasize the profound cultural, intangible and spiritual ties that the community has with its territory, in order to understand more fully the harm caused in this case.

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

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159 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs,* paras. 124, 135 and 137, and *Case of the 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 the Sawhoyamaxa Indigenous Community v. Paraguay*, paras. 73.61 to 73.74, and *Case of the Xákmok Kasek Indigenous Community v. Paraguay*, paras. 205, 207 and 208.

162 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *Merits, reparations and costs,* para. 154, and *Case of the Xákmok Kásek Indigenous People v. Paraguay,* para. 113.

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

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

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

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

152. The current Sarayaku President, José Gualinga, stated that in this "living forest" there are "special noises and phenomena" and it is the "inspiration where, when we are in these places, we feel a kind of sigh, an emotion, and then when we return to our people, to the family, we feel strengthened."[167] These are the places that "give us the necessary power, potential and energy to be able to survive and live. And everything is interrelated between the lagoons, the mountains, the trees, the beings, and also us as an external living being."[168] He also stated: "[W]e were born, we have grown up, our ancestors have lived on these lands and also our parents; in other words, we are natives of this land and we subsist from this ecosystem, from this environment."[169]

153. For the Sarayaku, a close relationship exists between the *Kawsak Sacha* or "living forest" and its members. According to Patricia Gualinga:

> It is a close relationship, a relationship of harmonious coexistence. For us, the *Kawsak Sacha* is the living forest, with everything this implies, with all its beings, with all its worldview, with all its culture with which we are intermingled. […] These beings are extremely important. They provide us with vital energy; they maintain balance and abundance; they maintain the entire cosmos and are interconnected. These beings are essential not just for the Sarayaku, but for the equilibrium of the Amazon, they are all interconnected and, therefore, the Sarayaku defends its living space so ardently.[170]

154. During the public hearing, expert witness Rodrigo Villagra Carrón indicated that "territory, knowledge, possibilities, the potential for production, but also for human reproduction, are intimately related."[171] Similarly, he considered that "the cultural identity of each cultural group is dependent on the special relationship it has with nature, expressed in the most varied practices of management, protection, use or primary extraction of natural resources, goods or services from the ecosystems." Meanwhile, expert witness Victor López Acevedo stated that "for the Sarayaku it is not acceptable to depend on the State or on other internal groups that demand products, because they understand that the land is their greatest wealth, in the sense that it contains all the material elements required for satisfactory social reproduction, and where the beings that represent their spiritual beliefs are to be found. These beliefs are based on a different value system to 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 allow the Court to consider that the Kichwa People of Sarayaku have a profound and special relationship with their ancestral territory, which is

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165 FLACSO. *Sarayaku: el Pueblo del Cénit*, p. 96 (evidence file, tome 11, folio 6678).

166 FLACSO. *Sarayaku: el Pueblo del Cénit*, folio 6729.

167 Affidavit prepared by José María Gualinga Montalvo on June 27, 2011 (evidence file, tome 19, folio 10016)

168 Affidavit prepared by José María Gualinga Montalvo*,* folio 10016.

169 Affidavit prepared by José María Gualinga Montalvo, folios 10028 and10029. See also: Affidavit prepared by Franco Tulio Viteri Gualinga on June 27, 2011 (evidence file, tome 19, folios 9994 and 9995)

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

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

172 Expert opinion provided by affidavit by anthropologist Víctor López Acevedo on June 29, 2011 (evidence file, tome 19, folios 10145 and 10146).

not limited to ensuring their subsistence, but rather encompasses their own worldview and cultural and spiritual identity.

B.3 Measures of protection to guarantee the right to communal property

156. The Inter-American Court has indicated 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 respected. Thus, "when indigenous communal property and individual private property enter into real or apparent conflict, the American Convention and the Court's case law provide guidelines to define the admissible restrictions,"[173] which must be established by law, necessary, proportionate and aimed at achieving a legitimate objective in a democratic society without denying their right to exist as a people.[174] The Court has also stated that, in cases concerning natural resources on the territory of an indigenous community, in addition to the above criteria, the State is must verify that these restrictions do not entail a denial of the survival of the indigenous people themselves.[175]

157. For this reason, in the case of *Saramaka v. Suriname*, the Court established that, to ensure that the exploration or extraction of natural resources in ancestral territories did not entail a negation of the survival of the indigenous people as such, 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 or large-scale investment plans; (ii) conduct an environmental impact assessment, and (iii) as appropriate, reasonably share the benefits produced by 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 this compensation should be, according to its customs and traditions.[176]

158. In this case, no specific arguments have been presented concerning the said criteria to determine the admissibility or validity of the restrictions to the communal ownership of the Sarayaku territory, or regarding one of the measures of protection relating to 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 observes that, in general, the close relationship between the indigenous communities and their land has an essential component, which is their cultural identity based on their specific worldviews, which, as distinct social and political actors in multicultural societies, must receive particular recognition and respect in a democratic society. Respect for the right to consultation of indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity (*infra* paras. 212 to 217), which must be assured, in particular, in a pluralistic, multicultural and democratic society.[177]

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[173] *Cf. Case of the Yakye Axa Indigenous Community 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.

[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] In this regard, for example, in its Judgment C-169/01, the Constitutional Court of Colombia declared: "The Court has already stated that "pluralism establishes the conditions to ensure that the axiological content of constitutional democracy has a place in democracy and a democratic foundation. In sum, the free and popular choice of the best values is justified formally by the possibility of choosing other values without restriction and substantively by the reality of a higher ethic". (Judgment C-089/94 ibid.). The same judgment indicated that the democratization of the State and society prescribed by the

160. Based on all the above, one of the fundamental guarantees to ensure 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 established in ILO Convention No. 169, and other complementary international instruments.[178]

161. On other occasions,[179] this Court has indicated that human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions. This evolutionary interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties. Thus, the Court has stated that, when interpreting a treaty, it is necessary to take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also the system of which it forms part (Article 31(3) of this instrument).[180] This Court has also 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] Thus, the Court has interpreted Article 21 of the Convention in the light of domestic law concerning the rights of members of the 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]

Constitution is related to a progressive effort of historical construction, during which it is essential that the public domain, and with this 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 substantive composition of the system maintains an adequate correlation to the diverse forces of which society is composed, and allows all of them to participate in the adoption of decisions that concern them. This is particularly important in a social rule of law, which presupposes the existence of a profound interrelationship between the traditionally separate concepts of "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 it to the 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 the 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.

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 *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 22.

182 *Cf. Juridical 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 *Juridical Status and Human Rights of the Child*, para. 22.

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

184 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*, paras. 138 and 139, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* paras. 122 and 123, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay,* para. 143.

185 *Cf. Case of the Saramaka People v. Suriname*, *Preliminary objections, merits, reparations and costs*, paras. 106 and 117, and *Case of the Moiwana Community v. Suriname, Preliminary objections, merits, reparations and costs*, para. 86.39 to 86.41.

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

> Given that the instant case concerns the rights of members of an indigenous community, the Court finds it appropriate to recall that, under 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 those individuals who are not subject to their jurisdiction. However, it is necessary to emphasize that in order to ensure those rights effectively, when interpreting and applying their domestic law, the States must take into account the particular characteristics that distinguish the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as indeed it will in the instant case, to assess the scope and content of the articles of the American Convention that the Commission and the representatives claim were violated by the State.[187]

163. ILO Convention No. 169 concerning Indigenous and Tribal Peoples of 1989 applies, *inter alia,* to "the 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 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. Several Member States of the Organization of American States have incorporated these standards in their domestic laws and through their highest courts. Thus, the domestic laws of several States in the region, such as Argentina,[190] Bolivia,[191] Chile,[192] Colombia,[193] United States,[194]

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186 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*, paras. 125 to 130; *Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs*, paras. 93 and 94, and *Case of the 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.

189 ILO. Convention No. 169, article 2.

190 Article 75.17 of the 1994 National Constitution of Argentina recognizes the ethnic and cultural preexistence of the Argentine indigenous peoples, 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 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 In Bolivia, the Constitution 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 that may affect them. In this context, the right to compulsory prior consultation conducted by the State, in good faith and with consensus, with regard 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, Bolivia's 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 comprehensiveness and participation.

192 In Chile, article 34 of 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 the indigenous organizations recognized by this Law."

193 In Colombia, article 330 of the Constitution states that "[t]he exploitation of natural resources in indigenous territories shall be undertaken without harming the cultural, social and economic integrity of the indigenous communities. In decisions taken with regard to such exploitation, the Government shall encourage the participation of representatives of the respective communities." Furthermore, several provisions of Colombian law refer to prior consultation: article 76 of Colombia's *General Law on the Environment*, Law 99 of 1993, regulates the methods and procedures for the participation of indigenous and black communities in environmental matters; 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 April 21, 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. Article III of the decree 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 of prior consultation is established in the 1966

Mexico,[195] Nicaragua,[196] Paraguay,[197] Peru[198] and Venezuela,[199] refer to the importance of consultation or of communal property. In addition, several domestic courts of States of the region

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National Historic Preservation Act, 16 USC §§ 470(a)(d)(6)(B) and 470(h) (1992); the National Environmental Policy Act (NEPA); the 1990 Native American Graves Protection and Repatriation Act § 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, shall establish the institutions and determine the necessary policies to ensure the exercise of indigenous rights and the integral development of their peoples and communities, and these shall be designed and operated in conjunction with them: […] IX. Consult indigenous peoples when drafting the National Development Plan and those of states and municipalities and, as appropriate, incorporate their recommendations and proposals" (Title I, Chapter 1, article 2.B.IX). 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. In addition, several Mexican states have promulgated legislation relating 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, 2012; *Law on Indigenous Rights and Culture of the State of Nayarit* of December 18, 2004; *Article 9 of the Constitution of the State on Indigenous Rights and Culture* of September 13, 2003, 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 de 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; Constitution of the Free and Sovereign State of Chihuahua, article 64; Constitution of the State of Durango, February 22, 2004; 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; Constitution of the Free and Sovereign State of Puebla of December 10, 2004; and the *Law on Indigenous Rights, Culture and Organization of the State of Quintana Roo* of November 20, 1996.

[196] The 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." Furthermore, it indicates that the State "recognizes the 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). In addition, "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 and Administrative Division, Chapter II: Communities of the Atlantic Coast, article 180). In addition, article 3 of the *Law on the communal property regime of the indigenous peoples and ethnic communities of the autonomous regions of the Atlantic coast of Nicaragua and of the Bocay, Coco, Indio and Corn rivers*, stipulate that consultation consists of the "delivery of technical information regarding the operation or the project, followed by a process of discussion and a decision thereon, during which communities shall have translators to translate what has been said during this process into their languages and be assisted by experts in the field."

[197] Article 64 of the 1992 Constitution of Paraguay establishes that indigenous peoples "have the right to communal ownership of land of sufficient extent and quality to conserve and lead their distinctive ways of life."

[198] The 2011 Law on the right to prior consultation of indigenous or tribal peoples recognized in ILO Convention No. 169, establishes, *inter alia*, that the right to prior consultation "[i]s the right of the indigenous or tribal peoples to be consulted in advance on legislative or administrative measures that directly affect their collective rights, physical existence, cultural identity, quality of life or development," and that "[c]onsultation shall also be conducted on national and regional development plans, programs and projects that directly affect these rights" (article 2). See also 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 1999 Constitution of the Bolivarian Republic of Venezuela establishes that "State exploitation of natural resources in indigenous habitats shall be undertaken without harming their cultural, social and economic integrity and, also, is subject to prior information and consultation with the indigenous communities concerned. The benefits of this exploitation for the indigenous peoples are subject to the Constitution and law." Meanwhile, 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

that have ratified ILO Convention No. 169[200] have referred to the right to prior consultation in accordance with the latter's provisions. Thus, high courts of Argentina,[201] Belize,[202] Bolivia,[203] Brazil,[204] Chile,[205] Colombia,[206] Costa Rica,[207] Ecuador,[208] Guatemala,[209] Mexico,[210] Peru[211] and

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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 that exploit natural resources and any development projects carried out on indigenous habitat and lands shall be subject to the procedures of information and prior consultation, pursuant to 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 the Nation has ruled that the guarantee of the right to communal property of the indigenous peoples, "must 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 in relation to nature, their culinary arts, their customary law, their dress, philosophy and values," and "[t]he significance and fragility of the said assets should guide judges not only in the elucidation of and decisions on substantive points of law, but also […] in those related to the "judicial protection" established in the American Convention on Human Rights (Art. 25), which has constitutional rank" (CSJN, "Eben Ezer Indigenous Community *v*/Province of Salta – Ministry of Labor and Production ref/*amparo*" of September 30, 2008, C. 2124. XLI, p.4). Similarly, the Neuquén Superior Court of Justice has ruled on the right to prior consultation of indigenous peoples, indicating that this is "essentially, a fundamental right of a collective nature, and therefore the State must establish procedures in good faith aimed at obtaining the free and informed opinion of these communities, when legislative or administrative actions of the Government are envisaged that may affect them directly, in order to establish the required agreements or arrangements." This court added that "recognition of [the right to prior consultation] arises from an awareness of the need to specifically advocate safeguarding the interests of human populations that, owing to factors related to their cultural identity, have been neglected in the decision-making processes of the public authorities and the functioning of state structures in general. Thus, it becomes a guarantee of equality or an equalizing mechanism, as regards the real ability of these peoples to express their opinions and influence provisions designed to haves an impact on their lives, in order to place them on the same footing as any other group of citizens" (TSJN, Agreement No. 6 in the case " Mapuche Catalán Community and Neuquina Indigenous Confederation *v*/Province of Neuquen ref/action on unconstitutionality" of October 25, 2010, File. No. 1090-1004). See also, First Chamber of the Supreme Court of Justice of Mendoza, Argentina, File No. 102.631, judgment of May 18, 2012.

202 The Belize Supreme Court indicated that "although Belize has not yet ratified [ILO] Convention No. 169 […], there is no doubt that article 14 of that instrument contains provisions on the right to the land of indigenous peoples that reflect the principles of international law concerning indigenous peoples." Supreme Court of Belize, *Case of Aurelio Cal in his own behalf and on behalf of the Maya Village 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 Bolivian Constitutional Court 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 original lands, guaranteeing the sustainable use and exploitation of the natural resources on those lands; making effective a guarantee to protect indigenous peoples based on their special characteristics, including the social and economic conditions that distinguish them from the rest of the national community, who are governed by their own customs or traditions, and are aware 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: "[a]ccording to article 15.2 of ILO Convention No. 169, consultation must also be carried out with regard to resources existing on the lands of the indigenous peoples, since it 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 established 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 (descendants of the Quilombo communities), especially when, as emphasized by the representative of the Public Prosecutor's Office, the Brazilian State has confirmed its intention to establish public policies to combat discrimination against the traditional lifestyles of indigenous and tribal peoples by publishing Legislative Decree No. 43/2000, ratifying ILO Convention No. 169. Fifth Federal Court of First Instance, Judicial District of Maranhão, *Joisael Alves et al. v. Diretor Geral do Centro de Lançamento de Alcântara*, Judgment No. 027/2007/JCM/JF/MA, Proceedings No. 2006.37.00.005222-7, judgment of February 13, 2007.

205 Chile's case law has referred to the right to prior consultation indicating that, in a case where a municipality proceeded to exploit trees on a hillside, without consulting the indigenous communities concerned, it "had violated the right to mental integrity of the appellants, 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, as well as the conservation of the inherent characteristics of their ethnic group, naturally causing distress and great concern." Court of Appeal of Conception, Chile, August 10, 2010.

206 Regarding the right to free and informed consultation, the Constitutional Court of Colombia has stated that "the State must guarantee and encourage, in a coordinated manner, the real and effective implementation of the fundamental

Venezuela[212] have indicated 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, autochthonous or tribal communities regarding any administrative or legislative measure that directly affects them, as well as with regard to the exploitation of natural resources on their territory. Thus, similar developments in case law are evident by the high courts of countries of the region, such as Canada[213] or the United

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right to prior consultation of the ethnic communities, above all, because the tools that support the consultation allow the parties to reconcile their positions and reach a middle ground for intercultural dialogue in which the peoples exercise their right to autonomy with their own life plans in relation to economic models based on market economy or similar" Constitutional Court of Colombia, judgment C-169/01, para. 5.1). Furthermore, the Court indicated that the State's obligation to consult is a direct result of the right of native communities to decide on the priorities in their process of developing and preserving their culture (judgment C 169/01, para. 2.3).

207 The Constitutional Chamber of the Supreme Court of Justice of Costa Rica indicated that the "Constitution must be interpreted and applied so as to allow and facilitate the independent life and development of ethnic minorities in Costa Rica, without other limitations than those imposed by human rights on the conduct of all" (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 consulted with them" (considering para. IV). Thus, it recalled that, because of the normative rank granted by article 7 of the Constitution, the ILO Convention No. 169 has primacy over the laws and, therefore, its protection falls within the scope of the constitutional jurisdiction (Considering para. III). Constitutional Chamber of the Supreme Court of Justice of Costa Rica, 2011-1768 of February 11, 2011, Application for *Amparo*. 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 referred to prior consultation in its case law, indicating that "[p]ublic consultation is another major aspect of environmental management, and the participation of the people must find expression at the different stages of this process, that is, during planning, policy development, environmental impact studies, monitoring and procedural legitimacy; the ability to file different actions before the administrative or judicial bodies must exist" (Case of the Dry Swamps of Pastaza, No. 222-2004-RA, judgment of June 9, 2004, considering Para. 12). It also indicated that "any State decision that may affect the environment, of which the community should be duly informed under 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 bear the consequences of the different activities undertaken in their environment" (Case of the IMAX cinema in the Parish of Cumbayá, No. 679-2003-RA, considering para. 6).

209 The Constitutional Court of Guatemala referred to the right to prior consultation of the indigenous peoples emphasizing that it consists essentially in "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 government legislative or administrative measures are proposed that may affect them directly, in order to establish the required agreements or measures." The Court added that "[t]his recognition is a result of the awareness of the need to promote in a special manner the safeguard of the interests of the human populations that, owing to factors related to their cultural identity, have been excluded from decision-making processes of the public authorities and from the operations of the State structures in general. In this regard, it becomes a guarantee of equality or an equalizing mechanism, for these populations to have a real ability to decide and influence the provisions that have an impact on their living conditions, in order to place them on the same footing as any other group of citizens" (Constitutional Court, Guatemala, December 21, 2009, Appeal against *amparo* judgment, Case 3878-2007, Section V.

210 *Cf*. Supreme Court of Justice of the Nation, Amparo under review 781/2011. María Monarca Lázaro *et al.* March 14, 2012. Also, the Electoral Tribunal of the Judiciary of the Mexican Federation invoked Convention No. 169 to determine that failure to consult an indigenous community regarding elections is considered an indication of lack of diligence by the authorities and, in the specific case, it resulted in the Court's decision to consider that the postponement of the elections had been improperly justified in accordance with indigenous customary law (Electoral Tribunal of the Judiciary of the Federation, *Joel Cruz Chavez et al. v. the Fifty-Ninth Legislature of the State of Oaxaca et al.*, SUP-JDC-11/2007, judgment of June 6, 2007).

211 The case law of the Peruvian Constitutional Court has referred to the right to prior consultation in several decisions. In particular, the Court has indicated 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 on whose territory activities are carried out be consulted, but also, for example, 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 the legislative or administrative measures that may directly affect indigenous peoples" (judgment of the Constitutional Court, Case No. 0022-2009-PI/TC, paras. 23 and 41). The Court also established that the right to ethnic identity includes: "[t]he right to be heard and consulted prior to any action or measure taken and that may affect them" (judgment of the Constitutional Court, Case No. 03343-2007-PA/TC, para. 30).

212 *Cf.* Judgment of the Supreme Court of Justice, Case No. 2005-5648, of December 6, 2005.

213 Regarding the territorial 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.

States of America,[214] or outside the region such as New Zealand.[215] In other words, the obligation to consult, in addition to being a treaty-based provision, 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 about to be affected is an obligation that has been clearly recognized. Such processes must respect the particular consultation system of each people or community, so that it can be understood as an appropriate and effective interaction with State authorities, political and social actors and interested third parties.

166. The obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative 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 entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights.[216] This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards.[217] Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.

511, para. 25). Regarding the obligation to consult, the Court established that the nature and scope of the obligation 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 v. British Columbia,* para. 35). Furthermore, the obligation to conduct a consultation involves a process of listening with an open mind to what the indigenous group has to say and being prepared to change the original proposal. Similarly, the Supreme Court of Canada ruled that the obligation to consult was a State obligation that increased in proportion to the severity of the impact on the right in question (*Haida v. British Columbia,* paras. 39 and 68). Finally, the Court also determined that the State's proposed intervention on indigenous territory 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 State's activity potentially will have a 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 *ff.)*

214 In the case of the United States Ninth Circuit Appeals Court, the Court held that the concept of consultation requires prior discussion with a community leader or executive or one with those who have explicit authority to represent the tribe before the agency (*Hoopa Valley Tribe v. Christie,* 812 F.2d 1097 (1986)). In a 1979 case, the Court established that the lack of prior consultation cannot be remedied by a meeting after the decision has been taken (*Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (1979)). Also, see *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (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 the 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 "[i]n 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." In addition, 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 this instrument establishes that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

167. Given that the State must guarantee these rights to consultation and participation at all stages of the 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 as a people, these dialogue and consensus-building processes must be conducted from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. In this regard, the State must ensure that the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests. Therefore, as applicable, the State must also carry out the tasks of inspection and supervision of their application and, when pertinent, deploy effective means to safeguard those rights through the corresponding judicial organs.[218]

168. In the case of Ecuador, the current Constitution (2008) provides comprehensively protection for the rights of indigenous communities.[219] Indeed, expert witness Anaya indicated during 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 laws, issued between 2000 and 2010, reaffirm the recognition of the right to property, among other rights, of the indigenous Peoples who define themselves as nationalities with ancestral roots, as well as black or Afro-Ecuadorian Peoples, and establish requirements for consultation by public institutions in a number of scenarios.[221] Thus, today, the right to consultation is fully recognized in Ecuador.

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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*.

219 The 2008 Constitution of Ecuador came into force on October 20, 2008. Its Article 57 establishes that "[i]ndigenous communities, peoples and nationalities are recognized and guaranteed, in conformity with the Constitution and international human rights conventions, agreements, declarations and other 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 the renewable natural resources located on their lands; (7) To free, prior and informed consultation, within a reasonable time, on the plans and programs for exploring for, exploiting and marketing non-renewable resources located on their lands that could have an environmental or cultural impact on them; to share in the profits of these projects and to receive compensation for any social, cultural or environmental damage caused to them. The consultation to be conducted by competent authorities shall be mandatory and timely. If the consent of the community consulted is not obtained, the provisions of the Constitution and the law shall be followed. (8) To preserve and promote their practices for managing biodiversity and their natural environment. The State must establish and implement programs with the participation of the community to ensure the conservation and sustainable use of biodiversity. (9) To conserve and develop their own forms of social organization and coexistence and for the establishment and exercise of authority, in their legally recognized territories and ancestral communal 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 State's plans and projects; (17) To be consulted before the adoption of a legislative measure that could affect any of their collective rights, [and …] (20) The limitation of military activities on their territories, according to the law. […]."

220 Expert opinion 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 for traditional production and enterprise. […]The State must protect the lands of the National Agricultural Development Institute (INDA) allocated for the development of the Montubio, indigenous and Afro-Ecuadorian Peoples and shall legalize them by granting them, without cost, to communities or ethnic groups that have owned them ancestrally, on the condition that they respect their own traditions, cultural life and social organization." *Cf.* Agrarian Development Law, No. 2004-02, published in the supplement to Official Gazette No 315 of April 16, 2004 (evidence file, tome 8, folios 4082 and *ff.*) The same month, the *Commune Organization and Management Law* (No. 2004-04, published in the supplement to Official Gazette No. 315 of April 2004, evidence file, tome 8, folio 4098)) was adopted, establishing that "the exercise of collective rights is guaranteed for indigenous peoples who define themselves as nationalities with ancestral roots and black or Afro Peoples, as well as the communities that form part of these collectivities in accordance with the provisions of […] the Constitution." On April 16, 2004, the *Vacant Lands and Settlement Act* (No. 2004-03, published in the supplement to Official Gazette 315 of April 16, 2004, evidence file, tome 8, folio 4119) was adopted; it states that "communal lands in the ancestral possession of the indigenous communities who define themselves as nationalities with ancestral roots and of the black or Afro-Ecuadorian peoples, as well as of the communities that form part of these collectivities, shall not be considered vacant lands, in accordance with the provisions of article 84 of the Constitution of the Republic." On September 10, 2004, the *Environmental Management Act* (supplement to the Official Record of 10 September 2004, evidence file, tome 8, folio 4103 and *ff.*), was

169. In the instant case, the State signed a partnership contract with the CGC on July 26, 1996, for exploration and exploitation of crude oil in block 23, which is part of Sarayaku territory.

170. According to expert witness Acosta Espinoza, before the entry into force of the 1998 Constitution and ILO Convention No. 169 in Ecuador, conflicts between indigenous territoriality and oil interests were resolved by simply imposing the will of the State, without the State conducting a formal expropriation procedure; thus, 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, in the terms of Article 21 of the Convention in relation to Articles 1(1) and 2 of this instrument, imposes on States the positive obligation to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied. Thus, in keeping with Article 29(b) of the Convention, the provisions of Article 21 of this instrument must be interpreted in conjunction with other rights recognized by the State in its domestic laws or in other relevant international norms.[223] Under international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of way of life strongly associated with the land and the use of its natural resources.[224]

172. Although the State had an obligation to guarantee the Sarayaku People their right to the effective enjoyment of their property, in accordance with their communal tradition and taking into

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adopted; its Articles 28 and 29 provide that "[e]very natural or legal person is entitled to participate in environmental management through mechanisms established by the Regulations, which include consultations, public hearings, initiatives, proposals or any type of association between the public and private sectors. A public interest action may be filed to denounce those who violate this guarantee, without prejudice to civil and criminal responsibility based on complaints or accusations of reckless or malicious behavior. […] The failure to comply with the consultation process referred to […] in the Constitution of the Republic will signify that the activity in question cannot be implemented and shall be grounds for the annulment of the respective contracts. […] Any natural or legal person is entitled to timely and adequately information on any activity of State institutions under the Regulations of this Act that may cause environmental impacts. To this end this, requests may be made and actions filed, either individually or collectively, with the relevant authorities." On January 29, 2009, the *Mining Act* was adopted (published in the supplement to Official Record 517 of January 29, 2009), its Articles 87, 89 and 90 establish that "[t]he State is responsible for implementing executing the participation and social consultation processes through the corresponding public institutions according to constitutional principles and regulations. This responsibility cannot be delegated to a private entity. The purpose of these processes shall be to promote the sustainable development of mining activities, as protecting the rational exploitation of mineral resources, respect for the environment, and social participation in environmental and development matters in the areas of influence of a mining project. […] This process shall be conducted at all stages of the mining activity within the framework of the procedures and mechanisms established in the Constitution and the law. […] The public participation or consultation processes must establish a special procedure for the communities, peoples and nationalities, based on the principle of legitimacy and representativeness, through their institutions, in those cases in which the mining exploration or exploitation is conducted on their ancestral lands and territories when such work may affect their interests." On April 20, 2010, the *Public Participation Act* was adopted (supplement to Official Register No 175), which states that "[t]he collective right to free, prior and informed consent within a reasonable time is guaranteed and recognized to all indigenous communes, communities, towns and nationalities, Afro-Ecuadorian and Montubio peoples. In the case of prior consultation on plans and programs for the exploration, exploitation and marketing of non-renewable resources that are on their territories and lands, the indigenous communes, communities, peoples and nationalities, and Afro-Ecuadorian and Montubio people, through their legitimate authorities, shall participate in the benefits that these projects will produce and shall receive compensation for eventual negative social, cultural, and environmental harm. The consultation to be conducted by competent authorities is mandatory and must be prompt. If the consent of the collective subject is not obtained, the provisions of the Constitution and the law shall apply."

222 *Cf.* Pleadings and motions brief, tome 1, folios 268 to 272. See also expert opinion provided by affidavit by Alberto José Acosta Espinoza, economist, of June 30, 2011 (evidence file, tome 19, folios 10072 to 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 to 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 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, paras. 113 to 115 (supporting an interpretation of international human rights instruments that takes into consideration the progressive development of the *corpus juris* of international human rights over time and its current status).

224 *Cf. Case of the 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.

account the inherent particularities of their indigenous identity in their relationship to the land, prior to the ratification of the said Convention, it assumed an international commitment to guarantee the right to consultation upon ratifying ILO Convention 169 in April 1998. Nevertheless, even after the collective rights of the indigenous and Afro-Ecuadorian Peoples had been constitutionally recognized on the entry into force of Ecuador's 1998 Constitution, the CGC initiated seismic survey activities in July 2002.[225] That was when the State, through the Ministry of Energy and Mines, approved the updated Environmental Impact Plan submitted by CGC and prepared by a subcontractor of the latter, which had been approved initially in August 1997. According to the State, the plan was approved based on the Substitute Environmental Regulations for Hydrocarbon Operations. It has not been contested that the company opened seismic lines, established heliports, destroyed caves, and water sources and subterranean rivers that 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 in the subsoil of the territory (*supra* para. 105).

173. In addition, it has not been contested that another national norm had been in force since 1998, which established consultation mechanisms under the responsibility of the State (the 1998 National Human Rights Plan[226] and the 2000 Investment Promotion and Public Participation Act[227]). It was not until after the company's Environmental Impact Plan had been approved, and the reactivation of prospecting activities ordered that, in December 2002, the *Regulations for Consultation on Hydrocarbon Activities* were approved,[228] the first article of which established:

> A standard procedure for the hydrocarbon sector for the application of the constitutional right of consultation of the indigenous peoples, who define themselves as nationalities and Afro-Ecuadorians regarding prevention, mitigation, control and rehabilitation related to the negative socio-environmental impacts and also the promotion of positive socio-environmental impacts resulting from the hydrocarbon operations on their lands, and the participation of the said Peoples and communities in the processes related to the consultations, the preparation of the environmental impact assessments, the environmental management plans, including the plans to promote community relations.[229]

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225 Article 84 of the Constitution of Ecuador (Chapter 5: Collective rights, Section One: Indigenous, Black or Afro-Ecuadorian Peoples) stipulates that: The State must recognize and guarantee to the indigenous peoples, in accordance with this Constitution and the law, respect for public order and human rights, the following collective rights: […] (2) To conserve the perpetual ownership of the communal lands, which shall be inalienable, indivisible and not subject to embargo, unless declared of public utility by the State. These lands shall be exempt from the payment of property tax. (3) To maintain the ancestral possession of communal lands and to be granted them, without cost, in accordance with the law. (4) To participate in the use, enjoyment, administration and conservation of the renewable natural resources to be found on their lands. […] (6) To conserve and promote their practices for the management of biodiversity and their natural environment. (8) To not be displaced, as Peoples, from their lands. (9) To the collective intellectual property of their ancestral knowledge, to its assessment, use and development in accordance with the law. (10) To maintain, develop and administer their cultural and historical heritage.

226 *Cf.* National Human Rights Plan of Ecuador of June 18, 1998 (evidence file, tome 9, folio 5312). Article 8 establishes as a general objective: "4. To 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 to analyze the possibility of indigenous peoples participating equitably in the benefits arising from the exploitation of those resources, as well as their right to be compensated for the damage caused."

227 Published in the supplement to Official Record No. 144 of August 18, 2000.

228 *Cf.* Executive Decree No. 3401 of December 2, 2002, Official Record No.728 of December 19, 2002 "*Regulations for Consultation on Hydrocarbon Activities*." This refers to the times at which the consultation must be carried out; the purpose of the preliminary pre-bid consultation with indigenous peoples, who identify themselves as nationalities and Afro-Ecuadorians; the purpose of the consultation prior to execution of indigenous peoples who identify themselves as nationalities and Afro-Ecuadorians; the purposes of the consultation; the decisions and agreements in the consultation with indigenous peoples, who identify themselves as nationalities and Afro-Ecuadorians; the compensation owing to the social and environmental harm caused by the hydrocarbon activities; the formalization of decisions and agreements with regard to the consultation on execution with indigenous peoples, who identify themselves as nationalities and Afro-Ecuadorians, and the phases of the implementation of hydrocarbon activities in which consultation is required prior to execution (evidence file, tome 8, folios 4130 and *ff.*)

229 In addition, article 7 of Executive Decree No. 3401 requires that: "both the consultation with the peoples who identify themselves as indigenous nationalities and Afro-Ecuadorians, and the public consultation shall be carried out: (a) prior to the call for bids issued by the agencies in charge of the hydrocarbon bidding processes, which shall be known as pre-bid 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 known as the pre-implementation consultation." In addition, article 8 establishes that: "[t]he purpose of the pre-bid consultation of indigenous peoples, who

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

175. Indeed, it should be noted that the Sarayaku People always opposed the company's entry into its territory by taking various measures on 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, Patricia Gualinga stated that, in Sarayaku, the plan was opposed because they "had seen all the problems that oil exploitation had caused in other areas; they had seen everything that happened in Block 10 and all the divisions it was causing [...] and, apart from that, they knew that part of their subsistence 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).

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define themselves as nationalities and Afro-Ecuadorians is: (a) to obtain, in advance, the views, comments, opinions and proposals of the indigenous peoples, who define themselves as nationalities and Afro-Ecuadorians, who live in the area of direct influence of the block open to bidding, with regard to the possible positive and/or negative socio-environmental impacts that the plans and programs resulting from the oil bidding processes and the signature of the respective exploration and exploitation contracts could have on their territories; (b) to receive opinions on the general socio-environmental strategies and measures for prevention, mitigation, control, compensation and rehabilitation of the negative socio-environmental impacts, as well as on efforts to promote positive socio-environmental impacts, which must be taken into account by the agency responsible for the bidding process, the award and signature of contracts and the activities for monitoring their execution, and (c) to obtain opinions on the mechanisms for the participation of indigenous peoples, who define themselves as nationalities and Afro-Ecuadorians, who live in the area of direct influence of the block open to bidding, through their representative organizations, during the implementation of the socio-environmental measures of prevention, mitigation, compensation, control and rehabilitation related to the negative socio-environmental impacts and to promote positive socio-environmental impacts on their territories due to the hydrocarbon activities resulting from the bidding processes and the award and signature of exploration and exploitation contracts." Lastly, article 10 stipulates that: "[t]he purpose of prior consultation of indigenous peoples, who define themselves as nationalities and Afro-Ecuadorians, is to obtain, in advance, the views, comments, opinions and proposals of the indigenous and Afro-Ecuadorian communities in the area of direct influence of the project, regarding the possible positive and/or negative socio-environmental impacts of the oil exploration and exploitation activities, and to determine the socio-environmental measures of prevention, mitigation, compensation, control and rehabilitation in relation to the negative socio-environmental impacts and to promote positive social and environmental impacts that, if technically and financially viable and legally appropriate, shall be incorporated into the Environmental Impact Assessment and the Environmental Management Plan, including the Community Relations Plan (evidence file, tome 8, folio 4130 and *ff.*).

230 In his expert report, William Powers described the impacts inherent in an oil project in the jungle, which include the arrival of workers in the zone, the opening up of numerous trails involving the clearing of vegetation, impact on water courses, soil erosion, and indirect effects owing to opening up the area to an external population; explosives 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 (evidence file, tome 19, folios 10090 to 100103).

231 *Cf.* Expert opinion provided by affidavit by Alberto José Acosta Espinoza, economist, of June 30, 2011 (evidence file, tome 19, folios. 10073 to 10077)

232 In this regard, the Inter-American Commission had indicated that, in 1997, oil exploitation in eastern Ecuador was directly violating 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 they used to drink and to wash themselves, in the air they breathed, and in the soil in which they grew their food. The Commission determined that this posed a considerable risk to human life and health because they were exposed to increased risks of contracting serious illnesses (Inter-American Commission, *Report on the Situation of Human Rights in Ecuador.* OAS/Ser.L/V/II.96 Doc. 10 rev. 1(1997), Ch. VIII. "The human rights situation of the inhabitants of the interior of Ecuador affected by development activities"). Expert witness Alberto Acosta referred to the effects that the oil boom had had on the Ecuadorian Amazon, indicating that "[i]t is indisputable that, since the second half of the 1960s, oil activities have caused massive damage to the biodiversity and well-being of the population of the Amazon region. The indigenous communities and the settlers have suffered innumerable violations of their most basic rights in the name of the mythical well-being of the population as a whole" (evidence file, tome 19, folios 10073 and 10074).

233 Testimony rendered by Patricia Gualinga before the Court during the public hearing on July 6, 2011. Also Affidavit prepared by Gloria Berta Gualinga Vargas on June 27, 2011 (evidence file, tome 19, folio 10037).

176. Given that ILO Convention 169 is applicable with regard to the subsequent impacts and decisions resulting from oil projects, even when the latter had been contracted prior to its entry into force,[234] it is evident that, at least since May 1999,[235] the State had the obligation to guarantee the right to prior consultation of the Sarayaku People, in relation to their right to communal property and cultural identity, in order to ensure that the implementation of the said concession would not harm their ancestral territory, or their subsistence and 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 the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their 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, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether 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 observing their essential characteristics, entails the State's international responsibility.

178. Thus, it is necessary 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 to reach 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. To this end, the Court must analyze the facts, recapitulating some of the essential elements of the right to consultation, taking into account inter-American case law and norms, State practice, and the evolution of international law. This analysis will be made as follows: (a) the prior nature of the consultation; (b) good faith and the aim of reaching an agreement; (c) appropriate and accessible consultation; (d) the environmental impact assessment, and (e) informed consultation.

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234 In the context of Ecuadorian oil operations, the ILO Committee of Experts affirmed that, although the provisions of the Convention cannot be applied retroactively, "the Convention is applicable in the current circumstances [in Ecuador] with regard to the activities that are being carried out since May 15, 1999." According to the Committee, "the obligation to consult the people concerned does not only apply to the concluding of agreements but also arises on a general level in connection with the application of the provisions of the Convention." Accordingly, the Committee requested that, as of that date, Ecuador "apply fully" the Convention, recommending that it "establish prior consultation in the cases of exploration and exploitation of hydrocarbons that could affect indigenous and tribal communities and to ensure the participation of the peoples concerned in the various stages of the process, as well as in environmental impact studies and environmental management plans" (ILO, "Representation alleging non-observance by Ecuador of the Convention (No. 169) […], para. 28, evidence file, tome 10, folios 6013 and 6014, 6019, paras. 28, 30 and 45(a)).

235 Nevertheless, under the provisions of Article 18 of the Vienna Convention on the Law of Treaties, Ecuador was obliged to act in good faith in accordance with the object and purpose of the Convention. Article 18 of the Convention establishes: "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 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.

179. It should be clarified that it is the obligation of the State – and not of the indigenous peoples – to prove that all aspects of the right to prior consultation were effectively guaranteed in this specific case.

a) Consultation must be carried out in advance

180. Regarding the moment at which the consultation should be carried out, article 15(2) of ILO Convention No. 169 indicates 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 program for the exploration or exploitation of such resources on their lands." On this point, this Court has observed that consultation should take place, in accordance with the inherent traditions of the indigenous people, during the first stages of the development or investment plan and not only when it is necessary to obtain the community's approval, if appropriate, because prior notice allows sufficient time for an internal discussion within the community to provide an appropriate answer to the State.[237]

181. In this regard, when examining a complaint that alleged non-observance of ILO Convention No. 169 by Colombia, the ILO Committee of Experts established that the requirement of prior consultation means that this must take place before taking the measure or implementing the project that may affect the communities, including legislative measures, and that the affected communities must be involved in the process as soon as possible.[238] In the case of consultation prior to the adoption of a legislative measure, the indigenous peoples must be consulted in advance during all stages of the process of the producing the legislation, and these consultations must not be restricted to proposals.[239]

182. The domestic legislation[240] and case law of several countries of the region have also referred to prior consultation.[241]

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237 *Cf. Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs* para.134. Similarly, article 32.2 of the United Nations 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 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 opinion of Rodolfo Stavenhagen of June 24, 2011 (File of affidavits of the Representatives of the Presumed victims, tome 19, folio 10130).

238 *Cf.* Report of the Committee set up examine the representation 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. 90. Similarly, ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Individual Observation concerning 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. Prior Consultation Act* of September 6, 2011, of Peru, article 4: "The consultation process shall take place prior to the adoption of the legislative or administrative measure to be adopted by the State institutions"; Law 3058, of May 17, 2005, *Hydrocarbons Act* of Bolivia, article 115: "the consultation shall take place at two moments: [p]rior to the bidding process, award, contracting and approval of the hydrocarbon measures, works or projects, this being a necessary condition; and, prior to the approval of the environmental impact assessments." Ecuador: 2008 Constitution, article 57.17, Substitute Environmental Regulations for 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 agency in charge of conducting the oil bidding process 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 hydrocarbon exploration and exploitation plans and programs, the monitoring mechanisms shall inform the communities included in the direct area of influence of the projects and hear their suggestions and opinions […]," and *Mining Act*, Official Record 517 of January 29, 2009, article 89; United States of America: 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 on the National Commission for the Development of the Indigenous Peoples of May 21, 2003, and Venezuela: Organic Law on Indigenous Peoples and Communities of December 8, 2005, articles 11 to 15. See also, Colombia: Presidential Order No. 01 of 2010, (2) Actions required by the guarantee of the right to prior consultation.

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

184. Thus, it has not been contested that the State did not carry out any type of consultation with the Sarayaku, at any stage of the implementation of oil exploration activities, through their institutions and representative bodies. In particular, the People were not consulted prior to the construction of the heliports, the preparation of the trails, the burial of the explosives, or the destruction of areas of great significance to their culture and worldview.

b) Good faith and the aim of reaching an 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. In addition, the consultation must not only serve as a mere formality, but rather it must be conceived 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] Thus, it is an inherent part of every

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241 Thus, the Peruvian Constitutional Court indicated that "[t]transferring this consultation to a moment after the publication of the measure eliminates the expectation of the intervention underlying the consultation [which] would also mean that the consultation takes place on acts that have been executed, which could be construed as lack of good faith" (judgment of the Constitutional Court of Peru, Case No. 0022-2009-PI/TC, para. 36). For its part, the Guatemalan Constitutional Court has declared that this "must take place before the actions in question have been defined" (Constitutional Court, Guatemala, December 21, 2009, Appeal of the *amparo* judgment, Case 3878-2007, V.a). Similarly, the Colombian Constitutional Court has stipulated that "the process shall be undertaken starting with the feasibility or planning stage, and not at the end." In addition, it is mandatory to define the procedure to be followed in each specific process, "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 T-129/11, 7.1, p.75, and 8.1.vi) or "consultation on the consultation" (in which "the conditions under which the prior consultation will take place shall be defined, if it is decided to undertake public works, as a specific stage of prior consultation, once the viability of the work has been determined" (T-235/11, p. 56)." See also, Constitutional Court of Bolivia, judgment 2003/2010-R (October 25, 2010, Case 2008-17547-36-RAC. III.5), which has established that "the consultation must be carried out […] (a) before adopting or applying laws or measures that may directly affect indigenous peoples […]; (b) before approving any project that might affect their lands or territories and other resources […]; (c) before authorizing or undertaking any program for the exploration or exploitation of the natural resources found on the lands inhabited by indigenous peoples […], and (d) before using indigenous lands or territories for military activities." The Supreme Court of Justice of Venezuela established on December 5, 1996, that the participation in the prior consultation of the indigenous peoples "must take place before and during the legislative activity, and not only at the time of its promulgation by the governor of the state." A 1996 ruling of the plenary of the Supreme Court of Justice, cited in case No. 2005-5648. Se also, Constitutional Court of Ecuador, judgment No. 001-10-SIN-CC, Cases Nos. 0008-09-IN and 0011-09-IN, judgment of March 18, 2010, pp. 39 and 53.

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 set up examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Federal District Engineers Union (SENGE/DF), 2006, GB.295/17; GB.304/14/7, para. 42.

244 ILO, CEACR, Individual Observation concerning 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, 17 February 2005. In this report, the Permanent Forum on Indigenous Issues established 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 concerning Convention No. 169,

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 acting 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 by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community, all of which are contrary to international standards. Similarly, the domestic legislation[246] and case law of the States of the region[247] have referred to the requirement of good faith.

187. It should be emphasized that the obligation to consult is the responsibility of the State;[248] therefore the planning and executing 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 very company that is interested in exploiting the resources in the territory of the community that must be consulted.[249]

188. During the proceedings, the State argued that, after the contract had been signed, the CGC oil company sought an "agreement" or form of "socialization" with the communities in order to carry out its contractual activities and that, in addition, the consulting company, Walsh Environmental, subcontracted by CGC, conducted an environmental impact assessment in 1997. The assessment

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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 set up examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made 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 human rights and fundamental freedoms of indigenous people, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 25.

[246] *Cf.* Bolivian Constitution, article 30.II: "Within the framework of the unity of the State and in accordance with this Constitution, the original rural 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. Within this framework, the right to mandatory prior consultation shall be guaranteed and respected, by the State, in good faith and by mutual agreement, with regard to the exploitation of non-renewable natural resources on their territory." Peru: *Law on Prior Consultation of indigenous or original peoples, recognized in ILO Convention No. 169*, September 6, 2011, article 4: "State entities shall analyze and assess the position of the indigenous or original peoples during the consultation process, in a climate of trust, cooperation and mutual respect." Similarly, in Venezuela, article 11 of the Organic Law on Indigenous Peoples and Communities of December 8, 2005, stipulates that "[c]onsultation shall be in good faith, taking into account the languages and spirituality, and respecting the specific organization, legitimate authorities and systems of communication and information of the members of the indigenous peoples and communities concerned, in accordance with the procedure as established in this Law […]."

[247] The Colombian Constitutional Court has stipulated that it is "necessary to establish effective communications based on the principle of good faith, in which the specific circumstances of each group and the importance of its territory and its resources are taken into consideration" (Constitutional Court of Colombia, judgment T-129/11, 8.1.iv. Also, the Guatemalan Constitutional Court, December 21, 2009, Appeal against *amparo* judgment, Case file 3878-2007, IV and V). In addition, the same Court has indicated that consultation in good faith "means 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.). Similarly, the Peruvian Constitutional Court has indicated that "the principle of good faith is the essential element of the right to consultation [… and that,] 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" (Case file No. 002-2009-PI/TC, para. 27). The Ecuadorian Constitutional Court has indicated that the "specific parameters developed by the ILO that must be taken into account are: […] e. The obligation for all those involved to act in GOOD FAITH. The consultation must constitute a real "participation mechanism" whose purpose is to seek consensus between the participants, [and] f. The obligation to publicize the process and use a reasonable time for each phase of the process, a condition that aids transparency and establishing trust between the parties" (judgment No 001-10-SIN-CC, Cases Nos. 0008-09-IN and 0011-09-IN, Judgment of March 18, 2010, p. 53).

[248] ILO Convention No. 169, Article 6; United Nations Declaration on the rights of indigenous peoples, Article 19; *Case of the Indigenous People of Saramaka v. Suriname, Preliminary objections*, *merits, reparations and costs*, paras. 102, 129 and 131. See also, affidavit provided by Rodolfo Stavenhagen on June 24, 2011 (file of affidavits of the representatives of the presumed victims, tome 19, folio 10131).

[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 14 July 2009, paras. 53 to 55.

was updated and approved in 2002, following several legal reforms and the entry into force of the 1998 Constitution, and in keeping with articles 34 and 41 of the Substitute Environmental Regulations on Hydrocarbon Operations. The State argued that this study had been "duly and opportunely socialized with the affected communities, although it was never implemented."[250] It also argued that, in accordance with article 37 of these Regulations, "on June 18, 19 and 22, 2002, [the CGC organized] three public presentations on the Environmental Management Plan in the communities of Canelos, Pacayacu and Shauk." Thus, the State's initial position before this Court reveals that State authorities sought to endorse these actions by the oil company as forms of consultation. These "presentations" did not include Sarayaku. This "socialization and contact" was conducted by the very same company that sought to carry out the oil exploration and, therefore, it was intended to negotiate its entry into the territory.

189. During the Court delegation's visit to the Sarayaku territory, when accepting its responsibility in this case, the State acknowledged that it had not carried out a proper prior consultation process (*supra* para. 23). In other words, in this way the State not only recognized that it had not carried out the consultation, but also - even if it were accepted that such a consultation process could be delegated to private third parties - the State did not indicate what type of measures it had taken to observe, supervise, monitor or participate in the process and thereby safeguard the rights of the Sarayaku People.

190. In addition to the foregoing, members of Sarayaku indicated that there had been a military presence on Sarayaku territory during the CGC incursions[251] and that the purpose of this presence was to ensure that the company could carry out its work, in view of their opposition. During the hearing, the State contested that the Army had entered the Sarayaku territory with the intention of militarizing it.

191. It has not been contested that the No. 17 Jungle Brigade[252] operated in the area of Block 23 and, in particular, that four military bases were set up around Sarayaku; namely, in Jatún Molino, Shaimi, Pacayaku and Pozo Landa Yaku.[253] During the public hearing, when referring to the "peace and life camps," the witness Ena Santi explained that these camps had been created because they had found out that "soldiers were being brought in from Montalvo [… and they] were very afraid that they would harm [their] husbands; that they would kill them, and that is why [they] 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: the so-called private security, provided by a private security company, Jaraseg, and another one, public security, which was provided jointly by the Ecuadorian Army and the National Police."[255] These statements are supported by photographs taken

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[250] Similarly, during the public hearing held at the Court on July 7, 2011, in response to a question by the Court on the State's position concerning the right to consultation, the State Agent indicated that "mechanisms existed that […], at that time, could not be considered to fit strictly within the parameters of prior consultation that we now have; but socialization and contact with the communities did take place."

[251] *Cf.* Affidavit prepared by José María Gualinga Montalvo on June 27, 2011, folio 13. See also affidavit prepared by Gloria Berta Gualinga Vargas on June 27, 2011 (evidence file, tome 19, folio 10038) and Testimony rendered by Ena Santi before the Court during the public hearing held on July 6, 2011.

[252] *Cf.* Ombudsman's Office of the province of Pastaza. Decision of April 10, 2003 (evidence file, tome 8, folio 4868)

[253] The Ministry for Energy and Mines advised that, during a meeting held on February 3 and 4, 2003, in the Sarayaku community, the decision had been taken "[t]o suspend the presence of soldiers and police in the Sarayaku territories." Report of the Ministry of Energy and Mines on the activities carried out in Block 23 (evidence file, tome 8, folio 4786) Map "of petro-military presence" prepared by the Pastaza Socio-Environmental Information Center (evidence file, tome 9, folio 4970); Ombudsman's Office of the province of Pastaza. Decision of April 10, 2003 (evidence file, tome 8, folio 4868).

[254] When asked by the State official whether she had witnessed these events directly or had only 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 carrying my baby; […] I was there. That is why I have come to bear witness." Testimony rendered by Ena Santi before the Court during the public hearing held on July 6, 2011.

[255] Testimony rendered by Marlon René Santi Gualinga before the Court during the public hearing held on July 6, 2011.

by Sarayaku members that are included in the case file,[256] as well as by newspaper articles,[257] and a video produced by Sarayaku in 2003.[258]

192. It is also relevant 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 undertook "to guarantee the security of the oil facilities, as well as of the persons working there" (*supra* para. 78). In this regard, the State itself presented, as an attachment to its answering brief, a letter from the CGC to PETROECUADOR dated December 16, 2002, in which its representative asked the State to anticipate "the security necessary for the oil operations, by urgently calling for the intervention of the National Police and the Armed Forces."[259] In a similar letter, dated November 25, 2002, the same CGC representative asked the State, given the Sarayaku opposition, to "take all the necessary measures it considers appropriate, so that, in conjunction with the armed forces, the implementation of the seismic project is facilitated."[260]

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

194. In addition, the company's actions, by attempting to legitimate its oil exploration activities and justify its intervention in Sarayaku territory, failed to respect the established structures of authority and representation within and outside the communities.[261] The CGC merely offered money and different economic benefits to the Sarayaku People (as it did to other communities in the area, *supra* paras. 73 to 75, 82 and 84) in order to obtain their consent to carry out activities to explore for and exploit the natural resources on their territory, without the State undertaking or monitoring a systematic and flexible process of participation and dialogue with them. It was also alleged, and was not contested by the State, that the CGC had used fraudulent procedures 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" proved that the constitutional right established in article 84(5) of the Constitution of Ecuador had been violated, together with ILO Convention No. 169 and Principle 10 of the Rio Declaration on Environment and Development. Furthermore, it found that the Ministry of Energy and Mines and the chairman of the board of PETROECUADOR were responsible for these violations, and also the legal representative of the CGC (*supra* para. 110).

196. For its part, on May 8, 2003, after visiting the Sarayaku People, the Human Rights Committee of the National Congress issued a report in which it concluded that "[t]he State, through the Ministries of the Environment and of Energy and Mines, has violated clause 5) of article 84 of the

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256 *Cf.* Photographs (evidence file, tome 11, folios 6575 and 6576), and video produced by the Sarayaku for the exclusive use of the Commission and the Court.

257 Evidence file, tome 11, folios 6550 and *ff.*

258 The video shows statements made to the press by the then Minister of Mines and Energy, retired Colonel Carlos Arboleda, in which, in October 2003, he declared that "the work of CGC will be protected because this is a State's policy" and, in response to the journalists' questions regarding the military presence in the area, he indicated that "the State must use all the State's forces to protect the security of the companies that wish to work in Ecuador." The video shows members of the Army using the helicopters hired by the CGC. 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, tome 14, folio 8647.

260 *Cf.* Note DM-DINAPA-CSA-870 of December 24, 2002, of the Ministry of Energy and Mines, referring to the CGC letter of November 25, 2002 (evidence file, tome 9, folio 4958 and *ff.*).

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 the Kichwa maintain with their sentient rain forest were placed 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 opinion provided by affidavit by professor Suzana Sawyer, on June 24, 2011 (evidence file, tome 19, folios 10109 and 10119).

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 Committee also concluded that the CGC had sidestepped the OPIP leadership by negotiating directly and separately with the communities, creating conflicts between them. It also noted the damage to the territory's flora and fauna. Regarding the population, it indicated in its conclusions that "[h]uman rights have been violated, because severe psychological harm was caused to the children of the community by witnessing the confrontations with the soldiers, the police and CGC security personnel, and also because of the arrest of the OPIP leaders, accusing them of being terrorists and subjecting them to physical abuse, which affected their personal integrity, prohibited by the Constitution of the Republic" (*supra* para. 106).

197. Also, following the suspension of the surveying activities, high-ranking authorities of the province of Pastaza and of the Government at the time issued statements supporting the oil exploration activities of the company, which did not help to create a climate of trust with the State authorities.[262]

198. Thus, it can be considered that the State's failure to conduct a serious and responsible consultation, at a time of high tension in inter-community relations 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 it is true that numerous meetings took place between different local and State authorities, public and private companies, the Police, the Army, and other communities, it is also evident that there was a disconnect between these efforts and a clear determination to seek consensus, which encouraged situations of tension and dispute.

199. In other words, the State not only partially and inappropriately delegated its obligation to consult to a private company, thereby failing to comply with the above-mentioned 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 itself, cannot be considered a consultation carried out in good faith, inasmuch as it did not involve a genuine dialogue as part of a process of participation process aimed at reaching an agreement.

c) Adequate and accessible consultation

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262 On June 1, 2003, the governor of the province of Pastaza announced publicly that the Government had decided to complete all the work on the 200,000 hectares of Block 23, with or without the agreement of the indigenous communities that live there (Marcelo Gálvez, "*Tensión por explotación petrolera en bloque 23*," EL UNIVERSO, June 2, 2003, evidence file, tome 11, folio 6547). The then President of the Republic of Ecuador, Lucio Gutiérrez, also announced that he would guarantee the complete security of the oil companies ("*La CGC continuará la exploración del bloque 23,*" EL COMERCIO, September 18, 2003, evidence file, tome 11, folio 6550). On September 16, 2003, it was announced that seismic surveying would be resumed in Blocks 23 and 24 starting in December 2003. (see newspaper articles, evidence file, tome 11, folios 6547 and 6550). On October 3, 2003, the Minister of Energy and Mines announced to the press that "the Government is prepared to provide every assurance of security to the CGC so that it can continue its work in Block 23 and fulfill its 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 keeping with its commitment to honor the contract" ("*Coronel Arboleda encabeza operación militar para invadir Sarayaku*," press release, evidence file, tome 11, folio 6553). In October 2003, the Minister of Energy and Mines declared that oil exploration and exploitation on Sarayaku's territory would be carried out with or without the consent of the Sarayaku People and, to this end, the indigenous territory would be militarized as of different dates (provisional measures file, request of the Inter-American Commission, folio 000010). On December 31, 2003, the Minister of Energy and Mines declared that a new intervention would begin to guarantee the transit of the oil companies, and therefore a new military incursion was imminent ("*Protestan Ecologistas por destrucción de la Amazonia Ecuatoriana*," press release (Mexico), United Nations Environment Program, January 4, 2004). The same note indicates that "an armed incursion is expected the day after tomorrow but, meanwhile, 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, folio 11).

201. This Court has established in other cases that consultations with indigenous peoples must be undertaken using culturally appropriate procedures; in other words, in keeping 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 has indicated 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 indigenous peoples, as well as [, contextually,] the nature of the measures under consultation.[266] Thus, such procedures must include, in keeping with systematic and pre-established criteria, the different 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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263 *Cf. mutatis mutandi, Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs*, para. 130

264 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."

266 ILO, Report of the Committee set up examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Federal District Engineers Union (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 has 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 can be understood that the gradual establishment of such bodies and mechanisms is one of the duties derived from the ratification of Convention No. 169 and other international norms, taking into account the minimum requirements 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 stated that the "appropriate nature of the consultation with indigenous communities through their representative institutions does not respond to a univocal formula but depends to a great extent on the scope or sphere of the specific measure which is the object and ultimate goal of the consultation." 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. 28

267 Report of the Committee set up examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Authentic 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 "[i]n light of these essential criteria of representativeness, it can be stated that they: (i) are contextually dependent on the scope of the measures to be consulted; (ii) must abide by systematic and pre-established criteria; (iii) must include different forms of indigenous organization, provided that these are consistent with the internal processes of these peoples; and (iv) based on principles of proportionality and non-discrimination, 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 of the Committee set up examine the representation 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 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. In addition, "the time required by the country's indigenous communities to carry out their decision making processes and to participate effectively in the decisions taken in a manner adapted to their cultural and social models

203. In this case, the Court has found it proved that the oil company attempted to negotiate directly with some members of the Sarayaku People, without respecting their form of political organization. In addition, the State has acknowledged the fact that it was not the one who "sought an understanding," but rather the oil company itself. Thus, the position maintained by the State before this Court reveals 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 subsoil of the Sarayaku territory (*supra* para. 199). Accordingly, the Court considers that the actions carried out by the CGC cannot be construed as an appropriate and accessible consultation.

d) Environmental Impact Assessment

204. In relation to the obligation to conduct environmental impact assessments, article 7(3) of ILO Convention No. 169 states that "Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and

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must be taken into consideration. […] if this is not taken into account, it will be impossible to comply with the fundamental requirements of prior consultation and participation."

269 The Guatemalan Constitutional Court has observed that prior consultation means that it must be "in keeping with the inherent characteristics of each nation, a process of information, participation and dialogue with members of their communities with genuine representativeness, aimed at reaching agreements on the measures that it is planned to implement" (December 21, 2009, Appeal against *amparo* judgment, Case file 3878-2007, V.). The Colombian Constitutional Court has ruled that "the participation of the indigenous communities in decisions that may affect them in relation to the exploitation of natural resources […] becomes a basic instrument to preserve the ethnic, social, economic and cultural integrity of the indigenous communities and, therefore, to ensure their survival as a social group" and that, in this way, "participation does not merely become an intervention in administrative actions to ensure 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 involving the definition of the fate and safety of the survival of the said communities" (judgment SU-039/97). See also, the Ecuadorian Constitutional Court, Case of the Huaorani Nationalities Organization, CONAIE v. AGIP OIL ECUADOR B.V. (0054-2003-RA), judgment of July 3, 2003, and judgment No 001-10-SIN-CC, Cases Nos. 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 nature of the consultation process, according to the domestic law of each State and the traditions and customs of the peoples consulted […] (d) The recognition that consultation does not end with merely providing information or public dissemination of the measure; according to ILO recommendations, consultation must be a systematic process of negotiation that entails 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 the internal processes as well as the decision-making practices and customs of the different peoples consulted […]."

270 *Cf.* Peru: Law on Prior Consultation of September 6, 2011, article 4.2: "Intercultural nature. 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 circumstances and characteristics of the indigenous or original peoples involved"; article 4.5: "The consultation process shall be undertaken observing reasonable time frames that allow the representative institutions or organizations of the indigenous or original peoples to become acquainted with, discuss, and make specific proposals on the legislative or administrative measure subject to consultation"; the 2009 Constitution of Bolivia, article 304: "The original autonomous rural indigenous peoples may exercise the following exclusive competences […] 21: Participate in, establish and implement mechanisms for prior, free and informed consultation, relating to the application of legislative, executive and administrative measures that affect them." See also Ecuador: Citizen Participation Act, Official Record No 175 (supplement) , April 20, 2010, article 81, and Mining Act, Official Record 51 of January 29, 2009, article 90: "The processes of citizen participation or consultation shall provide a special mandatory procedure for the communities, peoples and nationalities, based on the principle of legitimacy and representativeness, through their institutions for those cases in which mining exploration or exploitation will be carried out on their ancestral lands and territories and when these activities may affect their interests." Similarly, the Colombian Constitution: "Paragraph: […] In the decisions taken regarding the said exploitation, the Government shall promote the participation of representatives of the respective communities." Likewise, in Venezuela, article 13 of the Organic Law on Indigenous Peoples and Communities of December 8, 2005, stipulates that "[a]ny activity or project that it is intended to develop or execute on the territories and lands of indigenous peoples and communities shall be presented to indigenous peoples or communities concerned in the form of a proposal, so that, in a meeting, they may decide the extent to which their interests may be prejudiced and the necessary mechanisms that must be adopted to guarantee their protection. The decision shall be taken according to their practices 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 be assisted by technicians in the field […]."

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 constraints imposed on the indigenous or tribal communities with regard to their right to property when concessions are granted within their territory do not entail a denial of their survival as a people (*supra* para. 157). Thus, the Court has established that the State must guarantee that no concession will be granted within the territory of an indigenous community unless and until independent and technically competent bodies, under the supervision of the State, have made a prior environmental and social impact assessment.[271] The Court has also determined that environmental impact assessments "serve to evaluate the possible damage or impact that a proposed development or investment project may have on the property and community in question. Their purpose is not [only] to have some objective measure of the possible impact on the land and the people, but also […] to ensure that the members of the community […] are aware of the potential risks, including the environmental and health risks," so that they can decide whether to accept the proposed development or investment plan "knowingly and voluntarily."[272]

206. In addition, the Court has established that environmental impact assessments must be made in conformity with the relevant international standards and best practices;[273] respect the indigenous peoples´ traditions and culture, and be completed before the concession is granted, since one of the objectives of requiring such studies is to guarantee the right of the indigenous people to be informed about all proposed projects on their territory.[274] Therefore, the State's obligation to supervise the environmental impact assessment is consistent with its obligation to guarantee the effective participation of the indigenous people in the process of granting concessions. The Court also indicated that one of the points that should be addressed in the environmental and social impact assessment is the cumulative impact of existing and proposed projects.[275]

207. In this case, the Court observes that the environmental impact plan: (a) was prepared without the participation of the Sarayaku People; (b) was implemented by a private entity subcontracted by the oil company, without any evidence that it had subsequently been subject to strict control by State monitoring agencies, and (c) did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People. Therefore, the Court concludes that the environmental impact plan was not implemented in accordance with its case law or the relevant international standards.

e) The consultation must be informed

208. As indicated previously, the consultation must be informed, in the sense that the indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks. Thus, prior consultation requires that the State receive and provide information, and involves constant communication between the parties. The case law of the domestic courts[276] and laws[277] has referred to this aspect of the consultation.

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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.

273 *Cf. Case of the Saramaka People v. Suriname. Interpretation of judgment,* footnote 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 Colombian Constitutional Court has indicated that prior consultation must be addressed at ensuring that "the community has full knowledge of projects for the exploration and exploitation of natural resources on the territories that it occupies or owns, and the mechanisms, procedures and activities to execute them"; that "it is provided with information and an explanation of how the execution of the said projects may result in adverse effects or harm to the elements that constitute the foundation of the community's social, cultural, economic and political cohesion and, consequently, the basis for its survival as a human group with unique characteristics," and that "it has the opportunity, freely and without outside interference, to assess with full awareness, by consulting with its members or representatives, the advantages and

209. In this case, the Court finds that, according to the body of evidence, there is no indication that the alleged "understanding" reached by the CGC included the presentation of the information contained in the environmental impact assessment, or that it allowed the Sarayaku People to play an active role in an adequate discussion process. Furthermore, it has not been demonstrated that the alleged "socialization" of the assessment was related to a consultation process with the Sarayaku People, or that it had served as a basis for informing them of the advantages and disadvantages of the project in relation to their culture and way of life, in the context of a dialogue process aimed at reaching an agreement. Consequently, the Court considers that the company's actions did not form part of an informed consultation.

210. In this regard, there is evidence to conclude that the irregularities noted in the consultation process that the State was obliged to undertake, together with the numerous measures taken by the company to divide the communities, fostered confrontations between the communities of the Bobonaza and affected their inter-community relations. Thus, when expanding the provisional measures in June 2005, the Court considered it "particularly necessary that the measures to be adopt[ed should] include actions that promote a climate of respect for the human rights of the beneficiaries […] in order to ensure the effectiveness of the Convention as regards relations between individuals." For the same reason, the Court required the State, when implementing the measures, to inform "the neighboring indigenous communities about the meaning and scope of the provisional measures, for both the State itself and private third parties, in order to foster a climate of peaceful coexistence between them."

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211. In conclusion, the Court has verified that the State did not conduct an appropriate and effective process that would guarantee the right to consultation of the Sarayaku People before undertaking or authorizing the program of exploration or exploitation of resources on their territory. As analyzed by the Court, the oil company's actions have not complied with the minimum requirements of a prior consultation. In short, the Sarayaku People were not consulted by the State before the company carried out oil exploration activities, planted explosives or adversely affected sites of special cultural value. All this was acknowledged by the State and, in any case, has been verified by the Court from the evidence submitted.

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

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disadvantages of the project for the community and its members; to be heard in relation to any concerns and claims it presents in relation to the defense of its interests, and to express its opinion on the viability of the project" (judgment SU-039/97). In addition, see judgment C-030/08. See also, Constitutional Court of Ecuador, 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 original peoples recognized in ILO Convention No. 169, article 4.f: "Absence of coercion or conditions. The participation of the indigenous or original peoples in the consultation process shall be without coercion or conditions"; article 4.7: "Timely information. The indigenous or original peoples have the right to receive from the State institutions all the information necessary to be able to express their duly informed point of view, 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 notice." Bolivia: Executive Decree No. 29033, February 16, 2007: "The consultation and participation process shall be based on this principle of truthfulness in accordance with the laws in force, especially the provisions of ILO Convention No. 169, which establish that consultation must take place in good faith and, therefore, all the information that is part of and the result of the consultation and participation process must be truthful." Ecuador: Environmental Management Act, Official Record supplement 418, September 10, 2004, article 29: "Any natural or legal person has the right to be informed in a timely and appropriate manner regarding any activity by the State institutions that, according to the Regulations of this Law, may produce environmental impacts." Similarly, in Venezuela, the Organic Law on Indigenous Peoples and Communities of December 8, 2005, stipulates 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 the terms of reparation, so that they can be previously assessed and analyzed by the respective people or community […]." Also, see Nicaragua: article 3 of Law 445 of January 23, 2003, and Colombia: Decree 1397 of 1996, articles 8 and 16.

212. Regarding the above, the Court has recognized that "[disregard for the ancestral right of indigenous communities over their territories 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 "[b]ased on their environment, their integration with nature and their history, the members of indigenous communities transmit this non-material cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities."[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 crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law.

214. In this regard, Principle 22 of the Rio Declaration on 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: 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]

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278 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, reparations and costs*. para. 147. See also General Assembly, Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen. A/HRC/6/15, of 15 November 2007, para. 43.

279 *Cf. Case of the 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.

281 *Cf. Case of the Yakye Axa Indigenous Community*. *Merits, reparations and costs*, para. 154.

282 Article 2(2)(b): "Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action […] Such action shall include measures for (b) promoting 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, 10 December 2007, UN General Assembly Resolution 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 11: "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures […]." 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.* UNESCO Universal Declaration 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. In addition, see UNESCO conventions and recommendations relating to culture or cultural identity that mention indigenous peoples: Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005.

216. For their part, both the African Commission on Human and Peoples' Rights, in cases alleging the violation of Articles 17(2) and 17(3) of the African Charter on Human and Peoples' Rights,[285] and the Committee on Economic, Social and Cultural Rights (CESCR)[286] and, to some extent, the European Court of 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 develop their identities, languages and religions, within the framework of the States in which they live."[289]

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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. [… The Commission] 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 observed: "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 indicated 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 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, finding 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 communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories." Economic and Social Council, E/C.12/GC/21/Rev.1, para. 36.

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 observed that the need to protect cultural identity is also important for the proper functioning of a democracy. References to all the cases mentioned in this paragraph are found in "Cultural Rights in the case-law of the European Court of Human Rights," Research division ECHR, January 2011, pp. 9 to 12.

288 The 2007 United Nations Declaration on the Rights of Indigenous Peoples, widely accepted with the adhesion of 143 States (including Ecuador), includes the right of these Peoples to freely determine their political situation, to freely pursue their economic, social and cultural development, to participate in the adoption of decisions that affect them, and to participate fully, 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 specific case of Ecuador, the recognition of this right is so clear that, today, the 2008 Constitution itself recognizes the right to self-determination in different ways, among others, by 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 and, to that end, the Constitution guarantees the respect and promotion of the customs and identities of indigenous peoples in all aspects of life," and in the case of the "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 protect the observance of their rights."

289 ILO Convention No. 169. Fifth preambular paragraph.

218. In this case, it has not been contested that the company damaged areas of great environmental, cultural and subsistence food 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 People, on the land of the *Yachak* Cesar Vargas, namely the place known as "Pingullu" (*supra* para. 104). For the Sarayaku, the destruction of sacred trees, such as the Lispungu tree, by the company entailed 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 associated by the Sarayaku with the material sterility of the place and the permanent disappearance of the 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 ceremonies to initiate young people into adulthood (*supra* para. 105). Thus, the interruption of the community's daily activities and the dedication of the adults to the defense of their territory have had an impact on teaching children and young people about their traditions and cultural rituals, and on 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 animals to migrate. As for the area where explosives remain, the *Yachak* Sabino Gualinga said at the hearing that:

> In this sector, half 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 understand what they are doing. We do understand it, because we see it.

219. Given the importance that sites of symbolic value have for the cultural identity of the Sarayaku People and their worldview, as a collective entity, several of the statements and expert opinions provided 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 People's sense of being, on the other. This also highlights the profound impact on the social and spiritual relationships that members of the community may have with the different elements of the natural world that surrounds them, when these are destroyed or harmed.

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

B.7 Obligation to adopt provisions of domestic law

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[290] The *Yachak* Sabino Gualinga stated: "César Vargas had lands in a place called Pingullo, and he lived there with his trees; there, woven like threads, was the way in which he could cure. When they cut down that Lispungo tree they caused him much sadness […]. When they cut down the great Lispungo tree […] that he used as threads, 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 Court during the public hearing held on July 6, 2011).

[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 owner left all the animals are going … As the helicopters have been stopped from coming here, if we leave things quiet for some time, perhaps the animals will return." FLACSO, *Sarayaku: el Pueblo del Cénit*, folios 6627 and *ff.*

[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 the members of the Community, the Sarayaku festival involves the participation of all the *Kurakas*, together with the 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*, folios 6672 to 6676. See also, testimony of Simón Gualinga and Jorge Malaver, Self-evaluation, folio 6588 and *ff.*

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 sum, "the State has the obligation to adopt the necessary measures to make the exercise of the rights and freedoms recognized by the Convention effective."[295]

222. Despite the fact that, under the above-mentioned provisions, the State was obliged to consult the Sarayaku People, the Court has no information that, before December 9, 2002, the State had detailed regulations on prior consultation that established, *inter alia*, the moment at which the consultation should take place, its purpose, those who should be consulted, the phases of the implementation of activities for which prior consultation was required, the formalization of decisions taken during the consultation or the compensation for the socio-environmental damage caused by the exploitation of natural resources, particularly hydrocarbons. In any case, the 2002 Regulations for Consultations on Hydrocarbon Activities, which had no impact in this case either, were subsequently replaced in April 2008 by the Regulations on the Application of Mechanisms for Social Participation, established in the Environmental Management Act,[296] Decree No. 1040, which, as alleged, does not specifically establish consultation mechanisms, and this was not contested by the State.

223. Furthermore, the Court notes that the State indicated that it was "in the process of adopting legislative measures for constitutional harmonization" and that during "the transition period established in the 2008 Constitution […] itself, the legislative packages to be approved were indicated as a priority." In other words, the State acknowledges that, up until its brief in answer to this case, it did not have any regulatory provisions for constitutional harmonization that ensured the effective application of the domestic norms on prior consultation.[297]

224. Therefore, the Court concludes that, even though neither the Commission nor the representatives explained why the lack of regulations prior to December 2002 constituted a real obstacle to the effectiveness of the right to prior consultation of the Sarayaku People, the State itself recognized that it was currently undergoing a period of transition to adapt its regulatory and legislative provisions in order to make the right to prior consultation effective for the indigenous peoples of Ecuador.

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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.

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 Las 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 application of the social participation mechanisms established in the Environmental Management Act, Decree No. 1040, in the petitioners' communication of June 10, 2008 (evidence file, tome 8, folio 4154 and *ff.*).

297 Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples in his November 2010 observations on the progress made and challenges faced in the implementation of the constitutional guarantees of the rights of indigenous peoples in Ecuador, indicated that the State 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 Act, the Law on Water Resources, the Law on Intercultural Bilingual Education, the Organic Code on 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 2008 Constitution 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 made and challenges faced in the implementation of the constitutional guarantees of the rights of indigenous peoples I Ecuador, A/HRC/15/37/Add.7, 13 September 2010, para. 56.

225. Likewise, the Court observes that the State argued that "Article 2 of the American Convention […] refers not only to regulatory provisions, but also to measures of another nature […], combining those of an institutional, financial or other similar nature that can be taken together; in other words and as the Inter-American Court has stated on various occasions, […] in a comprehensive manner"; also that, "when determining these *other measures*, the Inter-American Court's case law has established that they refer not only to merely administrative or judicial matters, which are included among the obligations of respect and guarantee referred to in Article 1(1) of the American Convention, and not under Article 2 [of the Convention]. This characteristic can also be noted in States that have a *common law* system, because, under that system, general law is created not by a jurisdictional decision, but rather by the normative powers of the courts."

226. In this regard, although the State's arguments could be accepted in general terms, the Court observes that the State did not refer to any other mechanism or "other measures" in particular that might suggest that the absence of regulations on the right to prior consultation in the domestic and international law applicable to Ecuador did not constitute an obstacle to its effectiveness in this case.

227. Based on all the above, this Court finds that the State is responsible for failing to comply with its obligation to adopt domestic legal measures established in Article 2 of the American Convention, in relation to the violations of the rights to consultation, cultural identity and property that have been declared.

B.8 Right to freedom of Movement and Residence

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

229. Nevertheless, the fact that pentolite explosives were buried on the Sarayaku People's territory has certainly entailed an unlawful restriction on their movement, and on their hunting and other traditional activities in certain sectors of their property, owing to the obvious risks to their life and integrity. However the effects of this situation have been, and will be, examined under their right to communal property and to prior consultation, as well as under the rights to life and to 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 arguments made 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 cases such as this one, access to information is vital for effective democratic monitoring of the State's management of the activities of exploration and exploitation of natural resources on the territory of indigenous communities, a matter of evident 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, in the terms of Article 21 of the Convention, in relation to Articles 1(1) and 2 thereof; accordingly, it will not rule on the alleged violation of those provisions.

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[298] In fact, there is evidence that, on November 27, 2002, in response to certain facts alleged by the Sarayaku People, the Ombudsman ordered, as a precautionary measure, that "no person or authority or official may prevent the free movement, circulation, navigation or inter-communication of members of the Sarayaku" (*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."

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 the members of indigenous or tribal communities and peoples.[300] However, international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples.[301] In view of the fact that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated 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 have a direct impact on their territory, failed to comply with its obligations, under the principles of international law and 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, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity. Consequently, the Court finds 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, in the terms of Articles 1(1) and (2) of this instrument.

VIII.2
RIGHTS TO LIFE, TO PERSONAL INTEGRITY AND TO 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 People and its members, because its failure to comply with its obligation to guarantee them the right to property, allowing explosives to be buried on their territory, has created a permanent situation of danger that

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300 *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua; Case of the Moiwana Community v. Suriname, Preliminary objections, merits, reparations and costs; Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs; Case of the Sawhoyamaxa Indigenous Community v. Paraguay; Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs, and Case of the Xákmok Kásek Indigenous People v. Paraguay*.

301 Thus, for example, Article 1 of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* 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). In addition, other regional protection instruments, such as the 1986 African Charter on Human and Peoples' Rights, 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."

threatens the life and survival of its members and, furthermore, has jeopardized the People'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, causing the animals to migrate, and that the placement of explosives in areas traditionally used for hunting had prevented them from gathering food, reducing the ability of the People to ensure their subsistence and, thus, disrupting their life cycle. The Commission also argued that, when the Association of the Sarayaku People declared the state of emergency, daily economic, administrative and academic activities were suspended for three months, during which time the members of the community survived on resources from the jungle, because their crops and food ran out. All this also affected the possibility of the members of the Sarayaku People leading a decent life. In this context, the State had failed to adopt the necessary positive measures available to it, which would reasonably have been expected to prevent or avoid the danger to the right to life of members of the said People.

234. The representatives considered that the State had incurred responsibility by placing the members of the Sarayaku People at serious risk as a result of the oil company's "unconsulted" incursion into their territory. They also argued that the State had not taken the necessary and sufficient measures to ensure decent living conditions for all the members of the Sarayaku People, "affecting their different way of life, their individual and collective life project and their development model," which constituted a violation of Article 4(1) of the Convention. They further argued that the State had not taken any steps to fulfill its obligation to protect the community, taking into account the special situation of vulnerability of the indigenous people due to the incursion by the oil company. They argued that, during the period of food shortages and state of emergency, there were case of illnesses that mainly affected children and the elderly, a situation described as "fatal to the health of Sarayaku members who were prevented from having access to health care centers," which affected their right to life. The representatives also argued that the State had not provided information on 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 itself had been affected, and this had seriously disrupted the safety, tranquility and way of life of the members of the People.

235. The State considered that, within the system of guarantees established in the Convention, the right to life has priority and, therefore, the cases in which the State can be declared responsible for the violation of this right for having failed to respond with due diligence are very exceptional. In this case, the State reiterated that it cannot be claimed that the impact of the oil company's activities has caused serious harm to the conditions required for a decent life for the Sarayaku. With regard to the placement of explosives, the State has informed the Court of the progress made in removing these explosives under the provisional measures. Regarding the supposed illnesses and other alleged impacts, the State emphasized that no impartial medical certificates or other scientific evidence were provided, but rather affidavits from Sarayaku members and "studies of questionable reliability." In addition, the State argued that it was illogical to claim violations of the right to life owing adverse effects on the right to health, to food, to access to clean water, or to access to means of subsistence as a result of a private activity that had been interrupted and had not even reached the seismic survey phase. Thus, it was not appropriate to cite contamination or substantial disruption of the way of life of the indigenous peoples of the area. Lastly, he State argued that it had not failed to comply with 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 for natural resource extraction activities.

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

[303] Article 5 of the American Convention stipulates: "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 […]."

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

237. Regarding these events, the representatives considered that the State was responsible for violating the right to physical integrity of the members of Sarayaku who were assaulted and attacked in the community of Canelos. They argued that the State knew about the indigenous protest, and the constant blockades that hindered the Sarayaku's freedom of movement along the Bobonaza River and the attacks from neighboring communities, but, despite this, it dispatched a contingent of only 10 police agents. They affirmed that, after the attack had occurred, the State agents ordered the Sarayaku members to return to their community, which is a day by canoe from Canelos, despite their physical condition, without food or medical care, which proves that the State did not take the necessary measures to protect the personal integrity of the Sarayaku who were on their way to a peaceful march. In addition, the representatives indicated that the State had not investigated or punished the perpetrators of those attacks. Consequently, the representatives argued that the State had violated the right to integrity of the 120 members of the Sarayaku who were attacked in Canelos on December 4, 2003.

238. Regarding the events of December 4, 2003, the State rejected the arguments of the representatives and the Commission, considering that the criminal investigation system had been activated through various investigations to ascertain the facts and determine those responsible. It stressed that the investigations found that people who were injured did not suffer severe physical injuries, that they did not even need rest, that they received outpatient treatment and that some were only incapacitated for a few hours. The State also argued that the Governor of Pastaza had stated publicly that he had ordered the presence of the Armed Forces and the Police to protect people's rights and to prevent possible inter-community clashes from taking place, and that the efforts of the security forces would have been based on the parameters of proportionality and respect for rights. The State also argued that the members of the Sarayaku were fully aware of the potential risks of their actions.

239. As to the events of January 25, 2003, the representatives alleged that Elvis Gualinga, Marcelo Gualinga, Reinaldo Gualinga and Fabian Grefa had been detained by Ecuadorian soldiers, without a court order and without having been found *in flagrante delicto*. The representatives argued that the men were never informed about the reasons for their arrest or the charges against them and, therefore, the arrest violated Article 7 of the Convention. The representatives also argued that, while they were detained, they were subjected to inhuman treatment by CGC employees. Based on this, the representatives argued that the treatment to which they were subjected by the soldiers and the subsequent tolerance of the alleged ill-treatment inflicted on them by CGC personnel, constituted forms of torture and cruel, inhuman or degrading treatment that can be attributed to the State, in violation of Articles 5 of the Convention and 6 of the ICPPT.

240. As to the events of January 25, 2003, although the Commission referred to these, it indicated that it did not have sufficient evidence to rule on what had occurred. In addition, the Commission made no particular reference to the alleged violations of Article 7 of the American Convention and Article 6 of the ICPPT.

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[304] Article 7 of the American Convention establishes: "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 […]."

241. The representatives also considered that the State was responsible for several threats and acts of harassment against the Sarayaku leaders, which can be attributed to it, because it failed to provide protection, even though measures of protection in their favor granted by the Inter-American Commission on May 5, 2003, were in force. In addition, they argued that despite the complaints filed by those affected, the State has not conducted any investigative measure or announced any punishment.

242. Furthermore, the representatives emphasized that the said violations resulted in the stigmatization of the Sarayaku People as a violent people, and this has adversely affected its members' relations with the rest of Ecuadorian society, and particularly with neighboring communities. They also indicated that the situation had created distress, anxiety and fear among the members of the Sarayaku and had affected their physical and mental integrity. The representatives asked the Court to declare that the State had violated the right of all members of the Sarayaku People to their personal integrity.

243. Regarding the events of January 25, 2003, the State argued that, without reliable evidence to prove a particular pattern, and direct proof demonstrating the period during which the alleged ill-treatment took place, and evidence of the responsibility of State agents, the Court cannot declare the State's responsibility. It also indicated that, in this case, there is no consistent evidence or presumption that could lead the Court to conclude firmly that the presumed victims were subjected to torture or other cruel, inhuman or degrading treatment and, furthermore, with the support or tolerance of government authorities. Therefore, the State could not be declared responsible for acts that have not been reliably proved.

B. Considerations of the Court

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

244. In its consistent case law, the Court has established that the obligations imposed by Article 4 of the American Convention, in relation to Article 1(1) thereof, not only presuppose that no one is to be arbitrarily deprived of his 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. Special obligations are derived from the general obligations under Articles 1(1) and 2 of the Convention, which can be determined based on the particular needs for protection of the holder of the right, due either to their personal status or to the specific situation in which they find themselves.[305] In certain cases, exceptional circumstances have arisen that allow the Court to examine the violation of Article 4 of the Convention in relation to individuals who did not die as a result of the acts that violated the Convention.[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

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[305] *Cf. Case of the Mapiripán Massacre 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] Thus, for example, in the *Case of the Yakye Axa Indigenous Community v. Paraguay,* the Court declared 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 the Community 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 decent living conditions (*Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*, para. 158(d) and (e)). See also, *Case of the "Children's Rehabilitation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 176; *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, paras. 124, 125, 127 and 128, and *Case of Gelman v. Uruguay*, para. 130.

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 time 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 they did not take the necessary measures available to them that could be reasonably expected to prevent or avoid such risk.[307]

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 kilograms of high-powered explosives (pentolite) on the Sarayaku territory, considering that this "constitutes a serious risk factor to the life and integrity of [its] members."[308] Consequently, the Court ordered the State to remove the explosive material, a provision that is still in force to date and with which the State has complied partially (*supra* paras. 120 and 121). In view of the presence of this material in the territory, the Sarayaku Assembly decided to declare the area a restricted zone for safety reasons, prohibiting access to it, a measure that remains in force, even though the area is considered 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 work began in July 2009 and consisted solely of actions aimed at removing the pentolite found on the surface of the Sarayaku territory. To date, the State has removed between 14 and 17 kilograms of the 150 kilograms to be found on the surface,[309] and of a total of over 1400 kilograms left in the territory. It is worth noting that, upon completion of the contract with the CGC, it was placed on the record that there were no environmental liabilities (*supra* paras. 120 to 123). The presence of explosives has caused evident concern to the Sarayaku People owing to the risk to their physical safety,[310] and the activation or detonation of these explosives is, according to the expert witnesses[311] a real and potential possibility.

248. In this case, the oil company, with the State's acquiescence and protection, cleared trails and planted nearly 1400 kilograms of pentolite explosives in Block 23, which includes the Sarayaku territory. Therefore, this has resulted in a clear and proven risk, and it was the State's responsibility

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

308 *Matter of the Sarayaku Indigenous People with regard to Ecuador*. *Provisional measures.* Order of the Inter-American Court of June 17, 2005, Considering paragraph 12.

309 *Cf.* Annex 1 of the State's report of September 21, 2009, submitted to the Court on October 13, 2009 (evidence file, tome 8, folio 2523).

310 In its last order on provisional measures, the Court assessed positively "that 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 a first phase of removal of the explosives that were over the surface of the territory; the Sarayaku community was informed of this and several coordinated measures were taken in this regard. However, even though the State has provided explanations about the delay in the adoption of this procedure, this does not justify clearly why the implementation of the said procedure began more than four years after the Court expressly ordered it. In the particular circumstances in which these provisional measures were ordered, the protection of the right to life and personal integrity of the members of the Sarayaku Indigenous Community required and requires, fundamentally, the guarantee that the explosives will be removed from the territory where the community is settled, because the situation has impeded their freedom of movement 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 on their territory entails for the Sarayaku community." *Cf. Matter of the Kichwa Indigenous People of Sarayaku with regard to Ecuador. Provisional measures.* Order of the Inter-American Court of February 4, 2010, considering paragraph 13.

311 Thus, one of the expert witnesses explained that abandoning explosives, with visible detonation cables, poses a certain danger, because they can be detonated deliberately or accidentally (due to electrostatic causes) (affidavit of professor Shashi Kanth, Dossier on Pentolite Boosters used in Oil Exploitation. May 25, 2011. South Dakota School of Mines, evidence file, tome 19, folio 10164). Similarly, expert witness Bill Powers considered that the explosives abandoned on the territory by the CGC are a "latent danger" for the Sarayaku (affidavit of William E. Powers, engineer. *Etapas de Desarrollo de un Campo Petrolero en la Selva*, June 29, 2011, evidence file, tome 19, folio 10103).

to deactivate it, as ordered in the provisional measures. In other words, the State's non-compliance with its obligation to guarantee the Sarayaku People'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. Based on the foregoing reasons, the State is responsible for having put at grave 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, in the terms of Articles 1(1) and 21 thereof.

B.2 Alleged threats to members of the Sarayaku People

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

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

251. A number of situations were alleged in which third parties or even State agents obstructed or prevented the movement of members of the Sarayaku on the Bobonaza River. As indicated in the briefs submitted in the proceedings on provisional measures, it is clear that the State was aware of the situations affecting the free movement of members of the Sarayaku People. Regarding the events that took place on December 4, 2003 (*supra* paras. 108 to 113), even though, in the abstract, the measures adopted could have been different, the Court was not provided with documents or specific arguments indicating that State authorities were in a position to appreciate the scale of the events that occurred and that the police contingent sent would be insufficient in this regard. The Court does not have sufficient evidence to be able to conclude that the State is responsible for failing to comply with the obligation to guarantee the physical integrity of those 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 to 271).

252. With regard to the events of January 25, 2003 (*supra* para. 98), the Court observes that the representatives did not submit any documentation, and failed to make any specific reference to the evidence provided in their briefs that would allow the Court to verify whether a complaint was filed regarding these facts, indicating that the Sarayaku had suffered acts that would qualify as torture or cruel treatment by the company's security personnel, with the tolerance or acquiescence or through the negligence of military officials. It is worth noting that, although the report presented by the "Head of Physical Security of the [Company]. CGG" to the "CIA Brigade Chief. CGG," concluded that "upon reaching the Chonta base, the detainees were not physically or morally abused," also records that on reaching the base, the detainees 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, or those who performed the said medical examination; nor did they

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

refer specifically to these documents. Moreover, they did not provide information about the regular procedure to check the detainees' physical conditions or health at the time of the arrest.

253. Regarding the alleged violation of the personal liberty of the four Sarayaku members, the Court notes that, contrary to what was indicated by the representatives, the Pastaza District Prosecutor opened a preliminary inquiry against them on January 28, 2003.[313] The record of the preliminary inquiry shows that, although no court order was issued, the arrest was the result of alleged criminal acts committed by these individuals, who were detained at the scene of the incidents.[314] The Court observes, on the one hand, that between the time of 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, they had been "investigated" by private security personnel (*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, because they had been questioned by people who, apparently, were not competent authorities. On the other hand, these four people were subjected to a precautionary measure of deprivation of liberty by decision of the First Court of Pastaza (*supra* para. 99), without the court record indicating whether the prosecution and judicial authorities had duly justified the need for this measure based on the procedural requirement cited in that situation, namely, the danger of failure to appear in court. However, the representatives did not argue that the foregoing entailed 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 allow it to conclude that the State is responsible for the alleged violations of the rights recognized in Articles 5 and 7 of the American Convention and in Article 6 of the Convention to Prevent and Punish Torture.

VIII.3
RIGHTS TO A 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 application for *amparo* was not processed in the usual manner and there were unexplained delays in the procedure, because it was not decided and nor was a hearing held; (ii) the remedy was ineffective because the precautionary measure ordered was not complied with, and (iii) the State has not provided any information to conclude that it conducted an effective investigation into the complaints related to the various incidents of violence and threats against members of the Sarayaku People.

256. The representatives agreed with the Commission's observations and added that the judge with jurisdiction over the application for *amparo* had not convened the hearing under the legal terms established by the Constitution and the Constitutional Control Act. They argued that the State had violated the guarantee of due process by failing to comply with the precautionary measure ordered,

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313 *Cf.* Prosecutor's Investigation 069-2003 (evidence file, tome 16, folios 9096 and 9097)

314 *Cf.* Prosecutor's Investigation 069-2003, folios 9096 and 9097.

315 Article 8.1 of the American Convention establishes: "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 stipulates: "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."

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 by members of Sarayaku on various occasions.

257. The State argued that the application for *amparo* filed by the OPIP had been discontinued given the procedural inactivity of the interested party, on the understanding that the appellant "did not show the appropriate interest in pursuing the *amparo* proceeding" 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 proceedings" 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 deceitful intent regarding the failure to summon Daymi Services, "because the failure to notify it [Daymi Services] was their fault, because they had not verified the correct address of the defendant, in order to protect the rights allegedly violated." In addition, the State argued that OPIP did not appear at the hearing, or justify its absence; thus, under the Constitutional Control Act, this is understood as a withdrawal of the application.

258. Regarding the above, the representatives indicated that, on December 2, 2002, the First Civil Judge of Pastaza changed the date of the hearing, and notified the OPIP the same day. They added that the address for Daymi Services indicated in the OPIP brief was wrong, but that the error was corrected by a letter from OPIP dated December 16, 2002, and the case file did not show "that the judge took any further measures following that date to summon another hearing." Consequently, the representatives indicated that, if he had not summoned all the parties, "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 consider that they had withdrawn the application."

259. With regard to the investigations, the State indicated that "it cannot be considered guilty of the lack of investigation into the complaints filed by members of the Sarayaku because the investigative processes by the Pastaza Prosecutor's Office could only be undertaken after the prosecutor had access to the communities and the collaboration of the complainants to continue with the investigation of the cases presented." It also mentioned that the Sarayaku "did not provide the facilities for the prosecutor to conduct an investigation, because they restricted access to their territory, exposing law enforcement authorities to a major confrontation if they attempted to enter by force." The State added that the failure to conclude the inquiry was "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 considered that the State has an obligation 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 of law (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. In addition, the Court has indicated that Article 25(1) of the Convention establishes, in general terms, the obligation of the States to guarantee effective judicial remedies for acts that violate fundamental rights. When interpreting the text of Article 25 of the Convention, the Court has held on other occasions that the obligation 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

[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. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236, para. 105.

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 rights violation has occurred and providing redress."[318] Thus, the Court has declared that "the inexistence of an effective remedy for violations of the rights recognized by the Convention constitutes a violation of the Convention by the State Party in which this situation occurs."[319]

262. In addition, 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 rather they must be effective.[321] Thus, in the terms of Article 25 of the Convention, it is possible to identify two specific responsibilities of the State. First, it must establish in its legislation and ensure due application of effective remedies and guarantees of due process of law before the competent authorities that protect all persons subject to their jurisdiction from acts that violate their fundamental rights or that determine the latter's rights and obligations. Second, it must guarantee effective mechanisms to execute the decisions or judgments issued by said authorities, so that the declared or recognized rights are effectively protected. This is because a final judgment (*res judicata*) provides certainty concerning the right or dispute examined in the specific case and, therefore, one of its effects is the requirement or obligatory nature of compliance. The proceedings should lead to achieving the protection of the right recognized in the judicial ruling, by the proper application of that ruling.[322] Consequently, the effectiveness of the judgments and the judicial orders depends on their execution.[323] Anything to the contrary would entail the denial of the right concerned.[324]

264. Furthermore, with regard to indigenous peoples, it is essential that the States grant effective protection that takes into account the inherent particularities of indigenous peoples, their economic and social characteristics, and their special vulnerability, and their customary law, values, practices and customs.[325]

B.1 Regarding the obligation to investigate

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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 the 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 the Xákmok Kásek Indigenous Community v. Paraguay*, para. 139.

321 *Cf. Case of 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. Competence*. Judgment of November 28, 2003. Series C No. 104, paras. 73 and 82.

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

324 *Cf. Case of Baena Ricardo et al. v. Panama, Competence,* 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 et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, para. 184.

265. The Court has previously held that the obligation to investigate, prosecute and, as appropriate, punish those responsible for human rights violations is an affirmative measure that the States must adopt in order to guarantee the rights recognized in the Convention,[326] in accordance with Article 1(1) thereof. The State must assume this duty 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. The Court has also stated that the obligation to investigate, and the corresponding right of the alleged victims or their next of kin, derive not only from the treaty-based norms of international law, which are mandatory for the States Parties, but also from domestic law regarding the duty to investigate *ex officio* certain unlawful actions and the rules that allow victims or their families to report or file complaints, present evidence or petitions or take any other measure, in order to have legal standing in the criminal investigation in the hope of establishing the truth of the facts.[328]

267. In this case, the Court observes that several complaints were filed in relation to the alleged attacks and threats against members of the Sarayaku People (*supra* para. 107).

268. There is no indication of any measures taken or results related to the complaint filed before the Pichincha District Prosecutor by José Serrano in April 2004.

269. In addition to the official investigation begun, *ex officio*, by the Pastaza Ombudsman in connection with the events that took place on December 4, 2003 (*supra* para. 112), the Court observes that the Pastaza Prosecutor took some investigative measures[329] in response to the complaint filed (*supra* para. 113). Despite this, no probative documents were submitted that would allow the Court to determine whether any action or final or provisional decision was taken by the authorities in relation to the alleged events. Regarding the other complaints, the Court finds that the parties did not furnish any probative documents or specific arguments to determine whether an investigation or some sort of verification process was carried out as a result of the complaints filed. Also, no documentation was provided regarding any final or temporary decision by the authorities in relation to the alleged events.

270. In short, the Court observes that no investigation was opened in five of the six complaints filed and that, regarding the investigation that was opened, there is evidence of procedural inactivity after certain measures had been taken. Although the State argues that this inactivity was due to lack of access to the territory of the Sarayaku People, it did not provide any probative documentation regarding any final action or decision by the authorities in connection with the investigation of the complaints filed that contains this 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 presumed victims of these acts.

271. Based on the foregoing considerations, the Court finds that, in this case, the flaws in the investigation of the reported facts reveal that the State authorities did not act with due diligence or in accordance with their obligations to guarantee the right to personal integrity contained in Article 5(1) of the Convention, in relation to the State's obligation to guarantee the rights established in

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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 the 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. Series C No. 168, para. 104.

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

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

B.2 Regarding the remedy of amparo

272. In the context of examining the simple, prompt and effective remedies established in the provision under analysis, this Court has maintained that the filing of the remedy of *amparo* may have the necessary characteristics to ensure 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 instant case, the State argued that the remedy of *amparo* was effective to "resolve the juridical situation of the petitioner."

273. Regarding the application for *amparo* filed by the OPIP on November 28, 2002 in the instant case, the Court observes that, on December 12, 2002, the Superior Court of Justice of the District of Pastaza found "irregularities in [the] processing" of the application. In addition, the Superior Court of the District of Pastaza indicated that the initial decision summoning the parties to a public hearing violated the provisions of the Constitutional Control Act and expressed "concern over the total lack of promptness in dealing with the matter, considering the social repercussions of its purpose." In the same decision, the First Civil Judge of Pastaza was "strongly urged" "to adhere strictly to the provisions of the Constitutional Control Act, with the promptness and efficiency that the case requires.[331] Similarly, although the OPIP filed a brief before the First Civil Judge of Pastaza on December 16, 2002, clarifying the address at which the defendants should be notified,[332] no information or documentation was provided to enable this Court to determine whether there were any further procedural actions or a final decision by the above-mentioned court in relation to the application for *amparo*.

274. Based on the foregoing, the Court notes that the higher court found irregularities in the processing of the application for *amparo* and ordered that these be remedied. However, this Court cannot ascertain whether the First Civil Court of Pastaza complied fully with the orders of the higher court and that, consequently, this decision was effective. To the contrary, as the State itself has indicated, the remedy was inconclusive. Therefore, the Court finds that, in the present case, the *amparo* procedure was ineffective, because 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 complainants.

275. In the same way, the Court notes that on November 29, 2002, the First Civil Judge of Pastaza ordered, as a precautionary measures, the suspension of 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 the authorities complied with this order. Therefore, the Court finds that the November 29, 2003, decision of the First Civil Judge of Pastaza, ordering a precautionary measure, was ineffective to prevent the situation described, and did not produce the result for which it was conceived.[333] Thus, it should be reiterated that for the remedies applied in the

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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 Las Dos Erres Massacre v. Guatemala,* para. 121.

331 *Cf.* Decision of the Superior Court of Justice of Pastaza, folio 8725.

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

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

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

276. Lastly, while it is reasonable to consider that the precautionary measure ordered by the First Civil Judge was temporary, until the competent Judge had taken a final decision on the application for *amparo*, it is not possible to conclude that the obligatory nature of this measure had extinguished because the remedy was inconclusive; particularly, if the ineffectiveness of the *amparo* was due, as was demonstrated, to the negligence of the judicial authorities themselves. Consequently, the obligation to comply with the precautionary measures ordered by the State's judicial authority extended throughout the period during which the presumed risk to the rights of the complainants remained.

277. Furthermore, although the judicial authorities did not issue an order or final decision on the admissibility of the application for *amparo*, they ordered a precautionary measure in order to safeguard the effectiveness of an eventual final decision. Therefore, the State had the obligation to ensure compliance with said decision under the provisions of Article 25(2)(c) of the Convention.

278. Based on the foregoing considerations, the Court finds that the State did not guarantee an effective remedy to redress the juridical situation violated, and did not ensure that the appropriate competent authority ruled on the rights of the persons who filed the remedy, or that the decisions 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 the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum),* which consists of re-establishing the situation that existed prior to the violation. When this is not possible, as in most cases involving human rights violations, the Court will order measures to guarantee the rights that have been violated and to make reparation for the consequences of the violations.[338] Thus, the Court has considered the need to order diverse measures of reparation in order to redress fully the damage

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334 *Cf.*, *mutatis mutandi*, *Case of Acevedo Buendía et al. ("Dismissed 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.

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

281. This Court has established that the reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to repair the respective damage. Consequently, the Court must observe this concurrence in order to rule appropriately and according to law.[340]

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

283. Consequently, and without detriment to any form of reparation subsequently agreed between the State and the Sarayaku People, based on the violations of the American Convention declared in this Judgment, the Court will proceed to order measures aimed at repairing the damage caused to the Sarayaku. To this end, the Court will take into account the claims of the Commission and the representatives, together with 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 reparation.[341]

A. Injured Party

284. Under Article 63(1) of the American Convention, the Court considers the injured party to be the Kichwa Indigenous People of Sarayaku, who suffered the violations declared in the chapter on Merits of this Judgment (*supra* paras. 231, 232, 249, 271 and 278), and are therefore considered beneficiaries of the reparations that it orders.

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

285. The Court will 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 case law and, in particular, the case law 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 based on the damage caused to the Sarayaku People and the pecuniary and non-pecuniary consequences of the violations of the American Convention declared to their detriment, the Court finds it appropriate to establish measures of restitution and satisfaction and guarantees of non-repetition.

286. The Commission asked the Court to order the State to:

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

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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 to 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.

ii. "Guarantee the members of this People their right to practice their traditional subsistence activities by removing the explosives planted on their territory;

iii. "Ensure that indigenous representatives play a meaningful and effective role in the decision-making processes on development and other issues that affect them and their cultural survival";

iv. "Adopt, with the indigenous peoples' participation, the legislative or other measures necessary to give effect to the right to prior, free and informed consultation, in good faith, in accordance with international human rights standards," and

v. "Take the measures necessary to prevent a recurrence of similar events in the future, in keeping with the duty to prevent violations of human rights and to ensure the fundamental rights recognized in the American Convention."

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

i. "Conduct immediately effective and prompt investigations and proceedings with regard to all the facts denounced 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. Ensure the signature of a "document of brotherhood with the neighboring communities of the Kichwa People of Sarayaku[344]";

iii. "Cease immediate any type of oil exploration or exploitation in the territory of the Kichwa People of Sarayaku that is being carried out without respecting the rights of this People";[345]

iv. "Remove all types of explosives, machinery, structures, and non-biodegradable waste and reforest the areas deforested by the oil company when clearing trails and camp sites for the seismic survey";

v. "Respect for the decision of the Sarayaku People to declare their entire territory that it owns as 'Sacred Heritage Territory of Biodiversity and of the Ancestral Culture of the Kichwa Nationality";[346]

vi. "Adopt, within a reasonable time, training modules on the rights of indigenous peoples for all police agents, and judicial officials, and other State officials whose functions involve relations with members of indigenous peoples";

vii. "Comply fully with the provisional measures in force in favor of the members of the Sarayaku Indigenous People," and

viii. Ensure that the guarantee of 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 these requests by the Commission and the representatives.

B.1 Restitution

Removal of explosives and reforestation of the affected areas

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344 In particular, in their pleadings and motions brief, the representatives asked the Court to order the State "to sign a document which could be entitled 'Formal Deed of Brotherhood' between the Sarayaku and the two communities with which there is still bitterness," and in which the State "undertakes not to take any measures that could create divisions between the [13] peoples of the Bobonaza river basin." They added that, in the said document "the three communities would undertake to coexist in peace and harmony, in a climate of respect and tolerance." In addition, to this end, the State must initate a consultation process with the consent of the three communities involved.

345 They asked the Court to require the State "to take the necessary measures to annul the contract with the CGC as regards the territory of the Kichwa People of Sarayaku. As part of these measures, the State should provide clear and detailed information to the Sarayaku regarding the current status of the contract, and ensure that the community participates in the steps to be taken for its cancellation." They added that the State should "inform and guarantee the community's participation, and obtain its consent for any other current 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 "[t]he legal basis for this declaration is to be found in the right to self-determination of the Indigenous Peoples, recognized in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples; the Right to property guaranteed in Article 21 of the American Convention, in articles 57.12 and 66.12 of the Constitution."

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 explosives, at times in consultation with the Sarayaku People. In addition, the State has proposed several options to neutralize the explosives buried in the territory.

290. In particular, the State provided a certificate of approval by the Sub-Secretary for Environmental Quality of a "Comprehensive Environmental Assessment" of Block 23, indicating that the CGC representative should, *inter alia*, "[s]ubmit a schedule with specific deadlines for executing the activities contemplated in the Plan of Action, including those related to the information process on the way in which the pentolite was dealt with […], the current situation of this explosive; environmental impacts of the attempts to find and evaluate the buried material."[347] Also, in the terms of the contract termination agreement, in clause 8.4, the parties (PETROECUADOR and CGC) "accept and ratify that there is no environmental liability in the [concession] area that can be attributed to the contractor" (*supra* para. 123).

291. In relation to the removal of the pentolite from the territory of the Sarayaku People, the Court observes 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 five meters and it would be possible to remove it completely. Second, the pentolite buried at a greater depth – at about 15 to 20 meters – would be difficult to remove without causing significant environmental damage or even potential safety risks for those removing it.

292. Regarding the pentolite located near the surface, the State indicated that its removal by physical means posed serious safety risks for the people responsible for carrying out the operation. In addition, it would entail damage to the integrity of the territory, because it would have to be carried out with heavy machinery. For their part, representatives and the 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 stipulates that the State must neutralize, deactivate and, as appropriate, completely remove the surface pentolite, searching at least 500 meters on each side of the E16 seismic line running through the Sarayaku territory, as proposed by the representatives. The ways and means used for this purpose must be chosen after a process of prior, free and informed consultation with the People so that it may authorize the entry and presence on its territory of the equipment and people required in this regard. Lastly, since the State has argued that a risk exists to the physical integrity of the people responsible for removing the explosives, it is for the State, in consultation with the People, to select the methods for removing the explosives that pose the least possible risk to the ecosystems in the area, consistent with the Sarayaku worldview and the safety of the team performing the operation.

294. As for the pentolite buried at a greater depth, the Court notes that, based on the technical appraisals that have been conducted, the representatives themselves have proposed a solution to neutralize its danger.[348] The State did not present any observations in this regard. The case file contains no specific arguments, or technical appraisals or evidence of a different nature, which would indicate that the Sarayaku Peoples' proposal is not an appropriate and safe option in keeping with their worldview for neutralizing the buried explosives. Therefore, the Court decides that, in accordance with the technical appraisals presented in these proceedings, and unless a better

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[347] Evidence file, tome 17, folio 9595.

[348] The representatives asked the Court to require the State "to remove all the explosives on the surface of the territory […], as the Sarayaku requested during the proceeding on provisional measures." To this end, "the State must search at least 500 meters on both sides of the E16 seismic line which passes through Sarayaku territory." In addition, they asked the Court to "order the Ecuadorian State to deal with the pentolite underground in accordance with the plan proposed by Professor Kanth, which is based on determining the number of points where the pentolite is buried, burying the detonator cables, marking the points where these are buried, and declaring the area as a recovery zone." Lastly, they indicated that "the process described must be executed by the State as soon as possible," and that "[e]very phase of this management plan must be submitted for consultation and agreed with the Kichwa People of Sarayaku, who should continue receiving external advice on the process."

solution is agreed upon by the parties at the domestic level, the State must: (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) mark the burial locations appropriately, even planting local tree species that do not grow roots deep enough to cause an accidental explosion of the pentolite. In addition, the State must adopt the necessary measures to remove any machinery, structures and non-biodegradable waste that have remained as a result of the oil company's activities, and reforest the areas that may still be affected by the opening up of trails and campsites for the seismic survey. These tasks must be carried out following a process of prior, free and informed consultation with the Sarayaku People, who must authorize the entry and presence on its territory of the material and persons required to this end.

295. Compliance with this measure of reparation is an obligation of the State, and it must complete it within no more than three years. For the purposes of compliance, the Court decides that, within six months, the State and the Sarayaku People must establish by mutual agreement a schedule and a work plan that includes, among other aspects, the determination of the location of the superficial pentolite and of the material buried at a greater depth, as well as the specific and effective steps to deactivate, neutralize and, as appropriate, remove the pentolite. Within the same period, the parties must provide the Court with information in this regard. Once this information has been submitted, the State and the Sarayaku People must report on the measures taken to comply with the work plan every six months.

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 signed an Act of Termination by Mutual Agreement of the partnership contract for the exploration of hydrocarbons and exploitation of crude oil in Block 23 (*supra* para. 123). In addition, the representatives referred to several announcements by authorities of the State's hydrocarbons sector regarding a call for new bids for oil exploration in the south-central Amazonian region of Ecuador, in the provinces of Pastaza and Morona Santiago. In particular, it was alleged that at least eight blocks were to be exploited in the southeastern part of Amazonia, which includes the province of Pastaza, and that the new bidding round would include the Sarayaku territory.

297. Furthermore, it was reported that, in November 2010, the State had signed a "Contract modifying the contract for provision of services for the exploration and exploitation of hydrocarbons (crude oil) in Block 10" of the Ecuadorian Amazonian region[349] with a company holding the concession for this new "Block 10," the redefined area of which would include a portion of around 80,000 hectares of Block 23. This would affect the territory of Kichwa communities in the upper watershed of the Bobonaza River and the Achuar Association of Shaime, as well as a portion of the Sarayaku territory.

298. In this regard, it should be recalled that, when acknowledging the State's responsibility in this case, the Secretary for Legal Affairs of the Presidency of the Republic of Ecuador 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 an open and frank dialogue; not a dialogue undertaken by the oil company, as has always been denounced. We have changed the law so that the dialogue is initiated by the Government and not by the extractive sector […].

299. While it is not incumbent on the Court to rule on new oil bidding rounds that the State may have initiated, in the present case, the Court has determined that the State is responsible for the

[349] Final Negotiation Report. "Contract for the provision of services for the exploration and exploitation of crude oil in Block 10. AGIP ECUADOR OIL B.V, of November 21, 2010 (evidence file, tome 18, folios 9711 and 9736).

violation of the right to communal property of the Sarayaku People, because it failed to guarantee their right to consultation adequately. Consequently, as a guarantee of non-repetition, the Court stipulates that, in the event that the State should seek to carry out activities or projects for the exploration or extraction of natural resources, or any type of investment or development plans that could eventually have an impact on the Sarayaku territory or affect essential aspects of their worldview or their life and cultural identity, the Sarayaku People shall be previously, adequately and effectively consulted, in full compliance with the relevant international standards.

300. In this regard, the Court recalls that the processes of participation and prior consultation must be conducted in good faith at all the preparation and planning stages of any project of this nature. Moreover, in keeping with the international standards applicable in such cases, the State must truly ensure that any plan or project that involves, or could potentially affect the ancestral territory, includes prior comprehensive studies on the environmental or social impact, prepared by independent, technically qualified entities, with the active participation of the indigenous communities concerned.

b) Regulation of prior consultation in domestic law

301. Regarding domestic laws that recognize the right to prior, free and informed consultation, the Court has already observed that, in the evolution of the international *corpus juris*, the 2008 Ecuadorian Constitution is one of the most advanced in the world in this area. However, the Court has also noted that the right to prior consultation has not been sufficiently and adequately regulated through appropriate norms for its practical implementation. Thus, under Article 2 of the American Convention, the State must adopt, within a reasonable time, any legislative, administrative or other type of measures that may be necessary to implement effectively the right to prior consultation of the indigenous and tribal peoples and communities, and amend those measures that prevent its full and free exercise and, to this end, 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 and cultural identity of the Sarayaku People resulted from the acts and omissions of different officials and institutions that failed to guarantee those rights. The State must implement, within a reasonable time and with the corresponding budgetary allocation, mandatory programs or courses that include modules on the domestic and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as others whose functions involve relations with indigenous peoples, as part of the general and continuing training of officials in the respective institutions, at all hierarchical levels.

B.3 Measures of satisfaction

a) Public act of acknowledgment of international responsibility

303. The representatives asked the Court to order the State "[t]o conduct a public act of acknowledgment of responsibility, previously arranged with the Sarayaku People and its representatives, in relation to the violations declared in the Court's eventual judgment." They also indicated that "this act should be carried out in the territory of the People, in a public ceremony, with the presence of the President of the Republic and other senior State authorities, to which members of the neighboring communities of the Bobonaza River basin are invited." In addition, during this act, "the State must acknowledge that the Sarayaku are a peaceful People who have struggled for over 14 years to defend the integrity of their territory and to preserve their culture and survival." They also asked that […] the "State pay homage to the image of the Sarayaku leaders who have suffered threats, harassment and insults as a result of their work in defense of the

territory and of their People and, therefore, have been specific beneficiaries of the provisional measures." Lastly, they asked the Court to order the State "[t]o conduct the public act of acknowledgement in the Spanish language and also in the Kichwa language, and […] to disseminate it through the national media."

304. The Commission did not make similar requests and the State did not refer to the representatives' request.

305. Although, in this case, the State has already acknowledged its responsibility on Sarayaku territory, as it has in other cases[350] and in order to repair the damage caused to the Sarayaku People by the violation of their rights, the Court finds that the State must organize a public act to acknowledge its international responsibility for the violations declared in this Judgment. The determination of the place and method of carrying out this act must be previously consulted and agreed with the People. The act must take place in a public ceremony, in the presence of senior State officials and the members of the People, in the Kichwa and Spanish languages, and must be widely publicized in the media. The State has one year from notification of the Judgment to comply with this measure.

b) Publication and broadcasting of the judgment

306. The representatives asked that "the relevant parts of the judgment be published at least once in the Official Gazette and in another national newspaper, in both Spanish and Kichwa." The Commission and the State did not refer to this aspect.

307. In this regard, the Court finds, as it has in other cases,[351] that the State must publish, within six months of notification of this Judgment:

- the official summary of this Judgment prepared by the Court, once, in the Official Gazette;
- the official summary of this Judgment prepared by the Court, once, in a newspaper with wide national circulation; and
- this Judgment, in its entirety, on an official website, available for one year.

308. Furthermore, the Court considers it appropriate that the State publicize, through a radio station with widespread coverage in the southeastern Amazonian region, the official summary of the Judgment, in Spanish, Kichwa and other indigenous languages of this subregion, with the relevant translation. The radio broadcast must be made on the 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 damage

C.1 Pecuniary damage

309. In its case law, the Court has developed the concept of pecuniary damage and the circumstances in which it must be compensated. This Court has established that pecuniary damage includes "the loss or detriment to the income of the victims, the expenses incurred as a result of the

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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 the Xákmok Kásek Indigenous People 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.

facts, and the monetary consequences that have a causal nexus with the facts of the case *sub judice*."[352]

a) Arguments of the parties

310. The Commission asked the Court to order the State to make reparation "for the consequences of the violations at the individual and the community level" and that, when determining the pecuniary damage and other claims made by the representatives, it consider the worldview of the Sarayaku People, and the effect on the People and on its members of being prevented from using, enjoying and being able to avail themselves of their territory and, among other consequences, from carrying out their traditional subsistence activities."

311. The representatives asked the Court to determine, in equity, compensation for pecuniary damage, to be paid directly to the Sarayaku People, for the damage caused to their territory and their natural resources;[353] the effects of the suspension 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 their territory,[355] and the economic impact of the restrictions to their freedom of movement on 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 proved and that no reports or inspections had been submitted to support the request It claimed that the supposed lack of tourists was due "to the position taken by the leaders against the work of the

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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. 4, and Case of González Medina and family members v. Dominican Republic,* para. 310.

353 This item includes: (a) "The opening of seismic trails and 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 down of trees and plants of significant cultural, environmental and subsistence food value for the Sarayaku"; (d) "Environmental pollution, waste and garbage left behind by workers in the territory," and (e) "Abandonment of extremely dangerous explosives on the surface and subsoil of the Sarayaku territory, which still remain today."

354 This item includes: (a) loss of earnings owing to the impossibility of planting and selling their agricultural products, which meant that they had to purchase products in the markets. According to the representatives, the losses incurred from not being able to plant the cassava crop that year alone amounted to US$64,000 (sixty-four thousand United States dollars). Also, in order to supplement their diet because of the food shortages caused by the scarcity of game and fish owing to the seismic survey activities, each of the 160 families in the community had to spend US$34 (thirty-four United States dollars) a month during the six months of the state of emergency and US$8.50 (eight United States dollars and fifty cents) during the eight months that followed; (b) interruption of the community's other production activities, such as building canoes, houses and handcrafts; (c) serious impacts on the Sarayaku community tourism, reducing the direct income received by those responsible for the project from tourists from their expenditure on food, accommodation and jungle tours offered by community guides. They also claimed that each tourist paid US$15 (fifteen United States dollars) for admission to the territory. They alleged 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, following the conflict they had failed to receive a total of US$6,000 (six thousand United States dollars) destined for a community fund, and (d) some of the Sarayaku development projects were lost, such as fish farming and the community economics program. In their final arguments brief, the representatives stated that "[a]ccording to the new census mentioned above, it is estimated that Sarayaku has 206 nuclear families and not 160 as indicated in the pleadings and motions brief," and that "the Sarayaku have reviewed the calculations for the losses incurred on their farms (*chacras*), given the inclusion of some incorrect facts in the pleadings and motions brief." They have therefore presented a new request that includes loss of earnings due to their inability to grow and sell their agricultural products, which resulted in the need to buy products in the market. The amount that the representatives are requesting that the Court establish in equity for this item is US$618,000 (206 families x two farms each x 150 quintals of cassava x US$10 per quintal).

355 According to the arguments presented, the defense of the territory entailed numerous expenses for the Sarayaku leaders, who had to travel to different places within and outside the country. They added that the community tourism business had gone bankrupt.

356 The representatives claimed that this restriction entailed additional transportation costs because the Sarayaku members could only travel by air for urgent matters, which increased the community's expenses as each plane trip costs an average of US$250 (two hundred and fifty United States dollars). They added that the restrictions to freedom of movement had also hampered the following activities: (a) entry of tourists; (b) marketing of Sarayaku products in the cities; (c) entry of basic commodities from the city, which had to be brought in by plane, greatly increasing the costs; (d) entry of goods for Sarayaku stores, and (e) because it was presumably impossible for Sarayaku members to travel by river, they had to travel by plane to leave Sarayaku, which increased transportation costs.

foreign company" and that the "conflicts they created and their refusal to establish negotiation mechanisms were the major causes of these situations." Regarding the absence of cassava production and the need to purchase other essential goods, 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 observed that the presentation of a series of documents was required in order to demonstrate that it was bankrupt, including annual balance sheets, profit and loss statements, and the documents submitted to the Internal Revenue Service. Lastly, the State asserted that the Sarayaku People's freedom of movement along the Bobonaza River had not been restricted and "that the activities that, according to the Sarayaku community, were not possible because they were unable to exercise their right to free movement, must be properly demonstrated; in other words, duly substantiated."

b) Considerations of the Court

313. Regarding the damage to the Sarayaku territory and its natural resources, the Court observes that a report by the Human Rights Committee of the National Congress of the Republic of Ecuador[357] was submitted, which indicates that "the State, through the Ministries of the Environment and of Energy and Mines violated […] the Constitution of the Republic by not consulting the community regarding the plans and programs for exploration and exploitation of non-renewable resources on their lands, which could affect their environment and culture." This report refers, especially, to the "significant negative impact on the flora and fauna of the region due to the destruction of the forest and the construction of heliports." Also, in this regard, a report of the Ministry of Energy and Mines[358] was submitted that described the "land clearance" to be carried out during the seismic survey process.[359] The Court has also noted that the rest of the supporting documentation provided by the representatives consists of documents produced by the Sarayaku themselves (press releases,[360] or testimonies from the "Self-evaluation" 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]

314. The equity principle has been used in this Court's case law to quantify non-pecuniary[363] and pecuniary damage.[364] However, the use of this criterion does not mean that the Court may act discretionally when establishing the compensation amounts.[365] The parties must provide clear evidence of the damage suffered, as well as the specific relationship between the pecuniary claim and the facts of the case and the violations alleged.

315. The Court underlines that the probative elements submitted are not sufficient or specific enough to determine the loss of earnings by members of the Sarayaku People owing to the suspension of their activities during some periods, and for the interruption of 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. In addition, the Court notes that there is a significant variation in the amounts requested for pecuniary damage in the pleadings and motions brief and in the final written arguments submitted by the representatives.

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357 *Cf.* Evidence file, tome 10, folio 6158.

358 *Cf.* Evidence file, tome 10, folio 6398.

359 Specifically, the report describes land clearance activities for laying seismic lines, for the camps, for trails in the drop zones, and trails for the heliport.

360 *Cf.* Evidence file, tome 10, folio 6396.

361 *Cf.* Evidence file, tome 10, folio 6588 and *ff.*

362 *Cf.* Evidence file, tome 11, folio 6753 and *ff.*

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.

Although this is understandable owing to the difference in the number of families indicated initially, and the number that resulted from the census conducted in Sarayaku, the differences in the criteria used by the representatives to calculate the pecuniary damage are not clear. However, in the circumstances of this case, it is reasonable to presume that these events led to a series of expenses and loss of earnings, which the members of the Sarayaku People had to assume; in addition, their ability to use and enjoy the resources on their territory was affected, particularly due to their restricted access to areas used for hunting, fishing and general subsistence. Moreover, owing to the location and way of life of the Sarayaku People, the difficulty in proving these losses and the pecuniary damage is comprehensible.

316. Also, although no supporting vouchers were presented, it is reasonable to assume that the actions and efforts undertaken by members of the People generated costs that should be considered as consequential damage, particularly with regard to the actions or measures taken to hold meetings with the different public authorities and other communities, to which their leaders or members have had to travel. Based on the foregoing, the Court determines, in equity, compensation for the pecuniary damage, taking into account that: (i) members of the Sarayaku People incurred expenses to take measures at the domestic level to demand the protection of their rights; (ii) their territory and natural resources were damaged, and (iii) the financial situation of the People was affected by the suspension of production activities during certain periods.

317. Consequently, the Court establishes the sum of US$90,000.00 (ninety thousand United States dollars) as compensation for pecuniary damage. This sum must be paid to the Association of the Sarayaku People (*Tayjasaruta*) within one year of notification of this Judgment, so that the People may decide, in accordance with its own decision-making mechanisms and institutions, how to invest the money, among other aspects, for the implementation of educational, cultural, food security, health and eco-tourism development projects or other community infrastructure or projects of collective interest that the People considers a priority.

C.2 Non-pecuniary damage

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 changes of a non-pecuniary nature, in the living conditions of the victims or their family."[366]

a) Arguments of the parties

319. The Commission asked the Court to establish in equity the amount of compensation for the non-pecuniary damage caused to the Sarayaku People and its members, "owing to the suffering, anguish, and indignities to which they were subjected during the years in which their right to use, enjoy and have available their territory has been restricted" and other alleged violations.

320. The representatives asked the Court to establish an amount in equity to repair the non-pecuniary damage suffered by the Sarayaku Peoples that had the following impact: the threat to the survival and cultural identity of the People owing to the damage to the territory;[367] the adverse effects on the education of the children and young people;[368] the effects on health and safety,[369] on

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[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.

[367] In this regard, they indicated that the arrival of the oil company and the damage it caused to the territory meant that "the spirits that inhabited those places fled to other places taking with them the elements of the jungle such as 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 significant value for traditional medicine; (c) harm to sacred sites, and (d) impossibility of celebrating the *Uyantsa* festival for two years.

[368] In this regard, they indicated that, in addition to "the effects on the ancestral education, the education of the children and young people was also affected due to the suspension of classes in schools for three months, during which time

family and community relationships,[370] and on the individual life projects and the collective development project.[371]

321. The State indicated that the representatives' arguments regarding non-pecuniary damage are, in several respects, "absolutely invalid in the cultural context of a Quichua indigenous people in Amazonia because they relate to isolated aspects, and this contradicts the ethos of the Sarayaku indigenous worldview." Regarding the alleged threats to the People's livelihood and cultural identity owing to the damage to the territory and other alleged facts, the State added that in the "imagery of the Amazonian Quichua, the social, communal and environmental order with nature is revitalized through a process of symbolic hierarchical re-assignment that does not involve State intervention and, on the contrary, corresponds to the cultural agents of each village." As to the allegation that the community was deprived of education, health care, communal relations and collective development projects, the State indicated "that the ecological and social conditions in Sarayaku are not seriously at risk because there is a significant flow of tourists each month and community-based tourism has become a development alternative, or eco-development." Finally, the State asserted that it had invested more than half a million dollars in Sarayaku since 2004, including a project entitled "Preparation of the Life Plan of the Sarayaku Community," and 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." Consequently, it "considers that there have been no real changes in the life project of its inhabitants" and that their claim "exceeds the scope of any potential or collateral damage caused by lack of protection from the State apparatus."

b) Considerations of the Court

322. When declaring the violations of the rights to communal property and consultation, the Court took into account the serious impacts suffered by the People owing to their profound social and spiritual relationship with their territory and, in particular, the destruction of part of the forest and certain places of great symbolic value.

323. Bearing in mind the compensation ordered by the Court in other cases, and based on the circumstances of this case, the suffering caused to the People and 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 the other non-pecuniary damage they suffered

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the youngest children were left at home and the young people joined the Peace and Life Camps to protect their territory." They also mentioned that "many of the leaders of the Sarayaku People had to abandon their studies at the University of Sarayaku, created by a cooperation project between Ecuadorian universities and a Spanish university, because they had to defend the territory. Consequently, they were unable to obtain their university 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, an increase in gastritis and anemia, hepatitis B and other illnesses"; (b) the conflict seriously disrupted the security, tranquility and way of life of members of the People, who feel that [at any time] anything can happen to them and [that] all the threats could be real"; (c) the children have lived in fear of the militarization of the territory and for 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 State's actions, the Sarayaku People have been stigmatized as a 'guerilla' people and as 'a real state within a State,' with ties to subversive activities, which has affected their relations with much of Ecuadorian society.

370 The representatives argued that, on 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 among the Sarayaku families themselves, because of disputes over allowing the oil company to enter and owing to the lack of time to devote to family life," and (c) the divisions caused by the company led to the expulsion and punishment of some members of Sarayaku, [and also to] quarrelling and distrust." In this regard, they indicated that the consequences "of these conflicts continue to have an impact, as revealed by the situation created by the attempted secession of the territory and creation of the community of Kutukachi."

371 In particular, 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) the community's development projects, such as the fish farming project, and those relating to communal economy, land conservation, community tourism, and the Sarayaku university were "delayed, hindered or thwarted."

owing to the violations declared in this Judgment, the Court finds it pertinent to establish, in equity, the sum of US$1,250,000.00 (one million, two hundred and fifty thousand United States dollars) for the Sarayaku People as compensation for non-pecuniary damage. This amount must be paid to the Association of Sarayaku People (*Tayjasaruta*), within one year of notification of this Judgment, so that the money may be invested as the People see fit, in accordance with its own decision-making mechanisms and institutions, among other aspects, for the implementation of educational, cultural, food security, health care and eco-tourism development projects or other community infrastructure projects or projects of collective interest that the People 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 established in Article 63(1) of the American Convention.[372]

D.1 Arguments by the parties

325. The Commission asked the Court, "after hearing the representatives of the injured party, to 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 for the Sarayaku People, and its representatives, Mario Melo and CEJIL, for the following disbursements: expenses incurred by the People;[373] expenses incurred by the lawyer Mario Melo before the inter-American system,[374] and expenses incurred by CEJIL.[375] In total, they requested that the Court establish in equity the sum of US$152,417.26 for costs and expenses.

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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 Regarding this item, they indicated that, "over the past seven years, activities related to the case have obliged Sarayaku leaders and members to travel regularly to Puyo and Quito (Ecuador), Washington DC (United States of America), Asunción (Paraguay) and San José (Costa Rica)." They added that, while some of the expenses incurred have been covered by non-governmental organizations, other expenses have had to be covered by the Sarayaku People and that "these expenses amount […] to a US$5,000 a year. […] Since the Sarayaku People have not saved receipts for most of the expenses incurred, they are asking the Court to order, in equity, payment of a total of US$35,000." In their final written arguments, the representatives indicated that the Sarayaku People had received support from the Victims' Legal Assistance Fund of the Court, and therefore they did not request the reimbursement of any expenses additional to those included in the pleadings and motions brief.

374 The representatives requested the reimbursement of the costs and expenses arising from the defense undertaken by the lawyer Mario Melo, as a member of the team of the *Centro de Derechos Económicos y Sociales* (CDES) between 2003 and 2007, and as a member of the Pachamama Foundation team from 2007 to date. In particular, they indicated that "the costs arising from their professional services and the costs of travel to places such as Puyo and Sarayaku in Ecuador, Washington DC (United States of America) and San José (Costa Rica) to take different measures in this case, the collection of evidence and the notarization of documents have been covered by the CDES and the Pachamama Foundation at an average cost of US$13,569.97 a year." Therefore, they requested that the Court order a payment, in equity, to cover the costs incurred by the CDES and the Pachamama Foundation. In their final written arguments, they requested, in addition to the aforementioned costs and expenses, reimbursement of costs and expenses incurred by representatives of the Kichwa People of Sarayaku from the presentation of the pleadings and motions brief in September 2010 to the holding of the public hearing in this case at the seat of the Court in Costa Rica. Accordingly, they asked the Court to order payment, in equity, to the said organizations, CDES and Pachamama, of US$13,569.97. In total, they asked the Court to establish in equity the sum of US$73,569.97.

375 The representatives asked 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 proceedings starting in 2003 and to establish in equity the sum of US$28,056.29 for expenses, and that this payment be made by the State directly to the representatives. In addition, they asked the Court to establish in equity the sum of US$15,791.00 to cover the costs incurred by CEJIL from the presentation of the pleadings and motions brief up until the present. Lastly, they asked that they be awarded any future expenses that arise; these include, *inter alia,* "travel and additional expenses of witnesses and experts to any possible hearing before the Court; travel by the representatives to the Court; and the costs involved in obtaining future evidence." In total they asked the Court to establish in equity the sum of US$43,847.29.

327. For its part, the State did not submit observations on 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 concept of reparations, whenever the actions carried out by the victims to obtain justice involve expenditure that must be compensated when the State's international responsibility has been declared in a guilty verdict. Regarding their reimbursement, the Court must make a prudent estimate of their scope, which includes the expenses incurred in the proceedings before the authorities of the domestic jurisdiction and in the proceedings before this Court, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. The Court must make this assessment based on the principle of equity and taking into account the expenses indicated by the parties, provided the *quantum* is reasonable.[376]

329. In this regard, 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 pleadings and motions brief, even though such claims may be subsequently updated, in accordance with the new costs and expenses incurred in connection with these proceedings.[377] In addition, it is not sufficient merely to submit probative documents; the parties must also present arguments that relate the evidence to the fact that it is supposed to prove and, in the case of alleged financial disbursements, the items and their justification must be clearly described.[378]

330. Regarding the expenses requested by the lawyer Mario Melo, the Court notes that some of the vouchers do not identify the payments that they are intended to support. In fairness, the items referred to have been deducted from the calculations made by the Court. Also, as in other cases, it is evident that the representatives incurred expenses during the processing of the case before the inter-American human rights system. As to the expenses claimed by CEJIL, the Court observes that some of the vouchers submitted do not show clearly a connection with disbursements related to this case. However, it also notes that the representatives incurred various expenses related to, among other matters, the collection of evidence, transportation, and communications services during the domestic and international proceedings in this case.

331. In the instant case, the expenses incurred by the Sarayaku People have already been taken into account when determining the compensation for pecuniary damage (*supra* paras. 316 and 317). However, the Court determines, in equity and based on certain documentation provided that substantiate expenses, that the State must pay a total of US$58,000.00 (fifty-eight thousand United States dollars) for costs and expenses. Of this amount, the State must pay the sum of US$18,000.00 directly to CEJIL. The remainder must 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 stage of monitoring compliance with this Judgment, the Court may order the State to reimburse the victims or their representatives for subsequent reasonable and adequately proven expenses.

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376 *Cf. Case of Garrido and Baigorria v. Argentina, Reparations and costs, para. 82, and Case of González Medina and family members*, 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 members, 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 members*, para. 326.

E. Reimbursement of expenses to the Victims' Legal Assistance Fund

332. In 2008, the General Assembly of the Organization of American States (hereinafter "the 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 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 Sabino Gualinga, Marlon Santo, Patricia Gualinga and 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 disbursements made in the instant case, which amounted to US$6,344.63 (six thousand three hundred and forty-four United States dollars and sixty-two cents); however, it did not submit any observations in this regard. Consequently, under article 5 of the Rules of the Fund, the Court must assess whether it is appropriate to order the respondent State to reimburse the Legal Assistance Fund for the disbursements made.

334. Based on the violations declared in this Judgment, the Court orders the State to reimburse the Fund the sum of US$6,344.62 (six thousand three hundred and forty-four United States dollars and sixty-two cents) for the said expenses related to the public hearing. This amount must be repaid within 90 days of notification of this Judgment.

F. Method of compliance with the payments ordered

335. The State must pay the compensation established for pecuniary and non-pecuniary damage, as well as for reimbursement of costs and expenses (*supra* para. 331), directly to the Sarayaku People, through its authorities, as well as the corresponding payment for costs and expenses directly to the representatives, within one year of notification of this Judgment, in the terms of the following paragraphs.

336. The State must comply with its obligations by payment in United States dollars.

337. If, for reasons that can be attributed to the beneficiaries, it is not possible for them to receive the amounts ordered within the indicated period, the State must deposit these amounts in an account or a certificate of deposit in an Ecuadorian financial institution under the most favorable financial terms allowed by law and banking practice. If, after 10 years, the compensation has not been claimed, the amounts will be returned to the State with the accrued interest.

338. The amounts allocated in this Judgment as compensation and for reimbursement of costs and expenses shall be delivered to the beneficiaries in their entirety, as established in this Judgment, without deductions derived from eventual taxes or charges.

339. If the State should fall into arrears with its payments, it must pay interest on the amount owed at the current bank interest rate on arrears 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), in order to protect the life and integrity of the members of the Sarayaku People by a series of actions to be implemented by the State. The protection ordered was intended to prevent, *inter alia*, the obstruction of any eventual reparations that the Court might order in its favor. Based on the observations regarding the assessment of the information contained in the file on provisional measures (*supra* para. 48), and unlike most cases, the specific group of beneficiaries of these measures of protection are, following the delivery of this

[379] AG/RES. 2426 (XXXVIII-O/08). Resolution adopted by the thirty-eighth General Assembly of the OAS at 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).

Judgment on merits and reparations, the same as the beneficiaries of the measures of reparations ordered. In other words, the obligation to protect the rights to life and to personal integrity of the members of the Sarayaku People, initially required in the Orders on provisional measures, are hereafter included in the reparations ordered in this Judgment, which must be complied with from the time that it is notified to the State. Thus, given the special nature of this case, the State's obligations in the context of the provisional measures are replaced by the measures ordered in this Judgment and, consequently, their establishment and implementation will be subject to the monitoring of compliance with the Judgment, and no longer that of the provisional measures.[380] Consequently, the said measures are hereby annulled.

X
OPERATIVE PARAGRAPHS

341. Therefore,

THE COURT

DECLARES:

Unanimously, that:

1. Based on the broad acknowledgment of responsibility made by the State, which the Court has assessed positively, the preliminary objection filed has no purpose and it is not appropriate to analyze it, in 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, in 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 severely jeopardizing the rights to life and to personal integrity, recognized in Articles 4(1) and 5(1) of the American Convention, in relation to the obligation to guarantee the right to communal property, in 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 judicial guarantees and to judicial protection recognized in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kichwa Indigenous People of Sarayaku, in accordance with 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 indicated in paragraphs 228 to 230 and 252 to 254 of this Judgment.

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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. Also, see *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Provisional measures.* Order of the Court of November 26, 2007, considering paragraphs 10 and 11, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Monitoring compliance with judgment.* Order of the Court of February 2, 2007, considering paragraphs 8 to 21.

AND ORDERS:

Unanimously, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State must 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 People, within the time frames and in accordance with the ways and means described in paragraphs 293 to 295 of this Judgment.

3. The State must consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory, or any investment or development plan of any other type that could involve a potential impact on their territory, in the terms of paragraphs 299 and 300 of this Judgment.

4. The State must adopt necessary the legislative, administrative or any other type of measures to give full effect, within a reasonable time, to the right to prior consultation of the indigenous and tribal peoples and communities and to amend those that prevent its free and full exercise and, to this end, must ensure the participation of the communities themselves, in the terms of paragraph 301 of this Judgment.

5. The State must implement, within a reasonable time and with the respective budgetary allocations, mandatory training programs or courses that include modules on the national and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as other officials whose functions involve relations with indigenous peoples, in the terms of paragraph 302 of this Judgment.

6. The State must carry out a public act of acknowledgment of international responsibility for the facts of this case, as established in paragraph 305 of this Judgment.

7. The State must make the publications indicated in paragraphs 307 and 308 of this Judgment.

8. The State must pay the amounts established in paragraphs 317, 323 and 331 of this Judgment, as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, in the terms of the said paragraphs, and of paragraphs 335 to 339 of this Judgment, and reimburse the Victim's Legal Aid Fund the amount established in paragraph 334 hereof.

9. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures taken to comply with the Judgment, notwithstanding the provisions of the second operative paragraph, in relation to paragraphs 293 to 295, of this Judgment.

10. The provisional measures ordered in this case have been annulled, in the terms of paragraph 340 of this Judgment.

11. The Court will monitor full compliance with this Judgment, in exercise of its authority and in compliance with its obligations under the American Convention, and will close this case once the State has complied fully with the provisions of this Judgment.

Done, at San Jose, Costa Rica, on June 27, 2012, in the Spanish and the English languages, the Spanish text being authentic.

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